

# **JUDICIAL TRAINING ON GENDER SENSITIZATION**

## **TRAINING MANUAL**

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This training manual contains the narratives of each module of the Judicial Training on Gender Sensitization. Additionally, it provides ready reference to all international treaties, human rights instruments, national laws, and global and domestic jurisprudence discussed in all the modules.

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# Module Narratives

# MODULE 1: BASICS OF GENDER SENSITIZATION

## INTRODUCTION

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Many of you may be thinking well what is gender sensitization all about and why do we need this as judges? A very reasonable question.

In many ways the answer will emerge over the process of the 2 days of training session but if I could just give you this basic background.

- International bodies and United Nations agencies have been concerned for decades about the fact that women in all societies continue to suffer from violations of their most basic rights. Women of course make up more than half the population in the world, but they suffer inequalities at every level in every country, by comparison with men.
- United Nations bodies have drawn up a separate gender specific documents which identify and focus on particular needs of women. These have been discussed adopted and ratified by the majority of countries in the form of Conventions and other universal instruments.
- In order to address the inequalities for women, *effective implementation* is required.
- The legal system is a vital part of enabling women to have equality of access to justice with men and to seek redress for violations of the rights. Their matters come before the courts.
  - It is been found that the judicial system has been largely male dominated, with fewer female judges and fewer female court staff.
  - Women in every country have expressed that the court processes and court experiences have not been sensitive to their legal issues and that there was a lack of sensitivity and awareness on gender issues throughout the judicial system.
- The United Nations body which has had the greatest influence on addressing these issues has been the Committee on the Elimination of Discrimination against Women.
- Many countries, particularly common law countries, have recognized the need to address this issue through workshops such as this on gender sensitization for judges.
  - Many trainings have been undertaken through the International Women Judges Association, but also other bodies.

- Trainings have been done not only in my country but also in the Philippines, Nepal and India.
- They are tailor-made for each country but the overall principles remain
- This first Module is the basic introduction.

## OBJECTIVES OF THE SESSION

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### SLIDE 1

- Discuss what gender sensitization means
- Understanding the meaning of sex, gender, gender roles, gender stereotyping
- Discussing why men and women conform to society's belief of what is masculine and feminine
- Considering the effect that gender stereotyping has in the courts
- Understanding unconscious or implicit bias and the effect on judicial decision-making
- How to address and reduce unconscious bias
- 2 activities to assist understanding and discussion

## TOPIC 1: STARTING FROM WHERE WE ARE

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### SLIDE 2

- A starting point
- We will start the discussion about gender sensitization by undertaking an activity
- This will give each of us an opportunity to reflect on our current views and assumptions about the characteristics and capacities of men and women in society

### ACTIVITY 1

### SLIDE 3

- 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

## TRAINER NOTE

### Potential Questions

- What do you all think about labelling this word as being applicable to a woman or a male?
- What is the answer assume about women/men?
- Is that answer always true?
- Where do we get these notions from? Childhood upbringing, media, school, peer group etc
- What do you think the effect of having these assumptions and beliefs are on men and women, on society etc

## TOPIC 2: GENDER SENSITIZATION

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### SLIDE 5

- Gender sensitization is a process
- It is a process which requires an understanding of how we categorize or generalize about people and assume characteristics about them based on whether they are male or female
- It requires an understanding of how gender views can be perpetuated in society and can either be produced or reinforced by current conduct and attitudes, including our own
- This categorization or generalization which we make about people based on their sex is referred to as “gender stereotyping” of people
- Put another way gender stereotyping is ascribing behaviors or characteristics to persons based on preconceived beliefs or myths about them being male or female, rather than actual fact
- Gender stereotypes arise from or can be reinforced by current community conduct and attitudes.

### SLIDE 6

- Gender sensitization is:
  - not a war between the sexes
  - not anti-male
  - both women and men can be victims of discrimination or inequality
  - both men and women can benefit by considering why there are these differences and why it is important to redress them

- Gender stereotyping can lead to treating people differently based on generalizations and it can lead to gender discrimination because of their sex and result in gender inequality
- In the course of this workshop we will apply that understanding to identify situations in the work of judges which call for gender sensitization to redress discrimination and provide men and women equal access to justice
- As research reveals that the overwhelming majority of women are victims of discrimination and inequality in comparison with men, then the prime focus of this workshop is on women

## GENDER EQUALITY AND THE GENDER LENS

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### SLIDE 7

- Gender equality is about the equal valuing of women and men in society.
  - As we will develop this discussion further, we will see how men are more valued in society than women and that women are not treated equally.
  - There will be specific discussion on what is meant by equality in Module 2
- We need to recognize the similarities and differences between women and men.
  - As we will discuss shortly, the clear similarities are our human features and our clear differences are biological,
  - but as we will discuss, there are other features that we ascribe to women and men as being similarities and differences that are acquired because of societal and cultural influences.
- We need equal and respectful partnerships between men and women in the same way that we need both eyes to see best.
- In order to better understand the effect of gender inequality and discrimination and how it affects participation, needs and realities of women, we need to examine each situation using a 'gender lens'.

### SLIDE 8

- Think of a gender lens as putting on spectacles
- **TRAINER NOTE:** Read each lens
- Our sight or vision is the combination of what each eye sees

## TOPIC 3: SEX AND GENDER

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### SLIDE 9

In the course of this workshop we will apply the gender lens to identify situations in the work of judges which call for a gender sensitization approach to redress discrimination and provide men and women equal access to justice.

**TRAINER NOTE:** Ask participants what is the meaning of the sex of a person

### SEX OF A PERSON

### SLIDE 10

- sex identifies the biological difference between men and women
- it is about the functional differences between women and men and their reproductive potential
- it is determined by genes
- the terms men and women or male and female are biological terms
- sex is unchangeable (with rare exceptions )
- **TRAINER NOTE:** Ask participants what is the meaning of the gender of a person

### GENDER OF A PERSON

- SLIDE 11
- refers to the culturally or socially constructed roles ascribed to men and women
- gender is determined by our awareness and reaction to biological sex combined with cultural or sociological factors in society
- gender identifies the social relations between men and women
- the terms masculine and feminine refer to gender
- Unlike the sex of a person, since gender is cultural and social it can be changed, as both cultural and social relations are dynamic and change occurs over time
- gender also has two further elements:
  - Gender role
  - Gender identity

## GENDER ROLE AND GENDER IDENTITY

### SLIDE 12

- Before moving to talk about Gender Roles and Gender Identities, I will first address what is meant by Sex Roles.
- A Sex Role is one which results from a person having a certain biological functions depending on whether a person is male or female.
- For example, pregnancy is a female sex role because only members of the female sex may bear children. Being female is an essential qualification.
- A Sex Role therefore differs from a Gender role.

(Double column slide )

#### Gender Role

- The gender role results from learned behaviors that condition us to perceive certain activities and responsibilities as being male or female
- Simple examples: (as emerged in the Activity 1)
  - Women are nurturing and should stay at home and look after the home and the children
  - Men are assertive and should go out and work
- We therefore link generalized characteristics which we ascribe to women and men and that results in women and men taking on, or thinking that they have to take on, certain roles.
- But of course not all women are nurturing. Even if a particular woman has a nurturing characteristic, it does not mean that she should stay at home, or that should she should look after the children. In a family context, she may be the one who can best go out to work and her husband or another family member or paid employee, could look after the house and children
- Similarly not all men are assertive, but even if a particular man was assertive, that does not mean he should be one who is the bread winner and have to go out to work. His wife may be better suited to go out to work and instead he stays home to look after the home and children.
- In short Gender Roles are very limiting to both men and women

#### Gender Identity

- Refers to a person's private, subjective sense of their own sex
- Gender identity includes persons who identify as being lesbian, gay, transsexual, transgender, bi-sexual, or intersex (LGBTI)

- Intersex people refer to people whose five biological characteristics are not either all male or all female at birth
- Persons who identify as LGBTI are also ascribed gender roles based on perceptions as well as cultural and sociological factors.
- Eg If a Male person identifies as female and either behaves or dresses as a female, “she” may be discriminated against in a similar way to women, because “she” is not Masculine. Indeed LGBTI people are often in a worse situation than women.

## TOPIC 4: GENDER ROLES AND GENDER STEREOTYPES

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### SLIDE 13

Gender Roles and Gender Stereotypes are linked

- Gender stereotyping leads to Gender Roles being applied
- As has already been mentioned, Gender stereotypes are simplistic generalizations made about a person because of their sex
- Gender stereotypes lead us to regard a person as suitable to perform certain activities, tasks and responsibilities, based solely on whether they are male or female
- We then ascribe or assign Gender roles to them
- A simple practical example would be
  - This person is a woman
  - Women are home – orientated, caring, passive and obedient in taking orders **(Female gender stereotype)**,
  - She would make a good nurse or secretary **(Female Gender role)**
  - She would not be able to take up training for a managerial role as she would be indecisive, emotional, easily influenced and not be able to provide leadership. **(Female gender stereotype and not suitable for a Male gender role)**
  - Further, she is married with 2 children (she would not be able to work after hours - Female stereotype)
- Therefore Gender roles give rise to limitations in occupation based on gender.



## TRADITIONAL GENDER STEREOTYPES

### SLIDE 14

- Picture of common stereotypes
- **TRAINER NOTE:** Select some and see whether participants agree that these are commonly held in society?

## WHAT DOES THIS PICTURE DEPICT?

### SLIDE 15

Discuss male and female stereotypes and gender roles

## GENDER ROLES

### SLIDE 16

This Slide is highlighting another aspect of Gender Roles which leads to a **sexual division of labour**

- it describes the division between a “production role” on the one hand and a “reproduction role” on the other
- this sexual division of labour starts in the home and then it is replicated in the work that men and women engage in outside the home
- it is this sexual division of labour which highlights the inequality and the fact that there is not an equal valuing of women and men society.
- Men are valued more highly, they are seen as contributing to the economy because they have a production role which has economic value
- whereas women have a reproduction role which is not given an economic value .

#### **Production Role**

- Refers to the role of producing goods or services which are ascribed an economic value
- The production role is considered a male role associated with receiving money or wages for doing or providing those tasks in the public sphere: eg; bus drivers, construction workers or professors
- Even when men do work in the private sphere around the home, it may be fixing a tap, changing light bulbs or fixing an electrical issue, which is regarded as the tasks for which men are meant to be better suited

### Reproduction Role

- Refers to the biological reproduction functions which extends into roles such as child-rearing and housekeeping which are essential but are given no economic value
- This is considered a female role and takes place in the private sphere
- Even when women work outside the home, in the public sphere their jobs frequently replicate their reproductive activities in the private sphere, such as domestic work, nursing, secretarial and caregiving jobs
- These jobs usually attract less money than men’s jobs
- Also even when men and women do the same job or an equivalent job they are not equally remunerated. There is what is termed a “wage gap” between men and women’s work.

### SO WHAT IS THE PROBLEM ABOUT GENDER ROLES AND SEXUAL DIVISION OF LABOUR?

- The problem is that gender roles are usually wrongly classified as being a sex role when in fact the classification is a sociological role and not a biological one.
- For example, if child-rearing is classified as being a female role, it is a female **gender** role and **not** a female **sex** role. That is because men or women can do child rearing.
- The result is that if roles are defined in terms of sex they are unchangeable whereas when roles are defined in terms of gender, they can be changed and improved.
- Therefore correctly identifying whether a particular activity or role is by reason of biology as distinct from cultural or social constructs, can help change society to redress discrimination and inequality is between men and women.

## TOPIC 5: WHY DO WE HAVE THESE GENDERED VIEWS?

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### SLIDE 17

- PICTURE (TO OPEN THIS TOPIC UP FOR A 1 MIN EXCHANGE LEADING TO THE NEXT SLIDE)

Where does it start?

What are the influences?

How are these views perpetuated?

## WHY DO WE HAVE THESE GENDERED VIEWS?

### SLIDE 18

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

## CONFORMING TO SOCIETY'S BELIEF OF MASCULINE AND FEMININE?

### SLIDE 19

#### 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
- other?

### SLIDE 20

PICTURE EDUCATION LEADING TO NEXT SLIDE

### SLIDE 21

#### Education at school

- 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; for boys, 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. Man as the financial provider and protector while woman is homemaker and mother
- Other?

## SLIDE 22

PICTURE FOR RELIGION LEADING TO NEXT SLIDE

## SLIDE 23

### Religion

- 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.

## SLIDE 24

### Mass Media

- Images in media constantly portray women as housewives and sex symbols
- They reinforce women's submissive role to men
- We are constantly surrounded and bombarded with images, slogans and newspaper and television stories which contain stereotypes

## THE MEDIA PORTRAYAL

## SLIDE 25

- Highlighting language used in the everyday headlines from different news papers regarding violence against women, showing sexuality of women rather than heinous act of men.

## SLIDE 26

### Language

- Language is the most subtle but most pervasive form of reinforcing gender stereotypes
- Language articulates our consciousness, culture and it affects socialization.
  - For example if we say that women are “the weaker sex” then we are expressing that women are indeed weak and we would act accordingly.
- Sexist language, even if done unthinkingly, reinforces how we perceive gender
  - Many jokes are based on sexist attitudes and reinforce stereotypes, which can be very demeaning of women. This is particularly if they are of a sexual nature and expressed by men in front of women.
- Use of language in the Court is important.
- **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!’

## LANGUAGE IN THE COURTROOM – CASE EXAMPLES

## SLIDE 27

- Some simple but important examples which can be seen in court decisions which may be regarded as patronizing, literally, or suggest that the norm for some occupations are of a particular sex are:

*PICTURE*

- Further detailed information regarding language can be found in the UNESCO Guidelines, the reference is at the end of the handout.

## ACTIVITY 2

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### SLIDE 28

- 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 minutes)
- A representative from each group will report back on the group answers (2 minutes) for each group
- A short general discussion will follow
- The total activity is to take 30 minutes

## TOPIC 5: WHAT IS UNCONSCIOUS OR IMPLICIT BIAS?

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### SLIDE 29

- As humans we often make instinctive decisions about people
- Scientific evidence and the work of psychologists reveal that our unconscious people preferences or biases affect how we engage and make decisions about them.
- 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
- We assign a whole suite of unconscious characteristics both good and bad to that person as a result

**TRAINER MAY WISH TO USE THEMSELVES AS AN EXAMPLE**

### UNCONSCIOUS OR IMPLICIT BIAS

### SLIDE 30

- As judges we perceive ourselves as being “fair” and “independent” of bias
- Without further enquiry into our attitudes and our bias “blind spot”, it makes us vulnerable to making decisions which may be influenced by our bias

- Research reveals that the human instinct is to value, support and defend those who are most like ourselves
- We cannot process everything about every new person we meet and instead we make rapid judgments about them
- As judges we need to unpack our attitudes about people and also our cultural values so that we can better and more fairly assess what is real and not biased perceptions or stereotypes

## RISK FACTORS FOR JUDGES

### SLIDE 31

#### Emotional states

- Certain emotional states such as anger or disgust can increase the risk of implicit bias in making decisions.
- We all know as a matter of our common experience, that thinking and making decisions when we are angry, upset or other similar high emotional states, does not allow us to think and analyze situations clearly. So too it increases the risk that we oversimplify and generalize and fall back on stereotypes and bias.

#### Ambiguity

- When the basis for a judgment is somewhat vague such as the exercise of discretion or involves applying new or unfamiliar laws, the risk of unconscious bias is greater.
  - For example, when judges exercise discretions in matters such as deciding on credibility in matters of consent in rape, or when sentencing, We have seen some examples in our Activity 2.
  - For example when judges are required to apply new laws or laws with which they are not familiar, the process can be more difficult and challenging. It is easy to fall back and apply familiar views or experiences, the comfort zone, which may bring in biases or stereotypes.
- Judges in Punjab, will need to start applying some of the new pro women legislation, which will require special attention to these issues.

#### Distracted or pressured decision-making circumstances

- Judicial work can be tiring with long hours, fatigue and heavy or diverse caseloads
- This is a very common factor in all jurisdictions, but more so in some than others.
- Your jurisdictions are all high pressure with very high caseloads.
- Time pressure can force a judge into performing complex judgments relatively quickly
- Hearings are sometimes conducted in busy or noisy conditions
- Distractions can result in a judge not fully attending to incoming information

## RISK FACTORS FOR JUDGES CONTINUED

### SLIDE 32

#### Low – effort processing

- Pressured circumstances may lead a judge to engage in “low-effort” processing or reasoning
- Low effort processing is referring to reasoning or processing which happens when a judge knows that they have to reach a decision quickly and get on with the next case. They wish to reach a settled view on the witnesses and facts as speedily as possible and this may mean that they do not go through a full evaluation process of conflicts and nuances in the evidence.
- When this happens there is a tendency for the judge to form early views and develop inferences or expectations about a witness early on in the case
- If the “low – effort” reasoning is not addressed, this can affect the approach of the judge to subsequent information and increase the risk of biased assessments and biased judgments

## TOPIC 6 HOW CAN JUDGES REDUCE UNCONSCIOUS BIAS

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### SLIDE 33

- There are 3 excellent publications which can provide more detail and discussion on unconscious bias and how judges can reduce unconscious bias, which are in the References
- The basic techniques which are recommended are these:
  - Take notes so that you are not forced to rely on memory, particularly if transcript is not available to reflect on what occurred in a court.
  - Set out the reasoning behind your decision as this process gives a chance to review the evidence with a critical eye before giving your decision
  - Actively seeking feedback from other judges for whom you have respect as being fair and independent
  - Regularly engage in training sessions to consider hypothetical cases which raise stereotype issues, this is particularly useful for sentencing remarks
  - The biggest message from research is that judges should spend more time reviewing the facts before making a decision

#### JUDGES SHOULD SLOW DOWN THEIR DECISION-MAKING PROCESS



## FINAL SUMMARY

### SLIDE 34

- In this session:
- We have had an opportunity to reflect on our individual personal views so that we can better understand our personal biases
- We have discussed what has influenced our views including our backgrounds and society
- We have discussed the effect which gender stereotypes and unconscious bias can have on judicial work
- We have discussed the importance of addressing these issues
- We may also have come to the understanding that we need to modify or change our past views, attitudes and practices on these topics
- As Nelson Mandela said:

***“change your thoughts and you change your world.”***

### SLIDE 35 PICTURE SLIDE

## REFERENCES

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- National Centre for State Courts. Helping Courts Address Implicit bias: Strategies to Reduce the Influence of Implicit Bias. <https://www.law.georgetown.edu/faculty-staff/resources/upload/addressing-implicit-bias-in-state-courts-copy.pdf>
- Shire Professional Chartered Psychologists: Innovative Research Solutions: Unconscious bias. <http://www.shirepro.co.uk/index.php>
- UNESCO. 1999. Guidelines on Gender-Neutral language 3<sup>rd</sup> ed Paris. <http://unesdoc.unesco.org/images/0011/001149/114950mo.pdf>

# MODULE 2

# NATIONAL GENDER LAWS AND CULTURE OF PAKISTAN

## OBJECTIVES OF THE SESSION

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### SLIDE 2

#### Gender Related Laws

**Topic 1: Discuss in Light of Islam, Culture and law rights of women (inheritance)**

**Topic 2: Extent of Maintenance under Islam, Culture and Law reference custody & Guardianship of children**

**Topic 3: “Honor” “Killing” Islam, Culture and the Law**

**Topic 4: “Sawara and Wannu” Culture or Islam**

**Topic 5: Rape Cases and Practical Issues**

**Topic 6: Harassment Laws**

## GENDER RELATED NATIONAL LAWS

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### SLIDE 3

#### GENDER RELATED NATIONAL LAWS

It is important to start with the vision and goals set under the constitution empowering women. It is essential to revisit fundamental rights guaranteed under the constitution and Principles of Policy.

**Article 14 - Inviolability of dignity of man, etc.**—(1) The dignity of man and, subject to law, the privacy of home, shall be inviolable.

**Article 25 - Equality of citizens.—**

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

**Article 27. Safeguard against discrimination in services.—** (1) No citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated against in respect of any such appointment on the ground only of race, religion, caste, sex, residence or place of birth.....

**Article 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 [...]

(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;

**Article 38 - Promotion of social and economic well-being of the people.—**The State shall—

(a) secure the well-being of the people, irrespective of sex, caste, creed or race, by raising their standard of living, by preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest and by ensuring equitable adjustment of rights between employers and employees, and landlords and tenants;

[...]

(d) provide basic necessities of life, such as food, clothing, housing, education and medical relief, for all such citizens, irrespective of sex, caste, creed or race, as are permanently or temporarily unable to earn their livelihood on account of infirmity, sickness or unemployment;

List of laws following constitution will be discussed under each relevant heading. Listed here to highlight that these laws will be reviewed.

## GENDER RELATED NATIONAL LAWS (CONT)

### SLIDE 4 and 5

Highlight the recent amendments in Pakistan Penal Code with reference to crimes on pretext of honor killing.

**Section.229 (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 political danger to the community, or if the offence has been committed in the name or the pretext of honor.

**Section. 299 (ii) “offence committed in the name or on the pretext of honor”** means an offence committed in the name or on the pretext of karo kari, siyah kari or similar other customs and practices;

**Section. 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 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.
- (d) Provided that nothing in clause (c) shall apply where the principle of fasad-fil-arz is attracted and in such cases only clause (a) or clause (b) shall apply.

**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-e-amd if committed in the name or on the pretext of honour; and
- (b) The Government, if there is no heir.

**Section 310 Compounding of qisas (Sulh) in qatl-e-amd.-** (1) In the case of qatl-i-amd, an adult sane wali may, at any time on accepting badl-i-sulh, compound his right of qisas:

Provided that a female shall not be given in marriage or otherwise in badl-i-sulh.

Provided further that where the principle of fasad-fil-arz is attracted, compounding of the right of qisas shall be subjected to the provisions of section.311

**Section.310-A. Punishment for giving a female in marriage or otherwise in badl-e-sulh, wanni or swara.-** Whoever gives a female in marriage or otherwise compels her to enter into marriage, as badal-e-sulh, wanni, or swara or any other custom or practice under any time, 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.

**Section. 311. Ta’zir after waiver or compounding of right of qisas in qatl-e-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 or on the pretext of honor, the punishment shall be imprisonment for life.

**Section. 338 E. 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 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 and the principle of farz-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.

## GENDER RELATED NATIONAL LAWS (CONT)

### Slide 6

Focusing only on amendments in Code of Criminal Procedure 1898 in particular sections:

**161-A Right to legal representative to victim of rape** – (1) Where an offence under section 354 –A , 376,377 or Section. 377- B of the Pakistan Penal Code, 1860(Act XLV of 1860) has been committed or attempted to be committed , the police officer after recording the information under section. 154 shall inform the victim, against whom such offences have been committed or attempted to be committed, of his right to legal representation.

(2) If the victim under sub-section (1) requires free legal aid the police officer shall provide him the list of lawyers maintained by the Provincial Bar Councils for this purpose.

### **164-A Medical examination of victim of rape., etc.-**

(1) Where an offence of committing rape, unnatural offence or sexual abuse or attempt to commit rape, unnatural offence or sexual abuse under section 376,section 377-B respectively of the Pakistan penal Code,1860 (Act XLV of 1860) is under investigation, the victim shall be examined by a registered medical practitioner, in the case of female victim by a female registered medical practitioner, immediately after commission of such offence:

Provide that in all cases, where possible, the female victim shall be escorted by a female police officer or a family member from a place of her convenience to the place medical examination.

- (2) The registered medical practitioner to whom such victim is sent under sub-section (1) shall, without delay, examine the victim and prepare a report of examination giving the following particulars, namely:-
- (a) name and address of victim and of the person by whom she was escorted;
  - (b) age of the victim;
  - (c) description of material taken from the body of the victim for DNA profiling;
  - (d) marks of injury; if any, on body of victim;
  - (e) general mental condition of the victim and
  - (f) other material particulars in reasonable detail.
- (3) The report under sub-section (2) shall state precisely the reason for each conclusion arrived at.
- (4) the report under sub-section 2 shall specifically record that consent of the victim or of his or her natural or legal guardian to such examination had been obtained.
- (5) The exact time of commencement and completion of the examination under sub-section (1) shall also be noted in the report.
- (6) The registered medical practitioner shall, without delay, forward the report to the investigation officer who shall forward it to the magistrate along with other requirement as specified under clause (a) of sub-section (1) of section 173.
- (7) Nothing in the section shall be construed as rendering lawful any examination without consent if the victim or of any person authorized under sub-section (4)

#### **164-B DNA test.-**

- (1) Where an offence under section 376, 377 or 377-B of the Pakistan Penal Code, 1860 (Act XLV of 1860) is committed or attempted to have been committed or is alleged to have been committed, Deoxyribo Nucleic Acid (DNA) samples, where practicable, shall be collected from the victim with his or her consent or with the consent of his or her natural or legal guardian and the accused during the medical examinations conducted under section 164 – A within optimal time period of receiving information relating to commission of such offence.
- (2) The DNA samples collected under sub-section (1) shall at the earliest be sent for investigation to a forensic laboratory where these shall be properly examined and preserved:

Provided that confidentiality of such examination shall at all time be observed.

## GENDER RELATED NATIONAL LAWS (*continued*)

### SLIDE 7

Not elaborating on laws; we will be dealing with them in detail under the relevant headings. However, important to mention The Anti-Terrorism Act, 1997 in particular

**Sec. 6(2)(b)** An “action” shall fall within the meaning of sub Involves grievous violence against a person or grievous body injury or harm to person;

**Sec.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 term which shall be not less than ten years but may extend to imprisonment of life and with fine;
- (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 of 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 years 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, on 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;
- (g) (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;]
- (h) 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
- (i) the act of terrorism committed falls under clauses (h) to (n) of subsection (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; and
- (j) any other act of terrorism not falling under clauses (a) to (h) above or under any other provision of this Act, shall be punishable, on conviction, to imprisonment of not less than five years and not more than 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.

## ACTIVITY

### SLIDE 8

Participants will be divided into four groups and they will be given 10 minutes to go through a short case study with few pertinent questions to answer. Each group will get 3-5min to answer the said questions. The activity will take 35-40 min.

## TOPIC 1: INHERITANCE

### SLIDE 10

The tradition or the prevalent culture is not to give daughters their right of inheritance the same may be taken away in the name of:

- Culture of relinquishing right of women in favor of males out of “Natural Love”
- Culture of marrying women within family
- Culture of exchange marriages- wata sata
- Culture of marriage with the “Quran”
- Culture of giving dowry and other gifts instead of Inheritance

## INHERITANCE-QURANIC VERSUS

### SLIDE 11-12

Quranic versus, in particular Surah Nisa 4:7 and 4:13 &4.14, are very clear that women have a legal right in inheritance and anyone not following the set bounds shall face eternal hell. Considered as a major sin.

## INHERITANCE- LAWS

### SLIDE 13

Go through relevant laws existing on Inheritance and their interpretation.

#### 1. **Mohammaden Law-Inheritance**

Exclusion of daughters from inheritance by custom or by statute

#### 2. **Muslim Personal Law (Shariat) Application Act, 1962**

**Section.2. Application of the Muslim Personal Law.**— Notwithstanding any custom or usage, in all questions regarding succession (whether testate or intestate), special



property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, legitimacy or bastardy, family relations, wills, legacies, gifts, religious usages or institutions, including waqfs, trusts and trust properties, the rule of decision, subject to the provisions of any enactment for the time being in force, shall be the Muslim Personal Law (Shariat) in cases where the parties are Muslims.

### Sec 2A

### 3. The Pakistan Penal Code, 1860

#### Section. 498-A. Prohibition of depriving woman from inheriting property:

Whoever by deceitful or illegal means deprives any woman from inheriting any movable or immovable property at the time of opening of succession shall be punished with imprisonment for either description for a term which may extend to ten years but not be less than five years or with a fine of one million rupees or both.

## INHERITANCE- CASE LAWS

### Slides 14 & 15

Highlight issues in the following cases and show the trends to HC and SC.

- **Mst. Sardaran Bibi Vs. Mst. Allah Rakhi - 2017 MLD 689**  
(Women to be protected as suppressed)
- **Ghous-ud-Din Vs. Rashida - 2014 YLR 293**  
(Not valid gift- even though law recognizes oral gift, but proof/evidence has to be strong)
- **Mst. Mahar Angiza Vs. Bakhti Raja - 2014 MLD 962**  
(Lack of evidence to show money was paid in lieu of inheritance)
- **M. Akbar Vs. Mst. Suraya Begum - 2014 MLD 1080**  
(Heavy onus of person claiming in addition to inheritance proportions)
- **Mst. Parveen Akhtar Vs. M. Adnan - 2010 CLC 380**  
(Insurance, named person only collector money to be distributed to all sharers)
- **Zakaria and others Vs. Amanullah - 2008 CLC 1291**  
(In case of co-sharer no time limitation)

- **Falk Sher and others Vs. Mst. Banno Mai - 2006 SCMR 884**  
(daughter cannot be alienated under Islamic inheritance)
- **Ghulam Ali Vs. Ghulam Sarwar Naqvi - PLD 1990 SC 1**  
(against relinquishment of female share without consideration-void, woman is suppressed needs to be protected)

## TOPIC NO.2: MAINTENANCE/CUSTODY/ GUARDIAN

### MAINTENANCE/ CUSTODY/ GUARDIAN –QURANIC VERSUS

#### SLIDE 17, 18

Quranic versus, in particular Surah Al Talaq, Verse 7, Surah Nisa Verse 20-21 & Surah Al-Baqra Verse 233, indicates very clearly the duty of man to according to his means his children and to certain extent his ex-wife.

### MAINTENANCE/ CUSTODY/ GUARDIAN - RELEVANT LAW

#### SLIDE 19

Laws regarding maintenance

#### 1. **Mohammaden Law- Maintenance/ Custody/ Guardian**

Maintenance defined,  
Maintenance of children and grandchildren.  
Statutory obligation of father to maintain his children

#### 2. **The W.P Family Courts Act 1964**

##### **Section. 17 A- Suit for maintenance.-**

(1) In a suit for maintenance, the Family Court shall, on the date of the first appearance of the defendant, fix interim monthly maintenance for wife or a child and if the defendant fails to pay the maintenance by fourteen day of each month, the defence of the defendant shall stand struck off and the Family Court shall decree the suit for maintenance on the basis of averments in the plaint and other supporting documents on record of the case.

(2) In a decree for maintenance, the Family Court may:

- (a) fix an amount of maintenance higher than the amount prayed for in the plaint due to afflux of time or any other relevant circumstances; and
- (b) prescribe the annual increase in the maintenance.

(3) If the Family Court does not prescribe the annual increase in the maintenance, the maintenance fixed by the Court shall automatically stand increased at the rate of ten percent each year.

(4) For purposes of fixing the maintenance, the Family Court may summon the relevant documentary evidence from any organization, body or authority to determine the estate and resources of the defendant.]

### 3. The Guardian and Wards Act, 1890.

**24. Duties of guardian of the person.-** A guardian of the person of a ward is charged with the custody of the ward and must look to his support, health and education, and such other matters as the law to which the ward is subject requires.

**27. Duties of guardian of property.-** A guardian of the property of a ward is bound to deal therewith as carefully as a man of ordinary prudence would deal with it if it were his own, and, subject to the provisions of this Chapter, he may do all acts which are reasonable and proper for the realization, protection or benefit of the property

## MAINTENANCE/ CUSTODY/ GUARDIAN - CASE LAW

### Slide 20

Case Law empowering the courts to take strong action

- **Sultan Ahmad Vs. Judge Family Court - PLD 2012 Lah. 148**  
(if father is not available or refuses, liability of grand-father)
- **M. Anwar Ansari Vs. Mst. Nazia Shamim - PLD 2008 Kar. 477**  
( Regarding Dowry article- Time line-6 months )
- **M. Ismail Vs. Superintendent District Jail, Sheikhpura - 2007 CLC 128**  
(Coercive measures to recover maintenance money )
- **Saleem Ullah Vs. Abadat Ali Malik - 2000 CLC 1648**  
(liability of surety)

- **Bahadur Khan Vs. Kaneez Fatima - 2003 CLC 1620**  
(warrant of attachment may also be issued)
- **Tahir Farooq Vs. Judge Family Court - 2002 MLD 1758**  
(Arrears of Land Revenue)

## PAG DI LAAJ (MEN'S HONOUR)

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### SLIDE 21

Extremely important to understand the concept of the culture of man's honor.

### Slide 22

A video on SWARA showing the plight of the girls.

## TOPIC NO.3: SWARA

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### SWARA & WANI- QURAN AND SUNAH

### SLIDE 24

Quranic versus in particular Surah Fatir Verse 18 & Surah Ar-Rum Verse 21 that there is absolutely no provision for SWARA under the Quran rather it states something completely against it.

### SWARA -RELEVANT LAW

### SLIDE 25

Relevant laws prohibiting SWARA

#### 1. Muslim Family Law Ordinance, 1961

#### 5. Registration of marriage.

(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 marriage under this Ordinance, the Union Council shall grant licenses 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 such-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.

(5) The form of Nikahnama, the registers to be maintained by Nikah Registrars, the records to be preserved by Union Councils, the manner in which marriage shall be registered and copies of Nikahnama shall be supplied to parties, and the fees to be charged thereof, shall be such as may be prescribed.

(6) Any person may, on payment of the prescribed fee, if any, inspect at the office of the Union Council the record preserved under sub-section (5), or obtain a copy of any entry therein.

## 2. The Pakistan Penal Code, 1860

**Section.310-A. Punishment for giving a female in marriage or otherwise in badl-e-sulh, wanni or swara.-** Whoever gives a female in marriage or otherwise compels her to enter into marriage, as badal-e-sulh, wanni, or swara or any other custom or practice under any time, 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.

**498B. Prohibition of forced marriages.-** Whoever coerces or in any manner whatsoever compels a woman to enter into marriage shall be punished with imprisonment of either description for a term which may extend to ten years but not less than five years or with a fine of one million rupees or both.

**498C. Prohibition of marriage with the Holy Quran.-** (1) 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 also be liable to fine of five hundred thousand rupees.

Explanation: Oath by a woman on Holy Quran to remain un-married for the rest of her life or, not to claim her share of inheritance shall be deemed marriage with the Holy Quran.

## SWARA -ESSENTIALS OF A MARRIAGE

### SLIDE 26

Extremely important to discuss essentials of marriage which are missing under SWARA, hence not a valid marriage at all.

Essentials of a valid Marriage

3. Consent of Both Parties
4. 2 adult witnesses
5. Mehr (money, property or any other asset given by bridegroom to the bride)

## SWARA -NEWS PAPER HEADLINES

### SLIDE 27

## SWARA -CASE LAWS

### SLIDE 28

Relevant case law

- **Samar Minallah and others vs. Federation of Pakistan**
- **Sargand Vs. The State - 2014 MLD 1464 Pesh.**

(Giving a female in marriage or other wise in badl –e- sulh - bail refusal of accused)

- **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)

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## TOPIC NO. 4: HONOUR-KILLING

### HONOR-KILLING - QURANIC VERSE

#### SLIDE 30

Quranic verse in particular Surah Nisa 4:93 punishment for killing a believer.

### HONOR-KILLING-RELEVANT LAW

#### SLIDE 31

Relevant Laws

##### 1. The Pakistan Penal Code, 1860

**Section.229 (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 political danger to the community, or if the offence has been committed in the name or the pretext of honor.

**Section. 299 (ii) “offence committed in the name or on the pretext of honor”** means an offence committed in the name or on the pretext of karo kari, siyah kari or similar other customs and practices;

**Section. 302 Punishment of qatl-e-Amd.**- Whoever commits qatl-e-amd shall, subject to the provisions of this Chapter be -

- (d) punished with death as qisas
- (e) 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
- (f) 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-fil-arz is attracted and in such cases only clause (a) or clause (b) shall apply.

**Section. 305 Wali.**- In case of Qatl, the Wali shall be -

- (c) 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
- (d) The Government, if there is no heir.

**Section 310 Compounding of qisas (Sulh) in qatl-e-amd.-** (1) In the case of qatl-i-amd, an adult sane wali may, at any time on accepting badl-i-sulh, compound his right of qisas:

Provided that a female shall not be given in marriage or otherwise in badl-i-sulh.

Provided further that where the principle of fasad-fil-arz is attracted, compounding of the right of qisas shall be subjected to the provisions of section.311

**Section.310-A. Punishment for giving a female in marriage or otherwise in badl-e-sulh, wanni or swara.-** Whoever gives a female in marriage or otherwise compels her to enter into marriage, as badal-e-sulh, wanni, or swara or any other custom or practice under any time , 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.

**Section. 311. Ta'zir after waiver or compounding of right of qisas in qatl-e-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 or on the pretext of honor, the punishment shall be imprisonment for life.

**Section. 338 E. 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 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 and the principle of farz-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. The Anti-Terrorism Act, 1997

**Sec. 6(2)(b)** An “action” shall fall within the meaning of sub Involves grievous violence against a person or grievous body injury or harm to person;



**Sec.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 term which shall be not less than ten years but may extend to imprisonment of life and with fine;
- (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 of 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 years 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, on 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;
- (g) (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;]
- (h) 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
- (i) the act of terrorism committed falls under clauses (h) to (n) of subsection (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; and
- (j) any other act of terrorism not falling under clauses (a) to (h) above or under any other provision of this Act, shall be punishable, on conviction, to imprisonment of not less than five years and not more than 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.

### 3. The Code of Criminal Procedure, 1898

**Section. 154 - Information in cognizable cases.**- Every information relating to the commission of a cognizable offence If given orally to an officer in charge of a police-station, shall be reduced to writing by him or under his direction, and be read over to the informant, and every such information, whether given in writing or reduced to writing as aforesaid shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer In such form as the Provincial Government may prescribe in this behalf.

Provided that if the information is given by the woman against whom an offence under section 336-B, section 354, section 354-A, section 376 or section 509 of the Pakistan Penal Code, 1860, (Act XLV of 1860) is alleged to have been committed or attempted, then such information shall be recorded by an investigating officer in presence of a female police officer or a female family member or any other person with consent of the complainant, as the case may be:

Provided further that if the information is given by the woman against whom an offence under section 336-B, section 354, section 354-A, section 376 or section 509 of the Pakistan Penal Code, 1860, (Act XLV of 1860) is alleged to have been committed or attempted, is distressed such information shall be recorded by an investigating officer at residence of the complainant or at a convenient place of the complainant's choice in presence of a police officer or family member or any other person with consent of the complainant, as the case may be.

**Section. 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.

Provided that a statement of a woman against whom an offence under section 336-B, section 354, section 354-A, section, section 376 or section 509 of the Pakistan Penal Code, 1860 (Act XLV of 1860) is alleged to have been committed or attempted, shall be recorded by an investigating officer in presence of a female police officer or a female family member or other person of her choice.

