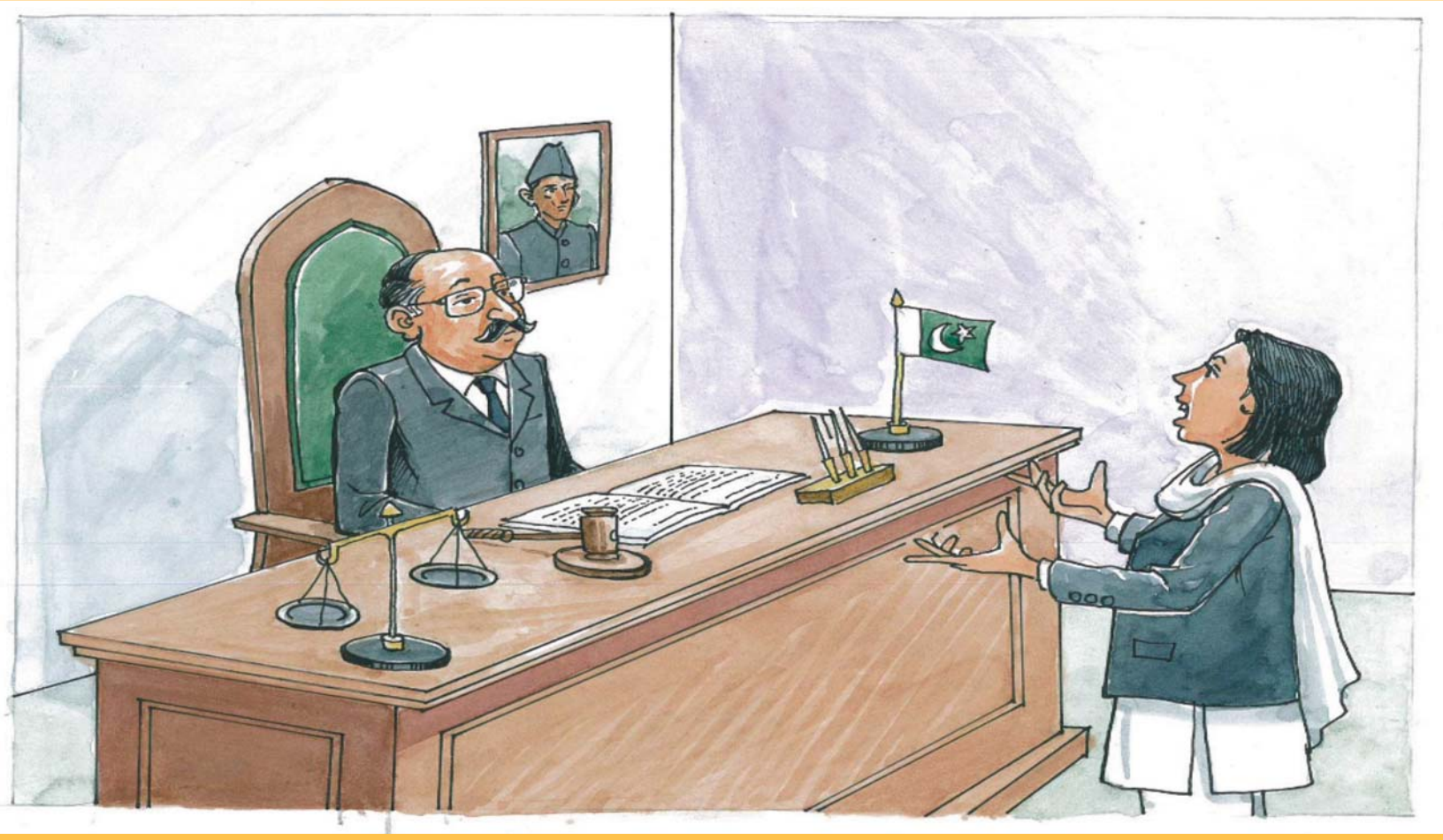
GENDER SENSITIZATION TRAINING FOR GENDER-BASED VIOLENCE CASES

JUDICIAL TRAINING MANUAL



PUNJAB JUDICIAL ACADEMY

ADB

GENDER SENSITIZATION TRAINING FOR GENDER-BASED VIOLENCE CASES

JUDICIAL TRAINING MANUAL

ADB

This training manual contains the presentations corresponding to each session of the Gender Sensitization Training for Gender-based Violence Cases. Additionally, it provides ready reference to the international treaties, human rights instruments, national laws, and global and domestic jurisprudence discussed in all the session presentations.

CONTENTS

SESSION PRESENTATIONS

Session 1:
WHAT IS GENDER SENSITIZATION?

Objectives of the Session

2

TOPIC 1 Discuss what gender sensitization means

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

TOPIC 3 Understand why gender stereotyping is an issue

TOPIC 4 Discuss why we have these gendered views

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

TOPIC 6 Discuss ways to address and reduce unconscious bias

2 activities to assist understanding and discussion

The Session will be interactive and encourage participation and discussion throughout

TOPIC 1 Gender Sensitization- Starting From Where We Are

3

ACTIVITY 1

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

What is Gender Sensitization

4

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

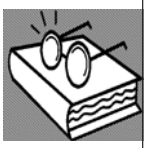
Gender sensitization and Equality

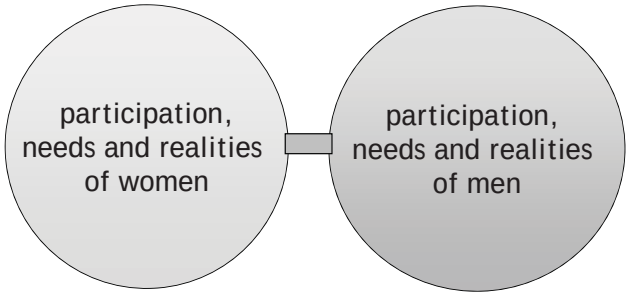
5

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

- Think of a gender lens as putting on spectacles

6



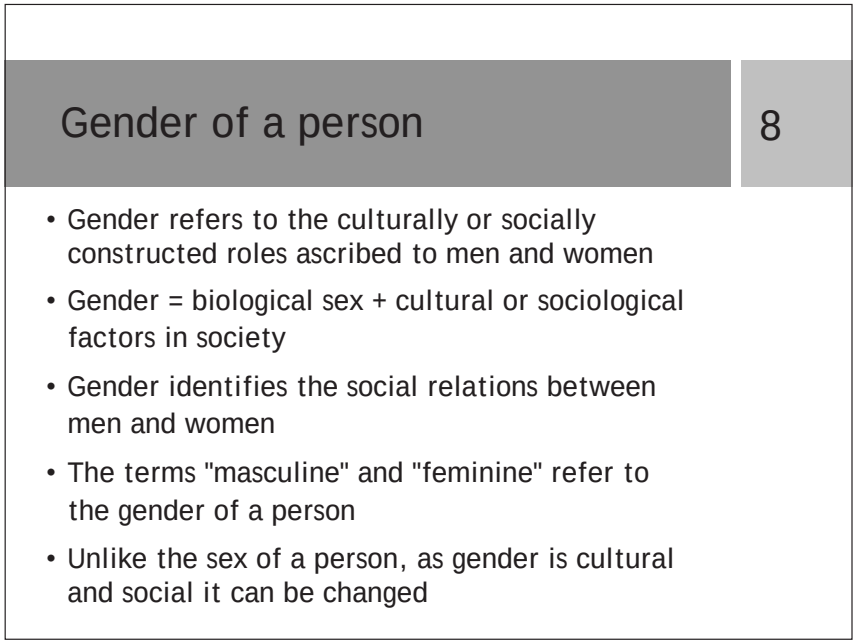


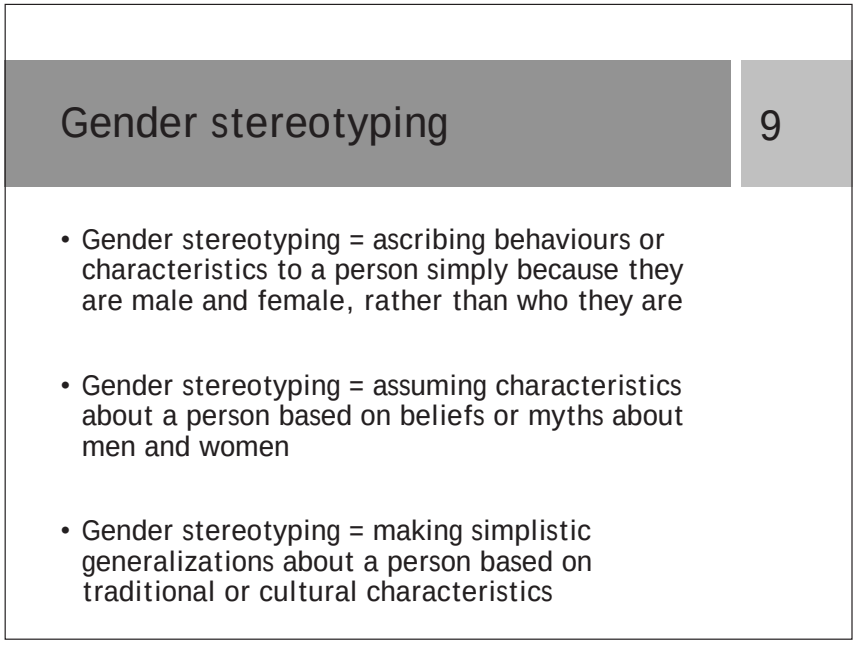
- Our sight or vision is the combination of what each eye sees

Sex Of A Person

7

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


Gender of a person
8
• Gender refers to the culturally or socially constructed roles ascribed to men and women
• Gender = biological sex + cultural or sociological factors in society
• Gender identifies the social relations between men and women
• The terms "masculine" and "feminine" refer to the gender of a person
• Unlike the sex of a person, as gender is cultural and social it can be changed


Gender stereotyping
9
• Gender stereotyping = ascribing behaviours or characteristics to a person simply because they are male and female, rather than who they are
• Gender stereotyping = assuming characteristics about a person based on beliefs or myths about men and women
• Gender stereotyping = making simplistic generalizations about a person based on traditional or cultural characteristics

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

10

Gender Identity

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

Sex Role and Gender Role

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Sex Role

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

Gender Role

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

Gender Roles and Gender Stereotypes

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Gender Roles and Gender Stereotypes are linked

SEX ⇨ GENDER STEREOTYPE ⇨ GENDER ROLE

Gender Roles – Production and Reproduction

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PRODUCTION ROLE

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

REPRODUCTION ROLE

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

What Does This Picture Depict?

15

Topic 3 Why are Gender roles an issue?

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

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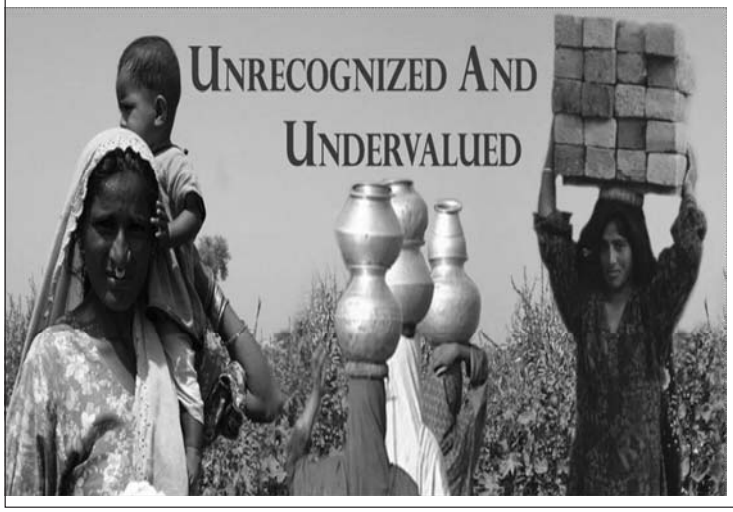

Topic 4 Why Do We Have These Gendered Views?

18

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

Childhood

19

- 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

Education books at school

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اردو جماعت ہشتم :صوبہ سرحد

نامے میرے نام (صفحہ ۱۱۶): اب تم لڑکیاں کی ہوئیں وہ وقت قریب آ گیا ہے کہ تم پرانے گھر کی ہونے والی ہو۔ کچھ لیاقت نہ ہوئی تو ناک کٹ جائے گی۔ کھیل بنانے کا وقت ختم ہوا۔

صبر کا پھل: مگر کے ہاں اگر اس بار بھی لڑکی پیدا ہوئی تو اسے پیدا ہوتے ہی قتل کر دیا۔ خدا اسے بیٹا دے جو سلطنت کا وارث ہو۔

اولاد نرینہ کے لئے دعائیں اور مسجدوں میں التجائیں کیں (صفحہ ۷)

پھر ایک رات اس نے مردانہ لباس پہنا اور شہزادے کی تلاش میں کسی نامعلوم منزل کی طرف روانہ ہو گئی (صفحہ ۱۲)

اردو جماعت ششم :صوبہ سرحد

صبح سویرے : ایک دو سال پہلے ہانڈی بھی اکیلے ساتھ بیر کر آیا کرتی تھی۔ مگر اب وہ بڑی ہو گئی ہے۔ بڑی لڑکیوں کا یوں بھی باہر آنا اچھا نہیں لگتا۔ پھر اسے شہ تیار کرنے میں ماں کی مدد کرنا ہوتی ہے

بیٹا! آج کل بڑا سالن کیسی پکا رہی ہے

بڑی بہن! تم دسترخوان لگا دو

بڑی دسترخوان سے برتن اٹھاتے ہوئے سلیم سے کہتی ہے (صفحہ ۱۹)

کسی کے ہاں بیٹا پیدا ہو یا شادی کا موقع ہو تو خاتمہ ضرور کی جاتی ہے۔ (صفحہ ۱۳۹)

اردو جماعت نہم : صوبہ سرحد

مرحوم کی یاد میں: دور سے ایسا معلوم ہو رہا تھا جیسے کوئی عورت آ کر کوڑا پھینک رہی ہو۔ مجھے اس مشابہت کا احساس بچپن تھا جس کی وجہ سے میرے ہاتھ پیر پھولنے لگے۔ (صفحہ ۱۰۰)

نوکیہ : جاپان خاص الخاص مردوں کا ملک ہے یہاں سے لڑکی کو سردی خاطر تواضع کرتی نصیب جاتی ہے۔

اردو جماعت نہم بلوچستان

گھر سے گھر تک: ہم سب لڑکیوں کو دیکھتے رہتے ہیں۔ یوں سمجھو کہ بڑے کے پیچھے کوئی کنواں جھانکتا ہوا نہیں رہتا ہے۔

اردو جماعت ہشتم بلوچستان

Education subjects and teaching

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

What Does This Picture show? 22

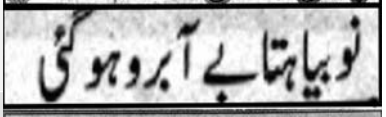
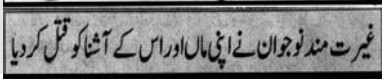
- Religion

Religious teaching and cultural practices 23

- 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

The Media Portrayals

24

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

Everyday Language and Court Language

25

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

Gender Sensitive Language in Court

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Activity 2

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

Language commonly used in the courtroom

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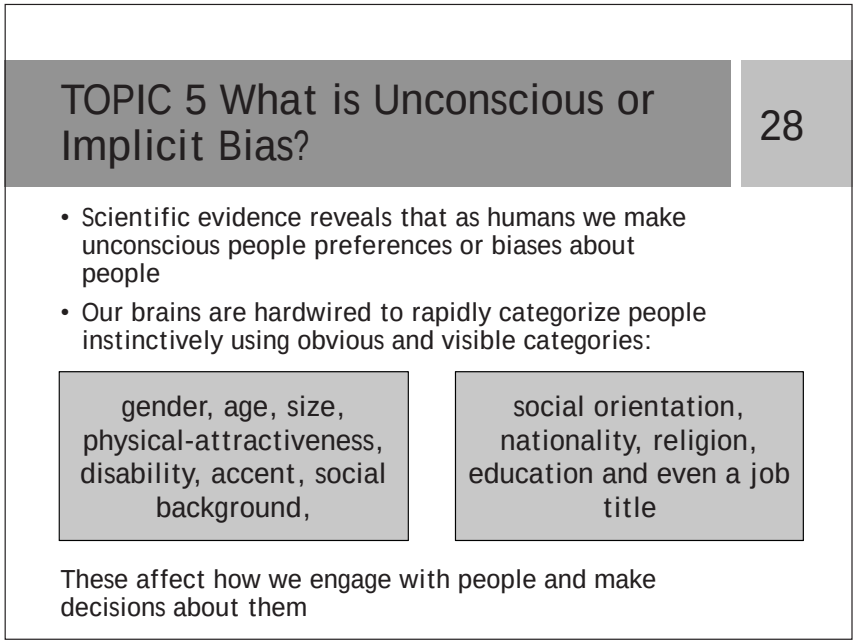
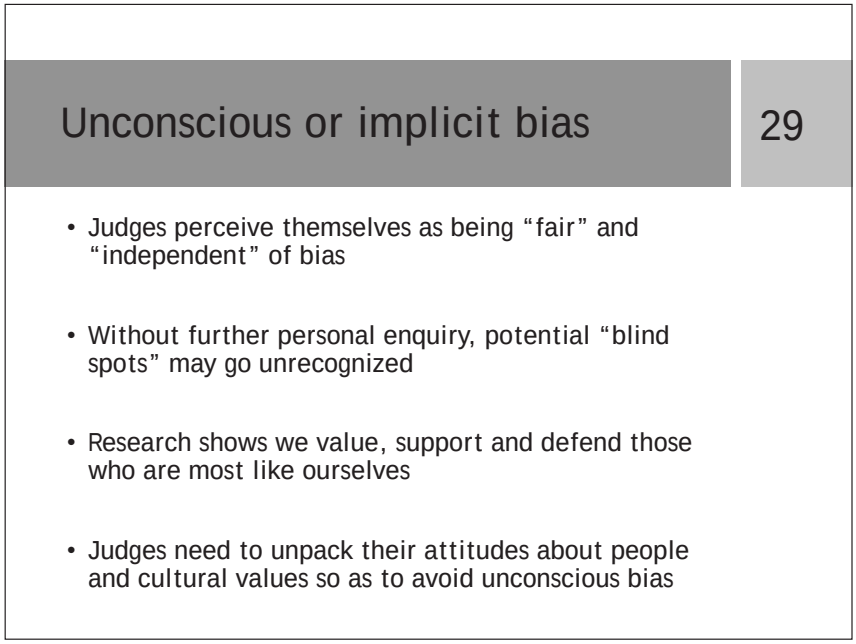
- Some simple but important examples in court decisions which are patronising or suggest gender roles :

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


TOPIC 5 What is Unconscious or Implicit Bias?
28
• Scientific evidence reveals that as humans we make unconscious people preferences or biases about people
• Our brains are hardwired to rapidly categorize people instinctively using obvious and visible categories:
gender, age, size, physical-attractiveness, disability, accent, social background,
social orientation, nationality, religion, education and even a job title
These affect how we engage with people and make decisions about them


Unconscious or implicit bias
29
• Judges perceive themselves as being "fair" and "independent" of bias
• Without further personal enquiry, potential "blind spots" may go unrecognized
• Research shows we value, support and defend those who are most like ourselves
• Judges need to unpack their attitudes about people and cultural values so as to avoid unconscious bias

Risk Factors for Judges

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

Topic 6 How can judges reduce unconscious bias?

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- Take notes
- Set out reasoning
- Seek feedback and assistance from other judges
- Regularly engage in training sessions
- Regularly question personal assumptions and beliefs
- Slow down decision-making process where possible

Final summary

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- This whole session has been a process of gender sensitisation
- Reflecting on individual personal views about gender, culture and society
- Discussing influences which come from backgrounds and society
- Discussing the effect which gender stereotypes and unconscious bias can have on judicial work
- Gender sensitisation requires modification and change
- As Nelson Mandela said:

"change your thoughts and you change your world"

What does this picture say about gender roles?

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General References

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- Dionisio, E.R.2008. *More alike than different: Women, Men and Gender Construction*. Occasional Paper No.3: National Commission on the role of Filipino Women (NCRFW) Manila.
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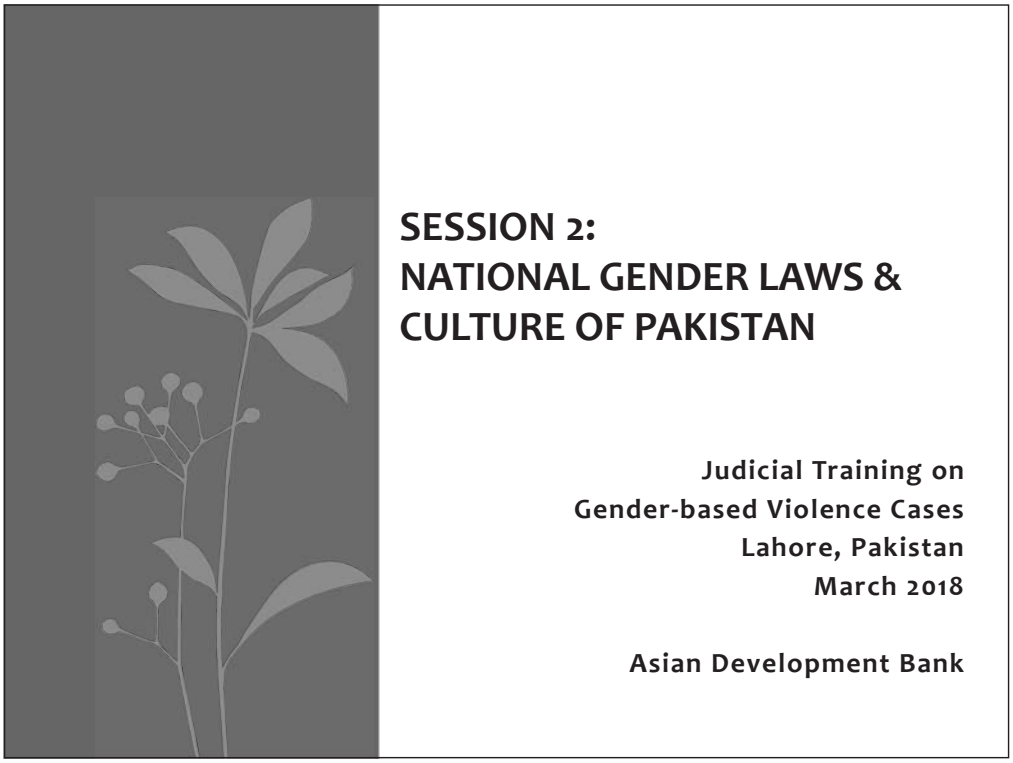
- Shire Professional Chartered Psychologists: Innovative Research Solutions: Unconscious bias. http://www.shirepro.co.uk/index.php
- UNESCO. 1999. Guidelines on Gender-Neutral language 3rd ed Paris. http://unesdoc.unesco.org/images/0011/001149/114950mo.pdf

Session 2:
NATIONAL GENDER LAWS AND CULTURE OF PAKISTAN



Objectives Of The Session

- **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 Wanni" Culture or Islam
- **Topic 5:** Rape Cases and Practical Issues
- **Topic 6:** Harassment Laws

2

Gender related National Laws

- **The Constitution of Islamic Republic of Pakistan, 1973**

Art. 14	Dignity of Man
Art. 25	Equality of Citizens
Art. 27	Safeguard against discrimination in services
Art. 35	Protection of family etc.
Art.37(e)	Promotion of social justice and eradication of social evils
Art.38	Promotion of social and economic well-being of people

- **Muslim Personal Law (Shariat) Application Act, 1962**

Sec.2	Application of Muslim Personal law
Sec 2A	Succession prior to Act IX of 1948

- **Mohammad Law on:**
  - Inheritance, Maintenance & Custody
- **The Limitation Act, 1908**

  Article. 120- period of 6 years were no limitation is provided

3

Gender related National Laws (Cont.)

- **The W.P Family Courts Act 1964**
  Sec. 17 A Suit for maintenance
- **The Muslim Family Laws Ordinance, 1961**
  Sec.4 Succession
  Sec.9 Maintenance
- **The Guardian and Wards Act, 1890**
  Sec.24 Duties of Guardian of person
  Sec.27 Duties of Guardian of Property
- **The Pakistan Penal Code, 1860**
  Sec. 498 A Prohibition of depriving woman from inheriting property.
  Sec. 498 B Prohibition of forced marriages.

4

Gender Related National Laws (Cont.)

Sec. 498 C	Prohibition of marriage with the Holy Quran
Sec. 310 A	Punishment for badla-e-sulh, wanni or sawara
Sec. 299(ee)	Fasad-fil-arz
Sec.299(ii)	Offences committed in the name or on the pretext of honor
Sec. 302	Punishment of qatl-i-amd
Sec. 305	Wali
Sec. 310	Compounding of qisas in qatl-i-amd
Sec.310-A	Punishment for giving a female in marriage or otherwise in badl-e-sulh, wanni or swara.-
Sec. 311	Tazir after Wavier or compounding of right of qisas in qatl-e-amd
Sec. 338 E (2nd proviso)	Wavier or compounding of offences

5

Gender related National Laws (cont.)

Sec.375	Rape
Sect 376	Punishment for Rape
Sec.376A	Disclosure of identity of the victim of rape
Sec.294	Obscene acts and songs
Sec.377A	Sexual Abuse
Sec.377B	Punishment
Sect 354	Assault or criminal force to woman with intent to outrage her modesty
Sec.354A	Assault or use of criminal force to woman and stripping her of her clothes
Sec. 509	Insulting modesty or causing sexual harassment

The Code of Criminal Procedure, 1898

Sec.154	Information in cognizable cases
Sec.161	Examination of Witnesses by Police
Sec. 161 A	Legal representation of victim of rape
Sec. 164 A	Medical Examination of victim of rape
Sec. 164 B	DNA test
Sec. 345	Compounding offenses

6

Gender related National Laws (cont.)

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

Harassment Laws

- The Protection Against Harassment of Women at Workplace Act, 2010.
- Federal Ombudsman Institutional Reforms Act, 2013.
- National Commission on the Status of Women Act, 2010
- Punjab Commission on the Status of Women Act, 2014
- The Punjab Protection of Women against Violence Act, 2016.

7

Activity

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

8

Topic no.1
Inheritance

Topic no.1
Inheritance –Culture & Custom

- Culture of relinquishing right of women in favour of males out of "natural love"
- Culture of marrying women within the family
- Culture of exchange marriages- watta satta
- Culture of marriage with the "Quran"
- Culture of giving dowry and other gifts instead of inheritance

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Topic no.1
Inheritance – Quranic Verses

لِّلرِّجَالِ نَصِيبٌ مِّمَّا تَرَكَ الْوَالِدَانِ وَالْأَقْرَبُونَ وَلِلنِّسَاءِ نَصِيبٌ مِّمَّا تَرَكَ الْوَالِدَانِ وَالْأَقْرَبُونَ مِمَّا قَلَّ مِنْهُ أَوْ كَثُرَ ۚ نَصِيبًا مَّفْرُوضًا-

{For men is a share of what the parents and close relatives leave, and for women is a share of what the parents and close relatives leave, be it little or much - an obligatory share.}

[Quran- Surah-An Nisa 4:7]

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Topic no.1
Inheritance – Quranic Verses

تِلْكَ حُدُودُ اللَّهِ ۚ وَمَن يُطِعِ اللَّهَ وَرَسُولَهُ يُدْخِلْهُ جَنَّاتٍ تَجْرِي مِن تَحْتِهَا الْأَنْهَارُ
–خَالِدِينَ فِيهَا ۚ وَذَٰلِكَ الْفَوْزُ الْعَظِيمُ
–وَمَن يَعْصِ اللَّهَ وَرَسُولَهُ وَيَتَعَدَّ حُدُودَهُ يُدْخِلْهُ نَارًا خَالِدًا فِيهَا وَلَهُ عَذَابٌ مُّهِينٌ :

These are bounds set by Allah. Allah will let the ones who obey Allah and His Messenger, enter gardens beneath which rivers flow. There, they will settle for good. That is the great triumph.
Whoever disobeys Allah and His Messenger and transgresses the bounds set by Him, *Allah will cause him to enter a fire, and there, he will settle for good. He will have a humiliating punishment.*"

(Quran-Surah-An Nisa 4:13-14)

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Topic no.1
Inheritance – Relevant Laws

1. Mohammaden Law-Inheritance

1. Muslim Personal Law (Shariat) Application Act, 1962
   Sec.2 Application of Muslim Personal law &
   Sec 2A Succession prior to Act IX of 1948

3. The Limitation Act, 1908
   Art. 120- period of 6 years where no limitation is provided

4. The Pakistan Penal Code, 1860
   Sect.498 A Prohibition of depriving woman from inheriting property.

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Topic no.1
Inheritance – Case laws

- **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)

Cont…..

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Topic no.1
Inheritance – Case laws

- **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 cant 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)

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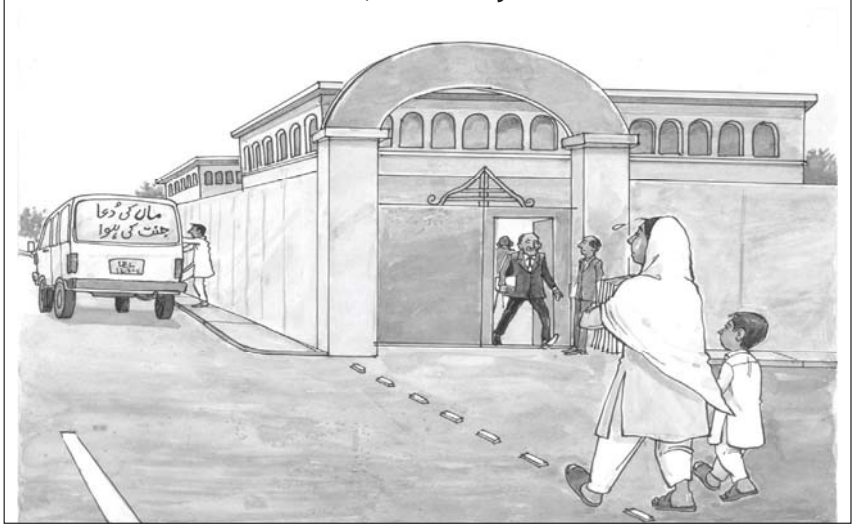
Topic no. 2
Maintenance, Custody & Guardian



Topic no.2
Maintenance/ Custody/ Guardian – Quranic verses

Interpretation Maintenance of children includes providing accommodation, food, drink, clothing, health and education, and everything that they need, on a reasonable basis, depending on the husband's circumstances, because Allaah says.

لِيُنفِقْ ذُو سَعَةٍ مِّن سَعَتِهِ ۖ وَمَن قُدِرَ عَلَيْهِ رِزْقُهُ فَلْيُنفِقْ مِمَّا آتَاهُ اللَّهُ ۚ لَا يُكَلِّفُ اللَّهُ نَفْسًا إِلَّا مَا آتَاهَا ۚ سَيَجْعَلُ اللَّهُ بَعْدَ عُسْرٍ يُسْرًا - 65:7

"Let the rich man spend according to his means; and the man whose resources are restricted, let him spend according to what Allaah has given him. Allaah puts no burden on any person beyond what He has given him. Allaah will grant after hardship, ease"

[Quran-Surah Al-Talaaq 65:7]

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Topic no.2
Maintenance/ Custody/ Guardian – Quranic verses

وَإِنْ أَرَدتُّمُ اسْتِبْدَالَ زَوْجٍ مَّكَانَ زَوْجٍ وَآتَيْتُمْ إِحْدَاهُنَّ قِنطَارًا فَلَا تَأْخُذُوا مِنْهُ شَيْئًا ۚ أَتَأْخُذُونَهُ بُهْتَانًا وَإِثْمًا مُّبِينًا 4:20- وَلَا تُؤْتُوا السُّفَهَاءَ أَمْوَالَكُمُ الَّتِي جَعَلَ اللَّهُ لَكُمْ قِيَامًا وَارْزُقُوهُمْ فِيهَا وَاكْسُوهُمْ وَقُولُوا لَهُمْ قَوْلًا مَّعْرُوفًا 4:5- وَكَيْفَ تَأْخُذُونَهُ وَقَدْ أَفْضَىٰ بَعْضُكُمْ إِلَىٰ بَعْضٍ وَأَخَذْنَ مِنكُم مِّيثَاقًا غَلِيظًا 4:21-

The provision for maintenance of a married woman is exclusively the responsibility of her husband **(Surah An-Nisa': 5)**, and a husband is required to pay the dowry for his wife upon marriage (Surah An-Nisa': 4). This dowry is exclusively owned by the wife, and the husband has no right to take it back even upon divorce.

(Quran-Surah An Nisa': 20-21)

وَالْوَالِدَاتُ يُرْضِعْنَ أَوْلَادَهُنَّ حَوْلَيْنِ كَامِلَيْنِ ۖ لِمَنْ أَرَادَ أَن يُتِمَّ الرَّضَاعَةَ ۚ وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ ۚ لَا تُكَلَّفُ نَفْسٌ إِلَّا وُسْعَهَا ۚ لَا تُضَارَّ وَالِدَةٌ بِوَلَدِهَا وَلَا مَوْلُودٌ لَّهُ بِوَلَدِهِ ۚ وَعَلَى الْوَارِثِ مِثْلُ ذَٰلِكَ ۗ فَإِنْ أَرَادَا فِصَالًا عَن تَرَاضٍ مِّنْهُمَا وَتَشَاوُرٍ فَلَا جُنَاحَ عَلَيْهِمَا ۗ وَإِنْ أَرَدتُّمْ أَن تَسْتَرْضِعُوا أَوْلَادَكُمْ فَلَا جُنَاحَ عَلَيْكُمْ إِذَا سَلَّمْتُم مَّا آتَيْتُم بِالْمَعْرُوفِ ۗ وَاتَّقُوا اللَّهَ وَاعْلَمُوا أَنَّ اللَّهَ بِمَا تَعْمَلُونَ بَصِيرٌ- 2:233

The father of the child shall bear the cost of the mother's food and clothing on a reasonable basis while feeding"

(Quran-Surah Al-Baqarah 2:233).

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Topic no.2
Maintenance/ Custody/ Guardian –Relevant Law

1. **<u>Mohammad Law</u>**
   Maintenance
   Custody &Guardian

2. **<u>The W.P Family Courts Act 1964</u>**
   Sec. 17 A Suit for maintenance

3. **<u>The Muslim Family Laws Ordinance, 1961</u>**
   Sec.9 Maintenance

4. **<u>The Guardian and Wards Act, 1890</u>**
   Sec.24 Duties of Guardian of person and
   Sec.27 Duties of Guardian of Property

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Topic no.2
Maintenance/ Custody/ Guardian – Case-laws

- **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- Timeline-6 months)
- **M. Ismail Vs. Superintendent District Jail, Sheikhupura - 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)

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Pag Di Laaj (Men's Honour)

Video

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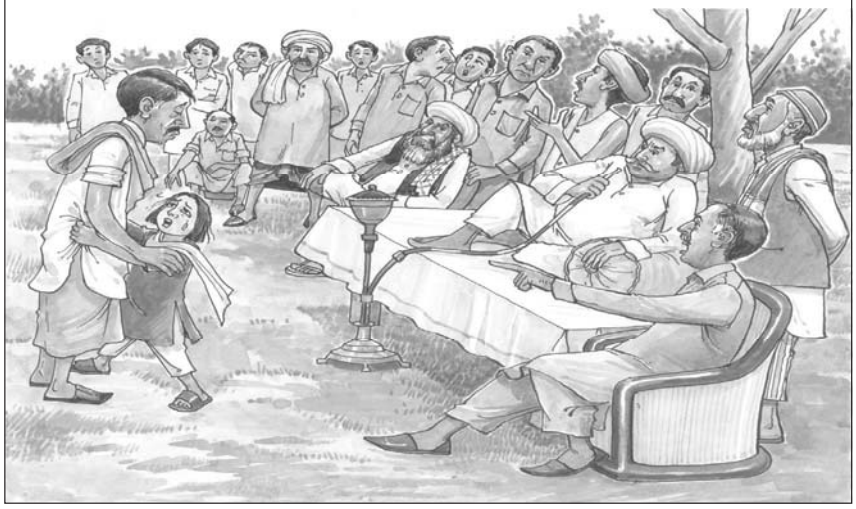
Topic no.3
Swara & Wani



Topic no.3
Swara & Wani- Quran and Sunah

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

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

(Quran-Surah-i-Fatir 35:18)

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُم مِّنْ أَنفُسِكُمْ أَزْوَاجًا لِّتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُم مَّوَدَّةً وَرَحْمَةً ۚ إِنَّ فِي ذَٰلِكَ لَآيَاتٍ لِّقَوْمٍ يَتَفَكَّرُونَ
Marriage is a partnership based on love and mercy.

(Quran-Surah Ar-Rum 30:21)

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

(Sunnah)

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Topic no.3
Swara -Relevant Law

- The Muslim Family Laws Ordinance, 1961
  Sec.5 Marriage requirements

- The Pakistan Penal Code, 1860

  - **Swara**

Sec 498 B	Prohibition of forced marriages.
Sec. 498 C	Prohibition of marriage with the Holy Quran
Sec. 310 A	Punishment for badla-e-sulh, wanni or sawara

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Topic no.3
Swara & Wani- Quran and Sunah

Essentials of a valid Marriage

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

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Topic no.3
Swara & Wani

THE EXPRESS TRIBUNE

KP & FATA

Five jirga members arrested in vani case

Vani/Swara victims in Sindh reach Capital for justice

Jirga decisions make people run for life

IGPs directed to submit reports about 'Vani', 'Swara' victims

Topic no.3
Swara– Case laws

- **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 a 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

Topic no.4
Honour-killing – Quranic verses

وَمَن يَقْتُلْ مُؤْمِنًا مُّتَعَمِّدًا فَجَزَاؤُهُ جَهَنَّمُ خَالِدًا فِيهَا وَغَضِبَ اللَّهُ عَلَيْهِ وَلَعَنَهُ وَأَعَدَّ لَهُ عَذَابًا عَظِيمًا - 4:93

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

(**Quran-Surah-An Nisa 4:93**)

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Topic no.4 Honor-killing-Relevant Law

The Pakistan Penal Code, 1860

Honor-killing

Sec. 299(ee) Fasad-fil-arz
Sec.299(ii) Offences committed in the name or on the pretext of honor
Sec. 302 Punishment of qatl-i-amd
Sec. 305 Wali
Sec. 310 Compounding of qisas in qatl-i-amd
Sec.310-A Punishment for giving a female in marriage or otherwise in badl-e-sulh, wanni or swara.-
Sec. 311 Tazir after Wavier or compounding of right of qisas in qatl-e-amd
Sec. 338 E Wavier or compounding of offences (2nd proviso)

- The Anti-Terrorism Act, 1997
  Sec.6(2)(b)
  Sec.7

- The Code of Criminal Procedure, 1898
  Sec.154 Information in cognizable cases
  Sec.161 Examination of Witnesses by Police

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Topic no.4
Honour Killing – Case laws

- **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

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Topic no.4
Honour Killing – Case laws (Cont..)

- **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 violates FR as enshrined under art 9)

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Topic no. 5
Rape

34

Topic no. 5
Rape – Relevant Laws

- The Pakistan Penal Code, 1860
  - Sec.375 Rape
  - Sect 376 Punishment for Rape
  - Sec.376A Disclosure of identity of the victim of rape
- The Code of Criminal Procedure, 1898
  - Sec.154 Information in cognizable cases
  - Sec.161 Examination of Witnesses by Police
  - Sec. 161 A Legal representation of victim of rape
  - Sec. 164 A Medical Examination of victim of rape
  - Sec. 164 B DNA testing

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Topic no. 5
Rape – Case laws

- **Salman Akram Raja Vs. Govt. of Punjab - 2013 SCMR 203**
- **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.

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Topic no.6
Harassment

Topic no.6
Harassment - Relevant Laws

- The Pakistan Penal Code, 1860
  - Harassment
    (Section.294, 354, 354A, 377A,377B,509)
- The Protection Against Harassment of Women at Workplace Act, 2010.
- The Punjab Protection of Women against Violence Act, 2016.
- The Code of Criminal Procedure, 1898
  (section. 154, 161)

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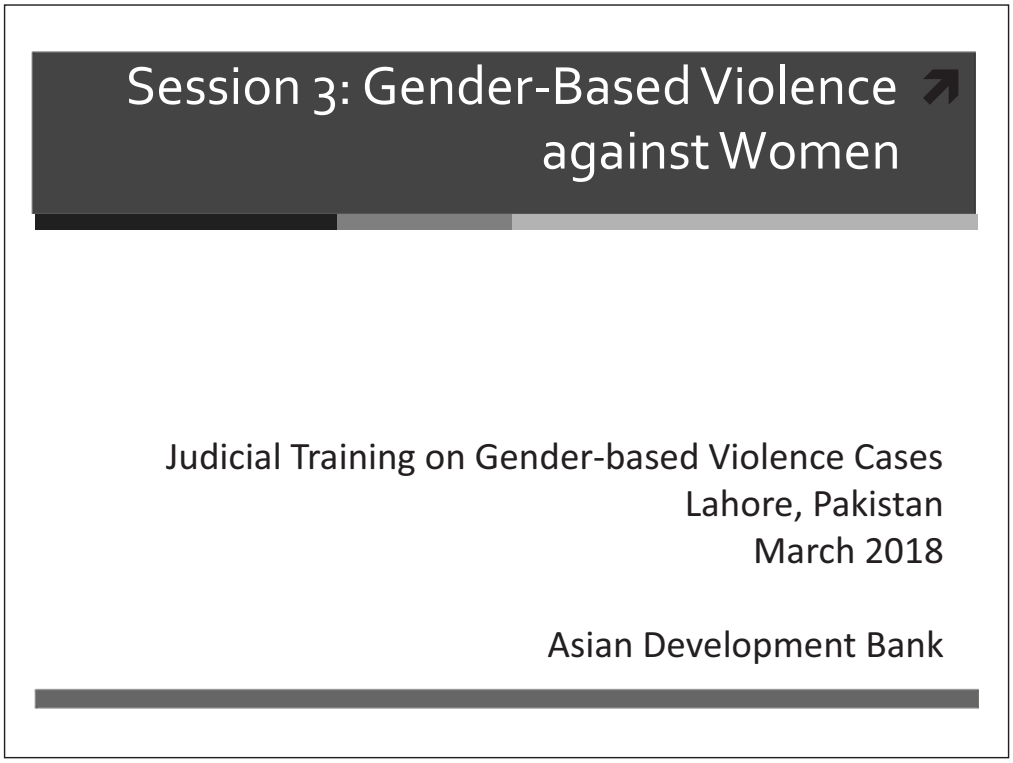
Session 3:
GENDER-BASED VIOLENCE AGAINST WOMEN



1

Objectives of session

- 1. Defining gender based violence
- 2. Causes and impact of violence against women
- 3. State obligation to eliminate violence against women
  - Under constitutional law
    - Jurisprudence
  - Under international law
    - Gender based violence is a violation of human rights
- 4. Unpacking specific forms of gender-based violence against women

2

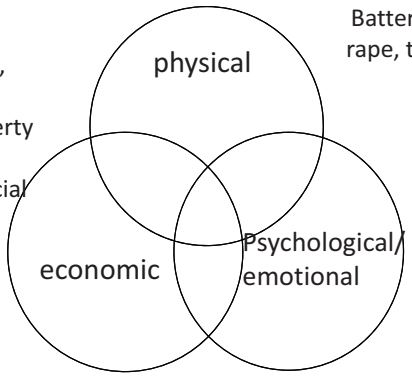
1. Gender-Based Violence against women (GBV)

- "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.
- GBV is violence directed at a woman
  - because she is a woman; or
  - that affects women disproportionately.

3

Gender-Based Violence against women (GBV)

Denying access/excluding from health care, employment, education, property and agricultural resources, financial resources and decision making



Battery, sexual assault, rape, trafficking, sexual exploitation

verbal abuse, shaming, isolation, intimidation, and controlling behavior, online violence, harassment

4

2. Causes and impact 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."

- Impact: Normalization of GBV.

5

Activity 1: Causes of GBV

- Break out into 2 groups.
- List out the possible causes of gender based violence.
  - Write down these causes on separate pieces of paper
- In plenary - Analyse and categorise these causes.

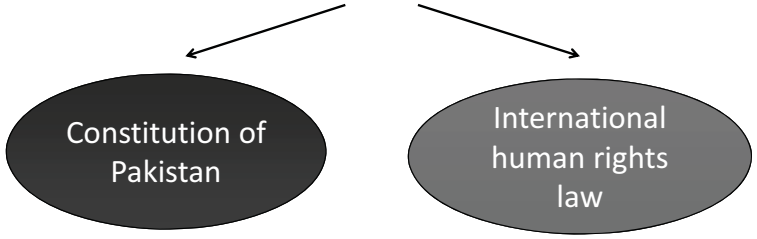
6

Acceptance, complicity and normalisation of GBV

7

3. State obligation to end violence against women

State obligation - States are obligated to **exercise due diligence** to promote, protect and fulfil women's human rights and eliminate gender discrimination including gender-based violence against women



8

Prohibition of Violence and Use of Force

- "The avoidance and prevention of violence constitute the basic purpose of lawmaking. The rule is so fundamental that "if a legal system did not have them, there would be no point in having any other rules at all." [Hart]
- Confronting violence is and must be the primary duty of the nation State. The prohibition of violence and use of force is imperative –
  - within the national context
  - in the international sphere amongst nations (UN Charter)

9

How does the State exercise due diligence?

- 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.
- The due diligence principle is one of means not end. States are obligated to establish holistic, systemic processes to –
  - Prevent;
  - Protect;
  - Prosecute;
  - Punish; and
  - Provide redress and reparations. [5P's]
- The principle does not hold States accountable if the State has systemic processes and safeguards in place –
  - a) that is extended to all individuals; and
  - b) that all individuals can access them.

10

3a. Pakistan Constitution

- Article 25:
  - 1. All citizens are equal before law and are entitled to equal
  - 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
- Fundamental rights: Security of person and right to life and liberty, right to property and protection of property rights, freedom of speech, freedom of movement, right to education
- Art. 8
  - Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void.

11

Constitutional duty to protect women from GBV

- **India:** The right to be protected from sexual harassment and sexual assault is, therefore, guaranteed by the Constitution and is one of the pillars on which the very construct of gender justice stands.' '[F]ailure in discharging this public duty renders it [the State] accountable for the lapse.' Verma Committee
- **South Africa**: Indeed, the state is under a series of constitutional mandates which include the obligation to deal with domestic violence. R. Baloyi, South Africa
- **Kenya:** [P]olice failure 'to conduct prompt, effective, proper and professional investigations… infringed the petitioners' fundamental rights and freedoms under… the Constitution of Kenya 160 girls case

12

3b. International obligation: GBV is a violation of human rights

- One of the most extreme and pervasive forms of discrimination against women, severely impairing and nullifying the enforcement of their rights
- Yet, only formally recognized as part of the human rights agenda in 1993
- Today, gender-based violence against women is a violation of women's human right and constitutes a form of discrimination against women prohibited under international human rights.

13

Major Instruments on Women's Human Rights

- **Prohibition of discrimination on the basis of gender is also found in:**
  - Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (189 countries ratified)
  - Universal Declaration of Human Rights (UDHR): **Article 23**
  - International Covenant on Civil and Political Rights (ICCPR): **Article 26**
  - International Covenant on Economic, Social and Cultural Rights (ICESCR): **Article 2**

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Major Instruments on GBV

- Committee on the Elimination of Discrimination against Women: Gen. Recommendation 12 in 1989 and Gen. Recommendation 19 in 1992:
  - 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
- Declaration on the Elimination of Violence against women: General Assembly resolution 48/104 of 19 December 1993 art 4
- CEDAW Gen. Recommendation 35 in 2017:
  - The *opinio juris* and State practice suggest that the prohibition of gender-based violence against women has evolved into a **principle of customary international law**.