(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.

## HONOUR KILLING - CASE LAWS

### SLIDES 32&33

Relevant cases

- **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)

- **Sher Ahmad Vs. Khuda-e-Rahim - 2012 MLD 158**  
(Honor Killing - Anti Terrorism )
- **Gul Ahmad Vs. The State - PLD 2012 Baluchistan 22**  
on same lines Anti terrorism
- **Khadim Hussain Vs. The State - PLD 2012 Baluchistan 179**  
(Can not pardon/compromise in honor killing cases. )
- **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 is violates FR as enshrined under art 9)

## TOPIC NO. 5: RAPE

### RAPE – RELEVANT LAWS

#### SLIDE 34

Relevant laws

##### 1. The Pakistan Penal Code, 1860

**Section.375- Rape.** - 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 her 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 her consent is given because she believes that the man is another person to whom she is or believes herself to be lawfully married; or
- (v) with or without her consent when she is under sixteen years of age.

**Explanation.** Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

### **Section. 376A.- Punishment for Rape-**

(1) Whoever commits rape shall be punished with death or imprisonment of either description for a term which shall not be less than ten years or more, than twenty-five years and shall also be liable to fine.

(2) When rape is committed by two or more persons in furtherance of common intention of all, each of such persons shall be punished with death or imprisonment for life.”.

## **2. The Code of Criminal Procedure, 1898**

### **Section. 154 - Information in cognizable cases.-**

### **Section. 161. Examination of witnesses by police.-**

**161-A Right to legal representative to victim of rape** – (1) Where an offence under section 354 –A , 376,377 or Section. 377- B of the Pakistan Penal Code , 1860(Act XLV of 1860) has been committed or attempted to be committed , the police officer after recording the information under section. 154 shall inform the victim , against whom such offences have been committed or attempted to be committed, of his right to legal representation.

(2) If the victim under sub-section (1) requires free legal aid the police officer shall provide him the list of lawyers maintained by the Provincial Bar Councils for this purpose.

**164-A Medical examination of victim of rape., etc.-** (1) Where an offence of committing rape, unnatural offence or sexual abuse or attempt to commit rape, unnatural offence or sexual abuse under section 376,section 377-B respectively of the Pakistan penal Code,1860 (Act XLV of 1860) is under investigation, the victim shall be examined by a registered medical practitioner, in the case of female victim by a female registered medical practitioner, immediately after commission of such offence:

Provide that in all cases, where possible, the female victim shall be escorted by a female police officer or a family member from a place of her convenience to the place medical examination.

(2) The registered medical practitioner to whom such victim is sent under sub-section (1) shall, without delay, examine the victim and prepare a report of examination giving the following particulars, namely:-

- (a) name and address of victim and of the person by whom she was escorted;
- (b) age of the victim;
- (c) description of material taken from the body of the victim for DNA profiling;
- (d) marks of injury; if any, on body of victim;
- (e) general mental condition of the victim and
- (f) other material particulars in reasonable detail.

(3) The report under sub-section (2) shall state precisely the reason for each conclusion arrived at.

(4) the report under sub-section 2 shall specifically record that consent of the victim or of his or her natural or legal guardian to such examination had been obtained.

(5) The exact time of commencement and completion of the examination under sub-section (1) shall also be noted in the report.

(6) The registered medical practitioner shall, without delay, forward the report to the investigation officer who shall forward it to the magistrate along with other requirement as specified under clause (a) of sub-section (1) of section 173.

(7) Nothing in the section shall be construed as rendering lawful any examination without consent if the victim or of any person authorized under sub-section (4)

**164-B DNA test.-** (1) Where an offence under section 376, 377 or 377-B of the Pakistan Penal Code, 1860 (Act XLV of 1860) is committed to attempted to have been committed or is alleged to have been committed, Deoxyribo Nucleic Acid (DNA) samples, where practicable, shall be collected from the victim with his or her consent or with the consent of his or her natural or legal guardian and the accused during the medical examinations conducted under section.164 – A within optimal time period of receiving information relating to commission of such offence.

(2) The DNA samples collected under sub-section (1) shall at the earliest be sent for investigation to a forensic laboratory where these shall be properly examined and preserved:

Provided that confidentiality of such examination shall at all time be observed.

## RAPE - CASE LAWS

### SLIDE 36

- **Salman Akram Raja Vs. Govt. of Punjab - 2013 SCMR 203**  
(Recommendation how to deal with rape cases)
- **Mohammad Shahid Sahil Vs. The State – PLD 2010 FSC 215**  
(Paternity of of the child checked through DNA.)
- **Aman-ullah Vs.The state – PLD 2009 SC 542**  
(Ocular account preferred over DNA)
- **Abid Hussain Vs. The State - 2002 YLR 3972**  
Runaway marriage (elopement case not rape)
- **Aman Ullah Vs. The State - 1987 MLD 2172 Kar.**  
(Accused guilty of rape of minor below 16 years of age –proved-sentence granted.

## TOPIC NO. 6: HARASSMENT

### HARASSMENT - RELEVANT LAWS

#### SLIDE 38

Laws on harassment

#### 1. The Pakistan Penal Code, 1860

**Section. 294 - Obscene acts and songs:** Whoever, to the annoyance of others, --

- (a) does any obscene act in any public place, or
- (b) sings, recites or utters any obscene songs, ballad or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

**Section. 354 Assault or criminal force to woman with intent to outrage her modesty:** Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years or with fine, or with both.

**Section. 354A- Assault or use of criminal force to woman and stripping her of her clothes:**Whoever assaults or uses criminal force to any woman and strips her of her clothes and in that condition, exposes her to the public view, shall be punished with death or with imprisonment for life, and shall also be liable to fine.

**Section. 377-A – Sexual Abuse:-** Whoever employs, uses, forces, persuades, induces, entices or coerces any person to engage in , or assist any other person to engage in fondling, stroking, caressing, exhibitionism, voyeurism or any obscene or sexually explicit conduct or simulation of such conduct either independently or in conjunction with other acts, with or without consent where age of the person is less than eighteen years, is said to commit the offence of sexual abuse.

**377B. Punishment.** Whoever commits the offence of sexual abuse shall be punished with imprisonment of either description for a term which may extend to seven years and liable to fine which shall not be less than five hundred thousand rupees or with both.

**Section. 509 - Insulting modesty or causing sexual harassment:**

Whoever,-

- (i) intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard,

or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman;

- (ii) conducts sexual advances, or demands sexual favours or uses verbal or non-verbal communication or physical conduct of a sexual nature which intends to annoy, insult, intimidate or threaten the other person or commits such acts at the premises of workplace, or makes submission to such conduct either explicitly or implicitly a term or condition of an individual's employment, or makes submission to or rejection of such conduct by an individual a basis for employment decision affecting such individual, or retaliates because of rejection of such behavior, or conducts such behavior with the intention of unreasonably interfering with an individual's work performance or creating an intimidating, hostile,, or offensive working environment; shall be punished with imprisonment which may extend to three years or with fine up to five hundred thousand rupees or with both.

**Explanation 1:** Such behavior might occur in public place, including, but not limited to, markets, public transport, streets or parks, or it might occur in private places including, but not limited to workplaces, private gatherings, or homes.

**Explanation 2:** Workplace means, the place of work or the premises where an organization or employer operates, this may be a specific building, factory, open area or a larger geographical area where the activities of the organization are carried out. Sexual advances may occur after working hours and outside workplace. It is the access that a perpetrator has to the person being harassed by virtue of a job situation or job related functions and activities.

**2. The Protection Against Harassment of Women at Workplace Act, 2010.**

**3. The Punjab Protection of Women against Violence Act, 2016.**

**4. The Code of Criminal Procedure, 1898**

**Section. 154 - Information in cognizable cases.-**

**Section. 161. Examination of witnesses by police**

# MODULE 3

## RELEVANCE OF INTERNATIONAL STANDARDS

### OBJECTIVES OF THE SESSION

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- Who determines values and rights
- What are universal values
- International norms of human rights
- Judicial application of international law
- Understanding equality and discrimination
- Culture and human rights
- The role of amicus curiae

### TOPIC 1: UNIVERSALITY IN HUMAN VALUES

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- Human rights is based on the “inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”, “dignity and worth of the human person”
- It is essential for human rights to be protected by rule of law

#### ACTIVITY 1 (INTERACTIVE)

Please form 4 groups and discuss the following in 20 minutes:

- Each group to identify what values are important to the group
- Who interprets/controls/defines these values?
  - Do you belong to this group?
  - Do you not belong to this group?
- If you belong to this group, what makes you a part of this group?
- If you do not belong to this group, what do you not have that blocks you from this group?
- Imagine that you are part of ‘other’ group. How will your life be different?



Start drawing together list of common values for everyone (this should lead into discussion on inclusivity and diversity)

### **The Court, the law and Society**

- Analyze our relationship with the law
  - Does the law follow society's will
  - Does the law dictate society's actions
- What is the function of law?
- What is our relationship with the law
  - How does the law influence us
  - Who influences the law

## **TOPIC 2: HUMAN RIGHTS**

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### **INTERNATIONAL HUMAN RIGHTS INSTRUMENTS**

Human rights is the theory that every person has basic rights that must be protected. Implicit in this is the idea that each individual has inherent inalienable and indivisible rights. Human rights allows for the description of women's lives and reality through a gender lens. It elevates women's rights as issues of human rights.

1. Universal Declaration of Human Rights – drafted by UN HR Commission – recommendation by General Assembly to member states : Aspirational - not embody what was law but in fullness of time, ought to be principles of law generally recognized and acted upon. Drafting committee: Eleanor Roosevelt, Pen-Chu Chang and Charles Malik Habib. and representatives from 6 other countries .
2. International Covenant of Civil and Political Rights (ICCPR)
3. International Covenant on Economic Social and Cultural Rights (IESCR)
4. Others - ICERD 1966, CEDAW 1979, CAT 1984, CRC 1989, CRPD 2006

### **SOURCES OF INTERNATIONAL LAW**

International law is derived from the following sources:

1. Instruments
  - (a) Treaties (conventions and covenants)
  - (b) Declarations

2. Court decisions
3. Writings of jurists
4. Customary international law – “[T]o prove the existence of a rule of international customary law or general law, it is necessary to establish that states act in this way because they recognize their legal obligation to this affect”. (PLD 1981 Supreme Court 377)

## WOMEN’S RIGHTS ARE HUMAN RIGHTS AND MAJOR INSTRUMENTS ON WOMEN’S HUMAN RIGHTS

- Human rights allows for the description of women’s lives and reality through a gender lens. It elevates women’s rights as issues of human rights.
- [Should we start with what is a treaty – may be too basic but on the other hand, our needs assessment disclose that most judges have not done international law. Or should we leave that to PJA]
- Major international law instruments that protect the rights of women.
- **Discrimination against women**
  - Universal Declaration of Human Rights: article 23
  - International Covenant on Civil and Political Rights: article 26
  - International Covenant on Economic, Social and Cultural Rights (ICESCR): article 2
  - Convention on the Elimination of All Forms of Discrimination Against Women
- **Prohibiting gender-based violence against women including family violence and sexual harassment**
  - Committee on the Elimination of Discrimination against Women: General “ Recommendation 12 in 1989 and Recommendation 19 in 1992
  - Declaration on the Elimination of Violence against women: General Assembly resolution 48/104 of 19 December 1993 art 4
  - Convention against Torture and Inhuman and Degrading Treatment (CAT): General Comment No. 2, CAT/C/GC/2, 24 January 2008
- The most detailed is contained in the **Convention on the Elimination of All forms of Discrimination Against Women (CEDAW)**. These rights of women are regarded as fundamental human rights. CEDAW is the second most ratified human rights convention in the world (189 countries)
  - Art. 1: Definition of Discrimination
  - Art. 2: Measures to be Taken to Eliminate Discrimination
  - Art. 3: Guarantees full development and advancement of women

- Art. 4 Special Measures
- Art. 5 Modifying Social and Cultural Patterns of Conduct
- CEDAW specifically obligates the State to adopt a policy to eliminate all forms of discrimination against women by amongst others, adopt appropriate legislative and other measures prohibiting discrimination against women; and take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women (article 2). Article 5 further requires States 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.
- Specific undertakings -
  - Trafficking and prostitution
  - Political and public life
  - Participation at international level
  - Nationality
  - Education
  - Employment
  - Healthcare
  - Economic and social benefits
  - Rural women
  - Equality before the law
  - Marriage and family life

### History of CEDAW and Pakistan's role

- 1954: UN General Assembly in 1954 called on governments to abolish laws customs and practices “inconsistent with the Universal Declaration of Human Rights”. The statement was pivotal to CEDAW.
- 1960s: 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** was adopted by the United Nations General Assembly on March 2, 1967. (A/RES/22/2263)

- **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:
  - The principle of equality of rights shall be embodied in the constitution or otherwise guaranteed by law;
  - 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.

## TOPIC 3: OBSERVANCE AND APPLICATION OF TREATIES

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### Vienna Convention on the Law of Treaties 1969

- Pacta Sunt Servanda – Art. 26: Every treaty in force is binding upon the parties to it and must be performed by them in good faith.
- Internal law and observance of treaties – Art. 27: 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 provides that when a treaty was concluded, if at that time, the treaty violated the State party's internal law, that situation does not invalidate the State's consent, with a limited exception

### STATE OBLIGATION UPON ACCESSION TO CEDAW

- By ratifying a treaty, a State not only agrees
  - to be bound by the obligations provided in the treaty;
  - to offer itself for scrutiny on the basis of standards set forth in the Convention.
- State Party comprises ALL constituent units, including provinces, districts, municipalities and all branches of state apparatus

- **The Government of Pakistan acceded to CEDAW on 12 March 1996 with the following –**
  - Declaration: “The accession by [the] Government of the Islamic Republic of Pakistan to the [said Convention] is subject to the provisions of the Constitution of the Islamic Republic of Pakistan.”
  - Reservation: “The Government of the Islamic Republic of Pakistan declares that it does not consider itself bound by paragraph 1 of article 29 of the Convention.”

## GENDER EQUALITY IN MUSLIM COUNTRIES

- **Pakistan:** “[G]ender inequality remains a big challenge to socio-economic development in Pakistan. Rural women engage in agriculture, livestock management and domestic chores as unpaid and unregistered workers. Female literacy rate is low and further lower in rural areas. Low literacy rates combined with gender stereotypes continue to result in instances of discrimination and violence against women”.<sup>1</sup>
- **Organization of Islamic Cooperation (OIC)**
  - ‘Women in the 57 Organisation of Islamic Conference (OIC) member states should be respected, developed, empowered, considered full active participants in social, political, cultural and economic spheres’.<sup>2</sup>
  - The OIC reiterated “its genuine desire to and hope ... that gender equality becomes a universally accepted norm in both Muslim and non-Muslim countries.”<sup>3</sup>
  - Their [women’s] legitimate claims and demands for equal treatment, access to opportunities, role in affairs of the state including policy and decision making and protection from violence and abuse must be met if we are to make women equal partners in development.<sup>4</sup>

## RESPECT, PROTECT AND FULFIL

- **CEDAW General Recommendation 28 para. 9 on State obligation:**

Under article 2, States parties must address all aspects of their legal obligations under the Convention to **respect, protect and fulfill** women’s right to non-discrimination and to the enjoyment of equality.

<sup>1</sup> Statement by Pakistan’s Federal Secretary at the 57th session of the Commission on the Status of Women, 7 March 2013. <http://www.un.org/womenwatch/daw/csw/csw57/generaldiscussion/memberstates/Pakistan.pdf>

<sup>2</sup> OIC’s Plan of Action for the Advancement of Women (adopted by Second Ministerial Conference on “Women’s Role in Development of OIC member States”. Available at [http://www.oic-iphrc.org/en/data/docs/legal\\_instruments/OIC%20Instruments/OPAAW/OPAAW%20-%20EV.pdf](http://www.oic-iphrc.org/en/data/docs/legal_instruments/OIC%20Instruments/OPAAW/OPAAW%20-%20EV.pdf)

<sup>3</sup> <http://www.un.org/womenwatch/daw/documents/ga65/Org-of-Islamic-Conference.pdf>

<sup>4</sup> Secretary-General of OIC Statement to the 4th Ministerial Conference on Women’s Role in the Development of OIC Member States, Dec 2012

- 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 exercise **due diligence** to protect women against discrimination including **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 **fulfill** 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.

## TOPIC 4: APPLICATION OF INTERNATIONAL LAW

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- **Monist and dualist States:**

Traditional distinctions have been drawn between theories of ‘monism’ and ‘dualism’ and the categorization of countries being either ‘monist ‘ or ‘dualist’ states. Generally, how a State applies international law depends on whether a State is a monist state or a dualist state.

- Monist States requires ratification to become law only
- Dualist States requires ratification and domestication (incorporation) to become law
- Common law countries are traditionally dualist states. It requires a State to pass legislations for the contents of a treaty to be applicable domestically. This serves as a protection against executive action. Pakistan adopts the dualist model.
- **Direct application:** “An International Convention or Treaty is not directly applicable in Domestic Law on Ratification in Pakistan. However, the provisions of such Treaties and Conventions are taken into consideration in formulating legislation and by the Courts when interpreting the law.”<sup>5</sup>

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<sup>5</sup> Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Fourth Periodic Report of State Parties – Pakistan, 24 September 2011. CEDAW/C/PAK/4, para. 37

- However, this distinction is no longer strictly adhered to as more countries adopt a measure of indirect application on international norms.
- **Indirect application: Bangalore Principles** articulate that it is within the proper nature of the judicial process and well established judicial functions of domestic 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 constitutions, legislation or common law as well as if the law is incomplete or there is a gap. Provided that where the national law is clear and inconsistent with international obligations, the national court is obliged to give effect to the national law.

### HOW COURTS GIVE EFFECT TO INTERNATIONAL NORMS

- There has been an increase in references to international law. Domestic courts employ different ways to give effect to international norms in developing domestic law in tandem with international law. This could be by:
  - 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).<sup>6</sup>
- In keeping with the common law tradition, judicial decisions can extend beyond resolving the dispute at hand to transforming social behaviour and attitudes. In this scenario, litigants in a case may be considered rights claimants who challenge public policy and/or social norms (including customary practices).

### EXAMPLES OF CASES APPLYING INTERNATIONAL LAW

Can Pakistani Courts draw on International Law without Legislative Instrument?

- The question arise for all consideration first, whether international is, of its own force, drawn into the law of the land without the aid of municipal law and secondly, whether, one so drawn, it overwrites municipal law in case of conflict. “[W]e 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.”<sup>7</sup>

<sup>6</sup> Sloss and Van Alstein, International Law in Domestic Courts, Santa Clara Law Digital Commons, 9-2015. Available at <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1891&context=facpubs>

<sup>7</sup> M/s Najib Zarab Ltd Vs the Government of Pakistan (PLD 1993 Karachi 93). See also Rashid Sultan, International Law and Pakistan’s Domestic Legal Order, 17, Nov 2014. Available at <https://www.linkedin.com/pulse/20141117063038-105216481-international-law-and-pakistan-s-domestic-legal-order>

## Bangladesh

- “Our courts will not enforce those Covenants as treaties and conventions, even if ratified by the State, are not part of the *corpus juris* of the State unless those are incorporated in the municipal legislation. However, the court can **look into these conventions and covenants as an aid to interpretation** of the provisions of Part III, particularly to determine the rights implicit in the rights like the right to life and the right to liberty, but not enumerated in the Constitution.”<sup>8</sup>
- The provisions of an international convention to which a country is a party, especially one which declares universal fundamental rights, “**may be used by the courts as a legitimate guide in developing the common law.** But the courts should act with due circumspection when the Parliament itself has not seen fit to incorporate the provisions of a convention into our domestic law.”<sup>9</sup>

## India

- “Independence of the judiciary forms a part of our constitutional scheme. **The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them and there is a void in the domestic law.**”<sup>10</sup>
- The Court interpreted a national legislation in conjunction with ILO Convention No. 100 and European jurisprudential practice in the field. The Supreme Court of India found that Ms D’Costa had received much lower pay than her male colleagues performing work of equal value. The fact that there was no man employed in the same job in the company was irrelevant, since the principle of equal remuneration presupposed that the same level of pay be guaranteed not only to persons performing identical jobs but also to persons performing work that was different but was considered to be of equal value. “Before dealing with the contentious of the parties, it is necessary to set out the relevant legal provisions governing the case. Article 39(d) of the Constitution of India provides that the State shall, in particular, direct its policy towards securing that there is equal pay for equal work for both men and women. **The Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value was adopted by the General Conference of the ILO on June 29, 1951. India is one of the parties to the said Convention.**”<sup>11</sup>

<sup>8</sup> *Bangladesh National Women’s Lawyers Association v. Government of Bangladesh & Ors*, 14 May 2009, Petition No. 5916 of 2008

<sup>9</sup> *Ibid.*

<sup>10</sup> *Vishaka & Ors v State of Rajasthan & Ors* (1997) 6 SCC 241

<sup>11</sup> *Mackinnon Mackenzie v. Audrey D’Costa and another*, 26 March 1987, [1987] 2 SCC 469 (India). Available at <http://compendium.itcilo.org/en/compendium-decisions/supreme-court-of-india-mackinnon-mackenzie-v.-audrey-d2019costa-and-another-26-march-1987-1987-2-scc-469>



## Australia

- The obligation under the CRC gave rise to a **legitimate expectation** to the respondent's children that his application would be treated in accordance with the terms of the CRC. "Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty. **"...the fact that the Convention has not been incorporated into Australian law does not mean that its ratification holds no significance** for Australian law. Where a statute or subordinate legislation is ambiguous, the courts should **favour that construction which accords with Australia's obligations** under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification so, the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia's] obligations under international law"<sup>12</sup>.

## Malaysia

- **The Court considered that international conventions and treaties to which Malaysia was signatory had been invoked by courts to resolve disputes when merited**, and noted that in several other jurisdictions such as the United States, Canada, United Kingdom, France, Germany, Israel and China, the courts had power to order paternity tests. ... In the exercise of judicial discretion and the inherent power of the court, and having regard to Article 3 of the CRC, the Court held that it was in the best interests of the child..., the Court considered Article 7 of the CRC, which states that a child had the right to know and be cared for by his or her parents, and found it to be **applicable as it did not contradict and indeed was very much in conformity with the Federal Constitution, national laws and national policies of the Government of Malaysia**. *Lee Lai Ching v. Lim Hooi Teik* (2013) available at <https://www.crin.org/en/library/legal-database/lee-lai-ching-v-lim-hooi-teik>

## United Kingdom

- In some of these countries, the courts have developed and proclaimed fundamental human rights to be inherent in the common law, without reference to parliamentary instruments. **"[S]ome rights are inherent and fundamental to democratic civilized society. Conventions, constitutions, bills of rights and the like respond by recognising rather than creating them."** *R v Secretary of State for the Home Department, ex parte Daly* [2001] <http://www.bailii.org/cgi-in/markup.cgi?doc=/uk/cases/UKHL/2001/26.html&query=ex+parte+Daly&method=all>

<sup>12</sup> Minister for Immigration and Ethnic Affairs v Teoh [1994-1995] 183 CLR 273, 287. Mason CJ and Deane J

## PAKISTAN CASES APPLYING CEDAW

- Mst Saima*: “The question whether petitioners Nos. 1 and 2 were committing an offence within **the mischief clause** of section 10 of Ordinance VII of 1979 would require a careful understanding of the penal provisions under the said law. ...In the instant case 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 and the U.N. Convention on Elimination of all Forms of Discrimination Against Women**. Article 35 of the Constitution enjoins the State to protect the marriage and the family. **Article 16 of the Convention on the Elimination of all Forms of Discrimination Against Women reads ...** ‘1 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.’ For what has been discussed above, the prosecution launched against, the petitioners prima facie reflects not only malice in fact but also male in law.”<sup>13</sup>
- 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.<sup>14</sup>
- Mst. Sarwar Jan v. Abdul Rehman**: Application for divorce by wife on the basis of cruel and inhuman behavior of the husband. The Court referred approvingly to CEDAW and Cairo Declaration of Human Rights.<sup>15</sup>
- Suo Moto No. 1K of 2006**: Application by foreign husband for citizenship. The court drew on Constitution, Islamic law and international human rights law i.e. UDH, CEDAW and Convention on Nationality of Married Women.<sup>16</sup>

## 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.<sup>17</sup>

<sup>13</sup> Mst Saima Vs The State PLD 2003 Lah. 747, Tassaduq Hussain Jilani J

<sup>14</sup> PLD 1999 Lah 494

<sup>15</sup> NLR 2004 SD 129

<sup>16</sup> PLD 2008 FSC 1

<sup>17</sup> Faqir Hussain, *The Role of District Judiciary in Protection of Human Rights*, FJA

- At sessions court, the State obligation most relevant is the obligation to protect women's human rights and prohibit/punish its violation, namely States are required to exercise due diligence to **prevent** violations, **protect** victims/survivors, **prosecute** and **punish** perpetrators and **provide redress and reparation** to victims/survivors. These obligations are interlinked, with overlapping issues and accords with the State obligation to respect, protect and fulfill human rights.
- For example, fear of repercussions from the perpetrator is one of the biggest hindrance to women taking action on violence against women. Therefore, the State should look into making **protection** of victims/survivors a priority, effectively **prosecute** perpetrators to remove impunity, ensure **punishment** is commensurate with the offence and capable of preventing recidivism and deterring others, **provide adequate reparations** to victims/survivors to enable them to rebuild their lives away from the perpetrator, if required, and address women's fears effectively in **prevention** campaigns.<sup>18</sup>

## TOPIC 5: EQUALITY

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- “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  
Do we focus on the law? Or do we focus on reality? Is the law neutral?
- The argument that law is neutral ignores the fact that lawmakers are products of their environment and incorporate their latent perspectives and biases into the law. Such a concept has inherent problems.
- In order to better understand the effect of gender inequality and discrimination and how it affects participation, needs and realities of women, we must study each situation using a ‘gender lens’.
- Gender equality is about equal valuing of women and men - of their similarities and their differences. We need equal, respectful partnerships between men and women in the same way that we need both eyes to see best.
- CEDAW adopts the substantive equality principle. There are generally 3 principles of equality.
  - Formal equality
    - Does not recognize difference; treats men and women as the same
    - Requires equal treatment of men and women and deems equality is achieved as long as the law does not expressly treat men and women differently. Formal equality is premised on the fact that women are “like” men and therefore women and men are to be treated alike. This notion requires similarly situated persons to be treated alike

<sup>18</sup> Zarizana Abdul Aziz and Janine Moussa, *Due Diligence Framework: State Accountability Framework for Eliminating Violence against Women* (2013, reprint 2016)

- It does not recognise nor account for legitimate differences between men and women. Neither does it look at inequality in opportunity or effect.
- Uses male standard, and puts burden on women to measure male standard
- But what if equal treatment yields disparate results? Sometimes to treat women and men the same is discriminatory and sometimes to treat them differently is discriminatory. Sometimes to treat the able bodied and the disabled persons the same is discriminatory and at other times treating them differently is discriminatory.
- Protectionist equality
  - Recognizes difference and considers women’s weakness as the rationale for different treatment;
  - Based on the misconceived notion that 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 between men and women.
  - Consequently, protectionist equality drives and justifies inequality in the name of protectionism. In this conceptualization, women may be banned or dissuaded from holding certain jobs or offices that are considered too dangerous, demanding or just plainly unsuitable for women. Women lose opportunities to obtain a varied range of opportunities due to exclusion.
- Substantive equality
  - Recognizes difference and affirms equality between men and women.
  - It places an obligation on the State to correct the environment that disadvantages women and considers equality to have been achieved only when there is **equality of opportunity, equality of access and equality of results or outcomes**.
  - The doctrine of equality has also evolved from the requirement that women be treated equally with men to the requirement that women not be subjected to detrimental treatment due to their gender.
- **Special measures**
  - CEDAW Art. 4 provides for adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory
  - These are non-identical treatment of women and men due to their biological differences. They are considered of a permanent nature, and refer to the provision of general conditions or the adoption of general social policies to improve the situation of women and girls. Clear examples, are protection of maternity or women’s reproductive rights.

- **Special temporary measures**
  - CEDAW obligates member States to take action to ensure that they eliminate gender discrimination. Article 4 of CEDAW further notes that *to accelerate achievement of de facto or substantive gender equality*, a **special temporary measure** may be imposed; for example, a quota for women representatives in the legislative house(s) *to neutralize the effect of some of the barriers* to women’s political participation. Temporary special measures must also include adequate training to imbue women with the knowledge and skills to fill quotas. Temporary special measures are not discriminatory but are measures to address discrimination. Article 17(b) of the Constitution similarly provides that special assistance given to disadvantaged groups will not be deemed as discrimination or preferential treatment.

## TOPIC 6: DISCRIMINATION

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- CEDAW defines “discrimination against women” as “**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”.
- **Structural discrimination**

Discrimination against women is often maintained by laws, policies, culture or customary practices. These policies and practices socially and legally entrench gender stereotypes. Such systemic discrimination has become accepted and morphed into unquestioned norms and standards. Structural or systemic discrimination requires a change in mindset and re-assessment of common socio-cultural and legal notions of gender.
- **There are two other kinds of discrimination.**
  - **Direct discrimination**

Direct discrimination occurs when someone is treated less favourably than another for prohibited reasons or protected characteristic. Direct discrimination can usually be easily identified. For example, if a woman is denied financing facilities by the Bank because she is a woman.
  - **Indirect discrimination**

At times what appears to be a neutral position, law, policy or measure, actually result in discrimination of women. Sometimes, women and girls are still unable to access the facilities and take advantage of the opportunities, not because there is direct or even intended discrimination but because certain rules or policies are such that it is difficult if not impossible for women to comply with.

- **Inherent requirements and reasonable adjustments**

It is not discriminatory if a person is not employed because he/she is unable to carry out the job requirements. This is called the inherent requirements of the job. However, it is a violation of human rights to dismiss a person if reasonable adjustments can be made to help a person to fulfill the inherent requirements of the job. Adjustments are reasonable if they would not be too expensive, difficult or time consuming or cause some other hardship.

For example:

- If an employer can modify the workplace to accommodate a person in a wheelchair then the employer must make such reasonable adjustments.

- **Who is the comparator?**

In order to determine whether a person has been discriminated, we need to identify a comparator. What is the comparator argued and adopted by the Court in the decision below? What should the comparator be?

In a case where a flight attendant was dismissed because she was pregnant, the court held, “The applicant cannot compare herself with the ground staff or with the senior chief stewardesses or chief stewardesses as they were not employed in the same category of work.” The court also said, “The equal protection guarantees in clause (1) of art. 8, therefore extends only to persons in the same class. It recognizes that all persons by nature, attainment, circumstances and the varying needs of different classes of persons often require separate treatment. Regardless of how we try to interpret art. 8 of the Federal Constitution, we could only come to the conclusion that there was obviously no contravention.”<sup>19</sup>

## TOPIC 7: CULTURE AS A HUMAN RIGHT

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- Important to note when we talk about culture, we understand that we all embrace culture. 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.
- It is also important to note that human rights are inherent, indivisible and inalienable. Cultural rights are human rights.
- **UNESCO Universal Declaration on Cultural Diversity**
  - Culture should be considered as a set of distinctive spiritual, material, intellectual and emotional features of society or a social group

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<sup>19</sup> *Beatrice Fernandez v Malaysian Airlines* [2005] 2 CLJ 713

- 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. (*Article 4*)
- No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope. (*Art. 4*)
- **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
- **CEDAW**
  - Not all cultural practices are protected under international human rights law
  - States must take appropriate measures to modify social cultural patterns of conduct (CEDAW Art. 5)
- **2012 Report of UN Special Rapporteur in the Field of Cultural Rights<sup>20</sup>**
  - 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.

## TOPIC 8: LITIGATION IMPACTING WOMEN'S HUMAN RIGHTS—THE ROLE OF AMICUS CURIAE

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- Sometimes, a case that appears straightforward may have human rights ramifications. In a traditional adversarial system, common law courts are hostile to interveners as litigation only involves 2 disputants who define the issues, present their facts and arguments in best possible light and cast their opponent's case in worst possible light.
- Yet common law is defined by the ability of judgments to become precedent and widely affect non-parties.

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<sup>20</sup> 2012 Report of Farida Shaheed, UN Special Rapporteur in the Field of Cultural Rights (A/67/287)

- Amicus evolved as vehicle for expression by those affected, particular where cases involve political ramifications wider than the narrow view of common law litigation. Court may also appoint amicus to gather information and inquiries and report to court
- Traditional role of amicus curiae
  - Amicus applied to bystander who not having interest in the cause, of his own knowledge makes suggestions on a point of law of fact for the information of the presiding judge – to prevent uninformed legal or factual error. Amicus submits on policy choice but not because of allegiance to any party.
  - Traditional amicus started as neutral position – end of 18<sup>th</sup> century, transition into role of an advocate. The amicus may assume 3 roles:
    - True disinterested party (neutral).
    - Endorsing amicus.
    - Interest group amicus.
  - The courts have increasingly allowed amicus counsels to appear before the court and make submissions, particularly on the wider impact of the case.

## ACTIVITY 2

Please form 4 groups. Discuss one of these hypothetical cases and how you can draw from the Constitution and international law to help in deciding these cases.

- Hypothetical case 1: A woman applies for a job as a replacement teacher. A couple of months later she was advised that she had obtained the position and asked to pick up and sign the employment contract. When she attended the offices, she was visibly pregnant. The officer refused to hand over her appointment letter and she was denied the appointment. Does this constitute discrimination?
- Hypothetical case 2: The government advertises for the position of ‘firemen’. The advertisement clearly states that only men are eligible to apply. Is this discrimination on the basis of gender? What if the advertisement does not state that only men are eligible to apply but states that all applicants must be at least 5 feet 7 inches. Would this be discriminatory?
- Hypothetical case 3: A company has a policy that to be eligible for promotion to a managerial position, an employee must have not taken leave of more than 21 consecutive days. Is this policy discriminatory on the basis of gender?
- Hypothetical case 4: In the technology industry, many employees put in extra hours, sometimes sleeping at their offices. Both employees and employers acknowledge that these extra hours, sometimes called “face-time” determines promotion of the individual up the corporate ladder. Is this practice discriminatory? If so, what should the employers do?



## MODULE 4

# GENDER SENSITIZED JUDICIAL CONDUCT IN GENDER-BASED VIOLENCE CASES

## OBJECTIVES OF THE SESSION

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### SLIDE 2

In this session, the focus will be on bringing together the information you have already heard about what gender sensitization means, the relevance of international principles and now adding on, what does that mean for judges when they have GBV cases before them

The objectives of the session are to:

- Provide a brief background about the universal and Pakistan experience of women and gender based violence (GBV)
- Discuss the international principles and current legal issues and practices in Pakistan regarding women's access to justice in courts
- Discuss challenges faced by women witnesses in court in GBV cases
- Provide and discuss good practices drawn from international standards and common law jurisdictions in GBV cases
- Discuss potential opportunities to improve court practices in Punjab State
- 2 practical exercises to assist with understanding the issues and their potential solutions

## TOPIC 1: UNIVERSAL AND PAKISTAN EXPERIENCE OF WOMEN AND GBV

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### SLIDE 3

#### 1.1 THE UNIVERSAL EXPERIENCE OF WOMEN IN SOCIETY

- In order to address gender sensitization for women in courts it is necessary to take account of the general inequalities faced by women on a daily basis.

- This is true worldwide and in some countries more than others.
- The challenges for women’s access to justice do not begin in the courts.
- Before they come to court

### **Women**

- Women suffer economic and social inequalities as well as inequalities in education, health, employment and within their relationships in families.
- They have employment inequalities and have lower literacy rates
- Fewer women than men finish their schooling
- They earn less than men for the same or similar work,
- They do significantly more household work and childcare than men and it is unpaid
- Women face discrimination on multiple grounds (Such as ethnicity/race, indigenous marital and/or maternal status and age)
- Women are most likely to be the victims of gender based violence (GBV)
- Violence against women is one of the major reasons why women come into the court system apart from matrimonial and inheritance issues, which can sometimes be closely linked to GBV

## **1.2 WHAT IS MEANT BY GENDERED BASED VIOLENCE**

### **SLIDE 4**

- Expressed in a simple form
- “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. It also includes domestic violence.
- This will be the subject of Module 5 and be discussed in significant detail

## **1.3 INTERNATIONAL AND PAKISTAN GBV CONTEXT**

### **SLIDE 5**

#### **Internationally**

- 1:3 women in the world experience violence, either physical or sexual at some point in their lives, mostly from someone close to them
- In some countries the figures can be as high as 1:2 (such as in some African countries)
- In Australia the figure is 1:4 .That is in spite of some initiatives to address this issue.

- Sometimes the increased numbers in countries where initiatives have been taken may be reflecting that more women feel able to come forward to complain about GBV rather than there being an increase in the GBV against women. It may be both.
- Whatever the explanation is, the statistics are appalling.

### **Pakistan**

- Current studies indicate: (references to the sources are at the end)
  - In South East Asia (including Pakistan) the rate is higher (37.7%)(WHO 2013)
  - Between (2008 – 2014) the number of GBV cases reported by women increased from 751 to 100,070, a 28.2% increase (Aurat Foundation 2015)
  - 4 women are raped every day – half of them minors (HRCP 2015; Parveen 2011)
  - In Punjab State the number of reported cases of GBV increased from 6,505 in 2015 to 7,313 in 2016 (Punjab Commission on the Status of Women 2017).
  - The increase in the cases is potentially an example of women feeling more able to lay a complaint than previously.
  - However as you will hear about in later modules, most women do not come forward to lay a complaint.
  - There is a significant gap between the constitutional position of women in Pakistan and all levels of policies and practices including access to justice

## **TOPIC 2: INTERNATIONAL PRINCIPLES ON WOMEN'S ACCESS TO JUSTICE**

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### **SLIDE 6**

- The underlying principle which underpins gender sensitization of judicial conduct in courts is ensuring that women have equal rights of access to justice
- International law requires countries to ensure that everyone benefits from equal protection of the law
- As you have heard from Module 2, many international treaties require States to ensure that everyone benefits from it protection of the law. The relevant ones requiring equal access to justice are:
  - Universal Declaration of Human Rights (articles 7 and 8)
  - International Covenant on Civil and Political Rights( articles 2 and 14
  - articles 2 (2) and 3 of the International covenant on Economic, social and cultural Rights. (articles 2 (2) and 3)he
  - The most detailed is Convention on the Elimination of Discrimination Against Women (CEDAW) (arts 2 (c), 3, 5(a) and 15)

- Pakistan is a party to each of these international instruments.
- All of these articles are contained in the Compendium

## 2.1 CEDAW CONVENTION AND GENERAL RECOMMENDATION NO. 33 (23 JULY 2015)

### SLIDE 7

- General Recommendation 33 Part II A, was adopted by CEDAW only 2 years ago.
- As was explained in Module 3, a General Recommendation of CEDAW is a powerful and persuasive guideline for States as to how the Convention is to be interpreted and applied in a practical way by the States.
- Part II A is specifically on “Justiciability, availability, accessibility, good quality, provision of remedies and accountability of justice systems”
- It is therefore very specifically addressing the roles and accountability of justice systems, which includes the Courts.
- The Compendium sets out the most relevant portions of this recommendation. I specifically highlight Paragraph 14 which identifies 6 essential components to attain women’s access to justice.
- The most pertinent components in Paragraph 14 are:
  - (d) Good quality justice –in summary, it requires 3 things
    - adherence to international standards of competence, efficiency, independence and impartiality.
    - timely, appropriate and effective remedies which are enforced, and .
    - justice systems need to be innovative, practical and gender sensitive.
  - (f) Accountability – in summary it requires the State to monitor 2 things
    - availability, accessibility to good quality justice and provision of remedies
    - and also the actions of the justice system professionals (judges and lawyers).
- Paragraphs 3 and 9 of the Recommendation identify common obstacles to women’s access to justice which “constitute persistent violations of women’s human rights” and they include issues already raised in our information to far.
- In addition CEDAW makes many other practical recommendations to improve the justice system for accessibility for women.
- It is therefore very comprehensive and remembering that these are standards for all countries

## 2.2 PAKISTAN - CONSTITUTIONAL FRAMEWORK AND PRO-WOMEN LEGISLATION

### SLIDE 8

- As has already been referred to in other modules, there are constitutional guarantees of equality between man and women in the law.
  - Articles 25, 28, 34 and 35
- The guarantee of equality between man and women is not only equality in the law in a formal sense (Art 25) ,but also in policy and also includes equality in other aspects of the personal lives of men and women
- The Government has taken important steps in the last two decades with Initiatives which are both in legislation and policy. These are referred to Module 2
- The Punjab State has also taken even greater steps both in legislation and policy, which are referred to in Module 2
- These are important steps and collectively have improved the framework for women to help improve their ability to access to justice

## TOPIC 3: CHALLENGES FACED BY WOMEN WITNESSES COMING TO COURT

### SLIDE 9

A drawing

- This depicts a woman going to make a complaint to the police.
- What do you think she is feeling if she wants to make a complaint about a sexual assault upon her by a neighbour?

## 3.1 BEFORE WOMEN COME TO COURT

### SLIDE 10

- Worldwide it is found that before women come to the courts they have often already experienced distressing and sometimes unresponsive, or even positively aggressive conduct by police or other law enforcers.
- Women often do not report violation of their rights to the authorities for fear that they will be humiliated, stigmatised, arrested or have other forms of violence inflicted upon them, including by law enforcement officials.

- Other reasons, include shame, concern about family and societal reactions, and concern or fear about the overall process of the criminal Justice system. This is particularly the case in relation to sex crimes and domestic violence.
- Even if women lodge complaints, the authorities frequently fail to act with due diligence to investigate and prosecute the perpetrators.

### 3.1 APPEARING IN COURT

#### SLIDE 11

- Just appearing in court is distressing
- Judges regard this as part of their familiar workplace and think nothing of it
- However, to a witness, and particularly a female witness, it is formidable
- It is formal building and rooms with a peculiar layout and with many people in formal court attire or in uniform moving around and speaking legal language with which they are unfamiliar
- They may come face-to-face with the accused which is an intimidating experience in itself
- Add to that, the proximity of the accused, at least two counsel and court staff, many of whom are likely to be men
- This is going to be the place in which they have to give evidence about an offence, the details of which are traumatic for them

### 3.3 GIVING EVIDENCE

#### SLIDE 12

- TRAINER NOTE: Refer to the drawing of a woman giving evidence
- Women have to give evidence, often about intimate conduct in relation to a sexual assault upon them. They have to tell this before strangers. A minimum of about 6 people most often males
- I ask you to imagine for a moment, what you would feel like if you had to give intimate details about a sexual experience that you have had in your life. And that you then have to tell all of the information about who, when, where and what happened, in sequence, and in very great detail. And to tell a group of judges here today. I suggest you would find the experience excruciating.
- But add to that the fear of women knowing that their conduct and reputation are likely to subject to adverse scrutiny through cross examination
- Women refer to this experience as feeling “re-victimised” by the process, feeling that they are the ones on trial and not the accused.

- Finally, knowing that a judge is going to decide whether to believe them or not
- Thinking about these issues will give you some sense of what it may feel like for a woman victim giving evidence in court.

## COURT CASE WHICH RECOGNIZES WOMEN'S EXPERIENCE

### SLIDE 13

A case which brings together some of the factors of which I have spoken is a case from the Philippines

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

“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”

## TOPIC 4: STEREOTYPING OF WOMEN IN GBV CASES AND EFFECT ON THEIR CREDIBILITY

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### SLIDE 14

- As we have previously discussed in the first module of this workshop, we all have personal views and it is very easy for stereotyping and gender bias to creep into our thinking.
- Stereotyping and gender bias of women in GBV cases can arise in different ways:
  - Judges can have rigid views based on what they consider to be appropriate conduct for women and take an adverse view of women who do not conform. For example, a woman should always dress demurely and not use bad language even if she is angry or upset.
  - Assessing a woman’s evidence by comparing her behaviour with how a man would respond. For example, if a woman was being sexually groped by a man in public, she would push his hand away and loudly tell him to stop.
- Generalizing or stereotyping of a woman’s behaviour about how she should behave in these circumstances, can affect the assessment of the credibility of her evidence

- A female witness should not be assessed against how a man would behave, nor how a stereotyped “normal” women ought to behave, but instead how this woman in her situation in all of her circumstances, behaved.
- In other words, assessing her credibility should take account of her personal background and her circumstances
- Women’s and men’s experiences and feelings and therefore their actions or inactions in relation to similar situations, might be (and often are) different for very valid reasons. For example, the effect of unequal physical strength or unequal power in community
- It is important to appreciate the reality of the particular situation, and also understand that situation from a woman’s perspective, and then that particular woman’s perspective.
- This is highly relevant when dealing with issues of consent in rape cases
- Also there is often a lack of understanding of the nature of domestic violence or sexual assault and its impact on women’s responses at the time of an offence and when giving evidence in court. This will be discussed in greater detail in Module 5.

## ACTIVITY 1 - QUIZ

### SLIDE 15

- Each of you will be given a quiz with 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
- We may not have time to go through all of the answers but some may be discussed as a group
- Total time 20 mins

SEE ADDITIONAL TRAINERS NOTES FOR THE ACTIVITY

## 4.2 LEGAL ISSUES AND GENDER STEREOTYPING IN RAPE CASES

### SLIDE 16

There are commonly held views of judges on legal issues which involve gender stereotyped views of women. They relate to the following topics:

- Delay by victim in reporting rape
- Moral character of the complainant and virginity



- Whether a complainant consented

The following slides provide case law examples referring to those issues and how they have judges have reflected on these topics

## CASES ON DELAY BY VICTIM IN REPORTING RAPE

### SLIDE 17

#### Case 1 *People v Ilao* (G.R.Nos 152683-84, December 11, 2003)

- “As the trial court found, the 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 2 *People v Ilagan* (G.R.No 144595, August 6, 2003)

- “[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)

## MORAL CHARACTER OF THE COMPLAINANT AND VIRGINITY

### SLIDE 18

TRAINER SUGGESTION: Due to time to read out only two.

**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)**

“**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)

- In the UK and Australia the court can disallow questions about the general reputation of a complainant as to chastity. But the court has the discretion to admit specific evidence about prior sexual conduct if that has “substantive probative value”, such as, for example evidence of the complainant having had consensual sexual relations with the defendant prior to the alleged offence. However it must be sufficiently proximate to the alleged offence.( UK and Aus )

Compare with: *Pakistan Qanun-e-Shahadat*, Order 1984 Section 151(4).

“Impeaching the credit of a witness –when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character”.

Note the word “may” which suggests the exercise of discretion.

## WHETHER THE VICTIM CONSENTED

### SLIDE 19

#### 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)

## TOPIC 5: ASSESSING CREDIBILITY

### SLIDE 20

Studies have shown that: (sources are in the references)

- the demeanour of a witness 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, or their family situation, or any number of factors totally unrelated to truthfulness

- the appearance, behaviour and body language of a witness is influenced many factors. For example, age, as well as social and cultural experiences.
- persons with physical or cognitive disabilities will also have different presentations
- quick “instinctive” reactions by judges to the visual look, appearance or behaviour of a witness leads to assessing by pre-conceived stereotype

## 5.1 ASSESSING WITNESSES FAIRLY AND WITHOUT BIAS

### SLIDE 21

- The most reliable approach is to carefully consider the likelihood or otherwise of particular evidence of a witness having happened
- Take into account ALL of the evidence in the case, both direct and circumstantial
- Carefully consider any inconsistencies and whether they may be attributed to misunderstanding or the stress of a witness giving evidence
- Be able to give logical reasons based on all the evidence as to why a particular assessment of a witness is reached
- Deliberately reflect on whether a stereotype or bias is influencing the reasoning process
- Take time to consider decisions and not be pressured to make “snap” judgments about whether a witness is to be believed

## TOPIC 6 STANDARDS OF COURT PRACTICE REGARDING WOMEN REGARDING GBV

### SLIDE 22

This topic will first address Standards of court practice in Pakistan and then international standards with regard to women in GBV cases

## 6.1 SALMAN AKRAM RAJA AND ANOTHER VS. GOVERNMENT OF PUNJAB – 2013 SCMR 203

### SLIDE 23

- Brief facts and background which I am sure you are already familiar with, but just as a reminder:

TRAINER SUGGESTION IT NEED NOT BE READ OUT.

- A 13 year old girl was subjected to gang rape. No formal FIR was registered. Upon entry of the complaint the Sub-Inspector took the victim to the Hospital for DNA test. Even after positive DNA findings no FIR was lodged. The victim tried to commit suicide and the incident was covered by media and a Suo Motu action was initiated and the matter was registered.
- The Supreme Court gave directions for courts, police, hospital and medical practitioners in matters concerning the complaint process, the taking and use of DNA and court processes for vulnerable witnesses particularly women, children and persons with disability

### **SALMAN AKRAM RAJA AND ANOTHER VS. GOVERNMENT OF PUNJAB DIRECTIONS FOR COURTS**

#### **SLIDE 24**

These are the Directions which the Supreme Court gave to be followed in Courts:

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

These are all examples of good practice but I wonder how often they are adhered to by courts? And if not why not? That could be a matter for discussion in Activity 2

## 6.2 INTERNATIONAL GOOD PRACTICE STANDARDS FOR WOMEN IN GBV CASES

### SLIDE 25

- The Examples of best practice have been drawn from international standards referred to by CEDAW and practices from UK and Australia
- Many of these best practices are reflected in Pakistan in the Supreme Court Directives, and also in legislation.
  - The Pakistan Criminal Law (Amendment)(Offences Relating to Rape) Act 2016 s 376 A (disclosure of identity); s 164A (mandatory medical examination of rape victim); s 164 (DNA testing)
- International good practices will be discussed under four major headings:
  - 6.3 Physical environment of a court, inside and outside
  - 6.4 Evidential rules and practices
  - 6.5 Content of questions, language and manner of questioning
  - 6.6 Guidelines for questioning Vulnerable witnesses

## 6.3 PHYSICAL ENVIRONMENT OF A COURT - INSIDE AND OUTSIDE

### SLIDE 26

Two aspects of physical environment will be considered - inside and outside a courtroom

### 6.3.1 OUTSIDE COURT ENVIRONMENT

### SLIDE 27

- Ensuring that the physical environment and the location of courts are welcoming, secure and accessible to all women. Courts around the world are making significant modifications to the way in which courts look and to make them less austere and more welcoming to witnesses. Obviously this is subject to the availability of finance.
- Protecting women complainant's and witnesses against threats, harassment and other harm before, during and after legal proceedings.
- Efforts are made to enable there to be separate areas for witnesses in the same case and to have "witness support persons" to escort vulnerable witnesses to special safe rooms before giving their evidence. These are persons employed by courts.
- Conventional sitting hours may be too difficult by reason of concern over child care arrangements.

- women witnesses who are breastfeeding need:
  - a suitable place to nurse, and
  - adequate breaks in court proceedings

### 6.3.2 INSIDE COURT ENVIRONMENT

#### SLIDE 27

- Creating a calm, organised court environment. This can sometimes be difficult because a lot of things are happening on the sidelines
- Making a witness feel comfortable before they give evidence. This is increasingly seen as a very important role for a judge. It has a twofold function of assisting the witness to give their best evidence but also to give them an appreciation that the judge is there to listen to what they have to say.
- Another important feature, which is especially needed in the case of a child, a vulnerable witness, is to emphasise that it is alright for a witness to tell them that they do not understand the question.
- Also that it is very important to tell them that they should not answer a question which they do not understand. This can lead them into making errors without realising it
- many jurisdictions also allow a supportive person of the witness's choice to be present while evidence is being given
- Finally a judge should particularly consider making adjustments to the proximity of lawyers, the dock and the witness box to the witness.
- In many courts around the world, which include magistrates and district courts, barristers sit at a bar table which is away from where the bench, the witness and the accused are situated. This may not be possible in your jurisdictions but this too may be the subject of further discussion.

### 6.4 BEST PRACTICE – LAW, RULES, GUIDELINES, DIRECTIVES OR PRACTICES

#### SLIDE 29

- Best practice can combine:
  - (1) Laws and rules
  - (2) Guidelines, directives or practices in court which can be implemented by judges without the need for laws or rules

- Whether best practice can be accomplished by court directives, guidelines or practices, or whether it requires laws or rules, depends on the particular country jurisdiction
- Therefore the focus of this session will be on the types of best practice measures, rather than by the means of achieving it

## BEST PRACTICE EXAMPLES

### SLIDE 30

The sources of these examples are in the References.

- Court orders can be made to protect the identity of complainants and witnesses. This can be done before the commencement of a court case and orders can be continued throughout the trial process, including prohibiting a publication of evidence either in the media or otherwise.
- Allowing pre-recorded visual interview evidence to be tendered as the evidence in chief of a complainant. The important feature of this is not just merely that the statements from a complainant are video recorded, but that they are admitted in a case as being the **entire evidence in chief**, leaving it only for cross-examination.
- Empowering a court to order an early “special hearing” to enable the whole evidence of a child or a “vulnerable witness” to be taken and videoed before a trial and then tendered as the evidence at the trial.
  - What this means is that instead of a complainant having to wait until the trial date can be found, which may be a number of years, the complainant can give video – recorded evidence at a much earlier point of time, when their memory is fresher
  - It is their whole evidence and nothing further is required as trial.
  - For a child, this is vital as an offence may occur eg when a child is 6 years old but by the date of trial may be 8 years old or even more, with a different way of communicating including language.
  - There is a tendency for the credibility of that child to be assessed on the basis of their presentation in court rather than at the age they were when the offence occurred.
  - Special training is now being given for judges to better understand the special issues of children giving evidence.
- Permitting a statement of a child or person with a disability about a sex offence, to be admitted as evidence of the **truth** of the contents of the statement. This is subject to the condition that they are unavailable to be called or to testify about the events in the statement, due to young age and/or disability.



- The points to be noted about this practice, is that there is a prerequisite that the person be “unavailable” to give evidence about what is in the statements because
  - eg they have an inadequate recollection of what happened due to their young age or they are an adult who is or may have become, disabled. It is therefore very limited in its application
- But if those matters can be shown, then the statement is admitted as being evidence of the **truth** of what they said in the statement

### SLIDE 31

- Allowing a complaint about a sexual offence by a complainant to be admitted for two purposes:
  - first**, to provide information about how the allegation of the sexual offence first came to light, and
  - secondly**, as evidence of “consistency of conduct” with the alleged offence. Evidence of the complaint is **not** admitted **to prove the truth** of what was alleged
- the points to be noted about this practice, is that it is no longer a requirement that a complainant has to show that a complaint had been made at the “first available opportunity”.
- This earlier common law pre-requisite for the admission of a complaint by victim requirement has been altered by legislation, recognising that delay in complaining is a common feature of victims of sexual offences.
- Preventing a self-represented accused person from personally questioning a complainant who is an alleged victim of a sexual offence. Questions can be asked through a judge.
- Special rules concerning cross examination of vulnerable witnesses which applies to all witnesses including defendants (discussed later in this session)

## 6.5 CONTENT OF QUESTIONS, LANGUAGE AND MANNER OF QUESTIONING

### SLIDE 32

There are two aspects of questioning which will be discussed here which are relevant to best practice when women give evidence in GBV cases.

## 6.5.1 CONTENT OF QUESTIONS

### SLIDE 33

- Starting with the Pakistan legislation
  - Qanun–E–Shahadat Order:
  - S 146 gives the court discretion to forbid any questions or inquiries which it regards as “indecent or scandalous”
  - S 148 allows the court to forbid any questions which appears to “be intended to insult or annoy” or appears to be “needlessly offensive”
- Many common law jurisdictions have evidentiary rules regarding the disallowance of **“improper”** questions of witnesses which are broader than QES Order
- Examples of “improper” questions include questions which use inappropriate language, or are **misleading, confusing, or harassing**.
- There can be many examples of questions which are **misleading or confusing** to a witness. For example
  - **Using legal terms.**  
Eg. “I suggest that you dreamt that up ‘ex post facto’”
  - **Long or complex sentences which ask more than one question.**
  - **Ambiguous questions.**  
Eg “how many times did you tell the policeman that your uncle touched you”. This could be asking either “how many times did you tell the policeman” or “how many times did your uncle touch you”.
  - **Harassing questions:** It is common for counsel to ask the same questions over and over again in the hope of wearing down a witness and getting a different answer

### SLIDE 34

- Where questions appear to be **stereotyping and/or unfairly alluding to a woman’s gender**.
  - Eg. Question in cross-examination. “Well I suggest that when you pushed him away you were more concerned that he would ruin your makeup?”
- Intervening if a statement **implies that a woman makes a less credible witness** than a man.
  - Eg. Submission. “This is a woman who is telling your Honour that she was assaulted by my client in a public place but she does not produce any male witness to corroborate her story”

- A court when deciding whether a question is “improper” should take into account a number of features of a witness. For example:  
Mental, intellectual or physical impairment; age; gender; language; educational background; religion; maturity and understanding of a witness. Also it may include the relationship, if any, to any other party in the proceeding.

### 6.5.2 MANNER OF QUESTIONING

#### SLIDE 35

- Regardless of content, a court may prohibit questioning which is done in a manner which is bullying, aggressive, angry or loud voice questioning which can result in a witness not being able to be treated fairly when giving evidence
- Prohibit body language or aggressive eye contact which can be threatening
- Prohibit rapid fire questions which can upset a witness and result in them feeling pressured, intimidated or flustered
- The court should control this conduct as part of its inherent power to regulate and control proceedings before them
- In order to do that the court needs to be aware of the impact of this conduct and that depends upon the individual witness and overall circumstances

**THE OVERALL PURPOSE IS TO ENSURE A FAIR TRIAL FOR ALL PARTIES BOTH THE ACCUSED AND THE COMPLAINANT AND ALSO FOR ALL WITNESSES**

### 6.6 GUIDELINES FOR QUESTIONING VULNERABLE WITNESSES

#### SLIDE 36

- Best practice includes guidelines about cross examination of vulnerable witnesses
- “Vulnerable witnesses” include children, persons with physical disability or cognitive impairment, victims of serious offences against the person and witnesses threatened by violence or retribution. In the case of GBV these are mostly females.
- The guidelines have regard to research which shows that the most reliable evidence from a vulnerable witness is obtained when they can “tell their story” in answer to “open questions”. This is to take account of their suggestibility when asked questions by those in authority and that they have a tendency to answer “yes” to leading questions (“confirmatory bias”)
- The way these guidelines are to be applied depends on the particular witness and the crime and the circumstances.

- They are also applicable to the defendant or other witnesses who give evidence who may be vulnerable witnesses.
- These guidelines are **not to be applied** in a manner which adversely impacts on a fair trial for the defendant, instead to ensure that there is a fair and just trial process for all parties.

### SLIDE 37 (cont.)

- Guidelines include:
  - limiting the number of questions asked of a witness
  - requiring questions in cross examination to be “open” questions and not “closed” or “leading”
  - Restricting unnecessary repetitive questions.
- **See : Guidelines for questioning vulnerable witnesses: children and witness with mental disabilities . District Court of Western Australia Circular to Practitioners CRIM 2010/1 8 September 2010. This is in the compendium**

## ACTIVITY 2

### SLIDE 38

- This Activity enables an open discussion about ways in which the courts in Lahore could improve better access for women in the courts. Time 30 mins

#### Questions:

- Are there ways in which the judiciary could improve :
    - the physical environment outside the courts?
    - the physical environment inside the courts?
    - the ways in which evidence can be taken from women or vulnerable witnesses, eg use of pre-recorded videos?
    - the manner of treatment of women in courts as a witness and during their questioning?
    - Improve the assessment of credibility of women witnesses?
-

## REFERENCES

### GENERAL REFERENCES

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- Cusack, S. 2014. Eliminating judicial stereotyping: Equal access to justice for women in gender-based violence cases. Final Paper OHCHR June 2014

### REFERENCES FOR SLIDE 6 INTERNATIONAL AND PAKISTAN GBV CONTEXT

- WHO Data 2013. Global and Regional estimates of the prevalence and health effects of intimate partner and non-partner sexual violence.
- Aurat Foundation 2015. Annual Report January – December 2014. Violence against women in Pakistan: A Qualitative review of reported incidents. Aurat Foundation. Islamabad. January 2015
- Human Rights Commission of Pakistan. 2015. State of Human Rights in 2015. Women.
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### REFERENCES FOR SLIDE 20 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 FOR SLIDES 31 AND 32 ON BEST PRACTICES

- Ministry of Justice UK: Achieving Best Evidence in Criminal cases: Guidance on interviewing victims and witnesses, and guidance on using special measures. March 2011
- Definition of vulnerable witness: s 4 Evidence Act 1929 South Australia
- Special arrangements in court for vulnerable witnesses Ss 12, 13C(1)(a), 13(2)(a)- (f) Evidence Act 1929 South Australia
- Special procedures for audio visual recording of children’s and disabled vulnerable witnesses’ evidence of in relation to sexual or violence offences: SS 74EA, 74EB and 74EC the Summary Offences act 1953 South Australia
- “special Hearing” - a pre-trial hearing to enable children or persons with a disability to give the whole of their evidence and be recorded audio visually and be later tendered as their evidence: S 12 AB Evidence Act 1929 South Australia
- “special Hearing” - a pre-trial hearing to enable children or persons with a disability to give the whole of their evidence and be recorded audio visually and be later tendered as their evidence: S 12 AB Evidence Act 1929 South Australia
- Admissibility of out of court statements of child or person with disability who is a victim of a sex offences to prove the truth: S 34LA Evidence Act 1929 South Australia
- Court orders to prohibit publication of the identity of a party or witness: r.39.(2) 4 CPR (Criminal Procedure Rules) UK
- Admission of evidence of complaint in sex cases: S 34M Evidence Act 1929 South Australia
- Prevent an accused from personally cross examining the victim of a serious offence such as violence or sexual offence: S 13B Evidence Act 1929 South Australia

### REFERENCES FOR SLIDE 38 GUIDELINES FOR QUESTIONING VULNERABLE WITNESSES

- Guidelines for questioning vulnerable witnesses: children and witness with mental disabilities. District Court of Western Australia Circular to Practitioners CRIM 2010/18 September 2010

# MODULE 5

# GENDER-BASED VIOLENCE AGAINST WOMEN

## OBJECTIVES OF THE SESSION

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1. Prohibition of violence and use of force
2. Definition of gender based violence
3. Causes and impact of violence against women
4. Gender based violence is a violation of human rights
5. State obligation to eliminate violence against women
  - (a) Under international law
  - (b) Under constitutional law
6. Unpacking specific forms of gender-based violence against women
7. Role of the court and the authorities

## TOPIC 1: PROHIBITION OF VIOLENCE AND USE OF FORCE

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- The “state of nature” is where each person has a right or license, to everything in the world which inevitably leads to conflict —a “war of all against all.”<sup>21</sup>
- Confronting violence is and must be the primary duty of the nation State. The prohibition of violence and use of force is imperative both in the international sphere amongst nations [as evidenced by the *United Nations Charter* Art 2(4)] and within the national context.
- 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.”<sup>22</sup>

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<sup>21</sup> Thomas Hobbes, *The Leviathan* Chapter XIII (1660). Also available at <http://oregonstate.edu/instruct/phl302/texts/hobbes/leviathan-c.html#CHAPTERXIII> (last visited Feb. 8, 2012).

<sup>22</sup> H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HVLR* 593.

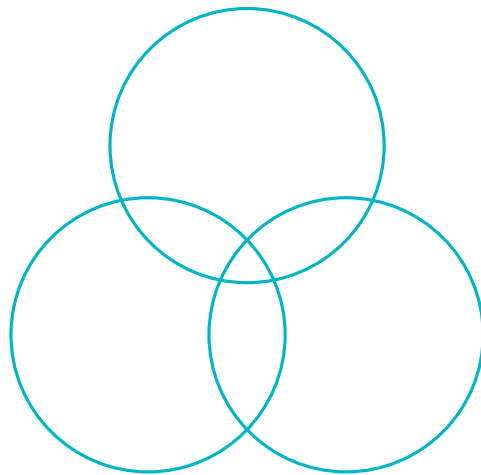
## TOPIC 2: DEFINITION OF GENDER-BASED VIOLENCE

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- The definition of discrimination against women includes gender-based violence. That is violence directed at a woman because she is a woman or that affects women disproportionately.
- “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. (1993 UN Declaration on the Elimination of Violence against Women)

Generally GBV can be divided into 3 categories (with overlaps):-

- Physical violence – intimate partner violence; domestic violence, rape and sexual assault; femicide/feminicide occurring in various settings within the family and the community whether during times of peace or conflict (including “honour killing” and dowry-related killing;<sup>23</sup> acid attacks; trafficking; sexual exploitation sexual harassment; forced or early marriage; harmful practices such as female genital mutilation; forced sterilization and forced pregnancy.
- Psychological / emotional violence – The sophistication of the use of violence that is not evidenced by physical injury, for example constant verbal abuse are as harmful and injurious as any form of physical violence, and sometimes even more harmful. This includes verbal abuse, shaming, isolation, intimidation, and controlling behavior, online violence or technology-based violence, and harassment. Examples can also be seen during conflict, such as solitary confinement and putting someone in perpetual fear of physical violence.



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<sup>23</sup> Tehseen Saeed, Dowry murder, The Express Tribune, 25 March 2016. Available at <https://tribune.com.pk/story/1072192/dowry-murder/>



- Economic violence – denying access/excluding from health care, employment, education,<sup>24</sup> property including inheritance. and agricultural resources, financial resources and decision making and right to livelihood.

### ACTIVITY ONE (INTERACTIVE)

Break up into four groups and discuss the following in 20 minutes:

- Imagine you are a victim of physical violence.
  - How do you feel?
  - What will you do about it?
- Will you feel differently if the perpetrator is someone you love, is much stronger than you and lives in the same house as you?
- Do you think you would feel differently if you were a member of the opposite sex?

## TOPIC 3: CAUSES AND IMPACT OF VIOLENCE AGAINST WOMEN

The causes of GBV are complex. Are these are the causes for GBV or are they ‘justifications’ for GBV?

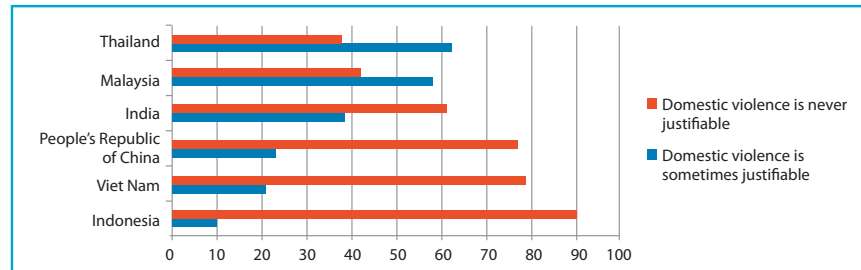
- Refuses to obey father/husband?
- Insufficient dower/bridal gifts?
- Insists on going out at night?
- Wearing inappropriate clothes?
- Spends too much time chatting on facebook?
- Cannot control children – children too noisy?
- Turns down romantic interest/marriage proposal?

### Is gender-based violence justifiable?

A study by UN Women indicates that in Asia, Indonesia has the highest percentage of respondents who believe domestic violence is never justifiable followed by Vietnam, China, India, Malaysia and Thailand.

<sup>24</sup> Islam made the quest for education and knowledge the duty of every Muslim, male and female. "Say (unto them, Muhammad), "Are those equal, those who know And those who do not know? (Qur'an (translation by Yusuf Ali), 39:9). Indeed, the first verse revealed to Muhammad is the command to read in the name of God.

### Perception Of Domestic Violence In Asia - Percentage<sup>25</sup>



- The scope of violence against women has evolved over time to reflect discourses on structural violence and understanding of gender inequality and gendered power imbalances within cultures and society. A broad and nuanced definition of violence against women is necessary to identify and address the variety of sources and causes of violence.
- The **underlying causes of GBV** against women are a complex but there is general agreement that the main features are gender inequality, power imbalance and in the case of domestic violence, controlling behaviour within relationships.

Apart from these, the other causes are –

- Community attitudes towards gender roles, sexuality, family violence and sexual assault can strongly influence both the prevalence of such violence and the disclosure or reporting rates.
- Cultural attitudes and in particular cultural views that support male authority over women and stigmatise victims/survivors of violence as well as language commonly used in the community add to the acceptance and normalization of violence against women. They also trivialize or minimise the seriousness of gender-based violence e.g. “it was only a slap”.
  - For example, both males and females believe that violence can sometimes/often be excused and that rape results from men not being able to control their need for sex or women “asking” to be raped.
- The Fourth World Conference on Women in Beijing in 1995 acknowledged that violence against women “derives essentially from cultural practices.”<sup>26</sup> Culture and the law often provide violence against women with excusatory loopholes which take the form of justifications, defence and mitigations for acts of violence against women,

<sup>25</sup> As summarized from UN Women (2011b). Progress of the World’s Women 2011-2012. In pursuit of Justice. Available at <http://progress.unwomen.org/pdfs/EN-Report-Progress.pdf>

<sup>26</sup> “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, Fourth World Conference on Women, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995) ¶ 119.

for example, crimes of honour, victim-blaming, crimes of passion and defence of provocation.<sup>27</sup>

- The continuous competition for social status and hierarchy amongst men has given rise, in some circumstances, to what anthropologists call a “culture-of-honour” stance. In a society where “culture of honour” is adhered to, anthropologists deduce that an affront, no matter minor or imagined, must be understood in the context of reputation, face, relative social status and enduring relationships.<sup>28</sup>
- Culture is thus formalized into a conventional mode of perceiving violence against women as a socially sanctioned punishment visited upon women violators of hallowed values – thereby rendering women active agents of their own injury. It is thus imperative that we critically examine how cultural discourses are created, reproduced and instrumentalized to challenge women’s human rights.<sup>29</sup>
- Consequently, 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.<sup>30</sup>
- Ideologies of male sexual entitlement. According to a study by UNDP, UN Women and .., on why men rape, the most common motivation (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.<sup>31</sup>
- Use of violence to resolve conflict.

The effect of these is the 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.”<sup>32</sup>

<sup>27</sup> It is important to note that a defence of provocation must be premised on an absence of opportunity to avert violence, in the sense that the provocation must have been grave and sudden. ‘Honour’ crimes, however, are often premeditated punishment for alleged moral transgressions against family, and more particularly, male honour. Therefore, acknowledging that honour crimes are crimes of revenge more correctly reflects the nature of the crime and the responsibility law can expect of the perpetrator.

<sup>28</sup> Dov Cohen and Joe Vandello, *Meanings of Violence*, 27 *J. Legal Stud.* 567 (1998). The findings are based on a study of amongst men in northern and southern United States (indicating that the “culture of honour” is not unique to Pakistani culture but exists even in the US).

<sup>29</sup> Zarizana Abdul Aziz, *Culture, Power and Violence in Domestic Violence Narrative in Family Ambiguity and Domestic Violence in Asia: Concept, Law and Process*, Maznah Mohamad & Anor. (ed.), Sussex Academic Press UK (2013) Ch 3, pp. 53–77

<sup>30</sup> Abdul Aziz (2013). This understanding of violence against women is underlined in the CEDAW Committee in General Recommendation 19 on Violence against Women and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence.

<sup>31</sup> UNDP, UNFPA, UN Women and UN Volunteers, *Why do some men use violence against women and how can we prevent it: Quantitative Findings from a United Nations Multi-Country Study on Men and Violence in Asia and the Pacific* (2013). <http://www.partners4prevention.org/sites/default/files/resources/p4p-report.pdf>

<sup>32</sup> Jean Hampton, *Punishment, Feminism and Political Identity: A Case Study in the Expressive Meaning of the Law*, 11 *Can. J. L. & Juris.* 23.

## TOPIC 4: GENDER-BASED VIOLENCE IS A VIOLATION OF HUMAN RIGHTS

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- GBV against women is the most prevalent form of violence. Violence against women is a violation of human rights and one of the most extreme and pervasive forms of discrimination against women, severely impairing and nullifying the enforcement of their rights.<sup>33</sup>
- Gender-based violence against women was formally recognized as part of the human rights agenda at the Vienna Conference in 1993. The Vienna Convention stated that gender-based violence against women included cultural prejudices and sexual harassment. It required the elimination of violence against women through legal action.<sup>34</sup> This helped focus attention on systemically mainstreaming gender equality in the international system.<sup>35</sup> CEDAW further obligates States to protect women against violence of any kind occurring within the family, at the work place, in the community or in any other area of social life.<sup>36</sup>
- CEDAW obligates States to protect women against GBV
  - within the family,
  - at the work place,
  - in the community or
  - in any other area of social life
- Gender based violence 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 favourable conditions of work.<sup>37</sup>

<sup>33</sup> *Jessica Lenahan (Gonzales) v. United States*, IACHR, para 110 (August 2011). See also, CEDAW articles 1-5 which discuss the meaning of discrimination, both direct and indirect, substantive equality and State obligations.

<sup>34</sup> Vienna Declaration (1993) and Program of Action, Para 18 (12 July 1993) A/Conf.157/23, UN, New York.

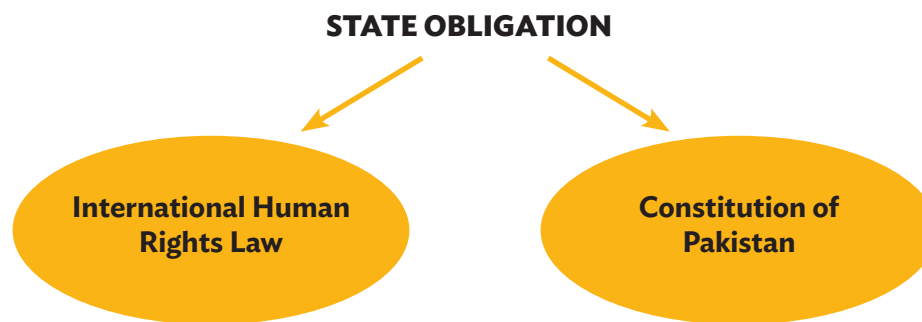
<sup>35</sup> *Id.*

<sup>36</sup> UN CEDAW (1989) General Recommendation No. 12: Violence against women (Eighth session).

<sup>37</sup> CEDAW GR 19 on Violence against Women

- Manfred Novak, the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment in his 2008 report said,
 

“While there is no exhaustive list of forms of violence that *may constitute torture or cruel, inhuman and degrading treatment* - rather it may encompass 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 - the Special Rapporteur would like to focus on three of them: domestic violence (in the form of intimate partner violence), female genital mutilation and human trafficking. The Special Rapporteur wishes to highlight these forms of violence for three reasons. First, they are widespread and touch millions of women around the world every year.<sup>38</sup> Second, in many parts of the world they are still trivialized and the comparison between them and “classic” torture will raise awareness with regard to the level of atrocity that they can reach. Third, stating that these forms of violence can amount to torture if States fail to act with due diligence, illustrates the *parallels between torture and other forms of violence against women.*”<sup>39</sup>
- Consent is pivotal to differentiating lawful from unlawful behavior. Consent pertains only to the exact act to which the consent, if any, relates. Because of this, defining consent (and the factors that vitiate “consent” such as coercion, undue influence and duress) is crucial in violence against women and must be addressed in all relevant law and cases.



<sup>38</sup> The United Nations estimates that as many as 4 million women and children become victims of human trafficking every year, most of whom are exploited for sexual purposes. According to the World Health Organization, the number of girls and women who have undergone female genital mutilation (FGM) is estimated at between 100 and 140 million. Each year, a further 2 million girls and women undergo FGM. However, the most current form of violence against women around the world is that perpetrated by husbands or other intimate partners. See, for example, *WHO Multi-country Study on Women's Health and Domestic Violence against Women: Initial results on prevalence, health outcomes and women's responses* (Geneva, 2005).

<sup>39</sup> A/HRC/7/3, 15 January 2008

## TOPIC 5: STATE OBLIGATION TO ELIMINATE VIOLENCE AGAINST WOMEN

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- States are obligated to exercise due diligence to promote, protect and fulfill women’s human rights and eliminate gender discrimination including gender-based violence against women, both as part of its *obligations under international human rights and the Constitution*.<sup>40</sup>
- Failure to do does not only render a State non-compliant with its international obligations but may be deemed a dereliction of a State’s constitutional duty. The State is accountable for gender-based violence –
  - committed by the State and its agents; and
  - committed by non-State actors if the State fails to exercise due diligence to eliminate violence against women.
- States are obligated to establish holistic, systemic processes to **prevent, protect, prosecute, punish and provide redress and reparations** for violence against women (5Ps).<sup>41</sup>
- The due diligence principle is one of means not ends. The principle does not hold States accountable for violence against women if the State has the requisite systemic processes and safeguards in place. Once these processes are functional, the State is obliged to ensure that they are –
  - (a) extended to all individuals; and
  - (b) that all individuals can access them, especially when the State knows or ought to know that an identified individual(s) is at “real and immediate risk”<sup>42</sup>.

<sup>40</sup> The due diligence principle can be found in several international instruments. General Recommendation No. 19 (1992) of the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) Committee and the United Nations General Assembly (1993) Declaration on the Elimination of Violence against Women underline that States are responsible for private acts of violence against women if they fail to act with due diligence to prevent, protect against, investigate, punish and redress the same.