15

CEDAW

- Articles 2 and 5 obligate the State to adopt a policy to eliminate all forms of discrimination against women
  - adopt appropriate legislative and other measures prohibiting discrimination against women; and
  - take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.
  - 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.

16

Pakistan's Role in upholding women's human rights

- 1954: UNGA called on governments to abolish laws customs and practices "inconsistent with the Universal Declaration of Human Rights".
- 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 discrimination against women**, namely, Afghanistan, Algeria, Argentina, Austria, Cameroon, Chile, Columbia, Czechoslavakia, 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 Discrimination Against Women** by the UNGA on March 2, 1967. (A/RES/22/2263)

17

GBV violates human rights

- CEDAW GR 19: GBV impairs or nullifies women's human rights and fundamental freedoms including –
  - Right to life;
  - Right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment;
  - Right to liberty and security;
  - Right to equal protection of the law;
  - Right to equality in the family;
  - Right to highest standard attainable in physical and mental health; and
  - Right to just and favorable conditions of work.

18

GBV and gender discrimination

- Gender-based violence against women is one of the fundamental social, political and economic means by which the subordinate position of women with respect to men and their stereotyped roles are perpetuated

- Why does discrimination against women deserve its own articulation in the Constitution and international convention?

19

Doctrine of Equality

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

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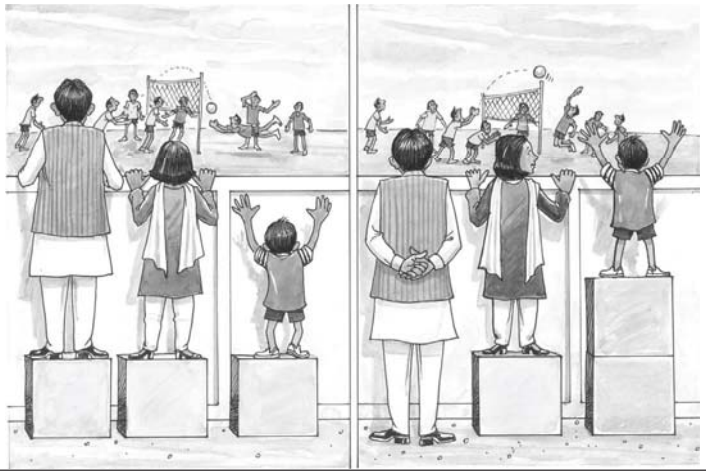
Equality



21

Discrimination

- **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:**
  - Laws, policies, culture or customary practices may socially and legally entrench gender stereotypes and become unquestioned norms and standards.
  - Requires change of mindset

22

Types of Discrimination

- **Direct discrimination**

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

- **Indirect discrimination**

  At times what appears to be a neutral policy or criterion, actually results in discrimination because certain rules or policies are such that it is difficult if not impossible for women to comply with unless such policies or criterion are inherently required and reasonable adjustments cannot be made

- **Who is the comparator**?

  In order to determine whether a person has been discriminated, we need to identify a comparator.

23

GBV are/may constitute forms of torture

Convention against Torture and Inhuman and Degrading Treatment (CAT): General Comment No. 2, CAT/C/GC/2, 24 January 2008. UN Special Rapporteur on Torture and CAT Committee:

- Domestic violence (intimate partner violence), female genital mutilation, human trafficking 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 constitute or may constitute torture or cruel, inhuman and degrading treatment

- States should be held accountable whenever they create and implement discriminatory laws that may trap women in abusive circumstances including laws that restrict women's right to divorce or inheritance, or that prevent them from gaining custody of their children, receiving financial compensation or owning property, all serve to make women dependent upon men and limit their ability to leave a violent situation. [SR Torture]

24

Drawing on International Law

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

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

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

25

Pakistani Cases Applying CEDAW

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

***Mst Saima Vs The State PLD* 2003 Lah. 747,**

Tassaduq Hussain Jilani J.

26

Pakistani Cases applying CEDAW

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

27

4. Unpacking specific forms of GBV

a. GBV and femicide justified in the name of honour

b. Intimate partner violence

c. Economic violence: Deprivation of Inheritance

d. Early or child marriage

28

a. Crimes in the name of 'honour'

29

Unpacking culture of honour

- Creates excuses where the woman is transformed from victim/survivor into perpetrator who violates cultural values.
- Consequently, perpetrators of violence against women, particularly domestic violence and rape are rarely punished but instead women are punished as transgressors of culture and male honour (e.g. rape victims/survivors are stigmatised or killed)
- Alternatively women are punished for male transgressions of honour to redeem the honour of the family. (swarra or jirga-ordered revenge rape of women for male transgressions)
- Culture of honour exists elsewhere. It is not unique to Pakistan e.g. US, Latin America, Middle East.

30

GBV and femicide in the name of honour

- "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." [Muhammad Siddique]
- "No tradition is sacred, no convention indispensable, and no precedent worth emulation if it does not stand the test of the fundamentals of a civil society generally expressed through the law and the Constitution." [Muhammad Siddique]
- "[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." Pakistan HR Commission, 2016

31

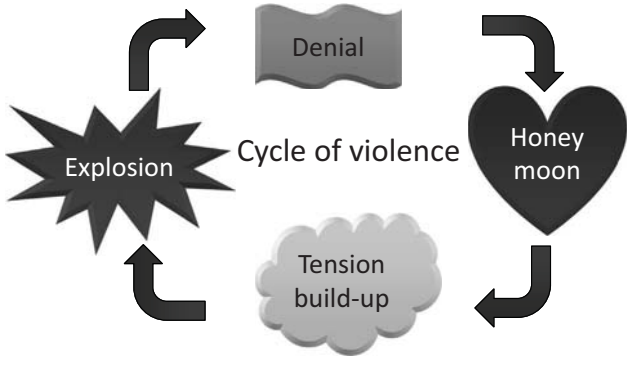
b. Intimate partner violence: Global statistics

World Health Organization:

- One in three women experience physical or sexual violence, mostly by intimate partners.
- 30% of women who have been in a relationship report that they have experienced violence by their intimate partner
- 38% of murders of women are committed by an intimate male partner

32

Cycle of violence



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Intimate partner violence

- Battered women syndrome: Psychological disorder of women subjected to long-term abuse.
- Battered women may suffer from the same intense symptoms that comprise the post-traumatic stress disorder identified in victims of official torture [UNSR Torture]
- Not a “private matter” - Opuz v Turkey: The perpetrators’ rights to privacy and family could not supersede victims’ human rights to life and to physical and mental integrity - incompatible with the State’s positive obligations to secure the enjoyment of the applicants’ rights.

34

Intimate partner violence (Sunnah and Qur’an)

- Sunnah: "How does anyone of you beat his wife as he beats the stallion camel and then embrace (sleep with) her?”; “The best of you are those who are the best to their wives, and I am the best of you to my wives”.
- The Holy Qur’an urges husbands to treat their wives with love and kindness.“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)

وَمِنْ ءَايَـٰتِهِۦٓ أَنْ خَلَقَ لَكُم مِّنْ أَنفُسِكُمْ أَزْوَٰجًا لِّتَسْكُنُوٓا۟ إِلَيْهَا وَجَعَلَ
بَيْنَكُم مَّوَدَّةً وَرَحْمَةً ۚ إِنَّ فِى ذَٰلِكَ لَـَٔايَـٰتٍ لِّقَوْمٍ يَتَفَكَّرُونَ ﴿٢١﴾

35

Intimate partner violence (Qur'anic verses)

- 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. (4: 19)

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُواْ لَا يَحِلُّ لَكُمۡ أَن تَرِثُواْ ٱلنِّسَآءَ
كَرۡهٗاۖ وَلَا تَعۡضُلُوهُنَّ لِتَذۡهَبُواْ بِبَعۡضِ مَآ ءَاتَيۡتُمُوهُنَّ إِلَّآ أَن يَأۡتِينَ
بِفَٰحِشَةٖ مُّبَيِّنَةٖۚ وَعَاشِرُوهُنَّ بِٱلۡمَعۡرُوفِۚ فَإِن كَرِهۡتُمُوهُنَّ فَعَسَىٰٓ
أَن تَكۡرَهُواْ شَيۡـٔٗا وَيَجۡعَلَ ٱللَّهُ فِيهِ خَيۡرٗا كَثِيرٗا

SESSION 3

36

c. Economic violence: Deprivation of Right to Land and Inheritance

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Economic violence: Deprivation of Right to Land and Inheritance

- SC: Women relinquishing inheritance rights is not recognized under Islamic and Pakistani law and is opposed to public policy. [PLD 1990 SC 1]
- Survey commissioned by the NCSW: 50.6% women do not receive shares; highest in Baluchistan (100%) followed by Punjab (97%).
- "Rights to land, housing and property are essential to women's equality and wellbeing." OHCHR
- Prevalence may be attributed to traditional/customary practice.
- Policies need to review the ground realities rather than continuing outdated frames of references.

38

3. Economic violence: Deprivation of Right to Land and Inheritance

- The hallmark of property in Islamic jurisprudence is underlined by the notion of dual ownership.
- Islamic legal theory insists that ownership of everything belongs to God. "131. Unto Allah belongeth whatsoever is in the heavens and whatsoever is in the earth. And We charged those who received the Scripture before you, and (We charge) you, that ye keep your duty toward Allah. And if ye disbelieve, lo! unto Allah belongeth whatsoever is in the heavens and whatsoever is in the earth, and Allah is ever Absolute, Owner of Praise.

وَلِلَّهِ مَا فِي ٱلسَّمَٰوَٰتِ وَمَا فِي ٱلْأَرْضِ ۗ وَلَقَدْ وَصَّيْنَا ٱلَّذِينَ أُوتُوا۟ ٱلْكِتَٰبَ
مِن قَبْلِكُمْ وَإِيَّاكُمْ أَنِ ٱتَّقُوا۟ ٱللَّهَ ۚ وَإِن تَكْفُرُوا۟ فَإِنَّ لِلَّهِ مَا فِي ٱلسَّمَٰوَٰتِ
وَمَا فِي ٱلْأَرْضِ ۚ وَكَانَ ٱللَّهُ غَنِيًّا حَمِيدًا ﴿١٣١﴾

- Sunnah: "regard the life and property of every Muslim as a sacred trust".

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d. Early or child marriages

40

Early or child marriages

- Child marriages are violations of human rights (CEDAW, CRC)
- The harm of child marriage: denies girls the opportunity to healthy development (risky early pregnancy, interrupted education) and increased risk of domestic violence. [WHO]
- The Islamic principle of avoiding harm and promoting the greatest good can be used to prohibit early marriage.
- Criminal law should not be the sole tool, e.g. need to address social norms and poverty and rights of the child. Are forced or early marriage declared void?

41

Early or child marriages

- Non-implementation of laws prohibiting child/ forced marriages.
- Obtaining data on forced or child marriages is challenging. This is because a high proportion of birth and marriages in Pakistan are not registered. Survey findings conducted for NCSW in 2010,
  - Births of about 49.4% of female and 50.6% of male respondents were found unregistered
  - Marriages of 53.21% female and 39.68% male respondents respectively were unregistered
- No protection of girls and women who defy their family's wishes to have them married as they risk being killed.

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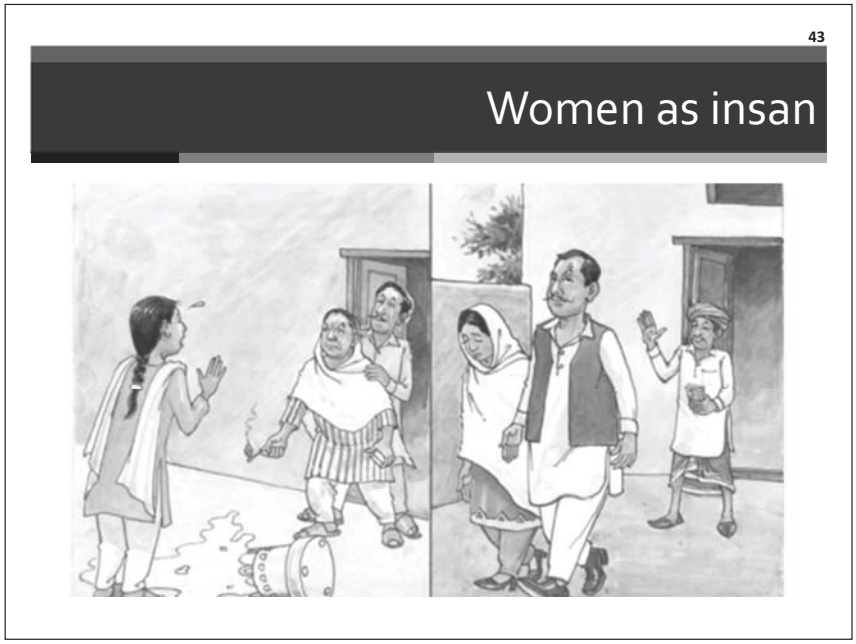
Activity 2

- Break into 2 or 4 groups.
- Group 1 and 3 look at chart and discuss.
- Group 2 and 4 study the hypothetical and discuss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Women as insan

Session 4:
GENDER ISSUES IN CONDUCTING GBV CASES

SESSION 4:
GENDER ISSUES IN
CONDUCTING GBV CASES

Judicial Training on Gender-based Violence Cases
Lahore, Pakistan
March 2018

Asian Development Bank

Objectives of the Session

2

- Topic 1 Provide a brief background about the universal and Pakistan experience of women and gender based violence (GBV)
- Topic 2 Discuss challenges for women witnesses in GBV and rape cases
- Topic 3 Gender stereotyping in GBV cases
- Topic 4 Discuss assessing credibility in rape cases
- Topic 5 Discuss Standards of Court Practices in Punjabi Courts – by reference to Model GBV Court in Lahore
- Topic 6 Content, language and manner of questioning
- The session will be interactive with 2 practical exercises

Topic 1 Universal and Pakistan Experience of Women and GBV

3

- **The Universal experience of women** is that the challenges for women's access to justice do not begin at the courtroom door
- **Women**:
  - suffer economic, social, educational and employment inequalities and have lower literacy rates
  - face discrimination on multiple grounds (ethnicity/race, marital and/or maternal status)
  - are most likely to be the victims of GBV and rape

What is Meant by Gendered Based Violence

4

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**.

International and Pakistan GBV data

5

Internationally

- 1:3 women in the world experience either physical or sexual violence at some point in their lives, mostly from someone close to them

Pakistan

- In South East Asia (including Pakistan) (37.7%) experience violence (WHO 2013)
- 4 women are raped every day – half of them minors (HRCP 2015; Parveen 2011)

Punjab Province data

6

In Punjab reported cases of GBV increased from 6,505 in 2015 to 7,313 in 2016 (Punjab Commission on the Status of Women 2017)

Pendency of cases of GBV from all Districts of Punjab as at 31.08.17 were 8,091

- 2838 rape,
- 240 gang rapes
- 667 sexual assault
- 2375 hurt
- 226 domestic violence

Punjab Attrition Data

7

Punjab Commission on the Status of Women Report 2017

Crime	Convictions	Acquittals	Consigned to record
Rape	100	2,183	70
Murder	50	84	-
Honour killings	19	114	8
Assaults (S 354)	17	660	723
Human Trafficking	15	312	81
All Hurt Cases	12	372	187

Pakistan - Constitutional Framework and Pro-Women Legislation

8

- There are constitutional guarantees of equality between man and women in the law
  - **Articles 25, 28, 34 and 35**
- The Government has taken important steps in the last two decades with initiatives in legislation and policy.
- The Punjab State has also taken even greater steps both in legislation and policy to improve women's access to justice

Federal Legislation

9

Federal Legislation

- The Protection of Women (Criminal Laws Amendment) Act, 2006
- The Protection Against Harassment of Women at Workplace Act, 2010
- The Prevention of Anti-Women Practices (Criminal Laws Amendment) Act, 2011
- The Acid Control and Acid Crime Prevention Act 2011
- Criminal Law (Amendment)(Offences related to Rape) Act 2016
- Criminal Law (Amendment) (Offences in the name or pretext of Honour) Act 2016

Punjab Legislation

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Punjab Legislation

- The Punjab Commission on Status of Women Act 2014
- The Punjab Women Empowerment Package 2016 (implemented and under the Act)
- The Punjab Protection of Women against Violence Act 2016

Topic 2 Challenges for Women in GBV cases

11

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

What do these pictures show? 12

Appearing In Court 13

- Just appearing in court is distressing. The building, courtroom, formal dress and formal legal language
- Having to come face-to-face with the accused
- The proximity of the accused, counsel and court staff, many of whom are likely to be men

Giving Evidence

14

- Having to give evidence about intimate conduct before strangers
- Knowing that their conduct and reputation can be subjected to XXN
- Knowing a judge will make a decision as to whether they should be believed

Recognising Women's Experience

15

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

"With all the attendant social consequences such a classification [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 3 Stereotyping Of Women In GBV and Rape Cases

16

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

Stereotyping Of Women In GBV and Rape Cases (cont)

17

- Stereotyping a woman's behaviour affects the assessment of her credibility
- A lack of knowledge and understanding of the nature of domestic violence or sexual assault and its impact on women's responses:
  - at the time of offence and
  - when giving evidence in court

ACTIVITY 1 - Quiz

18

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

Gender Stereotyping - legal and factual issues in Rape Cases

19

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

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

Delay By Victim in Reporting Rape

20

- ***Mehboob Ahmad v The State*** **(1999 SCMR 1102)**
- ***Muhummad Umar v The State*** **(1999 PCr LJ 699)**
- ***People v Ilao*** **(G.R.Nos 152683-84, December 11, 2003)**
- ***People v Ilagan*** **(G.R.No 144595, August 6,**
- **2003)**

Relevance of Moral Character or Virginity of victim

21

- ***People v Ilao*** **(G.R.Nos 152683-84, December 11, 2003)**
- ***People v Jason Navarro, Solomon Navarro and Roberto Olila*** **(G.R. 137597, October 24, 2003)**
- ***People v Wilson Suaraez, et al.*****(G.R.Nos 153573-76 April15, 2005)**
- ***State of Punjab v Gurmit Singh & Ors*****, 1996 AIR 1393**
- **Practice in UK and Australia**
- **Note Qanun-e-Shahadat Order S1 51(4) is repealed**

Whether the Victim Consented and absence of visible injury

22

- ***People v Ilao*** **(G.R.Nos 152683-84, December 11, 2003)**
- ***People v Ilagan*** **(G.R.No 144595, August 6, 2003)**
- **Mahraj Din v Emperor AIR 1927 Lah 222**
- ***The State v Shabbir alias Kaka s/o Moza Jhamke and Fozia Bibi*****.Jazeela Aslam Addl Sessions Judge, Sheikhupura. FIR No 1499/10 October 4, 2012**

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

23

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

TOPIC 4 Assessing Credibility - Research

24

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

Assessing Witnesses Fairly And Without Bias

25

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

Topic 5 Standards Of Court Practice for GBV cases in Punjabi Courts

26

Standards and directions given by the Supreme Court

Salman Akram Raja v Government of Punjab

2013 SCMR 203

Salman Akram Raja Vs. Government of Punjab

27

- Brief facts and background
- Supreme Court 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

LHC Guidelines to be followed in cases of GBV

28

- No 223325 dated 17 October 2017
- Incorporated the directions in *Salman Akram Raja* and S 13 of the *Criminal Law (Amendment) (Offences related to Rape) Act* 2016 and international best practices.
  - Supervising Magistrate
  - Sessions Court
  - Practice if victim or family members are threatened to compromise
  - Court environment
  - Taking evidence

The Model GBV Court Lahore

29

- Commenced operation 24 October 2017.
- Practice Note No 2 features include:
  - Female Support Officer
  - Processes for settling the victim and witnesses
  - Trial process provisions
  - Protection orders
  - Procedures when victim or other witnesses resile
  - Procedures where victim does not attend court
  - Courts power to ask questions and call witnesses
  - Procedure for XXN of victim by defence counsel

Operation of the GBV court in practice

30

- Issues which arise in the GBV Court
- Challenges for a judge
- Judicial responses to the challenges

TOPIC 6 Content, Language And Manner of Questioning

31

Two Aspects

- Content of Questions
- Manner of questions

Content of Questions

32

- 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 question which appears to "be intended to insult or annoy" or appears to be "needlessly offensive"
- Many common law jurisdictions disallow "**improper"** questions of witnesses

Improper questions

33

- Questions using inappropriate language, misleading, confusing, or harassing
- Are stereotyping and/or unfairly alluding to a woman's gender
- Infer that a woman makes a less credible witness than a man
- Need to take into account mental intellectual or physical impairment, age, gender, language, personality, educational background, religion, maturity and understanding of a witness.
- Other matters such as relationship, if any, to any other party in the proceeding

Manner of Questioning

34

- Regardless of content, probibit questions which are asked in a bullying, aggressive, angry or loud voice
- Prohibit body language or aggressive eye contact which can be threatening
- Prohibit rapid fire questions which can upset a witness and feel pressured, intimidated or flustered
- The court should control this conduct as part of its inherent power to regulate and control proceedings before them

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

Best Practice for Questioning Vulnerable Witnesses

35

- Research which shows that the most reliable evidence from a vulnerable witness e.g., a child, is to allow them to "tell their story" in answer to "open questions"
- This takes account of suggestibility when asked questions by those in authority.
- There is a tendency to answer "yes" to leading questions ("confirmatory bias")
- Many countries have guidelines to restrict questioning of vulnerable witnesses

Activity 2

36

Activity 2

- You will be divided into 4 groups and you will be given papers which have 4 hypothetical cases
- Each group will **discuss 1 of the cases** and answer the questions (15 mins)
- A representative from each group will report back on the group answers (2 mins) for each group
- A general discussion will follow

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37

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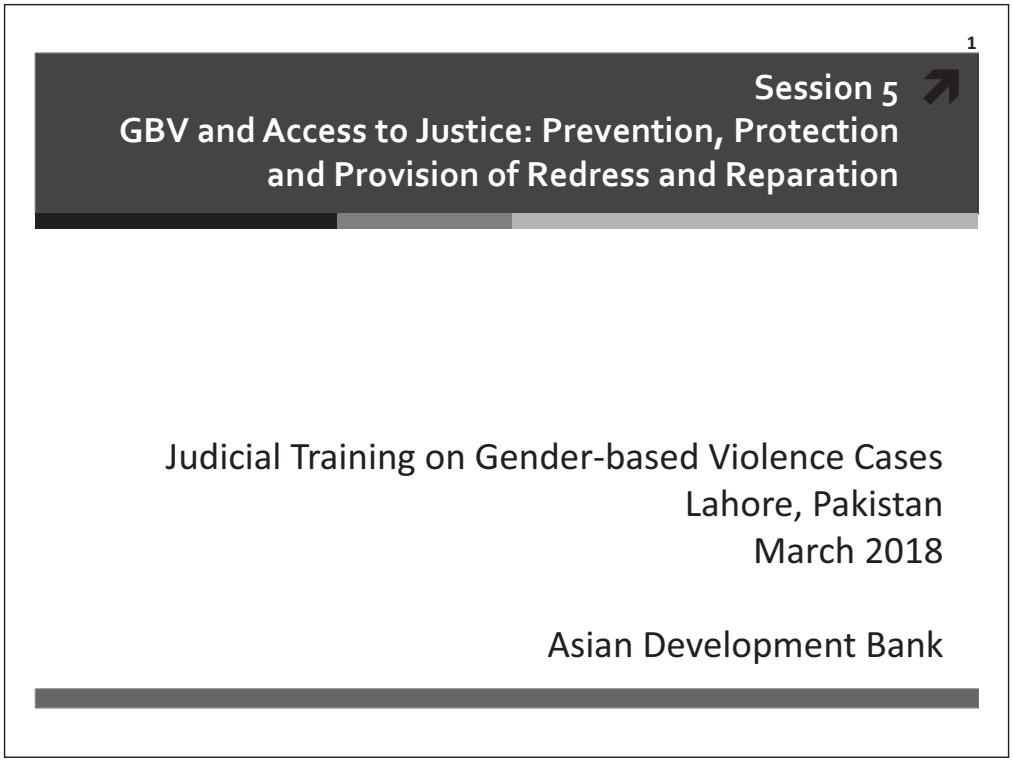
Session 5:

GBV AND ACCESS TO JUSTICE: PREVENTION, PROTECTION AND PROVISION OF REDRESS AND REPARATION



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Objectives

- 1. Role of the Court in
  - a. Prevention of GBV
  - b. Protection of victim/survivors
  - c. Punishing the perpetrator
  - d. Provision of redress and reparation for the victim/survivor
- 2. Amicus Curiae

3

1. Access to Justice: District/Sessions Court

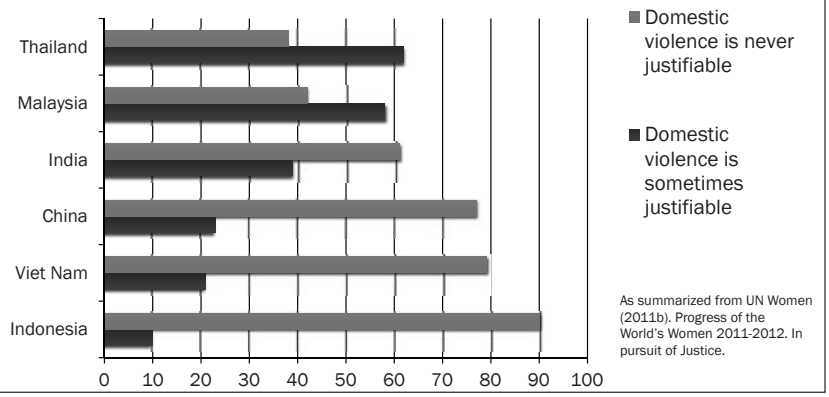
- The district judiciary is crucial as it is usually the point of first contact with the courts. 90% litigation is pending in the subordinate courts with only 10% cases are in the superior.
- The district and sessions courts play a critical role in enforcing constitutional safeguards whether they be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

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

4

Mindset & modifying behavior

Perceptions about domestic violence — Asia (percentage)



As summarized from UN Women (2011b). Progress of the World's Women 2011-2012. In pursuit of Justice.

5

Mindset and behaviour

Acceptance of justification by ever married men and women for IPV. Justifications: Burns the food, argues with him, goes out without telling him, neglects the children, refuses to have sexual intercourse, neglects the in-laws.

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%

ADB quoting Pakistan Demographic and Health Survey 2012-2013

6

Fundamental rights and human rights

- Fundamental rights or 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. These rights allow for the description of women's lives and reality through a gender lens. It elevates women's rights as issues of fundamental and human rights.

- This obligates States to exercise due diligence in 5 areas –
  - to prevent violations
  - protect victims/survivors
  - prosecute and investigate violations
  - punish perpetrators and
  - provide redress and reparation to victims/survivors

7

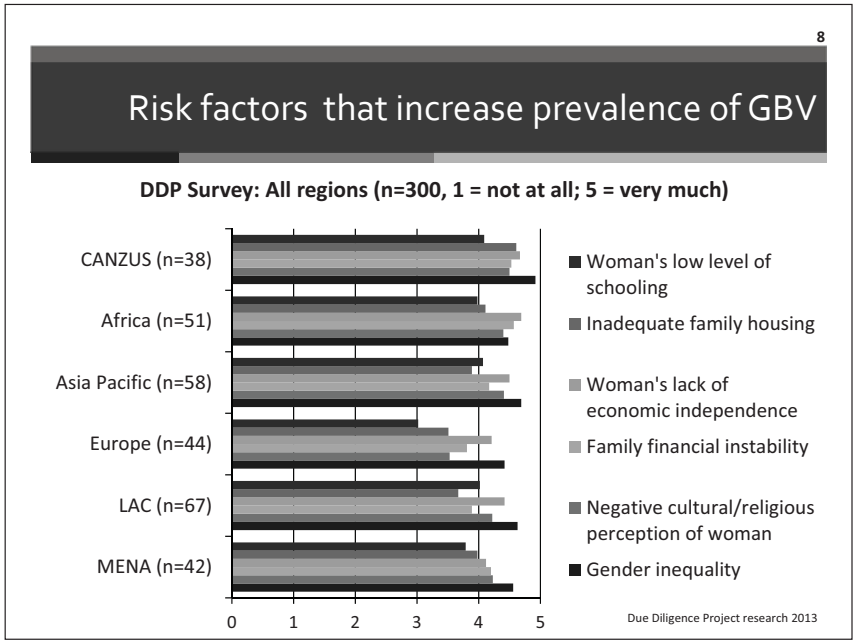
Respect, Protect and Fulfill

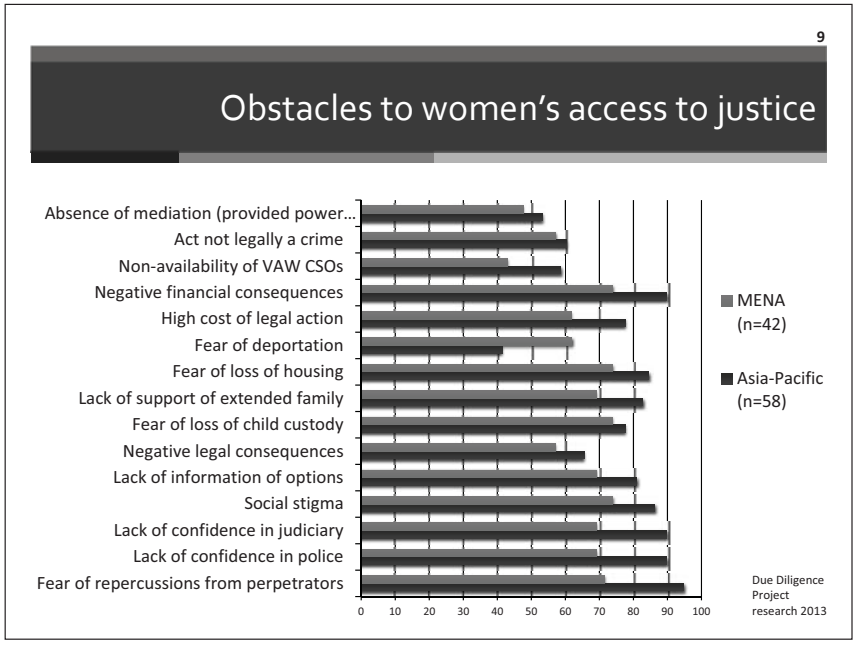
- State obligations [CEDAW Gen. Recommendation 28] -

- **Respect**: refraining from making laws, policies and structures that directly or indirectly result in the denial of the equal enjoyment by women of their civil, political, economic, social and cultural rights.

- **Protect:** exercising due diligence to protect women against discrimination including by private actors.

- **Fulfil:** ensuring that women and men enjoy equal rights de jure and de facto, including, through temporary special measures


8
Risk factors that increase prevalence of GBV
DDP Survey: All regions (n=300, 1 = not at all; 5 = very much)
CANZUS (n=38)
Africa (n=51)
Asia Pacific (n=58)
Europe (n=44)
LAC (n=67)
MENA (n=42)
0 1 2 3 4 5
Woman's low level of schooling
Inadequate family housing
Woman's lack of economic independence
Family financial instability
Negative cultural/religious perception of woman
Gender inequality
Due Diligence Project research 2013


9
Obstacles to women's access to justice
Absence of mediation (provided power...
Act not legally a crime
Non-availability of VAW CSOs
Negative financial consequences
High cost of legal action
Fear of deportation
Fear of loss of housing
Lack of support of extended family
Fear of loss of child custody
Negative legal consequences
Lack of information of options
Social stigma
Lack of confidence in judiciary
Lack of confidence in police
Fear of repercussions from perpetrators
0 10 20 30 40 50 60 70 80 90 100
MENA (n=42)
Asia-Pacific (n=58)
Due Diligence Project research 2013

10

Activity 1

- Break into 3 groups.
- Does the court have a role to play in addressing the following issues?
- If so, how? Provide specific examples of what the court's role is and how the court can discharge this role.
- Discuss

11

Access to Justice

- The right of access to justice for women is essential to the realization of all the rights protected under the Constitution and under Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).
- Effective access to justice optimizes the emancipatory and transformative potential of law.
- 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

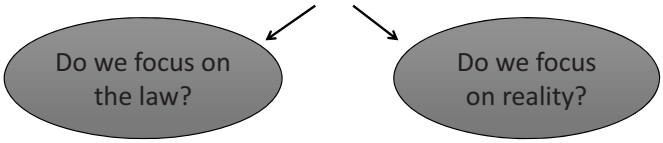
CEDAW GR 35

12

Neutrality and the Law

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

Is the law neutral?



- The argument that law is neutral is inherently problematic and ignores the fact that lawmakers and judges are products of their environment and incorporate their latent perspectives and biases into the law.

13

The Court, the Law and Society

- Our relationship with the law
  - Does the law follow society's will?
  - Does the law dictate society's actions?
- Function of law
- Our relationship with the law
  - How does the law influence us?
  - Who influences the law?

14

1a. Preventing GBV: Courts' role

- "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." [Muhammad Siddique PLD 2002 Lahore 444]
- The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity provided no one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope (UNESCO Universal Declaration on Cultural Diversity, Art 4)
- [The] general and discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts. [Maria de Penha]

15

International jurisprudence

- Courts must be efficacious – e.g. justice delayed is justice denied;
- Not demonstrate tolerance of GBV or create a climate conducive of GBV
- Actions to have preventive or deterrent effect.
- Provide effective remedy –impartial and fair hearings not affected by prejudices or stereotypes.
- Provide protection of victim/survivor (restraining or protection orders)
- Placing women's rights to life, physical integrity, and mental integrity above a perpetrator's right to freedom of movement

16

International jurisprudence on State accountability

- **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.
- **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.
- **Hungary**: Hungarian law did not provide for a restraining or protection order and there were no shelters equipped to accept A.T. together with her children, one of whom was severely brain damaged. CEDAW Committee - States may be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.

17

International jurisprudence on State accountability

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

18

E.g. Supreme Court decision on harassment of women

SC concerned over rising women harassment cases

In a decision reported in the Express Tribune on 24 September 2017, p. 9 affirming Peshawar HC decision against shutting down of women crisis centre.

"The Supreme Court expressed serious concerns over increasing incidents of harassment of women in government departments and other places…

The male dominated institutions had made inactive the females who were about half the population. ...

It lamented that non-state actors were busy in an organised manner in spreading terror and waging so-called jihad against girls getting education, doing jobs and taking part in sports.

The Court observed that Pakistan was a signatory of a number of international treaties to curb domestic crimes against females and bound to comply with them"

19

1b. Protecting victim/survivor: Courts' role

- Protection against VAW keeps survivors safe from harm and includes
  - avoiding the recurrence of further violence and ensuring that victims/survivors
  - survivors receive adequate and timely services.
- Protects from perpetrator, perpetrator's families and friends and and sometimes even from survivor's own family.
- Victims/survivors must have access to medical and psychological treatment, shelter or alternative accommodation and in the case of child survivors, child protection services and agencies dealing with child witnesses

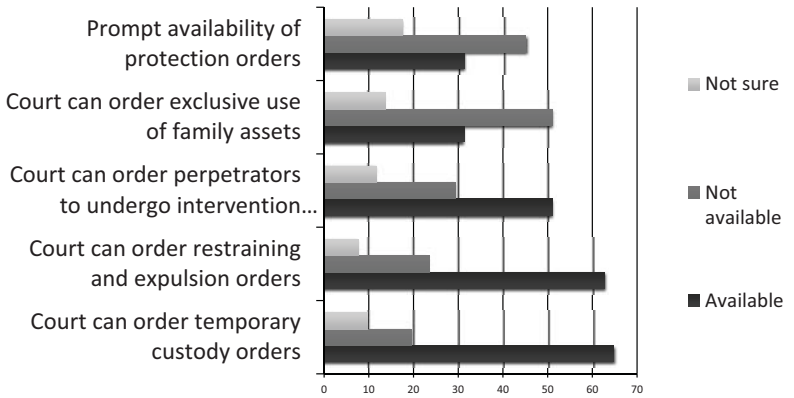
20

Availability of and accessibility to protection orders

- Restraining and expulsion orders are crucial to stop the violence and dissipate the fear and tension.
  - allow victims/survivors to continue to stay in their homes and use vehicles
  - protect them at home and at their workplaces/educational institutions
  - allow them (and their children) to continue with their daily life
- Enforcement of restraining and protection order is crucial

21

Protection orders: Judicial response in the Asia Pacific (n=51)



Due Diligence Project Survey

22

1c. Punishment: Court's role

- Punishment is a mechanism by which States ensure that those who commit violence face its consequences. At a minimum sanctions must ensure negative consequences for perpetrating GBV
- Facilitates women's realization of the right to be free from any acts of violence.
- Holding perpetrators accountable for VAW is fundamental to the principle of punishment: it creates a level of predictability and certainty, suggesting that perpetrators will have to answer for VAW.
- Certainty of Punishment
  - UN Survey on why men commit sexual violence:72-97% reported never punished

23

Punishment principles

- Premised on principle GBV is not justifiable. Failure to do so sends the message to society that VAW is both tolerated and tolerable.
- Ensuring Punishment is commensurate with offence
  - E.g. aggravating factors for sentencing: severity of violence, relationship between perpetrators and victims/survivors (loco parentis, spouse), capacity of victims/survivors (minor) and recidivism.
  - avoid down-criminalising offence – especially domestic violence
- Meeting the Goals of Punishment:
  - Preventing Recidivism
  - Rehabilitating Perpetrators
  - Deterring Others

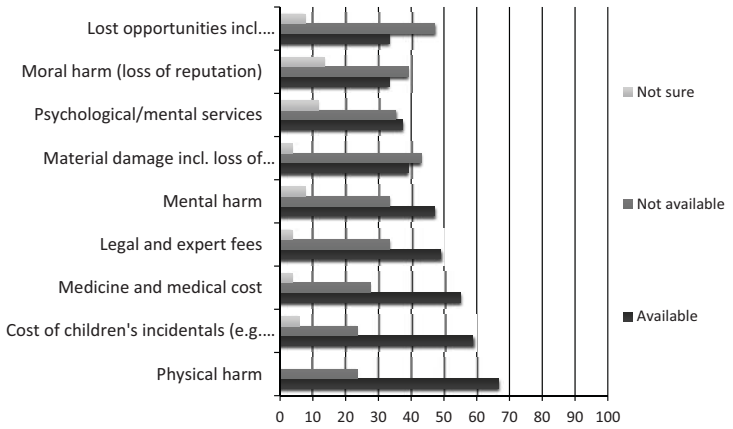
24

1d. Redress and Reparation

- Redress and reparation looks at the needs of survivors. This is sometimes forgotten after having dealt with the perpetrator.
- Unless redress, remedies and reparation fits victims/survivors' needs, they may be reluctant to report GBV
- Address the harm or loss suffered by survivors (formal and informal)
- Aim to eliminate or mitigate the effects of the violence committed
  - compensation (monetary/in kind), restitution, opportunity loss
  - rehabilitation including medical/ psychological
  - guarantees of non-repetition incl. measures toward prevention
  - measures of satisfaction e.g. public apologies,
  - victim impact statements

25

Redress/reparation for specific harm



26

Reparation principles

- Adopt a Victim/Survivor-oriented Perspective
  - Women not a homogeneous group – reparation to be granted according to circumstances and needs of survivors
  - Women's participation and perspectives can shape, monitor and evaluate reparation that best suit their living situation and needs
- Ensuring Proportionality to Gravity of Harm or Loss Suffered
  - reparation related to the violations suffered, gravity, facts/circumstances
  - damage/harm/loss, and measures requested to remedy the same
  - compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation

27

Reparation principles (cont.)

- Responsibility for Recuperating Reparation
  - Victims may be exposed to further risk and trauma from continued contact with perpetrators
  - Women also lack enforcement capabilities
- Working Towards Institutional Reform & Transformative Change
  - Objective to also rectify underlying causal factors of VAW
  - Transform power relations inherent in structural discrimination
  - Guarantees of non-repetition and protecting human rights
  - Suffering or removng impunity

28

2. Amicus Curiae

29

Amicus Curiae

- A case that appears straightforward may have human rights ramifications.
- Yet, in a traditional adversarial system, common law courts are hostile to interveners
- Amicus evolved as vehicle for expression by those affected, particularly 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

30

The Role of Amicus

- The courts have increasingly allowed amicus counsels to appear before the court and make submissions, particularly on the wider impact of the case.
- Traditional amicus started as neutral position – end of 18th century, transition into role of an advocate. The amicus may assume 3 roles:
  - True disinterested party (neutral).
  - Endorsing amicus.
  - Interest group amicus.

31

Activity 2

- Break into three groups.
- Group 1 to discuss and answer the questions posed in hypothetical 1.
- Group 2 to discuss and answer the questions posed in hypothetical 2.
- Group 3 to discuss and answer the questions posed on redress and reparation.

Session 6:
CHILDREN AS WITNESSES – GIVING EVIDENCE IN COURT

Session 6: Children as witnesses – giving evidence in court

Child Giving Evidence in Western Australian Court with Support person

Judicial Training on
Gender-based Violence Cases
Lahore, Pakistan
March 2018

Asian Development Bank

Objectives of the Session

2

TOPIC 1 Sources of International Law
TOPIC 2 Children differ from adults
TOPIC 3 Characteristics of sex offences on children
TOPIC 4 How children tell
TOPIC 5 Memory – what can children recall?
TOPIC 6 Reliability and Credibility
TOPIC 7 Lies and truth
TOPIC 8 Vocabulary and communication
TOPIC 9 Children in Court
TOPIC 10 Best Practice – Child Sensitive Court
Activities and role playing to assist understanding

What is your experience about children giving evidence

3

ACTIVITY

- This will be a simple activity taking 20 minutes
- It will be a general discussion about the following:
- What is your personal experience about children giving evidence?
- What are some of the issues and concerns about children giving evidence?
- What are some of the matters you think will need to addressed when assessing their evidence?

TOPIC 1 Sources of International law

4

- UN Convention on the Rights of the Child

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

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

Guidelines on Justice

5

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

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

International principles - Model Law

6

- In 2009 the UN Office on Drugs and Crime developed a *Model Law for Justice in Matters Involving Child Victims and witnesses in Crime*
- It was developed after reviewing domestic legislation and legal practices from around the world
- Commonly referred to as a "Model Law"

Facts v assumptions and stereotypes about children

7

ACTIVITY

Each of you will be given a paper with quiz questions to be answered by indicating whether in your view the proposition is true or false

Tick the box which you consider is relevant (10 mins)

Your answers will be collected and will remain anonymous

Anonymous answers will be discussed as a group

Total time 20 mins

TOPIC 2 Children differ from adults

8

The main general differences are:

- Lack of power
- Comprehension and communication skills
- More vulnerable to GBV offences particularly sex abuse

Factors affecting lack of power, communication and vulnerability

9

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

TOPIC 3 Characteristics of sex offences on children

10

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

Characteristics of child sexual abusers

11

Studies show

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

Characteristics of child GBV victims

12

- Vulnerability varies by age, development and circumstances
- Isolated or lonely children particularly vulnerable
- Children with intellectual disability more vulnerable
- Delay is common
- Incremental disclosure
- Errors of omission rather than commission
- Memory affected by age, nature of offence and trial delay

TOPIC 4 How children tell

13

Report in 2007 indicates

- Statements may be accidental, deliberate, verbal or non-verbal
- Suspicion may come from different sources
- Children may not report all details of abuse at once
- Disclosure may be immediate but often delayed
- Some never report their experience
- Children may deny or retract statements even if there is independent evidence

Disclosure

14

Key findings of a 2010 study

- Abuse by strangers- disclose < 1 month
- Abuse by family members- disclose > 1 month
- Multiple abuse is less likely to be disclosed
- Repeated abuse more likely if abuser is a relative
- Less intrusive abuse is more likely to be reported
- The younger the child the less likelihood of disclosure
- Disclosure to friends most common form and increases with age

Delay

15

Delay is common. Children may:

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

TOPIC 5 Memory -What can children recall?

16

- Memory does not operate like a video recorder
- Memory retrieval occurs in 3 ways
  - Recognition
  - Reconstruction
  - Free recall
- No universal rule
- As with adults – children may give very detailed accounts or provide little detail
- Age and development of a child is the most important determinant

General features of children's memory

17

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

TOPIC 6 Reliability and Credibility

18

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

- R v Barker [2010] EWCA Crim 4

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

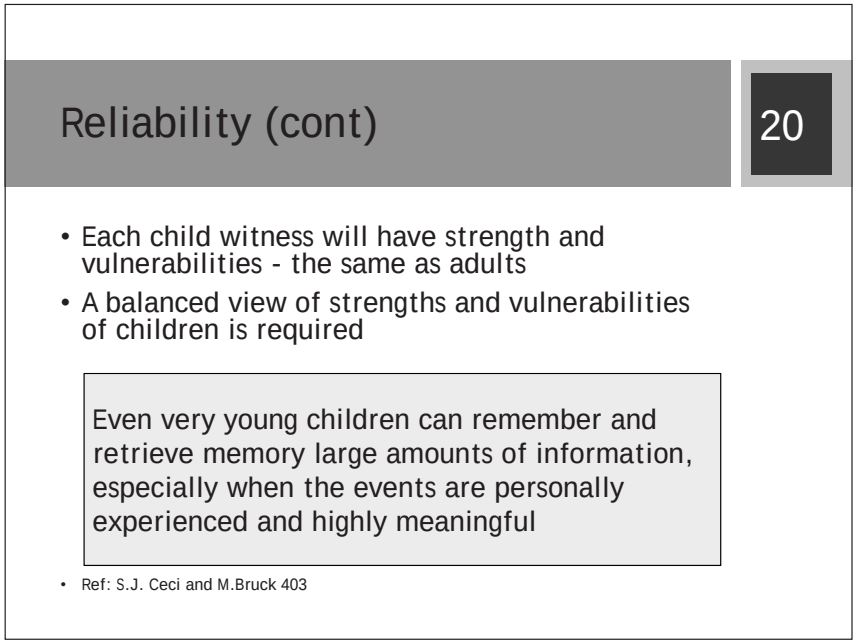
- ref Spencer and Flin p287

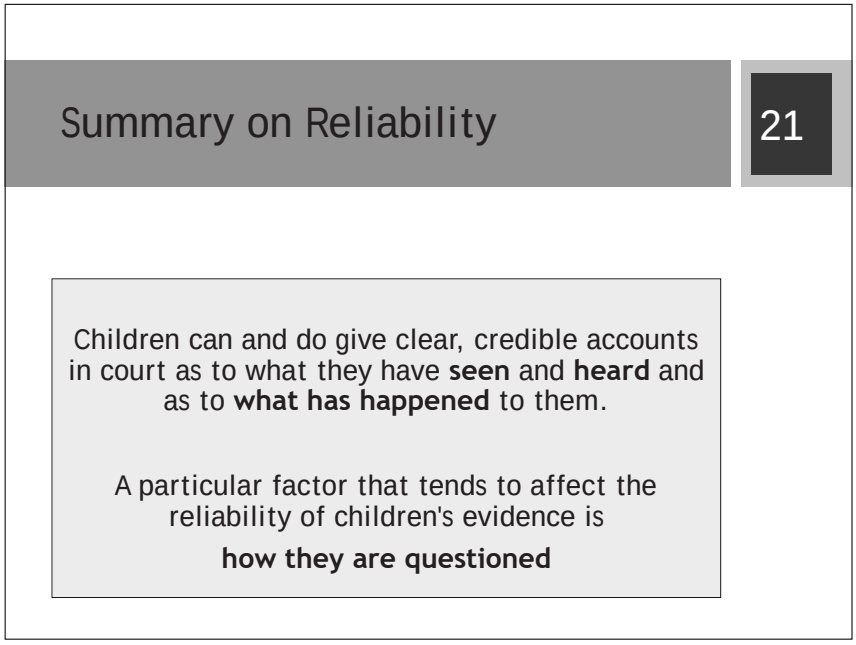
Reliability and fantasy

19

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

Ref:RK Oates (2007)


Reliability (cont)
20
• Each child witness will have strength and vulnerabilities - the same as adults
• A balanced view of strengths and vulnerabilities of children is required
Even very young children can remember and retrieve memory large amounts of information, especially when the events are personally experienced and highly meaningful
• Ref: S.J. Ceci and M.Bruck 403


Summary on Reliability
21
Children can and do give clear, credible accounts in court as to what they have **seen** and **heard** and as to **what has happened** to them.
A particular factor that tends to affect the reliability of children's evidence is
how they are questioned

TOPIC 7 Lies and truth

22

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

Omissions

23

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

Suggestibility

24

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

Suggestibility (cont)

25

- Degree of suggestibility depends on whether they were subjects or observers
- Children with disabilities can be more vulnerable to suggestibility
- Children are fairly resistant to suggestions that they have been hurt when they have not
- It is more difficult to mislead children to report negative/abuse events than positive events

TOPIC 8 Vocabulary and communication

26

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

Overview - Questioning of children

27

- Although children usually disclose incrementally, the first telling of their story or interview is vital
- The earlier in relation to the event the better
- The most reliable information is obtained if it is:
  - done through an experienced and unbiased interviewer
  - using open-ended questions and not leading questions
  - this is very important for questioning of children by police, medical officers, as well as Supervising Magistrates

TOPIC 9 Children in the court

28

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

Reducing stress for children in Court

29

Where a child sits in Wollongong NSW Australia when giving evidence

A child giving evidence in a United Kingdom court

Reducing stress for children in court

30

- Child complainants report that stress is reduced if :
  - information is given about court processes
  - information about what they need to prepare for Court
  - opportunity to express worries and concerns
  - information about coping mechanisms for court
  - support worker sitting with them
  - being debriefed after giving evidence

Informing and preparing children

31

Witness Support Service South Australia showing a child who will be the persons in court where they will sit and what they do

Challenges for questioning of children in court

32

- Language and formality of questioning in court is intimidating
- It is an adult environment
- Challenges for children when cross-examined
- Children have problems with leading questions which limits choice of answers to "yes" or "no"
- Closed questions is least accurate way to obtain reliable evidence of children <13yo
- Children tend to answer questions even if they are ambiguous or they do not understand them

TOPIC 10 Best Practice Child Sensitive Court

33

3 stages

- Stage 1 Settling the child witness
- Stage 2 Explaining the rules
- Stage 3 Understanding their capacity to answer questions

Child Sensitive Questioning

34

- It depends on the age of the child but generally:
- Relax the child and build rapport
- Encourage child to give a narrative about matters unrelated to the offence
- Answers to these questions could be followed up by asking further detail
- Use simple language with short sentences
- Follow a logical sequence either by chronology or topic

Child Sensitive Questioning (cont)

35

- Use open – ended questions such as who, what, where, why, when and how
  - open-ended by breadth
  - open-ended by depth
- Using some encouragers e.g. head nodding to indicate you are listening
- Adopt a suitable tone and manner – not overly sympathetic
- The purpose is to give the children the right to give their best evidence and also ensure the accused has a fair trial

Fair Trial

36

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

References

37

Major sources for this presentation :

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

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

MATERIALS ACCOMPANYING THE SESSION PRESENTATIONS

Session 1:
WHAT IS GENDER SENSITIZATION?