<sup>41</sup> Zarizana Abdul Aziz & Janine Moussa, *Due Diligence Framework: State Accountability Framework for Eliminating Violence against Women*, International Human Rights Initiative (2013), p.12. The exception is if State actors themselves commit VAW where the State can be held vicariously liable. Another oft-asked question concerns the applicability of the due diligence principle in a fragile State, conflict-affected countries, when there is no State (political actors recognized by the international community as the political governing body) or when swathes of land are controlled by different political parties or militia groups. In such situations, the individuals (or group of individuals) in de facto control of a specific area or over a specific community are recognized as ‘the State’ for applicability of the due diligence principle.

<sup>42</sup> *Osman v. the United Kingdom*, ECHR, § 115, Reports 1998-VIII, ECHR Judgment dated 28 October 1998; *Case of Opuz v. Turkey*, ECHR, Judgment of 9 June 2009.

## 1. INTERNATIONAL JURISPRUDENCE ON STATE ACCOUNTABILITY

- **Honduras**<sup>43</sup>
  - “An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of an act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.”
  - “[W]here State authorities ... know or have reasonable grounds ... and they fail to exercise due diligence to prevent, investigate, prosecute and punish ..., 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.” [CAT Committee]
- **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.”<sup>44</sup>
- **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.”<sup>45</sup>
- **The Philippines**
  - The State had failed to comply with its obligation to ensure that the complainant had effective remedy as her case had languished in the court for eight years before the accused was acquitted. The State was held accountable for failing to ensure that decisions in sexual assault cases are impartial and fair and not affected by prejudices or stereotypes.<sup>46</sup>
- **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

<sup>43</sup> *Velázquez Rodríguez v. Honduras*, judgment of 29 July 1988, IACtHR (ser. C) No. 4

<sup>44</sup> *Opuz v Turkey*, ECHR, Judgment of 9 June 2009

<sup>45</sup> *Maria Da Penha v. Brazil*, Case 12.051, Report No. 54/01, IACHR, Annual Report 2000, OEA/Ser.L/V.II.111 Doc.20 rev. (2000)

<sup>46</sup> Communication No. 18/2008, *Vertido v Philippines*, (Views adopted by the CEDAW Committee on 16 July 2010, forty-sixth session under the Optional Protocol to CEDAW), CEDAW/c/46/d/18/2008

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.<sup>47</sup>

- **Austria**
  - Şahide Goekce had 3 temporary restraining orders but the 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. The CEDAW Committee has also recognized that ‘there are linkages between traditional attitudes by which women are regarded as subordinate to men and domestic violence’ reinforcing hegemonic notions of masculinity and femininity and the institutions that propagate them. Such attitudes often influence, if not inform, legal systems.<sup>48</sup>
- **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**
  - The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Committee further made clear that, “where State authorities ... know or have reasonable grounds ... and they *fail to exercise due diligence to prevent, investigate, prosecute and punish ...*, 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*.” This principle applies to States parties’ failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking. The State’s indifference or inaction provides a form of encouragement and/or de facto permission.<sup>49</sup>
- **UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**
  - “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.” 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.”<sup>50</sup>

<sup>47</sup> Communication No. 2/2003, *A.T. v. Hungary* (Views adopted by the CEDAW Committee on 26 January 2005, thirty-second session under the Optional Protocol to CEDAW)

<sup>48</sup> *Goekce v. Austria*, Communication No. 5/2005, CEDAW/C/39/D/5/2005, adopted 6 August 2007, para 12.2. See also General Recommendation No. 19.

<sup>49</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Recommendation No. 2, CAT/C/GC/2 dated 24 January 2008.

<sup>50</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, A/HRC/7/3 dated 15 January 2008.



## 2. CONSTITUTIONAL DUTY TO PROTECT WOMEN FROM GBV

### National cases on constitutional duty of States

- **India: State duty not only to apprehend and punish but also to prevent**
  - Verma Committee was convened by the Indian government following public outcry against the brutal rape and murder of a young woman in New Delhi.<sup>51</sup> “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.*”<sup>52</sup> “[F]ailure in discharging this public duty renders it [the State] accountable for the lapse.” *The State’s role is not merely reactive to apprehend and punish the culprits for their crime; 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.*<sup>53</sup>
- **Kenya: Failure to conduct prompt effective proper and professional investigations is in violation of Constitution**
  - In the, the petitioners sued to hold the Kenyan government accountable for failure to prosecute sexual offences.<sup>54</sup> The Kenya High Court found police failure ‘to conduct prompt, effective, proper and professional investigations... infringed the petitioners’ fundamental rights and freedoms under... the Constitution of Kenya, 2010 and the general rules of international law... The respondent’s ongoing failure... created a “climate of impunity” for commission of sexual offences and in particular defilement. This to me makes the respondents responsible... because of *their laxity and their failure to take prompt and positive action to deter defilement*’.<sup>55</sup>
- **South Africa: State had direct constitutional obligations to deal with domestic violence and to protect every individual’s right to be free from domestic (or private) 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 and to bodily and psychological integrity,*<sup>1</sup> and the right to have their dignity respected and protected, as well as the defensive rights of everyone not to be subjected to torture in any way and not

<sup>51</sup> Four of the rapists have since been convicted and sentenced. Available at [http://articles.timesofindia.indiatimes.com/2013-09-13/india/42039813\\_1\\_murder-case-vinay-sharma-track-court](http://articles.timesofindia.indiatimes.com/2013-09-13/india/42039813_1_murder-case-vinay-sharma-track-court).

<sup>52</sup> *Ibid* ¶ 4.

<sup>53</sup> *Ibid* ¶ 7.

<sup>54</sup> Republic of Kenya: In the High Court of Kenya Petition No. 8 of 2012, C.K. (a child), through Ripples International as her guardian and next friend & Ors v. The Commissioner of Police/Inspector General of the National Police Service & Ors (“160 Girls’ case”) seeking inter alia a declaration to the effect that the neglect, omission, refusal and/or failure of the police to conduct prompt, effective, proper and professional investigations into the petitioners’ respective complaints violates the UDHR, UN Convention on the rights of the child, African Charter on the Rights and welfare of the child, and African Charter on Human and people’s rights, mandamus [that the respondents conduct prompt effective investigations and formulate a national policy framework in compliance with the Constitution on sexual offences].

<sup>55</sup> <http://thequalityeffect.org/160-girls/>

to be treated or punished in a cruel, inhuman or degrading way. (*S v. Baloyi*, South Africa)<sup>56</sup>

- **South Africa: State constitutionally obliged to afford citizens protection from violence**
  - In *Suzette Irene Elmarie Nelson v. The Minister of Safety and Security & anor* (South African High Court)<sup>57</sup> the Court held that the State is *constitutionally obliged to afford its citizens protection from violence*. Defendants’ servants must fulfill not only constitutional duties but also statutory duties. Plaintiff is not liable as joint wrongdoer.”

### GBV in Pakistan a pressing concern

- In Pakistan, “[t]he most pressing and urgent of all concerns is clearly that of security of life. Traditionally the women’s movement has struggled to link security issues to times of peace and stressed how security of livelihood and domestic violence equally threaten women’s lives regardless of broader security issues.”<sup>58</sup>
- “The Committee is concerned about the persistence of patriarchal attitudes and deep-rooted stereotypes concerning women’s roles and responsibilities that discriminate against them and perpetuate their subordination within the family and society. It expresses serious concern about the persistence amongst others of child and forced marriages, Karo-Kari, stove burning and acid throwing, marriage to the Qur’an, polygamy and honour killing.”<sup>59</sup>

## TOPIC 6: UNPACKING SPECIFIC FORMS OF VIOLENCE AGAINST WOMEN

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This section unpacks the some of the issues in relation to the following specific forms of GBV, namely –

- (a) GBV and femicide justified in the name of honour
- (b) Intimate partner violence
- (c) Economic violence: Deprivation of Inheritance
- (d) Early and forced marriage
- (e) Rape

<sup>56</sup> *S v. Baloyi and Others* 2000 (1) BCLR 86 (CC) per Sachs J.

<sup>57</sup> [2006] ZANCHS 88.

<sup>58</sup> Afiya S. Zia, *A Policy Framework for Women’s Equal Rights, A Study for the National Commission on the Status of Women* (2010), p. 9. Available at <http://www.ncsw.gov.pk/previewpublication/7>

<sup>59</sup> Concluding observations on the fourth periodic report of Pakistan adopted by the Committee at its fifty fourth session (11 February – 1 March 2013), CEDAW/C/PAK/CO/4, para. 21. Available at <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW.C.PAK.CO.4.pdf>

## GBV AND FEMINICIDE IN THE NAME OF “HONOUR”

- Pakistan Human Rights Commission recorded 1096 female victims and 88 male victims of honour crimes (2015)<sup>60</sup>
- “[R]ulers past and present ... have a lot to answer for. Not least because of their failure to confront or push back strongly enough against abhorrent crimes in the name of honour, and indeed addressing the perceptions or place of women in society.”<sup>61</sup>
- “These killings are carried out with evangelistic spirit. Little do these zealots know that there is nothing religious about it and nothing honourable either. It is male chauvinism and gender bias at their worst. These prejudices are not country specific ... or people specific.” ....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.”<sup>62</sup>

### Unpacking the Culture of Honour

- Culture of honour stance regards an affront, whether minor or imagined has an effect on reputation, face and relative social status with enduring consequences on relationships
- Creates excuses where the woman from victim/survivor is transformed into perpetrator who violates cultural values
- Consequently, perpetrators of violence against women, particularly domestic violence and rape are rarely punished
- Societal or customary practices though, need not always be preserved, e.g. slavery and torture [also see Pakistani Constitution]
- “Law, including judge-made law, has to play its role in changing the inhuman social mores.”

## INTIMATE PARTNER/DOMESTIC VIOLENCE

### Global statistics

- 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<sup>63</sup>

<sup>60</sup> <https://idjournal.co.uk/2017/01/29/gender-based-violence-in-pakistan/>

<sup>61</sup> Pakistan Human Rights Commission, HRCP aghast at girl’s Jirga-ordained murder, <http://hrqp-web.org/hrqpweb/hrqp-aghast-at-girls-jirga-ordained-murder/>, 6 May 2016

<sup>62</sup> *Muhammad Siddique v. The State* (PLD 2002 Lahore 444)

<sup>63</sup> World Health Organization

## Pakistan Statistics

- Levels of acceptance of at least one justification for domestic violence were nearly equivalent between females and males in the ICT (about 20%), Khyber Pakhtunkhwa (about 70%), and Sindh (about 40%). Acceptance of abuse for at least one justification was lower among females than males only in Balochistan (about 50% versus 65%) whereas acceptance for at least one justification was higher among females than males in Gilgit-Baltistan (about 75% versus 55%) and Punjab (about 35% versus about 20%).<sup>64</sup>

Province	Male (approx.)	Female (approx.)
Khyber Pakhtunkhwa	70%	70%
Sindh	40%	40%
Balochistan	65%	50%
Gilgit-Baltistan	55%	75%
Punjab	25%	30%
ICT Islamabad	20%	20%

- Intimate partner / domestic violence comparable to torture**
  - “Domestic violence, as well as torture, tends to escalate over time, sometimes resulting in death or leaving women’s bodies mutilated or permanently disfigured. Women who experience such violence, whether in their homes or in a prison, suffer depression, anxiety, loss of self-esteem and a feeling of isolation. Indeed, **battered women may suffer from the same intense symptoms that comprise the post-traumatic stress disorder identified in victims of official torture** as well as by victims of rape. Another parallel between privately battering women and torture, which refers back to the element of powerlessness, is the intention to keep the victim in a permanent state of fear based on unpredictable violence by seeking to reduce the person to submission and destroy his/her capacity for resistance and autonomy with the ultimate aim of achieving total control.”
- Intimate partner violence is not a private matter**
  - In *Opuz v. Turkey*,<sup>65</sup> a case before the European Court of Human Rights, the Court held that the authorities’ consideration that the dispute concerned a “private matter” was incompatible with the State’s positive obligations to secure the enjoyment of the applicants’ rights. In domestic violence cases, the Court found, perpetrators’ rights could not supersede victims’ human rights to life and to

<sup>64</sup> PDHS 2012–13 estimates of acceptance of justification for domestic violence are higher than those in the National Baseline Survey. Reasons for this difference may include the larger sample size of the PDHS and/or inquiring about the number of possible justifications for domestic violence, leading respondents to provide more accurate responses than to a single generic question in the National Baseline Survey. ADB Regional: Promoting Gender Inclusive Growth in Central and West Asia, p.31. Available at <https://www.adb.org/sites/default/files/project-document/173420/44067-012-tacr-24a.pdf>

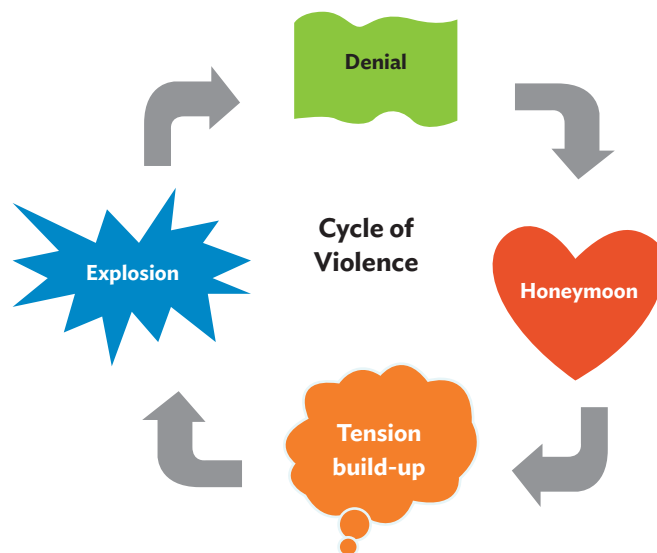
<sup>65</sup> *Opuz v. Turkey*, (2009), ECHR, App. No. 33401/02. Judgment dated 9 June 2009

physical and mental integrity. The authorities also could not rely on the victim's attitude or their failure to take adequate measures which could prevent the likelihood of an aggressor carrying out his threats against the physical integrity of the victim.

- **Culture and violence**

- Domestic violence which is excused in the name of culture erases from view the injury to women in active re-description as injury to male and family honour. The reluctance of law to punish such loss of self-control is also expressive of an attitude that regards women as the property of their families.

Battered women syndrome: Psychological disorder of women subjected to long-term abuse



### Islam prohibits intimate partner violence

- The Holy Prophet (saw) similarly urges Muslims not to commit intimate partner violence.
  - “How does anyone of you beat his wife as he beats the stallion camel and then embrace (sleep with) her?”<sup>66</sup>
  - “The best of you are those who are the best to their wives, and I am the best of you to my wives.”<sup>67</sup>
- The Holy Qur’an urges husbands to treat their wives with love and kindness.

<sup>66</sup> Al-Bukhari, English Translation, vol. 8, Hadith 68, pp. 42-43

<sup>67</sup> Narrated by al-Tirmidhi, 3895; Ibn Maajah, 1977; classed as saheeh by al-Albaani in *Saheeh al-Tirmidhi*

- “And of His signs is this: He created for you helpmates from yourselves that ye might find rest in them, and He ordained between you love and mercy. Lo! herein indeed are portents for folk who reflect.” (30: 21)<sup>68</sup>

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ

بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً إِنَّ فِي ذَلِكَ لَآيَاتٍ لِقَوْمٍ يُتَفَكَّرُونَ ﴿٢١﴾

- O ye who believe! Ye are forbidden to inherit Women against their will. Nor should ye treat them With harshness, that ye may Take away part of the dower Ye have given them,—except Where they have been guilty Of open lewdness; On the contrary live with them On a footing of kindness and equity. If ye take a dislike to them It may be that ye dislike A thing, and God brings about Through it a great deal of good.

“Live with them on a footing of kindness and equity. If ye take a dislike to them it may be that ye dislike a thing, and Allah brings about through it a great deal of good.” (4: 19)<sup>69</sup>

يَتَأْتِيهَا الَّذِينَ ءَامَنُوا لَا يَجِلُّ لَكُمْ أَنْ تَرِثُوا النِّسَاءَ  
كِرْهًا وَلَا تَعْضَلُوهُنَّ لِتَذْهَبُوا بِبَعْضِ مَا ءَاتَيْتُمُوهُنَّ إِلَّا أَنْ يَأْتِيَنَّ  
بِفِدْحَةٍ مَبِينَةٍ وَعَاشِرُوهُنَّ بِالْمَعْرُوفِ فَإِنْ كَرِهْتُمُوهُنَّ فَعَسَى  
أَنْ تَكْرَهُنَّ وَأَنْ تَكْرَهُنَّ وَبِئْسَ مَا كَانَتْ يَفْعَلُ اللَّهُ فِيهِ خَيْرًا كَثِيرًا



## ECONOMIC VIOLENCE: DEPRIVATION OF THE RIGHT TO LAND AND INHERITANCE

- 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.

<sup>68</sup> Translation M.M. Pickthall, *The Meaning of the Glorious Qur’ân*. Also available at <http://www.sacred-texts.com/isl/pick/030.htm>

<sup>69</sup> Translation Yusuf Ali, *The Holy Quran*. Also available at <http://www.sacred-texts.com/isl/quran/00403.htm>

- Further the *Office of the High Commissioner* notes that,
 

“Rights to land, housing and property are essential to women’s equality and wellbeing. Women’s **rights in, access to and control over land, housing and property is a determining factor in women’s living conditions** especially in rural economies, essential to women and their children’s daily survival, economic security and physical safety. Despite the importance of these rights for women and women headed households, women still disproportionately lack security of tenure.”<sup>70</sup>
- The Prophet (saw) in his farewell sermon (Khutbatul Wada’, 632 A.D.) called on his followers to “regard the life and property of every Muslim as a sacred trust. Return the goods entrusted to you to their rightful owners. Hurt no one so that no one may hurt you”.<sup>71</sup> Depriving another of her rights to property is a violation of this sacred trust.
- A high proportion of women do not get their shares in inheritance. According to a survey commissioned by the Pakistan National Commission on the Status of Women, 50.6%, but highest in Baluchistan (100%) followed by Punjab (97%), NWFP/FATA (55%), Gilgit) (FANA) (50%), while negligible in Sindh. No female respondent in Azad Jammu & Kashmir have been denied their share of inheritance.<sup>72</sup>
- Contradictorily, women relinquishing their rights to inheritance is **not recognized under Islamic and Pakistani law** and held to have been opposed to “public policy as understood in the Islamic sense with reference to Islamic jurisprudence.”<sup>73</sup>
- The Holy Qur’an states, “To (benefit) everyone, we have appointed sharers and heirs to property left by parents and relatives. To those, also, to whom your right hand was pledged, give their due portion. For truly Allah is witness to all things.”<sup>74</sup>

وَلِكُلِّ جَعَلْنَا مَوَالِيَكُمْ مِمَّا تَرَكَ الْوَالِدَانِ وَالْأَقْرَبُونَ وَالَّذِينَ عَقَدْتُمْ  
 أَيْمَانَكُمْ فَتَأْتُوهُمْ نَصِيحَتُهُمْ إِنَّ اللَّهَ كَانَ عَلَىٰ كُلِّ شَيْءٍ شَهِيدًا

- Yet, in many cases, women’s dowries become substituted by or transferred as part of women’s inheritance and this method allows men to deflect awarding women’s rights in both cases, that is, women neither receive dowries nor inheritance in most cases. Policies need to review the ground realities rather than continuing outdated frames of references.<sup>75</sup>
- The needs assessment interviews indicate that the prevalence may be attributed to acceptance of traditional/customary practice, preservation of family harmony (due to coercion and undue influence from family members) and lack of knowledge of

<sup>70</sup> United Nations Human Rights Office of the High Commissioner, Women and Land, Property and Housing, <http://www.ohchr.org/EN/Issues/Women/WRGS/Pages/Land.aspx> (last visited 14 December 2016)

<sup>71</sup> Available at [http://www.worldlibrary.org/articles/khutbatul\\_wada'#The\\_sermon](http://www.worldlibrary.org/articles/khutbatul_wada'#The_sermon)

<sup>72</sup> *Id.* p.12

<sup>73</sup> Ghulam Ali v. Ghulam Sarwar Naqvi(Mst.), PLD 1990 SC 1, 78

<sup>74</sup> Surah Al Nisa verse 33 (Translation Yusuf Ali. Available at <http://www.sacred-texts.com/isl/quran/00405.htm>)

<sup>75</sup> Afiya S. Zia, A Policy Framework for Women’s Equal Rights, A Study for the National Commission on the Status of Women (2010). Available at <http://www.ncsw.gov.pk/previewpublication/7>

rights to inheritance. Denying women’s rights to inheritance also serves to preserve property within the tribe/family/familial community. Women’s claim to inheritance from their father’s property is considered an act of dishonouring their family and socially condemned as is a husband’s demand for getting his wife’s share to inheritance.<sup>76</sup>

- NCSW also found that the prevalence may be linked to “defective or non-implementation of laws” [in Punjab (85%) followed by NWFP/FATA (75%), Gilgit (FANA) (50%), Baluchistan (12%) and Sindh (70%)] and “lack of awareness of procedures and information” [in Punjab (76%), followed by NWFP/FATA (75%) and Baluchistan (17%)]. No such problem was indicated in Sindh, FANA and AJK.

### FORCED AND EARLY MARRIAGES OF WOMEN AND GIRLS

- Child marriage is a violation of human rights (Article 16 of CEDAW invalidates child marriages). Similarly forced marriage is a violation of human rights (Article 16(2) requires marriage to be entered into only with the free and full consent of the intending spouses).
- Obtaining data on forced or child marriages is challenging. This is because a high proportion of birth and marriages in Pakistan are not registered. The births of about 49.4% of female and 50.6% of male respondents respectively were found unregistered. Similarly, the marriages of 53.21% female and 39.68% male respondents respectively were unregistered.<sup>77</sup>
- An overwhelming majority of marriages in Pakistan are endogamous and guardians (mostly father, brothers and uncles) have the exclusive right to select a mate for their children, particularly girls and their decisions are considered final and binding. Watta satta is common in both rural and urban families of all strata. The prevalence of exchange marriage (watta satta) is highest in Gilgit (FANA) (17.5%), followed by Punjab (13.5%), Baluchistan (12.5%), NWFP/FATA (12%) and AJK (8.5%).<sup>78</sup> There are also over 5,000 women in Sindh married to the Holy Qur’an.<sup>79</sup>
- Where a marriage is registered, guardians may deliberately omit the bride’s rights such as maintenance and delegated right of divorce. Girls and women who defy their family’s wishes risk being killed. They are also killed as revenge for insufficient bridal gifts.
- Even where laws prohibiting child and forced marriages are in effect, weak implementation of these laws and policies remain a challenge. Despite having been criminalised, women are still at risk of being exchanged or married to settle disputes or protect family property or honour.<sup>80</sup>

<sup>76</sup> *Id.* p 62

<sup>77</sup> Zia (2010), p. xii.

<sup>78</sup> *Women’s Rights of Inheritance and its Implementation*, Pakistan National Commission on the Status of Women

<sup>79</sup> Human Rights Commission of Pakistan report, 2000

<sup>80</sup> Section 310A of the Pakistan Penal Code.



- Criminal law cannot be the sole tool to eliminate child and forced marriages. The State must address culture, poverty, social norms and other factors that interact to place girls and women at risk of forced and early marriage.
- Child marriages deny girls the opportunity to healthy development (through early pregnancy which are risky, interrupted education) and increased risk of domestic violence.<sup>81</sup>
- The Islamic principle of avoiding harm and promoting the greatest good can also be used to prohibit early marriage.

## RAPE

- The accused was acquitted on a number of ‘guiding principles’ from other rape cases and the Judge’s unfavourable assessment of the complainant.
- CEDAW Committee: In failing to end discriminatory gender stereotyping in the legal process, failed to comply with its obligation to ensure the complainant’s right to an effective remedy. The case, having languished for 8 years, could not be said to have dealt with the complainant’s allegations in ‘a fair, impartial, timely and expeditious manner’.<sup>82</sup>

## TOPIC 7: ROLE OF THE COURT AND THE AUTHORITIES

- “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. ...Law, including judge-made law has to play its role in changing the inhuman social moors.”<sup>83</sup>
- Societal or customary practices though, need not always be preserved. Other practices, even those that privileged powerful members of society and once defended in the name of culture, have long been delegitimized or abandoned due to evolving values and ethos. Practices like slavery and torture have evolved over time from acceptable practices to prohibited norms internationally.<sup>84</sup>
- “Local customs, however hardened by time, are not decreed in heaven. Habits and feelings they engender may be counteracted and moderated. Experience attests that such local habits and feelings will yield, gradually though this be, to law and education. And educational influences are exerted not only by explicit teaching. They vigorously

<sup>81</sup> Child marriage is a violation of human rights, but is all too common, UNICEF (Updated February 2017). Available at <https://data.unicef.org/topic/child-protection/child-marriage/#>

<sup>82</sup> *Vertido v Philippines*

<sup>83</sup> *Muhammad Siddique* PLD 2002 Lahore 444

<sup>84</sup> Abdul Aziz (2013). Slavery was declared a crime against humanity. See the Slavery Convention 1926 and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1957, 226 U.N.T.S. 3, (April 30, 1957). See also Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment A/RES/39/46 dated 10 Dec. 1984

flow from the fruitful exercise of the responsibility of those charged with political official power and from the almost unconsciously transforming actualities of living under law.”<sup>85</sup>

- The effect of ineffective judicial process –
  - 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.”<sup>86</sup>
  - 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.**”<sup>87</sup>
- The role of the law as the arbiter is to ensure that a woman’s human rights are protected and that she is guaranteed her fundamental right to a standard of living adequate for herself and her family post separation, divorce or death of her husband or relatives.

## CLOSING THE IMPLEMENTATION GAP

- Need to address “the primary hold of custom .... Legal and institutional reform must therefore be accompanied with advocacy to modify behaviour and attitudes including campaigns to change mindset, provision of legal, financial and other support to women so as to enable them to claim their rights safely without endangering their lives and the lives of those who support them.”<sup>88</sup>
- The court’s function to issue Succession Certificates must be supported by implementation of universal registration of births, deaths and marriages.
- Women need to be able to access the courts without the intermediary of their male relatives or expensive counsels.
- The NCSW proposed the establishment of an inheritance transfer registry to ensure that each legal heir, particularly all female legal heirs, have been given their due share in inheritance.<sup>89</sup>
- NCSW also lists several procedural flaws which impede women’s access to justice. These range from lack of information desks in police stations that are supposed to disclose information on how women can get legal services; the non-availability of medical rape kits in the stations; the reluctance to contact women’s shelters/crisis centers when the woman complainant seeks help from police. In addition, it is pointed

<sup>85</sup> *Cooper v Aaron*, 358 U.S. 1, at 25, per Frankfurter J. This was a case about abolishing slavery in the United States.

<sup>86</sup> *Maria Da Penha v. Brazil* Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2000).

<sup>87</sup> *Id.* 9 para. 207–214

<sup>88</sup> Shaheed, Farida. “Engagements of Culture, Customs and Law: Women’s Lives and Activism.” ShirkatGah: Lahore; 1998

<sup>89</sup> Women’s Rights to Inheritances and its implementation, National Commission on the Status of Women.

out that often police staff are ignorant about the law itself, including the fact that women cannot be detained at police stations after dusk. Thus a consolidated policy on the dispensation of justice is itself missing from criminal justice law. This is a glaring gap between law and policy that is meant to sustain the viability of law.

## ACTIVITY TWO (INTERACTIVE)

Break up into four groups and discuss the following in 20 minutes.

- Is GBV against women necessary for the proper functioning of society?
- How would society be different if there was no GBV?
- What is the impact/cost of GBV against women –
  - To the family?
  - To the community?
  - To society?

# MODULE 6

## ATTRITION AND COMPROMISE

This session is building on a number of the modules which have already been addressed. In particular it is focusing on what happens once women have laid complaints for GBV and how do their complaints progress through to finalization.

In particular it is addressing the fact that, after a complaint has been laid, a large proportion of cases do not proceed to trial, and only a small proportion of those that do go to trial, result in a conviction and sentencing. This issue is referred to as attrition, and will be addressed under the following topics.

### OBJECTIVES OF THE SESSION

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#### SLIDE 2

- Topic 1 Meaning of attrition in relation to GBV cases
- Topic 2 Reasons for attrition
- Topic 3 Why attrition matters – international research and experience
- Topic 4 Pakistan and Punjab profile on attrition and compromise
- Topic 5 Best world practices to help reduce attrition rates
- 2 activities to discuss Punjab Court experiences and opportunities to reduce attrition

### TOPIC 1 MEANING OF ATTRITION IN GBV CASES

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#### SLIDE 3

- **“Attrition”** refers to cases which are in the criminal justice system after a complaint is made, but at some point, the complaint is either withdrawn, or does not proceed to trial or does not result in a criminal conviction
- **“Attrition rate” is the** percentage of overall cases of that type -
- The attrition rate for GBV cases is generally very high in comparison with other offences

- It is mostly due to female victims withdrawing or disengaging from prosecution
- It is a concerning Global phenomena
- Attrition is looked at in 3 stages :
  - (1) After a complaint is made and before it comes into the court system
  - (2) After it comes into the court system and up to the trial date
  - (3) After a trial proceeds and evidence is given but the accused is acquitted.
- The prime focus of this session is on stages (1) and (2)

## TOPIC 2 REASONS FOR ATTRITION

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### SLIDE 4

- There are many interrelated and overlapping factors
- The reasons for attrition fall into two major categories:
  - Victim/survivor related factors (which are largely personal but occur in a social context)
  - System related factors (which relate the state agency and criminal justice responses)

### 2.1 VICTIM/SURVIVOR RELATED FACTORS

### SLIDE 5

- We have already mentioned already many socio- economic features which impact on women's backgrounds, but when addressing attrition there are some additional background features to mention, namely societal, cultural, religious and criminal justice system **attitudes towards GBV** and victim blaming.
- The Victim's personal background and circumstances including:
  - Knowledge about GBV and access to free legal services. The victim may have very little knowledge about what to do if she is the subject of GBV, particularly domestic violence. She needs access to legal services and if they are not free this is an impediment. There can also be language and communication issues which can be a barrier to her getting the necessary advice to enable her to pursue a case
  - financial circumstances, housing and dependence on the abuser. All of which are highly relevant in pursuing cases, particularly in respect of domestic violence

- child responsibility status. This is a very relevant issue in deciding whether to pursue a case because the care and custody of children may be compromised if she pursues the case. It also affects whether a woman is able to leave home if she is the subject of domestic violence.
- Personal experiences and family circumstances including pressures or supports. Families can sometimes be very supportive of women who wish to pursue a case of GBV, but sometimes it is otherwise, and pressures may be put upon her not to shame the family, and instead to put up with it.
- a study has revealed that family members rather than victims/survivors are responsible for 47% of withdrawal of cases at the police station and 52% of withdrawals at court (eg Western African Regions)(Due Diligence report)

## 2.2 SYSTEM RELATED FACTORS

### SLIDE 6

- Many of the factors which contribute to attrition rates are issues related to the criminal justice system as a whole which includes:
  - mechanisms allowing women to feel safe in making complaints of gender-based violence, including protection orders, eviction orders, shelter and refuge (short-term and medium term)
  - the responses that they receive when they make a complaint, including all legal processes and practices that imply or place blame on victims/survivors for the violence committed against them and other negative responses
  - the supports that they get to allow them to pursue redress such as
  - free legal, medical and psychological support
  - ensuring that the rights of the victims in the legal system are at least equal to the rights of the accused
- There are a number of factors which have been found to be highly influential upon whether or not women pursue complaints of gender-based violence. For example:
  1. Availability and accessibility of free victim support, legal advocacy and information
  2. Interface and cooperation between all the professionals in the criminal justice system (police, prosecution services and courts). This is a highly important feature and one which I will be discuss later in this session.
  3. Early responses to protect the victim including risk assessment and safety planning put in place early by police, as well as throughout the progress of a case and after the case.
    - (a) These responses include the availability of urgent safety measures
    - (b) Restraining orders, arrest/custody or perpetrator
    - (c) Shelter for victims and victim support services

- (d) Women have great fear of retribution and putting themselves at greater risk as a result of pursuing a claim for GBV
1. Early and continuing court orders for protection of the victim. The courts have an important role here and the earlier court orders can be made the better. Sometimes these may have to include court orders against family members and not simply against the perpetrator
  2. Efficacy of investigation and the quality and quantity of evidence collected independently of victim engagement. This will be the subject of detailed discussion later
  3. Attitudes of professionals and provision of ongoing information. Professionals include not only police but also the attitudes of the Judiciary to gender-based violence including stereotyping, disbelief, victim blame, and lack of awareness of the needs of victims in the court room.
- Delay in matters being able to be pursued through the criminal justice system is a major cause for attrition.
    - Delay adversely impacts on the quality of the evidence due to
    - the effect on memory
    - stress aggravated by the lack of finality, not only for the victim but also any of the witnesses
    - Delays occur at multiple points throughout the criminal justice process .

## TOPIC 3 WHY ATTRITION MATTERS – THE INTERNATIONAL EXPERIENCE

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### SLIDE 7

Picture

### 3.1 WHY ATTRITION MATTERS

### SLIDE 8

- GBV is a crime and a gross violation of women's human rights (Module 5)
- Attrition leads to offender impunity and the continuation of the cycles of violence against women.
- If offenders are not brought to justice, then there is no specific or general deterrence, and offenders, usually men, know they can get away with it.

## 3.2 INTERNATIONAL RESEARCH OF COUNTRY REGIONS

### SLIDE 9

- A recent publication in November 2016 by Zarizana Abdul Azziz and others *Due Diligence Framework; State Accountability Framework for Eliminating Violence against Women*, provides an excellent framework which has been developed to enable States to take reasonable measures to address human rights abuses in relation to violence against women, though protection, prosecution, punishment, adequate reparations, and prevention.
- The framework was developed from and relies on literature reviews, questionnaire surveys from 48 countries and territories, and included wide consultations. It is a good source of information on this topic.
- Chart 23 brought together the deterrents to women seeking help in each of the regions. Although Pakistan was not one of those countries, but some of the countries within the Asian Pacific region and the Middle East and North African region revealed some similarity on seven of the top deterrents, which may find resonance in Pakistan.
- You will see many of the factors I have referred to already are reflected here. In particular in the context of attrition and the courts.
- I draw attention to the high percentage of victims/survivors who expressed that a factor as to why they do not take action was lack of confidence in the judiciary, almost 90%, and for police, about the same. They are the third and fourth highest factors identified in these interviews of victims/survivors.

## TOPIC 4 PAKISTAN AND PUNJAB EXPERIENCES OF ATTRITION AND COMPROMISE

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### SLIDE 10

Coming now to the Pakistan and Punjab experience of attrition and compromise. This will be discussed under four headings

- 4.1 Basic Context of GBV
- 4.2 Perceptions by Pakistani's of the criminal justice system
- 4.3 Views expressed by judges from Lahore during Needs Assessment
- 4.4 Profile of attrition/compromise of GBV cases from Kasur Courts



## 4.1 BASIC BACKGROUND CONTEXT

### SLIDE 11

- The legislative background of GBV has already been discussed in earlier modules, referring to:
  - Cognizable and non-cognizable offences
  - Compoundable and non-compoundable offences
- I simply highlight that in GBV cases,
  - most allegations do *not* require a warrant by police before arrest
  - most are *not* bailable except some “hurts” (S 337 PCC) and “abduction of married women” (S 496A PCC)
- These two provisions have an impact on whether or not the accused can be arrested and placed in custody at an early point of time, and if he is released, the terms upon which he obtains bail.
- This is an important time for the victims and the consequences may impact upon whether or not they pursue their case.
  - If for example, an alleged perpetrator is released on conditions, there may be issues as to whether they are properly complied with, with the risk on the victim
  - If for example, an alleged perpetrator has to remain in custody pending trial, and there is a delay in getting to trial, pressure may be placed on the victim, to withdraw her case.
- most offences are *not compoundable* except murder (S 302 PCC) and hurts (S 337 PCC) which are *compoundable*



- *non-compoundable offences* include rape, gang rape, attempted murder, abduction of unmarried women, acid throwing and outrage of the modesty of women
- whether or not offences are compoundable or not, has an effect on whether the victims are able to obtain justice in the court system.

## 4.2 PERCEPTIONS BY PAKISTANI'S OF THE CRIMINAL JUSTICE SYSTEM

### SLIDE 12

The following topics and slides relate to research undertaken about perceptions and experiences of women in the court system. The sources of the information are in the References.

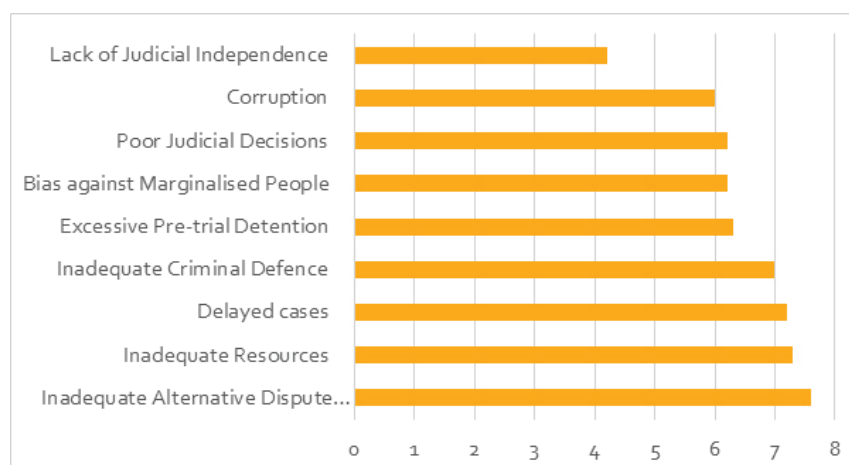
- 4.2.1 Problems faced by Criminal Courts in Pakistan
- 4.2.2 Perceptions of the courts by Pakistani's – Accountability
- 4.2.3 Experiences of women in Pakistan courts

### 4.2.1 PROBLEMS FACED BY CRIMINAL COURTS IN PAKISTAN

#### SLIDE 13

The information is not specific to gender-based violence cases but the criminal courts overall.

#### 4.2.1 Problems Faced by Criminal Courts in Pakistan



The information in this graph is interesting for a number of reasons. The points to highlight in the context of attrition are the reference to “delayed cases” were the third highest problem

faced by criminal courts in Pakistan. Also the reference to “Poor judicial decisions” and “Lack of judicial independence”.

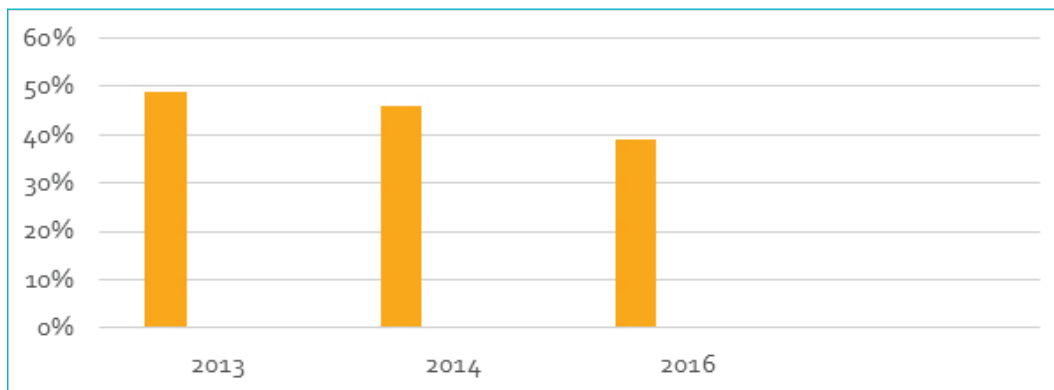
#### 4.2.2 PERCEPTIONS OF THE COURTS BY PAKISTANI’S – ACCOUNTABILITY

##### SLIDE 14

The source of the following information is also the World Justice Project, and it reports about perceptions of Pakistanis about how often court they regard the courts have guaranteeing everyone a fair trial. One of the questions asked was whether or not the courts “always and often” guaranteed everyone a fair trial.

#### 4.2.2 PERCEPTIONS OF HOW THE COURTS BY PAKISTANI’S – ACCOUNTABILITY – HOW OFTEN THE COURTS GUARANTEE EVERYONE A FAIR TRIAL

% responding Always and Often (source World Justice Project 2016)



- The two points to note are :
  - the perception of Pakistanis about accountability of the courts in guaranteeing everyone a fair trial “always and often” ,is that less than half consider that the courts are so accountable .
  - over a period of three years the percentage who responded positively, has dropped by a further 10% between 2013 and 2016

#### 4.2.3 EXPERIENCES OF WOMEN IN RAPE CASES IN PAKISTAN COURTS

##### SLIDE 15

- It is reported in that in relation to rape In Pakistan courts:

- There is DELAY and a case of rape or gang rape can take as long as 3-4 years before a verdict is reached in the courts.
- Going to trial is a TRAUMATIC PROCESS. It was so traumatic for the rape survivor that families take a decision to avoid it altogether.
- Even if the trial proceeds, the CONVICTION RATE is also extremely low, only 2-4%
- Also litigation is COSTLY, and since most rape survivors are of a lower socio-economic group they never turn up to the courts.

(source Khan & Zaman 2012)

### 4.3 SUMMARY OF VIEWS EXPRESSED BY JUDGES IN LAHORE DURING NEEDS ASSESSMENT

#### SLIDE 16

- As indicated earlier at the commencement of this workshop, a “needs assessment” was conducted the purpose of finding out how best we could respond to conducting a gender sensitization workshop for judges in Lahore and what the potential topics for discussion could be. We obtained some very helpful information from the participants on a number of issues and four of them will be discussed here.
- Three topics on which judges expressed views are summarized:
  - 4.3.1 views on rape
  - 4.3.2 views on sexual harassment and domestic violence
  - 4.3.3 views on abduction of unmarried woman/girl
- In addition in 4.3.4 we obtained information on certain topics related to the formal and informal systems and asked which system they considered was preferred by women in particular types of cases.
  - We have noted certain differences expressed between female and male judges
  - We also noted views which were shared by both female and male judges
- **It is important to note that these are summarized views and do not express the view of every single judge who spoke on the topic**

#### 4.3.1 JUDICIAL VIEWS EXPRESSED ON RAPE

#### SLIDE 17

- The number of false rape cases was high
- Most rape cases were ‘compromised’ with witnesses and complainants resiling from their statements

- ‘Genuine’ rape cases (eg vani, exchange and early marriages) were not brought to courts
- Male family members decided whether any case was to be filed, especially a rape/sexual assault case (both false and genuine cases)
- Male family members decided whether a case should be settled or withdrawn (either because of monetary compensation or fear of retribution)
- Judges generally allowed the cases to be withdrawn when witnesses or complainants resiled, (even if there was other evidence such as photos, medical evidence or forensic evidence to support a rape).
- Dissatisfaction was expressed about with the insufficiency of police evidence to support convictions.
- Judges are able to assess whether a rape complaint was genuine or not.

#### **4.3.2 JUDICIAL VIEWS EXPRESSED ON SEXUAL HARASSMENT AND DOMESTIC VIOLENCE**

##### **SLIDE 18**

- 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

#### **4.3.3 JUDICIAL VIEWS ON ABDUCTION OF UNMARRIED WOMAN/GIRL**

##### **SLIDE 19**

- 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.

#### 4.3.4 TOPICS ON WHICH MALE AND FEMALE JUDGES DIFFERED ABOUT ATTRITION ISSUES

##### SLIDE 20

- Topic: whether women would pursue their complaints about GBV using either a formal or informal system.
  - Female judges: 40% - 50% indicated women would not to pursue their cases
  - Male judges: >20% indicated that
- Topic: whether women would pursue their complaints of rape using either a formal or informal system – (1) stranger rape (2) rape by a family member
- (1) stranger rape
  - Female judges: 38% indicated that women would not pursue their cases
  - Male judges: 7% indicated that
- (2) rape by a family member
  - Female judges: 50% indicated that women would not pursue their cases
  - Male judges: 21% indicated that
- Note the sample of judges was small and not all judges responded

#### TOPICS ON WHICH MALE AND FEMALE JUDGES AGREED ON ATTRITION ISSUES

##### SLIDE 21

- Topic: Whether women preferred the formal or informal system to pursue (1) stranger rape (2) rape by a family member
- Approximately 1/2 of all judges indicated that for (1) stranger rape, women preferred the formal system
- Approximately 1/2 of all judges indicated that for (2) rape by a family member, women preferred the informal system
- Note the sample of judges was small and not all judges responded

#### 4.4 PROFILE OF ATTRITION/COMPROMISE OF GBV CASES IN KASUR DISTRICT

##### SLIDE 22

- During the Needs Assessment Judges from the District of Kasur in Lahore provided us with an excellent booklet with an overview of gender sensitization and a profile of crimes against women in Kasur between 2013 and 2106

##### DATA FROM KAZUR COURTS 2012-2016

##### SLIDE 23

- They also provided information about certain offences over the period 2012 through 2016, which were the number of cases reported in each year, the number of cases cancelled and the information which they provided to us has been converted into the following slide.

Offence	Number of cases reported between 2012 - 2016 (Min - max per year)	No. of cases cancelled between 2012 - 2016 (Min - max per year)	% of cases cancelled between 2012 - 2016 (Min - max per year)
Abduction of unmarried women	218 - 235	108 - 139	50 - 60%
Abduction of married woman S 496 A (fraudulent marriage)	114 - 158	46 - 83	40- 50%
Outrage the modesty of Women Ss 354, 354 - A	120 - 170	44 - 59	33-44%
Hurts Sec. 337 A1 - F 1	75 - 115	3 - 18	3-19%
Rape Sec. 376	58 - 119	12 - 26	15 - 31%
Murder Sec. 302	44 - 57	1	2%
Gang rape Sec. 376 - II	17 - 22	17 - 22	10 - 35%
Acid Throwing Sec. 336	1-2 (none in years 2012, 2013, 2015)	-	-

- In the **first left-hand column**, is the offence.
- In the **second left-hand column** the number of cases reported. In order to make a simple slide, the number of cases are expressed as being the range between **minimum**

number of cases reported (in any year) and the **maximum** number of cases reported (in any year). Taking the first entry of “Abduction of married women”, the minimum number of cases reported in any one year between 2012 and 2016 was 218. The maximum number of cases reported in any one year between 2012 and 2016 was 235.

- In the **third left-hand column** reference is made to the number of cases cancelled (attrition). A similar approach was taken and the number of cases cancelled are expressed as being the range between the minimum number and the maximum number in any year. Therefore using the first entry, of “Abduction of married women”, the minimum number of cases cancelled in any one year between 2012 -2016 was 108. The maximum number of cases cancelled in any one year between 2012 - 2016 was 139.
- The **fourth left-hand column**, expresses the number of cases cancelled as a percentage and again is expressed as a minimum in any year and a maximum in any year. Therefore using again the first entry of “Abduction of married women”, of the number of cases reported, between 50% and 60% of those cases were cancelled in any year.
- The same approach is taken with regard to all of the other offences.
- Clearly one needs to be careful when looking at data such as this, which does not contain details as to the make- up of “cancelled” cases, but there are some major points which can be made.
- The major point to note from this slide are the number of cases cancelled which appear to represent attrition.
- The high number of cases reported and also the high number and percentage of cases that are cancelled which relate to the abduction of unmarried women, the abduction of married women and the outrage of modesty of women. These shows a very high attrition rate for those offences, sometimes more than half the number of cases reported, and these offences are “not compoundable”.
- The other high rate of reported cases relate to hurts and rape. Hurts is compoundable and there are a smaller percentage which are cancelled. Rape, which is not compoundable, has a higher rate of cancellations.
- A second major point to make is that this is an example of where the gathering of data can help to point to where modifications may need to be made to address the issue of attrition

## ACTIVITY 1

### SLIDE 24

- Each of you will be given a paper
- You will be asked to respond to 2 questions about



1.what you consider are the 5 major factors leading to attrition in GBV cases between the time of a complaint and before the matter comes into the court system

2.what you consider are the 3 major factors which lead to attrition after the matter comes into the court system

- They are handed back anonymously and a short general discussion will follow.
- The purpose for the activity will be linked later with Activity 2
- Total time 30 minutes

## TOPIC 5 OVERVIEW OF BEST WORLD PRACTICES TO REDUCE ATTRITION RATES

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### SLIDE 25

- Topic 5 includes a number of slides about best world practices by which attrition rates for GBV can be reduced.
- The studies and research show clearly that addressing attrition requires a framework. It is not simply one body which needs to be responsive
- A framework requires a process which:
  - identifies the deterrents to women seeking help and the reasons for them not pursuing cases, and
  - adopts appropriate strategies to address these issues

## BEST WORLD CHARACTERISTICS AND STRATEGIES TO REDUCE ATTRITION IN GBV CASES

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### Slide 26

Research reveals than a best practice strategy framework to reduce attrition, needs to have 5 overall characteristics and 7 major strategies

- 5 Overall characteristics

- centred on victim safety
- based on multi-agency cooperation
- a case-by-case individualized approach
- engage the victims and respond to their needs
- procedural transparency
- 7 Strategies
  - Strategy 1 Data collection and monitoring
  - Strategy 2 Positive duty to investigate
  - Strategy 3 Specialization of services
  - Strategy 4 Confidentiality and privacy
  - Strategy 5 Victimless prosecution and pro- prosecution policies
  - Strategy 6 Reducing delay – case management
  - Strategy 7 Mediation, conciliation and reconciliation
- Each of these will now be dealt with in greater detail

## 5.1 STRATEGY 1 DATA COLLECTION

### SLIDE 27

- It is not surprising that the first strategy relates to the gathering of data. This needs to be the start of any process to address attrition and needs to be monitored over time to assess, and evaluate changes.
- Data collection of the progression of gender-based violence incidents from reporting to police through to court outcome
- Court data should include the nature of the case and information across the continuum e.g., processes, time taken, adjournments and case outcomes (including sentencing outcomes)
- Identifying the points where data indicates attrition and then develop a targeted response to reduce attrition
- Different points of attrition require different approaches

## 5.2 STRATEGY 2 POSITIVE DUTY TO INVESTIGATE

### SLIDE 28

Again it is not a surprise that the second strategy concerns the duty to investigate

- **Four Government institutions need to be involved**

### 5.2.1 STATE

- Has the overriding duty to investigate serious human rights violations
- Investigation of complaints of GBV needs to be without delay, thorough, impartial and effective.
- Ensure that the police and medical service providers have resources and training to collect evidence to increase successful prosecutions
- Ensure that the courts have sufficient resources to deal with cases efficiently. It is worth recalling slide 13 which gave information about the problems faced by criminal courts in Pakistan had “inadequate resources” as the second-highest problem.
- Ensure that there is also investigation into bribery or corruption or any other practices which subvert the justice system

## STRATEGY 2 DUTY OF POLICE TO INVESTIGATE

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### SLIDE 29

### 5.2.2 POLICE

- The Inter-American Human Right Court and Commission have developed 17 investigative guidelines with details as to how that is to be implemented
- Three of the primary guidelines include:
  - Recovering and preserving probative material (e.g. taking of photographs of victims and the crime scene, obtaining victims clothes and other relevant objects). This is a primary investigative duty and unless this is done effectively and efficiently in relation to GBV offences, attrition rates will continue to be high
  - Preserving crime scenes and determining the cause, place and time of the crime to identify the perpetrator
  - Identifying possible witnesses and obtaining their statements as promptly as possible. Again this is an important issue which is relevant to circumstantial evidence and corroborative evidence in relation to a GBV offence

## STRATEGY 2 DUTY OF PROSECUTION TO INVESTIGATE

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## SLIDE 30

### 5.2.3 THE PROSECUTION

- Specialized prosecutors or at least prosecutors who have received training to deal with GBV cases to better understand the needs of victims/survivors and avoid stereotyping and bias.
- Prosecutors should be responsible for ensuring that cases come before the courts as soon as possible and are progressed to completion in a timely fashion
- The prosecutorial process should be as non-traumatic for victims/survivors as possible

## STRATEGY 2 ROLE OF THE COURT REGARDING INVESTIGATION

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## SLIDE 31

### 5.2.4 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 appropriately undertaken their obligations prior to the time when the victim comes to court
  - for example in Pakistan there are the directives set out by the Supreme Court *Salman Akram Raja and Tahira Abdullah v Govt Punjab* [2013] SCMR 203
- Each Judge has a role to ensure that justice is done in all matters which come before them.
- If obligations to investigate have not been taken, these are matters of concern to the courts generally and to individual judges, as to justice is being done in every case. In situations where the directives have not been followed:
  - the court can adjourn and /or make appropriate orders to rectify the situation;
  - and/or should draw attention of deficiencies to the appropriate authority so that they can be addressed at a higher level. This is quite a common approach in many jurisdictions including Australia, although the preference is to see whether something can be redressed in the case itself.
  - Every case requires a fair and just process to be followed and applied.

### 5.3 STRATEGY 3 SPECIALIZATION OF SERVICES

#### SLIDE 32

- The third strategy requires specialized service delivery
- Victim satisfaction and engagement is increased and victim vulnerability is reduced through victim/survivor friendly approaches
- Specialization of services includes those delivered by police, prosecution and courts
- Effectiveness is maximized if free services are provided by:
  - dedicated units, or
  - a dedicated coordinator is assigned and prioritized services are delivered to meet the needs

## EFFECTIVENESS OF SPECIALIZED PROSECUTION AND COURT RESPONSES

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#### SLIDE 33

- Studies reveal that the non-cooperation of victims was reduced in sites which had specialized prosecution programs, increased victim advocacy and specialized domestic violence courts
- A “One stop shop” for victim services are an example of best practice
- Specialized responses include:
  - fast track scheduling of GBV cases in courts (particularly for children)
  - increased victim contact pending trial
  - victim-friendly proceedings that remove, as much as possible, the need for victim involvement in a trial

(Due Diligence Project 2016)

## STRATEGY 4 CONFIDENTIALITY AND PRIVACY

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### SLIDE 34

- A fourth strategy concerns matters related to confidentiality and privacy.
- In many countries there are very detailed guidelines and rules with regard to court orders to protect the names of victims or any details tending to identify them.
- The media often like to use the argument of “freedom of the press” and “the public’s right to know” about what happens in court cases, in order to publish information
- Sometimes court orders need to be quite extensive and very precise.
- The reasons for the need for court orders include the fact that often the media is very keen to obtain details about certain cases which come to their attention. The media’s need for sensationalism and the victim needs for privacy are very different.
- Also orders are needed to prevent intimate details being given about their cases and their ordeal, to the public generally, and that would include members of the community from which the victim comes.

### 5.4 STRATEGY 5 VICTIMLESS PROSECUTION, PRO – PROSECUTION POLICIES

### SLIDE 35

- The next three slides are highly relevant to the ways in which two common law countries have developed strategies of best practice to reduce attrition
- This is through policies and approaches which are designed, right from the start, to implement effective police investigation with a view to obtaining sufficient evidence to be able to prove a case of GBV, particularly domestic violence, without the need to call the victim at a trial. This is reinforced through court approaches to the evidence rules. This is what is meant by victimless prosecution and pro – prosecution policies.
- This topic will be dealt with under four headings.
  - 5.4.1 Overview of Best practices which directly addresses attrition
  - 5.4.2 Country example United Kingdom
  - 5.4.3 Country example United States
  - 5.4.4 Other Country examples

## 5.4.1 OVERVIEW OF BEST PRACTICES TO REDUCE ATTRITION

### SLIDE 36

- Best practices to reduce attrition combine:
  - a thorough investigation by police sufficient to support a conviction without the victim/survivor 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 of a criminal offence against her and the public interest in addressing grave human rights violations against women and ensuring that offenders are accountable
  - Ultimately it is a prosecution discretion as to whether to proceed or not, to be exercised according to guidelines

## 5.4.2 UNITED KINGDOM

### SLIDE 37

- The Crown Prosecution Service and other services in the criminal justice system follow detailed guides and codes of practice
- They include the process to be followed when a victim wishes to withdraw support for a prosecution:
  - **Police** undertake two activities:
  - Withdrawal statement
    - They take a detailed “**withdrawal statement**” from the victim.
    - This includes confirmation by the victim as to whether the original statement given by her to the police was true, or if it needs to be amended, with an explanation
    - whether the victim has been put under pressure to withdraw
    - the reasons why she seeks to withdraw
    - information about whether the victim has discussed the case with anyone and in particular anyone who advised them to withdraw (including a solicitor).
  - Background report
    - In addition the police provide a “**background report**” for the prosecutor

- this includes the officer’s view of the case, including any suspicions has been the subject of intimidation or pressure
- details of any identified risks of safety to the victim children or other person
- details of any support available to the victim
- how the victim might respond to being compelled to attend court
- the likely impact on the victim and any children of proceeding or not proceeding with the case
- Prosecutor
  - undertakes **a review** :
  - they specifically address whether the case can proceed without using the victim’s evidence
  - they assess whether it is possible to proceed using evidence other than the victim such as making an application under section 116 of the Criminal Justice Act 2003 for the police tape, admissions in interview, CCTV and police officer’s statements. This is in addition to other circumstantial or corroborative evidence in the case
  - whether any support could assist the victim and would enable her to proceed rather than withdraw. This is to be done using a specialist Independent Domestic Violence Advisor
  - As a last resort, they would consider whether the victim should be compelled to give evidence by issuing a witness summons. In order for such a robust approach, it needs to be in parallel with victim support and advocacy schemes and if possible, offender rehabilitation options.
- Using this approach, there is a transference of responsibility for decision-making from vulnerable witnesses to competent professionals
- The result of the practice has been a reduction in the number of cases of “unsuccessful” cases (due to victim issues such as retraction, non-attendance or where the victim’s evidence did not support the case). At the same time an increase in the conviction rates.<sup>90</sup>
- Details are available in the handout.
- Priority at all times, is the safety of the victim and family and support for victims throughout the court processes

(Source DPP UK Report 2012)

<sup>90</sup> The Violence against Women and Girls (VAWG) strategy commenced in 2008 and in 2011 was mainstreamed with greater coverage and accountability. Under the VAWG Strategy, the conviction rates increased for all VAW cases from 69% in 2008, to 71.5% in 2011, to 73.1% in 2012. This represents thousands of cases. Simply taking the year between 2011 and 2012, there was a 1.5% reduction in attrition for overall VAW and a 4% reduction in attrition in relation to rape. Similarly there was a reduction of attrition in domestic violence cases for that year.



### 5.4.3 UNITED STATES

#### SLIDE 38

- Moving now to the situation in the United States.
- What is highlighted here is a particular approach used by prosecutors in the US and interpreted by the courts, which allows cases to proceed without requiring the attendance of the victim at trial.
- The approach applies the provisions in the Federal Rules of Evidence which permits the use of hearsay evidence circumstances. The Rules provided for exceptions
- In short, the Federal Rules of Evidence allows exceptions to the Hearsay Rule “Excited Utterance” and a statement of an “Existing Mental, Emotional, or Physical Condition” to prove the truth of the statement
- Both express common law exceptions to the rule against hearsay
- In your compendium there is detail on the use of hearsay and particular cases which have applied the exceptions to prohibition of hearsay evidence
- Hearsay evidence is allowed to prove a case against the defendant when e.g. the complainant victim either did not turn up, or sought to assert spousal privilege to avoid testifying against her husband
- These exceptions have enabled evidence to be given in the following situations, detailed in the handout. For example
  - the contents of a 911 call made by the victim to a police station
  - statements made by a victim to a police officer who turned up at the scene
  - statements made by a child victim of a sexual abuse case to a doctor at the hospital
  - statements made by a girl victim to her mother
  - statements made by a victim to a social worker when she was undergoing an examination

(source Leventhal & Aldrich 2006)
- these cases demonstrate the use which can be made of a proper investigation and presentation of evidence which enable cases of GBV to be proved, without reliance solely on the victim, and in some instances where the victim is unavailable to give evidence
- The law in Pakistan also has provisions of a similar nature which could potentially be utilized in a similar way
  - Example of “Excited Utterance” (cf s19(a) Qanun-E-Shahadat Order)
  - Example of “Existing Mental, Emotional, or Physical Condition” (cf QES s27 Explanation 1)

#### 5.4.4 OTHER COUNTRIES

##### SLIDE 39

- Numerous countries have either Constitutional provisions, legislation, rules or codes of conduct which give the Attorney General or the prosecution the right or discretion to pursue prosecution of cases, notably rape and domestic violence cases even without the consent of the complainant/victim or even against her will.
- **Cyprus:** The Attorney General is vested with constitutional rights (Art. 11(2))
- The Philippines: through RA No. 9262, a woman who does not pursue her complaint is required to file an affidavit of desistance which then is considered by the court
- In **Canada**, in British Columbia, the Criminal Justice Branch, Ministry of Justice, Crown Council Policy Manual 23 July 2015, obliges Crown Council to examine the case at each stage and decide whether there is a “substantial likelihood” of conviction and if so whether a prosecution is required in the public interest. This cannot be solely determined by the victim’s wishes
- **Brazil:** Art 16 of the Maria da Penha Law (2006) requires a woman to renounce her denunciation before a Judge at a hearing after hearing the views of the prosecutor
- **Trinidad and Tobago :**Victim/survivors who do not wish to continue with a complaint are directed to the Victim and Witness Support Unit which assists in handling and resolving their cases

#### 5.6 STRATEGY 6 REDUCING DELAY – CASE MANAGEMENT

##### SLIDE 40

- Strategy 6 addresses the issue of delay
- Systemic delay of resolution of cases is a primary cause of attrition in GBH cases
- The length of time between complaint and finalization varies greatly between countries, population size, legal systems
- Reduction of attrition depends on whether Case management processes are effective to reduce delay
- Case management methodology is an enormous topic on its own and is not appropriate for this workshop
- The major point to be made here is that case management is judge-driven, judge-managed and designed by the court, after consultation and discussion with relevant stakeholders
- Case management must be based upon and developed around data collected on current case flow

- Following this workshop you may consider that there are approaches which could be undertaken, through case management, to reduce delay in your courts.

## 5.7 STRATEGY 7 ADR, CONCILIATION AND RECONCILIATION

### SLIDE 41

- The final strategy is on alternative dispute resolution and similar measures
- A number of studies conclude that ADR is not appropriate for GBV cases eg allowing perpetrators to pay off victims/survivors or marrying rape or abduction victim/survivors (Due Diligence Project)
- ADR is based on the assumption of equal fault for violence and equal bargaining power which is rarely the situation with GBV
- Courts need to be vigilant against potential intimidation of victims/survivors through financial payments in particular child victims who may be under family pressure
- Even if a particular GBV case is compoundable pursuant to section 345 CrPC without court permission, courts need to be alert to fitness and unfairness or pressure on a victim or family.

## CONCLUDING REMARKS BEFORE ACTIVITY 2

### SLIDE 42

- You have now been provided with information about:
- Reasons for attrition in GBV cases and its importance
- Some Pakistan ,Punjab and Lahore information about attrition and compromise
- You have heard about some best world practices to help reduce attrition rates
- Now it is time to open this up for some general discussion and sharing information and ideas on how attrition could be potentially be improved in the courts in Lahore.

## ACTIVITY 2 DISCUSSION

- Each of you will be given a paper with a number of suggested topics/ideas for a general discussion about what potential legal and or practical measures could be implemented in Punjab courts to reduce attrition in GBV
- Total time 30 minutes

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# Accompanying Materials

# LIST OF CONVENTIONS/TREATIES RELATED TO WOMEN AND/OR GIRLS TO WHICH PAKISTAN IS A PARTY

## Treaties / Conventions

Treaty / Convention	Dates	Relevant Declaration / Reservations
International Covenant on Civil and Political Rights <sup>a</sup>	<ul style="list-style-type: none"> <li>Signed: 17 April 2008</li> <li>Ratified: 23 June 2010</li> </ul>	<ul style="list-style-type: none"> <li>“...Pakistan declares that the provisions of Articles 3, 6, 7, 18 and 19 shall be so applied to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan and the Sharia laws.” <ul style="list-style-type: none"> <li>Article 3 – “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.”</li> <li>Article 6 – Right to life</li> <li>Article 7 – Torture; cruel, inhuman or degrading treatment or punishment.</li> <li>Article 18 – Right to freedom of thought, conscience and religion</li> <li>Article 19 – Right to freedom of expression</li> </ul> </li> </ul> <p>Note: Pakistan has not signed the Optional Protocol and the Second Optional Protocol.</p>
International Covenant on Economic, Social and Cultural Rights <sup>b</sup>	<ul style="list-style-type: none"> <li>Signed: 3 November 2004</li> <li>Ratified: 17 April 2008</li> </ul>	<p>“Pakistan, with a view to achieving progressively the full realization of the rights recognized in the present Covenant, shall use all appropriate means to the maximum of its available resources.” (Declaration upon ratification)</p> <p>Note: Pakistan has not signed the Optional Protocol.</p>
Convention on the Elimination of All Forms of Discrimination against Women	<ul style="list-style-type: none"> <li>Acceded: 12 March 1996</li> </ul>	<ul style="list-style-type: none"> <li>“...Pakistan declares that it does not consider itself bound by paragraph 1 of article 29 of the Convention.” <ul style="list-style-type: none"> <li>Art. 29(1): “Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. [...]”</li> </ul> </li> </ul> <p>Note: Pakistan has not signed the Optional Protocol.</p>

*continued on next page*

Treaty / Convention	Dates	Relevant Declaration / Reservations
Convention on the Rights of the Child <sup>c</sup>	<ul style="list-style-type: none"> <li>Signed: 20 September 1990</li> <li>Ratified: 12 November 1990</li> </ul>	<p>No reservation/declaration.</p> <p>Note: Pakistan has signed and ratified both (i) the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, and (ii) the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.</p>
Convention on the Rights of Persons with Disabilities <sup>d</sup>	<ul style="list-style-type: none"> <li>Signed: 25 September 2008</li> <li>Ratified: 5 July 2011</li> </ul>	<p>No reservation/declaration.</p> <p>Note: Pakistan has not signed the Optional Protocol.</p>

<sup>a</sup> Both [the ICCPR and ICESCR] use the same wording to prohibit discrimination based on, inter alia, sex (art. 2), as well as to ensure the equal right of men and women to the enjoyment of all rights contained in them (art. 3). The International Covenant on Civil and Political Rights guarantees, among other rights, the right to life, freedom from torture, freedom from slavery, the right to liberty and security of the person, rights relating to due process in criminal and legal proceedings, equality before the law, freedom of movement, freedom of thought, conscience and religion, freedom of association, rights relating to family life and children, rights relating to citizenship and political participation, and minority groups' rights to their culture, religion and language. The International Covenant on Economic, Social and Cultural Rights guarantees, for instance, the right to work, the right to form trade unions, rights relating to marriage, maternity and child protection, the right to an adequate standard of living, the right to health, the right to education, and rights relating to culture and science." Source: United Nations. 2014. Women's Rights are Human Rights. Pp. 4-5.

<sup>b</sup> See Table footnote a.

<sup>c</sup> "The Convention on the Rights of the Child (art. 2) and the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (art. 7) also prohibit discrimination based on sex." Source: United Nations. 2014. Women's Rights are Human Rights. P. 7.

<sup>d</sup> "The Convention on the Rights of Persons with Disabilities (art. 6) recognizes the multiple discrimination that women with disabilities are subjected to, and requires State parties to address this by taking "all appropriate measures to ensure the full development, advancement and empowerment of women" in the enjoyment of their human rights." Source: United Nations. 2014. Women's Rights are Human Rights. P. 7.

## Other Relevant International Instruments

- Universal Declaration of Human Rights
- UN Declaration on the Elimination of Violence against Women (1993)
- Beijing Declaration and Platform for Action (1995)
- Millennium Development Goals
- UN Security Council resolution 1325 on women, peace and security (2000) and related resolutions<sup>1</sup>
- 2030 Agenda for Sustainable Development (Goal 5: Achieve gender equality and empower all women and girls)

<sup>1</sup> "UN Security Council resolution 1325 on women, peace and security (2000) recognized that war impacts women differently, and reaffirmed the need to increase women's role in decision-making with regard to conflict prevention and resolution. The UN Security Council subsequently adopted seven additional resolutions on women, peace and security: 1820 (2008), 1888 (2009), 1889 (2009), 1960 (2010), 2106 (2013), 2122 (2013) and 2242 (2015). Taken together, the eight resolutions represent a critical framework for improving the situation of women in conflict-affected countries." Source: UN Women – Asia and the Pacific: <http://asiapacific.unwomen.org/en/about-us/guiding-documents>

# RECENT COMMENTS BY UN BODIES RE: PAKISTAN ON GENDER AND DISCRIMINATION

## Legal Gaps

- **CEDAW Committee Concluding observations on the fourth periodic report of Pakistan adopted by the Committee at its fifty fourth session<sup>2</sup> (1 March 2013)**

“15. The Committee is concerned about the lack of full incorporation of the Convention in national legislation, including the absence of a prohibition of all forms of discrimination against women, in line with article 1 of the Convention and about the persistence of discriminatory provisions against women in a number of laws, such as, the Qanoon-e-Shahadat Order 1984 (Law of Evidence), the Hudood Ordinances (1979) and the Citizenship Act (1951). It is concerned at the delay and the lack of a clear timeframe for the adoption of a number of important bills, such as the Domestic Violence (Criminal Law amendment) Bill and the Prevention and Control of Women Trafficking Bill as well as about the poor implementation of laws aimed at the elimination of discrimination against women. The Committee is also concerned that the jurisdiction of the highest courts in the Constitution does not apply to the whole territory of the State party hence women could be deprived of their constitutional rights as well as about the ambiguity caused by the recognition in the Constitution of the Federal Shariat Court. It is also concerned at the lack of awareness by the judiciary on women’s rights and relevant domestic legislation. It is further concerned at the existence of parallel justice systems (jirgas and panchayats), despite the ruling against their legality and of different informal dispute resolution mechanisms (Musalihah Anjuman), which are discriminatory against women.

16. The Committee calls upon the State party to:

- (a) Include in its Constitution and/or in other relevant legislation provisions prohibiting all forms of direct and indirect discrimination against women, including sanctions, in line with article 1 of the Convention (and in line with article 25 of the Constitution) and repeal all discriminatory laws, including the Hudood Ordinances, the Law of Evidence and the Citizenship Act (1951);

<sup>2</sup> CEDAW/C/PAK/CO/4. This is the latest CEDAW Committee report on Pakistan. Only the sections related to the topic are cited, i.e. sections on health (maternal mortality rate, etc.), education, participation in development projects, refugees and internally displaced women and girls, and employment were excluded from the Compendium.



- (b) Adopt without delay pending bills, such as the Domestic Violence Bill and the Prevention and Control of Women Trafficking Bill; and, design strategies to overcome obstacles to their adoption including through the sensitization of parliamentarians and members of the Council of Islamic Ideology on women's rights;
- (c) Ensure the effective enforcement of existing legislation aimed to protect women and to eliminate discrimination against them, such as the Prevention of Anti-Women Practices (2011);
- (d) Take measures to establish a unified judicial system, to eliminate all parallel legal systems and informal dispute resolution mechanisms which discriminate against women and to sensitize the public on the importance of addressing violations of women's rights through judicial rather than parallel justice systems; and
- (e) Provide systematic training to judges, prosecutors and lawyers on women's rights, including the Convention, its Optional Protocol and all relevant domestic legislation for women, ensure the provision of free legal aid services, implement legal literacy programmes and increase awareness on the availability of all legal remedies to women and girls."

## Marriage and Family Relations

- **CEDAW Committee Concluding observations on the fourth periodic report of Pakistan adopted by the Committee at its fifty fourth session** (1 March 2013)

"37. The Committee is concerned about the existence of multiple legal systems with regard to marriage and family relations in the State party and its discriminatory impact on women. It is concerned about the current status of Hindu and Christian law on marriage and divorce and the fact that under Muslim law women have unequal rights to inheritance, dissolution of marriage and its economic consequences as well as unequal rights in respect to guardianship of children. It is concerned about the persistence of child and forced marriages and at the fact that the minimum age of marriage for girls is 16 years. It is deeply concerned about the abduction of women and girls belonging to religious minorities for the purpose of forced conversion and forced marriages. It is also concerned that polygamy is permitted under certain circumstances. The Committee also notes with concern that property relations are governed by a regime of separate property, which often discriminates against women.

38. The Committee recalls article 16 of the Convention and calls on the State party to:

- (a) Adopt the Hindu Marriage Bill[,] the Christian Marriage (Amendment) Bill and the Christian Divorce Amendment Bill;
- (b) Revise the Muslim Marriages Dissolution Act (1939) with the aim to repeal discriminatory provisions against women; and amend the relevant legislation to raise the minimum age of marriage for girls to 18 years;
- (c) Take the necessary measures to ensure that marriage and family cases are efficiently handled and heard by civil courts;

- (d) Conduct research about the extent of the phenomenon of abduction of girls for the purposes of forced conversion and forced marriages and develop a comprehensive strategy to address this phenomenon to ensure the effective investigation of cases, prosecutions and punishment of perpetrators as well as remedies and support services for the victims;
- (e) Take necessary legislative measures that prohibit polygamy; and
- (f) Enact legal provisions to ensure that, upon dissolution of marriage, women have equal rights to property acquired during marriage, in line with article 16 paragraph 1 (h) of the Convention and the Committee's general recommendation 21.

## Honor Killings, Rape, and Other Crimes

- **CEDAW Committee Concluding observations on the fourth periodic report of Pakistan adopted by the Committee at its fifty fourth session** (1 March 2013)

“4. The Committee notes with appreciation that, since the consideration of its combined initial, second and third periodic report (CEDAW/C/PAK/1-3) in 2007, the State party has enacted and revised numerous laws and legal provisions aimed at eliminating discrimination against women. In particular, it welcomes the adoption of:

- (a) The Criminal Law Act (Second Amendment, 2011), referred to as the Acid control and Acid Crime Prevention;
- (b) The Criminal Law Act (Third Amendment, 2011), referred to as Prevention of Anti-Women Practices; and
- (c) The Protection against Harassment of Women at the Workplace Act, 2010.

[xxx]

21. The Committee is concerned about the persistence of patriarchal attitudes and deep-rooted stereotypes concerning women's roles and responsibilities that discriminate against them and perpetuate their subordination within the family and society, all of which have recently been exacerbated by the influence of non-State actors in the State party. It expresses serious concern about the persistence, amongst others, of child and forced marriages, Karo-Kari, stove burning and acid throwing, marriage to the Quran, polygamy, honor killing. It is concerned that in spite of the provisions in the Criminal Law (Amendment) Act 2004, which criminalize offenses in the name of so-called honour, the Qisas and Diyat Ordinances continue to be applied in these cases hence resulting in perpetrators being given legal concessions and/or being pardoned and not being prosecuted and punished. It expresses its concern at the high prevalence of domestic violence and marital rape and at the absence of clear legislation criminalizing such acts. It is also concerned about the paucity of information about the implementation of the Standard Operational Procedures on the treatment of women victims of violence and at the scarce number of shelters for victims. It is further concerned at the inconsistencies in the collection of data on violence against women

and about reports on the wide circulation of small arms and its impact on women's security.

22. In line with its General Recommendation No. 19 (1992), the Committee calls upon the State party to:

- (a) Ensure the proper implementation of the Prevention of Anti-Women Practices (Criminal Law Amendment) Act of 2011 and other relevant legislation, ensure uniformity in the application of the law and repeal the provisions of the Qisas and Diyat Ordinances which discriminate against women;
- (b) Address shortcomings in the Criminal Law (Amendment Act of 2004) and repeal all provisions under which perpetrators of the so-called honour crimes are allowed to negotiate pardon with victims' families;
- (c) Strengthen support services for victims of violence such as counseling and rehabilitation services, including medical and psychological; increase the number of shelters to ensure the implementation of the Standard Operational Procedures for the treatment of victims in all provinces;
- (d) Adopt a comprehensive strategy to eliminate all harmful practices and stereotypes, in conformity with articles 2, and specifically 2 (f), and 5 (a) of the Convention, which includes awareness-raising efforts targeting the general public and the media, religious and community leaders, in collaboration with civil society and women's organizations;
- (e) Ensure a robust and effective regulation of the arms trade as well as appropriate control over the circulation of existing and often illicit arms to enhance the security of women and girls; and
- (f) Take appropriate measures to ensure disaggregated data collection on all forms of violence against women, including domestic violence, by the Gender Cell Crime (GCC).

23. The Committee is concerned at reports indicating that children, in particular girls who are internally trafficked are subject to bonded labour, domestic servitude and child marriages. It is also concerned at the lack of statistical data and information about the extent of women and girls' exploitation for the purposes of prostitution.