A. Session Activities

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

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

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

* To be made into individual cards

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

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

Case 1

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

Questions for discussion:

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

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

Case 2

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

Questions for discussion:

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

Case 3

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

Questions for discussion:

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

Case 4

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

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

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

Questions for discussion:

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

B. Case Law

Language is the most pervasive form of reinforcing gender stereotypes.

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

Facts:

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

Issue:

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

Decision:

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

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

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

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

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

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

Facts:

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

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

Issue:

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

Decision:

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

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

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

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

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

Facts:

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

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

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

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

Issue:

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

Decision:

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

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

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

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

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

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

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

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

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

Facts:

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

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

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

Issue:

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

Decision:

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

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

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

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

Facts:

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

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

Issue:

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

Decision:

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

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

C. Handouts

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

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

Helping Courts Address Implicit Bias

Strategies to Reduce the Influence of Implicit Bias*

NCSC National Center for State Courts www.ncsc.org

Race & Ethnic Fairness in the Courts

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

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

Helping Courts Address Implicit Bias

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

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

Risk factor: Certain emotional states

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

Risk factor: Ambiguity

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

Helping Courts Address Implicit Bias

Risk factor: Salient social categories

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

Risk factor: Low-effort cognitive processing

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

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

Helping Courts Address Implicit Bias

Risk factor: Distracted or pressured decision-making circumstances

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

Risk factor: Lack of feedback

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

Helping Courts Address Implicit Bias

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

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

Strategy 1: Raise awareness of implicit bias

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

What can the individual do?

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

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

Helping Courts Address Implicit Bias

What can the organization do?

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

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

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

Helping Courts Address Implicit Bias

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

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

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

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

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

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

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

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

What can the individual do?

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

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

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

What can the organization do?

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

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

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

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

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

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

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

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

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

What can the individual do?

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

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

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

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

What can the organization do?

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

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

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

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

What can the individual do?

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

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

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What can the organization do?

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

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

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

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

What can the individual do?

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

What can the organization do?

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

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

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

Strategy 6: Institute feedback mechanisms

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

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

What can the individual do?

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

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

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

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What can the organization do?

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

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

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

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

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

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

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

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

What can the individual do?

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

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

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

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What can the organization do?

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

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

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

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Session 2:
NATIONAL GENDER LAWS AND CULTURE OF PAKISTAN

A. Session Activities

- **Activity 1: Hypothetical Cases**

No. 1 Swara

Two sisters aged 14 and 15 years are given in marriage as compensation for murder committed by their brother. The *panchayat* of elders passed this decision in the presence of the father and brothers of the girls who agreed to the decision. One of the girls was earlier engaged to her cousin (ABC).

Two years after the incident the cousin (ABC) returns from Dubai and finds out about this decision. The cousin (ABC) files a case on behalf of two sisters against the perpetrators that include the members of the *panchayat*, father, brothers, husbands and other in-laws of the girls. By this period, his fiancée had already given birth to a baby girl who is now 8 months old.

i. Can a girl can be given as swara to avoid serious future clashes and further enmities?
ii. Is the cousin of the girls competent to file a case on their behalf?
iii. What can the nature of case to be filed by ABC be, and against whom would it be filed?
iv. Who can take against the brother and what action is this?
v. Can any action be carried against the *panchayat*?

No. 2 Honor Killing

Asiya belonged to a very conservative, middle class family and in spite of her family's disapproval started working as T.V model, singer and actress. She was pretty and talented and quickly became famous. She was also very bold. After being in popular media for some time, very objectionable photographs and videos of hers were shown on social media. This raised a big hue and cry in her neighborhood and family.

After a few days, Asiya's mother found her dead in bed. Right after the discovery of her body, her brother surrendered himself and confessed without any remorse before the family and police that he killed his sister because of her shameful activities that have degraded the honor of the family. Investigation showed that she was given sleeping pills and was strangulated afterwards that resulted in her death.

Police arrested the brother and now the case is before this Court. The father has come to this Court and in exercise of his right of qisas, has pardoned the accused (now his only son) and has requested for his release.

i. Whether murder on the pretext of honor killing is compoundable?
ii. Whether the father of the accused alone is competent to pardon him in exercise of his right of qisas?

No. 3 Acid Throwing

Danial and Afreen were neighbors and their parents were very close friends. Danial's parents proposed for Afreen but her parents refused, as Danial was still a student and had no source of income.

Danial was very depressed. One of his friends then suggested that he threaten Afreen that if she does not marry him, he would not let her marry anyone else. He called Afreen and threatened her; she did not take it seriously and refused to go against her parent's will.

A week later, while Afreen was going shopping with her mother, a motorcycle with two men with covered faces pulled close to them. They tried to pull her shawl away from her face and thereafter threw acid. Afreen was able to cover her face but got burnt on her hand and arm. The case has come before you accusing Danial and unknown person. The girl is hesitant to give evidence.

How would you proceed with the case?

No. 4 Rape

Rani was a student of B.A and was studying in NOP College. For pick and drop services, to and from home, her parents had engaged a rickshaw driver.

One day, while on their way to school, the rickshaw driver took Rani to a deserted house on the pretext of dropping medicine off for his mother. Rani claimed that the rickshaw driver dragged her in the house and raped her and left her there. Rani was so frightened and shocked that she remained unconscious for several hours. When she regained her senses, she came out of the house, weeping and crying, her clothes were crumpled and hair was rumpled. An elderly lady living across the road saw her coming out of the house in very bad shape. She offered to help her in any way possible. Rani requested her to drop her off at her college. When Rani reached the college, her teacher immediately noticed her condition and asked her what had happened. She told her teacher the entire story, who then immediately informed her parents of the incident.

Her parents reached Rani's college only after one hour because their house and the office of her father were located at a distance. They took Rani to their house and started discussing various options. After several hours the girl's teacher called to check on Rani, and asked if they had reported the case. The teacher was informed that they were considering several options; however, the teacher advised them to immediately to take her to the hospital for medical examination and to report the matter to the police.

Her medical and DNA tests were completed. Her report was prepared in the presence of the police by the doctor, and was then sent to the forensic laboratory for investigation, examination and preservation.

In the meantime, the police also arrested the rickshaw driver and his DNA was also obtained. The two DNA tests matched.

During investigation the rickshaw driver denied the allegations of rape. After due process under the law, the case has come to your court. The charge was framed against the accused and the trial commenced. While evidence was being recorded, the victim stated that she does not want to proceed further with the case.

What steps will you take now?

B. Case Law

- **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 brothers 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. l/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 ½ 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***[1]
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:

Whether the petitioners (brothers) could use a moral reason to take their sister's inheritance. Whether the sister can relinquish her inheritance in Islamic Law.

Decision

The brothers had no "moral" ground to oust their sister from their father's property as the interest in property devolved on the sister automatically after the father's death. Further, the Court said that it was the brothers' moral obligation in Islam to maintain their widowed/divorced sister.

The brothers tried to argue that they were an 'intermediary' for their sister. But the Judge responded that the concept of 'intermediary' is unknown to Islamic law. In Islamic law, there is no intermediary. The property is devolved on the heirs automatically and immediately in definite shares.

> "…. whether they (the brothers) like it, want it, abhor it, or shun it…. It is the public policy of Islamic law…If the State, the Court, the executor, the administrator (cannot) intervene, (then nobody) intervenes on any other principle, authority or relationship—(not) even of kinship."
>
> "It has already been held that the devolution of property through Islamic inheritance takes place immediately without any intervention; therefore, in this case the respondent became the owner of the property immediately on the death of her father."

The Judge extensively quoted from Quran to establish that a woman under Muslim Law enjoys equal rights and privileges as men and this is true even in case of inheritance. Also, by

[1] 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.

virtue of Quran (4:34), Islam enjoins upon men the duty to protect and enforce the rights of women.

> "Relinquishment" by a female of her inheritance is undoubtedly opposed to "public policy" as understood in the Islamic sense. Accordingly....in agreeing to the relinquishment (though denied by the sister) it was against public policy."

Therefore, in the Court's opinion, even if the sister had herself waived the right of inheritance, this being against public policy would invalidate the agreement to relinquish inheritance rights between petitioner and the respondent.

> "It is unimaginable that a daughter enjoying "protection and maintenance" by the father till she is married, when she is married and divorced, would lose this right—this of course is subject to certain conditions...it would be her right to be treated by the father in the best possible manner in all these circumstances. And if beyond the bare necessity he does anything concerning the daughter, it has to be treated as gift and not something which would have to be returned by the daughter by compensating the father in the tangible property. The rights of a sister, in cases like the present case, will have to be equated with that of a daughter..."

> "...it might be very rare that a male co-heir would relinquish his right for a female heir. Experience shows that is has always been the reverse. The flow of love cannot be so unnatural. Therefore, (...) in cases like the present one there will be a presumption (...) that it was not on account of natural love but on account of social constraints (...) that relinquishment has taken place. (...) In the present case, it appears to be jugglery that the petitioners claimed that the relinquishment by the respondent was in consideration of what they claim to have done in her two marriages as also for her maintenance. (...) All these claims are against the teachings of Islam- injunctions in the Holy Qur'an and the Sayings of the Holy Prophet (PBUH), wherein emphasis has been laid again and again on the best possible concern for and treatment of female relations."

• 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, SHEIKHUPURA, 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 WANNI

The judiciary as a catalyst for social change

▶ ***SAMAR MINALLAH V. FEDERATION OF PAKISTAN*** [2]
(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

[2] Excerpt below from: Samar Minallah Khan. The Supreme Court of Pakistan and Compensation Marriages. http://ethnomedia.pk/pdf/Booklet.pdf

seen and experienced in the courts where little girls and their fathers came to reach out for justice. Justice, that till recent past remained silent in such accepted norms, could finally be heard and seen driven by logic and ideals. The Honourable Supreme Court's proactive stance opened the doors for many women and children who were silently enduring the injustice that was being perpetrated upon them in the name of culture. During the period from December 2005 to June 30th, 2006, around sixty cases of Swara were recorded in the two districts of the KR In the month of May after the Honourable Supreme Court heard the appeal of Zarina Bibi, a victim of Vanni, more than twelve cases of Vanni emerged only from District Bhakkar within two weeks time. Seven of these cases of Vanni resulted in intervention by the local media and police.

From Mianwali, five sisters given as Vanni reached out for judicial intervention when they experienced lack of apathy from other quarters. In June, 2006, the handing over of an eleven year old girl to a rival family in Swara was challenged in the Peshawar High Court. A writ petition was filed by two sisters, Sanad Bibi aged (eleven) and Shah Izzat Bibi aged (nine), with a prayer to the court that a Jirga decision in Barawal Banda in Upper Dir regarding the handing over one of them to the rival family in Swara be declared as illegal and unconstitutional. Bakht Meena aged (eight), was to serve as compensation for her brother's crime. The incident was reported by one of the villagers. Mardan Police took prompt action when they were reported that a Jirga in Bakhshali had resolved a dispute through a Swara deal. Saima aged (five), was to be given in marriage to Mohammad Ali aged (twenty five) for her father Hashmat's crime. Her father was involved in a 'Sharam' (honour crime) and the only way to free himself from the rage of the girl's family was to hide behind little Saima. The Jirga was overruled by the local administration in April 2006 in Bashkhali, Mardan. The Mardan Police, in June 2006, recovered five year old Rubina from the rival party's home. She had been handed over to the rival party as compensation for a moral crime committed by her brother. On May 31st 2006, on the demand of the Jirga members in Shikarpur Sindh, Mohammad Ramzan pledged to hand over his daughter Heer aged (nine) and one year old Kareema as compensation for eleven buffaloes within three days. The handing over of the girls was halted after the case was brought to the notice of the Honourable Supreme Court. In June 2006, in Buner, a two month old girl was taken to a Jirga where she was given in marriage to a one year old boy. The verbal solemnization was conducted by the imam of the mosque. Buner police later arrested the Jirga members and the imam. In the past few years since the Honourable Supreme Court has taken up the issue of Swara and Vanni, the police has ceased to treat this sensitive issue as a 'private' matter.

In 2012, The Supreme Court of Pakistan clubbed together the NCSW (National Commission on the Status of Women) Petition Against Jirgas and the 2004 Petition AgainstJirga and Compensation Marriages."

Jirga members accused of violating Section 310-A of Pakistan Penal Code [3] ***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.

3 "310-A. Punishment for giving a female in marriage or otherwise in `badla-e-sulh', wanni or Swara: "Whoever gives a female in marriage or otherwise compels her to enter into marriage, `badla-e-sulh', wanni, or swara or any other custom or practice under any name, in consideration of setting a civil dispute or a criminal liability, shall be punished with imprisonment of either description for a term which may extend to seven years but shall not be less than three years and shall also be liable to fine of five hundred thousand rupees."

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. Crl. Misc. No.25168-B of 2015
Erum Sajad Gull, J (Lahore High Court)

Facts:

Ghulam Yasin, petitioner, allegedly murdered his 16/17 year old daughter. He is charged under Section 302 PPC. He seeks bail before arrest on the ground that the legal heirs of the deceased have pardoned him.

Issue:

Whether or not he is entitled to bail.

Decision:

No. Mere fact that the legal heirs of the deceased have pardoned the petitioner is not sufficient to entitle the petitioner to pre-arrest bail as the offence alleged against the petitioner is against the State as well as the society. Section 345 Cr.P.C.[4] 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.

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

4 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."

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)[5] 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.

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5 "(2) Notwithstanding the repeal of the Suppression of Terrorist Activities (Special Courts) Act, 1975 (XV of 1975) and the amendment of the Anti-Terrorism Act, 1997 (XXVII of 1997), by the Anti-Terrorism (Amendment) Ordinance, 2001--

(a) every order, decision or judgment passed by any Anti-Terrorism Court constituted under this Act or Special Court constituted under the Suppression of Terrorist Activities (Special Courts) Act, 1975, or any Appellate Court before such repeal or amendment shall remain in force and operative and the repeal or amendment shall not affect the previous operation of the law or any thing duly done or suffered or punishment incurred;

(b) every case, appeal and legal proceedings whatsoever filed or pending before any Court under the Suppression of Terrorist Activities (Special Courts) Act, 1975, including the High Court and the Supreme Court shall continue to be proceeded with in accordance with law before the concerned Court of competent jurisdiction, including the Court established under this Act, and all orders passed, decisions made and judgments delivered whether in the past or which may be made delivered hereafter by such concerned Court whether original, appellate or revisional, shall be deemed to have been validly and competently made;

(c) all convictions made, punishments or sentences awarded by the Anti-Terrorism Court or Special Court or an Appellate Court before such repeal or amendment shall be executed as if the said Acts where in force;

(d) any investigation or inquiry under this Act or the Suppression of Terrorist Activities (Special Courts) Act, 1975 made or instituted before the commencement of the Anti-Terrorism (Amendment) Ordinance, 2001, shall continue to be made and proceeded with in accordance with law;

(e) all cases pending before the Anti-Terrorism Court or Special Court immediately before the commencement of the Anti-Terrorism (Amendment) Ordinance, 2001, if not covered by this Act or clauses (a) and (b) above, shall stand transferred to the respective Courts of Session of the area or such other Courts of competent jurisdiction where the cases were registered against the accused and such Courts shall proceed with the cases from the stage at which they were pending, without the necessity of recalling any witnesses; and

(f) the Court of Session or, as the case may be, any other Court to which a case has been transferred from the Anti-Terrorism Court or a Special Court under Clause (d) shall try it in accordance with the provisions of the Code of Criminal Procedure, 1898 (Act V of 1898), and the law applicable to such case."

Decision:

No. According to Section 39(2) of the Anti-Terrorism Act, pending cases that do not constitute a terrorist act within the meaning of Anti-Terrorism Act, 1997, would be transferred and tried by the respective Courts of Session. On the other hand, cases that come within the definition of "terrorism" as provided in section 6 of the Anti-Terrorism Act, 1997 shall be tried by the Special Court.

The respondent had committed the murder of Rehmatullah and Mst. Amina on the allegation of siyahkari in a brutal manner by means of firing with Kalashinkov. The act of the respondent, as alleged, falls under section 6(g)[6] 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.

6 Section 6(g): "Involves taking the law in own hand, award of any punishment by an organization, individual or group whatsoever, not recognized by the law, with a view to coerce, intimidate or terrorize public, individuals, groups, communities, Government officials and institutions, including Law Enforcement Agencies beyond the purview of the law of the land."

▶ *GUL MUHAMMAD V. THE STATE*

PLD 2012 Balochistan 22
A.T.A. Criminal Appeal No.6 of 2007 and A.T.A. Murder Reference No.1 of 2007, decided on 29 September 2011.
Muhammad Hashim Khan Kakar and Ghulam Mustafa Mengal, JJ (Balochistan High Court)

Facts:

Gul Muhammad (accused) is the husband of Momil, who in turn is the daughter of Alan (complainant). In his complaint, Alan stated that four to five months back, Gul Muhammad made allegation of siyahkari upon Momil and intended to commit her murder. At that time, Momil was with Alan. Because of Gul's actuations, Alan did not hand custody of his daughter to Gul. In response, Gul killed several of Alan's relatives.

The Special Judge of the Anti-Terrorism Court convicted and sentenced appellant Gul Muhammad under section 302(b) of the P.P.C. read with section 7(a) of the Anti Terrorism Act, 1997 to death as ta'zir with direction to pay compensation of Rs.100,000.

On appeal, the accused contends that the case is an "ordinary crime" that does not fall under section 6 of the Anti Terrorism Act, 1997.

Issue:

Whether the accused's acts fall outside the ambit of the Anti-Terrorism Act, and therefore the Anti-Terrorism Court had no jurisdiction over the offense.

Decision:

Yes, the act falls under Section 6 of the Anti-Terrorism Act and therefore the court had jurisdiction. A plain reading of Section 6(g) of the Anti-Terrorism Act leaves no room for any doubt that any offence where the offender takes the law in his own hands and awards punishment, falls within the purview of the law. Venue of commission of a crime, the time of occurrence, the motive and the fact whether or not the said crime had been witnesses by public at large are not the only determining factors for deciding the issue whether a case did or did not fall within the parameters of the Anti-Terrorism Act, 1997. The crucial question would be whether the said crime had or had not the effect of striking terror or creating a sense of fear and insecurity in the people or any section of the people. The appellant has committed the murder of three innocent people on the fake allegation of siyahkari, while taking the law in his own hands, which certainly would have created a sense of fear, panic and terror amongst the villagers.

The killing of an innocent wife, sister and other female relatives, on the allegation of siyahkari, has become a routine practice, rather a fashion, and it is high time we discouraged such unwarranted and shocking practice resulting in double murder in the name of so-called 'honour killing'. [...] It is true that, in the rural areas of Balochistan and especially in Naseerabad division, the people do not swallow such kind of insult, touching the honour of their 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 mention-

ing 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.[7]

Lastly, as the Anti-Terrorism Act is a special law, the private complainant or the legal heirs have no right to compound the 'Scheduled Offence', as those offences are mainly against the State and not only against individuals. Moreover, the offences cannot be compounded automatically by the legal heirs, but it is always through the Court and the Court can decline the permission to compromise the offence by the legal heirs of victim.

Pardon 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.

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7 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)."

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[8] (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.

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8 338-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***[9]
  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."

9 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-Reman Ramday, Faqir Muhammad Khokhar and Mahmood Akhtar Shahid Siddiqui, JJ (Supreme Court)

Facts:

The petitioner is accused of rape, but bail was sought on the ground that the petitioner had been found innocent by the Investigating Officer who had even recommended his discharge from the case.

According to the medico-legal examination of the prosecution, the rape victim was about 18 years of age at the time of occurrence. Her hymen was found torn at multiple places, which bled on touch. Her vagina admitted two fingers but rightly and painfully.
The police file showed that the accused had been declared innocent and his discharge recommended only because C.A.M.B. Forensic Science Laboratory had found, after the DNA test, that the traces of semen found in the vagina were not those of the accused. However, no reason was offered to explain the alleged substitution of the accused with the person who had actually committed the crime.

Issue:

Whether the accused is entitled to bail on the ground that the DNA test shows that it was not his semen found in the victim's vagina.

Decision:

No. Reports of so-called experts are only corroborative in nature and are required only when the ocular testimony is of a doubtful character. In the present case, no reasons could be offered as to why the prosecutrix who had admittedly been subjected to sexual intercourse, should have spared the actual offender and should have, instead substituted the accused for him. In the circumstances, at least prima facie and for the purpose of bail petition, it could not be said that the testimony offered by the prosecutrix could admit of any doubt.

We would like to add that it is for the first time that we have noticed a D.N.A. test being used in such a case. We therefore feel compelled to place our warning on record that unless one was absolutely sure and confident of the capacity, the competence, and the veracity of the Laboratory, as well as the integrity of the one conducting such a test, taking recourse to the same would be fraught with immense dangers and could in fact lead to disastrous consequences not only in criminal cases but even in cases, for example, of paternity and inheritance etc. In the present case, at least prima facie, we find the laboratory report in question, a doubtful affair.

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.

Session 3:
GENDER-BASED VIOLENCE AGAINST WOMEN

A. Session Activities

- **Activity 1: Causes of GBV**

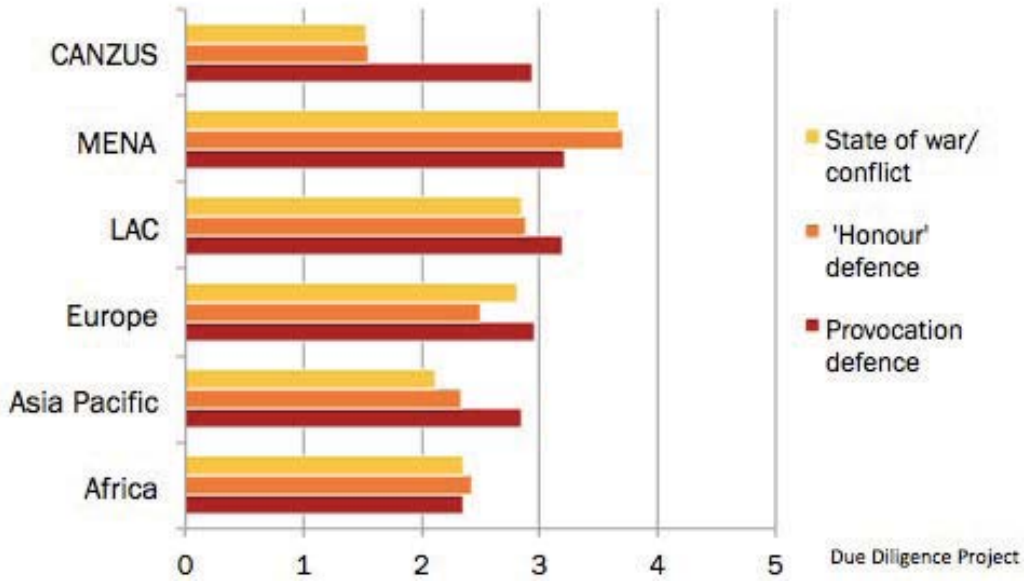
  Break out into two groups. List out the possible causes of gender-based violence. Write down these causes on separate pieces of paper. After the list is completed, analyse and categorise these causes in the main group plenary.

- **Activity 2: Factors Influencing Sentencing and Hypothetical Case**

  Break into two or four groups.

  For groups 1 and 3
  Study the chart below:

  Do these factors influence sentencing?
  All regions (n=300) (1= strongly disagree, 5 = strongly agree)



Questions for discussion:

- How does state of war commonly influence sentencing? Does it decrease or increase the sentence? What are the arguments?
- How did honour influence sentencing? Did it decrease or increase the sentence? What were the arguments?
- How does provocation influence sentencing? Does it decrease or increase the sentence?
- Discuss the elements constituting provocation and revenge. If honour is no longer considered a defence, would it be better argued as revenge crimes?

For groups 2 and 4

Study the hypothetical case below and discuss.

Salman and Amina have been married for three years. Amina is a doctor and Salman is a business-man. They are expecting a baby. Salman's business has taken a downturn for three consecutive years. As they decided that the one parent should care for the baby full time, the couple decided that Salman should suspend his business and take care of the baby and be the homemaker.

1. What would be the likely public reaction if their decision became public? Why?

Upon learning of the couple's arrangement, Amina's colleagues became hostile and collectively decided to persistently 'persuade' her to leave her employment. She complained to the hospital administration.

2. What should the hospital do?

B. Case Law

• CONSTITUTIONAL DUTY TO PROTECT WOMEN FROM GBV

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

▶ *THE VERMA COMMITTEE REPORT*

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

- "The right to be protected from sexual harassment and sexual assault is, therefore, guaranteed by the Constitution, and is one of the pillars on which the very construct of gender justice stands."[10]

[10] 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

- "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."[11]

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

▶ ***THE STATE V. BALOY***[12]
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),[13] 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

11 Id, para. 7.

12 Digest taken from the Constitutional Court's Explanatory Note. http://www.saflii.org/za/cases/ZACC/1999/19media.pdf

13 Section 7(2) reads: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

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[14] and to bodily and psychological integrity,[15] and the right to have their dignity respected and protected,[16] as well as the defensive rights of everyone not to be subjected to torture in any way[17] and not to be treated or punished in a cruel, inhuman or degrading way.[18]

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.

14 Section 12(1).
15 Section 12(2).
16 Section 10.
17 Section 12(1)(d).
18 Section 12(1)(e).

KENYA:
Police failure to conduct prompt, effective, proper and professional investigations infringed the petitioners' fundamental rights and freedoms under the Constitution of Kenya.

▶ ***C.K. (A CHILD) & 11 OTHERS V. COMMISSIONER OF POLICE/INSPECTOR-GENERAL OF THE NATIONAL POLICE SERVICE & 2 OTHERS***[19]
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 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.

[19] 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

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.

• 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 e legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and integrity of the Republic and the supremacy of the constituted Legislature in making laws, may not be subjected to external rules except to the extent legitimately accepted by the constituted Legislatures themselves. The doctrine of incorporation also recognizes the position that the rules of international law should be incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. Comity of nations and municipal law must prevail in case of conflict. Courts cannot say "yes" if Parliament has said "no" to a principle of international lay. National Courts will endorse international law but not

if it conflicts with national law. National Courts being organs of the National State and not organs of international law, must perforce apply national law if international law conflicts with it. But the Courts are under an obligation within the legitimate limits, so to interpret the municipal statute as to avoid confrontation with the comity of nations or the well-established principles of international law. But if conflict was inevitable, the latter must yield.

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

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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.

• PAKISTANI CASES APPLYING CEDAW

▶ *SAIMA, ET AL. V. THE STATE*

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

Facts:

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

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

Issue:

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

Decision:

No. Rev. Daniel Younas was appointed as Deacon via a letter of appointment issued by the Methodist Church of Pakistan. The letter specifically authorized him to solemnize matrimony and administer baptism. Rev. Younas solemnized the marriage in that capacity. The letter from the Bible Society is merely an opinion by a body which is engaged in publication of the Holy Bible and does not have any authorization to pronounce opinion/verdicts on issues of the kind. In any event, marriage primarily is a union between two sui juris individuals and the nonperformance of rituals would not invalidate the marriage particularly when Rev. Younas has placed on record the requisite authorized.

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

Here, petitioners Nos. 1 and 2 were of the view that they are validly married. Hence the condition precedent for the offence alleged prima facie does not exist. The Court is also conscious of the protection given to the marriage and the institutions of family under the Constitution of Islamic Republic of Pakistan[20] and the U.N. Convention on Elimination of all

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

Forms of Discrimination Against Women.[21] The prosecution launched against the petitioners prima facie reflects not only malice in fact but also male in law.

▶ *MST HUMAIRA MEHMOOD V. THE STATE*[22]

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 againsther. 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

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21 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."

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

marriage is not valid without consent. She argued that as she did not consent to the marriage with Mr. Moazzam Ghayas, it was invalid.

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

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

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

Issues:

The Court considered two writ petitions in this case. In the first petition it examined the meaning and role of consent in a valid marriage under Pakistani law. In the second petition, brought by a human rights activist, the Court considered whether the police in their investigations had acted male fides (in bad faith). It also considered whether courts have the authority created by the Constitution of Pakistan 1973 ["the Constitution"] and CEDAW to sanction the actions of the police and whether it should do so in this instance.

Decision:

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

In the second petition brought by a human rights activist, the Court stated that it does have the power to intervene in police action or to quash a case when there is evidence of bad faith on the part of the police. In this case, the Court found that there was ample evidence of bad faith by the police. Firstly, it cited the false case against "Rabia", and the arrest of Mst. Humaira despite police knowledge that "prearrest bail" had been granted. The Court also agreed with the petitioner that it was unlikely that a husband would wait two months to report the

abduction of his wife. Secondly, the Court acknowledged the police's abusive treatment of Mst. Humaira and Mehmood Butt upon their arrest. Finally, it found that the threats by police to the person who performed the marriage ceremony between Mst. Humaira and Mehmood Butt were also evidence of bad faith on the part of the police.

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

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

▶ ***SARWAR JAN V ABDUR REHMAN***
2004 CLC 1785
29 October 2003
Syed Manzoor Hussain Gillani (Supreme Court of Azad Jammu & Kashmir)

Facts:

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

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

Issue:

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

Decision:

Yes. As stated above, the appellant has throughout maintained that she cannot live with the respondent against whom she has developed severe hatred and disliking due to his inhumane and cruel treatment. Their wedlock is spread over fifteen years with four living and two dead children. In her pre- and post-trial statements, she has stood fast on her stand for separation. Even in her statement before the Court on 26-08-2003, in an effort to help them reach some reconciliation in view of the fifteen-year union with half a dozen children, she could not be brought around. With this background of the case, the argument of the respondent

that she did not raise the plea of Khula before the trial court is misconceived. The above state of affairs itself makes out a case of Khula when her other pleas, i.e., torture, beating, etc. were not proved. The dissolution of marriage on the ground of Khula is a pure question of law, hence can be raised even before the Highest Court of appeal. It does not require any evidence or proof, as it is the statement of the wife alone which is the determinative factor.

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

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

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

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

The appellant under the circumstances is the best judge of her sentiments and conscience. She alone can perceive and measure the quantum of love or hatred towards her husband.

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

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

> "Pakistan is a member of United Nations and is signatory to the "Convention on the Elimination of all Forms of Discrimination Against Women" which in its Article 16 enjoins all the member States as under:-
>
> (1) States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on the basis of equality of men and women:--
> (a) the same right to enter into marriage;
> (b) the same right freely to choose a spouse and to enter into marriage only with their free and full consent;
> (c) the same rights and responsibilities during marriage and at its dissolution.
>
> At a Conference attended by the representatives of all the Islamic countries including Pakistan, a Resolution was adapted which is known as Cairo Declaration of Human Rights in Islam dated 5th August 1990 (Encyclopedia of Human Rights by Edward Lawson, 2nd Edition at page 176). [It] stipulates as under:-
>
> Article 5. (a) The family is the foundation of society and marriage is the abais of its formation. Men and women have the right to marriage, and no restrictions stemming from race, colour or nationality shall prevent them from enjoying this right.
> (b) Society and the Slate shall remove all obstacles to marriage and shall facilitate marital procedure. They shall ensure family protection and welfare.
>
> Article 6 (a). Women is equal to man in human dignity and has rights to enjoy as well as duties to perform; she has her own civil entity and financial independence and the right to retain her name and lineage.

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

▶ *SUO MOTO NO. 1K OF 2006*

PLD 2008 FSC 1
Haziqul Khairi, CJ (Federal Shariat Court)

Facts:

The Federal Shariat Court, in exercise of its powers under Article 203—D of the Constitution of Islamic Republic of Pakistani, took *suo moto* notice of a news item that under the Citizenship Act 1951, a married Pakistani woman was denied the right to get Pakistani citizenship for her foreign husband, while a married Pakistani man was entitled, under section 10[23] of the said Act to obtain Pakistan citizenship for his foreign wife.

Issue:

Whether gender discrimination in Section l0 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 ommunity to equal and indiscriminate treatment to its women and to enforce equal rights for them. Pakistan is a signatory to the Universal Declaration of Human Rights which inter alia proclaimed that "everyone has a right to nationality" and that "no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." Pakistan is also a signatory to the Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, as well as the Convention on Nationality of Married Women. In the words of Professor Oppenheim "Law of Nations or International Law is the name for the body of customary and treaty rules which are considered legally binding by civilized States in their intercourse with each other." Pakistan has also ratified these treaties in terms of Article 2 of the Vienna Convention according to which ratification means "the International act whereby a State establishes on the international plane its consent to be bound by a treaty."

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23 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.

Holy Prophet (Peace be upon him) himself had made many treaties with States/tribes and fully adhered to [their] terms and conditions. However, treaties with the entire mankind such as above were not in the field in the days of Holy Prophet (Peace be upon him) of Islam which certainly stand at a higher pedestal than a treaty with a State, tribe or individual to which the Holy Prophet attached great sanctity and importance. The Holy Quran attaches utmost importance to treaties, covenants, pledges and promises and enjoins its followers to fully adhere to its terms and conditions. According Encyclopedia of Seerah Vol. I.:

- "The Quran commands: "O you who believe! Fulfill all your obligations (and trusts)." (5:1).
- "Excepting those unbelievers with whom you made treaties and who afterwards did not violate these in the least, nor did they give help to anyone against you; so you also should observe treaties with such people in accordance with their terms, for Allah loves pious people." (9:4).
- "If you fear treachery from any group, throw back (their covenant) to them, so as to be on equal terms, for Allah loves not the treacherous." (8:58).

xxx

...Islam is a universal religion. The last sermon of Holy Prophet is the first Charter of Human Rights wherein all human beings are equal. Mankind is one. Allah says in Holy Quran that "He created man and woman from a single being (7:189)" and for HIM "whoso doeth good work, whether male or female and he (or she) is a believer, such will enter paradise. (4:124)."

[Thus,] section 10 of the Citizenship Act is discriminatory, negates gender equality and is in violation of Articles 2-A and 25 of the Constitution of Islamic Republic of Pakistan. It is also against the international commitments of Pakistan, and most importantly is repugnant to Holy Quran and Sunnah."

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

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

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

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

• DOMESTIC VIOLENCE IS NOT A PRIVATE MATTER

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

Facts:[24]

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

24 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

complaints. This is despite the applicant's mother's indication to the Diyarbakır Public Prosecutor that she and her daughter had withdrawn their complaints because of the death threats issued and pressure exerted on them by the applicant's husband. It is also striking that the victims withdrew their complaints when the husband was at liberty or following his release from custody

As regards the Government's argument that any further interference by the national authorities would have amounted to a breach of the victims' rights under Article 8 of the Convention, the Court recalls its ruling in a similar case of domestic violence (see Bevacqua and S. v. Bulgaria, no. 71127/01, § 83, 12 June 2008), where it held that the authorities' view that no assistance was required as the dispute concerned a "private matter" was incompatible with their positive obligations to secure the enjoyment of the applicants' rights. Moreover, the Court reiterates that, in some instances, the national authorities' interference with the private or family life of the individuals might be necessary in order to protect the health and rights 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***[25]
PLD 1990 SC 1
Muhammad Afzal Zullah, J. (Supreme Court, on appeal)

Facts:

The three petitioners in the case were the sons of Ghulam Ahmed Shah. The respondent was Shah's daughter and the petitioners' sister. The father left behind property in different estates at the time of his death. Mutations were entered and sanctioned properly in all estates except for one. She was deprived of her Islamic share in her father's property covered by this mutation.

The petitioners' (brothers) explanation for this discriminatory treatment of the respondent's (sister) share was based on the fact that the petitioners (brothers) had spent a great sum of money on their sister's marriage. They further claimed that they had maintained her for about five years. The petitioners thus claimed that for these considerations, the respondent (sister) voluntarily relinquished her inheritance.

Issue:

Whether the petitioners (brothers) could use a moral reason to take their sister's inheritance. Whether the sister can relinquish her inheritance in Islamic Law.

Decision:

The brothers had no "moral" ground to oust their sister from their father's property as the interest in property devolved on the sister automatically after the father's death. Further, the Court said that it was the brothers' moral obligation in Islam to maintain their widowed/divorced sister.

The brothers tried to argue that they were an 'intermediary' for their sister. But the Judge responded that the concept of 'intermediary' is unknown to Islamic law. In Islamic law, there is no intermediary. The property is devolved on the heirs automatically and immediately in definite shares.

> ".... whether they (the brothers) like it, want it, abhor it, or shun it.... It is the public policy of Islamic law...If the State, the Court, the executor, the administrator (cannot) intervene, (then nobody) intervenes on any other principle, authority or relationship—(not) even of kinship."
>
> "It has already been held that the devolution of property through Islamic inheritance takes place immediately without any intervention; therefore, in this case the respondent became the owner of the property immediately on the death of her father."

The Judge extensively quoted from Quran to establish that a woman under Muslim Law enjoys equal rights and privileges as men and this is true even in case of inheritance. Also, by

25 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.

virtue of Quran (4:34), Islam enjoins upon men the duty to protect and enforce the rights of women.

> "Relinquishment" by a female of her inheritance is undoubtedly opposed to "public policy" as understood in the Islamic sense. Accordingly....in agreeing to the relinquishment (though denied by the sister) it was against public policy."

Therefore, in the Court's opinion, even if the sister had herself waived the right of inheritance, this being against public policy would invalidate the agreement to relinquish inheritance rights between petitioner and the respondent.

> "It is unimaginable that a daughter enjoying "protection and maintenance" by the father till she is married, when she is married and divorced, would lose this right—this of course is subject to certain conditions...it would be her right to be treated by the father in the best possible manner in all these circumstances. And if beyond the bare necessity he does anything concerning the daughter, it has to be treated as gift and not something which would have to be returned by the daughter by compensating the father in the tangible property. The rights of a sister, in cases like the present case, will have to be equated with that of a daughter..."

> "...it might be very rare that a male co-heir would relinquish his right for a female heir. Experience shows that is has always been the reverse. The flow of love cannot be so unnatural. Therefore, (...) in cases like the present one there will be a presumption (...) that it was not on account of natural love but on account of social constraints (...) that relinquishment has taken place. (...) In the present case, it appears to be jugglery that the petitioners claimed that the relinquishment by the respondent was in consideration of what they claim to have done in her two marriages as also for her maintenance. (...) All these claims are against the teachings of Islam- injunctions in the Holy Qur'an and the Sayings of the Holy Prophet (PBUH), wherein emphasis has been laid again and again on the best possible concern for and treatment of female relations."

Session 4:
GENDER ISSUES IN CONDUCTING GBV CASES

A. Session Activities

- **Activity 1: GBV Women Stereotypes and Myths**

  Mark with a tick in the box as to whether the statement is true of false.

Number	Statement	True?	False?
1	A genuine victim reports rape immediately after it happens.		
2	Delay in reporting rape indicates that a rape claim is false.		
3	All rape victims should physically put up a fight and failure to do so indicates consent.		
4	All rape victims will sustain genital injuries.		
5	All rape victims will sustain bodily injuries.		
6	Absence of genital injuries and/or bodily injuries indicates that the victim has consented to sexual conduct.		
7	Consent to sex can be assumed when women: (a) wear provocative clothing or makeup (b) engage in flirtatious behaviour (c) stay out late		
8	Rape occurs because men are unable to control their sexual urges when they are provoked by a woman's behaviour such as in 7 above.		
9	Rape is more likely to be committed by a stranger than by a person known to the victim such as friend, family member or neighbour.		
10	When a woman says "no" it does not mean she is not consenting to sexual intercourse.		
11	Women are unreliable as witnesses about rape allegations and there must be corroboration of their evidence by independent witnesses or evidence.		
12	Complainants, particularly if they are children, usually make up stories that they have been raped or sexually assaulted.		
13	The past sexual history of a woman complainant is: (a) Always relevant to whether she consented to sexual intercourse. (b) Rarely relevant to whether she consented to sexual intercourse.		
14	A judge may rely solely on the demeanour of a complainant in court when deciding whether to believe her evidence that a rape occurred.		

- **Activity 2: Hypothetical Cases**

The purpose of this activity is for each group to discuss one of three hypothetical cases set forth below. (15 minutes). Each group is to nominate a person to be the reporter on the group discussion and the answers. (2 minutes per group)

Case 1

Basima and Hassan have known each other since they were children. They lived in the same village. Hassan is the brother of Basima's girl friend Amira. As they grew older and Basima was 18 and Hassan was 20, they still saw each other regularly, particularly when Basima stayed at the family house with Amira.

The parents of Basima from an early age told Basima that they wanted her to marry the oldest son from a good family who were close friends of Basima's parents. Also Hassan was told by his parents that they wanted him to marry the youngest daughter of their close friends.

One night when Basima was staying overnight at Amira's family house. Basima and Hassan were no longer there in the morning.

Basima's father went to the police alleging that Basima had been abducted and raped. An FIR was registered. Basima's parents caught up with them 1 week later. They found them staying with friends of Hassan in Lahore.

Basima came home with her parents. A day later she went with her father and made a statement to police that Hassan had abducted and raped her. She presented the police with the results of a medical examination which showed that she was no longer a virgin. She made a section 164 statement alleging abduction and rape by Hassan.

Hassan denied the charge. The case was Challaned. Hassan is charged with Abduction and Rape and after the usual processes comes up for a trial hearing.

At the hearing Basima indicates that she wished to resile from her section 164 statement. She says that Hassan had not abducted and raped her.

- **Question 1:** If you were the judge, what would you do? With reasons.

Further information:

Assume that Basima was 14 years of age and Hassan was 27 years of age when the events took place.

- **Question 2:** If you were the judge, what would you do? With reasons.

Further information:

Assume further information comes before. Namely, that when Basima's parents found her in Lahore, they forced Basima to: return home; make a statement to police to say that Hassan had abducted and raped her; forced her to undergo a medical examination; and forced her to make

section 164 statement making allegations against Hassan, even though she told them that she had gone voluntarily with Hassan to Lahore and that she wanted to marry him.

- **Question 3:** If you were the judge what would you do? With reasons. Would the ages of Hassan and Basima make any difference?

Case 2

Farida is an 8-year-old girl. She was visiting the house of her maternal Aunt Amal and Uncle Salman's place, and stayed overnight which she did regularly. When her Aunty Amal went out to the shops, Uncle Salman took Farida to the bedroom to have "cuddles" which began as hugs but later became sexual fondling. He used to do this regularly when Aunty Amal went out since Farida was 5 years old.

On 13 October 2016 when Aunty Amal went out, he took her to the bedroom. This time after cuddling her he dropped his trousers, undressed her and started to insert his penis into her vagina. It hurt her and she cried out loud. He stopped. Uncle Salman told Farida not to tell anyone because otherwise she would be in trouble with both her Aunty Amal and also her mother because he would tell them that she had spoken to him rudely, refused to get him a glass of water, and refused to wash the dishes. She had previously been in trouble for not washing the dishes a month earlier and her mother was very angry. When her Aunty Amal returned she did not say anything.

Farida went home later that day and it was only in the evening at bed time when she was crying in her room that her mother asked her what was wrong and she said what had happened. Her mother did not believe her and was very angry with her and told her not to say anything to anyone.

A week later a teacher at her school saw her crying and asked her what was wrong. She told the teacher what had happened. The teacher reported this to the police. The police took a statement from Farida. An FIR was registered. The police sent Farida for a medical examination which confirmed that her hymen was partially torn but no further physical injury was seen. A section 164 statement was taken from Farida by a Supervising Magistrate.

The case was Challaned and sent to the District and Sessions Court where Uncle Salman was charged with attempted rape. Uncle Salman denies the attempted rape and says that Farida made it all up to get back at him for telling her off for her behaviour.

The case comes on for hearing and on the day of the hearing, Farida, who is now 10 years of age, does not want to give evidence and wants to resile from her statement and says that Uncle Salman did not do this.

- **Question 1:** If you were the judge, what would you do? With reasons.

Case 3

Jasmin is a 19-year-old who went to a party at her cousin Ayesha's place. Ayesha's parents were away. Jasmin stayed overnight as did a couple of other guests which included both males and females. Around 2 am in the morning Sohail whom she had met at the party came into the

bedroom where she was alone and forcibly undressed her and inserted his penis into her vagina. She could not shout out while this happened as he held his hands over her mouth and also he was very strong and she was scared to move. He told her not to tell anyone as otherwise he would say that Jasmin had encouraged him to have sex and he would tell everybody. Jasmin was also worried as she had had some alcohol that night which meant she would be in trouble if her parents found out.

Jasmin did not tell anyone until she broke down in front of a girl friend and told her everything 3 days later. Her girlfriend encouraged her to go to the police which she did. An FIR was registered and Jasmin gave a section 164 statement to a supervising Magistrate. She was medically examined and slight bruises were found on her upper body and thighs and her hymen was ruptured. Her underclothing from that night was subjected to DNA testing which identified Sohail. The case was Challaned and sent to the District and Sessions Court.