24. The Committee urges the State party to:

- (a) Conduct research on the prevalence of internal and international trafficking, including its scope, extent, causes, consequences and purposes, as well as its potential link with bonded labour, domestic servitude and child marriage;
- (b) Develop and implement a national comprehensive plan on internal and international trafficking in persons based on the findings of the research, with a result-oriented approach, including specific indicators and targets, in line with the Convention;

- (c) Strengthen mechanisms for the investigation, prosecution and punishment of trafficking offenders and support services for victims;
- (d) Conduct nationwide awareness-raising campaigns on the risks and consequences of trafficking targeted at women and girls, and provide systematic training to all relevant law enforcement officials on its causes and consequences;
- (e) Adopt measures for rehabilitation and social integration of victims of forced prostitution; and
- (f) Ratify the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol)."

- **The United Nations in Pakistan Urges Government Action to End “Honour Killings”<sup>3</sup>** (June 28, 2016)

“ISLAMABAD (20 June 2016) – The United Nations (UN) joins people across the country in strongly condemning the increasing number of killings in the so-called name of ‘honour’ and urges the Pakistani Government to prevent such killings and to bring those responsible to justice.

“Every year, hundreds of women and girls are killed in Pakistan to protect family or community ‘honour’” said United Nations Resident Coordinator, Neil Buhne. “But the large numbers and tragic nature of killings over the last weeks highlights the terrible cost from such killings to women, children, families, communities and all of Pakistan, as tragically shown by the Muqaddas Bibi (22) who, was brutally murdered by members of her own family simply because she married a man of her own choice”. According to reports, her father, brother and mother slit the throat of Ms. Muqaddas, who was pregnant with her second child after she married against her family wish, three years ago. Adding to the latest surge in reported ‘honour killings’ in Pakistan are the recent deaths of another pregnant woman and her husband by relatives who disapproved of their marriage, and a young girl shot by her brother for wanting to marry a man of her choice.

Last week Zeenat Rafiq (18) was burned to death by her mother for “bringing shame to the family” by marrying a man of her choice. On 31 May family members tortured and burned alive school teacher Maria Sadaqat (19) for refusing an arranged marriage proposal. Young girls are also affected: on 29 April the body of Ambreen Riasat (16) was found inside a vehicle that had been set on fire after a ‘jirga’ ordered her death for helping her friend marry of her own choice. In one case a man’s throat was slit by relatives of his wife who disapproved of their match – a rare instance of a male victim.

According to the Human Rights Commission of Pakistan (HRCP), 1,096 women (of whom 170 were minors under the age of 18) were killed for ‘honor’ in 2015. As there are no official figures on ‘honor’ killings the real figure could be much higher, with many such killings believed to be disguised as accidents, or they go unreported by family members.

<sup>3</sup> <https://www.un.org.pk/the-united-nations-in-pakistan-urges-government-action-to-end-honour-killings/>

“Under international and national laws and standards, there is a clear State responsibility to uphold women’s rights and ensure freedom from discrimination, which includes the responsibility to prevent, protect and provide redress – regardless of sex, and regardless of a person’s status in the family,” added Mr. Buhne. “It is both the State’s and the judiciary’s responsibility to deter such crimes, and ensure that people who commit them are brought to justice. The UN General Assembly, in three separate resolutions in 2001, 2003 and 2005, called on Member States to intensify legislative, educational, social and other efforts to prevent and eliminate “honour”-based crimes, and to investigate thoroughly and prosecute effectively, bringing the perpetrators to justice.

The Government of Pakistan has recognized this, as Prime Minister Nawaz Sharif said in February. “Honour killing is a most critical issue and the Government is determined to adopt all possible ways and means to remove this stain from our society” Mr. Buhne said the UN System stands ready to assist the Government of Pakistan to take urgent measures to do this. In this direction, a strengthened and adequately resourced national and provincial Women’s Commissions and Women Development Departments can play a major role.”

- **The United Nations in Pakistan lauds passage of bills on anti-honour killing and anti-rape<sup>4</sup>** (7 October 2016)

“Islamabad, Pakistan – The United Nations (UN) joins people across the country in lauding the Pakistani Government in unanimously approving the much awaited anti-honour killing and anti-rape bills, as a historic success on Thursday. Both bills were originally laid before the Senate in January 2014 and with review, revision and follow-up, have finally made their way to adoption.

“Every year, hundreds of women have their rights violated, are abused physically or sexually, and even killed in the name of honour” said United Nations Resident Coordinator, Neil Buhne, “The crisis of violence against women and harmful traditional practices have often been seen as private matters that are ‘outside’ justice. Passing and implementing effective laws and policies to protect the rights and well-being of survivors and strictly punish perpetrators can provide the foundation for a coordinated and comprehensive approach to end violence against women across the country,” added Mr. Buhne.

Mr. Buhne said the UN System stands ready to assist the Government of Pakistan to address the marginalization and discrimination against women, and provide all possible support to implement measures to strengthen effective implementation, including training of officials who handle cases of violence against women, the establishment of mechanisms for monitoring and impact evaluation as well as accountability, and better coordination.”

<sup>4</sup> <http://asiapacific.unwomen.org/en/news-and-events/stories/2016/10/anti-honour-killing-and-anti-rape>

## Engaging Men and Boys

- **UN Pakistan calls for the engagement of men and boys in ending violence against women and girls<sup>5</sup>** (5 December 2016)

“Islamabad, Pakistan — Every Wednesday Radio Pakistan’s News and Current Affairs Channel airs a program called ‘Perspective’ highlighting the United Nations (UN) work in Pakistan. On Wednesday 30th of November, Mr. Neil Buhne, Resident Coordinator of UN Pakistan, Mr. Jamshed M Kazi, Country Representative of UN Women, and Ms. Khawar Mumtaz, Chairperson of the National Commission on the Status of Women, joined the program to put focus on the need for a proactive approach by the society to end violence against women in Pakistan, in particular by engaging men and boys.

Mr. Buhne explained that violence against women is a global phenomenon, which affects one third of women around the world. “It happens in poor countries, it happens in rich countries, and it limits women’s development opportunities” he said. Mr. Buhne further highlighted that violence against women is a specific issue within the UN, and that the UN has launched a program in Khyber Pakhtunkhwa to help women easily report incidents of violence against them to the police. He called for more women police officers to be recruited for the purpose. “We need to have more women police officers if we are going to stop violence against women”, he told the listeners. [...]”

## Devolution/Binding Effect of CEDAW on All State Organs and Instrumentalities

- **CEDAW Committee Concluding observations on the fourth periodic report of Pakistan adopted by the Committee at its fifty fourth session** (1 March 2013)

“8. While reaffirming that the [National] Government has the primary responsibility and is particularly accountable for the full implementation of the State party’s obligations under the Convention, the Committee stresses that the Convention is binding on all branches of the State apparatus [...]

[xxx]

12. The Committee underlines the responsibility of the federal government in ensuring the full implementation of the Convention and in providing guidance in this respect to the provincial governments. It recommends that the State party set standards and establish an effective mechanism aimed at ensuring a transparent, coherent and consistent implementation of the Convention throughout its territory.

[xxx]

<sup>5</sup> <http://asiapacific.unwomen.org/en/news-and-events/stories/2016/12/un-pakistan-calls-for-the-engagement-of-men-and-boys>

17. The Committee is concerned that since the 18th Amendment and the devolution of powers in the area of the advancement of women's rights, that from the national to the provincial levels there are governance challenges in the integration and coordination of policies' aimed at the advancement of women. It is further concerned at the lack of capacity of the State party to put in place an efficient mechanism to ensure the adoption of legal and other measures to fully implement the Convention in a coherent and consistent manner at the provincial level as well as the lack of capacity and resources of the Women Development Departments (WDD) which may prevent them from fulfilling their mandate as the provincial machineries for the advancement of women. It expresses its concern about the paucity of information with respect to the human and financial resources available to the National Commission on the Status of Women to fulfill its broad mandate to monitor and to safeguard women's rights and promote gender equality.

18. The Committee underscores the responsibility of the federal government in ensuring the full implementation of the Convention across its territory including at provincial level. It recommends that the State party:

- (a) Ensure that the devolution of powers do not adversely impact the advancement of women in all spheres of life, and ensure that federal institution such as the National Commission on the Status of Women are fully equipped to effectively coordinate and oversee the formulation and implementation of gender equality policies and programmes and the prioritization of women's rights in development strategies, in line with Convention across the territory of the State party;
- (b) Institutionalize an inter-provincial coordination mechanism with adequate human and technical resources and also ensure adequate financial resources to the Women Development Departments; and
- (c) Ensure that the National Commission on the Status of Women has adequate human, technical and financial resources to fulfil its mandate, including by establishing Provincial Commissions on the Status of Women and by ensuring that its recommendations on legislations, policies and programmes are considered without delay by the relevant governmental body."

## Temporary Special Measures / Participation in Political and Public Life

- **CEDAW Committee Concluding observations on the fourth periodic report of Pakistan adopted by the Committee at its fifty fourth session** (1 March 2013)

"19. The Committee is concerned at the uneven allocation and implementation of the 10% national civil service employment quotas for women among the provinces due to the devolution of employment sector to the provinces. It is also concerned that the 5% quota for members of minority communities to be employed in the public sector is gender neutral, and as such may indirectly discriminate against women from minorities.

It regrets the expiration of the local government system, which used to reserve 33% of seats for women at local government level.

20. The Committee recommends that the State party, in accordance with article 4 (1) of the Convention and General Recommendation No. 25 (2004):

- (a) Ensure consistency in the allocation and implementation of quotas aimed at accelerating equality between women and men across the Provinces, in particular the civil service employment quotas, and use other temporary special measures as part of a necessary strategy to achieve women's substantive equality, in fields such as political participation, health, education and employment with focus on women belonging to minority communities; and
- (b) Ensure that the local government system is restored, that the 33% reserved seats for women are retained and that women from religious minorities are represented in such a system.

[xxx]

25. The Committee reiterates its concern at the low level of participation of women in political and public life, especially in decision-making positions and in the local administration, as well as in the diplomatic service. It is concerned that women have only 17% of reserved seats in the National Assembly, Provincial Assemblies and the Senate. It is further concerned that patriarchal attitudes and rooted stereotypes on the roles of women and men in society, results in the forced disenfranchisement of women, impede and discourage their participation in elections (as candidates and voters). It reiterates its concern at the low participation of women in the judiciary in the Superior Courts and the total absence of women judges in the Supreme Court (CEDAW/C/PAK/CO/3, para. 32).

26. The Committee calls upon the State party to:

- (a) Amend relevant laws, where appropriate, in order to increase the quotas allocated for women in the National and Provincial Assemblies and in the Senate to a minimum of 33%, as per international standards;
- (b) Establish a procedure for filing complaints in cases of forced disenfranchisement of women and adopt the draft bill submitted by the Electoral Commission of the State party, advocating re-polling where less than 10% of women's votes were polled;
- (c) Implement awareness-raising activities about the importance of women's participation in decision-making with the aim to eliminate patriarchal attitudes and stereotypes on the roles of women and men in society; and
- (d) Take appropriate measures to increase the number of women judges in Superior Courts and ensure appointment of women in the Supreme Court."



# TREATY PROVISIONS/PROVISIONS FROM INTERNATIONAL HUMAN RIGHTS DECLARATIONS/RELATED COMMENTS OR RECOMMENDATIONS MENTIONED IN THE MODULES

## UNIVERSAL DECLARATION OF HUMAN RIGHTS<sup>6</sup> (1948)

- **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.

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<sup>6</sup> 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.

## DECLARATION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN<sup>7</sup> (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.

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<sup>7</sup> Resolution adopted by the UN General Assembly, 7 November 1967

## 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;
- (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<sup>8</sup> (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<sup>9</sup> (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;

<sup>8</sup> <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom12>

<sup>9</sup> <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>



- (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 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;

[...]

- (c) Effective measures should be taken to ensure that the media respect and promote respect for women;

[...]

- (d) Effective complaints procedures and remedies, including compensation, should be provided;

[...]

- (e) 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;

[...]

- (f) 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;

[...]

- (g) 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<sup>10</sup> (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<sup>11</sup> (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.

[...]

<sup>10</sup> CEDAW/C/2010/47/GC.2 (19 October 2010)

<sup>11</sup> CEDAW/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 impartiality<sup>5</sup> 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 of 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.

## DECLARATION ON THE ELIMINATION OF VIOLENCE AGAINST WOMEN<sup>12</sup> (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;
- (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;

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<sup>12</sup> Resolution No. 48/104 adopted by the General Assembly on 19 December 1993



- (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.

## COMMITTEE AGAINST TORTURE GENERAL COMMENT NO. 2<sup>13</sup> (2008)

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.

<sup>13</sup> CAT/C/GC/2, 24 January 2008

## 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.

## 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.

- **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.<sup>14</sup>

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<sup>14</sup> Punjab Commission on the Status of Women. [http://pcsw.punjab.gov.pk/constitutional\\_rights\\_of\\_women](http://pcsw.punjab.gov.pk/constitutional_rights_of_women)

## NATIONAL LAWS<sup>15</sup>

- **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<sup>16</sup>

- **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.<sup>17</sup>

<sup>15</sup> 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.

<sup>16</sup> <http://asiapacific.unwomen.org/en/countries/pakistan/evaw-pakistan/legislation-on-vaw>

<sup>17</sup> *Id.*



- **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<sup>18</sup> 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.

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<sup>18</sup> 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 failed 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 consummated;

(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 or 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.

- **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.<sup>19</sup>

- **Anti-Terrorism Act 1997**

This Act provides for the prevention of terrorism and sectarian violence and for speedy trial of heinous offences (such as kidnapping for ransom). The law covers issues of child molestation and gang rape.<sup>20</sup>

- **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.<sup>21</sup>

- **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.<sup>22</sup>

- **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.<sup>23</sup> Section 5A<sup>24</sup> which states that no zina-bil-jabr complaint will be converted to zina, was inserted.

<sup>19</sup> <http://asiapacific.unwomen.org/en/countries/pakistan/evaw-pakistan/legislation-on-vaw>

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Offence of Zina (Enforcement of Hudood) 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.

- **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.<sup>25</sup>

- **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.<sup>26</sup>

- **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.”<sup>27</sup>

- **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.<sup>28</sup> 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.<sup>29</sup> Section 11 states the powers of the NCSW thus:

<sup>25</sup> <http://asiapacific.unwomen.org/en/countries/pakistan/evaw-pakistan/legislation-on-vaw>

<sup>26</sup> *Id.*

<sup>27</sup> 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 contact or received into human body or otherwise shall he said to cause hurt by coercive substance.

<sup>28</sup> <http://asiapacific.unwomen.org/en/countries/pakistan/evaw-pakistan/legislation-on-vaw>

<sup>29</sup> NCSW Pakistan. <http://www.ncsw.gov.pk/pro-women-legislation/national-commission-on-status-of-women-act-2012>

- 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
- **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 fact 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).<sup>30</sup>
  - 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.<sup>31</sup>
    - 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.<sup>32</sup>

<sup>30</sup> “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>

<sup>31</sup> 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.

<sup>32</sup> ““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>

## PROVINCIAL LAWS

- **Amendment to Punjab Poison Rules 1919<sup>33</sup>**
  - 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<sup>34</sup>**
  - 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.

<sup>33</sup> Explanatory text from: <http://pcsw.punjab.gov.pk/acidcrimes>

<sup>34</sup> Explanatory text from: [http://pcsw.punjab.gov.pk/land\\_revenue\\_2012](http://pcsw.punjab.gov.pk/land_revenue_2012)



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.

- **The Punjab Commission on Status of Women Act 2014<sup>36</sup>**

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.

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<sup>36</sup> Explanatory text from <http://pcsw.punjab.gov.pk/pcswact>



- 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<sup>37</sup>**

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.

<sup>37</sup> Explanatory text from: [https://pcsw.punjab.gov.pk/family\\_laws](https://pcsw.punjab.gov.pk/family_laws)

- 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. 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<sup>38</sup>**
    - 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<sup>39</sup>**
    - 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.

<sup>38</sup> Explanatory text from: [https://pcsw.punjab.gov.pk/family\\_laws](https://pcsw.punjab.gov.pk/family_laws)

<sup>39</sup> Explanatory text from: [https://pcsw.punjab.gov.pk/child\\_marriage](https://pcsw.punjab.gov.pk/child_marriage)

- 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<sup>40</sup>**

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 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.

<sup>40</sup> Explanatory text from: [http://pcsw.punjab.gov.pk/land\\_ammendment\\_act](http://pcsw.punjab.gov.pk/land_ammendment_act)

(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<sup>41</sup>**

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):

<sup>41</sup> Explanatory text from [pcsw.punjab.gov.pk/immovable\\_property\\_2015](http://pcsw.punjab.gov.pk/immovable_property_2015)

### 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.<sup>42</sup> It also establishes district-level panels to investigate reports of abuse, and requires the use of GPS bracelets to keep track of offenders.<sup>43</sup> 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.<sup>44</sup>

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.

<sup>42</sup> 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>

<sup>43</sup> Reuters. Pakistan province passes landmark law protecting women against violence. 25 February 2016. <http://www.reuters.com/article/us-pakistan-rights-women-idUSKCN0VY1QE>

<sup>44</sup> *Id.*

(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.

- **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.

# CASE LAW

## MODULE 1: BASICS OF GENDER SENSITIZATION

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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 the court, 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 redutant 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 is 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 former's 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, Cirilo 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 disfigure 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.”

## MODULE 2: NATIONAL GENDER LAWS AND CULTURE OF PAKISTAN

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### Inheritance

**Women should be protected in inheritance issues. They should not be deprived of their right of inheritance in the name of custom or by emotional exploitation.**

- **Sardaran Bibi, et al. v. Allah Rakhi, et al.**

2017 MLD 689

C.R. No. 2512 of 2016, heard on 19th May, 2016

Ali Akbar Qureshi, J

- **Facts:**

Plaintiffs are the brother of defendants-sisters. On chehlum of their deceased father, the defendants-sisters allegedly orally gifted the property subject of the suit in favor of the plaintiff in recognition of the latter's services to their father. However, when the plaintiff intended to transfer the property to his son, the defendants-sisters refused to honor their commitment. The suit of the plaintiff was dismissed by the trial court, as well as lower appellate court.

- **Issue:**

Who owns the property?

- **Decision:**

The defendants-sisters own the property. In a case of this kind when both parties stand to gain or lose valuable property, the oral evidence is always to be approached with caution and it is safer to rely on that evidence which is on accord with admitted circumstances and probabilities. The oral gift is to be proved independently, giving time, date, place and names of the witnesses in whose presence the oral gift was made. In this case, the petitioners have failed to fulfill these mandatory requirements, as no specific date, time and place are mentioned in the complaint. Defendants-sisters have flatly and categorically denied the factum of making an oral gift in favor of the petitioners. Women should not be deprived of their right of inheritance in the name of custom or by emotionally exploiting them.

### **Strong proof is required to sustain an allegation of an oral gift.**

- **Ghous-ud-Din, et al. v. Rashida, et al.**

2014 YLR 293

Civil Revision No.167 of 2013, decided on 9 September 2013.

Muhammad Noor Meskanzai, J

- **Facts:**

The parties to this suit are the children of the late Jamal-ud-Din. The petitioners-defendants, brothers of the plaintiffs-respondents (sisters), alleged that their sisters have gifted their share of the inheritance to them. They (brothers) have since demolished the earlier structures on the property, and have caused new construction on the property in dispute.

During the pendency of proceedings before the trial court, plaintiff (sister) No.1 / respondent No. 1, through a compromise deed, gifted her share to defendant No. 3 (her brother) and to such extent a preliminary decree was drawn and the same has attained finality. The case of the plaintiff/respondent No.2 (sister) proceeded to trial. The trial court and the appellate court ruled in her favor, as there is no written deed in support of the contentions of the petitioners.

- **Issue:**

Whether plaintiff/respondent No. 2 is entitled to receive her share of the inheritance.

- **Decision:**

Yes. The petitioners have not been able to prove their allegations for multiple reasons. Firstly, during the pendency of the suit, the respondent/plaintiff No.1 gifted her share to petitioner No. 3 through a compromise deed, which was accepted by the parties. The acceptance of this gift nullifies the assertion of an earlier gift; if the contention of the petitioners regarding the earlier gift was correct and true, then what was the occasion for the 'subsequent gift' without reference to any earlier gift. Secondly, per the divine law, succession opens at the moment of death and the legal heirs enter into possession of their share. Thirdly, the petitioners have utterly failed to produce any cogent, coherent, confidence-inspiring and tangible evidence in support of their plea. Fourthly, the respondent/plaintiff No.2 could not be deprived of her legal share simply because of the new construction raised by the petitioners. It would neither entitle the petitioners to any additional interest or right to the property nor would constitute a ground for depriving of a heir of his/her respective share, particularly so when the new construction was done without the permission of their sister, respondent No. 2. The trial court has rightly observed that the petitioners/defendants have raised construction on their own risk and costs. Fifthly, under Islamic law which protects the rights of women, a female shareholder cannot be deprived of her share on such flimsy, concocted and baseless pretext.

**Lack of evidence to show money was paid in lieu of inheritance.**

- **Mst. Mahar Angiza and 5 others v. Mst. Bakhti Raja**

2014 MLD 962

Civil Revision No.238 with C.M. No. 362 of 2013, decided on 19 August 2013

Muhammad Daud Khan, J (Peshawar High Court)

- **Facts:**

Respondent/plaintiff instituted a suit against the petitioners/defendants for the declaration to the effect that she is the legal sharer of a piece of land, as she is the legal heir of her father. Petitioners/defendants thus have no right to deny or interfere in the property. The petitioners/defendants contested the suit, claiming that the respondent had already received her hereditary share in the form of cash (Rs.650,000) from her brother (respondent/defendant no. 3).

- **Issue:**

Whether Mst. Bakht Raja has received her inherited share by receiving Rs.650,000 as sale amount from her brother.

- **Decision:**

No, the alleged sale was not proved through cogent and reliable evidence, which the law requires in cases such as this. Respondents recorded their statements by themselves as DW-1 to DW-4, but these statements contradict each other. DW-1 and 2 stated that the amount paid to her by Bakht Zada was drawn from the Bank, whereas Bakht Zada as DW-4, when cross-examined, stated that he did not draw the amount from the Bank. Moreover, DW-1 stated that their sisters were not paid money collectively, whereas DW-2 stated that Bakht Zada paid money to both her sisters collectively at the same time. Similarly, DW-3 Mst. Bakht Qaim, stated that her sister was paid Rs.650,000 after one month of payment of the similar amount to her.

### **Heavy onus lies on the person claiming in addition to inheritance proportions.**

- **Muhammad Akbar v. Suraya Begum, et al.**

2014 MLD 1080

Civil Revision No. 403 of 2011, decided on 8 December 2011.

Qaiser Rashid Khan, J (Peshawar High Court)

- **Facts:**

The plaintiff (Respondent No. 1) is the sister of the defendant-petitioner. This case involves a house and an adjacent plot of land that belonged to their late father. The plaintiff alleged that after their father's death, the defendant and another brother (who no longer appealed the judgment of the trial court) fraudulently transferred the property through registered gift and partition deeds. Thus, her brothers deprived her as well as her other sisters from their sharai shares.

The petitioner argued that his sisters and their respective husbands were present at the time of execution of the disputed deeds. As such, there was no question of fraud or misrepresentation on his part.

- **Issue:**

Whether the deeds were validly executed.

- **Decision:**

No. According to the respondent, when she was informed about the partition of the property among the legal heirs, she went to the petitioner's house where she was asked to sign such document. Believing the same to be in respect of the partition of the legacy of her late father, she signed the documents. Later on, she came to know that she had been deceived and defrauded and she thus accordingly filed the suit. The scribe of the deeds candidly stated that the deeds were scribed at the petitioner's instance and that he did not personally know the respondent No. 1/plaintiff. In our own conservative set up and social milieu, a pardanashin lady is unable to understand the technicalities of transactions, especially in a situation where the perpetrators of fraud are her real brothers. It is quite understandable that she will fall prey to such machinations especially when they are executed with a degree of finesse by her otherwise benign-looking real brothers. As such, the burden to prove the gift fell squarely on the shoulders of the beneficiaries who, in this case, would be the petitioner and their other brother. They failed to discharge this burden.

The relinquishment of the right of a female heir in the inherited property in favor of a male heir, through gift or any other legal device, may take effect, but if the existence of such a transaction is denied and disputed by the said female heir, a presumption would be raised that the transaction was not genuine. The onus to prove that the transaction is genuine and was entered in good faith would be on the person who was claiming its genuineness. If such onus is not discharged satisfactorily, the document of relinquishment of rights would not ipso facto confer title adverse to the interest of the female heir.

**The nominee under an insurance policy is a mere trustee of the amount received and is bound to distribute the amount of insurance policy among the legal heirs per their entitlement.**

- **Parveen Akhtar v. Muhammad Adnan, et al.**

2010 CLC 380

Writ Petition No.280 of 2009, decided on 28 October 2009.

Asad Munir, J (Lahore High Court)

- **Facts:**

The late Khurshid Ahmad had two life insurance policies. The petitioner, his wife, was the nominee indicated in these insurance policies. Upon Ahmad's death, the proceeds of the life insurance policy were given to the petitioner, who has two minor sons with the deceased. The two respondents were the children of the deceased with Mst. Shafqat Bibi, whom he had divorced before his death.

- **Issue:**

Whether the respondents were entitled to share in the proceeds of the life insurance policies.

- **Decision:**

Yes. The nominee under an insurance policy is a mere trustee of the amount received and cannot appropriate the same to his use or benefit but is bound to distribute the amount of insurance policy among the legal heirs per their entitlement. The nomination merely confers a right to collect the money or to receive the money. It does not operate either as a gift or as a will and, therefore, cannot deprive the other heirs of the nominator who may be entitled thereto under the law of succession applicable to the deceased.



**No time limitation in case of co-sharers.**

- **Zakaria, et al. v. Amanullah, et al.**

2008 CLC 1291

Civil Revision No. 230 of 2006, decided on 16 May 2008.

Syed Musadiq Hussain Gillani, J (Peshawar High Court)

- **Facts:**

Abdul Rehman, the predecessor of the parties, was owner of the land subject of the dispute. He was survived by a widow, son and daughter. The son got the legacy of his father transferred in his name to the exclusion of his mother and sister. Subsequently, Rehman's widow died.

The respondents in this case were the legal heirs of Abdul Rehman's daughter, while the petitioners are the legal heirs of Abdul Rehman's son. The petitioners, with the collusion of Revenue staff, were able to successfully transfer the disputed land in their names. On the other hand, the respondents alleged that Rehman's daughter, being a pardanasheen lady, had no knowledge of the attestation of the mutation because her brother used to give her the share of the produce. On his death, the petitioners also kept on giving her the said share of produce but later on ceased from doing so.

- **Issue:**

Whether the respondents, being legal heirs of Rehman's daughter, are entitled to their share of the land.

- **Decision:**

Yes. Rehman's wife and daughter were not shown in existence, meaning that his son inherited the land under Shariat and not under customs. The daughter was also entitled to inherit her due share in the legacy of her mother and father. She was deprived of her due share. It is settled that no limitation runs against a co-sharer to enforce his rights under the inheritance. The daughter was therefore not required to institute the suit within six years under Article 120 of the Limitation Act, 1908.

### **Daughter cannot be alienated from her Islamic inheritance.**

- **Falak Sher, et al. v. Banno Mai, et al.**

2006 SCMR 884

Civil Petition No.2032-L of 1999, decided on 20 January 2003.

Javed Iqbal and Faqir Muhammad Khokhar, JJ (Supreme Court of Pakistan)

- **Facts:**

Banno Mai is the daughter of Meera. At his death, his property was inherited by Banno Mai as limited owner. She could not alienate the property by means of sale or mortgage. In case of her marriage, the property was to be reverted to the successors-in-interest of Meera.

Thereafter, she contracted marriage before the independence of Pakistan. As such she could not legally retain the property. The mutation of inheritance was made, by which ½ share of the property was transferred to Banno Mai and the remaining ½ share was transferred in favor of respondents. The respondents challenged this mutation of inheritance and also prayed for possession of the property.

- **Issue:**

Whether Banno Mai, Meera's daughter, is entitled to ½ share of the property.

- **Decision:**

Yes. The case of petitioner revolves around the fact that Mst. Bano was limited owner who had married prior to partition and before the promulgation of the Punjab Muslim Personal Law (Shariat) Application Act, 1948. As such, according to them, she was not entitled to inherit the property of her father because the succession was opened at the time of her marriage before partition, and not on 29-9-1970 i.e. the date of attestation of the mutation. The Court disagreed, stating that any ambiguity or confusion in this case has been clarified by section 2-A, West Pakistan Muslim Personal Law (Shariat) Act (Amendment Ordinance, 1983 (Punjab Ordinance XIII of 1983). Customary law was declared repugnant to the injunctions of Holy Qur'an. The Sunnah impact was discussed in *Abdul Ghafoor v. Muhammad Shafi*, PLD 1985 SC 407, where the Court said:

“...In the opening clause of the newly added section 2-A (to Act V of 1962) it has been made absolutely clear that notwithstanding anything to the contrary contained in section 2 of 1962 Act ‘or any other law for the time being in force’; and further, notwithstanding any custom or usage or decree, judgment or order of any Court, the governing law shall be Muslim Personal Law (Shariat); if, any male ‘heir’ had ‘acquired’ any agricultural land under custom before the application of Act IX of 1948 of 15th March 1948; provided the person from whom the said heir had acquired the land, was a Muslim. In order to make it more clear it has been provided that the said heir shall be deemed to have become, upon the said

acquisition, 'an absolute owner of such land, as if such land had devolved on him under the Muslim Personal Law (Shariat)."

Retrospective effect has been given to section 2-A. As such, Meera would be considered as absolute owner of the land in question being the last male heir. Accordingly, his legacy shall be devolved upon the legal heirs in accordance with the Muslim Personal Law of Inheritance. Banno Mai is thus entitled to  $\frac{1}{2}$  share of the property left by her father. She cannot be deprived from the share conferred upon her by the Muslim Personal Law of Inheritance, and the authenticity and validity of Mutation No. 647 sanctioned on 29-9-1970 is above board being in consonance with Islamic Law of Inheritance.

**Relinquishment without consideration of the share of the female heir is void. Women are suppressed and therefore their rights must be protected.**

- **Ghulam Ali v. Mst Sarwar Naqvi<sup>45</sup>**

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 and, the respondent (his daughter and their 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:**

1. Whether the petitioners (brothers) could use a moral reason to take their sister's inheritance.
2. 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.

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."

<sup>45</sup> 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>.

“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 it 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.”

## Maintenance / Custody / Guardianship

### **The grandfather is liable for his grandchildren’s maintenance if their father is not available or refuses to give such allowance.**

- **Sultan Ahmad v. Judge Family Court**

PLD 2012 Lah. 148

Writ Petition No. 27527 of 2011, decided on 19 January 2012.

Abdul Waheed Khan, J (Lahore High Court)

- **Facts:**

The respondents, grandchildren of the petitioner, filed a suit for maintenance allowance against their father. The claim for allowance was granted by the court, but the respondents’ father failed to satisfy the maintenance decree and went into hiding. The Executing Court then attached petitioner’s house and ordered it to be auctioned.

The petitioner assailed this order of the Executing Court, contended that (i) he was not a party to the suit, and therefore his property cannot be attached and auctioned, and (ii) since the judgment debtor (respondents’ father) was alive and well, and physically and mentally fit, the order should be executed against him and not any other person.

- **Issue:**

Whether petitioner’s property could rightfully be attached to answer for his grandchildren’s maintenance.

- **Decision:**

Yes. Minors cannot be left merciless and unattended. The judgment in Haji Nizam Khan v. Additional District Judge (PLD 1976 Lah. 930), quoted below, is informative:

“It is from the above main provisions of the Islamic Law on the question of the obligations and rights of the opulent and needy relations in Muslim society that as corollary it has been unquestionably accepted that a grandfather in easy circumstances is bound to maintain and support his needy grandchildren.”

Thus, when the judgment debtor/father, who is the petitioner’s real son, is unavailable, the grandfather is bound to provide maintenance allowance to his grandchildren.

**Cases pertaining to the maintenance of children, divorce, and return of dowry articles should be tried and decided on a priority basis. The courts are bound to dispose of such matters in six months.**

- **Muhammad Anwar Ansari v. Mst. Nazia Shamim, et al.**

PLD 2008 Kar. 477

Constitutional Petition No. S-235 and C.M.A. No. 1814 of 2007, decided on 15 May 2008

Khawaja Naveed Ahmad, J (Karachi High Court)

- **Facts:**

This constitutional petition is a case of recovery of dowry articles after the spouses divorced. Proceedings were initiated by the wife (respondent) against the petitioner in the year 2004. The suit was decided in favor of the respondent in March 2005. The petitioner appealed, but the Additional District Judge subsequently dismissed the appeal for non-prosecution. With the consent of the respondent, it was later on reinstated. However, the petitioner did not actively pursue the appeal. He alleged that his mother's illness prevented him from pursuing the appeal, but the certificate he submitted to the court did not indicate any serious illness on the part of his mother.

The matter has been pending with the High Court since May 2007 (or three years since the suit was instituted), and neither the petitioner nor his counsel presented themselves before the High Court

- **Issue:**

What are the consequences of party-induced delay in a suit for recovery of dowry articles?

- **Decision:**

Cases pertaining to the maintenance of children, khula'/divorce, as well as return of dowry articles, should be tried and decided on priority basis. If possible, the trial court should fix these cases every week and should see that on each date of hearing, some progress is made in the case. In case progress is not made, the party who created hurdles should be asked to pay the costs, for that particular day for delaying the matter. In our society, there are certain persons, who make the lives of their ex-wives and children miserable by showing arrogance and indifferent behavior towards them. These people sit in their private gatherings and express their sentiment that they are above the law and will ruin the lives of their ex-wives and teach a lesson to their ex-in laws. Judges should be vigilant about such ruthless and arrogant persons, who try to ruin their ex-wives' lives by delaying the return of their dowry articles, even after five years post-divorce. These dowry articles were given to them by their parents from their hard-earned money.

In spite of the fact that the Family Courts Act has been amended as to bind the courts to dispose of such matters within six months, the courts below have not taken any serious steps to follow the law in respect of expeditious disposal of family cases. I hereby direct all trial courts that execution proceedings in family matters should be fixed by Family Courts on a weekly basis. Courts should try to dispose of execution proceedings within one month from the date of filing of the same unless there are some exceptional circumstances causing delay in disposal of the execution.



### Coercive measures to recover maintenance money

- **Muhammad Ismail v. Superintendent, District Jail, Sheikhpura, et al.**

2007 CLC 128

Criminal Miscellaneous No.1035-H of 2006, decided on 20 September 2006.

Tariq Shamim, J (Lahore High Court)

- **Facts:**

Plaintiff/respondent filed suit for maintenance allowance against defendant/petitioner. This was decreed by the Family Court. Defendant appealed, but his appeal was dismissed by the Court. The plaintiff thereafter filed execution proceedings. The defendant filed an objection thereto, but the Court dismissed his objections and bailable warrants were issued against him.

The defendant thereafter filed an application seeking his release against bail bonds on the ground that he was willing to deposit Rs 10,000. The Court directed him to pay Rs.10,600 to the plaintiff at once and, on submission of surety bonds, the defendant was directed to be released from jail. The balance was ordered to be paid “within one month from the date of the orders” i.e., 15-6-2006. The defendant appeared before the Court on 28-6-2006 and requested for extension of time, but this was declined by the Court. On the last day fixed for the payment of the amount in question, the defendant filed an application under Order XXI, rule 29 read with section 151, C.P.C. for a stay of the proceedings. After hearing the parties, the Court dismissed the application and the defendant was taken into custody and sent to judicial lock-up.

The defendant thereafter filed another application seeking easy installments of the decretal amount. This was dismissed by the Court, which held that the defendant’s request for installments of Rs.1,000 per month was neither reasonable nor proper. The case was fixed for 29-7-2005 when it transpired that no payment had been made by the defendant, therefore the case was fixed for payment of the decretal amount for 4-9-2006.

On 25-8-2006, the defendant once again filed another application seeking his release from jail. This application was dismissed by the Court.

- **Issue:**

Whether the Court’s order committing the defendant to judicial lock-up is valid.

- **Decision:**

Yes. Family Courts Act, 1964 has created a special procedure for decision of family matters. C.P.C. and the Evidence Act are not applicable to a case before Family Courts since Family Courts are given inquisition jurisdiction through a special procedure provided under the Act for regulating family matters. The reason for exclusion of C.P.C. and the Evidence Act is that the spouse may have easy access to justice.

The execution of money decrees is governed by section 13(3) of the Family Courts Act, 1964, whereby the executing Court could summon the judgment-debtor to pay maintenance allowance. On his refusal to pay, the Court could proceed and adopt coercive measures. In the instant case the Executing Court, before passing order against the defendant for his committal in judicial lock-up, made concerted efforts to recover the decretal amount from him. However, the efforts of the Court were frustrated by the delaying tactics employed by the defendant.

Consequently, the detention of the defendant pursuant to the orders passed by the Executing Court is well within the ambit of the law and cannot be termed as illegal or arbitrary in any manner.

## Liability of the surety

- **Saleem Ullah v. Abadat Ali Malik, et al.**

2000 CLC 1648

Writ Petition No. 7551 of 2000, decided on 3 May 2000.

Falchar-un-Nisa Khokhar, J. (Lahore High Court)

- **Facts:**

A suit for maintenance allowance was decreed in favor of respondent. The latter sought execution of the said decree. A house, of which judgment-debtor was owner up to 1/3 share, was put to auction for recovery of the decretal amount as recovery of land revenue. Petitioner, husband of the judgment-debtor, appeared as her surety before the Court Auctioneer and undertook to pay the decretal amount to the decree-holder. This undertaking was accepted on behalf of the decree-holder.

However, petitioner/surety subsequently contended that he, not being a party to judgment and decree passed by Court, could not be held liable to pay the decretal amount.

- **Issue:**

What is the extent of a surety's liability?

- **Decision:**

Section 13(3) of the Muslim Family Courts Act, 1964 states in part:

“(3) Where a decree related to the payment of money and the decretal amount is not paid within the time specified by the Court, the same shall, if the Court so directs to recover as arrears of land revenue, and on recovery shall be paid to the decree-holder.

(4) The decree shall be executed by the Court passing it or by such other Civil Court as the District Judge may, by special or general order, direct.”

When the arrears under a decree are assessed as land revenue then the provision of section 80 onwards of the Land Revenue Act are made applicable. A defaulter under section 80 of the Land Revenue Act is defined in section 4(7) of the Act as meaning a person liable for arrears of land revenue and as including “a person who is responsible as surety for payment of the arrears”.

The petitioner stood as a surety. He was under no obligation to bind himself, but he did bind himself to pay the decretal amount. Therefore, the Civil Judge is correct in holding him liable for such amount.