Sohail was charged with Rape and he pleaded not guilty and his defence was that Jasmin consented.

On the day of the trial, Jasmin indicates she wishes to resile from her statement. She no longer wishes to give evidence against the accused.

- **Question 1:** If you were the judge, what would you do? With reasons.

Further information:

Assume that Jasmin is ability-challenged and has a mental capability of a 12 year old.

- **Question 2:** If you were the judge, what would you do? With reasons

B. Case Law

Recognizing 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 by the Victim in Reporting Rape

- ***MEHBOOB AHMAD V. THE STATE***
  1999 SCMR 1102
  Criminal Appeal No. 42 (S) of 1998, decided on 5 March 1999
  Maulana Muhammad Taqi Usmam and Dr. Mehmood Ahmad Ghazi, JJ. (Supreme Court of Pakistan)

  Facts:

  The prosecutrix Saima Bibi, 11 to 12 years old, alleged that appellant raped her. There were efforts to bring about reconciliation between the parties which failed because Saima's ailing father did not agree to condone the offense. As a result, there was a delay of around 4 days in lodging the FIR.

  Issue:

  Whether or not the delay in reporting the crime should be taken against the complainant.

  Decision:

  No. We cannot be unmindful of the prevailing taboos in our society. Even in modern day advanced societies, for and on account of the prevalent predilections, many cases of rape go unreported. A victim of rape should not be penalized on account of ostensible delay in reporting what she has undergone. On the contrary, kindness, encouragement and understanding re the requirements to approbate a victim's difficult decision to purge the society of perpetrators of such heinous offenses.

- ***MUHAMMAD UMAR V. THE STATE***
  1999 P Cr. L J 699
  Criminal Appeal No. 89/Q of 1997, decided on 27 March 1998
  Mian Mehboob Ahmed, C.J. and Ch. Ejaz Yousaf, J. (Federal Shariat Court)

  Facts:

  The complainant, father of the 11-year old victim, alleged that his stepbrother-in-law named Raja visited the complainant's family in their home. As the complainant was about to go to Sindh to visit his relatives, he requested Raja to extend his stay. When the complainant came back to his house on 24-6-1994, neither Raja, his wife, nor his children were present. The complaint searched for them but his efforts proved unfruitful. The FIR was lodged on 23-8-1994.

  Three years later, the complainant found them. His daughter contended that she was abducted by the accused, confined forcibly in the house of one Muhammad Din, and was subjected to Zina-bil-Jabr by the appellant, due to which she became pregnant.

  Before the court, the appellant contended, among others, that the FIR was lodged with a delay of about 2 months.

  Issue:

  Whether or not the delay in reporting the crime should be taken against the complainant.

Decision:

No. Record reveals that the delay in lodging the F.I.R. has been properly explained at the trial by the prosecution witnesses. It has come in evidence that the complainant subsequent to the occurrence had initially tried to search out the abductees in the area. Thereafter, he went to Tehsil Bachalwah in Jacobabad District in order to make an inquiry from Muhammad Saleh Marhata, father of the absconding accused Raja Marhata. Unsuccessful in tracing out the abductees he, according to him, again came back to Jatpat and reported the matter to the elders and notables of his tribe and area and on their persuasion, ultimately reported the matter to the police. This portion of complainant's statement has not been challenged by the defence at the trial. Therefore, to our mind, nothing on record is available to disbelieve the explanation offered by the complainant. Even otherwise, delay of such type in reporting the occurrence of this sort to the police is not uncommon in this country, particularly in the tribal society where people are normally hesitant to report to the police the matters concerning womenfolk and involving their honour. Thus, this contention raised by the appellant, in our view, has no force.

▶ ***PEOPLE V. ILAO***
G.R. Nos. 152683-84
December 11, 2003
(Supreme Court of the Philippines)

Facts:

On appeal is the decision of the Regional Trial Court convicting appellant Leonardo Ilao of two counts of rape (allegedly committed on November 18, 1999 and December 9, 1999).

The accused asserts, among others, that the delay of the complainant in reporting her alleged rape shows that no such rape occurred. The complainant revealed her ordeal to her husband on December 19, 1999. It took the family two days to decide on their course of action. On December 21, 1999, the complainant, her husband, and their daughter resolved to bring charges against appellant before the barangay (village) officials. A week after, on December 27, 1999, upon the prodding of their relatives, they sought the assistance of the National Bureau of Investigation office and executed their sworn statements thereat. The complainant later submitted herself to a physical examination.

Issue:

Whether or not the delay in reporting the crime should be taken against the complainant.

Decision:

No. While indeed the victim might have tarried in reporting her defilement, yet the delay is explained by the fear generated by appellant in the mind of complainant. The hiatus in reporting the crime does not extricate appellant from his predicament. As the trial court found, complainant did not divulge the first incident of rape out of fear for her life and that of her family. She could have kept her ordeal forever in silence were it not for the second incident which engendered her continuing fear of a repetition thereof, unless she could put a stop to it. This reaction appears typical of a woman who has been abused. Rape is a harrowing experience and the shock concomitant to it may linger for a while. It is upon this fear springing from the initial rape that the perpetrator hopes to build a climate of psychological terror, which could numb his victim to submissiveness.

▶ ***PEOPLE V. ILAGAN***
G.R. No. 144595
August 6, 2003
(Supreme Court of the Philippines)

Facts:

On appeal is the decision of the Regional Trial Court convicting appellant Dante Ilagan of one count of qualified rape[26] (allegedly committed on May 19, 1998).

The accused asserts, among others, that the delay of the complainant (his daughter) in reporting her alleged rape shows that no such rape occurred. It was only on December 10, 1998, while the accused was in another province, that the complainant told her friend, Jocelyn, about the sexual assault by her father. They went to the Department of Social Welfare and Development, which brought the complainant to the Norzagaray Police where she gave her sworn statement. Thereafter, she was brought to the Philippine National Police Provincial Crime Laboratory for physical examination.

Issue:

Whether or not the delay in reporting the crime should be taken against the complainant.

Decision:

No. Suffice it to state that delay and the initial reluctance of a rape victim to make public the assault on her virtue is neither unknown or uncommon. Rape is a traumatic experience, and the shock concomitant with it may linger for a while. Oftentimes, the victim would rather bear the ignominy and the pain in private, rather than reveal her shame to the world or risk the rapists carrying out his threat to harm her.

Relevance of Moral Character or Virginity of the Victim

▶ ***PEOPLE V. ILAO***
G.R. Nos. 152683-84
December 11, 2003
(Supreme Court of the Philippines)

Facts:

On appeal is the decision of the Regional Trial Court convicting appellant Leonardo Ilao of two counts of rape (allegedly committed on November 18, 1999 and December 9, 1999).

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.

26 Since the complainant at the time of the offense was younger than 18 years old, and the accused was her father.

Decision:

No. The assertion of appellant that private complainant was a married woman, and was no longer a virgin, will not exculpate him from criminal liability for rape. Well-settled is the rule that in rape cases, virginity of the victim is not an element of rape. The fact that private complainant was older than appellant by 5 years does not excuse nor mitigate the heinous nature of the sexual molestation. Whether or not appellant is younger than complainant is not relevant in rape cases as force or intimidation is relative and need only be sufficient to consummate the crime.

▶ ***PEOPLE V. NAVARRO, ET AL.***
G.R. No. 137597
October 24, 2003
(Supreme Court of the Philippines)

Facts:

On appeal is the decision of the Regional Trial Court convicting appellants Jason S. Navarro and Solomon S. Navarro of rape.

At around 11:30 p.m. of July 26, 1998, the 16 year old complainant, a freshman in college, had just finished working on a project in her classmate's house and was walking along Osmeña Boulevard. A slow moving vehicle driven by appellant Jason Navarro, with Reynante Olila in the front passenger seat and appellant Solomon Navarro and Roberto Olila at the backseat, approached her and asked for directions to any exit in the vicinity. The complainant obliged by pointing to the direction of "Baseline". The four, however, claiming to be from another city and appearing to be still lost, continued asking for directions. Taking pity on them, the victim decided to accompany them to "Baseline" and boarded the vehicle, sitting in between Jason and Reynante at the front seat.

When they reached "Baseline", the complainant told the group that she had to go down, but Jason accelerated the speed of the vehicle, insisting on going around with her.

The group then went to Lahug City where Jason, Reynante and the complainant alighted and purchased liquor at a convenience store as Solomon and Roberto remained in the vehicle. The group, along with the complainant, continued going around until at 2:00 a.m. of the following day, July 27, 1998, when they reached a secluded place where the four men drank gin and lime juice outside the vehicle as the complainant stayed inside.

At around 4:00 a.m. of still the same day, July 27, 1998, the group together with the complainant proceeded to the reclamation area at Mandaue City where the vehicle suddenly stopped. Jason allegedly raped the complainant as she was held by Solomon.

Among other assertions, the accused impugned the character of the complainant and alleged that the sexual encounter was consensual because she had the opportunity to leave.

Issue:

Whether these factors bear on the charge of rape.

Decision:

No. The defense's attempt to depict the victim as a woman of loose morals deserves scant consideration. The victim's character or reputation is immaterial in rape, there being absolutely no nexus between it and the odious deed committed. A woman of loose morals could still be the victim of rape, the essence thereof being carnal knowledge of a woman without her consent.

The argument of appellants that the victim must have consented to the sexual act, if indeed there was, because she acquiesced to go with them and had the opportunity to leave their company at any time she wished, is a non sequitur. Freely going with a group for a ride around is one thing; freely having sex with one of the members thereof is another.

▶ ***PEOPLE V. SUAREZ, ET AL.***
G.R. Nos. 153573-76
April 15, 2005
(Supreme Court of the Philippines)

Facts:

On appeal is the decision of the Regional Trial Court convicting appellant of rape.

With the permission of her mother, on September 15, 2001, the complainant (14 years old) attended the birthday party of one of the accused in his house. She arrived around 10pm, accompanied by other friends.

The celebration lasted until the early morning of September 16, 2001. When it was over, the complainant slept on the sofa while the accused-appellant, Santiago, and Ricarte, slept on the mat spread out beside the sofa.

At around 2 o'clock in the morning of September 16, 2001, accused-appellant suddenly pulled down the complainant to the floor, forcibly undressed her and inserted his penis into her vagina. She could not shout as accused-appellant covered her mouth with clothes. While she was being raped by accused-appellant, Santiago and Ricarte held her hands and thighs, sucked her breasts and kissed her body. Jenalyn tried to awaken the others to no avail. When the complainant momentarily freed herself from accused-appellant, she ran to the comfort room nearby but the latter pursued her and, while sporting a knife, raped her again.

When her mother later learned of her ordeal, they immediately reported the incident to the police. On September 26, 2001, Jenalyn was examined by Dr. Michael A. Maunahan, who found deep, healed hymenal lacerations about 5–11 days old.

In his defense, the accused-appellant impugned the character of the complainant.

Issue:

Whether or not the character of the complainant bears on the charge of rape.

Decision:

No. In a last ditch effort to discredit the 14-year-old complainant, the defense attempted to picture her as a girl of loose morals. Suffice it to state that such debasement of her character

does not necessarily cast doubt on her credibility, nor does it negate the existence of rape. It is a well-established rule that in the prosecution and conviction of an accused for rape, the victim's moral character is immaterial, there being absolutely no nexus between it and the odious deed committed. Even a prostitute or a woman of loose morals can be the victim of rape, for she can still refuse a man's lustful advances.

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

Facts:

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

Issue:

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

Decision:

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

> "The trial court not only erroneously disbelieved the prosecutrix, but quite uncharitably and unjustifiably even characterized her as a girl "of loose morals" or "such type of a girl". What has shocked our judicial conscience all the more is the inference drawn by thecourt, based on no evidence and not even on a denied suggestion, to the effect:
>
> > "The more probability is that (prosecutrix) was a girl of loose character. She wanted to dupe her parents that she resided for one night at the house of her maternal uncle, but for the reasons best known to her she does not do so and she preferred to give company to some persons."
>
> We must express our strong disapproval of the approach of the trial court and its casting a stigma on the character of the prosecutrix. The observations lack sobriety expected of a Judge. Such like stigmas have the potential of not only discouraging an even otherwise reductant victim of sexual assault to bring forth [a] complaint for trial of criminals, thereby making the society to suffer by letting the criminal escape even a trial. The courts are expected to use self-restraint while recording such findings which have larger repercussions so far as the future of the victim of the sex crime is concerned and even wider implications on the society as a whole-where the victim of crime is discouraged-the criminal encouraged and in turn crime gets rewarded! Even in cases, unlike the present case, where there is some acceptable material on the record to show that the victim was habituated to sexual intercourse, no such inference like the victim being a girl of "loose moral character" is permissible to be drawn from that circumstance alone. Even if the prosecutrix, in a given case, has been promiscuous in her sexual behavior earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone

because she is not a vulnerable object or prey for being sexually assaulted by anyone had everyone. No stigma, like the one as cast in the present case should be cast against such a witness by the Courts, for after all it is the accused and not the victim of sex crime who is on trial in the Court.

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

Whether the Victim Consented and Absence of Visible Injury

▶ ***PEOPLE V. ILAO***
G.R. Nos. 152683-84
December 11, 2003
(Supreme Court of the Philippines)

Facts:

On appeal is the decision of the Regional Trial Court convicting appellant Leonardo Ilao of two counts of rape.

First count of rape: The accused-appellant pointed a knife at the complainant and shoved her into the room. It was during that fraction of time that the complainant's eldest daughter, Rose, arrived from the store and saw the ruckus. Appellant swiftly grabbed Rose by the hair, poked a knife at her, and rammed her inside the room with her mother.

At first, Zenaida tried kicking appellant. Ilao then mercilessly beat her at the upper right torso which made her writhe with pain. With his prey neutralized and weakened, appellant sexually assaulted the complainant. In her weakened state, she could not put up any further resistance; she wept after her ravishment and dishonor.

Rose, who was down on the floor, saw the entire monstrous assault by appellant on her mother. But Rose could do nothing but cower in overwhelming fear.

Second count of rape: The circumstances are almost similar to the first rape, except that this time the appellant used an ice pick instead of a knife.

Issue:

Whether or not the fact that Zenaida did not resist or attempt to flee or shout for help negates force or intimidation.

Decision:

No. Different people react differently when confronted by a shocking or a harrowing and unexpected incident, for the workings of the human mind when placed under emotional stress are unpredictable. Some people may cry out, some may faint, some may be shocked into insensibility, while others may appear to yield to the intrusion. Moreover, in rape cases, physical resistance need not be established when intimidation is exercised upon the victim and the latter submits herself out of fear. Intimidation is addressed to the mind of the victim

and is therefore subjective. Here, the victim categorically described the force and intimidation exerted with the use of lethal weaponry (knife and ice pick) when she was ravished. Mentally, she was revolted at the sexual assault. Indeed with a knife poked at her, physical resistance was not only futile but truly hazardous and might cost her life and, in the first incident, that also of her daughter.

- ***PEOPLE V. ILAGAN***
  G.R. No. 144595
  August 6, 2003
  (Supreme Court of the Philippines)

Facts:

On appeal is the decision of the Regional Trial Court convicting appellant Dante Ilagan of one count of qualified rape[27] (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.

- ***MAHRAJ DIN V. EMPEROR***
  AIR 1927 Lahore 222
  Criminal Appeal No. 1178 of 1926, Decided on 11 January 1927
  Zafar Ali, J.

Facts:

The appellant, Mahraj Din, 18 years of age, was convicted of rape of a five-year old female child. The child, stripped of her trousers, was found seated on the naked thighs of the accused. However, there was no bleeding from her private parts with the exception of fresh redness at the entrance to the vagina. The girl bore no other mark of injury and her hymen was intact. She also did not cry out.

27 Since the complainant at the time of the offense was younger than 18 years old, and the accused was her father.

Issue:

Whether or not the crime committed was rape.

Decision:

No. As the trousers of the child had been taken off and were lying on the ground close by, it is difficult to see how they could be soiled with blood, etc. Further, the child could not have bled as she bore no wound nor was there anywhere a rupture of her skin. The mother of the child stated that there were only two or three drops of blood. The police found no blood on the trousers of the accused, nor on the trousers of the girl; but the Chemical Examiner detected blood on the trousers of the accused but no semen on either. It cannot be said that the invisible stain of blood on the trousers of the appellant was caused by the blood of the girl.

What the doctor had originally observed was redness and not a bruise. However, he could not positively say that the redness of the labia was the result of an attempt to effect penetration. As the girl did not cry out, it appears that she felt no pain which an attempt to effect penetration resulting in discharge of blood must have naturally caused. Her mother stated that she began to cry on seeing her. This indicates that she had not cried before that. But at that stage the accused had already gratified his lust if there was semen on the thighs of the girl.

It may therefore be safely concluded that there was no bleeding from the private parts of the girl and that the redness of the labia might or might not have been the result of the act of the appellant.

The appellant concedes that he did make an indecent assault, but he contends that he was not guilty of rape. This however was not merely an indecent assault. From the state in which the appellant and the child were found together, it may be inferred that he attempted, though unsuccessfully, to effect penetration. It may be observed here that though rupture of the hymen is by no means necessary in law, the Courts are reluctant to believe that there could have been penetration without that which is so very near to the entrance having been ruptured.

The appellant is therefore guilty of an attempt to commit rape. The conviction was altered accordingly.

Whether Women Rape Victims are Unreliable – and Their Evidence Must be Corroborated

▶ ***AMAN ULLAH V. THE STATE***
PLD 2009 SC 542
Criminal Petition No. 250-L of 2009, decided on 29 May 2009
Khalil-Ur-Reman Ramday, Faqir Muhammad Khokhar and Mahmood Akhtar Shahid Siddiqui, JJ (Supreme Court)

Facts:

The petitioner is accused of rape, but bail was sought on the ground that the petitioner had been found innocent by the Investigating Officer who had even recommended his discharge from the case.

According to the medico-legal examination of the prosecution, the rape victim was about 18 years of age at the time of occurrence. Her hymen was found torn at multiple places, which bled on touch. Her vagina admitted two fingers but rightly and painfully.

The police file showed that the accused had been declared innocent and his discharge recommended only because C.A.M.B. Forensic Science Laboratory had found, after the DNA test, that the traces of semen found in the vagina were not those of the accused. However, no reason was offered to explain the alleged substitution of the accused with the person who had actually committed the crime.

Issue:

Whether the accused is entitled to bail on the ground that the DNA test shows that it was not his semen found in the victim's vagina.

Decision:

No. Reports of so-called experts are only corroborative in nature and are required only when the ocular testimony is of a doubtful character. In the present case, no reasons could be offered as to why the prosecutrix who had admittedly been subjected to sexual intercourse, should have spared the actual offender and should have, instead substituted the accused for him. In the circumstances, at least prima facie and for the purpose of bail petition, it could not be said that the testimony offered by the prosecutrix could admit of any doubt.

We would like to add that it is for the first time that we have noticed a D.N.A. test being used in such a case. We therefore feel compelled to place our warning on record that unless one was absolutely sure and confident of the capacity, the competence, and the veracity of the Laboratory, as well as the integrity of the one conducting such a test, taking recourse to the same would be fraught with immense dangers and could in fact lead to disastrous consequences not only in criminal cases but even in cases, for example, of paternity and inheritance etc. In the present case, at least prima facie, we find the laboratory report in question, a doubtful affair.

▶ ***IMRAN V. THE STATE***

2016 PCr LJ 1888
Criminal Bail Application No. 524 of 2016, decided on 30 May 2016
Zulfiqar Ahmad Khan, J. (Sindh High Court)

Facts:

The prosecutrix claimed that while she was at home, the accused Imran called her up to ask her to come out of her home. She acceded, and was thereafter was taken on a motorcycle driven by Imran to a vacant room. She alleged that the accused raped her there, and subsequently she was brought by the accused to the house of his relatives. His relatives threatened her and would have her marry the accused, but she was not ready to marry Imran. She was then beaten up. Thereafter, the accused Imran and his elder brother Faisal took her on motorcycle and left her near her home, but also forcibly put petrol in her mouth.

Before the court, the accused alleged that: (i) the prosecutrix consented to the sexual intercourse as she had accompanied the accused of her own will; and (ii) the results of the DNA Test Report – which stated that "no human male profile was identified in the vaginal swab" – are in favour of the accused.

Issue:

Whether the complainant consented to sexual intercourse, and whether the DNA Test Report has evidentiary value.

Decision:

Section 375 of P.P.C. states the following:

> "375. Rape:-
> A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the following descriptions,
> (i) against her will;
> (ii) without her consent;
> (iii) with her consent, when the consent has been obtained by putting her in fear of death or of hurt;
> (iv) with her consent, when the man knows that he is not married to her and that consent is given because she believes that the man is another person to whom she is or believes herself to be married; or
> (v) with her consent when she is under sixteen years of age.
>
> Explanation: Penetration is sufficient to constitute the intercourse necessary to the offence of rape."

Also of relevance is section 90, which states that: "A consent is not such a consent as is intended by any action of this Code if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception."

As could be seen from the special provisions or section 375, "will' and "consent" are differentiated, meaning thereby even if there is will but no consent, rape will be actualized, and vice versa. To start with, I would thus like to focus on the first ingredient of section 375 being 'against her will', which relates to psychological state of the prosecutrix (as compared to 'without her consent', which refers to action and performative). The word 'will' implies the faculty of reasoning power of mind that determines whether to do an act or not. There is a fine distinction between an act done 'against the will' and 'an act done without consent'. Every act done 'against the will' is obviously 'without the consent.' But every act 'without the consent' is not 'against the will.' To me clause (I) of section 375 applies where the woman is in possession of her senses and therefore capable of consenting. Courts have explained that the expression 'against her will' ordinarily means that the intercourse was done by a man with a woman despite her resistance and opposition.

Here, examination of the statement of the victim and the evidence clearly shows that she was not a consenting party, and the rape was committed against her will. The testimony of the victim in cases of rape is held to be of vital significance and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Court ought not to find any difficulty in convicting the accused on the prosccutrix's testimony alone. (2007 SCMR 605 and PLD 2011 SC 554)

With regard to the second ingredient of section 375, being that the act was done 'without her consent', I note that though the victim's consent for taking her out of her home was obtained

on the basis of friendship or allurement with hidden intent, consent of this nature which is based on fraud, cannot be termed, prima facie, to conclude that she consented to the sexual act also. Had the victim known that ultimately she would be raped, there is no doubt in my mind that she would not have left home with the accused.

With regard to the second assertion that the DNA Test Report dated 29.01.2016 declared "No human male DNA profile identified in the vaginal swab", I note from the said report that the case was received at the National Forensic Science Agency on 16.11.2015. While per FIR, rape was committed on 11.09.2015, which means that whatever swab samples were presented to the said DNA Laboratory, they were more than two months old. It is not sure how these samples were preserved in this long period of time since external factors (such as temperature and humidity) and internal factors (other bodily fluids) alter the validity of a sample. Studies show that the earlier the samples are collected and tested, the higher the chances of yielding solid results. DNA testing from vaginal swabs can reliably lead to an offender only if the sample is tested within the first 7 days of rape. Therefore the conclusion given in the said report of non-finding of a male DNA from the swab tested after more than two months of rape is not surprising at all.

Thus, it appears that there is enough material to arrive at the prima facie conclusion that the applicant was involved in the offence, as well as, added with the fear that the applicant, belonging to a relatively influential class, if released on bail at this stage it is most likely that he would intimidate or influence the victim and/or the witnesses. One could also imagine a strong likelihood that in the above circumstances, the victim would make herself scarce and might flee from the justice, I am therefore not inclined to grant bail at this stage.

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 organiza-

tions 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.

C. Handouts

- **Handout A: Cases Referred to in Slides 19 to 23**

DELAY IN REPORTING RAPE –

CASE 1 ***Mehboob Ahmad v The State*** **(1999 SCMR 1102)**

The Court observed **"We cannot be unmindful of the prevailing taboos in our society. Even in modern-day advanced societies, for and on account of the prevalent predilections, many cases of rape go unreported. A victim of rape should not be penalised on account of ostensible delay what she has undergone. On the contrary, kindness, encouragement and understanding of the requirements to activate a victim's difficult decision to purge the society of perpetrators of such heinous offences"**

CASE 2 ***Muhummad Umar v The State*** **(1999 PCr LJ 699)**

The Federal Shariat Court did not accept the defence argument of the delay in lodging the FIR 2 months after the rape saying "**delay in reporting occurrence of such a nature to police was not uncommon, particularly in tribal society where people were normally hesitant to report to police matters concerning womenfolk and involving their honour**".
Similar views have been expressed in ***Nasreen v Fayyaz Khan v The State*** **(PLD 1991 SC 412)** a delay of several months in lodging the FIR and also ***Azhar Iqbal v The State*** **(1997 PCrLJ 1500)**.

CASE 3 ***People v. Ilao*** **(G.R. Nos. 152683-84, December 11, 2003). (The Philippines)** On appeal.

"As the trial court found, complainant did not divulge the first incident of rape out of fear for her life and that of her family. She could have kept her ordeal forever in silence were it not for the second incident which engendered her continuing fear of a repetition thereof, unless she could put a stop to it. This reaction appears typical of a woman who has been abused. **Rape is a harrowing experience and the shock concomitant to it may linger for a while**. It is upon this fear springing from the initial rape that the perpetrator hopes to build a climate of psychological terror, which could numb his victim to submissiveness.(emphasis added)

Case 4 *People v Ilagan* (G.R. No. 144595. August 6, 2003). (The Philippines) On appeal.

"[as to] the delay in reporting the case to the authorities, suffice it to state that **delay and the initial reluctance of a rape victim to make public the assault on her virtue is neither unknown or uncommon**. Rape is a traumatic experience, and the shock concomitant with it may linger for a while. **Oftentimes, the victim would rather bear the ignominy and the pain in private, rather than reveal her shame to the world or risk the rapist's carrying out his threat to harm her."**(emphasis added)

RELEVANCE OF MORAL CHARACTER OR VIRGINITY OF VICTIM

CASE 1 *People v. Ilao* (G.R. Nos. 152683-84, December 11, 2003). (The Philippines) On appeal.

"The assertion of appellant that the private complainant was a married woman, and was no longer a virgin, will not exculpate him from criminal liability for rape. **Well-settled is the rule that in rape cases, virginity of the victim is not an element of rape."** (emphasis added)

CASE 2 *People v. Jason Navarro, Solomon Navarro and Roberto Olila* (acquitted) (G.R. 137597, October 24, 2003) (Philippines)

"The defense's attempt to depict the victim as a woman of loose morals deserves scant consideration. **The victim's character or reputation is immaterial in rape, there being absolutely no nexus between it and the odious deed committed. A woman of loose morals could still be the victim of rape, the essence thereof being carnal knowledge of a woman without her consent.**

The argument of appellants that the victim must have consented to the sexual act, if indeed there was, because she acquiesced to go with them and had the opportunity to leave their company at any time she wished, is a *non sequitur*. **Freely going with a group for a ride around is one thing; freely having sex with one of the members thereof is another.** (emphasis added)

CASE 3 *People v. Wilson Suarez, et al.* (G.R. Nos. 153573-76 April 15, 2005) (The Philippines)

"In a last ditch effort to discredit the 14-year-old complainant, the defense attempted to picture her as a girl of loose morals. Suffice it to state that **such debasement of her character does not necessarily cast doubt on her credibility, nor does it negate the existence of rape**. It is a well-established rule that in the prosecution and conviction of an accused for rape, **the victim's moral character is immaterial, there being absolutely no nexus between it and the odious deed committed**. Even a prostitute or a woman of loose morals can be the victim of rape, for she can still refuse a man's lustful advances."(emphasis added)

CASE 4 *State of Punjab v. Gurmit Singh & Ors*, 1996 AIR 1393; 1996 SCC (2) 384 (Anand J) (India, Supreme Court)

'The trial court not only erroneously disbelieved the prosecutrix, but quite uncharitably and unjustifiably even characterised her as a girl "of loose morals" or "such type of a girl". ... We must express our strong disapproval of the approach of the trial court and its casting a stigma on the character of the prosecutrix. The observations lack sobriety expected of a judge. ... The courts are expected to use self-restraint while recording such findings which have larger repercussions so far as the future of the victim of the sex crime is concerned and even wider implications on the society as a whole – where the victim of crime is discouraged – the criminal encouraged and in turn crime gets rewarded! ... **Even if the prosecutrix, in a given case, has been promis-**

cuous in her sexual behaviour earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone [and] everyone. No stigma, like the one as cast in the present case should be cast against such a witness by the courts, for after all it is the accused and not the victim of sex crime who is on trial in the Court.' (emphasis added)

WHETHER COMPLAINANT CONSENTED AND ABSENCE OF VISIBLE INJURY

CASE 1 *People v. Ilao* (G.R. Nos. 152683-84, December 11, 2003) (The Philippines)

"The fact that private complainant **did not resist or attempt to flee or shout for help does not negate force or intimidation. Different people react differently** when confronted by a shocking or a harrowing and unexpected incident, for the workings of the human mind when placed under emotional stress are unpredictable. Some people may cry out, some may faint, some may be shocked into insensibility, while others may appear to yield to the intrusion. Moreover, in rape cases, physical resistance need not be established when intimidation is exercised upon the victim and the latter submits herself out of fear. Intimidation is addressed to the mind of the victim and is therefore subjective. (emphasis added)

CASE 2 *People v Ilagan* (G.R. No. 144595. August 6, 2003) (The Philippines)

Physical resistance need not be established in rape when intimidation is exercised upon the victim herself. As held in People v. Las Pinas, Jr., **the test is whether the intimidation produces a reasonable fear in the mind of the victim that if she resists or does not yield to the desires of the accused, the threat would be carried out. When resistance would be futile, offering none at all does not amount to consent to sexual assault. The law does not impose upon a rape victim the burden of proving resistance.** (emphasis added)

Absence of injury does not mean that the victim consented to sexual assault.

CASE 3 *Mahraj Din v Emperor* AIR 1927 Lah 222

When finding the appellant guilty of attempted rape the Court noted "...though **rupture of the hymen is by no means necessary in law, the Courts are reluctant to believe that there could have been penetration without that which is so very near to the entrance having been ruptured**"

Thus partial penetration not resulting in injury to the hymen is sufficient to constitute the offence of rape as a matter of law. Whether rape has occurred would depend on the overall facts of the case.

CASE 4 *The State v Shabbir alias Kaka s/o Moza Jhamke and Fozia Bibi.* Jazeela Aslam Addl Sessions Judge, Sheikhupura. FIR No 1499/10

Medical examination revealed that the 14/15-year-old victim looked frightened and disoriented. There was no mark on her body. Local examination revealed fresh bleeding from her vagina, a torn hymen and a lacerated wound on the side of her vagina.

"The statement of the victim that the accused persons committed rape one by one when she was under their significant control must be accepted as true. Obviously, she being under fear could not raise any alarm and if she did, nobody would have heard or come to her rescue, as it was a cold winter midnight of 27th and 28th December. **Also if there is no mark of violence on**

the visible parts of her body, it is not indicative of non-resistance. The peculiar circumstances of the case are such as altogether exclude the elements of consent and character of a girl of the age of 14/15 years.

See also ***Mehboob Ahmad v The State* (1999 SCMR 1102, 1103), *Haji Ahmad v The State* (1975 SCMR 6, Ghulam Sarwar v The State (PLD 1984 SC 218)** on the proposition that absence of marks of violation on the body of the victim does not imply non-commission of the offence.

WHETHER WOMEN RAPE VICTIMS ARE UNRELIABLE AND THEIR EVIDENCE MUST BE CORRBORATED (4 CASES AND REPORT EXTRACT)

CASE 1 *Amanullah v The State* PLD 2009 SC 542

The ocular account of a rape victim was preferred over DNA. Reports of "so called experts" are only corroborative in nature and required only when the ocular testimony is of doubtful nature

CASE 2 *Imran v The State* 2016 PCr LJ 1888 (Sindh)

Application for bail which was refused. Testimony of rape victim is of vital significance and unless there is compelling reason, then no corroborative evidence is required

CASE 3 *The State v Muhammad Afzal S/O Ghulam Haide.* Amjad Ali Shah Addl Sessions Judge Narowal Case FIR No.109/2010 19.01.2012

Observations:

- "Needless to say that in cases of zina-bil-jabr/ rape there is seldom an eyewitness because such type of crimes are committed away from the public places but there is a plethora of case law to the effect that even then conviction can be passed on the sole testimony of the victim if it rings true. (ref 1983 SCMR 901 and 2984 PSC (FSC) 727
- "[i]n many cases conviction was passed despite absence of injuries on the person of the victim on the ground that she was over powered by the assailant one way or the other. Reliance is placed on 1975 SCMR 394, 1975 SCMR 69, 1977 P Cr LJ 352, PLJ 1982 FSC 80.
- "Moreover all medical evidence is ultimately corroborative in nature and cannot take the place of direct oral evidence of rape especially when it is supported by the eyewitnesses and in that situation the conviction can be passed on this basis even in the absence of corroborative evidence like semen grouping and DNA test"
- "[i]n our socio—religious texture of the society no daughter would normally level false allegation of Zina against her real father nor the other real daughter or wife of the accused can come forward to support such allegation unless it is true. The only plea taken by the accused and suggested to the PW's is that of general bad character of the victim... with the allegation that she had illicit relations with... The question was answered in negative by them. Moreover this is the usual allegation always repeated against women folk in our society whenever their relationships with male partners/relatives become strained"

See also ***Muhammad Abbas v The State* (PLD 2003 SC 863), *Rana Shahbaz Ahmad v the State* (2002 SCMR 303, 306), *Shahzad v The State* (2002 SCMR 1009), *Mehboob Ahmad v The State* (1999 SCMR 1102, 1103), *Haji Ahmad v The State* (1975 SCMR 69)** for the proposition that corroboration is not required

GENDER STEREOTYPING AND WHETHER WOMEN FABICATE ALLEGATIONS OF RAPE AND DELAY IN REPORTING

International commission of Jurists (2015), *Sexual Violence Against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Laws and Practice*. Geneva. Switzerland

Extracts:

II. DOUBTING WOMEN'S TRUTHFULNESS: THE APPLICATION OF PROMPT COMPLAINT, CORROBORATION AND CAUTIONARY REQUIREMENTS

It is often believed that women fabricate allegations of rape and sexual assault. Underlying this may be general stereotypes to the effect that women are untruthful or related assumptions that due to shame and stigma women will not admit to having had consensual sex outside of marriage and thus will lie, saying such premarital or extramarital sex was non-consensual, or ideas that women easily make allegations of rape when they want to cause harm or seek revenge.

The inaccuracy of this belief is now verified by data that demonstrates that the percentage of women who fabricate sexual assault complaints is very low. Moreover it is increasingly accepted and understood, that in fact allegations of sexual assault are not easy to make...

UNDERLYING HARMFUL STEREOTYPES OR ASSUMPTIONS

No matter what their form, prompt complaint rules and practices in cases of sexual assaults against women are inconsistent with the prohibition of gender discrimination including the duty "not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence." They embody the belief that "real" victims of sexual violence will report the violence quickly and give legal form to inaccurate and impermissible assumptions as to what is to be "expected from a rational and ideal victim," or what is considered "to be the rational and ideal response of a woman in a rape situation."

These beliefs are incorrect. There is no evidence that delayed reports of sexual violence are less truthful. In fact statistics indicate that most crimes of sexual violence are never reported at all. As the Supreme Court of California noted, "the overwhelming body of current empirical studies, data, and other information establishes that it is not inherently "natural" for the victim to confide in someone or to disclose, immediately following commission of the offense, that he or she was sexually assaulted." Instead survivors are often afraid of reporting the crime because of stigma and shame. If the perpetrator is someone the survivor knows personally, as is often the case, it can be even more difficult to report the crime.

Corroboration requirements in sexual assault cases embody the skepticism with which women alleging sexual assault have historically been treated and reflect the inherent assumption that women fabricate claims of sexual assault. As the High Court of Australia noted, corroboration requirements rely on the view that "female evidence in such cases is intrinsically unreliable."

There is no legitimate reason for the application of a different approach to corroboration with regards to the testimony of survivors of sexual violence than with regards to the testimony of victims of other crimes. As the Court of Appeal of Kenya observed, "there is neither scientific

proof nor research findings that we know of to show that women and girls will, as a general rule, give false testimony or fabricate cases against men in sexual offences."

As the Bangladesh High Court held, "the testimony of a victim of sexual assault is vital, and unless there are compelling reasons which necessitate corroboration of her statement, the court should find no difficulty in convicting an accused on her testimony alone if it inspires confidence and is found to be reliable." To do so, the Court noted, would be to treat victims of sexual violence equally with other victims and witnesses of violent crimes, for whom decisions of credibility are made on a case by case basis and not subject to general rules.

The *per se* imposition of a requirement that a victim's testimony be corroborated in sexual assault cases is discriminatory and contradicts the duty of the authorities, outlined by the Committee on the Elimination of Discrimination against Women to ensure that "legal procedures in cases involving crimes of rape and other sexual offenses ... be impartial and fair, and not affected by prejudices or stereotypical gender notions."

Corroboration requirements also reflect often mistaken notions of how sexual assault occurs and what kind of conduct it involves. For example, it is often assumed that true allegations of any sexual assault crime will be easily 'corroborated' or substantiated by physical evidence because such crimes involve physical force or a physical struggle in which the victim or perpetrator suffers injury. However, as will be discussed in Section IV, these assumptions are inaccurate.

- **Handout B: Guidelines Issued by the Lahore High Court to be Followed in Gender-based Violence Cases**

LAHORE HIGH COURT, LAHORE

Phone No. 042-99212951 Ext.274
E-mail: - It.ddj@lhc.gov.pk
Fax No. 042-99212281

No. 22325 /HC/DDJ/DRIT
Dated 17 /October, 2017

From

The Director General,
Directorate of District Judiciary,
Lahore High Court, Lahore.

To

All the District & Sessions Judges,
In the Punjab.

Subject: - **GUIDELINES TO BE FOLLOWED IN CASES OF GENDER BASED VIOLENCE (GBV)**

Dear Sir,

I am directed to refer to the subject cited above and to inform that **Hon'ble the Chief Justice** has been pleased to approve guidelines to be followed in cases of Gender Based Violence (GBV) in the light of **Salman Akram Raja Case (PLJ 2013 SC 107).**

2. You are, therefore, requested to circulate these guidelines among all respected Judges working on Criminal side under your kind control, to comply with in letter and spirit.

Yours faithfully,

MUHAMMAD AKMAL KHAN
Director General
Directorate of District Judiciary

NUMBER & DATE EVEN

Copy is forwarded for kind information to: -

i. Principal Staff Officer to Hon'ble Chief Justice, Lahore High Court, Lahore.
ii. Private Secretary to Hon'ble Justice Ayesha A. Malik, Judge, Lahore High Court, Lahore.
iii. Staff Officer to Registrar, Lahore High Court, Lahore.

Director General
Directorate of District Judiciary

GUIDELINES TO BE FOLLOWED IN CASES OF GENDER BASED VIOLENCE (GBV) IN THE LIGHT OF PLJ 2013 SC 107 (SALMAN AKRAM RAJA CASE)

1. And Whereas there is a need to build upon the directives given by the Supreme Court in Salman Akram Raja vs. The Government of Punjab through Chief Secretary, Civil Secretariat, Lahore and others[1] in respect of victims and vulnerable witnesses in rape trials, and extend them with suitable adaption to apply to women complainants, victims and vulnerable witnesses, such as women , children or persons with disabilities who are giving evidence in cases of violence;
2. The Lahore High Court, Lahore shall prioritize the gender-based violence cases. The courts shall conduct trials in a gender-sensitive manner and incorporate the directions of the Supreme Court in Salman AkramRaja vs. The Government of Punjab through Chief Secretary, Civil Secretariat, Lahore and others[2], Section 13 of the Criminal Law (Amendment) (Offences related to Rape) Act 2016[3]. The international best practices shall be followed in dealing with gender-based violence cases, such as a courtroom set-up responsive to the needs of women and other vulnerable witnesses. In particular, the courts shall act upon the guidelines issued by Lahore High Court, Lahore, as follows:
    1) *The magistrate unless there are compelling reasons shall record thestatement of the Victim under Section 164, Cr.P.C. in the day on which the application is moved by the Investigation Officer. The Magistrate before proceeding to record the statement shall ensure that the victim (child, women or any vulnerable person) is made comfortable and he/she is free of any extraneous pressure.*
    2) *If the victims of rape are reluctant to appear before a male magistrate as they cannot express their agony appropriately before them, therefore if requested the statement of victim be recorded before female Magistrate, where ever is available.*
    3) *An endeavor shall be made to commit such cases of offence to the Court of Sessions expeditiously and preferably within 15 days.*

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[1] 2013 SCMR 203.

[1] See note 9.

[1] Section 13 provides:

"13. Amendment of section 352, Act V of 1898.-In the Code, in section 352, the existing provision shall be re-numbered as sub-section (1) of that section and after sub-section (1) re-numbered as aforesaid, the following new sub-sections shall be inserted namely:-

'(2) Notwithstanding anything contained in sub-section (1), the trial of offences under section 354A, 376, 376A, 377 and 377B of the Pakistan Penal Code. 1860 (Act XLV of 1860) shall be conducted in camera;

Provided that the Presiding Officer, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the Court.

(3) Where any proceedings are held under sub-section (2), the Government may adopt appropriate measures, including holding of the trial through video link or usage of screens, for the protection of the victim and the witnesses.

(4) Where any proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish or broadcast any matter in relation to any such proceedings, except with the permission of the Court.'"

- **Handout B: Guidelines Issued by the Lahore High Court to be Followed in Gender-based Violence Cases** *(continued)*

4) In such cases where a victim shall be given an opportunity to have a state counsel and in cases where a victim has a private lawyer, she may be allowed to retain the private lawyer.
5) That as far as possible Chief examination and cross-examination of the victim must be conducted on the same day.
6) The Court shall maintain a panel of psychiatrists, psychologists and experts in sign language etc. who would assist in recording the statement of victim are vulnerable as and when requested by the Sessions Court.
7) If it is brought to the notice of the Court from a support person/advocate/victim/Police/Prosecution department regarding threats received by the victim or his/her family members to compromise the matter, the Court shall immediately direct the Assistant Superintendent of Police to look into the matter and provide an action taken report before the Court within 2 days. The Court must ensure that protection is provided to the victim and her family.
8) In cases in which the witness is sent back unexamined and is bound down, the Court shall ensure that at least the travelling expenses for coming to and from for attending the Court are paid.
9) At the time of recording of evidence of the victim or vulnerable witness irrelevant persons be excluded from the Court. This may include an order that the accused is to be excluded from the court provided that the accused shall be able to see and hear the evidence given.
10) The proceedings of such cases be conducted in camera.
11) Conducting a trial after regular court hours where appropriate.
12) Where possible evidence of victim of violence should be recorded through video conferencing so that the victims do not need to be present in the Court
13) Availability of screens, one-way glass, or other arrangements such as closed circuit television so that a victim does not have to see the accused person in court when giving evidence.
14) Questions put in cross-examination on behalf of accused should be given in writing to the Presiding Officer who should put them to the victim or to a vulnerable witness in a language which is clear and not degrading.

There are certain oth[illegible] international best practices and guidelines to be incrementally introduced into the courts: -

1) A supportive person/Advocate may be allowed to the victim/survivors or witness' choice to be present while evidence is being given.
2) To make adjustments to the proximity of lawyers the dock and the witness box to the witness giving evidence in
3) Examination and cross examination of the victim/survivor are restricted to issue relevant to the case and are not frivolous or for the purposes of embarrassing or humiliating the victim/survivor including through the introduction of evidence of victim/survivor's past sexual behavior, history, or reputation.

4) To develop practice guideline for the examination and cross-examination of such a witness to help ensure that questions are asked to the victim/witness using appropriate language manner and content.
5) Witness Care Video Link Rooms may be established to record evidence of the victim or vulnerable witness so that they feel comfortable in recording of their statement at a place where there is no physical interaction with the accused.
6) An audio-visual pre-recording of a statement or evidence of the victim may be allowed, either in part or in whole, to be replayed and admitted as their evidence at the trial. Such pre-recording can include the whole of the evidence of the victim; their evidence in chief cross examination, and re-examination.
7) Other procedural or practice guidelines to be developed where women or their relatives and representatives indicate their wish not to proceed with a case of violence or witnesses resile from their earlier statements;
8) Such other procedural or practical guidelines for other issues which ever so to overcome or remove constraints and barriers to women's access to justice in cases of gender-based violence.

MUHAMMAD AKMAL KHAN
Director General
Directorate of District Judiciary

- **Handout C: Practice Note for the Model Gender-based Violence Cases Court**

LAHORE HIGH COURT, LAHORE
(Directorate of District Judiciary)

PH: 042-99212951-Ext.306
FAX: 042-99212281

From

The Director General,
Directorate of District Judiciary
Lahore High Court, Lahore

To

The District & Sessions Judge,
Lahore

No. 2053 /DDJ/P,D&IT/DR-IT Dated: 01-02-2018

Subject: **Practice Note For the Model "Gender Base Violence Cases Court (GBV Court), Lahore**

Dear Sir,

I am directed to refer to the subject cited above and to state that Hon'ble the Chief Justice is pleased to approve the Practice Note (attached herewith) to be followed by the Model GBV Court Lahore. His lordship is further pleased to direct you to ensure implementation of the same.

2. You are, therefore, requested to comply with the direction of his lordship in letter and spirit.

Yours faithfully,

(Judge Muhammad Akmal Khan)
DIRECTOR GENERAL

O/C

PRACTICE NOTE[1] FOR THE MODEL "GENDER-BASED VIOLENCE CASES COURT" ("GBV COURT")

THE PURPOSE OF THE GBV COURT

1. The purpose of the GBV Court is to enable cases which concern gender-based violence offences[2] to be prioritized and conducted in a gender- sensitive manner. The GBV Court applies to the victims of gender-based violence; these victims would include women, children, and other vulnerable witnesses[3] including persons who may regard themselves as having a different gender identity[4]. The purpose of GBV Court also recognises the fact that the victims of gender – based violence are mainly women (and girl children) and they often do not report violence against them for fear of retribution, humiliation, shame, social stigma and loss of honour. In addition victims are also fearful of coming to the court to give evidence because the court processes are intimidating and they feel re-victimised. The GBV Court and the Practice Note are a response to allow them to give their best evidence and minimise the trauma.

PURPOSE OF THE PRACTICE NOTE

2. The purpose of this Practice Note is to enable the "Guidelines to be followed in Cases of gender-based violence (GBV)" No. 22325 dated 17 October 2017 ("the Guidelines), to be implemented in practice with clarity and consistency.
3. At the same time the Practice Note is to be applied flexibly if particular situations require some modification in order to maintain the purpose and principles of the Guidelines.
4. The Practice Note will also apply to the treatment of other witnesses giving evidence in such cases, either for the prosecution or defense, and it includes the accused, with modifications as the situation may require. It is important for all witnesses in the court to have the best conditions be able to give their best evidence.

OUTSIDE THE COURT ROOM

5. On reaching the Court to precinct, the victim is to be met by a "Female Support Officer"[5], who will escort the victim to a protected place so as to avoid contact with the accused or their family or friends as well as the general public.

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[1] This practice note replaces an earlier Practice Note No. 1 initially developed by the GBV Court.
[2] Gender based violence (GBV) is an act of violence that results in or is likely to result in physical, sexual, psychological or economic harm or suffering. It includes threats of such acts, coercion or arbitrary deprivations of liberty whether occurring public or in private and it includes domestic violence. The violence is primarily committed on the victim by reason of their sex or gender. Examples of gender based violence include offences under Section 332, 336A, 337, 337A1 – F1, 359-369, 376, 376 II, 302, 336 and 496A of PPC.
[3] Vulnerable witnesses would include also persons with mental or other disabilities.
[4] Persons who identify as being Lesbian, Gay, Bisexual, Transsexual or Intersex (LGBTI)
[5] A "Female Support Officer" is an employee of the court which is designated to fulfil this role.

- **Handout C: Practice Note for the Model Gender-based Violence Cases Court** *(continued)*

6. The Female Support Person is to settle victim, but is not to talk about any of the details of the case.
7. The Female Support Person is to bring the victim either to the "e- court room" or to the court as required, and remain with the victim while the victim gives evidence.
8. The victim may be accompanied or spoken to by their private counsel or prosecutor as required.
9. The prosecutor or counsel for the victim should speak with the victim and find out whether the victim wishes to give evidence from the "e- court room", or in the courtroom with a screen, or in the court room without a screen. This may also be confirmed by the Female Support Officer.

THE SET UP OF THE COURT ROOM

10. Adjustments are to be made to the courtroom to improve the comfort for persons in the court which include, making adjustments to the witness box and the accused box so that the witnesses and the accused are able to sit and have water and tissues available to them during the trial process.
11. The lawyers, both prosecution and defence, are to be seated at a separate bar table during the trial process. Lawyers are to remain seated during the trial process unless they are speaking or are questioning the witnesses, in which case the counsel may either sit or stand.
12. If the victim gives evidence in the court room, it is required that the victim be allowed to enter the court room in the absence of the accused and be seated in the witness box behind a screen. When the accused returns to the court room, the accused should not be visible to the victim.
13. The victim will then give evidence with a screen which prevents the victim from seeing the accused and also the accused from seeing the victim, unless identification of the perpetrator is required. If identification is required then the victim may move away from behind the screen to also be able to view accused person. The female support person should be seated near to where the victim is giving evidence.
14. If the victim so chooses, the victim may give evidence in court without the use a screen.
15. Further, other arrangements may be made by the Judge in the court room according to the needs of the victim and having regard to the particular circumstances.

SET UP AND USE OF THE *e*-COURT ROOM

16. Video facilities are to be made available in the trial court room to permit evidence to be given by the victim from the *e* - Court room outside the trial court and be seen and heard on a screen in the trial court. This is to enable the victim to give evidence without coming into the trial court.
17. The positioning of the video camera should allow the victim to see the trial courtroom and particularly the Judge and counsel, but not the accused person, unless it is necessary for the victim to identify the person whom the victim says was the perpetrator of the conduct alleged.
18. If identification is required then the camera may be repositioned so as to include a view of the accused person.

19. The view that persons in the trial court will have is of the victim only, who will be seated unless there is, a need for identification or as per the requirement of the case.
20. Persons present in the *e*-Court room will be the female support officer and or any person such as an interpreter as required.
21. The Female Support Officer is to settle the victim in the room before commencement of their evidence.
22. If the victim is required to draw or identify certain objects then the Female Support Officer is to show this to the victim.
23. The Female Support Officer is also to inform the Judge if the victim indicates that they need a break because they are tired or need to take a break or becomes upset.

PROCESSES FOR THE TRIAL AND TAKING OF EVIDENCE

24. The Judge will usually list three cases on each day of hearing unless the circumstances suggest a different listing arrangement
25. The Judge at the commencement of the trial may acquaint counsel and the accused on matters related to the procedures to be followed in the Court.

PROCESS FOR TAKING OF THE EVIDENCE OF THE VICTIM AND THE WITNESSES

Settling the victim and witnesses

26. The judge shall decide the procedure to be followed, which in his/her opinion is most appropriate for both prosecution and defence with modification as required including evidence of the victim.
27. The Judge will introduce himself or herself to all including the victim and explain who the other persons in the court room are.
28. Questions asked by the Judge would include the following from the witnesses including the victims:
    a. asking whether they have any concerns about security for themselves or their family in relation to the case and may make orders as may be appropriate.
    b. asking questions to settle them and to ensure that they are comfortable for the giving of the evidence, including whether they are comfortable with giving evidence, from the "e-court, or in the court with or without the screen as they choose;.
    c. explaining to the witness the importance of their telling the Judge if they do not understand the questions and that is not shameful to say they do not understand;
    d. explaining to the witness that it is very important to know if the witness does not understand as the witness may give an unintended answer;
    e. informing the witness that if they feel tired or need a break they should tell the Female Support Officer.
29. A similar overall procedure should also be followed by the Judge with other witnesses as well as the accused if this is appropriate, with modification as required.

- **Handout C: Practice Note for the Model Gender-based Violence Cases Court** *(continued)*

Trial process

30. The trial is to proceed and be completed without any adjournment where possible. Adjournment is only be permitted by the Judge for good reason. In particular, the whole of the evidence of the victim, including examination, cross examination and re-examination, is as far as possible to be conducted on the same day.
31. The Judge is to ensure that all questions asked of the victim are to be done with gender sensitivity and in appropriate language having regard to the victim's age, educational level, cultural background, physical or mental disabilities as well as being asked in an appropriate manner and tone. (Qanun-e-Shadat, Order 1984 (QSO) Arts 146 and 148).
32. In addition the court may also limit questions asked of the victim where that is appropriate and it includes unnecessarily repetitive questions.
33. In accordance with the Guidelines, questions put in cross-examination on behalf of the accused should be given in writing or as the court think fit according to circumstances of the case, the Judge who should put them to the victim or to a vulnerable witness in a language which is clear and not degrading. The Judge may give directions as to the manner in which this is to be undertaken.

PROTECTION ORDERS.

34. When the Judge orders that a summons be issued to the victim or witnesses, the Judge may include a further direction endorsed or attached to the summons form which asks the victim or witness "Do you require any police protection for yourself or family prior to the trial"
35. The process server is to be directed to ask this question of the victim or witness.
36. If the victim indicates "yes" by a signature or mark, the process server is then to arrange that protection requested be provided by the relevant SP cell. The SP Cell without any delay inform to the court of arrangements done.
37. The process server is then to report back to the court on the process, which was followed, and the protection, which was arranged.
38. Any person-receiving summons who is related to the case including victim or witnesses may file an application to the court through their counsel as early as possible for protection.
39. The Judge may at any time make orders to provide specific protection and arrangements in order to give security for the victim/witnesses and or other relevant family or persons. Further the Judge may direct that the SP Cell to arrange for any person related to the case applying for protection.

PROCEDURES WHEN THE VICTIM OR OTHER WITNESSES RESILE FROM PREVIOUS STATEMENTS

40. Having regard to the concerning number of cases involving non-compoundable offences in which on the date of trial, the victim resiles from earlier statements and further where other witnesses also resile from their statements, the Judge may adopt any of the following procedures or a combination of such procedures or another procedure which the Judge considers appropriate to address this issue.

a. **Procedure 1.** The Judge may clear the court of all persons (including the accused) leaving only the victim and a court reporter person or alternatively the Judge may bring the victim and a court reporter into chambers. The Judge may then ask questions of the victim as to why she has resiled and ascertain whether the victim has been exposed to any pressure and further whether there has been any compromise of the case through family pressure or agreement between the accused and the victim's family. These questions and answers are to be recorded. The Judge may thereafter make appropriate orders as to the process of the case and this may include making appropriate protection orders.

b. **Procedure 2.**The Judge may adjourn the case until the following day or some other early suitable day, and make appropriate protection orders and arrangements to protect the victim and or other relevant family or persons. On the resumed day the Judge may undertake Procedure 1.

c. **Procedure 3.**The Judge may adjourn the case to another day. The Judge may direct that the Assistant Superintendent of Police/Sub-Divisional Police Officer of Concerned Area, look into the matter including whether the victim and/or other witnesses have been pressured into making a false statements and provide a report on the actions before the court within 7 days, or such further extension as the Judge may order. The Judge may make appropriate protection orders.

d. **Procedure 4.** The Judge may instead direct that the trial continue and that the victim and other witnesses be required to give evidence either on that day or another early day with appropriate protection orders. If this Procedure is directed by the Judge, then the following processes would apply:
    i. The victim and other witnesses who seek to resile are to be informed about the process which will take place in the court them to give evidence.
    ii. If the victim is declared hostile, the cross examination of the victim by both the prosecutor and the defendant is not required to be in writing in the manner indicated in the Guidelines and Practice Note No. 2 paragraph 33.
    iii. Particular care needs to be taken by the Judge to ensure that the victim is not subjected to undue pressure by the nature and manner of this procedure.
    iv. After all of the relevant evidence in the case is called, the facts and the findings of the Judge will be assessed and based on the totality of the evidence.

PROCEDURES WHERE THE VICTIM DOES NOT ATTEND COURT

41. If the victim does not attend Court on the day set for hearing, the case may be adjourned to another date and a further summons may be issued for her attendance as provided in sections 87 and 88 Cr P.C

- **Handout C: Practice Note for the Model Gender-based Violence Cases Court** *(continued)*

42. If a further summons is so issued, then the Judge should give directions on the manner in which the victim is to be brought to the court, so as to ensure this is undertaken sensitively.
43. If the victim cannot be found or again does not attend, the prosecution may still proceed with the trial if there appears to be sufficient evidence which can be called to prove the commission of the offence, even without the attendance of the victim, subject to the Judge deciding that the accused should be acquitted pursuant to S 265K Cr P.C.

COURTS POWER TO ASK QUESTION, CALL WITNESSES ETC.

44. In relation to the cases which come before the court, in particular in relation to cases where there is resiling or where the victim does not attend court, it is important for the court to appropriately utilise its powers given pursuant to Sections 540 CrP.C and 161 QSO
45. Pursuant to Section 540 CrP.C the Judge is empowered to summon any person as a witness, or examine any person in attendance, although not summoned as a witness. The Judge may also recall and re-examine any person already examined, if the evidence of such a witness appears to be essential to the just decision of the case.
46. Pursuant to Article 161 QSO. In order to discover or to obtain proper proof of relevant facts, the Judge may ask any question the Judge pleases, in any form at any time, of any witness, or of the parties about any fact either relevant or irrelevant. In addition the Judge may order the production of any document or thing. Neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the court, to cross examine any witness upon any answer given in reply to any such question. This is subject to the proviso contained in that section
47. This would include processes of the prosecutor giving up the victim and witnesses and having them declared hostile and then opening the victim and witnesses for cross examination by the Prosecutor and Defence Counsel.

(Judge Muhammad Akmal Khan)
Director General
Directorate Of District Judiciary

Session 5:
GBV AND ACCESS TO JUSTICE: PREVENTION, PROTECTION AND PROVISION OF REDRESS AND REPARATION

A. Session Activities

- **Activity 1: Courts' Role**

  Break into 3 groups, and discuss:

  - Does the court have a role to play in addressing the following issues?
  - If so, how?
  - Provide specific examples of what the court's role is and how the court can discharge this role.

  Group 1 takes issues 1–4; Group 2 issues 5-8; and Group 3 issues 9–12:

  1. Lack of confidence in police
  2. Lack of confidence in judiciary
  3. Social stigma
  4. Fear of loss of housing
  5. Act not legally a crime
  6. Absence of mediation (provided power imbalance addressed and safeguards provided)
  7. Fear of repercussions
  8. High cost of legal action
  9. Negative financial consequences (e.g., loss of maintenance)
  10. Negative legal consequences
  11. Fear of loss of child custody
  12. Lack of information on options

- **Activity 2: Factors Influencing Sentencing and Hypothetical Cases**

  Break into three groups. Discuss and answer the following questions.

GROUP 1

You are stationed in a small town. Everyone in town knows that Ahmed beats and sexually assaults Sara. Yet, Sara has not come forward to report the case.

Discuss the possible reasons why Sara does not report the case. Is there anything you can do as a judge so that Sara can access the justice system? What kind of orders can you think of that will facilitate Sara's access to justice.

One day, Sara was hospitalised and slipped into a coma due to the beatings. The police took statements from the neighbours, some of whom spoke on condition they will not serve as witnesses in court. The Chief of Police approached you and presented his dilemma. What are the possible options for the police?

Would your response be different if Ahmed is Sara's husband and if Ahmed is Sara's pimp? Would the protection, punishment and reparation be different in each scenario?

GROUP 2

You are asked by several village elders to consider allowing family disputes to be mediated by the elders. They argue that they know the families better and are able to provide solutions that will ensure the family stays together.

What is your response to them? Provide rationales for your arguments, either in favour of mediation, and if so, how, where, by whom and the principles that should bind the mediator; or against mediation, providing the reasons why your alternative is better.

GROUP 3

- What possible redress and reparations can judges provide (or should be able to provide) for the following harms:
- Physical harm
- Mental harm
- Lost opportunities
- Material damage
- Moral harm (loss of reputation or stigma)
- Legal (and other professional) fees
- Medical cost
- Psychological/mental harm
- Children's incidentals

Is monetary damages the only reparation possible? Is it the optimal reparation?

B. Case Law

Preventing GBV: Courts' Role

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

Facts:

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

Decision:

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

> "We have given our anxious consideration to the prayer for appellant's acquittal on the basis of compromise and not that the appellant pre-planned the triple murder and carried out the plan in a cold-blooded, calculated and brutal manner. There was no element of grave and sudden provocation. The only fault of appellant's adult daughter Mst. Salma was that she married someone of her own choice. There is no evidence that there was no marriage or that they were living a life of adultery. They had entered the sacred union of marriage and had given birth to a baby girl.
>
> While examining the case this Court, with a tinge of dismay, took judicial notice of the fact that the act of the appellant is not a singular act of its kind. It is symptomatic of a culture and a certain behavior pattern which leads to violence when a daughter or a sister marries a person of her choice. Attempts are made to sanctify this behaviour in the name of "family honor". It is this perception and psyche which had led to hundreds of murders.
>
> According to the report of the Human Rights Commission of Pakistan which has not been controverted by any State agency, over 1000 victims were of "honor killing" in the year 1999 and 888 in the single Province of Punjab in the year 1988. Similarly in Sindh, according to the statistical record maintained by the Crimes Branch of Sindh, it was 65 in 1980, 141 in 1999 and 121 in 2000. In the year 2001, at least 227 "honor killings" were reported in Punjab alone.
>
> These killings are carried out with an evangelistic spirit. Little do these zealots know that there is nothing religious about it and nothing honorable either. It is male chauvinism and gender bias at their worst. These prejudices are not country specific, region specific or people specific. The roots are rather old and violence against women has been a recurrent phenomenon in human history. The Pre-Islamic Arab Society was no exception. Many cruel and inhuman practices were in vogue which were sought to be curbed

by the advent of Islam. It is well-known that in those times, daughters used to be buried alive, it was strongly deprecated and a note of warning was conveyed in Holy Qur'an. In Sura No.81 (Al-Takwir), Verse 8, the Day of Judgment is portrayed in graphic detail when inter alia those innocent girls, who were buried alive or killed, would be asked to speak out against those who wronged them and the latter would have to account for that.

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

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

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

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

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

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

▶ ***MARIA DA PENHA V. BRAZIL***
Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2000)
April 16, 2001
(Inter-American Commission on Human Rights)

Facts:

The petition alleges that the Federative Republic of Brazil (hereinafter "Brazil" or "the State") condoned, for years during their marital cohabitation, domestic violence perpetrated in the city of Fortaleza, Ceará State, by Marco Antônio Heredia Viveiros against his wife at the time, Maria da Penha Maia Fernandes, culminating in attempted murder and further aggression in May and June 1983. As a result of this aggression, Maria da Penha has suffered from irreversible paraplegia and other ailments since 1983.

The petition maintains that the State has condoned this situation, since, for more than 15 years, it has failed to take the effective measures required to prosecute and punish the aggressor, despite repeated complaints. The petition alleges violation of Article 1(1) (Obligation to Respect Rights), 8 (a Fair Trial), 24 (Equal Protection), and 25 (Judicial Protection) of the American Convention, in relation to Articles II and XVIII of the American Declaration of the Rights and Duties of Man ("the Declaration"), as well as Articles 3, 4(a), (b), (c), (d), (e), (f), and (g), and 5 and 7 of the Convention of Belém do Pará.

Decision:

The impunity that the ex-husband of Mrs. Fernandes has enjoyed and continues to enjoy is at odds with the international commitment voluntarily assumed by the State when it ratified the Convention of Belém do Pará. The failure to prosecute and convict the perpetrator under these circumstances is an indication that the State condones the violence suffered by Maria da Penha, and this failure by the Brazilian courts to take action is exacerbating the direct consequences of the aggression by her ex-husband. Furthermore, as has been demonstrated earlier, that tolerance by the State organs is not limited to this case; rather, it is a pattern. The condoning of this situation by the entire system only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women.

Given the fact that the violence suffered by Maria da Penha is part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors, it is the view of the Commission that this case involves not only failure to fulfill the obligation

with respect to prosecute and convict, but also the obligation to prevent these degrading practices. That general and discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts.

International Jurisprudence on State Accountability

TURKEY

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

Facts: [28]

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

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

Issue:

Whether the State could be held responsible, under Article 3, for the ill-treatment inflicted on persons by non-state actors.

Decision:

The obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals. Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity.

[28] 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

The local authorities, namely the police and public prosecutors, did not remain totally passive. After each incident involving violence, the applicant was taken for medical examination and criminal proceedings were instituted against her husband. The police and prosecuting authorities questioned H.O. in relation to his criminal acts, placed him in detention on two occasions, indicted him for issuing death threats and inflicting actual bodily harm and, subsequent to his conviction for stabbing the applicant seven times, sentenced him to pay a fine.

However, none of these measures were sufficient to stop H.O. from perpetrating further violence. In this respect, the Government blamed the applicant for withdrawing her complaints and failing to cooperate with the authorities, which prevented the latter from continuing the criminal proceedings against H.O., pursuant to the domestic law provisions requiring the active involvement of the victim.

The Court reiterates its opinion in respect of the complaint under Article 2, namely that the legislative framework should have enabled the prosecuting authorities to pursue the criminal investigations against H.O. despite the withdrawal of complaints by the applicant on the basis that the violence committed by H.O. was sufficiently serious to warrant prosecution and that there was a constant threat to the applicant's physical integrity.

However, it cannot be said that the local authorities displayed the required diligence to prevent the recurrence of violent attacks against the applicant, since the applicant's husband perpetrated them without hindrance and with impunity to the detriment of the rights recognised by the Convention. By way of example, the Court notes that, following the first major incident, H.O. again beat the applicant severely, causing her injuries which were sufficient to endanger her life, but he was released pending trial "considering the nature of the offence and the fact that the applicant had regained full health". The proceedings were ultimately discontinued because the applicant withdrew her complaints. Again, although H.O. assaulted the applicant and her mother using a knife and caused them severe injuries, the prosecuting authorities terminated the proceedings without conducting any meaningful investigation. Likewise, H.O. ran his car into the applicant and her mother, this time causing injuries to the former and life-threatening injuries to the latter. He spent only 25 days in prison and received a fine for inflicting serious injuries on the applicant's mother. Finally, the Court was particularly struck by the Diyarbakır Magistrate's Court's decision to impose merely a small fine, which could be paid by installments, on H.O. as punishment for stabbing the applicant seven times.

Thus, the response to the conduct of the applicant's former husband was manifestly inadequate to the gravity of the offences in question. It therefore observes that the judicial decisions in this case reveal a lack of efficacy and a certain degree of tolerance, and had no noticeable preventive or deterrent effect on the conduct of H.O.

THE PHILIPPINES

▶ *VERTIDO V. PHILIPPINES*

Communication No. 18/2008
16 July 2010
(Views adopted by the CEDAW Committee, forty-sixth session under the Optional Protocol to CEDAW)

Facts:

In 1996, Karen Tayag Vertido ("the author") worked as Executive Director of the Davao City Chamber of Commerce and Industry in the Philippines. She filed a complaint for rape against J. B. C. ("the accused"), who at that time was a former 60-year-old President of the Chamber. The rape allegedly took place on 29 March 1996.

Within 24 hours of being raped, the author underwent a medical and legal examination at the Davao City Medical Centre. Within 48 hours of being raped, the author reported the incident to the police. On 1 April 1996, she filed a complaint in which she accused J. B. C. of raping her.

The case remained at the trial court level from 1997 to 2005. The reasons for the prolonged trial included the fact that the trial court judge was changed several times and the accused filed several motions before the appellate courts. Three judges recused themselves from the case. The case was referred to Judge Virginia Hofileña-Europa in September 2002.

On 26 April 2005 Judge Hofileña-Europa issued a verdict acquitting J. B. C. The Court challenged the credibility of the author's testimony. Although the Court allegedly took into account a Supreme Court ruling according to which "the failure of the victim to try to escape does not negate the existence of rape", it concluded that that ruling could not apply in this case, as the Court did not understand why the author had not escaped when she allegedly appeared to have had so many opportunities to do so. The Court found the allegations of the complainant as to the sexual act itself to be implausible. Guided by a Supreme Court ruling, the Court concluded that had the author really fought off the accused when she had regained consciousness and when he was raping her, the accused would have been unable to proceed to the point of ejaculation, in particular bearing in mind that he was already in his sixties. It also concluded that the testimony of the accused was corroborated on some material points by the testimony of other witnesses (namely the motel room boy and the friend of the accused). The Court therefore concluded that the evidence presented by the prosecution, in particular the testimony of the complainant herself, left too many doubts in the mind of the Court to achieve the moral certainty necessary to merit a conviction.

Issue:

Did Judge Hofileña-Europa rely on gender-based myths and misconceptions about rape and rape victims in her decision? If so, did this amount to a violation of the rights of the complainant and a breach of the Philippines' obligations to end discrimination in the legal process under articles 2 (c), 2 (f) and 5 (a) of the Convention?

Decision:

Yes, the Philippines has failed to fulfill its obligations and has thereby violated the rights of the author under article 2 (c) and (f), and article 5 (a), read in conjunction with article 1 of the Convention and general recommendation No. 19 of the Committee.

With regard to the author's claim in relation to article 2 (c), the Committee, while acknowledging that the text of the Convention does not expressly provide for a right to a remedy, considers that such a right is implied in the Convention, in particular in article 2 (c), by which States parties are required "to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination". The Committee notes the undisputed fact that the case remained at the trial court level from 1997 to 2005. It considers that for a remedy to be effective, adjudication of a case involving rape and sexual offenses claims should be dealt with in a fair, impartial, timely and expeditious manner.

The Committee further reaffirms that the Convention places obligations on all State organs and that States parties can be responsible for judicial decisions which violate the provisions of the Convention. It notes that by articles 2 (f) and 5 (a), the State party is obligated to take appropriate measures to modify or abolish not only existing laws and regulations, but also customs and practices that constitute discrimination against women. In this regard, the Committee stresses that stereotyping affects women's right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general. The Committee further recalls its general recommendation No. 19 on violence against women. This general recommendation addresses the question of whether States parties can be held accountable for the conduct of non-State actors in stating that "... discrimination under the Convention is not restricted to action by or on behalf of Governments ..." and that "under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation". In the particular case, the compliance of the State party's due diligence obligation to banish gender stereotypes on the grounds of articles 2 (f) and 5 (a) needs to be assessed in the light of the level of gender sensitivity applied in the judicial handling of the author's case.

The Committee notes that, under the doctrine of stare decisis, the Court referred to guiding principles derived from judicial precedents in applying the provisions of rape in the Revised Penal Code of 1930 and in deciding cases of rape with similar patterns. At the outset of the judgment, the Committee notes a reference in the judgment to three general guiding principles used in reviewing rape cases. It is its understanding that those guiding principles, even if not explicitly referred to in the decision itself, have been influential in the handling of the case. The Committee finds that one of them, in particular, according to which "an accusation for rape can be made with facility", reveals in itself a gender bias. With regard to the alleged gender-based myth and stereotypes spread throughout the judgment and classified by the author, the Committee, after a careful examination of the main points that determined the judgment, notes the following issues.

First of all, the judgment refers to principles such as that physical resistance is not an element to establish a case of rape, that people react differently under emotional stress, that the failure of the victim to try to escape does not negate the existence of the rape as well as to the fact that "in any case, the law does not impose upon a rape victim the burden of proving resistance". The decision shows, however, that the judge did not apply these principles in evaluating the author's credibility against expectations about how the author should have

reacted before, during and after the rape owing to the circumstances and her character and personality. The judgment reveals that the judge came to the conclusion that the author had a contradictory attitude by reacting both with resistance at one time and submission at another time, and saw this as being a problem. The Committee notes that the Court did not apply the principle that "the failure of the victim to try and escape does not negate the existence of rape" and instead expected a certain behavior from the author, who was perceived by the court as being not "a timid woman who could easily be cowed". It is clear from the judgment that the assessment of the credibility of the author's version of events was influenced by a number of stereotypes, the author in this situation not having followed what was expected from a rational and "ideal victim" or what the judge considered to be the rational and ideal response of a woman in a rape situation.

Although there exists a legal precedent established by the Supreme Court of the Philippines that it is not necessary to establish that the accused had overcome the victim's physical resistance in order to prove lack of consent, the Committee finds that to expect the author to have resisted in the situation at stake reinforces in a particular manner the myth that women must physically resist the sexual assault. In this regard, the Committee stresses that there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence.

Further misconceptions are to be found in the decision of the Court, which contains several references to stereotypes about male and female sexuality being more supportive for the credibility of the alleged perpetrator than for the credibility of the victim. In this regard, the Committee views with concern the findings of the judge according to which it is unbelievable that a man in his sixties would be able to proceed to ejaculation with the author resisting the sexual attack. Other factors taken into account in the judgment, such as the weight given to the fact that the author and the accused knew each other, constitute a further example of "gender-based myths and misconceptions".

HUNGARY

▶ *MS. A. T. V. HUNGARY*

Communication No.: 2/2003
26 January 2005
(Views of the CEDAW Committee under article 7, paragraph 3, of the Optional Protocol to CEDAW)

Facts:

Ms. A. T. ("the author") states that for the past four years she has been subjected to regular severe domestic violence and serious threats by her common law husband, L. F., father of her two children, one of whom is severely brain-damaged. Although L. F. allegedly possesses a firearm and has threatened to kill the author and rape the children, the author has not gone to a shelter, reportedly because no shelter in the country is equipped to take in a fully disabled child together with his mother and sister. The author also states that there are currently no protection orders or restraining orders available under Hungarian law.

In March 1999, L. F. moved out of the family apartment. His subsequent visits allegedly typically included battering and/or loud shouting, aggravated by his being in a drunken state. In

March 2000, L. F. reportedly moved in with a new female partner and left the family home, taking most of the furniture and household items with him. The author claims that he did not pay child support for three years, which forced her to claim the support by going to the court and to the police, and that he has used this form of financial abuse as a violent tactic in addition to continuing to threaten her physically. In addition, there were some instances when L. F. broke into the apartment using violence.

L. F. is said to have battered the author severely on several occasions, beginning in March 1998. Since then, 10 medical certificates have been issued in connection with separate incidents of severe physical violence, even after L. F. left the family residence, which, the author submits, constitute a continuum of violence.

The author states that there have been civil proceedings regarding L. F.'s access to the family's residence, a 2 and a half room apartment jointly owned by L. F. and the author. Decisions by the court of the first instance and the regional court authorized L. F. to return and use the apartment. The judges reportedly based their decision on the following grounds: (a) lack of substantiation of the claim that L. F. regularly battered the author; and (b) that L. F.'s right to the property, including possession, could not be restricted. Since that date, and on the basis of the earlier attacks and verbal threats by her former partner, the author claims that her physical integrity, physical and mental health and life have been at serious risk and that she lives in constant fear. The author reportedly submitted to the Supreme Court a petition for review of the regional court's decision.

The author states that she also initiated civil proceedings regarding division of the property, which have been suspended. She claims that L. F. refused her offer to be compensated for half of the value of the apartment and turn over ownership to her. In these proceedings the author reportedly submitted a motion for injunctive relief (for her exclusive right to use the apartment), which was rejected.

The author states that there have been two ongoing criminal procedures against L. F., one that began in 1999 concerning two incidents of battery and assault causing her bodily harm and the second that began in July 2001 concerning an incident of battery and assault that resulted in her being hospitalized for a week with a serious kidney injury. The author further states that L. F. has not been detained at any time in this connection.

Issue:

Whether Ms. A. T. is the victim of a violation of articles 2 (a), (b) and (e), 5 (a) and 16 of the Convention because, as she alleges, for the past four years Hungary (the State Party) has failed in its duty to provide her with effective protection from the serious risk to her physical integrity, physical and mental health and her life from her former common law husband.

Decision:

Yes. With regard to article 2 (a), (b), and (e), the Committee notes that the State party has admitted that the remedies pursued by the author were not capable of providing immediate protection to her against ill-treatment by her former partner and, furthermore, that legal and institutional arrangements in the State party are not yet ready to ensure the internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence. While appreciating the State party's efforts at instituting a comprehensive

action programme against domestic violence and the legal and other measures envisioned, the Committee believes that these have yet to benefit the author and address her persistent situation of insecurity.

The Committee further notes the State party's general assessment that domestic violence cases as such do not enjoy high priority in court proceedings. The Committee is of the opinion that the description provided of the proceedings resorted to in the present case, both the civil and criminal proceedings, coincides with this general assessment. Women's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy. The Committee also takes note that the State party does not offer information as to the existence of alternative avenues that the author might have pursued that would have provided sufficient protection or security from the danger of continued violence. In this connection, the Committee recalls its concluding comments from August 2002 on the State party's combined fourth and fifth periodic report, which state "... [T]he Committee is concerned about the prevalence of violence against women and girls, including domestic violence. It is particularly concerned that no specific legislation has been enacted to combat domestic violence and sexual harassment and that no protection or exclusion orders or shelters exist for the immediate protection of women victims of domestic violence". Bearing this in mind, the Committee concludes that the obligations of the State party set out in article 2 (a), (b) and (e) of the Convention extend to the prevention of and protection from violence against women, which obligations in the present case, remain unfulfilled and constitute a violation of the author's human rights and fundamental freedoms, particularly her right to security of person.

In respect of the case now before the Committee, the facts of the communication reveal aspects of the relationships between the sexes and attitudes towards women that the Committee recognized vis-à-vis the country as a whole. For four years and continuing to the present day, the author has felt threatened by her former common law husband, the father of her two children. The author has been battered by this same man, her former common law husband. She has been unsuccessful, either through civil or criminal proceedings, to temporarily or permanently bar L. F. from the apartment where she and her children have continued to reside. The author could not have asked for a restraining or protection order since neither option currently exists in the State party. She has been unable to flee to a shelter because none are equipped to accept her together with her children, one of whom is fully disabled. None of these facts have been disputed by the State party and, considered together, they indicate that the rights of the author under articles 5 (a) and 16 of the Convention have been violated.

BRAZIL

▶ *MARIA DA PENHA V. BRAZIL*

Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2000)
April 16, 2001
(Inter-American Commission on Human Rights)

Facts:

The petition alleges that the Federative Republic of Brazil (hereinafter "Brazil" or "the State") condoned, for years during their marital cohabitation, domestic violence perpetrated in the city of Fortaleza, Ceará State, by Marco Antônio Heredia Viveiros against his wife at the time,

Maria da Penha Maia Fernandes, culminating in attempted murder and further aggression in May and June 1983. As a result of this aggression, Maria da Penha has suffered from irreversible paraplegia and other ailments since 1983.

The petition maintains that the State has condoned this situation, since, for more than 15 years, it has failed to take the effective measures required to prosecute and punish the aggressor, despite repeated complaints. The petition alleges violation of Article 1(1) (Obligation to Respect Rights), 8 (a Fair Trial), 24 (Equal Protection), and 25 (Judicial Protection) of the American Convention, in relation to Articles II and XVIII of the American Declaration of the Rights and Duties of Man ("the Declaration"), as well as Articles 3, 4(a), (b), (c), (d), (e), (f), and (g), and 5 and 7 of the Convention of Belém do Pará.

Decision:

The impunity that the ex-husband of Mrs. Fernandes has enjoyed and continues to enjoy is at odds with the international commitment voluntarily assumed by the State when it ratified the Convention of Belém do Pará. The failure to prosecute and convict the perpetrator under these circumstances is an indication that the State condones the violence suffered by Maria da Penha, and this failure by the Brazilian courts to take action is exacerbating the direct consequences of the aggression by her ex-husband. Furthermore, as has been demonstrated earlier, that tolerance by the State organs is not limited to this case; rather, it is a pattern. The condoning of this situation by the entire system only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women.

Given the fact that the violence suffered by Maria da Penha is part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors, it is the view of the Commission that this case involves not only failure to fulfill the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices. That general and discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts.

AUSTRIA

▶ *GOEKCE V. AUSTRIA*

Communication No. 5/2005
6 August 2007
(Views of the CEDAW Committee under article 7, paragraph 3, of the Optional Protocol to CEDAW)

Facts: [29]

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

[29] Facts by Antonia Ross, from https://opcedaw.wordpress.com/category/communications/sahide-goekce-deceased-v-austria/

family apartment several times between 2000 and 2002 in response to reports of disturbances, disputes and/or battering. During this period, Mustafa was issued with two expulsion and prohibition to return orders and an interim injunction order. It is alleged that police were informed that Mustafa had breached the interim injunction order and that he was in possession of a handgun, despite being subject to a weapons prohibition. On two occasions the police requested that Mustafa be detained for making a criminally dangerous threat (a death threat) and assaulting Şahide. These requests were denied by the Police Prosecutor. It appears that no explanation was provided at the time for the refusal.

On 5 December 2002, the Public Prosecutor stayed all court proceedings against Mustafa. The Public Prosecutor claimed that there were insufficient reasons to prosecute Mustafa for causing bodily harm and making criminally dangerous threats.

On 7 December 2002, Şahide phoned a police emergency call service but no police officer was sent to the apartment in response to the call. Several hours later, Mustafa shot and killed Şahide in the family apartment, in front of their two daughters, with a handgun he had purchased three weeks earlier. Mustafa surrendered himself to police two-and-a-half hours after committing the crime.

Mustafa was found guilty of murdering Şahide. Nevertheless, Mustafa was held to have committed the homicide under the influence of a "paranoid jealous psychosis" as Şahide had claimed that Mustafa was not the father of "all of her children," in an argument that preceded her murder. The court accepted that the psychosis met the requirements for a defence of mental illness. On this ground Mustafa was absolved of criminal responsibility. He is now serving a life sentence in a mental health institution.

The communication was jointly brought before the CEDAW Committee by the Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice, on behalf of Şahide and with the written consent of the guardian of Şahide's three minor children, the City of Vienna Office for Youth and Family Affairs.

The authors submitted that Austria failed to protect the deceased from domestic violence because the State Party did not take effective measures to protect Şahide's right to personal security and life and because it did not recognise Mustafa as an extremely violent and dangerous offender. The authors claimed that slow and ineffective communication between police and the Public Prosecutor lead to Mustafa avoiding conviction. Moreover, the authors claimed that Austria's existing domestic laws do not adequately protect women from violent persons, especially where the offender is repeatedly violent or makes death threats. The authors claimed that Austria violated articles 1, 2, 3 and 5 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). They cited several other international instruments in support of their claim, including General Recommendations 12, 19 and 21, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Issue:

Whether Austria violated its obligations under article 2 (a) and (c) through (f), and article 3 of the Convention.

Decision:

The Committee notes that the State party has established a comprehensive model to address domestic violence that includes legislation, criminal and civil law remedies, awareness-raising, education and training, shelters, counseling for victims of violence and work with perpetrators. However, in order for the individual woman victim of domestic violence to enjoy the practical realization of the principle of equality of men and women and of her human rights and fundamental freedoms, the political will that is expressed in the aforementioned comprehensive system of Austria must be supported by State actors, who adhere to the State party's due diligence obligations.

In the instant case, the Committee notes that during the three-year period starting with the violent episode that was reported to the police on 3 December 1999 and ending with the shooting of Ms. Goekce on 7 December 2002, the frequency of calls to the police about disturbances and disputes and/or battering increased; the police issued prohibition to return orders on three separate occasions and twice requested the Public Prosecutor to order that Mustafa Goekce be detained; and a three-month interim injunction was in effect at the time of her death that prohibited Mustafa Goekce from returning to the family apartment and its immediate environs and from contacting Ms. Goekce or the children. The Committee notes that Mustafa Goekce shot Ms. Goekce dead with a handgun that he had purchased three weeks earlier, despite a valid weapons prohibition against him as well as the uncontested contention by the authors that the police had received information about the weapon from the brother of Mustafa Goekce. In addition, the Committee notes the unchallenged fact that Ms. Goekce called the emergency call service a few hours before she was killed, yet no patrol car was sent to the scene of the crime.

The Committee considers that given this combination of factors, the police knew or should have known that Ms. Goekce was in serious danger; they should have treated the last call from her as an emergency, in particular because Mustafa Goekce had shown that he had the potential to be a very dangerous and violent criminal. The Committee considers that in light of the long record of earlier disturbances and battering, by not responding to the call immediately, the police are accountable for failing to exercise due diligence to protect Ms. Goekce.

Although, the State party rightly maintains that, it is necessary in each case to determine whether detention would amount to a disproportionate interference in the basic rights and fundamental freedoms of a perpetrator of domestic violence, such as the right to freedom of movement and to a fair trial, the Committee is of the view, as expressed in its views on another communication on domestic violence, that the perpetrator's rights cannot supersede women's human rights to life and to physical and mental integrity. In the present case, the Committee considers that the behavior (threats, intimidation and battering) of Mustafa Goekce crossed a high threshold of violence of which the Public Prosecutor was aware and as such the Public Prosecutor should not have denied the requests of the police to arrest Mustafa Goekce and detain him in connection with the incidents of August 2000 and October 2002.

While noting that Mustafa Goekce was prosecuted to the full extent of the law for killing Ms. Goekce, the Committee still concludes that the State party violated its obligations under article 2 (a) and (c) through (f), and article 3 of the Convention read in conjunction with article 1 of the Convention and general recommendation 19 of the Committee and the corresponding rights of the deceased Ms. Goekce to life and physical and mental integrity.

Session 6:
CHILDREN AS WITNESSES – GIVING EVIDENCE IN COURT

A. Session Activities

- **Activity 1: What is Your Experience About Children Giving Evidence?**

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

- **Activity 2: True or False Questions**

  Activity sheet to be given on the day of the training.

B. Case Law

No Scientific Basis for Any Presumption Against a Child's Credibility as a Witness

▶ ***R V. BARKER***
[2010] EWCA Crim 4
Case No: 2009/02867/C5, 21 January 2010
Lord Judge CJ, Hallett LJ and Macur JJ (Court of Appeal Criminal Division)

Facts:

S. B. was convicted of anal rape of a child under 13 years of age. On appeal, his argument was that it is not acceptable for a conviction, very heavily dependent on the evidence of a child as young as 4½ years, describing events said to have occurred when she was not yet 3 years old, to be regarded as safe: more formally, the competency requirement was not satisfied.

Issue:

Whether credence could be given to the testimony of the child witness.

Decision:

Section 53 of the Youth Justice and Criminal Evidence Act 1999 provides that:
"Competence of witnesses to give evidence.

(1) At every stage in criminal proceedings all persons are (whatever their age) competent to give evidence.
(2) Subsection (1) has effect subject to subsection (3) and (4).
(3) A person is not competent to give evidence in criminal proceedings if it appears to the court that he is not a person who is able to –
(a) Understand questions put to him as a witness and
(b) Give answers to them which can be understood.
(4) A person charged in criminal proceedings is not competent to give evidence in the proceedings for the prosecution (whether he is the only person, or is one of two or more persons, charged in the proceedings).
(5) In sub-section (4) the reference to a person charged in criminal proceedings does not include a person who is not, or is no longer, liable to be convicted of any offence in the proceedings (whether as a result of pleading guilty or for any other reason)."

These statutory provisions are not limited to the evidence of children. They apply to individuals of unsound mind. They apply to the infirm. The question in each case is whether the individual witness, or, as in this case, the individual child, is competent to give evidence in the particular trial. The question is entirely witness or child specific. There are no presumptions or preconceptions. The witness need not understand the special importance that the truth should be told in court, and the witness need not understand every single question or give a readily understood answer to every question. Many competent adult witnesses would fail such a competency test. Dealing with it broadly and fairly, provided the witness can understand the questions put to him and can also provide understandable answers, he or she is competent. If the witness cannot understand the questions or his answers to questions which he understands cannot themselves be understood he is not. The questions come, of course, from both sides. If the child is called as a witness by the prosecution he or she must have the ability to understand the questions put to him by the defence as well as the prosecution and to provide answers to them which are understandable. The provisions of the statute are clear and unequivocal, and do not require reinterpretation.

We should perhaps add that although the distinction is a fine one, whenever the competency question is addressed, what is required is not the exercise of a discretion but the making of a judgment, that is whether the witness fulfils the statutory criteria. In short, it is not open to the judge to create or impose some additional but non-statutory criteria based on the approach of earlier generations to the evidence of small children. In particular, although the chronological age of the child will inevitably help to inform the judicial decision about competency, in the end the decision is a decision about the individual child and his or her competence to give evidence in the particular trial.

We emphasise that in our collective experience the age of a witness is not determinative on his or her ability to give truthful and accurate evidence. Like adults some children will provide truthful and accurate testimony, and some will not. However children are not miniature adults, but children, and to be treated and judged for what they are, not what they will, in years ahead, grow to be. Therefore, although due allowance must be made in the trial process for the fact that they are children with, for example, a shorter attention span than most

adults, none of the characteristics of childhood, and none of the special measures which apply to the evidence of children carry with them the implicit stigma that children should be deemed in advance to be somehow less reliable than adults. The purpose of the trial process is to identify the evidence which is reliable and that which is not, whether it comes from an adult or a child. If competent, as defined by the statutory criteria, in the context of credibility in the forensic process, the child witness starts off on the basis of equality with every other witness. In trial by jury, his or her credibility is to be assessed by the jury, taking into account every specific personal characteristic which may bear on the issue of credibility, along with the rest of the available evidence.

The judge determines the competency question, by distinguishing carefully between the issues of competence and credibility. At the stage when the competency question is determined the judge is not deciding whether a witness is or will be telling the truth and giving accurate evidence. Provided the witness is competent, the weight to be attached to the evidence is for the jury.

The trial process must, of course, and increasingly has, catered for the needs of child witnesses, as indeed it has increasingly catered for the use of adult witnesses whose evidence in former years would not have been heard, by, for example, the now well understood and valuable use of intermediaries. In short, the competency test is not failed because the forensic techniques of the advocate (in particular in relation to cross-examination) or the processes of the court (for example, in relation to the patient expenditure of time) have to be adapted to enable the child to give the best evidence of which he or she is capable. At the same time the right of the defendant to a fair trial must be undiminished. When the issue is whether the child is lying or mistaken in claiming that the defendant behaved indecently towards him or her, it should not be over-problematic for the advocate to formulate short, simple questions which put the essential elements of the defendant's case to the witness, and fully to ventilate before the jury the areas of evidence which bear on the child's credibility. Aspects of evidence which undermine or are believed to undermine the child's credibility must, of course, be revealed to the jury, but it is not necessarily appropriate for them to form the subject matter of detailed cross-examination of the child and the advocate may have to forego much of the kind of contemporary cross-examination which consists of no more than comment on matters which will be before the jury in any event from different sources. Notwithstanding some of the difficulties, when all is said and done, the witness whose cross-examination is in contemplation is a child, sometimes very young, and it should not take very lengthy cross-examination to demonstrate, when it is the case, that the child may indeed be fabricating, or fantasising, or imagining, or reciting a well rehearsed untruthful script, learned by rote, or simply just suggestible, or contaminated by or in collusion with others to make false allegations, or making assertions in language which is beyond his or her level of comprehension, and therefore likely to be derived from another source. Comment on the evidence, including comment on evidence which may bear adversely on the credibility of the child, should be addressed after the child has finished giving evidence.

The competency test may be re-analysed at the end of the child's evidence. This extra statutory jurisdiction is a judicial creation, clearly established in a number of decisions of this court (R v MacPherson: R v Powell: R v M: R v Malicki; see to the contrary effect DPP v R [2007] EWHC 1842 (Admin)), where it was emphasised that an asserted loss of memory by a witness does not necessarily justify the conclusion that the appropriate level of understand-

ing is absent.) If we were inclined to do so, and we are not, it would be too late to question this jurisdiction. This second test should be viewed as an element in the defendant's entitlement to a fair trial, at which he must be, and must have been, provided with a reasonable opportunity to challenge the allegations against him, a valuable adjunct to the process, just because it provides an additional safeguard for the defendant. If the child witness has been unable to provide intelligible answers to questions in cross-examination (as in Powell) or a meaningful cross-examination was impossible (as in Malicki) the first competency decision will not have produced a fair trial, and in that event, the evidence admitted on the basis of a competency decision which turned out to be wrong could reasonably be excluded under section 78 of the 1984 Act. The second test should be seen in that context, but, and it is an important but, the judge is not addressing credibility questions at that stage of the process any more than he was when conducting the first competency test.

In this case, we are very conscious of the extreme youth of the child, and that the ABE interview took place long after the alleged indecency occurred. The first question for decision is whether the judge was wrong when he concluded that the child's competence had been established not only before she gave evidence but after its conclusion. We have the advantage of the ABE interview of the child, which we studied closely. As we have recorded, we ourselves are satisfied that both the child's answers and her behaviour during the interview demonstrated her competence to give evidence. We did not observe the child being cross-examined: the judge did. We have studied the transcript of her evidence, and taken note and commented on specific features of it which concerned Mr Richmond. We note that she gave clear answers although, from time to time, she responded by nodding her head or shaking it. That is what she had done during the ABE interview. No one entertained the slightest doubt that a nod meant "yes", and a shake of a head meant "no". Neither indicated uncertainty nor lack of comprehension by her of the question or her intended response, or left any doubt about her meaning. Having reflected on these submissions, and considering the matter with anxious care, there is in our judgment no basis which would justify this court interfering with the judge's conclusion that the competency of the child as a witness was established, and remained established after her evidence had concluded.

We are unable to accept that Mr Richmond could not put his case to X. Indeed as the transcript demonstrates, he did. His case was that the child was not telling the truth, and that she was advancing fabricated allegations against the appellant because of the influence and pressure exerted on her by her older sisters to improve the position of her mother at the expense of the appellant. He also asked questions with a view to demonstrating that the child's responses to the first interview with the police officer, when she did not formulate a complaint of sexual misbehaviour against the appellant, represented the truth. Her answers were that she was telling the truth about what had happened to her and that she was not acting on her sister's instructions or at her behest to fabricate a false story. Indeed given the extreme youth of the child, it seems plain that if she had been advancing a story manufactured for her by her older sisters, a very short cross-examination would have revealed, "ingenuously", as W.G. Dixon had observed in 1864, that the child had been tutored, and what she was "desired to say".

Both [the cases of] Powell and Malicki underlined the importance to the trial and investigative process of keeping any delay in a case involving a child complainant to an irreducible minimum. Unsurprisingly, we agree, although we draw attention to the circumstances

which did not appear to arise in either Powell or Malicki, that the complaint itself, for a variety of understandable reasons, in the case of a child or other vulnerable witness may itself be delayed pending "removal" to a safe environment. The trial of this particular issue was delayed because of the trial arising from the death of Baby P. With hindsight it can now be suggested that perhaps the better course, given the age of X, would have been to try her allegation first. Be that as it may, in our judgment the decisions in Powell and Malicki should not be understood to establish as a matter of principle is that where the complainant is a young child, delay which does not constitute an abuse of process within well understood principles, can give rise to some special form of defence, or that, if it does not, a submission based on "unfairness" within the ambit of section 78 of the 1984 Act is bound to succeed, or that there is some kind of unspecified limitation period. There will naturally and inevitably be case specific occasions when undue delay may render a trial unfair, and may lead to the exclusion of the evidence of the child on competency grounds. Powell, for example, was a case in which after the evidence was concluded it was clear that the child did not satisfy the competency test, and if the child in Malicki was indeed "incapable of distinguishing between what she had said on the video and the underlying events themselves" it is at least doubtful that the competency requirement was satisfied. However, in cases involving very young children delay on its own does not automatically require the court to prevent or stop the evidence of the child from being considered by the jury. That would represent a significant and unjustified gloss on the statute. In the present case, of course, we have reflected, as no doubt the jury did, on the fact of delay, and the relevant timetable. Making all allowances for these considerations, we are satisfied, as the judge was, that this particular child continued to satisfy the competency requirement.