**Warrant of attachment may also be issued.**

- **Bahadur Khan v. Kaneez Fatima, et al.**

2003 CLC 1620

Writ Petition No. 5624 of 2003, decided on 17 June 2003.

Fakhar-un-Nisa Khokhar, J. (Lahore High Court)

- **Facts:**

This case involves enforcement of a decree for recovery of the amount equivalent to dowry articles. The Executing Court issued a warrant of arrest against the judgment-debtor and sent him to civil imprisonment. The petitioner-surety, one of three such sureties, then stepped into shoes of judgment-debtor and undertook to pay the decretal amount if the judgment-debtor would not do so. On the strength of that undertaking, the judgment-debtor was released from jail.

However, the judgment-debtor failed to pay the decretal amount. As such, notices were issued to the surety and the judgment-debtor was again sent to civil imprisonment. The Trial Court sent a warrant of attachment and auction against the petitioner-surety, who challenged the warrant by contending that he performed his duty when he produced the judgment-debtor before the Executing Court.

- **Issue:**

Whether or not a warrant for attachment may be issued against the surety.

- **Decision:**

Yes. When the judgment-debtor refuses to pay the decretal amount, the Executing Court can assess the same as arrears of land revenue, in which case it is recoverable as arrears of land revenue. All the three sureties had voluntarily stepped into the shoes of the judgment-debtor, and they have given clear undertaking that in case the judgment-debtor fails to pay what is due, then they will pay the decretal amount. Therefore, the warrant of attachment against the sureties was correctly issued.

## Arrears of Land Revenue

- **Tahir Farooq v. Judge Family Court, et al.**

2002 MLD 1758

Writ Petition No.11163 of 2002, decided on 2 July 2002.

Fakhar-un-Nisa Khokhar, J (Lahore High Court)

- **Facts:**

Respondent No. 2, who is the petitioner/judgment-debtor's wife, and Respondent No. 3, their minor child, filed suit for recovery of maintenance against the petitioner and past maintenance from May 1997 onwards. The Court decreed a maintenance allowance in favor of the minor to the extent of Rs.1,000 per month from 22-4-1998, as well as future maintenance to the minor at the rate of Rs.1000 per month. Maintenance for the wife was disallowed.

Petitioner filed an appeal, but the same was dismissed. Respondent No. 2 then filed an application for execution of the judgment. During execution proceedings, the petitioner was sent to lock-up for a period of one year on 1-12-2001; he is still in civil detention on account of non-payment of maintenance to the minor child.

The petitioner assailed the orders of the Executing Court. He contended, among others, that as the provisions of Family Courts Act regarding grant of maintenance are borrowed from the provisions of section 488, Cr. P.C. (since repealed), therefore the Judge Family Court had no jurisdiction to order the petitioner to civil prison. He could only be detained in civil prison with the orders of the Collector.

- **Issue:**

Whether the petitioner's detention in civil prison is illegal.

- **Decision:**

No. Section 13(1), (3) and (4) of the West Pakistan Family Courts Act, 1964 state:

“(1) The Family Court shall pass a decree in such form and in such manner as may be prescribed, and shall enter its particulars in the prescribed register;

xxx

(3) Where a decree relates to the payment of money and the decretal amount is not paid within the time specified by the Court, the same shall, if the Court so directs to recover as arrears of land revenue, and on recovery shall be paid to the decree-holder;

(4) The decree shall be executed by the Court passing it or by such other Civil Court as the District Judge may, by special or general order direct.”

The objection raised by the petitioner that the Judge Family Court, after assessing the same as arrears of land revenue, could not act as a Collector is without substance. It is very clear from section 13(4) of the West Pakistan Family Courts Act, 1964 that a decree shall be executed by the Court who has passed the same or by any such Civil Court as the District Judge may by special or general order direct. The West Pakistan Family Courts Act intended to circumvent the litigation between the parties as much as possible. As such, section 13 gives the Family Court as executing Court vast powers relating to the enforcement of decree.

Under section 13(2), if the judgment-debtor pays the money or any property is delivered to the decree-holder, the learned Judge Family Court shall enter the fact of payment and delivery of property in the register. But if the decretal amount is not paid within the time specified by the Court (if the Court so directs to be recovered as arrears of land revenue) that means that the Family Court has vast powers to assess the decretal amount recoverable as arrears of land revenue and direct the same to be recovered under section 80 onward of the Land Revenue Act. The Judge Family Court may do that by himself or he may forward the warrants to the Collector to recover the same as arrears of land revenue. The Family Court can also stop the proceedings and give time to the judgment-debtor to pay and satisfy the decretal amount, or direct the decree to be paid in such installments as it deems fit.

In addition, Section 55, C.P.C. states:

“A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall, as soon as practicable, be brought before the Court (which may make an order for his detention in prison to suffer simple imprisonment for a period not exceeding one year.)”

This provision applies where the decree in execution is a decree for payment of money. In the present case, the statement of judgment-debtor shows that he is desperately unwilling to satisfy the decree of maintenance granted by Judge Family Court and confirmed by the Appellate Court. Under section 13 of the West Pakistan Family Courts Act, 1964 the Family Court has powers to adopt procedures for satisfying the decree granted by it, as section 13(3) starts with the words “where a decree relates to payment of money and decretal amount is not paid within the time specified by the Court” and then the words “if the Court so directs”. Section 13(4) also provides that the decree shall be executed by the Court passing it or by such other Civil Court as the District Judge may by special or general order direct. Therefore, the Family Court, being the Executing Court, is also empowered to order for recovery of the decretal amount otherwise than as arrears of land revenue.

## Swara and Vanni

### The judiciary as a catalyst for social change

- **Samar Minallah v. Federation of Pakistan**<sup>46</sup>

(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

<sup>46</sup> Excerpt below from: Samar Minallah Khan. The Supreme Court of Pakistan and Compensation Marriages. <http://ethnomedia.pk/pdf/Booklet.pdf>

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 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 Against Jirga and Compensation Marriages.”



## **Jirga members accused of violating Section 310-A of Pakistan Penal Code<sup>47</sup> 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:

- 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.

<sup>47</sup> “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 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.”

**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.

## Honor Killing

### Compounding of offenses

- **Ghulam Yasin v. The State, et al.**

PLD 2017 Lah 103

Case No. CrI. 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.

- **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.<sup>48</sup> 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.

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.

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<sup>48</sup> 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."

## 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)<sup>49</sup> of the later law.

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 Kalashnikov. The act

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<sup>49</sup> “(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 were 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.”

of the respondent, as alleged, falls under section 6(g)<sup>50</sup> 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.

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<sup>50</sup> 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 witnessed 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 womenfolk 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.<sup>51</sup>

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.

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<sup>51</sup> 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).”



### **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<sup>52</sup> (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 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.

<sup>52</sup> 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.

**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.

## Rape

### Guidelines issued by the Supreme Court to be followed in the investigation and prosecution of all rape cases

- **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.

## Paternity of the child confirmed through DNA testing

- **Mohammad Shahid Sahil v. The State**<sup>53</sup>

PLD 2010 FSC 215

(Federal Shariat Court)

- **Facts:**

The petitioner was alleged to have committed rape, and as a result, the victim conceived and gave birth to a baby girl. The victim made an application for conducting a DNA test of the petitioner/accused, which was accepted by the trial court. The Court directed the petitioner/accused to appear for a DNA test in order to ascertain whether the victim's daughter was related to him or not. The petitioner/accused challenged this order.

- **Issue:**

Whether the court's order directing a DNA test of the petitioner was proper.

- **Decision**

The Federal Shariat Court did not find any legal infirmity in the order and confirmed it. The Court observed that once a DNA test is conducted, its report would be produced as evidence by summoning the expert who conducted the test. The accused would have an opportunity to cross-examine the expert, and that would be sufficient to grant him a fair opportunity to question the validity of the evidence. The Court said that DNA evidence was the best available evidence in this case for unearthing the truth without loss of time. The Court noted:

“The prosecution agencies should take heed and use latest available technology to trace and locate the actual criminal. Under Article 164 of QSO, a court might allow to be produced any evidence available because of modern devices or techniques. Furthermore, the Holy Qur'an and Sunnah did not forbid employing scientific or analytical methods in discovering the truth. On the contrary, the discovery and investigation had been strongly recommended by both. The courts in matters relating to Offence of Zina (Enforcement of Hudood) Ordinance 1979 had all the powers to permit reception of evidence including resort to DNA test, if demanded by the occasion. It is fundamental duty of the courts to arrive at the truth without depriving an affected party to establish its point of view.”

<sup>53</sup> Digest taken from: Cheema, Shahbaz Ahmad. DNA Evidence in Pakistani Courts: An Analysis. LUMS Law Journal. <https://sahsol.lums.edu.pk/law-journal/dna-evidence-pakistani-courts-analysis>



## Ocular account preferred over DNA

- **Aman Ullah v. The State**

PLD 2009 SC 542

Criminal Petition No. 250-L of 2009, decided on 29 May 2009

Khalil-Ur-Raman 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.

## Runaway Marriages: Elopement vs. Zina

- **Abid Hussain v. The State**

2002 YLR 3972

Criminal Miscellaneous No. 679-B of 1999, decided on 4 October 1999

Muhammad Zafar Yasin, J (Lahore High Court)

- **Facts:**

Petitioner-accused was charged under sections 11/10(3) of the offence of Zina (Enforcement of Hudood) Ordinance VII of 1979. However, he contended that (i) he was in fact married to Mst. Pathano on 13 January 1999, and (ii) his wife filed a complaint against her parents the next day in which she appeared before the Magistrate and made a categorical statement that she is the legally wedded wife of the petitioner; that she was never abducted by anybody; that she and accused were living a happy marital life; and that she was never subjected to Zina-bil-Jabr.

Shortly thereafter, Mst. Pathano was recovered by her parents and, in her statement on 25-2-1999 under S.164, Cr.P.C., she levelled an allegation of Zina against the accused. She then filed a suit for dissolution of marriage on the basis of Khula before the Judge Family Court. At the same time, the petitioner also filed a suit for restitution of conjugal rights in the same Court. Both family suits are pending adjudication.

The petitioner has been in judicial lock-up since 16 March 1999, and more than six months have passed since his arrest. The petitioner is now seeking post-arrest bail.

- **Issue:**

Whether the accused is entitled to bail on the ground that the facts show a prima facie case of elopement.

- **Decision**

Yes. From the F.I.R., it appears prima facie that this is a case of elopement and not Zina-bil-Jabr.

Mst. Pathano has made inconsistent statements. Hence, there are no reasonable grounds to believe that the petitioner has committed an offense that is covered by a prohibitory clause. Moreover, the petitioner has been behind bars for more than six months and no purpose would be served if he is detained further. It is well-established principle of law that bail cannot be withheld as a punishment; otherwise the benefit of inconsistency is to be given to the accused at the bail stage.

## Rape of a minor girl below 16 years of age

- **Amanullah v. The State**

1987 MLD 2172 Kar.

Criminal Appeal No. 97 of 1984, decided on 28 June 1987

Abdul Razzak A. Thahim, J (Karachi High Court)

- **Facts:**

The circumstances of the case show that Mst. Alam Ara, a 14-year old girl, had gone on her own accord with the accused. She was with the accused for 2 days, however she contended that the accused raped her at knifepoint. Semen was detected on the underwear of the accused and the clothes of Mst. Alam Ara.

The accused was tried and convicted for offences under section 363/376 read with section 34 P.P.C. Hence this appeal.

- **Issue:**

(1) Whether the accused is guilty of kidnapping if the alleged victim went with him voluntarily.

(2) Whether the accused is guilty of rape.

- **Decision**

The age of the girl has been proved to be 14 years. According to section 361, C.P.C. whoever takes or entices any female minor under 16 years of age, out of the keeping of her lawful guardian, without such guardian's consent, is said to kidnap such minor from her lawful guardian. If it is proved, then the accused is liable for conviction under section 363, P.P.C. Therefore, in the present case, the fact that Mst. Alam Ara may have consented to leaving with the accused is immaterial, as the victim was a minor below 16 years of age.

With regard to the rape charge, sections 375 and 376, P.P.C state that if the rape is committed with a girl below 16 years of age, with or without her consent, then the accused is guilty of rape.

## MODULE 3: RELEVANCE OF INTERNATIONAL STANDARDS

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### Sources of International Law: Customary Law

- **A. M. Quershi v. Union of Soviet Socialist Republics, et al.**

PLD 1981 Supreme Court 377

(Supreme Court of Pakistan)

- **Facts:**

The plaintiff has filed this suit against the Union of Soviet Socialist Republics (USSR) and the Trade Representation in Pakistan of that Union for the recovery of Rs. 45,19,333. Out of this amount, Rs. 33,17,333 was claimed by way of commission for arranging the sale of one thousand trucks and two thousand jeeps of the defendants, and Rs. 12,02,000 by way of damages for breach of contract. The breach is said to consist of the failure of the defendants to give to the plaintiff the agency for selling similar vehicles.

Defendant USSR put up the defense of absolute sovereign immunity. At the time the case was constituted in the High Court, there was no domestic law to govern sovereign immunity. The High Court agreed with the defendant, hence plaintiff's recourse to the Supreme Court of Pakistan for quashing of the judgment.

- **Issue:**

Whether or not the USSR enjoyed absolute sovereign immunity from being sued in the courts of Pakistan.

- **Decision:<sup>54</sup>**

The Supreme Court, in order to come to a definite conclusion, examined the customary international law principles and state practice regarding sovereign immunity. While examining customary international law principles, the court opined that "to prove the existence of a rule of international customary law or general law, it is necessary to establish that states act in this way because they recognize their legal obligation to this affect".

After examining the practice of states the Supreme Court came to the conclusion that:

"To give our answers straight away, our study has led us to the conclusion that the grant or acceptance of absolute jurisdictional community to the foreign

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<sup>54</sup> Decision taken from Asian Yearbook of International Law, vol. 4 (1994), pp. 132-133.

state has neither been a uniform practice nor a rigid obligatory rule, and there has never been a uniformity of courts of various countries in this respect, and if at any interval of time in the world it was so consider then it has undergone a tremendous change and as rather entrenched to the contrary”.

In addition to the state practice, the Supreme Court also surveyed the case law beginning with the observation of Lord Denning in the famous case of Ibrahim Rahimtoola v. Nizam of Hyderabad. The court also considered the views and opinions of the jurists and expert writers and came to the conclusion that “it will appear that they also constitute, if not conclusive, at least prima facie evidence of the development of restrictive immunity.” The Supreme Court decided the case on the basis of the restrictive immunity principle, viz. no immunity for transactions of a commercial nature.

## Drawing on International Law

- **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 the 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 law. 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...”

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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.

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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.”

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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.

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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.



## Examples of Cases Applying International Law

### Bangladesh

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- **Bangladesh National Women Lawyers Association (BNWLA) v. Government of Bangladesh, et al.**

Writ Petition No. 5916 of 2008; An application under Article 102(2) (a) (ii) of the Constitution of the People's Republic of Bangladesh.

SM Hossain, J (Supreme Court)

- **Facts:**<sup>55</sup>

The Bangladesh National Women Lawyers Association (BNWLA) filed a writ petition against the Government, seeking urgent steps to be taken to prevent sexual harassment against women at the place of work or study. On the date the petition was filed, there existed no legislative provisions protecting women from abusive behavior by men in high-level positions in the workplace or in educational institutions.

BNWLA requested that the Court order the Government to adopt legislation aimed at preventing sexual harassment and protecting and safeguarding the rights of women. Several incidents involving sexual harassment in workplaces or in places of study, such as schools and universities, were highlighted in the petition.

- **Decision:**

The Fundamental Rights guaranteed in chapter III of the Constitution of Bangladesh are sufficient to embrace all the elements of gender equality including prevention of sexual harassment or abuse. [...] The international conventions and norms are to be read into the fundamental rights in the absence of any domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction to interpret municipal law in conformity with international law and conventions when there is no inconsistency between them or there is a void in the domestic law.

Bangladesh acceded to the CEDAW on 6-11-1984. It is also a signatory to the "Declaration on the Elimination of Violence against Women (Resolution No. 48/104 of 20 December 1993)". If we make a comparison of Part III of the Constitution with the Universal Declaration of Human Rights (UDHR) we shall find that most of the rights enumerated in the Declaration have found place in some form or other in Part III and some have been recognized in Part II of the Constitution. The Declaration was followed by two Covenants, Covenant on Civil and Political Rights (ICCPR) and Covenant

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<sup>55</sup> Facts taken from the summary in Global Health and Human Rights Database <http://www.globalhealthrights.org/asia/bangladesh-national-women-lawyers-association-bnwla-v-government-of-bangladesh-ors/>

on Economic, Social and Cultural Rights (ICESCR) adopted by the United Nations General Assembly in December, 1966 making the rights contained in the UDHR binding on all states that have signed the treaty, creating human rights law. Bangladesh acceded to both ICCPR and ICESCR.

Our courts will not enforce those Covenants as treaties and conventions, even if ratified by the State, are not part of the corpus juris of the State unless those are incorporated in the municipal legislation. However, the court can look into these conventions and covenants as an aid to interpretation of the provisions of Part III, particularly to determine the rights implicit in the rights like the right to life and the right to liberty, but not enumerated in the Constitution.

In view of this, the Court issued guidelines on sexual misbehavior to be followed and observed at all work places and educational institutions till adequate and effective legislation is made in this field. These directives are aimed at filling up the legislative vacuum.

## India

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- **Vishaka & Ors v State of Rajasthan & Ors**<sup>56</sup>

6 SCC 241

13/08/1997

Verma, CJI (Supreme Court of India)

- **Facts:**

The litigation resulted from a brutal gang rape of a publicly employed social worker in a village in Rajasthan during the course of her employment. The petitioners bringing the action were various social activists and non-governmental organisations.

Under Article 32 of the Indian Constitution, an action was filed in order to establish the enforcement of the fundamental rights relating to the women in the workplace. In particular it sought to establish the enforcement of Articles 14,<sup>57</sup> 15,<sup>58</sup> 19(1)(g)<sup>59</sup> and 21<sup>60</sup> of the Constitution of India and Articles 11<sup>61</sup> and 24<sup>62</sup> of the Convention on the Elimination of All Forms of Discrimination against Women. India is a party to the CEDAW.

- **Decision:**

The fundamental right to carry on any occupation, trade or profession depends on the availability of a 'safe' working environment. The right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, belongs to the legislature and the executive. When, however, instances of sexual harassment resulting in violations of Articles 14, 19 and 21 are brought under Article 32, effective redress requires that some guidelines for the protection of these rights should be laid down to fill the legislative vacuum.

The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to compass all the facets of gender equality including

<sup>56</sup> Digest taken from Equal Rights Trust [http://www.equalrightstrust.org/ertdocumentbank/Microsoft%20Word%20-%20Vishaka\\_edited.pdf](http://www.equalrightstrust.org/ertdocumentbank/Microsoft%20Word%20-%20Vishaka_edited.pdf)

<sup>57</sup> Article 14 (the right to equality)

<sup>58</sup> Article 15 (the right to non discrimination)

<sup>59</sup> Article 19(1)(g) (the right to practise one's profession)

<sup>60</sup> Article 21 (the right to life)

<sup>61</sup> Article 11: "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. [...]"

<sup>62</sup> Article 24: "States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention."

prevention of sexual harassment or abuse. Independence of Judiciary forms a part of our constitutional scheme. The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the fields when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law.

In light of these deliberations, the Court outlined guidelines which were to be observed in order to enforce the rights of gender equality and to prevent discrimination for women in the workplace.

These guidelines included the responsibility upon the employer to prevent or deter the commission of acts of sexual harassment and to apply the appropriate settlement and resolutions and a definition of sexual harassment which includes unwelcome sexually determined behaviour (whether directly or by implication) such as:

- physical contact and advances;
- a demand or request for sexual favours;
- sexually-coloured remarks;
- showing pornography;
- any other unwelcome physical, verbal or non-verbal conduct of a sexual nature.

Furthermore the guidelines set out that persons in charge of a workplace in the public or private sector would be responsible for taking the appropriate steps to prevent sexual harassment, including:

- The prohibition of sexual harassment should be published in the appropriate ways and providing the appropriate penalties against the offender;
- For private employees, the guidelines should be included in the relevant employment guidelines;
- Appropriate working conditions in order to provide environments for women that are not hostile in order to establish reasonable grounds for discrimination;
- The employer should ensure the protection of potential petitioners against victimisation or discrimination during potential proceedings;
- An appropriate complaints mechanism should be established in the workplace with the appropriate redress mechanism;
- Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person-in-charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.

- **Mackinnon Mackenzie v. Audrey D'Costa and another**

2 SCC 469

26 March 1987

(Supreme Court of India)

- **Facts:**

After her employment was terminated, the respondent female employee charged her employer with discrimination under the Equal Remuneration Act (No. 25 of 1976). She claimed that she was paid less as a stenographer than male stenographers performing the same work or work of a similar nature. She thus claimed that she was entitled to recover from the petitioner the amount equivalent to the difference between the remuneration which she was being paid and the remuneration which was being paid to the male Stenographer who had put in the same length of service.

- **Issue:**

Whether the petitioner had violated the provisions of Section 4 of the Equal Remuneration Act, 1976.

- **Decision:**

The Court interpreted a national legislation in conjunction with ILO Convention No. 100 and European jurisprudential practice in the field. The Supreme Court of India found that Ms D'Costa had received much lower pay than her male colleagues performing work of equal value. The fact that there was no man employed in the same job in the company was irrelevant, since the principle of equal remuneration presupposed that the same level of pay be guaranteed not only to persons performing identical jobs but also to persons performing work that was different but was considered to be of equal value. "Before dealing with the contentious of the parties, it is necessary to set out the relevant legal provisions governing the case. Article 39(d) of the Constitution of India provides that the State shall, in particular, direct its policy towards securing that there is equal pay for equal work for both men and women. The Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value was adopted by the General Conference of the ILO on June 29, 1951. India is one of the parties to the said Convention."

## Australia

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- **Minister for Immigration and Ethnic Affairs v. Teoh**

183 CLR 273

7 April 1995

Mason CJ and Deane J (High Court of Australia)

- **Facts:**

Ah Hin Teoh, a Malaysian citizen, came to Australia in May 1988 and was granted a temporary entry permit. In July 1988, Teoh married Jean Lim, an Australian citizen and the de facto spouse of Teoh's deceased brother. Mrs Teoh had four children, one from her first marriage and three from the de facto relationship. Subsequently, Mr and Mrs Teoh had three children together. In October 1988, Teoh was granted a further temporary entry permit that enabled him to remain in Australia until February 1989. Prior to the expiry of the permit, Teoh applied for a grant of resident status. In November 1990, whilst this application was being processed, Mr Teoh was convicted on charges of heroin importation and possession.

In January 1991, Teoh was notified pursuant to the Migration Act 1958 that his application for resident status had been refused on the ground that he could not meet the good character requirement as he had a criminal record. In February 1991, Teoh applied for a review of the decision, providing documentation that included a testimonial from Teoh's mother-in-law who stated that Teoh was the only person who could keep the family together.

The Immigration Review Panel rejected the review in July 1991, highlighting the seriousness of Teoh's criminal conviction. This decision was accepted by the Immigration Minister, and in February 1992 an order was made that Teoh be deported. Teoh sought a review of both the acceptance of the recommendation and the decision to deport.

In September 1993 in the Federal Court, French J dismissed the application, finding that the acceptance of the Panel's recommendation and the ordering of deportation had not been an improper exercise of power, a denial of natural justice, nor did it involve the consideration of irrelevant factors by the decision-makers.

On appeal, the full bench of the Federal Court (Black CJ, Lee and Carr JJ) found that the decision-maker's power had been improperly exercised because it had failed to make appropriate investigations into the hardship to Teoh's wife and her children were

Teoh refused resident status.<sup>63</sup> The judges referred to Article 3.1 of the Convention on the Rights of the Child (CROC) which provides that “(i)n all actions concerning children ... the best interests of the child shall be a primary consideration.” Australia had ratified CROC, but it had not yet incorporated CROC’s provisions into its national law by statute. The full court ordered a stay of the deportation order until the decision had been reconsidered in light of the court’s finding. The Immigration Minister appealed against the decision to the High Court of Australia.

- **Issue:**

Whether the ratification of an international convention (in this case, CROC) can be a basis for the existence of a legitimate expectation.

- **Decision:**

Yes. It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute. A treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law. In this case, it is common ground that the provisions of the Convention have not been incorporated in this way.

But the fact that the Convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia’s obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, *prima facie*, intends to give effect to Australia’s obligations under international law.

The critical questions to be resolved are whether the provisions of the Convention are relevant to the exercise of the statutory discretion and, if so, whether Australia’s ratification of the Convention can give rise to a legitimate expectation that the decision-maker will exercise that discretion in conformity with the terms of the Convention.

The existence of a legitimate expectation that a decision-maker will act in a particular way does not necessarily compel him or her to act in that way. That is the difference between a legitimate expectation and a binding rule of law. To regard a legitimate expectation as requiring the decision-maker to act in a particular way is tantamount

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<sup>63</sup> “Black CJ found that the existence of the Convention on the Rights of the Child (CROC) emphasized the need for special care to be taken in respect of decisions that separate children from a parent, and that the decision-maker had failed to obtain more information in respect of the welfare of the family unit prior to making the decision to refuse the appellant resident status. Lee and Carr JJ held that the ratification of CROC created a legitimate expectation in parents and children, whose interests would be affected by the actions of the Commonwealth relating to children, such that the Commonwealth’s actions would be of a nature that complied with the principles of CROC.” (Roberts, Susan. “Teoh v Minister For Immigration: The High Court Decision and the Government’s Reaction to it” [1995] AUJHRights 10.)

to treating it as a rule of law. It incorporates the provisions of the unincorporated convention into our municipal law by the back door.

But, if a decision-maker proposes to make a decision inconsistent with a legitimate expectation, procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course. So, here, if the delegate proposed to give a decision which did not accord with the principle that the best interests of the children were to be a primary consideration, procedural fairness called for the delegate to take the steps just indicated.

It can be said that the delegate carried out a balancing exercise in which she considered the plight of Mrs. Teoh and the children and recognized that they would face a “very difficult and bleak future” if the respondent were deported. On the other hand, she considered that the respondent had been convicted of very serious offences and this factor outweighed the “compassionate claims”. However, it does not seem to us that the Panel or the delegate regarded the best interests of the children as a primary consideration. The last sentence in the recommendation of the Panel reveals that, in conformity with the departmental instructions, it was treating the good character requirement as the primary consideration.

The language of that sentence treats the policy requirement as paramount unless it can be displaced by other considerations. There is no indication that the best interests of the children are to be treated as a primary consideration. A decision-maker with an eye to the principle enshrined in the Convention would be looking to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it. The decision necessarily reflected the difference between the principle and the instruction. That view entails the conclusion that there was a want of procedural fairness.

Appeal dismissed.



## Malaysia

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- **Lee Lai Ching v. Lim Hooi Teik**<sup>64</sup>

Civil Suit No. 22-587 of 2004

8 February 2013

(High Court of Malaya, Pulau Pinang)

- **Facts:**

The complainant, Lee Lai Ching, was the natural mother of Lim Chee Zheng (“the child”). She alleged that the defendant was the child’s natural father and wanted the court to order him to undergo DNA testing to determine paternity. The defendant denied that he was the child’s father and refused to undergo the test, relying on the authority of a precedent case (the “Peter James Binsted” case). In that case, the High Court held that a person could not be compelled under the existing law in Malaysia to undergo DNA testing to determine paternity, ruling that whoever subjected a person against his will to undergo such a test would be voluntarily causing hurt, an offence under section 323 of the Penal Code.

The complainant relied on the CROC, to which the Malaysian Government had acceded in 1995 albeit with reservations, and argued that the Court should determine the issue by considering whether ordering the defendant to undergo DNA testing was in the best interests of the child in accordance with Article 3(1). The complainant also relied on Article 8(1) and (2) of the Federal Constitution and argued that the child was entitled to equal protection of the law and therefore had the right to know the identity of his biological father.

- **Issue**

Whether the Court could compel a person to undergo DNA testing for paternity.

- **Decision**

Yes. The Court ordered the DNA test as it was in the best interest of the child to determine paternity.

The Court considered that international conventions and treaties to which Malaysia was signatory had been invoked by courts to resolve disputes when merited, and noted that in several other jurisdictions such as the United States, Canada, United Kingdom, France, Germany, Israel and China, the courts had power to order paternity tests.

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<sup>64</sup> Digest taken from <https://www.crin.org/en/library/legal-database/lee-lai-ching-v-lim-hooi-teik>

In the exercise of judicial discretion and the inherent power of the court, and having regard to Article 3 of the CRC, the Court held that it was in the best interests of the child that the defendant be ordered to undergo DNA testing to determine paternity. In reaching its conclusion that the child had the right to know whether the defendant was his father, the Court considered Article 7 of the CRC, which states that a child had the right to know and be cared for by his or her parents, and found it to be applicable as it did not contradict and indeed was very much in conformity with the Federal Constitution, national laws and national policies of the Government of Malaysia.

The decision in the Peter James Binsted case was found to be distinguishable as the issue of the best interests of the child had not been considered in that case, which the Court emphasized had been decided within an overly narrow scope 13 years ago. An order for DNA testing should not be construed as causing ‘hurt’ as defined in the Penal Code because the intention or objective behind the test was to determine paternity. No intentional harm would be caused as only a blood sample was required for the test. With the advent of technology, even extraction of blood might not be necessary and a simple swab of sweat or saliva might suffice.

## United Kingdom

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- **R v Secretary of State for the Home Department, ex parte Daly**<sup>65</sup>

[2001] UKHL 26

(House of Lords)

- **Facts:**

Following a prison break on September 9, 1994, an inquiry was set up, which led to an official report to Parliament. The report of the inquiry recommended, among other things, that cells and property should be searched at frequent but irregular intervals. Following a strip search, each prisoner was to be excluded from his cell during the search, to avoid intimidation. The inquiry team gave no consideration at any stage to legal professional privilege or confidentiality.

The following policy was introduced in Security Manuals as an instruction to prison governors in order to give effect to the inquiry team's recommendations: during a cell search staff must examine legal correspondence thoroughly in the absence of the prisoner. The policy also stated that the staff must examine the correspondence only so far as necessary to ensure that it is bona fide correspondence between the prisoner and a legal adviser and does not conceal anything else.

The appellant argued that a blanket policy of requiring the absence of prisoners when their legally privileged correspondence is examined infringes, to an unnecessary and impermissible extent, a basic right recognized and under Article 8 of the European Convention of Human Rights. The appellant did not claim that privileged legal correspondence is immune from all examination, only that such examination should ordinarily take place in the presence of the prisoner whose correspondence it is.

- **Issue:**

Was the searching of legally privileged items disproportional.

- **Decision:**

Yes. The claim was successful. The Law Lords noted prior European Court of Human Rights case law that emphasized the importance of correspondence between a prisoner and his or her lawyer. The European Court previously held that the "reading of a prisoner's mail to and from a lawyer, on the other hand, should only be permitted in exceptional circumstances when the authorities have reasonable cause to believe that the privilege is being abused in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature." While holding

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<sup>65</sup> Digest from <http://hravillains.blogspot.com/2013/01/r-on-application-of-daly-v-secretary-of.html>

that common law required a finding for the appellant in this case, the Law Lords (Lord Bingham in particular) also found that the policy interfered with the appellant's exercise of his right to privacy under Article 8.1 to an extent much greater than necessity required.

On fundamental human rights, Lord Cooke of Thorndon stated: "First, while this case has arisen in a jurisdiction where the European Convention for the Protection of Human Rights and Fundamental Freedoms applies, and while the case is one in which the Convention and the common law produce the same result, it is of great importance, in my opinion, that the common law by itself is being recognized as a sufficient source of the fundamental right to confidential communication with a legal adviser for the purpose of obtaining legal advice. Thus the decision may prove to be in point in common law jurisdictions not affected by the Convention. Rights similar to those in the Convention are of course to be found in constitutional documents and other formal affirmations of rights elsewhere. The truth is, I think, that some rights are inherent and fundamental to democratic civilized society. Conventions, constitutions, bills of rights and the like respond by recognizing rather than creating them."

## Pakistani Cases Applying CEDAW

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- **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<sup>66</sup> and the U.N. Convention on Elimination of all Forms of Discrimination Against Women.<sup>67</sup> The prosecution launched against the petitioners prima facie reflects not only malice in fact but also male in law.

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<sup>66</sup> The Court referred to Article 35, which enjoins the State to protect the marriage and the family.

<sup>67</sup> 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.”

- **Mst Humaira Mehmood v. The State**<sup>68</sup>

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 November 1998, 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 against her. She was later released.

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

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<sup>68</sup> Digest from: PLD, A Digest of Case Law on Human Rights of Women (Asia Pacific) (2006). Available at SSRN: <https://ssrn.com/abstract=2690179>

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 Abdul Rehman**

NLR 2004 SD 129

- **Facts:**

This case involved an application for divorce by the wife on the basis of cruel and inhuman behavior of the husband.

- **Decision**

The court, discussing women's right to divorce under Islamic law, declared that equality is maintained between the spouses by allowing the wife this right through intervention of the court.<sup>69</sup> The court referred to the Humaira case approvingly, quoting the Cairo Declaration on Human Rights in Islam and CEDAW and arguing that the Government is under obligations under Qur'an and Sunna and international conventions to ensure the rights of women during marriage and at its dissolution.<sup>70</sup>

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<sup>69</sup> Shaheen Sardar Ali. Navigating Religion, Politics and Cultural Norms: the Arduous Journey toward Domestication of CEDAW in Pakistan. *Journal of Peace, Conflict & Development* (University of Bradford). See here: <http://www.bradford.ac.uk/social-sciences/peace-conflict-and-development/issue-19/Iss-19-Art-D-Shaheen.pdf>

<sup>70</sup> *Id.*

- **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<sup>71</sup> of the said Act to obtain Pakistan citizenship for his foreign wife.

- **Issue:**

Whether gender discrimination in Section 10 of the Citizenship Act is discriminatory and unconstitutional.

- **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 community 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

<sup>71</sup> 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.

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).

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...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.”

## Discrimination – Comparator

- **Beatrice Fernandez v. Malaysian Airlines**

2 CLJ 713

(Federal Court of Malaysia)

- **Facts:**<sup>72</sup>

Ms. Beatrice Fernandez began working as a flight stewardess for Malaysia Airlines (MAS) in 1980. Eleven years into her service at MAS, and after promotion to the position of leading stewardess, Ms. Fernandez became pregnant. A 1988 collective agreement that governed the terms and conditions of her service required a female stewardess to resign on becoming pregnant and allowed the company to terminate her services should she not resign. After she became pregnant and refused to resign, the airline terminated her services in 1991.

Ms. Fernandez brought an action in the High Court in November 1991 seeking a declaration that various provisions in the collective agreement were invalid based on article 8 of the Federal Constitution and/or that her termination of service was void because it contravened section 14(3) of the Industrial Relations Act 1987 and section 7 of the Labour Act 1955. She also sought damages, interests, and costs. The High Court dismissed Ms. Fernandez’s application in 1996 and the Court of Appeal dismissed her appeal in a judgment on 5 October 2004.

In its judgment, the Court of Appeal ruled that constitutional remedies were not available to Ms. Fernandez because the constitution only protects an individual’s fundamental rights from actions by a public authority and there was no evidence to show that MAS is a public authority. Even if it could be considered a public authority, the Court ruled that neither article 8(1) nor 8(2) of the Federal Constitution, which provide equality for all citizens before the law, applied to the case. Article 8(1)<sup>73</sup> does not apply because a collective agreement cannot be considered “law”. Article 8(2),<sup>74</sup> which has prohibited discrimination based on gender since it was amended in 2001, had not been amended at the time of Ms. Fernandez’s termination and cannot be applied retrospectively.

On whether the provision in the collective agreement on termination by reason of pregnancy is void, the Court held that the Employment Act is not relevant to the particular provision.

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<sup>72</sup> Statement of facts taken from Joint Press Statement of the Joint Action Group against Violence Against Women (JAG-VAW). [http://www.wao.org.my/backup\\_v1\\_21.7.2011/news/20050103mas.htm](http://www.wao.org.my/backup_v1_21.7.2011/news/20050103mas.htm)

<sup>73</sup> “All persons are equal before the law and entitled to the equal protection of the law.”

<sup>74</sup> “Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.”

- **Issue:**

Whether Beatrice was discriminated against.

- **Decision:**<sup>75</sup>

No. The Federal Court upheld the decision of the Court of Appeal.

The job requirements of flight stewardesses “are quite different from that of women in other occupations ... We take judicial notice that the nature of the job requires flight stewardesses to work long hours and often flying across different time zones. They have to do much walking on board flying aircrafts. It is certainly not a conducive place for pregnant women to be in.

The applicant cannot compare herself with the ground staff or with the senior chief stewardesses or chief stewardesses as they were not employed in the same category of work.

The equal protection guarantees in clause (1) of art. 8, extends only to persons in the same class. It recognizes that all persons by nature, attainment, circumstances and the varying needs of different classes of persons often require separate treatment. Regardless of how we try to interpret art. 8 of the Federal Constitution, we could only come to the conclusion that there was obviously no contravention.

We have also looked at s 40 of the Employment Act 1955 and totally agree with the Court of Appeal that it is of no assistance to the applicant. Unless and until the Employment Act 1955 is amended to expressly prohibit any term and condition of employment that requires flight stewardesses to resign upon becoming pregnant, such clauses are subject to our Contracts Act 1950 and continue to be valid and enforceable.

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<sup>75</sup> Decision from Abdul Aziz. Mechanisms to Promote Gender Equality in Malaysia: The Need for Legislation. <http://wccpenang.org/wp-content/uploads/2013/06/The-Need-for-Malaysian-Gender-Equality-Legislation-by-Zarizana-Abdul-Aziz.pdf>

## MODULE 4: GENDER-SENSITIZED JUDICIAL CONDUCT IN GENDER-BASED VIOLENCE CASES

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### Court case which recognizes women'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.



## Delay in Reporting Rape

- **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<sup>76</sup> (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.

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<sup>76</sup> Since the complainant at the time of the offense was younger than 18 years old, and the accused was her father.

## Moral Character of the Complainant and Virginity

- **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 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 the court, 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 redemptive 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 the victim consented

- **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.

- **Decision:**

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. 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<sup>77</sup> (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.

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<sup>77</sup> Since the complainant at the time of the offense was younger than 18 years old, and the accused was her father.