There remains the broad question whether the conviction which is effectively dependent upon the truthfulness and accuracy of this young child is safe. In reality what we are being asked to consider is an underlying submission that no such conviction can ever be safe. The short answer is that it is open to a properly directed jury, unequivocally directed about the dangers and difficulties of doing so, to reach a safe conclusion on the basis of the evidence of a single competent witness, whatever his or her age, and whatever his or her disability. The ultimate verdict is the responsibility of the jury.

We have examined the evidence and asked ourselves whether there is any basis for interfering with the jury's verdict. Despite justified concerns about some aspects of the way in which it was conducted, the ABE interview shows an utterly guileless child, too naive and innocent for any deficiencies in her evidence to remain undiscovered, speaking in matter of fact terms. She was indeed a compelling as well as a competent witness. On all the evidence, this jury was entitled to conclude that the allegation was proved. Unless we simply resuscitate the tired and outdated misconceptions about the evidence of children, there is no justifiable basis for interfering with the verdict.

C. Handouts

- **Handout A: The Australasian Institute of Judicial Administration Incorporated (AIJA) Bench Book for Children Giving Evidence in Australian Courts (pages i–xii)**

- **Handout A: The Australasian Institute of Judicial Administration Incorporated (AIJA) Bench Book for Children Giving Evidence in Australian Courts (pages i–xii)** *(continued)*

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Acknowledgements

The authors gratefully acknowledge the following:

The Judicial Commission of New South Wales for its assistance with research materials for the writing of the Bench Book, and for access to materials on its website, including the Sexual Assault Handbook, Equality before the Law Bench Book and the New South Wales Criminal Trial Courts Bench Book.

The Australasian Institute of Judicial Administration for access to the Aboriginal Bench Book for Western Australian Courts (2nd ed.).

The Judicial College of Victoria for access to the Victorian Criminal Charge Book.

Foreword

In July 2004 the AIJA convened a Seminar on "Child Witnesses – Best Practice for Courts". The Seminar was held in the District Court of New South Wales at Parramatta which hosts a special facility for child witnesses.
The idea for the Parramatta Seminar was a proposal then under consideration by the AIJA's Project and Research Committee for the development of a best practice in relation to the taking of evidence from child witnesses, together with the development of a benchbook.

There has been considerable consideration of the particular issues and difficulties attendant upon the giving of evidence by child witnesses in criminal proceedings over the past 10 years or so. Many jurisdictions have considered the matter and have adopted procedures for the taking of such evidence. The Project and Research Committee formed the view that any project for the development of a benchbook would be best informed by a Seminar at which ideas and concerns could be canvassed. The Seminar involved presentations from the judicial perspective, the practising profession's perspective and the particular difficulties attendant upon child witnesses giving evidence in jury trials.

A Committee was formed, consequent upon the Seminar, to prepare a child witnesses' benchbook. Judge Helen O'Sullivan of the District Court of Queensland was appointed to chair the Committee. The other members of the Committee were Justice Marcia Neave AO, Court of Appeal, Melbourne, Dr Annie Cossins, Faculty of Law, University of New South Wales, Justice Robyn Layton, Supreme Court, Adelaide, Justice Richard Refshauge, Supreme Court of the Australian Capital Territory, Judge Meryl Sexton, County Court of Victoria, Judge Ann M Ainslie-Wallace, District Court of New South Wales and Judge Kevin Sleight, District Court of Western Australia. Judge Hal Jackson QC, District Court of Western Australia and Judge David Freeman, District Court of New South Wales also served upon the Committee.
An initial working draft was prepared by Dr Michael King, former Western Australian magistrate and now Senior Lecturer, Faculty of Law, Monash University.
The Committee has worked tirelessly in relation to the preparation of the benchbook and the quality of the benchbook is to be commended. The Committee is to be commended for its work and also Ms Danielle Andrewartha for her editing. The benchbook looks at the position of child witnesses not only from the viewpoint of the

- **Handout A: The Australasian Institute of Judicial Administration Incorporated (AIJA) Bench Book for Children Giving Evidence in Australian Courts (pages i–xii)** *(continued)*

legal issues involved but with a view to the psychological aspects of the child giving evidence. It will be a valuable resource for both judicial officers and practitioners.

The AIJA has committed resources to the continuing update of the benchbook to ensure its ongoing accuracy and relevance.

Virginia Bell
Justice, High Court of Australia
Former President of the AIJA

Introduction

1. This Bench Book is intended primarily for judicial officers who deal with children giving evidence in criminal proceedings as complainants or witnesses, not as accused. It is not limited to child sexual abuse, although this forms a substantial proportion of criminal proceedings involving children. The Bench Book does not deal with the sentencing of child offenders or child protection hearings.

2. The objectives of this Bench Book are:

    i. To promote accurate knowledge and understanding of children and their ability to give evidence.

    ii. To assist judicial officers to realise the goal of a fair trial for both the accused and the child complainant.

    iii. To assist judicial officers to create an environment that allows children to give the best evidence in the courtroom.

3. The material currently available to judicial officers in each jurisdiction varies greatly and includes articles, websites, detailed jury directions, Bench Books, and Practice Directions. This Bench Book is an attempt to collate these materials and write a comprehensive text. The focus throughout the Bench Book is on the provision of helpful information to judicial officers for use in court. This Bench Book is not intended to duplicate existing materials, or to be in any way inconsistent with them. The value of existing Bench Books is acknowledged and respected.

4. This Bench Book is the first attempt in Australia, and possibly internationally, to collate legal material and psychological material on child witnesses in the same text, with an emphasis on usefulness for judicial officers.

5. In July 2004, the Australasian Institute of Judicial Administration (AIJA) held a conference 'Child Witnesses - Best Practice for Courts' at the Parramatta Court in Sydney. This was prompted by the NSW Specialist Child Sexual Assault

- **Handout A: The Australasian Institute of Judicial Administration Incorporated (AIJA) Bench Book for Children Giving Evidence in Australian Courts (pages i–xii)** *(continued)*

Jurisdiction Pilot. The need for judicial officers to be provided with clear information about child witnesses became apparent from informal discussions at the conference.

6. Initial members of the AIJA Committee 'Children Giving Evidence' were Judge Helen O'Sullivan and Judge Hal Jackson (Co-Chairs), Dr Annie Cossins, Judge Shauna Deane, Judge David Freeman, Justice Robyn Layton, Professor Marcia Neave, and Judge Roy Punshon.

7. Current members of the Committee are Judge Helen O'Sullivan (Chair), Judge Ann Ainslie-Wallace (New South Wales), Dr Annie Cossins (New South Wales), Justice Robyn Layton (South Australia), Justice Marcia Neave (Victoria), Justice Richard Refshauge (Australian Capital Territory), Judge Meryl Sexton (Victoria), and Judge Kevin Sleight (Western Australia).

8. Dr Michael King undertook initial research of the existing literature and produced a compilation. This work was then expanded and refined into Bench Book format by the members of the Committee.

9. The members of the Committee are mindful that this is a first attempt and there may be errors and omissions. The Committee warmly welcomes comments and suggestions to be sent to the AIJA so that these may be incorporated on a continuing basis.

10. The Benchbook was updated by Associate Professor Annie Cossins, 2010, 2012 and 2015. The law is stated as at February 2015.

Disclaimer

The *Bench Book for Children Giving Evidence in Australian Courts* contains information prepared and collated by the Australasian Institute of Judicial Administration Committee (the Committee).

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Courts, Children's Evidence and Children's Coping Skills

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The Judicial Role in Child Sexual Abuse Cases and Preparation for Trial

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Particular Procedures for Children Giving Evidence

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Chapter 6

Other Trial Issues: Expert Evidence and Summing -Up

• Handout B: Essays in Advocacy, Chapter 19 "The Child and the Trial" by Dr. R.A Layton QC, University of Adelaide's Bar Smith Press, University of Adelaide, South Australia (2012)

Essays in Advocacy Chapter 19

THE CHILD AND THE TRIAL[1]

The advocacy skills required of counsel when witnesses are children are particularly difficult. Whether a person is acting on behalf of the child or calling the evidence of children as part of a client's case, or alternatively whether one is cross-examining a child, there are certain common matters that an advocate must keep in mind. Walker[2] encapsulated part of the problem when she said:

> The external forensic system in which children are expected to retrieve information is a system that was built *by* adults *for* adults. It is a system that uses often arcane language in an adult environment under adult rules which are frequently intimidating even for adults themselves. Under such circumstances, it is not surprising that some inconsistencies – both real and imagined – should occur in a child's testimony.

Walker outlined six different requirements for the competency of children when giving evidence, namely whether the witness:[3]

(1) has observed or experienced the event in question;

(2) can recollect the event in question;

(3) can communicate their recollection verbally;

(4) understands the questions put to them;

(5) is able to give intelligent answers to the questions put to them; and

(6) is aware of their duty to speak the truth.

Each of these requirements and their relevance to the role of counsel will be discussed below. The purpose of this chapter is to outline some findings in the relevant research that help to understand the particular issues that are relevant to children as witnesses. It will be seen that a child is often a perfectly competent witness so long as questions are posed in a fair and considerate manner. It will also be explained that, in the case of children who make complaints of offending, early questioning by a competent and unbiased questioner is important to preserve the reliability of the child's evidence. Part 5 of this chapter gives examples of proper and improper questioning techniques for counsel when dealing with child witnesses.

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1 This chapter draws substantially on a previous publication for which I was a contributing author: *Bench Book for Children Giving Evidence in Australian Courts* (2009) Australian Institute of Judicial Administration Incorporated <http://www.aija.org.au/Child%20Witness%20Bch%20Bk/Child%20Witness%20BB%202009.pdf> at 5 February 2010.

2 A G Walker, *Handbook on Questioning Children: A Linguistic Perspective* (2nd ed, 1999, ABA Center on Children and the Law, American Bar Association) 84.

3 A G Walker, 'Questioning Young Children in Court: A Linguistic Case Study' (1993) 17 *Law and Human Behavior* 59.

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Understanding children

Before considering the role of counsel in respect of questioning children, it is essential to understand the development of children and the ways in which they understand the world around them as well as their abilities to understand and communicate events.

An overriding feature of children, which impinges on all aspects of children giving evidence as witnesses in a trial, is that they lack power.

Lack of Power

Children are more vulnerable than adults because of their physical size and intellectual development which can be physically and emotionally exploited by adults. This vulnerability is also the feature of their constitution which often leads to children being the victims of adult behaviour or offending. Particularly when young, children are also often reluctant to contradict an adult. In addition, children lack power throughout the whole court process commencing from the complaint about conduct through to the giving of evidence in court. This lack of power can mean that the trial process is particularly burdensome on a child as the court process requires them to:

- complain to a person in authority;
- be questioned by police or other authority figures;
- be subjected to family responses;
- await trial, undergo proofing and experience court delays;
- give evidence in chief and then be subjected to cross-examination; and
- when they give evidence they are older with different ways of expressing themselves than the time when the event occurred and the complaint was made.

This lack of power is further affected by the following factors:

- family, social and environmental circumstances;
- socio-economic disadvantage and educational background;
- physical, intellectual or mental health problems;
- the child being non-English speaking or from culturally different places; and
- the child having an Aboriginal background.

One can also add to those factors, the circumstances of being in court, in a formal and unfamiliar environment.

Fair Trial

The purpose of understanding matters about child development, is to provide an appropriate balance so that children are given the opportunity to give their best evidence, particularly if it relates to an alleged offence committed against them. At the same time it is necessary to recognise that the accused in a criminal trial has the right to a fair trial, which includes the ability to test the prosecution's case through cross-examination of witnesses.

Sections 22 and 25 of the *Evidence Act 1929* (SA) seeks to strike this balance by providing that questions asked of a witness may be disallowed and the witness told that the question need not be answered if the question is vexatious and not relevant or is otherwise 'improper'. A question is 'improper' if it is:

- misleading or confusing;
- based on a stereotype including a sexual, racial, ethnic or cultural stereotype or a stereotype based on age or physical or mental disability;
- unnecessarily repetitive, offensive or oppressive or one of a series of questions that is repetitive, offensive or oppressive; or
- said in a humiliating, insulting or otherwise inappropriate manner or tone.

The provision also allows the Court to take into account the age, personality and educational level of a witness as well as their mental or physical disabilities, cultural background, nature of the proceedings etc.

The role of the judge in balancing the interests of the witness and those of the accused has been discussed in cases such as *R v TA* (2003) 57 NSWLR 444 where Spigelmann CJ stated (at 446):

> Judges play an important role in protecting complainants from unnecessary, inappropriate and irrelevant questioning by or on behalf of an accused. That role is perfectly consistent with the requirements of a fair trial, which requirements do not involve treating the criminal justice system as if it were a forensic game in which every accused is entitled to some kind of sporting chance.

It is the responsibility of counsel to ensure that, no matter which party they act for, they treat each witness with appropriate respect, particularly if the witness is a child. In the case of a child who is alleged to be the victim of a crime, which is often the context in which they give evidence, it is important that they do not become re-victimised as a consequence of improper questioning by counsel. This is a duty owed by a counsel to the court in the interests of justice. It is a higher duty than the interests of the client, and the client should be advised of this overriding duty.

1. Has a child observed or experienced the event in question?

Sometimes it may be apparent from the behaviour of the child, either by actions or words, that the child has observed or experienced an event. This may be contemporaneous with the event or subsequent to the event. Sometimes the occurrence of an event may be apparent from sources or evidence independent of the child. Frequently however, that is not the case, particularly when the alleged event is sexual abuse in which the child and the alleged abuser were the sole witnesses. Research has consistently shown that sexually abused children commonly delay their complaint of abuse for months or years.[4] Still further research suggests that some children do not disclose the abuse within the first year after the abuse.[5]

[4] See eg, K London et al, 'Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways That Children Tell?' (2005) 11 *Psychology, Public Policy, and Law* 194; T A Roesler, 'Reactions to Disclosure of Childhood Sexual Abuse: The Effect on Adult Symptoms' (1994) 182 *Journal of Nervous and Mental Disease* 618; H S Resnick et al, 'Prevalence of Civilian Trauma and Posttraumatic Stress Disorder in a Representative National Sample of Women' (1993) 61 *Journal of Consulting and Clinical Psychology 984*; D Finkelhor et al, 'Sexual Abuse in a National Survey of Adult Men and Women: Prevalence, Characteristics, and Risk Factors' (1990) 14 *Child Abuse & Neglect* 19.

[5] J Henry, 'System Intervention Trauma to Child Sexual Abuse Victims Following Disclosure' (1997) 12 *Journal of Interpersonal Violence* 499; L D Sas and A H Cunningham, *Tipping the Balance to Tell the Secret:*

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Many will never disclose it.[6] A comprehensive study funded by the Public Health Agency of Canada and undertaken by Directors at the Centre for Children and Families in the Justice System in London investigated the phenomenona of non-disclosure and delay in disclosure by victims of sexual abuse.[7] Key findings of that report included:

- A majority of sexually abused children do not disclose immediately or within one month of abuse. Most report the abuse one or more years after it occurred or not at all.
- Children abused by strangers are more likely to disclose within one month.
- Children abused by family members are more likely to delay disclosure longer than one month.
- Repeated abuse is more likely to occur if the abuser is a relative.
- Children who experience multiple abuses are less likely to disclose.
- Less intrusive forms of abuse are more likely to be reported.
- The younger the child at onset of abuse, the less likely they will disclose.
- Threats and use of force may be associated with delay in reporting.
- Authority figures (police, clergy, social workers etc) are the least common type of confidant for a child.
- Friends are the most common type of confidant and disclosure to peers increases with age.

Failure by a child to disclose at the time of offending can be explained by factors such as:

- not understanding the significance of the event;
- embarrassment, shame or self blame;
- fear of reprisals such as punishment, harm to others or abandonment;
- perceiving that they won't be believed;
- believing that they have to keep their promise not to tell;
- loyalty conflicts; and
- lack of adult support.

It is quite common for children in subsequent interviews or questioning and even at the time when giving evidence in court, to disclose certain events that have not been disclosed before. This is not necessarily lying. As with adults, something may trigger remembrance of a matter not previously mentioned.

The Public Discovery of Child Sexual Abuse (London, Ontario, Canada: London Family Court Clinic, 1995); D M Elliott and J Briere, 'Forensic Sexual Abuse Evaluations of Older children: Disclosures and Symptomatology' (1994) *Behavioral Sciences and the Law* 261.

6 In their meta-analysis, London et al concluded that two thirds of adults who stated in retrospective surveys that they had been abused as children reported that they did not disclose the abuse during childhood: London et al, above n 4.

7 A Cunningham and L Baker, *Little Eyes, Little Ears: How Violence against a Mother Shapes Children as They Grow* (2007) Public Health Agency of Canada <http://www.lfcc.on.ca/little_eyes_little_ears.pdf> at 5 February 2010.

The first interview is vital and the earlier the better. What children tell is more reliable when it is done by an experienced and unbiased interviewer using open-ended questions.

2. Can children recollect the event in question?

In order to give evidence a child must be able to have a memory retrieval ability.

Memory retrieval requires three stages:

- recognition;
- storage; and
- retrieval and its expression.

Recognition

Recognition is the encoding of information about an event which has happened. The nature and extent of encoding depends on:

- What the event was; its meaningfulness; in particular whether it was traumatic or unusual or whether there was some specific memorable feature at the time.
- The child's existing knowledge and how the event was understood at the time.
- The age and general intelligence of the child.

Children have a different perspective from adults as to what is important to remember. This facet itself can be a useful guide to the accuracy or otherwise of a child's memory. A child may not entirely understand what is happening or what they are observing, but they may be able to still recall and relate details of the event. Sometimes the detail recalled may be trivial but it gives credibility to what is described. For example:

- I was worried about my new pyjamas with the bears on them.
- He came into my room with a box of tissues.
- He then "wee'd" on me or he "milked" on me (ejaculation).

Storage of memory

The storage of memory is also dependent on the meaningfulness of the event. In addition it depends on:

- Whether the child re-experiences the event or remembers it because something triggers the memory.
- The quality of memory of an event is affected by the passage of time before the child either remembers it voluntarily or is reminded in some way of the event.
- The extent to which there are later competing events of a similar nature.
- Subsequent events may impact positively or adversely upon the quality of memory.
- Depending on the nature of intervening events, memory may be diminished or strengthened.
- The longer the gap between an event and its recall, the more likely it is that the memory details will be lost, particularly with respect to peripheral details. Some

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exceptions may be details that are of interest to the child, such as smell, a look on the face, or sounds of groaning etc.

Retrieval

Children generally lack the same memory retrieval strategies that are available to an adult. Retrieval depends on what attention the child paid at the time of the event and the detail noted.

Children's recall also depends on language development, conceptual development, memory and emotional development as well as the context in which recall is undertaken.

Emotional factors may affect memory, particularly in relation to questions about abuse where there can be signs of embarrassment, disgust, surprise or disbelief, each of which depends on the age of the child. This may affect the motivation to retrieve the particular memory. The child may wish not to remember and thereby avoid recounting a terrible and frightening memory.

General features about the memory of children

Research indicates that there is no universal rule concerning children's memory, particularly in the context of giving evidence. Children may give very detailed accounts of an event, or they may provide little detail. Memory, either of child or adult, does not operate like a video recorder; it is a product of subjective reality of the individual and the interaction of the individual with his or her environment and it can change over time.[8]

A Child's ability to encode, store and retrieve information develops over time and improves with their age at the time of the event. From three years of age children form detailed and enduring memories of events that happen to them, particularly if they are distinctive or emotionally positive or negative.[9] Children older than three are also more able to engage in a conversation about such events with others, which may serve to reinforce their memories.

Children may provide different but nonetheless accurate details about the same event at different interviews.[10] This discrepancy may be due to the fact that young children have difficulty presenting information in an organised manner. This is because different aspects of the experience may become more relevant to them as they develop.[11] This means that inconsistency in children's accounts do not necessarily equate to inaccuracy, especially in repeated recalls that follow open ended questioning.

Young children have particular difficulty isolating a specific incident that occurred as part of a routine experience and may not differentiate a discrete event from that routine experience.

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[8] L Baker-Ward and P A Ornstein, 'Cognitive Underpinnings of Children's Testimony', in Westcott, Davies and Bull (eds.), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (2002) 22.

[9] Cunningham and Baker, above n 7, 11.

[10] R Fivush and A Schwarzmueller, 'Say It Once Again; Effects of Repeated Questions on Children's Event Recall' (1995) 8 *Journal of Traumatic Stress* 555; R Fivush, 'The Development of Autobiographical Memory', in Westcott, Davies and Bull (eds.) *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (2002) 58.

[11] R Fivush and A Schwarzmueller, 'Say It Once Again; Effects of Repeated Questions on Children's Event Recall' (1995) 8 *Journal of Traumatic Stress* 555; R Fivush, 'The Development of Autobiographical Memory', in Westcott, Davies and Bull (eds.) *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (2002) 58.

For example, a child giving evidence about having been inappropriately touched following a family dinner might, in response to a question inquiring whether a sister was present at that *dinner*, answer "yes" even though the sister was not there, because it was the child's routine experience that the sister generally was there for all family dinners.[12]

Literature indicates that repeated experiences of an event – such as repeated acts of abuse – decrease a child's ability to remember the specific details of each experience.[13] With a lapse of time, the interference in memory is likely to increase, particularly with younger children. However, if a particular incident of abuse was distinctive in some way – such as being the first or the last act, or being in a different location or at night rather than in the daytime, or in some other way an unusual and different feature – then the child is more likely to be able to distinguish the individual event from others.[14]

Further, the fact that certain experiences were traumatic does not in itself prevent or hinder them being recalled. In relation to the effect of high levels of stress in relation to memory, there are some contradictory findings. Some studies suggest that high levels of stress increase children's abilities to focus and encode information.[15] Others have suggested that too much stress at the time of the event can cause memory impediment.[16]

Accuracy of memory and suggestibility

The extent to which children of different ages are vulnerable to suggestion has been the subject of much research, largely with inconsistent results, because of the use of different methodologies. However, some common conclusions can be drawn:

- Children may be particularly prone to answering questions that they do not understand during the cross-examination process.[17]
- If children are asked open questions such as who, what, where, why, when and how, this permits free narrative and the completeness of their accounts is increased without decreasing its accuracy.[18]

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[12] L Sas, 'The Interaction between Children's Developmental Capabilities and the Courtroom Environment: The Impact on Testimonial Competency' (2002) Department of Justice, 40 <http://www.justice.gc.ca/eng/pi/rs/rep-rap/2002/rr02_6/index.html> at 5 February 2010.

[13] M Powell and D Thomson, 'Children's Memories for Repeated Events', in Westcott, Davies and Bull (eds.), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (2002) 72.

[14] Ibid.

[15] L Terr, 'What Happens to Early Memories of Trauma? A Study of Twenty Children under Age Five at the Time of Documented Traumatic Events' (1988) 27 *Journal of Amer Academy of Child & Adolescent Psychiatry* 96.

[16] S J Ceci and M Bruck, 'Suggestibility of the Child Witness: A Historical Review and Synthesis' (1993) 113 *psychological* Bulletin 403, 434; K A Merritt, P A Ornstein and B Spicker, 'Children's Memory for a Salient Medical Procedure: Implications for Testimony' (1994) 94 *Pediatrics* 17; D P Peters (ed.), *The Child Witness: Cognitive and Social Issues* (1989); D P Peters, 'The Influence of Stress and Arousal on the Child Witness', in Doris (ed.), *The Suggestibility of Children's Recollections: Implications for Eyewitness Testimony* (1991) 60.

[17] R Zajac, J Gross and H Hayne, 'Asked and Answered: Questioning Children in the Courtroom' (2003) 10 *Psychiatry, Psychology and Law* 201 <http://www.judcom.nsw.gov.au/publications/benchbks/sexual_assault/abstract_zajac-questioning_children_in_the_courtroom.html> at 5 February 2010 citing A H Waterman, M Blades and C Spender, 'Do Children Try to Answer Nonsensical Questions?' (2000) 18 *British Journal of Developmental Psychology* 211.

[18] D A Poole and D S Lindsay, 'Interviewing Preschoolers: Effects of Non-Suggestive Techniques, Parental Coaching, and Leading Questions on Reports of Non-Experienced Events' (1995) 60 *Journal of Experimental Child Psychology* 129.

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- The degree of suggestibility varies markedly between children who have participated in an event as distinct from merely being observers of events.[19]
- Reports of misinformation in free recall by children are rare.[20]
- Generally it is more difficult to mislead children to report negative or abuse-related events than positive events, regardless of age.[21]
- Children are fairly resistant to suggestions that they have been hurt when they have not.[22]
- Two factors that predict children's suggestibility are:
    - 'Yield' – a tendency to respond affirmatively to leading questions; and
    - 'Shift' – a tendency to be socially sensitive to negative feedback which may cause a child to change his or her responses to please the questioner.[23]
- Young children are more suggestible than older children and adults.
- Children with disabilities can be more vulnerable to suggestibility depending on their level of intellectual functioning and the nature of the disability.
- False reports can be due to a combination of social and cognitive problems such as suggestibility or a weak memory for an event.

It is very important on all occasions that children are questioned using an open-ended free narrative. This form of questioning best ensures the accuracy of their information and their evidence. The strength of memory for an event may be less than the strength of new suggested information by an interviewer. There is potential for children to be influenced by information suggested to them by an interviewer using leading questions when this information has not been previously volunteered by the child, eg. "Did daddy put his fingers inside you?"

Unfortunately early and unwitting questioning of children may result in tainting a child's information by the introduction of elements or assumptions not volunteered by the child. This may occur at the time of disclosure to a parent or other adult, or even by inappropriate questioning by police. It is therefore important that a child is questioned by a competent and experienced person as soon as possible.

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[19] G Goodman et al, 'Children's Concerns and Memory; Issues of Ecological Validity in the Study of Children's Eyewitness Testimony', in Fivush and Hudson (eds.) *Knowing and Remembering in Young Children* (1990) 249; C Gobbo, C Mega and M-E Pipe, 'Does the Nature of the Experience Influence Suggestibility? A Study of Children's Event Memory' (2002) 81 *Journal of Experimental Child Psychology* 502, 504.

[20] K Pezdek, K Finger and D Hodge, 'Planting False Childhood Memories: The Role of Event Plausibility' (1997) 8 *Psychological Science* 437; K Pezdek and T Hinz, 'The Construction of False Events in Memory', in Westcott, Davies and Bull (eds.), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (2002) 99; B M Schwartz-Kenney and G S Goodman, 'Children's Memory of a Naturalistic Event Following Misinformation' (1999) 3 *Applied Developmental Science* 34.

[21] M L Eisen et al, 'Memory and Suggestibility in Maltreated Children: New Research Relevant to Evaluating Allegations of Abuse', in Lynn and McConkey (eds.), *Truth in Memory* vol. 67, (1998) 163; Sas, above n 12.

[22] Sas, above n 12, 40.

[23] G S Goodman and A Melinder, 'Child Witness Research and Forensic Interviews of Young Children: A Review' (2007) 12 *Legal and Criminological Psychology* 1, 9-10, citing G H Gudjonsson, 'A New Scale of Interrogative Suggestibility' (1984) 5 *Personality and Individual Differences* 303; G H Gudjonsson, 'A Parallel Form of the Gudjonsson Suggestibility Scale' (1987) 26 *British Journal of Clinical Psychology* 215.

3. Can children communicate their recollection verbally?

Children differ in their language development. Whilst most children's speech sounds a lot like adults by the age of five, their cognitive understanding of language may differ.

Vocabulary and understanding for the purposes of communication gradually increases with age. Each child has their own unique word pattern which is shaped by family and social circumstances, education and upbringing.

Children have a limited ability to correct a misunderstanding and are reluctant to contradict an adult questioner.

Children use words which may differ from the way in which adults use the same words. For example, in sexual matters children often use different language and are certainly unlikely to understand words such as semen; vagina; penis; ejaculation etc. Accordingly, being hurt during a sexual encounter might be described as being "stabbed".

Children suffer from cognitive limitations which differ from adults. Research has provided certain indicators of general age-determined language faculties:

Pre-schoolers

- use words connoting time, distance, relationship or size, well before they understand their meaning;
- are confused by the use of negatives. For example, "Did you not go to the door?";
- may only answer one aspect of a complicated question;
- usually do not know that they do not understand something; and
- believe that adults generally speak the truth, are sincere and would not trick them.

Children aged 7-10 years

- the word "touching" involves a hand, and touching by a mouth or penis is not included;
- may have problems with questions considering the future from the perspective of the past; for example, "Was Uncle John supposed to take you to the movies that day?";
- have difficulties with the passive tense;
- do not have the skills to deal with irony, sarcasm and insincerity;
- still believe that generally adults tell the truth;
- do not understand that other people do not know what they know. That includes a lawyer asking questions. They do not tend to offer spontaneous information;
- < 6 to 7 years they are unable to say how long an activity went on for and will typically say about 5 mins;
- < 7 years they are unable to distinguish between "before" and "after";
- < 7 to 8 years they do not fully understand the difference between "come", "go", "bring" and "take";

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- < 7 to 10 years they are not able to tell the difference between "ask" and "tell";
- < 7 years they have problems describing what others are feeling and may simply project their own feelings and perception;
- < 7 years they have trouble with the sequence of events. This includes the order in which events took place. They tend to simply remember the fact that events have occurred;
- < 8 years they have difficulty knowing the day of the week and seasons;
- < 8 to 9 years they have not acquired the adult concept of "remember". A younger child may use the word "forget" in the sense of not having known;
- < 9 years are not able to provide accurate measurements; and
- < 10 years they do not realise that they have insufficient information to correctly interpret the world around them. They are unaware, in giving an answer, that they did not understand the question.

It is useful for a questioner to check comprehension by asking a child to either paraphrase what they understand the question to be or to ask further questions to explain their answers.

4. Can children understand the questions put to them?

The language used in a courtroom is often very intimidating. Children generally have little ability to deal with legal jargon. Of necessity, any lawyer is in a powerful position and children often do not know how to disagree. Children of all ages, like adults, are less likely to admit that they do not understand a question if they think they should understand it, particularly if the atmosphere is forbidding and formal.[24] It is common for children under pressure in the witness box to simply repeat a previous answer.[25]

Children may also have problems in dealing with questions that limit choice as to answers, such as that allow only a yes or no answer, particularly when the child knows that neither answer applies in the circumstances.

It has sometimes been said that a helpful rule of thumb to enhance the ability of a child to understand a question, is to match the number of words in the question with the age of the child. For example, for a six year old child, there would be six words in the question.

Two separate studies conducted by Zajac and Hayne (2003)[26] raise serious issues about the appropriateness of cross-examination in order to test the accuracy of the evidence of children aged between 5 and 13. A study of court transcripts of the evidence of children in that age group in sexual abuse cases and controlled studies done in respect of children aged 5 to 6 years, demonstrated that closed questions simulating cross-examination and usual cross-examination techniques, resulted in 75% of children in the court environment changing at least one aspect of their evidence.[27] In the controlled studies, which involved a true situation,

[24] Walker, above n 2, 60.
[25] Ibid, 69.
[26] R Zajac, J Gross and H Hayne, 'Asked and Answered: Questioning of Children in the Courtroom' (2003) 10 *Psychiatry, Psychology and Law* 199; Zajac and Hayne, 'The effect of cross-examination on the accuracy of children's reports' (2003) 9 *Journal of Experimental Psychology* 187.
[27] R Zajac, J Gross and H Hayne, 'Asked and Answered: Questioning of Children in the Courtroom' (2003) 10 *Psychiatry, Psychology and Law* 199, 206.

closed questions, and a younger age group, 85% changed one aspect of their statement. Also in the controlled study, 33% of the children changed all of their original responses to what was a true situation.[28]

Further, the study of the court transcripts revealed that children were also prone to answering questions even if they were ambiguous, or did not make sense. It also revealed that children's responses largely depended on the type of questions asked rather than the lawyer posing them. Both articles reinforced the need for questions to be age-appropriate and open-ended. The questions should not involve complex language structure, contain more than one part, include inappropriate negatives, be ambiguous or be tagged.[29]

Therefore, as one of the prime purposes of cross-examination is to discredit the child's testimony through controlling questioning techniques, the unfortunate outcome is that it is the least likely technique to allow children to give their most accurate evidence.

5. Are children able to give intelligent answers to the questions put to them?

As discussed earlier, intelligent, accurate responses depend primarily upon the way in which the child is questioned.

How to question children for the most reliable evidence

- use simple, jargon-free language which is appropriate to the child's age or development;
- use simple construction consisting of subject, verb and object;
- use the active rather than the passive voice;
- try to convey only one idea at a time;
- avoid complex concepts, phrases and negatives;
- ask open questions which commence with who, where, what, why, how etc.
- require an answer that is within the child's cognitive capabilities;
- use a pleasant clear tone of voice, but not over-friendly; and
- watch to see whether or not a child is tiring and if the judge has not picked it up, do so.

Questions which produce the least reliable evidence from children

- **Legalese.**
  Examples:
  - Q: You told "my friend" that…
  - Q: No, I'll withdraw that…
  - Q: I put it to you that….

- **Unmarked questions or propositions** where there is no indication that a response is required; it is simply a proposition.
  Example:
  - Q: I put it to you that you are telling a lie.

[28] Zajac and Hayne, above n 26, 193.

[29] Ibid. The term "tagged questions" essentially refers to a question which is essentially a statement phrase but which is transformed into a question by an interrogative phrase which is 'tagged' to the end of the sentence. Eg "He took you straight to the football, did he?".

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- **Double negatives.**
  Example:
  - Q: He did not suggest to you that you should not go outside the door did he?

- **Tagging of questions** at the end of a sentence.
  Examples:
  - Q: He didn't do it, did he? (It has been recognised in one study that the answer to this question requires seven different cognitive operations to be in process.)
  - Q: If something happens today and then something happens tomorrow, you are not going to say they are a year apart, are you?

- **Negative tagging** by adding a negative construction at the end of a sentence.
  Examples:
  - Q: He took you on a picnic to the park by the river, did he not?

  Contrast with:
  - Q: Did he take you on a picnic to the park by the river?

- **Ambiguous questions.**
  Examples:
  - Q: How many times did you tell the policeman that Frank touched you on the buttocks? (It is ambiguous because of uncertainty as to whether the question is directed to the *number of times this topic* was raised with police officer, or whether it was asking *how many times* Frank touched the child on the buttocks.)
  - Q: How do you say he forced you to touch him?
    A: I was forced to…[literal interpretation].
    Q: How do you say you were forced to?
    A: I just said it.

- **Specific and difficult questions.**
  Examples:
  - Q: You walked <u>perpendicular</u> to the road didn't you?
  - Q: Its pure <u>fabrication</u> isn't it?

- **Repeated questioning.**
  Asking the same questions over and over again. This may result in the child thinking that the wrong answer must have been given to the lawyer therefore the child may change his/her answer. This is more particularly an issue with young children. This process may not only be very demoralising, but the child may get exhausted by the process and start responding by saying "I do not know" to questions which have previously been answered.

- **Rapid fire questioning.**

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A series of very quick questions, particularly if done in a commanding style, may eventually lead a child to offer a random response to stop the questioning and therefore the responses may be unreliable.

- **Negative rhetorical questions.**
  Examples:
  - Q: Now you had a bruise did you not, near one of your breasts, do you remember this?
  - Q: It's the case is it not that you didn't….
  - Q: Are you saying none of that ever happened?
    A: (Child shakes head.)
    Q: Does that mean it did happen or it didn't happen? (It is easier for a child to answer "yes" to such a question than interpret the different phrases of the question in the context of the whole so as to understand that one would say "no".)

- **Multi-faceted questions.**
  Examples**:**
  - Q: Well did he take hold of you and make you do anything? Did he grab hold of your hand and do anything with your hand?
  - Q: You told the police officer you were kicked on the shin did you not, and that you had a bruise, do you remember that?

- **Multiple questions** within a question.
  Example:
  - Q: When was the last time he did this to you before the time we have been speaking of? We have been speaking of one in February obviously, when was the last time he interfered with you before that?

- **Juxtaposition of unrelated topics** or jumping quickly from one topic to another.
  Examples:
  - Q: On that occasion when mum went to the youth group, you were at Glenelg?
    A: I have made a mistake, it wasn't Glenelg it was Brighton.
    Q: Right, it should be Brighton – you did not see the defendant at anytime when he put his penis in your bottom did you?

  (Actual transcript of XXN of a 13 year old, with suburbs changed.)
  - Q: You then said he tried to put his finger in your vagina – did he put his finger on your vagina or in your vagina?
    A: In my vagina.
    Q: Did you have your green pyjama top on?
    A: Yes
    Q: Did he do anything else to you?
    A: No
    Q: Were you wearing a watch when all of this happened?

- **Passive voice.**
  Examples:

- **Handout B: Essays in Advocacy, Chapter 19 "The Child and the Trial" by Dr. R.A Layton QC, University of Adelaide's Bar Smith Press, University of Adelaide, South Australia (2012)** *(continued)*

  - Q: The door was then closed behind Frank wasn't it?
  - Q: The door was then closed behind the person. Is that what you are really saying?

- **Imbedding,** which is a series of qualifying phrases within a sentence.
  Example:
  - Q: Taking you back to the time when you were living in Sydney, when you first met Fred, at that time and throughout the period that Fred was living with your family, he used to work as a baker didn't he?

- **Backward referencing.**
  Example:
  - Q: So you told us that you don't remember - do you remember saying that a moment ago?

6. Are children aware of their duty to speak the truth?

Before a child can even commence giving evidence, the child must satisfy the requirements of being aware of their duty to speak the truth. A judge undertakes the enquiry to decide whether or not a child is competent to give evidence. There is a presumption of competency of a child to give sworn evidence unless the judge determines that the child does not have sufficient understanding of the obligation to be truthful.[30] Counsel for the accused does not have the right to ask questions of the child in relation to competency testing. The Judge is not concerned with substantive issues to be raised at trial, but only whether the relevant criteria have been met under the legislation for the giving of sworn evidence. Section 9 of the *Evidence Act 1929* (SA) sets out the relevant criteria for the giving of evidence, and this applies to children as well as adults.

If a judge determines that the child does not have a sufficient understanding of the obligation to be truthful for the purposes of sworn evidence, the judge may permit the child to give unsworn evidence provided that the Judge is satisfied that the child understands the difference between the truth and the lie; the Judge tells the child that it is important to tell the truth and the child agrees that he or she will tell the truth.[31]

Lies and truth

Lying is the deliberate intention to deceive a questioner. It may result from true information being withheld (an act of omission) or false information being given (an act of commission). Children are likely to commit errors of omission rather than commission. However it must be remembered that both children and adults lie. There is no evidence to suggest that children lie more than adults. The circumstances in which children may lie however differ from that of adults.

In relation to truth and lies, so far as a jury is concerned often this is judged by behaviour in the witness box, confidence with which evidence is given and whether there are inconsistencies in evidence.

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[30] See discussion in Lunn, *Civil Procedure South Australia* (Butterworths, loose leaf) [1048].
[31] Section 9(2), *Evidence Act 1929* (SA).

Juries should be informed that inconsistencies may not be indications of lying in a child. They may be due to a misunderstanding or confusion which has not been clarified.

Omissions and keeping secrets

One reason that a child may lie by omission is because of a perceived requirement to keep a secret. With respect to keeping secrets:

- Children aged 5 to 6 years are more likely to keep a secret than if they are only 3 years of age.
- Children aged between 9 and 10 years are not likely to report a matter that they were asked to keep secret about but they will respond to direct questioning.

Other motivations for children lying include:

- avoiding punishment;
- avoiding embarrassment or shame;
- getting a reward;
- being accepted; or
- protecting a loved one.

It is common for offenders to groom a child prior to offences being committed. Often an offender is somebody known to the child or even a relative. Rewards are often given for "favours" and a child may be asked to keep their "little secret". All of these may lead to a child not disclosing.

Special procedures

Finally and in brief, there are special provisions and procedures which relate to children giving evidence.

Witness Assistance Service

There is a child Witness Assistance Service available to assist children when giving evidence.

Director of Public Prosecutions – South Australian Witness Assistance Service http://www.dpp.sa.gov.au/02/was.php?s=02

Directions Hearings

Arrangements for children giving evidence may be the subject of Directions Hearings.

Criminal Practice Directions 2007 (SA) PD 10 and 10A. http://www.courts.sa.gov.au/lawyers/practice_directions/joint-crim-PDs-07/joint-crim-PDs-07-am01.pdf

- **Handout B: Essays in Advocacy, Chapter 19 "The Child and the Trial" by Dr. R.A Layton QC, University of Adelaide's Bar Smith Press, University of Adelaide, South Australia (2012)** *(continued)*

Arrangements to give evidence and recording of evidence

Sections 12, 13, 13A, 13C and 13D of the *Evidence Act 1929* (SA) are of particular relevance. These sections concern physical arrangements which can be made for the taking of evidence from children, including the use of closed circuit TV. The court is also enabled to make an audiovisual record of evidence given by a child in criminal proceedings which may be then admitted as evidence in later proceedings.

Jury Directions

There are also provisions which deal with the content of jury directions. South Australia has abolished the common law rule that juries are required to be warned about the dangers of convicting an accused person on the basis of uncorroborated evidence of a child in sexual assault charges.[32]
There are also statutory provisions which modify the common law requirements set out in certain case law.

***Legislation on* Longman**[33]

Evidence Act 1929 (SA) s 34CB http://www.legislation.sa.gov.au/LZ/C/A/EVIDENCE%20ACT%201929.aspx

***Legislation on* Kilby**[34] ***and* Crofts**[35]

Evidence Act 1929 (SA) s 34M http://www.legislation.sa.gov.au/LZ/C/A/EVIDENCE%20ACT%201929.aspx

[32] Section 12A, *Evidence Act 1929* (SA).
[33] *Longman v The Queen* (1989) 168 CLR 79.
[34] *Kilby v The Queen* (1973) 129 CLR 560.
[35] *Crofts v The Queen* (1996) 186 CLR 427.

- **Handout C: 'Child Development and Trauma Guide' of the Government of Western Australia, Department of Child Protection**

Government of **Western Australia**
Department for **Child Protection**

Child development and trauma guide

Some important points about this guide

This guide has been prepared because of the importance of professionals in the Out-of-Home Care, Child Protection and Individual and Family Support areas to understand the typical developmental pathways of children and the typical indicators of trauma at differing ages and stages. It is intended to inform good practice and assist with the task of an overall assessment, and of itself is not a developmental or risk assessment framework. Rather, it is a prompt for busy workers to integrate knowledge from child development, child abuse and trauma and importantly to offer practical, age appropriate advice as to the needs of children and their parents and carers when trauma has occurred.

Engaging families, carers, significant people and other professionals who know the child well as a source of information about the child, will result in a more complete picture. It is essential to have accurate information about the values and child rearing practices of the cultural group to which a child belongs, in order to appreciate that child's development.

The following points give an essential perspective for using the information in the child development and trauma resource sheets about specific age groups:

- Children, even at birth, are not 'blank slates'; they are born with a certain neurological make-up and temperament. As children get older, these individual differences become greater as they are affected by their experiences and environment. This is particularly the case where the child is born either drug dependent or with foetal alcohol syndrome.
- Even very young babies differ in temperament eg. activity level, amount and intensity of crying, ability to adapt to changes, general mood, etc.
- From birth on, children play an active role in their own development and impact on others around them.
- Culture, family, home and community play an important role in children's development, as they impact on a child's experiences and opportunities. Cultural groups are likely to have particular values, priorities and practices in child rearing that will influence children's development and learning of particular skills and behaviours. The development of children from some cultural backgrounds will vary from traditional developmental norms, which usually reflect an Anglo-Western perspective.
- As children get older, it becomes increasingly difficult to list specific developmental milestones, as the achievement of many of these depends very much on the opportunities that the child has to practise them, and also, on the experiences available to the child. A child will not be able to ride a bicycle unless they have access to a bicycle.
- Development does not occur in a straight line or evenly. Development progresses in a sequential manner, although it is essential to note that while the path of development is somewhat predictable, there is variation in what is considered normal development. That is to say no two children develop in exactly the same way.
- The pace of development is more rapid in the very early years than at any other time in life.
- Every area of development impacts on other areas. Developmental delays in one area will impact on the child's ability to consolidate skills and progress through to the next developmental stage.
- Most experts now agree that both nature and nurture interact to influence almost every significant aspect of a child's development.
- General health affects development and behaviour. Minor illnesses will have short to medium term effects, while chronic health conditions can have long-term effects. Nutritional deficiencies will also have negative impacts on developmental progression.

Specific characteristics and behaviours are indicative only. Many specific developmental characteristics should be seen as 'flags' of a child's behaviour, which may need to be looked at more closely, if a child is not meeting them. Workers should refer to the Casework Practice Manual and relevant specialist assessment guides in undertaking further assessments of child and family.

- **Handout C: 'Child Development and Trauma Guide' of the Government of Western Australia, Department of Child Protection** *(continued)*

Some important points about development

The information in this resource provides a brief overview of typically developing children. Except where there are obvious signs, you would need to see a child a number of times to establish that there is something wrong. Keep in mind that if children are in a new or 'artificial' situation, unwell, stressed, interacting with someone they do not know, or if they need to be fed or changed, then their behaviour will be affected and is not likely to be typical for that child. Premature babies, or those with low birth weights, or a chemical dependency, will generally take longer to reach developmental milestones.

The indicators of trauma listed in this guide should not become judgements about the particular child or family made in isolation from others who know the child and family well, or from other sources of information. However, they are a useful alert that a more thorough contextual assessment may be required.

There has been an explosion of knowledge in regard to the detrimental impact of neglect and child abuse trauma on the developing child, and particularly on the neurological development of infants. It is critical to have a good working knowledge of this growing evidence base so that we can be more helpful to families and child focused.

The following basic points are useful to keep in mind and to discuss with parents and young people:

- Children need stable, sensitive, loving, stimulating relationships and environments in order to reach their potential. They are particularly vulnerable to witnessing and experiencing violence, abuse and neglectful circumstances. Abuse and neglect at the hands of those who are meant to care is particularly distressing and harmful for infants, children and adolescents.
- Given that the infant's primary drive is towards attachment, not safety, they will accommodate to the parenting style they experience. Obviously they have no choice given their age and vulnerability, and in more chronic and extreme circumstances, they will show a complex trauma response. They can eventually make meaning of their circumstances by believing that the abuse is their fault and that they are inherently bad.
- Infants, children and adults will adapt to frightening and overwhelming circumstances by the body's survival response, where the autonomic nervous system will become activated and switch on to the freeze/fight/flight response. Immediately the body is flooded with a biochemical response which includes adrenalin and cortisol, and the child feels agitated and hypervigilant. Infants may show a 'frozen watchfulness' and children and young people can dissociate and appear to be 'zoned out'.
- Prolonged exposure to these circumstances can lead to 'toxic stress' for a child which changes the child's brain development, sensitises the child to further stress, leads to heightened activity levels and affects future learning and concentration. Most importantly, it impairs the child's ability to trust and relate to others. When children are traumatised, they find it very hard to regulate behaviour and soothe or calm themselves. They often attract the description of being 'hyperactive'.

0 - 12 months • 12 months - 3 years • 3 - 5 years • 5 - 7 years • 7 - 9 years • 9 - 12 years • 12 - 18 years

- Babies are particularly attuned to their primary carer and will sense their fear and traumatic stress; this is particularly the case where family violence is present. They will become unsettled and therefore more demanding of an already overwhelmed parent. The first task of any service is to support the nonoffending parent and to engage the family in safety.
- Traumatic memories are stored differently in the brain compared to everyday memories. They are encoded in vivid images and sensations and lack a verbal narrative and context. As they are unprocessed and more primitive, they are likely to flood the child or adult when triggers like smells, sights, sounds or internal or external reminders present at a later stage.
- These flashbacks can be affective, i.e. intense feelings, that are often unspeakable; or cognitive, i.e. vivid memories or parts of memories, which seem to be actually occurring. Alcohol and drug abuse are the classic and usually most destructive attempts to numb out the pain and avoid these distressing and intrusive experiences.
- Children are particularly vulnerable to flashbacks at quiet times or at bedtimes and will often avoid both, by acting out at school and bedtimes. They can experience severe sleep disruption, intrusive nightmares which add to their 'dysregulated' behaviour, and limits their capacity at school the next day. Adolescents will often stay up all night to avoid the nightmares and sleep in the safety of the daylight. Self harming behaviours release endorphins which can become an habitual response.
- Cumulative harm can overwhelm the most resilient child and particular attention needs to be given to understanding the complexity of the child's experience. These children require calm, patient, safe and nurturing parenting in order to recover, and may well require a multi-systemic response to engage the required services to assist.
- The recovery process for children and young people is enhanced by the belief and support of non-offending family members and significant others. They need to be made safe and given opportunities to integrate and make sense of their experiences.
- It is important to acknowledge that parents can have the same post-traumatic responses and may need ongoing support. Workers need to engage parents in managing their responses to their children's trauma. It is normal for parents to feel overwhelmed and suffer shock, anger, severe grief, sleep disturbances and other trauma related responses. Case practice needs to be child centred and family sensitive.

0 - 12 months • 12 months - 3 years • 3 - 5 years • 5 - 7 years • 7 - 9 years • 9 - 12 years • 12 - 18 years

- **Handout C: 'Child Development and Trauma Guide' of the Government of Western Australia, Department of Child Protection** *(continued)*

Factors which pose risks to healthy child development

The presence of one or more risk factors, alongside a cluster of trauma indicators, may greatly increase the risk to the child's wellbeing and should flag the need for further child and family assessment.

The following risk factors can impact on children and families and the caregiving environment:

Child and family risk factors

- family violence, current or past
- mental health issue or disorder, current or past (including self-harm and suicide attempts)
- alcohol/substance abuse, current or past, addictive behaviours
- disability or complex medical needs eg. intellectual or physical disability, acquired brain injury
- newborn, prematurity, low birth weight, chemically dependent, foetal alcohol syndrome, feeding/sleeping/settling difficulties, prolonged and frequent crying
- unsafe sleeping practices for infants eg. side or tummy sleeping, ill-fitting mattress, cot cluttered with pillows, bedding, or soft toys which can cover infant's face, co-sleeping with sibling or with parent who is on medication, drugs/alcohol or smokes, using other unsafe sleeping place such as a couch, or exposure to cigarette smoke
- disorganised or insecure attachment relationship (child does not seek comfort or affection from caregivers when in need)
- developmental delay
- history of neglect or abuse, state care, child death or placement of child or siblings
- separations from parents or caregivers
- parent, partner, close relative or sibling with a history of assault, prostitution or sexual offences
- experience of intergenerational abuse/trauma
- compounded or unresolved experiences of loss and grief
- chaotic household/lifestyle/problem gambling
- poverty, financial hardship, unemployment
- social isolation (family, extended family, community and cultural isolation)
- inadequate housing/transience/homelessness
- lack of stimulation and learning opportunities, disengagement from school, truanting
- inattention to developmental health needs/poor diet
- disadvantaged community
- racism
- recent refugee experience

Parent risk factors

- parent/carer under 20 years or under 20 years at birth of first child
- lack of willingness or ability to prioritise child's needs above own
- rejection or scapegoating of child
- harsh, inconsistent discipline, neglect or abuse
- inadequate supervision of child or emotional enmeshment
- single parenting/multiple partners
- inadequate antenatal care or alcohol/substance abuse during pregnancy

Wider factors that influence positive outcomes

- sense of belonging to home, family, community and a strong cultural identity
- pro-social peer group
- positive parental expectations, home learning environment and opportunities at major life transitions
- access to child and adult focused services eg. health, mental health, maternal and child health, early intervention, disability, drug and alcohol, family support, family preservation, parenting education, recreational facilities and other child and family support and therapeutic services
- accessible and affordable child care and high quality preschool programs
- inclusive community neighbourhoods/settings
- service system's understanding of neglect and abuse.

0 - 12 months • 12 months - 3 years • 3 - 5 years • 5 - 7 years • 7 - 9 years • 9 - 12 years • 12 - 18 years

Resources

Other useful websites

The Raising Children Network
raisingchildren.net.au

An essential part of this resource is the references to the Raising Children Network. This is an Australian website, launched in 2006, on the basics of raising children aged 0-15 years.

Talaris Developmental Timeline
www.talaris.org

A research based timeline about how children develop in the first five years.

Infant Mental Health
www.zerotothree.org

Zero to Three website has a relational and mental health focus.

Secretariat of National Aboriginal and Islander Child Care (SNAICC)
www.snaicc.asn.au

The national non-government peak body in Australia representing the interests of Aboriginal and Torres Strait Islander children and families.

Parenting Research Centre
www.parentingrc.org.au

Independent non-profit research and development organisation with an exclusive focus on parenting.

Ngala
www.ngala.com.au

A provider of early parenting and early childhood services. The website includes parenting information on antenatal and 0-4 years.

Western Australian Government

Department for Child Protection
www.dcp.wa.gov.au

Provides a range of child safety and family support services to Western Australian individuals, children and their families.

Parenting WA
www.communities.wa.gov.au/childrenandfamilies/parentingwa/

Parenting WA offers an information, support and referral service to parents, carers, grandparents and families with children up to 18 years of age.

WA Health
www.health.wa.gov.au

WA Health is responsible for promoting, maintaining and restoring the health of the people of WA, including the provision of child health and child adolescent mental health services.

Department of Education Student Support Services
http://det.wa.edu.au/studentsupport/statewidespecialistservices/detcms/portal/

Trauma websites

Child Trauma Academy
www.childtrauma.org

International Society for Traumatic Stress Studies
www.istss.org

Traumatology
www.fsu.edu/~trauma

Traumatic Stress Institute/Center for Adult & Adolescent Psychotherapy
www.tsicaap.com

Telephone services

Parenting WA Line
(08) 6279 1200 or 1800 654 432

healthdirect Australia (24 hour)
1800 022 222

Family Helpline
(08) 9223 1100 or 1800 643 000

- **Handout C: 'Child Development and Trauma Guide' of the Government of Western Australia, Department of Child Protection** *(continued)*

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Government of **Western Australia**
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Child development and trauma guide
0 - 12 months

Developmental trends

The following information needs to be understood in the context of the overview statement on child development:

0-2 weeks

- anticipates in relationship with caregivers through facial expression, gazing, fussing, crying
- is unable to support head unaided
- hands closed involuntarily in the grasp reflex
- startles at sudden loud noises
- reflexively asks for a break by looking away, arching back, frowning, and crying

By 4 weeks

- focuses on a face
- follows an object moved in an arc about 15 cm above face until straight ahead
- changes vocalisation to communicate hunger, boredom and tiredness

By 6-8 weeks

- participates in and initiates interactions with caregivers through vocalisation, eye contact, fussing, and crying
- may start to smile at familiar faces
- may start to 'coo'
- turns in the direction of a voice

By 3-4 months

- increasing initiation of interaction with caregivers
- begins to regulate emotions and self soothe through attachment to primary carer
- can lie on tummy with head held up to 90 degrees, looking around
- can wave a rattle, starts to play with own fingers and toes
- may reach for things to try and hold them
- learns by looking at, holding, and mouthing different objects
- laughs out loud
- follows an object in an arc about 15 cm above the face for 180 degrees (from one side to the other)
- notices strangers

May even be able to:

- keep head level with body when pulled to sitting
- say "ah", "goo" or similar vowel consonant combinations
- blow a raspberry
- bear some weight on legs when held upright
- object if you try to take a toy away

By 6 months

- uses carer for comfort and security as attachment increases
- is likely to be wary of strangers
- keeps head level with body when pulled to sitting
- says "ah", "goo" or similar vowel consonant combinations
- sits without support
- makes associations between what is heard, tasted and felt
- may even be able to roll both ways and help to feed himself
- learns and grows by touching and tasting different foods

By 9 months

- strongly participates in, and initiates interactions with, caregivers
- lets you know when help is wanted and communicates with facial expressions, gestures, sounds or one or two words like "dada" and "mamma"
- watches reactions to emotions and by seeing you express your feelings, starts to recognise and imitates happy, sad,excited or fearful emotions
- unusually high anxiety when separated from parents/carers
- is likely to be wary of, and anxious with, strangers
- expresses positive and negative emotions
- learns to trust that basic needs will be met
- works to get to a toy out of reach
- looks for a dropped object
- may even be able to bottom shuffle, crawl, stand
- knows that a hidden object exists
- waves goodbye, plays peekaboo

- **Handout C: 'Child Development and Trauma Guide' of the Government of Western Australia, Department of Child Protection** *(continued)*

Child development and trauma guide
0 - 12 months

Possible indicators of trauma

- increased tension, irritability, reactivity, and inability to relax
- increased startle response
- lack of eye contact
- sleep and eating disruption
- loss of eating skills
- loss of acquired motor skills
- avoidance of eye contact
- arching back/inability to be soothed
- uncharacteristic aggression
- avoids touching new surfaces eg. grass, sand and other tactile experiences
- avoids, or is alarmed by, trauma related reminders, eg sights, sounds, smells, textures, tastes and physical triggers
- fight, flight, freeze response
- uncharacteristic, inconsolable or rageful crying, and neediness
- increased fussiness, separation fears, and clinginess
- withdrawal/lack of usual responsiveness
- limp, displays no interest
- unusually high anxiety when separated from primary caregivers
- heightened indiscriminate attachment behaviour
- reduced capacity to feel emotions – can appear 'numb'
- 'frozen watchfulness'
- loss of acquired language skills
- genital pain: including signs of inflammation, bruising, bleeding or diagnosis of sexually transmitted disease

Trauma impact

- neurobiology of brain and central nervous system altered by switched on alarm response
- behavioural changes
- regression in recently acquired developmental gains
- hyperarousal, hypervigilance and hyperactivity
- sleep disruption
- loss of acquired motor skills
- lowered stress threshold
- lowered immune system
- fear response to reminders of trauma
- mood and personality changes
- loss of, or reduced capacity to attune with caregiver
- loss of, or reduced capacity to manage
- emotional states or self soothe
- insecure, anxious, or disorganised attachment behaviour
- heightened anxiety when separated from primary parent/carer
- indiscriminate relating
- reduced capacity to feel emotions - can appear 'numb'
- cognitive delays and memory difficulties
- loss of acquired communication skills

Parental / carer support following trauma

Encourage parent(s)/carers to:

- seek, accept and increase support for themselves, to manage their own shock and emotional responses
- seek information and advice about the child's developmental progress
- maintain the child's routines around holding, sleeping and eating
- seek support (from partner, kin, child health nurse) to understand, and respond to, infant's cues
- avoid unnecessary separations from important caregivers
- maintain calm atmosphere in child's presence. Provide additional soothing activities
- avoid exposing child to reminders of trauma
- expect child's temporary regression; and clinginess - don't panic
- tolerate clinginess and independence
- take time out to recharge

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Child development and trauma guide
12 months - 3 years

Developmental trends

The following information needs to be understood in the context of the overview statement on child development:

By 12 months

- enjoys communicating with family and other familiar people
- seeks comfort, and reassurance from familiar objects, family, carers, and is able to be soothed by them
- begins to self soothe when distressed
- understands a lot more than he can say
- expresses feelings with gestures sounds and facial expressions
- expresses more intense emotions and moods
- does not like to be separated from familiar people
- moves away from things that upset or annoy
- can walk with assistance holding on to furniture or hands
- pulls up to standing position
- gets into a sitting position
- claps hands (play pat-a-cake)
- indicates wants in ways other than crying
- learns and grows in confidence by doing things repeatedly and exploring
- picks up objects using thumb and forefinger in opposition (pincer) grasp
- is sensitive to approval and disapproval

May even be able to:
- understand cause and effect
- understand that when you leave, you still exist
- crawl, stand, walk
- follow a one step instruction – "go get your shoes"
- respond to music

By 18 months

- can use at least two words and learning many more
- drinks from a cup
- can walk and run
- says "no" a lot
- is beginning to develop a sense of individuality
- needs structure, routine and limits to manage intense emotions

May even be able to:
- let you know what he is thinking and feeling through gestures
- pretend play and play alongside others

By 2 years

- takes off clothing
- 'feeds'/'bathes' a doll, 'washes' dishes, likes to 'help'
- builds a tower of four or more cubes
- recognises/identifies two items in a picture by pointing
- plays alone but needs a familiar adult nearby
- actively plays and explores in complex ways

May even be:
- able to string words together
- eager to control, unable to share
- unable to stop himself doing something unacceptable even after reminders
- tantrums

By 2 1/2 years

- uses 50 words or more
- combines words (by about 25 months)
- follows a two-step command without gestures (by 25 months)
- alternates between clinginess and independence
- helps with simple household routines
- conscience is undeveloped; child thinks "I want it, I will take it"

By 3 years

- washes and dries hands
- identifies a friend by naming
- throws a ball overhand
- speaks and can be usually understood half the time
- uses prepositions (by, to, in, on top of)
- carries on a conversation of two or three sentences
- helps with simple chores
- may be toilet trained
- conscience is starting to develop; child thinks "I would take it but my parents will be upset with me"



- **Handout C: 'Child Development and Trauma Guide' of the Government of Western Australia, Department of Child Protection** *(continued)*

Child development and trauma guide
12 months - 3 years

Possible indicators of trauma

- behavioural changes, regression to behaviour of a younger child
- increased tension, irritability, reactivity, and inability to relax
- increased startle response
- reduced eye contact
- sleep and eating disruption
- loss of eating skills
- loss of recently acquired motor skills
- avoidance of eye contact
- inability to be soothed
- uncharacteristic aggression
- avoids touching new surfaces eg. grass, sand and other tactile experiences
- avoids, or is alarmed by, trauma related reminders, eg sights, sounds, smells textures, tastes and physical triggers

- fight, flight, freeze
- uncharacteristic, inconsolable, or rageful crying, and neediness
- fussiness, separation fears, and clinginess
- withdrawal/lack of usual responsiveness
- loss of self-confidence
- unusually anxious when separated from primary caregivers
- heightened indiscriminate attachment behaviour
- reduced capacity to feel emotions – can appear 'numb', apathetic or limp
- 'frozen watchfulness'
- loss of acquired language skills
- inappropriate sexualised behaviour/ touching
- sexualised play with toys
- genital pain, inflammation, bruising, bleeding or diagnosis of sexually transmitted disease

Trauma impact

- neurobiology of brain and central nervous system altered by switched on alarm response
- behavioural changes
- regression in recently acquired developmental gains
- hyperarousal, hypervigilance and hyperactivity
- sleep disruption
- loss of acquired motor skills
- lowered stress threshold
- lowered immune system
- greater food sensitivities

- fear response to reminders of trauma
- mood and personality changes
- loss of, or reduced capacity to attune with caregiver
- loss of, or reduced capacity to manage emotional states or self soothe
- insecure, anxious, or disorganised attachment behaviour
- heightened anxiety when separated from primary parent/carer
- indiscriminate relating
- increased resistance to parental direction
- memory for trauma may be evident in behaviour, language or play
- cognitive delays and memory difficulties
- loss of acquired communication skills

Parental / carer support following trauma

Encourage parent(s)/carers to:

- seek, accept and increase support for themselves, to manage their own shock and emotional responses
- seek information and advice about the child's developmental progress
- maintain the child's routines around holding, sleeping and eating
- seek support (from partner, kin, child health nurse) to understand, and respond to, infant's cues
- avoid unnecessary separations from important caregivers
- maintain calm atmosphere in child's presence. Provide additional soothing activities
- avoid exposing child to reminders of trauma
- expect child's temporary regression; and clinginess - don't panic
- tolerate clinginess and independence
- take time out to recharge



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Government of **Western Australia**
Department for **Child Protection**

3 - 5 years

Child development and trauma guide
3 - 5 years

Developmental trends

The following information needs to be understood in the context of the overview statement on child development:

Between 3-4 years

- communicates freely with family members and familiar others
- seeks comfort, and reassurance from familiar family and carers, and is able to be soothed by them
- has developing capacity to self soothe when distressed
- understands the cause of feelings and can label them
- extends the circle of special adults eg. to grandparents, baby-sitter
- needs adult help to negotiate conflict
- is starting to manage emotions
- is starting to play with other children and share
- has real friendships with other children
- is becoming more coordinated at running, climbing, and other large-muscle play
- can walk up steps, throw and catch a large ball using two hands and body
- use play tools and may be able to ride a tricycle
- holds crayons with fingers, not fists
- dresses and undresses without much help
- communicates well in simple sentences and may understand about 1000 words
- pronunciation has improved, likes to talk about own interests
- fine motor skill increases, can mark with crayons, turn pages in a book
- day time toilet training often attained

Between 4-5 years

- knows own name and age
- is becoming more independent from family
- needs structure, routine and limits to manage intense emotions
- is asking lots of questions
- is learning about differences between people
- takes time making up his mind
- is developing confidence in physical feats but can misjudge abilities
- likes active play and exercise and needs at least 60 minutes of this per day
- eye-hand coordination is becoming more practised and refined
- cuts along the line with scissors/can draw people with at least four 'parts'
- shows a preference for being right-handed or left-handed
- converses about topics and understands 2500 to 3000 words
- loves silly jokes and 'rude' words
- is curious about body and sexuality and role-plays at being grown-up
- may show pride in accomplishing tasks
- conscience is starting to develop, child weighs risks and actions; "I would take it but my parents would find out"

- **Handout C: 'Child Development and Trauma Guide' of the Government of Western Australia, Department of Child Protection** *(continued)*

Child development and trauma guide
3 - 5 years

Possible indicators of trauma

- behavioural change
- increased tension, irritability, reactivity and inability to relax
- regression to behaviour of younger child
- uncharacteristic aggression
- Reduced eye contact
- loss of focus, lack of concentration and inattentiveness
- complains of bodily aches, pains or illness with no explanation
- loss of recently acquired skills (toileting, eating, self-care)
- enuresis, encopresis
- sleep disturbances, nightmares, night terrors, sleepwalking
- fearfulness of going to sleep and being alone at night
- inability to seek comfort or to be comforted

- mood and personality changes
- obvious anxiety and fearfulness
- withdrawal and quieting
- specific, trauma-related fears; general fearfulness
- intense repetitive play often obvious
- involvement of playmates in traumarelated play at school and day care
- separation anxiety with parents/others
- loss of self-esteem and self confidence
- reduced capacity to feel emotions - may appear 'numb', limp, apathetic
- repeated retelling of traumatic event
- loss of recently acquired language and vocabulary
- loss of interest in activities
- loss of energy and concentration at school
- sudden intense masturbation
- demonstration of adult sexual knowledge through inappropriate sexualised behaviour
- genital pain, inflammation, bruising, bleeding or diagnosis of sexually transmitted disease
- sexualised play with toys
- may verbally describe sexual abuse, pointing to body parts and telling about the 'game' they played
- sexualised drawing

Trauma impact

- behavioural changes
- hyperarousal, hypervigilance, hyperactivity
- loss of toileting and eating skills
- regression in recently acquired developmental gains
- sleep disturbances, night terrors
- enuresis and encopresis
- delayed gross motor and visualperceptual skills

- fear of trauma recurring
- mood and personality changes
- loss of, or reduced capacity to attune with caregiver
- loss of, or reduced capacity to manage emotional states or self soothe
- increased need for control
- fear of separation
- loss of self-esteem and self confidence
- confusion about trauma evident in play, magical explanations and unclear understanding of causes of bad events
- vulnerable to anniversary reactions set off by seasonal reminders, holidays, and other events
- memory of intrusive visual images from traumatic event may be demonstrated/ recalled in words and play
- at the older end of this age range, children are more likely to have lasting, accurate verbal and pictorial memory for central events of trauma
- speech, cognitive and auditory processing delays

Parental / carer support following trauma

Encourage parent(s)/carers to:

- seek, accept and increase support for themselves, to manage their own shock and emotional responses
- remain calm. Listen to and tolerate child's retelling of event
- respect child's fears; give child time to cope with fears
- protect child from re-exposure to frightening situations and reminders of trauma, including scary T.V. programs, movies, stories, and physical or locational reminders of trauma
- accept and help the child to name strong feelings during brief conversations (the child cannot talk about these feelings or the experience for long)
- expect and understand child's regression while maintaining basic household rules
- expect some difficult or uncharacteristic behaviour
- seek information and advice about child's developmental and educational progress
- take time out to recharge

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Government of **Western Australia**
Department for **Child Protection**

5 - 7 years

Child development and trauma guide
5 - 7 years

Developmental trends

The following information needs to be understood in the context of the overview statement on child development:

Physical skills

- active, involved in physical activity, vigorous play
- may tire easily
- variation in levels of coordination and skill
- many become increasingly proficient in skills, games, sports
- some may be able to ride bicycle
- may use hands with dexterity and skill to make things, do craft and build things

Social-emotional development

- has strong relationships within the family and integral place in family dynamics
- needs caregiver assistance and structure to regulate extremes of emotion
- generally anxious to please and to gain adult approval, praise and reassurance
- conscience is starting to be influenced by internal control or doing the right thing "I would take it, but if my parents found out, they would be disapproving"
- not fully capable of estimating own abilities, may become frustrated by failure
- reassured by predictable routines
- friendships are very important, although they may change regularly
- may need help moving into and becoming part of a group
- some children will maintain strong friendships over the period
- may have mood swings
- able to share, although not all the time
- perception of, and level of regard for self, fairly well developed

Cognitive and creative characteristics

- emerging literacy and numeracy abilities, gaining skills in reading and writing
- variable attention and ability to stay on task; attends better if interested
- good communication skills, remembers, tells and enjoys jokes
- may require verbal, written or behavioural cues and reminders to follow directions and obey rules
- skills in listening and understanding may be more advanced than expression
- perspective broadens as experiences at school and in the community expand
- most valuable learning occurs through play
- rules more likely to be followed if he/she has contributed to them
- may have strong creative urges to make things

Possible indicators of trauma

- behavioural change
- increased tension, irritability, reactivity and inability to relax
- sleep disturbances, nightmares, night terrors, difficulty falling or staying asleep
- regression to behaviour of younger child
- lack of eye contact
- 'spacey', distractible, or hyperactive behaviour
- toileting accidents/enuresis, encopresis or smearing of faeces
- eating disturbances
- bodily aches and pains – no apparent reason
- accident proneness
- absconding/truanting from school
- firelighting, hurting animals

- obvious anxiety, fearfulness and loss of self esteem
- frightened by own intensity of feelings
- specific fears
- efforts to distance from feelings of shame, guilt, humiliation and reduced capacity to feel emotions
- reduced capacity to feel emotions - may appear 'numb', or apathetic
- 'frozen watchfulness'
- vulnerable to anniversary reactions caused by seasonal events, holidays, etc
- repeated retelling of traumatic event
- withdrawal, depressed affect
- 'blanking out' or loss of concentration when under stress at school with lowering of performance
- explicit, aggressive, exploitative, sexualised relating/engagement with other children, older children or adults
- verbally describes experiences of sexual abuse pointing to body parts and telling about the 'game' they played
- sexualised drawing
- excessive concern or preoccupation with private parts and adult sexual behaviour
- hinting about sexual experience and sexualised drawing
- verbal or behavioural indications of age-inappropriate knowledge of adult sexual behaviour
- running away from home

- **Handout C: 'Child Development and Trauma Guide' of the Government of Western Australia, Department of Child Protection** *(continued)*

Child development and trauma guide
5 - 7 years

Trauma impact

- changes in behaviour
- hyperarousal, hypervigilance, hyperactivity
- regression in recently acquired developmental gains
- sleep disturbances due to intrusive imagery
- enuresis and encopresis
- trauma driven, acting out, risk taking behaviour
- eating disturbances
- loss of concentration and memory
- flight into driven activity or retreat from others to manage inner turmoil
- post-traumatic re-enactments of traumatic event that may occur secretly and involve siblings or playmates
- loss of interest in previously pleasurable activities

- fear of trauma recurring
- mood or personality change
- loss of, or reduced capacity to attune with caregiver
- loss of, or reduced capacity to manage emotional states or self soothe
- increased self-focusing and withdrawal
- concern about personal responsibility for trauma
- wish for revenge and action oriented responses to trauma
- may experience acute distress when encountering any reminder of trauma
- lowered self-esteem
- increased anxiety or depression
- fearful of closeness and love
- child is likely to have detailed, long-term and sensory memory for traumatic event
- Sometimes the memory is fragmented or repressed
- factual, accurate memory may be embellished by elements of fear or wish; perception of duration may be distorted
- intrusion of unwanted visual images and traumatic reactions disrupt concentration and create anxiety often without parent awareness
- vulnerable to flashbacks of recall and anniversary reactions to reminders of trauma
- speech and cognitive delays

Parental / carer support following trauma

Encourage parent(s)/carers to:

- seek, accept and increase support for themselves to manage their own shock and emotional responses
- listen to and tolerate child's retelling of event – respect child's fears; give child time to cope with fears
- increase monitoring and awareness of child's play, which may involve secretive re-enactments of trauma with peers and siblings; set limits on scary or harmful play
- permit child to try out new ideas to cope with fearfulness at bedtime: extra reading time, radio on, listening to a tape in the middle of the night to undo the residue of fear from a nightmare
- reassure the older child that feelings of fear or behaviours that feel out of control or babyish eg. night wetting are normal after a frightening experience and that the child will feel more like himself or herself with time
- encourage child to talk about confusing feelings, worries, daydreams, mental review of traumatic images, and disruptions of concentration by accepting the feelings, listening carefully, and reminding child that these are normal but hard reactions following a very scary event
- maintain communication with school staff and monitor how the child is coping with demands at school or in community activities
- expect some time-limited decrease in child's school performance and help the child to accept this as a temporary result of the trauma
- protect child from re-exposure to frightening situations and reminders of trauma, including scary television programs, movies, stories, and physical or locational reminders of trauma
- expect and understand child's regression or some difficult or uncharacteristic behaviour while maintaining basic household rules
- listen for a child's misunderstanding of a traumatic event, particularly those that involve self-blame and magical thinking
- gently help child develop a realistic understanding of event. Be mindful of the possibility of anniversary reactions
- remain aware of your own reactions to the child's trauma. Provide reassurance to child that feelings will diminish over time
- provide opportunities for child to experience control and make choices in daily activities
- seek information and advice on child's developmental and educational progress
- provide the child with frequent high protein snacks/meals during the day
- take time out to recharge



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Government of **Western Australia**
Department for **Child Protection**

Child development and trauma guide
7 - 9 years

7 - 9 years

Developmental trends

The following information needs to be understood in the context of the overview statement on child development:

Physical skills

- improved coordination, control and agility compared to younger children
- skilled at large motor movements such as skipping and playing ball games
- often practises new physical skills over and over for mastery
- enjoys team and competitive sports and games
- improved stamina and strength

Social-emotional development

- strong need to belong to, and be a part of, family and peer relationships
- is increasingly able to regulate emotions
- increasingly independent of parents; still needs their comfort and security
- begins to see situations from others perspective – empathy
- able to resolve conflicts verbally and knows when to seek adult help
- conscience and moral values become internalised "I want it, but I don't feel good about doing things like that"
- increased confidence, more independent and takes greater responsibility
- needs reassurance; understands increased effort leads to improvements
- humour is component of interactions with others
- peers seen as important, spends more time with them
- friendships are based on common interests and are likely to be enduring
- feelings of self worth come increasingly from peers
- friends often same gender, friendship groups small

Self concept

- can take some responsibility for self and as a family member
- increasingly influenced by media and by peers
- learns to deal with success and failure
- may compare self with others and find self wanting, not measuring up
- can exercise self control and curb desires to engage in undesirable behaviour - has understanding of right and wrong
- can manage own daily routines
- may experience signs of onset of puberty near end of this age range (girls particularly)

Cognitive and creative characteristics

- can contribute to long-term plans
- engages in long and complex conversations
- has increasingly sophisticated literacy and numeracy skills
- may be a competent user of computers or play a musical instrument

Possible indicators of trauma

- behavioural change
- increased tension, irritability, reactivity and inability to relax
- sleep disturbances, nightmares, night terrors, difficulty falling or staying asleep
- regression to behaviour of younger child
- lack of eye contact
- 'spacey' or distractible behaviour
- 'blanking out' or lacks concentration when under stress at school with lowering of performance
- eating disturbances
- toileting accidents/enuresis, encopresis or smearing of faeces
- bodily aches and pains - no apparent reason
- accident proneness
- absconding/truanting from school
- firelighting, hurting animals

- obvious anxiety, fearfulness and loss of self-esteem
- frightened by own intensity of feelings
- specific post-traumatic fears
- efforts to distance from feelings of shame, guilt, humiliation
- reduced capacity to feel emotions - may appear 'numb'
- vulnerable to anniversary reactions caused by seasonal events, holidays, etc.
- repeated retelling of traumatic event
- withdrawal, depressed affect or black outs in concentration
- blanking out/loss of ability to concentrate when under learning stress at school with lowering of performance
- explicit, aggressive, exploitative, sexualised relating/engagement with other children, older children or adults
- hinting about sexual experience
- verbally describes experiences of sexual abuse and tells stories about the 'game' they played
- excessive concern or preoccupation with private parts and adult sexual behaviour
- verbal or behavioural indications of age-inappropriate knowledge of adult sexual behaviour
- sexualised drawing or written 'stories'
- running away from home

- **Handout C: 'Child Development and Trauma Guide' of the Government of Western Australia, Department of Child Protection** *(continued)*

Child development and trauma guide
7 - 9 years

Trauma impact

- changes in behaviour
- hyperarousal, hypervigilance, hyperactivity
- regression in recently acquired developmental gains
- sleep disturbances due to intrusive imagery
- enuresis and encopresis
- eating disturbances
- loss of concentration and memory
- post-traumatic re-enactments of traumatic event that may occur secretly and involve siblings or playmates
- trauma driven, acting out, risk taking behaviour
- flight into driven activity or retreat from others to manage inner turmoil
- loss of interest in previously pleasurable activities

- fear of trauma recurring
- mood or personality changes
- loss of, or reduced capacity to attune with caregiver
- loss of, or reduced capacity to manage emotional states or self soothe
- increased self-focusing and withdrawal
- concern about personal responsibility for trauma
- wish for revenge and action oriented responses to trauma
- may experience acute distress when encountering any reminder of trauma
- lowered self-esteem
- increased anxiety or depression
- fearful of closeness and love
- child is likely to have detailed, long-term and sensory memory for traumatic event. Sometimes the memory is fragmented or repressed
- factual, accurate memory may be embellished by elements of fear or wish; perception of duration may be distorted
- intrusion of unwanted visual images and traumatic reactions disrupt concentration and create anxiety often without parent awareness
- vulnerable to flashbacks of recall and anniversary reactions to reminders of trauma
- speech and cognitive delays

Parental / carer support following trauma

Encourage parent(s)/carers to:

- seek, accept and increase support for themselves to manage their own shock and emotional responses
- listen to and tolerate child's retelling of event – respect child's fears; give child time to cope with fears
- increase monitoring and awareness of child's play, which may involve secretive re-enactments of trauma with peers and siblings; set limits on scary or harmful play
- permit child to try out new ideas to cope with fearfulness at bedtime: extra reading time, radio on, listening to a tape in the middle of the night to undo the residue of fear from a nightmare
- reassure the older child that feelings of fear or behaviours that feel out of control or babyish eg. night wetting are normal after a frightening experience and that the child will feel more like himself or herself with time
- encourage child to talk about confusing feelings, worries, daydreams, mental review of traumatic images, and disruptions of concentration by accepting the feelings, listening carefully, and reminding child that these are normal but hard reactions following a very scary event
- maintain communication with school staff and monitor how the child is coping with demands at school or in community activities
- expect some time-limited decrease in child's school performance and help the child to accept this as a temporary result of the trauma
- protect child from re-exposure to frightening situations and reminders of trauma, including scary television programs, movies, stories, and physical or locational reminders of trauma
- expect and understand child's regression or some difficult or uncharacteristic behaviour while maintaining basic household rules
- listen for a child's misunderstanding of a traumatic event, particularly those that involve self-blame and magical thinking
- gently help child develop a realistic understanding of event. Be mindful of the possibility of anniversary reactions
- remain aware of your own reactions to the child's trauma. Provide reassurance to child that feelings will diminish over time
- provide opportunities for child to experience control and make choices in daily activities
- seek information and advice on child's developmental and educational progress
- provide the child with frequent high protein snacks/meals during the day
- take time out to recharge

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Government of **Western Australia**
Department for **Child Protection**

9 - 12 years

Child development and trauma guide
9 - 12 years

Developmental trends

The following information needs to be understood in the context of the overview statement on child development:

Physical skills

- large and fine motor skills becoming highly coordinated
- enjoys risk taking
- does well at games/sports requiring skill, strength and agility
- may look more adult-like in body shape, height and weight

Social-emotional development

- growing need and desire for independence and separate identity
- may challenge parents and other family members
- parents and home important, particularly for support and reassurance
- growing sexual awareness and interest in the opposite gender
- may experience embarrassment, guilt, curiosity and excitement because of sexual awareness
- girls may reach puberty during this time
- belonging to a group is extremely important; peers largely influence identity/self-esteem
- often interact in pairs or small groups; each member has status and position
- groups generally one gender, although interact with the other
- strong desire to have opinions sought and respected

Social-emotional development

- beginning to think and reason in a more logical adult-like way
- capable of abstract thinking, complex problem solving, considers alternative possibilities and broadening perspectives
- concentrates for long periods of time if interested, but needs worries to be sorted
- may have sophisticated literacy and numeracy skills
- popular culture of great interest and major influence
- uses language in sophisticated ways; for example, tells stories, argues, debates
- knows the difference between fantasy and what is real
- has some appreciation of the value of money

Possible indicators of trauma

- increased tension, irritability, reactivity and inability to relax
- sleep disturbances, nightmares, night terrors, difficulty falling or staying asleep
- regression to behaviour of younger child
- reduced eye contact
- 'spacey' or distractible behaviour
- toileting accidents/enuresis, encopresis or smearing of faeces
- eating disturbances
- bodily aches and pains - no reason
- accident proneness
- absconding or truanting from school
- firelighting, hurting animals

- obvious anxiety, fearfulness and loss of self-esteem/self confidence
- frightened by own intensity of feelings
- specific post-traumatic fears
- efforts to distance from feelings of shame, guilt, humiliation and reduced capacity to feel emotions
- reduced capacity to feel emotions - may appear 'numb' or apathetic
- vulnerable to anniversary reactions caused by seasonal events, holidays, etc.
- repeated retelling of traumatic event
- 'frozen watchfulness'
- withdrawal, depressed affect, or black outs in concentration
- 'blanking out' or lacks concentration when under stress at school with lowering of performance
- explicit, aggressive, exploitative, sexualised relating/engagement with other children, older children or adults
- verbally describes experiences of sexual abuse and tells 'stories' about the 'game' they played
- excessive concern or preoccupation with private parts and adult sexual behaviour
- hinting about sexual experience and telling stories
- verbal or behavioural indications of age-inappropriate knowledge of adult sexual behaviour
- sexualised drawing or written 'stories'
- running away from home

- **Handout C: 'Child Development and Trauma Guide' of the Government of Western Australia, Department of Child Protection** *(continued)*

Child development and trauma guide
9 - 12 years

Trauma impact

- changes in behaviour
- hyperarousal, hypervigilance, hyperactivity
- regression in recently acquired developmental gains
- sleep disturbances due to intrusive imagery
- enuresis and encopresis
- eating disturbances
- loss of concentration and memory
- post-traumatic re-enactments of traumatic event that may occur secretly and involve siblings or playmates
- trauma driven, acting out, risk taking behaviour
- flight into driven activity or retreat from others to manage inner turmoil
- loss of interest in previously pleasurable activities

- fear of trauma recurring
- mood or personality changes
- loss of, or reduced capacity to attune with caregiver
- loss of, or reduced capacity to manage emotional states or self soothe
- increased self-focusing and withdrawal
- concern about personal responsibility for trauma
- wish for revenge and action oriented responses to trauma
- may experience acute distress when encountering any reminder of trauma
- lowered self-esteem
- increased anxiety or depression
- fearful of closeness and love
- child is likely to have detailed, long-term and sensory memory for traumatic event. Sometimes the memory is fragmented or repressed
- factual, accurate memory may be embellished by elements of fear or wish; perception of duration may be distorted
- intrusion of unwanted visual images and traumatic reactions disrupt concentration and create anxiety often without parent awareness
- vulnerable to flashbacks of recall and anniversary reactions to reminders of trauma
- speech and cognitive delays

Parental / carer support following trauma

Encourage parent(s)/carers to:

- seek, accept and increase support for themselves to manage their own shock and emotional responses
- listen to and tolerate child's retelling of event – respect child's fears; give child time to cope with fears
- increase monitoring and awareness of child's play, which may involve secretive re-enactments of trauma with peers and siblings; set limits on scary or harmful play
- permit child to try out new ideas to cope with fearfulness at bedtime: extra reading time, radio on, listening to a tape in the middle of the night to undo the residue of fear from a nightmare
- reassure the older child that feelings of fear or behaviours that feel out of control or babyish eg. night wetting are normal after a frightening experience and that the child will feel more like himself or herself with time
- encourage child to talk about confusing feelings, worries, daydreams, mental review of traumatic images, and disruptions of concentration by accepting the feelings, listening carefully, and reminding child that these are normal but hard reactions following a very scary event
- maintain communication with school staff and monitor how the child is coping with demands at school or in community activities
- expect some time-limited decrease in child's school performance and help the child to accept this as a temporary result of the trauma
- protect child from re-exposure to frightening situations and reminders of trauma, including scary television programs, movies, stories, and physical or locational reminders of trauma
- expect and understand child's regression or some difficult or uncharacteristic behaviour while maintaining basic household rules
- listen for a child's misunderstanding of a traumatic event, particularly those that involve self-blame and magical thinking
- gently help child develop a realistic understanding of event. Be mindful of the possibility of anniversary reactions
- remain aware of your own reactions to the child's trauma. Provide reassurance to child that feelings will diminish over time
- provide opportunities for child to experience control and make choices in daily activities
- seek information and advice on child's developmental and educational progress
- provide the child with frequent high protein snacks/meals during the day
- take time out to recharge

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Government of **Western Australia**
Department for **Child Protection**

12 - 18 years

Child development and trauma guide
12 - 18 years

Developmental trends

The following information needs to be understood in the context of the overview statement on child development:

Physical skills

- significant physical growth and body changes
- develops greater expertise/skills in sport
- changing health needs for diet, rest, exercise, hygiene and dental care
- puberty, menstruation, sexuality and contraception
- nutritious balanced diet including adequate calcium, protein and iron

Self concept

- can be pre-occupied with self
- secondary sex characteristics affect self concept, relationships with others and activities undertaken
- dealing with own sexuality and that of peers
- developing identity based on gender and culture
- becoming an adult, including opportunities and challenges

Social-emotional development

- empathy for others
- ability to make decisions (moral)
- values and a moral system become firmer and affect views and opinions
- spends time with peers for social and emotional needs beyond parents and family
- peer assessment influences self concept, behaviour/need to conform
- girls have 'best friends', boys have 'mates'
- may explore sexuality by engaging in sexual behaviours and intimate relationships
- develops wider interests
- seeks greater autonomy personally, in decision making
- more responsible in tasks at home, school and work
- experiences emotional turmoil, strong feelings and unpredictable mood swings
- interdependent with parents and family
- conflict with family more likely through puberty
- able to negotiate and assert boundaries
- learning to give and take (reciprocity)
- focus is on the present - may take significant risks
- understands appropriate behaviour but may lack self control/insight

Cognitive and creative characteristics

- thinks logically, abstractly and solves problems, thinking like an adult
- may take an interest in/develop opinions about community or world events
- can appreciate others' perspectives and see a problem or situation from different angles
- career choice may be realistic, or at odds with school performance and talents

- **Handout C: 'Child Development and Trauma Guide' of the Government of Western Australia, Department of Child Protection** *(continued)*

Child development and trauma guide
12 - 18 years

Possible indicators of trauma

- increased tension, irritability, reactivity and inability to relax
- accident proneness
- reduced eye contact
- sleep disturbances, nightmares
- enuresis, encopresis
- eating disturbances/disorders
- absconding or truanting and challenging behaviours
- substance abuse
- aggressive/violent behaviour
- firelighting, hurting animals
- suicidal ideation
- self harming eg. cutting, burning

- efforts to distance from feelings of shame and humiliation
- loss of self-esteem and self confidence
- acute psychological distress
- personality changes and changes in quality of important relationships evident
- increased self-focusing and withdrawal
- reduced capacity to feel emotions – may appear 'numb'
- wish for revenge and action oriented responses to trauma
- partial loss of memory and ability to concentrate
- trauma flashbacks
- acute awareness of parental reactions; wish to protect parents from own distress
- sexually exploitative or aggressive interactions with younger children
- sexually promiscuous behaviour or total avoidance of sexual involvement
- running away from home

Trauma impact

- sleep disturbances, nightmares
- hyperarousal, hypervigilance, hyperactivity
- eating disturbances or disorders
- trauma acting out, risk taking, sexualised, reckless, regressive or violent behaviour
- flight into driven activity and involvement with others or retreat from others in order to manage inner turmoil
- vulnerability to withdrawal and pessimistic world view
- vulnerability to depression, anxiety, stress disorders, and suicidal ideation
- vulnerability to conduct, attachment, eating and behavioural disorders

- mood and personality changes and changes in quality of important relationships evident
- loss of, or reduced capacity to attune with caregiver
- loss of, or reduced capacity to manage emotional states or self soothe
- lowered self-esteem
- flight into adulthood seen as way of escaping impact and memory of trauma (early marriage, pregnancy, dropping out of school, abandoning peer group for older set of friends)
- fear of growing up and need to stay within family orbit

Memory for trauma includes:
- acute awareness of and distress with intrusive imagery and memories of trauma
- vulnerability to flash backs, episodes of recall, anniversary reactions and seasonal reminders of trauma
- may experience acute distress when encountering any reminder of trauma
- partial loss of memory and concentration

Parental / carer support following trauma

Encourage parent(s)/carers to:
- seek, accept and increase support for themselves to manage their own shock and emotions
- remain calm. Encourage younger and older adolescents to talk about traumatic event with family members
- provide opportunities for young person to spend time with friends who are supportive and meaningful
- reassure young person that strong feelings - whether of guilt, shame, embarrassment, or wish for revenge - are normal following a trauma
- help young person find activities that offer opportunities to experience mastery, control, and self-esteem
- encourage pleasurable physical activities such as sports and dancing
- monitor young person's coping at home, school, and in peer group
- address acting-out behaviour involving aggression or self destructive behaviour quickly and firmly with limit setting and professional help
- take signs of depression, self harm, accident proneness, recklessness, and persistent personality change seriously by seeking help
- help young person develop a sense of perspective on the impact of the traumatic event and a sense of the importance of time in recovering
- encourage delaying big decisions
- seek information/advice about young person's developmental and educational progress
- provide the young person with frequent high protein snacks/meals during the day
- take time to recharge

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- **Handout D: 'Emotional and psychological influences on children's ability to give evidence' by Alison Tucker**

Emotional and psychological influences on children's ability to give evidence
(revised in 2009 for seminars for criminal justice personnel who handle child sexual offence allegations, Commissioned by the South Australian Attorney-General's Department)

Alison Tucker, Psychologist
Optima Psychologists & Mediators, Adelaide SA

The purpose of this part of the discussion about children's evidence is to consider the impact of stress and trauma on their inherent cognitive abilities.

Children's memory

Before turning to these areas, I want to briefly comment on children's memory. It is now well understood that children remember significant experiences. The focus in this discussion is on stressful experiences, but this remembering clearly applies to other significant experiences.

Understanding memory is essential to understanding the effects of stress and trauma. The brain works by making associations between a current experience and past experience. There is so much information coming in that the brain has to make assumptions to avoid being overwhelmed. The brain associates what seems to be similar information with existing memories (or 'templates'), and pays particular attention, to unusual information. While this works well in our everyday lives, after trauma the brain can make erroneous associations. We can again believe we are at threat (becoming stressed or re-traumatised) when in fact we are safe.

In addition while all children remember, they recount their memories in different ways depending on their developmental abilities and how stress and I or trauma has affected them. For example, in my clinical experience, I have witnessed:

> (1) a 10-month old boy, relaxed in the arms of his foster carer who, when his father enters the room, arches backwards and turns his head away, and remains completely still. From a stress and trauma perspective, he was trying to stay safe, and all he had control over was being 'invisible' by being quiet and still. A month earlier his father had broken his ribs (throwing his body onto that of his son's). The father eventually acknowledged this; the son remembered.
>
> (2) a 3-year old girl, telling me late one night about her experiences earlier that evening: where she was, who she was with, and what was happening culminating in the statement "he milked me". This innocent and telling sentence was confirmed by the semen on her clothing, and her father's admission.
>
> (3) recently, a 12-year old boy.; telling me how his father had hit him, the bruises still visible. Talking me through how the evening unfolded in a factual way, but also reflecting on his own and his father's possible motivations. Managing to stay coherent, even at those times when emotion welled up and he needed a break.

So, children recount their memories in different ways. However, of these three children, only the 12-year old had the cognitive abilities and skills to give evidence at the level required by the

criminal justice system. Giving evidence is a complex processing task for children, as indeed it is for adults to be alert, to take in new information and make sense of it, and determine how best to respond. At a basic level of brain functioning our motivation is to stay safe I to survive. At a higher level of functioning, we want to achieve a positive outcome (to learn, to maximise our potential, to thrive). If we become overwhelmed in our capacity to manage the demands of a new experience, the motivation to survive will take over.

Therefore, preparing children for giving evidence is essential. Children benefit from being told what will happen and who will be involved. What are the rules and the expectations? What is the physical environment? We are fortunate in Adelaide to have a Witness Assistance Service, for children giving evidence in the District Court.

Further, if a child becomes overwhelmed by stress when giving evidence, we need to notice this and stop. This means being attuned to the child, really listening to their words but also to their non-verbal communications such as their body posture, their level of agitation or 'frozenness', or the pitch of their voice.

This is where competency testing can be of great assistance if it is done in a way that connects with the child. You cannot expect in a few minutes to earn a child's trust. However, by speaking simply and honestly, and by actively listening to what children say, they can feel safer and therefore likely will be more responsive. This may assist when assessing their stress levels, as you then can compare this more relaxed (but still vigilant) presentation of the child with their presentation when the testing of evidence begins.

The importance of the relationship between the child and the listener

Establishing this relationship is as simple and as difficult as relating to the child on a human-to-human level. Children know that they matter to you when you turn your full attention to them, gently but with focus, when you truly listen to them and show this in how you respond to them, and when you talk to them in a way that they feel respected. To achieve this attuned communication we adults have to 'merge' with the child at their level, including using age appropriate language and sensitive behaviour. It is not possible or reasonable to expect the child to merge at the adult level.

Bruce Perry, who is a child psychiatrist and neuroscientist, and a leader in understanding children and trauma, talks about the importance of human relationships. He talks about relationships having the power to create or destroy, nurture or terrorise, traumatise or heal. In his view it is the quality of relationships after a trauma that help children recover. While this refers to the primary relationships in a child's life, in my view all relationships can make a difference. Children's involvement in Court proceedings may well be a brief chapter in their lives. Nonetheless it is likely to be significant given the context of stressors and possible background of trauma. At the least when relating with child witnesses we can hold the intention of 'doing no harm'.

The effects of trauma on brain functioning

Trauma may seem more of a background consideration when a child gives evidence, compared to the immediate impact of stress on their functioning in Court. Children who ·are seriously ·traumatised are unlikely to be psychologically able to give evidence. Nonetheless, understanding the

effects of trauma is essential if we are to support child witnesses to have access to the criminal justice system, without doing them harm.

Children's healthy development is reflected in the attainment of skills such as creating a positive sense of identity, being able to build and maintain relationships (social intelligence), and successfully regulating emotions and behaviour (emotional intelligence). All these essential developmental skills can be compromised by trauma, with enduring effects that last throughout adulthood.