## 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.

## MODULE 5: GENDER-BASED VIOLENCE AGAINST WOMEN

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**The due diligence principle is one of means not ends. Once the requisite systemic processes and safeguards are functional, the State is obliged to ensure that (i) they are extended to all individuals; and (ii) that all individuals can access them, especially when the State knows or ought to know that an identified individual(s) is at ‘real and immediate risk’.**

- **Osman v. the United Kingdom**

Reports 1998-VIII

28 October 1998

(European Court of Human Rights)

- **Facts:**<sup>78</sup>

The applicants are Mrs. Mulkiye Osman and her son Ahmet Osman. Mr. Ali Osman, the husband and father of the applicants, respectively, was shot dead by Mr. Paul Paget-Lewis on 7 March 1988. Mr. Paget-Lewis was a former instructor of Ahmet Osman and had developed a strong attachment to him. Ahmet Osman was also wounded in the shooting incident.

Starting at least a year prior to the shooting, Mr. Paget-Lewis had harassed Ahmet Osman and at least one of Ahmet’s friends. Mr. Paget-Lewis followed Ahmet home, asked Ahmet to stay in during lunch, allegedly put up graffiti regarding Ahmet and stole office documents to find out personal information about Ahmet. During this time, the Osmans attempted to move Ahmet to a new school and contacted the police regularly. The police interviewed Paget-Lewis for a number of suspicious activities and vague threats. At one point, the police attempted to arrest Paget-Lewis, but he immediately left the area. Mr. Paget-Lewis returned to the area and was seen near the Osman’s home on 1, 4 and 5 March; police were alerted on each visit, but did not arrest him until the morning after the shooting.

The applicants’ complaints are directed at the failure of the authorities to appreciate and act on what they claim was a series of clear warning signs that Paul Paget-Lewis represented a serious threat to the physical safety of Ahmet Osman and his family.

Applicants brought a claim before the European Court of Human Rights alleging (i) the United Kingdom had failed to take adequate and appropriate steps to protect the lives of the second applicant and his father, Ali Osman, from the real and known danger

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78 Facts taken from Global Health and Human Rights Database <http://www.globalhealthrights.org/health-topics/mental-health/osman-v-united-kingdom/>

which Paget-Lewis posed, and (ii) the police had failed to bring an end to the campaign of harassment, vandalism and victimization which Paget-Lewis waged against their property and family. This, the applicants allege, violated their right under article 2 (right to life) of the European Convention on Human Rights.

- **Issue:**

Whether the UK authorities had violated their positive obligation to protect the applicants' family's right to life in the context of their duty to prevent and suppress offences.

- **Decision:**

No.

The first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties.

Where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person, it must be established to the Court's satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or willful disregard of the duty to protect life. Such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2. For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case.

It is the applicants' contention that by that stage the police should have been alert to the need to investigate further Paget-Lewis' alleged involvement in the graffiti incident and the theft of the school files or to keep a closer watch on him given their awareness of the obsessive nature of his behaviour towards Ahmet Osman and how that behaviour manifested itself. The Court for its part is not persuaded that the police's failure to do so at this stage can be impugned from the standpoint of Article 2 having regard to the state of their knowledge at that time. While Paget-Lewis' attachment to Ahmet Osman could be judged by the police officers who visited the school to be most reprehensible from a professional point of view, there was never any suggestion that Ahmet Osman was at risk sexually from him, less so that his life was in danger. Furthermore, Mr. Perkins, the deputy headmaster, alone had reached the conclusion that Paget-Lewis had been responsible for the graffiti in the neighbourhood of the school and the theft of the files. However Paget-Lewis had denied all involvement when interviewed by Mr. Perkins and there was nothing to link him with either incident. Accordingly, at that juncture, the police's appreciation of the situation and their decision to treat it as a matter internal to the school cannot be considered unreasonable.

The applicants have attached particular weight to Paget-Lewis' mental condition and in particular to his potential to turn violent and to direct that violence at Ahmet Osman. However, it is to be noted that Paget-Lewis continued to teach at the school up until June 1987. Dr Ferguson examined him on three occasions and was satisfied that he was not mentally ill. On 7 August 1987 he was allowed to resume teaching, although not at Homerton House. It is most improbable that the decision to lift his suspension from teaching duties would have been made if it had been believed at the time that there was the slightest risk that he constituted a danger to the safety of young people in his charge. The applicants are especially critical of Dr Ferguson's psychiatric assessment of Paget-Lewis. However, that assessment was made on the basis of three separate interviews with Paget-Lewis and if it appeared to a professional psychiatrist that he did not at the time display any signs of mental illness or a propensity to violence it would be unreasonable to have expected the police to have construed the actions of Paget-Lewis as they were reported to them by the school as those of a mentally disturbed and highly dangerous individual.

The Court has also examined carefully the strength of the applicants' arguments that Paget-Lewis on three occasions communicated to the police, either directly or indirectly, his murderous intentions. However, in its view these statements cannot be reasonably considered to imply that the Osman family were the target of his threats and to put the police on notice of such. [...]

Furthermore, the fact that Paget-Lewis is reported to have intimated to the driver of the car with which he collided on 7 December 1987 that he was on the verge of committing some terrible deed could not reasonably be taken at the time to be a veiled reference to a planned attack on the lives of the Osman family. [...]

The applicants have failed to point to any decisive stage in the sequence of the events leading up to the tragic shooting when it could be said that the police knew or ought



to have known that the lives of the Osman family were at real and immediate risk from Paget-Lewis. While the applicants have pointed to a series of missed opportunities which would have enabled the police to neutralise the threat posed by Paget-Lewis, for example by searching his home for evidence to link him with the graffiti incident or by having him detained under the Mental Health Act 1983 or by taking more active investigative steps following his disappearance, it cannot be said that these measures, judged reasonably, would in fact have produced that result or that a domestic court would have convicted him or ordered his detention in a psychiatric hospital on the basis of the evidence adduced before it. The police must discharge their duties in a manner which is compatible with the rights and freedoms of individuals. In the circumstances of the present case, they cannot be criticised for attaching weight to the presumption of innocence or failing to use powers of arrest, search and seizure having regard to their reasonably held view that they lacked at relevant times the required standard of suspicion to use those powers or that any action taken would in fact have produced concrete results.

## International Jurisprudence on State Accountability

### Honduras

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- **Velasquez Rodriguez v. Honduras**

Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

29 July 1988

(Inter-American Court of Human Rights)

- **Facts:**<sup>79</sup>

Angel Manfredo Velasquez Rodriguez (“Manfredo Velasquez”), a student, was arrested without warrant in Tegucigalpa on September 12, 1981. Eyewitnesses saw members of the National Investigation Directorate and G-2 (Intelligence) of the Armed Forces of Honduras apprehend and take Manfredo Velasquez to an unknown location. On September 9, 1981, the Government of Honduras recognized the jurisdiction of the Inter-American Court of Human Rights in accordance with Article 62 of the American Convention on Human Rights (the “Convention”).

It was believed that Manfredo Velasquez was first taken to II Station of Security Force in the El Manchén neighborhood, a facility known for torture. On September 17, 1984, Velasquez was transferred to First Battalion of Infantry. The Government of Honduras denied his arrest. The Inter-American Commission on Human Rights (the “Commission”) requested confirmation and/or clarification of information regarding Velasquez’s case from the Government of Honduras. After repeated unsuccessful requests, the Commission presumed facts from the October 7, 1981 correspondence to be true and approved resolution 30/83. The resolution, transmitted to the Government of Honduras on October 11, 1983, alleged that the Government of Honduras had violated the right to life and the right to personal liberty of Velasquez, as guaranteed by the Convention. The resolution also recommended that the Government of Honduras investigate the case and identify, apprehend, and hold accountable the people responsible for Velasquez’s disappearance.

The Government of Honduras responded on November 18, 1983. In its response, the Government asserted that legal domestic remedies had not been exhausted (a writ of habeas corpus was pending in the Supreme Court of Justice) and that Velasquez was rumored to be with an El Salvadorian Guerilla group and was not in the country. When

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<sup>79</sup> Facts taken from the summary in Global Health and Human Rights Database <http://www.globalhealthrights.org/human-rights/right-to-liberty-and-security-of-person/velasquez-rodriquez-v-honduras/>

the Commission requested more information, the Government of Honduras claimed to know the identity of one of the individuals who apprehended Velasquez.

On May 30, 1984, the Commission requested an update on the writ of habeas corpus mentioned in the November 18 correspondence and the investigation into the individual who arrested Velasquez. The Government of Honduras requested more time as it had formed an Investigations Commission to investigate. The Government of Honduras later contacted the Commission, informing it that the Court had dismissed proceedings brought by the Investigation Commission against a number of people for murder, torture, abuse of authority and disobedience.

- **Issue:**

Can the disappearance be the responsibility of the State even if committed by private persons? If so, in what circumstances?

- **Decision:**

Without question, the State has the right and duty to guarantee its security. It is also indisputable that all societies suffer some deficiencies in their legal orders. However, regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the State is not unlimited, nor may the State resort to any means to attain its ends. The State is subject to law and morality. Disrespect for human dignity cannot serve as the basis for any State action.

The forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States Parties are obligated to respect and guarantee. The kidnapping of a person is an arbitrary deprivation of liberty, an infringement of a detainee's right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest, all in violation of Article 7 of the American Convention on Human Rights which recognizes the right to personal liberty.<sup>80</sup>

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<sup>80</sup> Article 7. Right to Personal Liberty

- (1) Every person has the right to personal liberty and security.
- (2) No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
- (3) No one shall be subject to arbitrary arrest or imprisonment.
- (4) Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
- (5) Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
- (6) Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.
- (7) No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support.

Moreover, prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being. Such treatment, therefore, violates Article 5 of the Convention,<sup>81</sup> which recognizes the right to the integrity of the person.

The practice of disappearances often involves secret execution without trial, followed by concealment of the body to eliminate any material evidence of the crime and to ensure the impunity of those responsible. This is a flagrant violation of the right to life, recognized in Article 4 of the Convention, the first clause of which reads as follows:

“Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.”

The practice of disappearances, in addition to directly violating many provisions of the Convention, such as those noted above, constitutes a radical breach of the treaty in that it shows a crass abandonment of the values which emanate from the concept of human dignity and of the most basic principles of the inter-American system and the Convention. The existence of this practice, more over, evinces a disregard of the duty to organize the State in such a manner as to guarantee the rights recognized in the Convention.

The Commission has asked the Court to find that Honduras has violated the rights guaranteed to Manfredo Velasquez by Articles 4, 5 and 7 of the Convention. The Government has denied the charges and seeks to be absolved. This requires the Court to examine the conditions under which a particular act, which violates one of the rights recognized by the Convention, can be imputed to a State Party thereby establishing its international responsibility.

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<sup>81</sup> Article 5. Right to Humane Treatment

- (1) Every person has the right to have his physical, mental, and moral integrity respected.
- (2) No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
- (3) Punishment shall not be extended to any person other than the criminal.
- (4) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.
- (5) Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.
- (6) Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

Article 1(1) of the Convention<sup>82</sup> specifies the obligation assumed by the States Parties in relation to each of the rights protected. Each claim alleging that one of those rights has been infringed necessarily implies that Article 1(1) of the Convention has also been violated.

The Commission did not specifically allege the violation of Article 1(1) of the Convention, but that does not preclude the Court from applying it. The precept contained therein constitutes the generic basis of the protection of the rights recognized by the Convention and would be applicable, in any case, by virtue of a general principle of law, *iura novit curia*, on which international jurisprudence has repeatedly relied and under which a court has the power and the duty to apply the juridical provisions relevant to a proceeding, even when the parties do not expressly invoke them.

In effect, Article 1(1) charges the States Parties with the fundamental duty to respect and guarantee the rights recognized in the Convention. Any impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention.

The first obligation assumed by the States Parties under Article 1(1) is “to respect the rights and freedoms” recognized by the Convention. The exercise of public authority has certain limits which derive from the fact that human rights are inherent attributes of human dignity and are, therefore, superior to the power of the State. The second obligation of the States Parties is to “ensure” the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.

The obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation – it also requires the government to conduct itself so as to effectively ensure the free and

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<sup>82</sup> Article 1. Obligation to Respect Rights

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

full exercise of human rights. The obligation of the States is, thus, much more direct than that contained in Article 2.<sup>83</sup>

According to Article 1(1), any exercise of public power that violates the rights recognized by the Convention is illegal. Whenever a State organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention. This conclusion is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.

This principle suits perfectly the nature of the Convention, which is violated whenever public power is used to infringe the rights recognized therein. If acts of public power that exceed the State's authority or are illegal under its own laws were not considered to compromise that State's obligation under the treaty, the system of protection provided for in the Convention would be illusory. Thus, in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State.

However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

Violations of the Convention cannot be founded upon rules that take psychological factors into account in establishing individual culpability. For the purposes of analysis, the intent or motivation of the agent who has violated the rights recognized by the Convention is irrelevant - the violation can be established even if the identity of the individual perpetrator is unknown. What is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible. Thus, the Court's task is to determine whether the violation is the result of a State's failure to fulfill its duty to respect and guarantee those rights, as required by Article 1(1) of the Convention.

The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations

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<sup>83</sup> Article 2. Domestic Legal Effects

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.

This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party. Of course, while the State is obligated to prevent human rights abuses, the existence of a particular violation does not, in itself, prove the failure to take preventive measures. On the other hand, subjecting a person to official, repressive bodies that practice torture and assassination with impunity is itself a breach of the duty to prevent violations of the rights to life and physical integrity of the person, even if that particular person is not tortured or assassinated, or if those facts cannot be proven in a concrete case.

The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.

In certain circumstances, it may be difficult to investigate acts that violate an individual's rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.

In the instant case, the evidence shows a complete inability of the procedures of the State of Honduras, which were theoretically adequate, to carry out an investigation into the disappearance of Manfredo Velasquez, and of the fulfillment of its duties to pay compensation and punish those responsible, as set out in Article 1(1) of the Convention.

As the Court has verified above, the failure of the judicial system to act upon the writs brought before various tribunals in the instant case has been proven. Not one writ of habeas corpus was processed. No judge had access to the places where Manfredo Velasquez might have been detained. The criminal complaint was dismissed.

Nor did the organs of the Executive Branch carry out a serious investigation to establish the fate of Manfredo Velasquez. There was no investigation of public allegations of a practice of disappearances nor a determination of whether Manfredo Velasquez had been a victim of that practice. The Commission's requests for information were ignored to the point that the Commission had to presume, under Article 42 of its Regulations, that the allegations were true. The offer of an investigation in accord with Resolution 30/83 of the Commission resulted in an investigation by the Armed Forces, the same body accused of direct responsibility for the disappearances. This raises grave questions regarding the seriousness of the investigation. The Government often resorted to asking relatives of the victims to present conclusive proof of their allegations even though those allegations, because they involved crimes against the person, should have been investigated on the Government's own initiative in fulfillment of the State's duty to ensure public order. This is especially true when the allegations refer to a practice carried out within the Armed Forces, which, because of its nature, is not subject to private investigations. No proceeding was initiated to establish responsibility for the disappearance of Manfredo Velasquez and apply punishment under internal law. All of the above leads to the conclusion that the Honduran authorities did not take effective action to ensure respect for human rights within the jurisdiction of that State as required by Article 1(1) of the Convention.

The duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains.

The Court is convinced, and has so found, that the disappearance of Manfredo Velasquez was carried out by agents who acted under cover of public authority. However, even had that fact not been proven, the failure of the State apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it assumed under Article 1(1) of the Convention, which obligated it to ensure Manfredo Velasquez the free and full exercise of his human rights.

The Court notes that the legal order of Honduras does not authorize such acts and that internal law defines them as crimes. The Court also recognizes that not all levels of the Government of Honduras were necessarily aware of those acts, nor is there any evidence that such acts were the result of official orders. Nevertheless, those circumstances are irrelevant for the purposes of establishing whether Honduras is responsible under international law for the violations of human rights perpetrated within the practice of disappearances.



## Turkey

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- **Opuz v. Turkey**

App. No. 33401/02.

9 June 2009

(European Court of Human Rights)

- **Facts:**<sup>84</sup>

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

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<sup>84</sup> 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>

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.

## Brazil

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- **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 Philippines

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- **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

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- **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.

## Austria

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- **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:**<sup>85</sup>

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 December 1999, 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

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<sup>85</sup> Facts by Antonia Ross, from <https://opcedaw.wordpress.com/category/communications/sahide-goekce-deceased-v-austria/>

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.

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 led 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.

## National cases on constitutional duty of states

### (i) State duty not only to apprehend and punish but also to prevent (India)

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.”<sup>86</sup>
- “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.”<sup>87</sup>

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<sup>86</sup> 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](http://www.thehindu.com/migration_catalog/article12284683.ece/BINARY/Justice%20Verma%20Committee%20Report%20on%20Amendments%20to%20Criminal%20Law)

<sup>87</sup> Id, para. 7.

(ii) **Failure to conduct prompt effective proper and professional investigations is in violation of Constitution (Kenya)**

- **C.K. (A Child) & 11 Others v. Commissioner of Police/Inspector-General of the National Police Service & 2 Others<sup>88</sup>**

Petition No. 8 of 2012

27 May 2013

(High Court, Meru)

- **Facts:**

The first 11 petitioners were girls aged between 5 and 15 years from Meru County who were all victims of defilement. The 12th petitioner was Ripples International, a charitable NGO that shelters vulnerable children in the County, who brought the proceedings in the public interest. The three respondents were the Commissioner of Police/Inspector-General of Police, the Director of Public Prosecutions and the Minister for Justice, National Cohesion and Constitutional Affairs.

The 11 petitioners had all experienced sexual abuse at the hands of family members, caregivers, neighbours, employers, and in the case of one girl, a police officer. As a result of the abuse, some of girls became pregnant, some contracted sexually transmitted diseases, while others sustained physical injuries requiring surgery. Most of them had to drop out of school, and all had to seek refuge from the 12th petitioner after being chased away from home or experiencing threats from the perpetrators. Each of the girls had reported or attempted to report the defilement to the police. However, the police response in all cases was inadequate, ranging from failure to record the complaints in the police Occurrence Book, demanding money for fuel, interrogating the victims in a humiliating manner, failure to arrest the perpetrators or to interview witnesses. The police also failed to collect and preserve evidence or bring the evidence to court or visit the crime scenes. This resulted in further psychological and physical harm to the girls, including delays in receiving medical treatment, while the alleged perpetrators, who were known, roamed free and continued to make threats against the girls and their families.

The petition alleged that by failing to conduct prompt, effective, proper and professional investigations into the first 11 petitioners' complaints of defilement the respondents had violated the petitioners' rights under the Constitution of Kenya 2010, specifically the rights to equality and freedom from discrimination on the grounds of sex and age; rights to human dignity, security of the person and protection from all

<sup>88</sup> Digest taken from: Dr. Winifred Kamau, et al. Case Comment – Victory for 160 Girls in Defilement Constitutional Challenge. <http://kenyalaw.org/kl/index.php?id=4504>

forms of violence and cruel, inhuman or degrading treatment; right of access to justice; the right of children to be protected from abuse, violence or inhuman treatment.

The petition also alleged that the police failures violated international human rights norms, including those in the Universal Declaration of Human Rights, the United Nations Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, and the African Charter on Human and People's Rights.

- **Issue:**

Whether failure on the part of the police to conduct prompt, effective, proper and professional investigation into the petitioners' complaints of defilement and other forms of sexual violence infringes on the petitioners' fundamental rights and freedoms under the Constitution of Kenya, 2010.

- **Decision:**

Yes. The petitioners' argument that while the perpetrators were directly responsible for many of the harms suffered by the girls, the respondents could not escape responsibility as their inaction had created a "climate of impunity" in which the perpetrators knew they could commit crimes against innocent children without fear of apprehension and prosecution, thus rendering the respondents indirectly responsible for the harms inflicted by the perpetrators. The respondents were also directly responsible for psychological harms arising from mistreatment by the police. The court recognized that "the petitioners had to flee and seek protection and safety from the 12th petitioner" and that the police inaction "led to psychological damage arising from their alienation from family, schools and their own communities".

The court concluded that these harms amounted to violations of the petitioners' fundamental rights and freedoms under the Constitution. The respondents had failed in their fundamental duty as under Article 21 to "observe, respect, protect, promote and fulfill the rights and fundamental freedoms guaranteed in the Constitution", in particular the rights and freedoms relating to special protection as members of a vulnerable group (Article 21(3)), equality and freedom from non-discrimination (Article 27), human dignity (Article 29), access to justice (Article 48 and 50) and protection from abuse, neglect, all forms of violence and inhuman treatment (Article 53(1)(d)).

The court also held that the respondents were in breach of provisions of international conventions which Kenya had ratified, and which were found applicable to the petitioners' claim. The court agreed with the petitioners' argument that sexual violence amounts to discrimination against women under CEDAW, Article 1 of which defines discrimination against women to include "acts that inflict sexual harm". The court found that the conduct of the police in failing to take appropriate action to ensure justice to the petitioners amounted to discrimination contrary to Article 27 which provides for equality before the law and the right to equal protection and equal benefit of the law and Article 21(4) which prohibits any discrimination by the State either directly or indirectly against any person on any ground, including sex and age.

Further, the State was obligated under Articles 48 and 50 “to ensure access to courts is not unreasonably or unjustifiably impeded and in particular where there is legitimate complaint, dispute or wrong that can be resolved by the courts or tribunals.” The police failure to conduct prompt, effective, proper, corrupt free and professional investigations into the petitioners’ complainants, and demanding payments as preconditions for assistance violated petitioners right to access of justice and right to have disputes that can be resolved by the application of law decided in a fair and in public hearing before court of law.



(iii) **State had direct constitutional obligations to deal with domestic violence and to protect every individual's right to be free from domestic (or private) violence (South Africa)**

- **The State v. Baloyi**<sup>89</sup>

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 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),<sup>90</sup> 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

<sup>89</sup> Digest taken from the Constitutional Court's Explanatory Note. <http://www.saflii.org/za/cases/ZACC/1999/19media.pdf>

<sup>90</sup> Section 7(2) reads: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

obligation to deal with domestic violence: to protect both the rights of everyone to enjoy freedom and security of the person<sup>91</sup> and to bodily and psychological integrity,<sup>92</sup> and the right to have their dignity respected and protected,<sup>93</sup> as well as the defensive rights of everyone not to be subjected to torture in any way<sup>94</sup> and not to be treated or punished in a cruel, inhuman or degrading way.<sup>95</sup>

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.

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.

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<sup>91</sup> Section 12(1).

<sup>92</sup> Section 12(2).

<sup>93</sup> Section 10.

<sup>94</sup> Section 12(1)(d).

<sup>95</sup> Section 12(1)(e).

(iv) **State constitutionally obliged to afford citizens protection from violence (South Africa)**

- **Suzette Irene Elmarie Nelson v. The Minister of Safety and Security, et al.**<sup>96</sup>

Case no: 1326/04

20060505

(High Court of South Africa, Northern Cape Division)

- **Facts:**

The Plaintiff was abused by her husband and threatened by him with his firearm. Pursuant thereto, he was arrested and the firearm temporarily seized but subsequently returned to him. On the Plaintiff's application, a protection order was issued but his firearm was not seized. The Plaintiff was subsequently shot (not fatally) by husband.

- **Decision:**

The Court held that the State is constitutionally obliged to afford its citizens protection from violence. Defendants' servants must fulfill not only constitutional duties but also statutory duties. The Plaintiff is not liable as joint wrongdoer. The Court also approved the dicta in *Minister of Safety and Security v. van Duivenboden*, which held that a negligent omission is culpable if a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it and a negligent omission is unlawful when the circumstances of the case are of such a nature that the omission not only evokes moral indignation but the legal convictions of the community require that it should be regarded as unlawful.

The first defendant was thus ordered to pay the plaintiff such damages as she is able to prove for the injuries sustained by her as a consequence of being shot by her husband on 20 January 2002.

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<sup>96</sup> Digest taken from: Columbia Law School Human Rights Clinic, et al. *Human Rights and Domestic Violence: An Advocacy Manual*. <http://www.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/dv%20advocacy%20manual.pdf>

## Gender-based violence and feminicide in the name of “honor”

- **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 an 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.”

## Intimate partner violence is not a private matter

- **Opuz v. Turkey**

App. No. 33401/02.

9 June 2009

(European Court of Human Rights)

- **Facts:**<sup>97</sup>

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

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<sup>97</sup> 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>

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 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.



## Economic violence: deprivation of right to land and inheritance

- **Ghulam Ali v. Mst Sarwar Naqvi**<sup>98</sup>

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 and, the respondent (his daughter and their 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:**

(1) Whether the petitioners (brothers) could use a moral reason to take their sister's inheritance.

(2) 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.

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

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<sup>98</sup> 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>.

(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 it 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.”

## Role of the court and the authorities

- **Cooper v. Aaron**

358 U.S. 1 (1958)

(Supreme Court of the United States)

- **Facts:**

On May 17, 1954, the United States Supreme Court decided that enforced racial segregation in the public schools of a State is a denial of the equal protection of the laws enjoined by the Fourteenth Amendment (*Brown v. Board of Education*). Under a plan of gradual desegregation of the races in the public schools of Little Rock, Arkansas, adopted by petitioners and approved by the courts below, respondents (African-American children) were ordered admitted to a previously all-white high school at the beginning of the 1957-1958 school year. Due to actions by the Legislature and Governor of the State opposing desegregation, and to threats of mob violence resulting therefrom, respondents were unable to attend the school until troops were sent and maintained there by the Federal Government for their protection; but they attended the school for the remainder of that school year. Finding that these events had resulted in tensions, bedlam, chaos and turmoil in the school, which disrupted the educational process, the District Court, in June, 1958, granted petitioners' request that operation of their plan of desegregation be suspended for two and one-half years, and that respondents be sent back to segregated schools. The Court of Appeals reversed.

- **Issue:**

Were Arkansas officials bound by federal court orders mandating desegregation?

- **Decision:**

Yes. This Court cannot countenance a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of the United States Constitution in *Brown v. Board of Education*. This Court rejects the contention that it should uphold a suspension of the Little Rock School Board's plan to do away with segregated public schools in Little Rock until state laws and efforts to upset and nullify its holding in the *Brown* case have been further challenged and tested in the courts.

In many locations, obedience to the duty of desegregation will require the immediate general admission of African-American children, otherwise qualified as students for their appropriate classes at particular schools. If, after analysis of the relevant factors (which, of course, excludes hostility to racial desegregation), a District Court concludes that justification exists for not requiring the present non-segregated admission of all qualified African-American children to public schools, it should scrutinize the program of the school authorities to make sure that they have developed arrangements

pointed toward the earliest practicable completion of desegregation, and have taken appropriate steps to put their program into effective operation.

The petitioners stand in this litigation as the agents of the State, and they cannot assert their good faith as an excuse for delay in implementing the respondents' constitutional rights when vindication of those rights has been rendered difficult or impossible by the actions of other state officials. The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature, and law and order are not here to be preserved by depriving the African-American children of their constitutional rights.

The constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the Brown case can neither be nullified openly and directly by state legislators or state executives or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously."

The interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "anything in the Constitution or Laws of any State to the Contrary notwithstanding." State support of segregated schools through any arrangement, management, funds or property cannot be squared with the command of the Fourteenth Amendment that no State shall deny to any person within its jurisdiction the equal protection of the laws.

- **Concurring opinion of Mr. Justice Frankfurter:**

The conception of a government by laws dominated the thoughts of those who founded this Nation and designed its Constitution, although they knew as well as the belittlers of the conception that laws have to be made, interpreted and enforced by men. To that end, they set apart a body of men who were to be the depositories of law, who, by their disciplined training and character and by withdrawal from the usual temptations of private interest, may reasonably be expected to be 'as free, impartial, and independent as the lot of humanity will admit.' So strongly were the framers of the Constitution bent on securing a reign of law that they endowed the judicial office with extraordinary safeguards and prestige. No one, no matter how exalted his public office or how righteous his private motive, can be judge in his own case. That is what courts are for. [...]

The Constitution is not the formulation of the merely personal views of the members of this Court, nor can its authority be reduced to the claim that state officials are its controlling interpreters. Local customs, however hardened by time, are not decreed in heaven. Habits and feelings they engender may be counteracted and moderated. Experience attests that such local habits and feelings will yield, gradually though this be, to law and education. And educational influences are exerted not only by explicit teaching. They vigorously flow from the fruitful exercise of the responsibility of those

charged with political official power, and from the almost unconsciously transforming actualities of living under law.

The process of ending unconstitutional exclusion of pupils from the common school system -- "common" meaning shared alike -- solely because of color is no doubt not an easy, overnight task in a few States where a drastic alteration in the ways of communities is involved. Deep emotions have, no doubt, been stirred. They will not be calmed by letting violence loose -- violence and defiance employed and encouraged by those upon whom the duty of law observance should have the strongest claim -- nor by submitting to it under whatever guise employed. Only the constructive use of time will achieve what an advanced civilization demands and the Constitution confirms.

For carrying out the decision that color alone cannot bar a child from a public school, this Court has recognized the diversity of circumstances in local school situations. But is it a reasonable hope that the necessary endeavors for such adjustment will be furthered, that racial frictions will be ameliorated, by a reversal of the process and interrupting effective measures toward the necessary goal? The progress that has been made in respecting the constitutional rights of the African-American children, according to the graduated plan sanctioned by the two lower courts, would have to be retraced, perhaps with even greater difficulty because of deference to forcible resistance. It would have to be retraced against the seemingly vindicated feeling of those who actively sought to block that progress. Is there not the strongest reason for concluding that to accede to the Board's request, on the basis of the circumstances that gave rise to it, for a suspension of the Board's non-segregation plan, would be but the beginning of a series of delays calculated to nullify this Court's adamant decisions in the Brown case that the Constitution precludes compulsory segregation based on color in state-supported schools?

That the responsibility of those who exercise power in a democratic government is not to reflect inflamed public feeling, but to help form its understanding, is especially true when they are confronted with a problem like a racially discriminating public school system. This is the lesson to be drawn from the heartening experience in ending enforced racial segregation in the public schools in cities with African-American populations of large proportions. Compliance with decisions of this Court, as the constitutional organ of the supreme Law of the Land, has often, throughout our history, depended on active support by state and local authorities. It presupposes such support. To withhold it, and indeed to use political power to try to paralyze the supreme Law, precludes the maintenance of our federal system as we have known and cherished it for one hundred and seventy years.

## MODULE 6: ATTRITION AND COMPROMISE

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### Role of the Court regarding 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.

- **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.



## Understanding US cases on hearsay such as excited utterances and statements about symptoms in relation to GBV cases, notably domestic violence.

- **Crawford v. Washington**

124 S. Ct. 1354 (2004)

March 8, 2004

Scalia, J (United States Supreme Court)

- **Facts:**<sup>99</sup>

Michael Crawford stabbed a man he claimed tried to rape his wife. During Crawford's trial, prosecutors played for the jury his wife's tape-recorded statement to the police describing the stabbing. The statement contradicted Crawford's argument that he stabbed the man in defense of his wife. Because it was pre-recorded, Crawford could not cross-examine the statement. The jury convicted Crawford for assault.

Crawford claimed the playing of his wife's statement, with no chance for cross-examination, violated the Sixth Amendment guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." The state supreme court upheld the conviction, relying on the U.S. Supreme Court's decision in *Ohio v. Roberts* (1980). That decision allowed the admission of out-of-court testimony against a defendant if that testimony was reliable.

- **Issue:**

Does playing out-of-court testimony to a jury, with no chance for cross-examination, violate a defendant's Sixth Amendment guarantee?

- **Decision:**<sup>100</sup>

Yes. The State's use of Sylvia's statement violated the Confrontation Clause because, where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation.

The Court pointed out that the testimonial statements consist of in-court testimony and statements that the declarant reasonably expect to be used by the prosecution. The Confrontation Clause applies to 'witnesses' against the accused—in other words, those who 'bear testimony. The Court overturned the reliability test, previously explained in *Ohio v. Roberts*, 448 U.S. 56 (1980). Although the Confrontation Clause exists to ensure that evidence is reliable, the guarantee is procedural, not substantive and cannot be compromised because the evidence is determined reliable. Reliability is

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<sup>99</sup> Facts taken from: <https://www.oyez.org/cases/2003/02-9410>

<sup>100</sup> Decision taken from: <https://legaldictionary.net/crawford-v-washington/>

an undefined concept which can result in judicial unreliability and admit evidence the Confrontation Clause was meant to exclude.

The Court then outlined a new standard in which testimonial statements of unavailable witnesses are admissible only where the defendant had a prior opportunity for cross examination.

Here, Crawford's wife's statement made against Crawford is testimonial in nature since it was made to officers in an interrogation and she knew or should have known the statement would be used as a going to be used at a following trial. Since Crawford's wife is unavailable at trial, due to her marital privilege, in addition to the fact that Crawford did not have an opportunity to cross-examine his wife's statement, its admission would violate the Confrontation Clause.

- **Davis v. Washington**<sup>101</sup>

No. 05-5224

547 US 813 (2006)

June 19, 2006

Scalia, J (United States Supreme Court)

- **Facts:**

Davis was arrested after Michelle McCottry called 911 and told the operator that he had beaten her with his fists and then left. At trial, McCottry did not testify, but the 911 call was offered as evidence of the connection between Davis and McCottry's injuries. Davis objected, arguing that presenting the recording without giving him the opportunity to cross-examine McCottry violated his Sixth Amendment right to confront his accuser as interpreted by the U.S. Supreme Court in *Crawford v. Washington*. The Washington Supreme Court disagreed, finding that the call was not "testimonial" and was therefore different from the statements at issue in *Crawford*.

- **Issue:**

Was the 911 call testimonial in nature?

- **Decision:**

No. The Court distinguished between testimonial and nontestimonial hearsay: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

The Confrontation Clause of the Sixth Amendment, as interpreted in *Crawford v. Washington*, does not apply to "non-testimonial" statements not intended to be preserved as evidence at trial. Although McCottry identified her attacker to the 911 operator, she provided the information intending to help the police resolve an "ongoing emergency," not to testify to a past crime. The Court reasoned that under the circumstances, McCottry was not acting as a "witness," and the 911 transcript was not "testimony." Therefore, the Sixth Amendment did not require her to appear at trial and be cross-examined.

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<sup>101</sup> Digest taken from: <https://www.oyez.org/cases/2005/05-5224> and <https://supreme.justia.com/cases/federal/us/547/813/opinion.html>

- **Hammon v. Indiana**<sup>102</sup>

No. 05-5705

547 US 813 (2006)

October 31, 2005

Scalia, J (United States Supreme Court)

- **Facts:**

Hershel Hammon was charged with domestic abuse after police responded to a call from his house. When police responded to a reported domestic disturbance, Hammon's wife Amy said nothing was wrong, but let them in. After entering, police separated Amy from Hammon and interviewed her, and in response to their questions, she said Hammon assaulted her, and she also swore to an affidavit to the same effect.

While Mrs. Hammon did not testify at Mr. Hammon's trial, the police officer did testify about what she had told him. Mr. Hammon's attorney objected to the admission of the testimony without cross-examination, but the judge allowed it under the "excited utterance" exception to the general rule against hearsay testimony (second-hand reports of what someone said or did). The police officer was not trying to preserve evidence but merely to assess the incident, so Mrs. Hammon's statements to him were not the sort of testimony prohibited under the U.S. Supreme Court's decision in Crawford v. Washington.

- **Issue:**

Whether statements of the type Amy made to the police officers are "testimonial" and thus subject to "confrontation clause" of the Sixth Amendment.

- **Decision:**

Yes. Amy Hammon's statements were testimonial. They were not much different from those in Crawford. It is clear from the circumstances that Amy's interrogation was part of an investigation into possibly criminal past conduct. There was no emergency in progress, she told the police when they arrived that things were fine, and the officer questioning her was seeking to determine not what was happening but what had happened. Objectively viewed, the primary, if not sole, purpose of the investigation was to investigate a possible crime. While the formal features of Crawford's interrogation strengthened her statements' testimonial aspect, such features were not essential to the point. In both cases, the declarants were separated from the defendants, the statements recounted how potentially criminal past events began and progressed, and the interrogation took place some time after the events were over. For the same reasons the comparison to Crawford is compelling, the comparison to Davis is unpersuasive. The statements in Davis were taken when McCottry was alone, unprotected by police, and apparently in immediate danger from Davis. She was seeking aid, not telling a story about the past.

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<sup>102</sup> Digest from: <https://www.oyez.org/cases/2005/05-5705> and <https://supreme.justia.com/cases/federal/us/547/813/>

# ADB Team



## 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.

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 is Senior Counsel in the Office of the General Counsel of the Asian Development Bank (ADB). She completed her legal education from the London School of Economics and Political Science. Before joining ADB, she practiced on contentious and non-contentious legal matters in Pakistan. In addition, Ms. Ahsan taught law at various prestigious institutions.

At ADB, she is working in the Office of the General Counsel where she advises on multi-sector projects for inclusive growth. She is currently leading law and policy reform (LPR) projects on areas such as environmental and climate change adjudication and enforcement, legal literacy for women, and SAARC regional coordination on areas of common interests. 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 led to the establishment of the Asian Judges Network on Environment, the first such network in the world. She has also organized several symposiums for Chief justices on environmental and climate change laws and presented her work at numerous international forums.

Ms. Ahsan is a member of ADB's governance and gender thematic groups. She is an active advocate for gender consciousness and for women's rights and passionately steers the gender discussion in ADB.



## PATRICIA IMRANA JALAL

Patricia Imrana Jalal is a Fijian lawyer and gender advocate, who served as a Human Rights Commissioner on the Fiji Human Rights Commission, as a Fiji Law Reform Commissioner, and as Human Rights Advisor to the Pacific Regional Rights Resource Team (RRRT) and the United Nations Development Program. She is a Commissioner on the Geneva-based International Commission of Jurists, to which she was elected in May 2006, and is former Chair of the UN Committee on Harmful Practices Against Women. She is also a senior gender specialist at the Asian Development Bank in Manila.

Ms. Jalal drafted and helped negotiate the passage of the groundbreaking Fiji Family Law Act, which took twelve years to pass, which gave women unprecedented equality in family law, and which has since been emulated around the Pacific Islands.

She is a founding member of the Fiji Women's Rights Movement (FWRM), which in November 2017 will be thirty years old, and RRRT. She continues to sit on FWRM's Board as a non-resident permanent founding member. She is associated with the international networks Women Living Under Muslim Law (Pakistan) and the Asia Pacific Forum for Women, Law and Development (Thailand).

Ms. Jalal is the author of the reference book *Law for Pacific Women: A Legal Rights Handbook*. She is also a member of UN Women's global Expert Advisory Group, guiding the production of the next, 2018, *Progress of the World's Women* flagship report.

Ms. Jalal holds a Bachelor of Laws degree and a Master of Laws degree from University of Auckland.





## 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 Internazionale, 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.



## 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, Surrige & 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.



## 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.



## 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.

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