- **Handout E: R v Barker**

R. V. BARKER [2010] EWCA CRIM 4

Date:
5th February 2010

Evidence
Competence of Child Witness

In R. v. Barker [2010] EWCA Crim 4, judgment delivered January 21, the Court of Appeal (Lord Judge CJ, Hallett LJ and Macur JJ) gave the following guidance in relation to s.53 of the 1999 Act.

(1) The provisions were not limited to the evidence of children, but also applied to individuals of unsound mind and to the infirm. The question in each case was whether the individual witness, or, as in the instant case, the individual child (aged four-and-half at the time of the trial), was competent to give evidence in the particular trial. The question was entirely witness or child specific. There were no presumptions or preconceptions. The witness needed not to understand the special importance that the truth should be told in court, and the witness needed not to understand every single question or give a readily understood answer to every question. Many competent adult witnesses would fail such a competency test. Dealing with it broadly and fairly, provided the witness could understand the questions put to him and could also provide understandable answers, he or she was competent. If the witness could not understand the questions or his answers to questions which he understood could not themselves be understood he was not. The questions came, of course, from both sides. If the child was called as a witness by the prosecution he or she had to have the ability to understand the questions put to him by the defence as well as the prosecution and to provide answers to them which were understandable. The provisions of the statute were clear and unequivocal, and did not require reinterpretation.

(2) Although the distinction was a fine one, whenever the competency question was addressed, what was required was not the exercise of a discretion but the making of a judgment as to whether the witness fulfilled the statutory criteria. In short, it was not open to the Judge to create or impose some additional but non-statutory criteria based on the approach of earlier generations to the evidence of small children. In particular, although the chronological age of the child would inevitably help to inform the judicial decision about competency, in the end the decision was a decision about the individual child and his or her competence to give evidence in the particular trial.

(3) The age of a witness was not determinative on his or her ability to give truthful and accurate evidence. Like adults some children would provide truthful and accurate testimony, and some

would not; however children were not miniature adults, but children, and to be treated and Judged for what they were, not what they would, in years ahead, grow to be. Accordingly, although due allowance had to be made in the trial process for the fact that they were children with, for example, a shorter attention span than most adults, none of the characteristics of childhood, and none of the special measures which applied to the evidence of children carried with them the implicit stigma that children should be deemed in advance to be somehow less reliable than adults. The purpose of the trial process was to identify the evidence which was reliable and that which was not, whether it came from an adult or a child. If competent, as defined by the statutory criteria, in the context of credibility in the forensic process, the child witness started off on the basis of equality with every other witness. In trial by jury, his or her credibility was to be assessed by the jury, taking into account every specific personal characteristic which might bear on the issue of credibility, along with the rest of the available evidence. The Judge determined the competency question by distinguishing carefully between the issues of competence and credibility. At the stage when the competency question was determined the Judge was not deciding whether a witness was or would be telling the truth and giving accurate evidence. Provided the witness was competent, the weight to be attached to the evidence was for the jury.

(4) The trial process had to cater for the needs of child witnesses, as indeed it had increasingly catered for the use of adult witnesses whose evidence in former years would not have been heard, by, for example, the now well understood and valuable use of intermediaries. In short, the competency test was not failed because the forensic techniques of the advocate (in particular in relation to cross-examination) or the processes of the court (for example, in relation to the patient expenditure of time) had to be adapted to enable the child to give the best evidence of which he or she was capable. At the same time the right of the defendant to a fair trial had to be undiminished. When the issue was whether the child was lying or mistaken in claiming that the defendant had behaved indecently towards him or her, it should not be over-problematic for the advocate to formulate short, simple questions which put the essential elements of the defendant's case to the witness, and fully to ventilate before the jury the areas of evidence which bore on the child's credibility. Aspects of evidence which undermined or were believed to undermine the child's credibility had, of course, to be revealed to the jury, but it was not necessarily appropriate for them to form the subject matter of detailed cross-examination of the child and the advocate might have to forego much of the kind of contemporary crossexamination which consisted of no more than comment on matters which would be before the jury in any event from different sources. Notwithstanding some of the difficulties, the witness whose cross-examination was in contemplation was a child, sometimes very young, it should not take very lengthy cross-examination to demonstrate, when it was the case, that the child might indeed be fabricating, or fantasizing, or imagining, or reciting a well rehearsed untruthful script, learned by rote, or simply just suggestible, or contaminated by or in collusion with others to make false allegations, or making assertions in language which was beyond his or her level of comprehension, and therefore likely to be derived from another source.

Comment on the evidence, including comment on evidence which might bear adversely on the credibility of the child, should be addressed after the child had finished giving evidence.

(5) The competency test might be re-analyzed at the end of the child's evidence. That extra statutory jurisdiction was a judicial creation, clearly established in a number of decisions of the Court of Appeal. That second test should be viewed as an element in the defendant's entitlement to a fair trial, at which he had to be, and had to have been, provided with a reason-

able opportunity to challenge the allegations against him, a valuable adjunct to the process, just because it provided an additional safeguard for the defendant. If the child witness had been unable to provide intelligible answers to questions in cross-examination or a meaningful cross-examination was impossible, the first competency decision would not have produced a fair trial, and in that event, the evidence admitted on the basis of a competency decision which turned out to be wrong could reasonably be excluded under s.78 of the Police and Criminal Evidence Act 1984. The second test should be seen in that context, but importantly, the Judge was not addressing credibility questions at that stage of the process any more than he had when conducting the first competency test.

(6) Previous authority underlined the importance to the trial and investigative process of keeping any delay in a case involving a child complainant to an irreducible minimum; however, the complaint itself, for a variety of understandable reasons, in the case of a child or other vulnerable witness might itself be delayed pending removal to a safe environment.
The trial of the instant allegation had been delayed because of the trial arising from the death of Baby P. With hindsight it could be suggested that perhaps the better course, given the age of X, would have been to try her allegation first. Nevertheless, the decisions in R. v. Powell [2006] All ER (D) 45 (Jan) and R. v. Malicki [2009] All ER (D) 309 (Mar), should not be understood to establish as a matter of principle that where the complainant was a young child, delay which did not constitute an abuse of process within well understood principles, could give rise to some special form of defence, or that, if it did not, a submission based on unfairness within the ambit of s.78 of the 1984 Act was bound to succeed, or that there was some kind of unspecified limitation period.

There would naturally and inevitably be case specific occasions when undue delay might render a trial unfair, and might lead to the exclusion of the evidence of the child on competency grounds.

However, in cases involving very young children delay on its own did not automatically require the court to prevent or stop the evidence of the child from being considered by the jury. That would represent a significant and unjustified gloss on the statute.

(7) It was open to a properly directed jury, unequivocally directed as to the dangers and difficulties of doing so, to reach a safe conclusion on the basis of the evidence of a single competent witness whatever his or age and whatever his or her disability. The ultimate verdict was the responsibility of the jury.

- **Handout F: 'Child Forensic Interviewing Best Practices' of the U.S. Department of Justice Program (September 2015)**

U.S. Department of Justice
Office of Justice Programs
Office of Juvenile Justice and Delinquency Prevention

Working for Youth Justice and Safety
JUVENILE JUSTICE BULLETIN

September 2015 *Robert L. Listenbee, Administrator*

From the Administrator

The Office of Juvenile Justice and Delinquency Prevention is committed to preventing the victimization of children and ensuring the well-being of all youth. In suspected abuse or maltreatment cases, law enforcement, medical, court, and other child protection professionals must respond swiftly and effectively and in a manner that avoids retraumatizing the affected youth.

To assist those who work in this field, the National Children's Advocacy Center convened experts from the major national forensic interview training programs to identify best practices in child forensic interviewing in cases of alleged abuse or exposure to violence.

The resulting discussions led to this publication, which provides guidance on topics, such as interview timing and setting, question type, rapport-building between the interviewer and the victim, interview aids as well as vicarious trauma and self-care.

This bulletin represents commendable collaboration across multiple entities and is an effort to build consensus within the field. We hope that the information contained within it will aid practitioners' efforts to protect children from abuse and bring those who prey upon them to justice.

Robert L. Listenbee
Administrator

OJJDP

Child Forensic Interviewing: Best Practices

Chris Newlin, Linda Cordisco Steele, Andra Chamberlin, Jennifer Anderson, Julie Kenniston, Amy Russell, Heather Stewart, and Viola Vaughan-Eden

Highlights

This bulletin consolidates the current knowledge of professionals from several major forensic interview training programs on best practices for interviewing children in cases of alleged abuse. The authors discuss the purpose of the child forensic interview, provide historical context, review overall considerations, and outline each stage of the interview in more detail.

Among the topics that the authors discuss are the following:

- No two children will relate their experiences in the same way or with the same level of detail and clarity. Individual characteristics, interviewer behavior, family relationships, community influences, and cultural and societal attitudes determine whether, when, and how they disclose abuse.
- The literature clearly explains the dangers of repeated questioning and duplicative interviews; however, some children require more time to become comfortable with the process and the interviewer.
- Encouraging children to give detailed responses early in the interview enhances their responses later on.
- Forensic interviewers should use open-ended questions and should allow for silence or hesitation without moving to more focused prompts too quickly. Although such questions may encourage greater detail, they may also elicit potentially erroneous responses if the child feels compelled to reach beyond his or her stored memory.

SEPTEMBER 2015

Child Forensic Interviewing: Best Practices

Chris Newlin, Linda Cordisco Steele, Andra Chamberlin, Jennifer Anderson, Julie Kenniston, Amy Russell, Heather Stewart, and Viola Vaughan-Eden

During the last quarter of the 20th century, the United States began to fully recognize the incidence of child abuse and neglect affecting our country. Increased public awareness and empirical literature have improved efforts to intervene effectively on behalf of children. One of the most significant interventions has centered on how to elicit accurate information from children regarding abuse and neglect—a process commonly referred to as "forensic interviewing" (Saywitz, Lyon, and Goodman, 2011). Following two decades of research and practice, professionals have gained significant insight into how to maximize children's potential to accurately convey information about their past experiences. Yet, as this effort continues and practice evolves, professionals face new challenges in standardizing forensic interviewing practice throughout the country.

A relative lack of both research and practice experience challenged pioneers in the field. As such, protocols and training efforts underwent significant revisions as more research was conducted and people began gaining practice-based experience, which informed further training. Additionally, given the dearth of resources at the time, geographically diverse training programs began to develop naturally throughout the United States, emanating from frontline service providers who struggled to provide quality services themselves and who also wanted to help fellow professionals. Different case experiences, contextual perspectives, and community standards influenced these training efforts. In addition, these service providers were not directly communicating with one another about the content of their training or their theoretical approaches. This further supported the existence of various approaches and the lack of standardized training language regarding forensic interviewing.

It is now widely accepted that professionals should have formal initial and ongoing forensic interview training (National Children's Alliance [NCA], 2011). However, the field has yet to determine one standardized practice to follow throughout the country. Although national training programs are generally based on the same body of research, some differences exist. Focusing on the variations among them often obscures consistencies within the various forensic interview models. In some cases, the veracity of the child's statement or the performance of the forensic interviewer has been questioned solely on the basis of the model being used. However, forensic interviewers often receive training in multiple models and use a blended approach to best meet the needs of the child they are interviewing (Midwest Regional Children's Advocacy Center [MRCAC], 2014). Furthermore, the model being used and any subsequent adaptations to it are often rooted in jurisdictional expectations. State statutes and case law dictate aspects of interview practice, further demonstrating that no one method can always be the best choice for every forensic interview.

In 2010, representatives of several major forensic interview training programs—the American Professional Society on the Abuse of Children, the CornerHouse Interagency Child Abuse Evaluation and Training Center, the Gundersen National Child Protection Training Center, the National Children's Advocacy Center, and the National Institute of Child Health and Human Development—gathered to review their programs' differences and similarities. The resulting discussions led to this bulletin, which consolidates current knowledge on the generally accepted best practices of those conducting forensic interviews of children in cases of alleged abuse or exposure to violence.

- **Handout F: 'Child Forensic Interviewing Best Practices' of the U.S. Department of Justice Program (September 2015)** *(continued)*

This nation must remain committed to consistently putting the needs of children first. It is the authors' hope that this document will become an essential part of every forensic interview training program and will be widely used as an authoritative treatise on the implementation of best practices in forensic interviewing.

Purpose of the Child Forensic Interview

The forensic interview is one component of a comprehensive child abuse investigation, which includes, but is not limited to, the following disciplines: law enforcement and child protection investigators, prosecutors, child protection attorneys, victim advocates, and medical and mental health practitioners. Although not all of the concerned disciplines may directly participate in or observe the forensic interview, each party may benefit from the information obtained during the interview (Jones et al., 2005).

Most child abuse investigations begin with a forensic interview of the child, which then provides direction for other aspects of the investigation. Although forensic interviewers are trained to conduct quality interviews, it is important to note there is no "perfect" interview.

For the purposes of this bulletin, and in an effort to build consensus within the field, the authors offer the following definition of a child forensic interview:

> A forensic interview of a child is a developmentally sensitive and legally sound method of gathering factual information regarding allegations of abuse or exposure to violence. This interview is conducted by a competently trained, neutral professional utilizing research and practice-informed techniques as part of a larger investigative process.

Historical Context

In the 1980s, several high-profile cases involving allegations that daycare providers had sexually abused multiple children in their care became the subject of considerable analysis because of the interview techniques that were used (Ceci and Bruck, 1995). Law enforcement depended on mental health practitioners because of their ability to establish rapport with children. However, mental health practitioners often used therapeutic techniques that were later deemed inappropriate for forensic purposes, primarily because of concerns regarding suggestibility. The courts scrutinized the interview procedures used in these early cases and found that techniques that invited make-believe or pretending were inappropriate for criminal investigations.

As awareness of child abuse grew, professionals realized that it might take special skills to interview children. Sgroi (1978) was the first medical/mental health professional to address the issue of investigative interviewing in the literature. The American Professional Society on the Abuse of Children (APSAC) wrote the first practice guidelines—*Psychosocial Evaluation of Suspected Sexual Abuse in Young Children* (APSAC, 1990)—the title of which reflects the initial focus of these interviews: mental health. Today, the focus has shifted from the mental health or clinical perspective to a forensic perspective. Even the nomenclature changed to include terms such as "forensic interview" and "child forensic interview training."

In the late 1980s and early 1990s, substantial empirical literature discussed children's developmental capabilities and appropriate ways of engaging them in the interview process. The Cognitive Interview (Fisher and Geiselman, 1992) and Narrative Elaboration (Saywitz, Geiselman, and Bornstein, 1992) models included specific strategies that applied memory-based techniques to elicit detailed information from witnesses. Traces of both models remain in current approaches to evidence-based forensic interviewing (Saywitz and Camparo, 2009; Saywitz, Lyon, and Goodman, 2011).

Considerations Regarding the Child

Many influences have an impact on a child's experience of abuse and on his or her ability to encode and communicate information. These influences interact in a uniquely individual manner, such that no two children will ever engage or relate their experiences in the same way or with the same level of detail and clarity. This section describes the major influences on children's memory, language abilities, and motivation to converse.

Development

All of the forensic interviewing models agree that considering the age and development of the child is essential. Lamb and colleagues (2015) state that "age is the most important determinant of children's memory capacity." A child's age and developmental abilities influence his or her perception of an experience and the amount of information that they can store in long-term memory (Pipe and Salmon, 2002). Infants and toddlers can recall experiences, as demonstrated through behavioral reactions to people, objects, and environments; however, these early memories are not associated with verbal descriptions. Even as they begin to develop their language

capabilities, young children are less able to make sense of unfamiliar experiences, have a more limited vocabulary, and are less accustomed to engaging in conversations about past experiences than older children. As children age, their attention span improves and they are better prepared to comprehend, notice unique elements, and describe their experiences verbally. This, in turn, allows them to store more information and also allows them to discuss remembered events with others, which further serves to consolidate and strengthen memories. Children of all ages are more likely to recall salient and personally experienced details rather than peripheral details (Perona, Bottoms, and Sorenson, 2006).

Metacognition—the ability to recognize whether one understands a question and has stored and can retrieve relevant information—also improves as children mature. Very young children find it difficult to focus their attention and to search their memory effectively when interviewed. They may simply respond to recognized words or simple phrases without considering the entire question, and they are unable to monitor their comprehension or answers to questions (Lamb et al., 2015). As children grow older, both natural development and knowledge gained from school improve their skills.

Remembering an experience does not ensure that a child will be able to describe it for others. Forensic interviews are challenging for children, as they involve very different conversational patterns and an unfamiliar demand for detail (Lamb and Brown, 2006). Young children may use words before they completely understand their meaning and may continue to confuse even simple concepts and terms such as "tomorrow," "a lot," or "a long time." As children mature, they acquire the ability to use words in a more culturally normative way, although terminology for sexual encounters, internal thoughts and feelings, and particularly forensic and legal matters may be beyond their grasp (Walker, 2013). Forensic interviewers and those who evaluate the statements that children make in a legal context would do well to appreciate the many extraordinary demands made on child witnesses.

Although concerns about younger children's verbal and cognitive abilities are well recognized, the challenges of effectively interviewing adolescents are often overlooked. Because adolescents look much like adults, forensic interviewers and multidisciplinary team members may fail to appreciate that adolescents vary greatly in their verbal and cognitive abilities and thus fail to build rapport, provide interview instructions, or ensure the comprehension of questions (Walker, 2013). Ever conscious of wanting to appear competent, adolescents may be reluctant to ask for assistance. Forensic interviewers and investigators must guard against unreasonably high expectations for teenage witnesses and should not adopt a less supportive approach or use convoluted language, which will complicate matters.

Culture and Development

A child's family, social network, socioeconomic environment, and culture influence his or her development, linguistic style, perception of experiences, and ability to focus attention (Alaggia, 2010). Cultural differences may present communication challenges and can lead to misunderstandings within the forensic interview. Fontes (2008) highlights the importance of having clear-cut guidelines and strategies for taking culture into account when assessing whether child abuse or neglect has occurred. Forensic interviewers and investigators must consider the influence of culture on perception of experiences, memory formation, language, linguistic style, comfort with talking to strangers in a formal setting, and values about family loyalty and privacy when questioning children and evaluating their statements (Fontes, 2005, 2008; Perona, Bottoms, and Sorenson, 2006).

Disabilities

Children with disabilities are potentially at greater risk for abuse and neglect than children without disabilities (Hershkowitz, Lamb, and Horowitz, 2007; Kendall-Tackett et al., 2005). Forensic interviewers are unlikely

- **Handout F: 'Child Forensic Interviewing Best Practices' of the U.S. Department of Justice Program (September 2015)** *(continued)*

"Cultural differences may present communication challenges and can lead to misunderstandings within the forensic interview."

to have specialized training or experience in the broad field of disabilities or regarding developmental or medical concerns; thus, collaboration is often necessary to successfully interview these children. Interviewers should use local resources—including disability specialists or other professionals who work with children and their primary caregivers—to gain insight into the functioning of specific children and any needs they may have for special accommodations (Davies and Faller, 2007). The interviewer may have to adapt each stage of the interview, balancing these adaptations with the demand for forensic integrity (Baladerian, 1997; Hershkowitz, Lamb, and Horowitz, 2007). More than one interview session may be necessary to gain the child's trust, adapt to the child's communication style and limitations, and allow adequate time to gather information (Faller, Cordisco Steele, and Nelson-Gardell, 2010).

Trauma

Children who have been victims of maltreatment or were witnesses to violent crime often react uniquely to their experiences. Forensic interviewers must be cognizant of factors that mitigate or enhance the impact, as trauma symptoms may interfere with a child's ability or willingness to report information about violent incidents (Ziegler, 2002). The memories of children who have suffered extreme forms of trauma may be impaired or distorted (Feiring and Tasca, 2005); these children may not recall their experiences in a linear fashion but, instead, as "flashbulb memories" or snapshots of their victimization (Berliner et al., 2003). In addition, their memories of traumatic experiences may be limited, with a particular emphasis on central rather than peripheral details (Fivush, Peterson, and Schwarzmueller, 2002). Interviewers and those involved in investigating child abuse may need to modify their expectations of what a traumatized child is able to report. They should not attempt to force a disclosure or continue an interview when a child becomes overly distressed, which may revictimize the child. Children who are severely traumatized may benefit from additional support and multiple, nonduplicative interview sessions (Faller, Cordisco Steele, and Nelson-Gardell, 2010; La Rooy et al., 2010).

Disclosure

Understanding the disclosure process is critical for both the investigative process and child protection outcomes. Research to date on children's disclosure of sexual abuse—based mainly on retrospective surveys of adults and reviews of past child abuse investigations—indicates that no single pattern of disclosure is predominant (Lyon and Ahern, 2010). Disclosure happens along a continuum ranging from denial to nondisclosure to reluctant disclosure to incomplete disclosure to a full accounting of an abusive incident (Olafson and Lederman, 2006). Some children also disclose less directly, over a period of time, through a variety of behaviors and actions, including discussions and indirect nonverbal cues (Alaggia, 2004).

The interaction of individual characteristics, interviewer behavior, family relationships, community influences, and cultural and societal attitudes determines whether, when, and how children disclose abuse (Alaggia, 2010; Bottoms, Quas, and Davis, 2007; Hershkowitz et al., 2006; Lyon and Ahern, 2010). Factors that help to explain a child's reluctance are age, relationship with the alleged offender, lack of parental support, gender, fear of consequences for disclosing, and fear of not being believed (Malloy, Brubacher, and Lamb, 2011; McElvaney, 2013). A review of contemporary literature reveals that when disclosure does occur, significant delays are common. In a recent analysis of child sexual abuse disclosure patterns, Alaggia (2010) found that as many as 60 to 80 percent of children and adolescents do not disclose until adulthood. If outside corroborative evidence exists (e.g., physical evidence, offender confessions, recordings, witness statements), there is still a high rate of nondisclosure (Lyon, 2007; Sjoberg and Lindblad, 2002). Furthermore, children who disclose often do not recount their experiences fully and may, over time, provide additional information (McElvaney, 2013).

Current literature on children's disclosure of sexual abuse has implications for practice. According to Malloy, Brubacher, and Lamb (2013), precipitating events or people frequently motivate children to disclose abuse. Some children require a triggering event, such as a school

safety presentation, to allow them to discuss abuse without being the one to broach the subject (McElvaney, 2013). Other children may need to be questioned specifically about the possibility of abuse. Child abuse professionals should understand the many intersecting dynamics that help a child disclose maltreatment and should be open to the possibility that disclosure is not an all-or-nothing event.

Considerations Regarding the Interview

Almost universal agreement exists regarding the need to interview children about allegations of abuse. Once this is accepted, there are a number of important considerations, such as timing, documentation, setting, interviewer, questions to be asked, and whether to use interview aids/media.

Timing

Conduct the forensic interview as soon after the initial disclosure of abuse, or after witnessing violence, as the child's mental status will permit and as soon as a multidisciplinary team response can be coordinated (APSAC, 2012; Saywitz and Camparo, 2009). As time passes, the opportunity to collect potential corroborative evidence may diminish, children's fortitude to disclose may wane, and opportunities for contamination, whether intentional or accidental, increase (Johnson, 2009). However, children who are overly fatigued, hungry, frightened, suffering from shock, or still processing their traumatic experiences may not be effective reporters in a forensic interview (APSAC, 2012; Home Office, 2007; Myers, 2005).

Documentation

Electronic recordings are the most complete and accurate way to document forensic interviews (Cauchi and Powell, 2009; Lamb et al., 2000), capturing the exchange between the child and the interviewer and the exact wording of questions (Faller, 2007; Warren and Woodall, 1999). Video recordings, used in 90 percent of Children's Advocacy Centers (CACs) nationally (MRCAC, 2014), allow the trier of fact in legal proceedings to witness all forms of the child's communication. Recordings make the interview process transparent, documenting that the interviewer and the multidisciplinary team avoided inappropriate interactions with the child (Faller, 2007). Recorded forensic interviews also allow interviewers and others to review their work and facilitate skill development and integrity of practice (Lamb, Sternberg, Orbach, Esplin, and Mitchell, 2002; Price and Roberts, 2011; Stewart, Katz, and La Rooy, 2011).

Neutral and Objective Setting

The National Children's Alliance (NCA), as a part of its accreditation process, requires CACs to provide child-focused settings that are "comfortable, private, and both physically and psychologically safe for diverse populations of children and their non-offending family members" (NCA, 2011:36). However, there is a dearth of literature on what constitutes a child-friendly environment (NCA, 2013).

Interview rooms come in all shapes and sizes, are often painted in warm colors, may incorporate child-sized furniture, and should only use artwork of a non-fantasy nature. The room should be equipped for audio- and video-recording, and case investigators and other CAC staff should be able to observe the forensic interview (Myers, 2005; NCA, 2013; Pence and Wilson, 1994). Although it is generally recommended that there be minimal distractions in the interview room (APSAC, 2012; Saywitz, Camparo, and Romanoff, 2010), opinions differ about the allowance of simple media, such as paper and markers. More recently published literature suggests that younger children may benefit from having access to paper and markers during the forensic interview (Poole and Dickinson, 2014). Materials that encourage play or fantasy are uniformly discouraged, as is any interpretation by the interviewer of the child's use of media or other products.

Role of the Interviewer

Forensic interviewers should encourage the most accurate, complete, and candid information from a child and, to this end, the child should be the most communicative during the forensic interview (Teoh and Lamb, 2013). Interviewers must balance forensic concerns with decisions about how much information to introduce (APSAC, 2012; Orbach and Pipe, 2011). In addition, they should be attentive to the possibility that their preconceived ideas may bias the information gathered—particularly if the interview is conducted in an unduly leading or suggestive manner—and should avoid such practices (Ceci and Bruck, 1995; Faller, 2007).

Question Type

Maximizing the amount of information obtained through children's free recall memory is universally accepted among forensic interview models as a best practice. Forensic interviewers should use open-ended and cued questions skillfully and appropriately to support children's ability and willingness to describe remembered experiences in their own words (Lamb, Orbach, Hershkowitz, Esplin, and Horowitz, 2007; Myers, 2005; Saywitz and Camparo, 2009; Saywitz, Lyon, and Goodman, 2011). Ask more focused questions later in the interview, depending on the developmental abilities of the child, the child's degree of

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candor or reluctance, the immediacy of child protection issues, and the existence of reliable information previously gathered (e.g., suspect confession, photographs) (Imhoff and Baker-Ward, 1999; Lamb et al., 2003; Perona, Bottoms, and Sorenson, 2006). This approach reduces the risk of the interviewer contaminating the child's account.

A common language for labeling the format of questions does not exist; however, similarities in currently used labels do exist (Anderson, 2013; APSAC, 2012; Lyon, 2010). Agreement also exists that questions should not be judged in isolation. The labels for memory prompts may be classified into two main categories—recall and recognition—and are based on the type of memory accessed.

Recall prompts are open-ended, inviting the child to tell everything he or she remembers in his or her own words; such prompts have been shown to increase accuracy (Lamb, Orbach, Hershkowitz, Horowitz, and Abbott, 2007; Lamb et al., 2008). Open-ended questions encourage children to elaborate and to include salient details without significant input from the interviewer, who should use them throughout the interview. Recall prompts may include directives or questions, such as "Tell me everything that happened," "And then what happened?" and "Tell me more about (specific person/action/place that the child previously mentioned)." Although the accounts retrieved through the use of recall prompts can be quite detailed and accurate, they may not be complete. Interviewers may ask specific, focused questions to obtain additional details about topics the child has already mentioned, using a "who, what, where, when, and how" format. Although these detailed questions focus the child on certain aspects of his or her report that are missing, the child may or may not recall such information. These questions may promote a narrative response or may elicit brief answers (Saywitz and Camparo, 2009; Hershkowitz et al., 2012). They do not introduce information or pose options to the child: "You said you were in the house. What room were you in?" followed by "Tell me about that."

Once open-ended questions are exhausted, it may be necessary to progressively focus the query. Children may omit details because they do not know the significance of the information sought or because they are reluctant to divulge certain information. In contrast to recall prompts, recognition prompts provide the child with context or offer interviewer-created options. Recognition prompts may elicit greater detail once the child has exhausted his or her capability for narrative or when a child cannot comprehend a more open-ended question. The risk of using recognition prompts is that they may elicit responses that are less accurate or potentially erroneous if the child feels compelled to reach beyond his or her stored memory. It is essential to use these questions judiciously, as over-use can significantly affect the integrity and fact-finding function of the interview (Faller, 2007; Lamb, Orbach, Hershkowitz, Horowitz, and Abbott, 2007; Myers, 2005; Perona, Bottoms, and Sorenson, 2006). Suggestive questions are those that "to one degree or another, [suggest] that the questioner is looking for a particular answer" (Myers, Saywitz, and Goodman, 1996) and should be avoided.

Interview Aids/Media

The goal of a forensic interview is to have the child verbally describe his or her experience. A question remains, however, as to whether limiting children to verbal responses allows all children to fully recount their experiences, or whether media (e.g., paper, markers, anatomically detailed drawings or dolls) may be used during the interview to aid in descriptions (Brown et al., 2007; Katz and Hamama, 2013; Macleod, Gross, and Hayne, 2013; Patterson and Hayne, 2011; Poole and Dickinson, 2011; Russell, 2008). The use of media varies greatly by model and professional training. Decisions are most often made at the local level, and interviewer comfort and multidisciplinary team preferences may influence them. Ongoing research is necessary to shed further light on the influence of various types of media on children's verbal descriptions of remembered events.

The Forensic Interview

Forensic interview models guide the interviewer through the various stages of a legally sound interview; they vary from highly structured/scripted to semi-structured (interviewers cover predetermined topics) to flexible (interviewers have greater latitude). All models include the following phases:

- The initial **rapport-building phase** typically comprises introductions with an age- and context-appropriate explanation of documentation methods, a review of interview instructions, a discussion of the importance of telling the truth, and practice providing narratives and episodic memory training.
- The **substantive phase** most often includes a narrative description of events, detail-seeking strategies, clarification, and testing of alternative hypotheses, when appropriate.
- The **closure phase** gives more attention to the socioemotional needs of a child, transitioning to nonsubstantive topics, allowing for questions, and discussing safety or educational messages.

Divergent research, state statutes, community standards, and identified child/case populations contribute to the variations among models. Lack of adherence to a particular model does not, in and of itself, deem an interview forensically unsound. Increasingly, forensic interviewers receive training in multiple models and use a blend of models individualized to the needs of the child and the case (MRCAC, 2014).

Rapport-Building Phase

All interview models acknowledge that building rapport is important for both the child and the interviewer. During this phase, the child can begin to trust the interviewer and become oriented to the interview process. The interviewer can begin to understand the child's linguistic patterns, gauge the child's willingness to participate, and start to respond appropriately to the child's developmental, emotional, and cultural needs. A narrative approach to building rapport sets a pattern of interaction that should be maintained throughout the interview (Hershkowitz et al., 2015; Collins, Lincoln, and Frank, 2002; Hershkowitz, 2011).

Interview Instructions

Giving interview instructions during the rapport-building phase sets expectations that the child should provide accurate and complete information and also mitigates suggestibility. The child's age may influence the number of instructions and, perhaps, the type of instructions that may be most helpful. Interviewers may want to include some of the following instructions:

- "I was not there and don't know what happened. When I ask you questions, I don't know the answer to those questions."
- "It's okay to say 'I don't know' or 'I don't understand that question.'"
- "Only talk about things that really happened." (This emphasizes the importance of the conversation.)

For younger children, interviewers may want to have them "practice" following each guideline to demonstrate their understanding (APSAC, 2012; Saywitz and Camparo, 2009; Saywitz, Lyon, and Goodman, 2011). When children demonstrate these skills spontaneously, interviewers should reinforce them.

"Truth Versus Lies" Discussion

Recent research indicates that children may be less likely to make false statements if they have promised to tell the truth before the substantive phase of the interview (Lyon and Evans, 2014; Lyon and Dorado, 2008; Talwar et al., 2002). State statutes and community practices may vary about whether to include a "truth versus lies" discussion in forensic interviews. Some states require such a discussion or mandate that children take a developmentally appropriate oath before the substantive phase of the interview. In other states, interviewers have more autonomy regarding the techniques they use to encourage truth telling—to assess whether the child will be a competent witness in court and to increase the likelihood that the recorded interview will be admitted into evidence (Russell, 2006).

Narrative Practice/Episodic Memory Training

A substantial body of research indicates that encouraging children to give detailed responses early in the interview (i.e., during the rapport-building phase) enhances their informative responses to open-ended prompts in the substantive portion of the interview. When interviewers encourage these narrative descriptions early on, children typically will begin to provide more details without interviewers having to resort to more direct or leading prompts (Brubacher, Roberts, and Powell, 2011; Lamb et al., 2008; Poole and Lamb, 1998).

To help a child practice providing narratives, the interviewer may select a topic that was raised during a response to an earlier question, such as "Tell me some things about yourself," "What do you like to do for fun?" or "What did you do this morning?"; ask a question about a favorite activity; or ask for a description of the child's morning. The interviewer should then instruct the child to describe that topic from "beginning to end and not to leave anything out." The interviewer should continue to use cued, open-ended questions that incorporate the child's own words or phrases to prompt the child to greater elaboration. The interviewer may cue the child to tell more about an object, person, location, details of the activity, or a particular segment of time. This allows the child to provide a forensically detailed description of a nonabuse event and enables the interviewer to begin to

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understand the child's linguistic ability and style (APSAC, 2012; Saywitz and Camparo 2009; Saywitz, Lyon, and Goodman, 2011; Walker, 2013).

Substantive Phase

The interviewer should be as open-ended and nonsuggestive as possible when introducing the topic of suspected abuse, using a prompt such as "What are you here to talk to me about today?" If the child acknowledges the target topic, the interviewer should follow up with another open invitation, such as "Tell me everything and don't leave anything out" (APSAC, 2012; Lamb et al., 2008; Orbach and Pipe, 2011; Saywitz and Camparo, 2009; Saywitz, Lyon, and Goodman, 2011) and proceed to the narrative and detail-gathering phase of the interview.

However, if a child is anxious or embarrassed, has been threatened or cautioned not to talk, or has not made a prior outcry of abuse, the interviewer may need a more focused approach (Pipe et al., 2007). There is a distinction between real and apparent reluctance. Real reluctance refers to children who are cautious and significantly unwilling to respond to questions, whereas apparent reluctance refers to children who are introspective before responding to questions. Interviewers should therefore allow for silence or hesitation without moving to more focused prompts too quickly. In many cases, gently reassuring the child that it is important for the interviewer to understand everything that happened can effectively combat a child's reluctance.

Interviewers should plan for this transitional period deliberately, taking into account the child's characteristics, information included in the initial report, and any case concerns (Smith and Milne, 2011). Variations exist among interviewing models as to the most effective and defensible way to help a reluctant child transition to the substantive portion of the interview. Broadly speaking, options range from (1) the use of escalating and focused prompts gleaned from information in the allegation report (APSAC, 2012; Lamb et al., 2008; Saywitz, Lyon, and Goodman, 2011) to (2) the use of an incremental approach exploring various topics, such as family members, caregiving routines, body safety, and so forth (APSAC, 2012; Faller, 2007) to (3) the use of human figure drawings along with a discussion of body safety and appropriate and inappropriate contact (Anderson et al., 2010).

Forensic interviewers who have been trained in multiple models may use a variety of options, depending on child and case characteristics. Use focused or direct prompts only if good reason exists to believe the child has been abused and the risk of continued abuse is greater than the risk of proceeding with an interview if no abuse has occurred (Lamb et al., 2008; Orbach and Pipe, 2011).

Narrative and Detail Gathering

All forensic interview models direct the interviewer to ask the child to provide a narrative account of his or her experience to gain a clear and accurate description of alleged events in the child's own words. Do not interrupt this narrative, as it is the primary purpose of the forensic interview. Open-ended invitations ("Tell me more" or "What happened next?") and cued narrative requests ("Tell me more about [fill in with child's word]") elicit longer, more detailed, and less self-contradictory information from children and adolescents (Lamb et al., 2008; Orbach and Pipe, 2011; Perona, Bottoms, and Sorenson, 2006). Because of their relatively underdeveloped memory retrieval processes, very young or less cognitively and linguistically skilled children may require greater scaffolding and more narrowly focused open-ended questions to elicit information regarding remembered events (Faller, 2007; Hershkowitz et al., 2012; Lamb et al., 2003; Orbach and Pipe, 2011). Cued and open-ended prompts, attentive listening, silence, and facilitators, such as reflection and paraphrasing, may help (Evans and Roberts, 2009). Additionally, "wh" questions are the least leading way to ask about important but missing details and can either be open-ended ("What happened?") or more direct ("What was the man's name?") (Hershkowitz et al., 2006; Orbach and Pipe, 2011). Interviewers should delay the use of recognition prompts and questions that pose options for as long as possible (APSAC, 2012; Lamb et al., 2008; Saywitz and Camparo, 2009; Saywitz, Lyon, and Goodman, 2011).

Because many children experience multiple incidents of abuse, interviewers should ask them whether an event happened "one time or more than one time." If a child has been abused more than once, the interviewer should explore details regarding specific occurrences in a developmentally appropriate way (Walker, 2013), using the child's own wording to best cue the child to each incident (Brubacher, Roberts, and Powell, 2011; Brubacher et al., 2013; Brubacher and La Rooy, 2014; Schneider et al., 2011). Using prompts such as "first time," "last time," and other appropriate labels may lead to additional locations, acts, witnesses, or potential evidence.

No one recalls every detail about even well-remembered experiences. Questions related to core elements of the abuse can maximize the quantity and quality of information a child provides. Research suggests that children and adults may recall personally experienced events better than they recall peripheral details or events they witnessed (Perona, Bottoms, and Sorenson, 2006; Peterson, 2012).

Once the child's narrative account of an alleged incident(s) has been fully explored, the interviewer can then follow with focused questions, asking for sensory details, clarification, and other missing elements. If a child provides only brief responses, the interviewer should follow up by asking for additional information or explanation using focused questions that incorporate terms the child previously provided. Although particular elements may have forensic significance (e.g., temporal dating, number of events, sexual intent, penetration), the child may not have accurately perceived or stored the information in long-term memory (Friedman and Lyon, 2005; Hershkowitz et al., 2012; Orbach and Lamb, 2007; Lamb et al., 2015). Forensic interviewers should proceed with caution when encouraging children through the use of recognition prompts to provide such information.

Introducing externally derived information (e.g., information gathered outside the interview or that the child has not divulged) may be appropriate in some interviews. There is broad consensus, however, that interviewers should use such information with caution and only after attempting other questioning methods. It is important to understand the suggestibility of such information within the context of the overall interview, the other questions asked, the child's presentation and development, and the strength of any external evidence obtained. Before or during the interview, multidisciplinary teams should discuss how, if, and when to introduce externally derived information or evidence. The manner and extent to which this information is presented varies across jurisdictions and models.

Alternative Hypotheses

Contextually appropriate questions that explore other viable hypotheses for a child's behaviors or statements are essential to the overall integrity of the interview. Allow the child to explain apparently contradictory information, particularly as it concerns forensically relevant details (e.g., the suspect's identity or specific acts committed). Additionally, the interviewer may need to explore the circumstances surrounding the targeted event to distinguish abuse from caregiving activities, particularly with a young child or one with limited abilities.

Questions about the child's source of information or prior conversations or instructions may be helpful if there are concerns about possible coaching or contamination. There is no one set of questions used routinely in every interview, as child characteristics, contextual settings, allegations, and case specifics vary greatly.

Consultation With the Multidisciplinary Team

Forensic interviews are best conducted within a multidisciplinary team context, as coordinating an investigation has been shown to increase the efficiency of the investigation while minimizing system-induced trauma in the child (Cronch, Viljoen, and Hansen, 2006; Jones et al., 2005). Before the interview, multidisciplinary team members should discuss possible barriers, case-specific concerns, and interviewing strategies, such as how best to introduce externally derived information, should that be necessary. Regardless of whether the forensic interview is conducted at a CAC or other child-friendly facility, the interviewer should communicate with the team members observing the interview to determine whether to raise additional questions or whether there are any ambiguities or apparent contradictions to resolve (Home Office, 2007; Jones et al., 2005). The interviewer often has to balance the team's request for further questions with the need to maintain legal defensibility and with the child's ability to provide the information requested.

Closure Phase

The closure phase helps provide a respectful end to a conversation that may have been emotionally challenging for the child. The interviewer may use various strategies during this phase (Anderson et al., 2010; APSAC, 2012; Home Office, 2007; Poole and Lamb, 1998):

- Ask the child if there is something else the interviewer needs to know.
- Ask the child if there is something he or she wants to tell or ask the interviewer.
- Thank the child for his or her effort rather than for specific content.

"Because many children experience multiple incidents of abuse, interviewers should ask them whether an event happened 'one time or more than one time.'"

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- Address the topic of safety plans and educational materials and provide a contact number for additional help.

Other Considerations

Multiple evidence-supported forensic interview models are used throughout the United States, and all of these require the interviewer to adapt the model to the needs of each child based on unique situational variables. Some of the more commonly faced situational variables are highlighted below.

Multiple, Nonduplicative Interviews

One comprehensive forensic interview is sufficient for many children, particularly if the child made a previous disclosure, possesses adequate language skills, and has the support of a family member or other close adult (APSAC, 2002; Faller, 2007; London et al., 2007; NCA, 2011; Olafson and Lederman, 2006). The literature clearly demonstrates the dangers of multiple interviewers repeatedly questioning a child or conducting duplicative interviews (Ceci and Bruck, 1995; Fivush, Peterson, and Schwarzmueller, 2002; Malloy and Quas, 2009; Poole and Lamb, 1998; Poole and Lindsay, 2002). However, some children require more time and familiarity to become comfortable and to develop trust in both the process and the interviewer. Recent research indicates that multiple interview sessions may allow reluctant, young, or traumatized children the opportunity to more clearly and completely share information (Leander, 2010; Pipe et al., 2007). Multiple, nonduplicative interviews are most effective when the interviewer uses best practices in forensic interviewing; adapts the interview structure to the developmental, cultural, and emotional needs of the child; and avoids suggestive and coercive approaches (Faller, Cordisco Steele, and Nelson-Gardell, 2010; La Rooy et al., 2010; La Rooy, Lamb, and Pipe, 2009).

Supervision and Peer Review

Although agreement exists that knowledge of forensic interviewing significantly increases through training, this newly acquired knowledge does not always translate into significant changes in interviewer practices (Lamb, Sternberg, Orbach, Hershkowitz, Horowitz, and Esplin, 2002; Lamb et al., 2008; Price and Roberts, 2011; Stewart, Katz, and La Rooy, 2011). Supervision, peer reviews, and other forms of feedback should help forensic interviewers integrate the skills they learned during initial training and also improve their practice over time.

Supervision facilitates one-on-one interaction between a more experienced forensic interviewer and a professional new to the job and may or may not include assessment of the interviewer's performance (Price and Roberts, 2011; Stewart, Katz, and La Rooy, 2011). Larger CACs may employ multiple forensic interviewers who can provide individual support to newly trained interviewers. Often, CACs operating within a regional service area undertake similar efforts.

Peer review is a facilitated discussion with other interviewers or team members and is intended to both maintain and increase desirable practices in forensic interviewing (Stewart, Katz, and La Rooy, 2011). It is an opportunity for forensic interviewers to receive emotional and professional support and for other professionals to critique their work. The peer review should be a formalized process in a neutral environment with established group norms and a shared understanding of goals, processes, and purpose. Power dynamics, a lack of cohesion, and differing expectations can easily derail peer review efforts, leading to a failure to achieve real improvements in practice. Training in the use of tools for providing more effective feedback (e.g., guidelines for giving and receiving feedback), checklists to assist peer reviewers in defining practice aspects for review, and strong leadership can assist practitioners in establishing a meaningful and productive process.

Vicarious Trauma and Self-Care

Professionals exposed to the reports of abuse and victimization of children often suffer from vicarious traumatization, an affliction commonly called "the cost of caring" that has symptoms similar to those of posttraumatic stress disorder (Figley, 1995; Perron and Hiltz, 2006; Lipsky and Burk, 2009). Studies suggest that forensic interviewers, law enforcement officers, child protection workers, victim advocates, therapists, medical personnel, attorneys, and judges can all suffer from repeatedly hearing reports of child victimization (Conrad and Kellar-Guenther, 2006; Perron and Hiltz, 2006; Russell, 2010).

Vicarious trauma can be mitigated at multiple levels. Supervisors and organizations should be particularly attentive to the mental health of their staff and should be aware of factors that can exacerbate the development of vicarious trauma, including gender, past personal trauma, work dissatisfaction, large caseloads, long hours, and a lack of personal and professional support systems (Meyers and Cornille, 2002). Individuals should recognize the benefits of the work they undertake in their professional lives and celebrate their successes, knowing they have made a difference in a child's life.

Summary

The CAC movement was born out of the concept that the traditional fragmented and duplicative child abuse investigative process was not in the best interests of children. The multidisciplinary team approach has proven to be more child-friendly and better able to meet the needs of children and their families (Bonarch, Mabry, and Potts-Henry, 2010; Miller and Rubin, 2009). This revolutionary approach should continue to guide the nation's response to child abuse investigations. To increase the likelihood of successful outcomes for all children, it is imperative to continue ongoing discussions among professionals in both direct service delivery and program planning.

Although there have been significant efforts over the past several decades to improve the nation's response to child maltreatment, these efforts have often emanated from a single program or region without leading to a national debate on a particular topic, such as the development of forensic interviewing with children. This bulletin serves as the first collaborative effort, by professionals from many nationally recognized forensic interview training programs, to summarize the current knowledge and application of best practices in the field.

INTERVIEWER TIPS

Overall Considerations

- Conduct the interview as soon as possible after initial disclosure.
- Record the interview electronically.
- Hold the interview in a safe, child-friendly environment.
- Use open-ended questions throughout the interview, delaying the use of more focused questions for as long as possible.
- Consider the child's age, developmental ability, and culture.

Building Rapport With the Child

- Engage the child in brief conversation about his or her interests or activities.
- Provide an opportunity for the child to describe a recent nonabuse-related experience in detail.
- Describe the interview ground rules.
- Discuss the importance of telling the truth.

Conducting the Interview

- Transition to the topic of the suspected abuse carefully, taking into account the characteristics of the child and the case.
- Ask the child to describe his or her experience in detail, and do not interrupt the child during this initial narrative account.
- Once the initial account is fully explored, begin to ask more focused questions if needed to gather additional details, get clarification, or fill in missing information.
- Mirror the child's wording when asking followup questions.
- Exercise caution at this stage. Use focused queries judiciously and avoid suggestive questions that could compel the child to respond inaccurately.
- Explore other viable hypotheses for the child's behaviors or statements.
- Consult with those observing the interview to determine whether to raise additional questions or whether to resolve any ambiguities or contradictions.

Ending the Interview

- Ask the child if there is anything else he or she would like to share or to ask.
- Discuss safety plans and provide educational materials.
- Thank the child for participating.

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Acknowledgments

Chris Newlin, M.S., LPC, is Executive Director of the National Children's Advocacy Center (NCAC). In addition, he participates in national and international training and leadership activities on the protection of children. NCAC was the first CAC in the world, and it continues to provide prevention and intervention services for child abuse in Huntsville/Madison County, AL. It also houses the NCAC Training Center, the Southern Regional Children's Advocacy Center, and the Child Abuse Library Online (CALiO). Mr. Newlin received his master's degree from the University of Central Arkansas.

Linda Cordisco Steele, M.Ed., LPC, is a senior trainer and child forensic interview specialist for NCAC. She has 30 years of experience in forensic interviewing, therapy, and advocacy work with victims and has conducted more than 350 trainings across the United States and abroad. Her areas of expertise include child forensic interviewing, child development, victim advocacy, and working within the multidisciplinary team setting. Ms. Cordisco Steele has served as clinical director and forensic interviewer for three CACs. She received her master's degree in education from the University of Pittsburgh.

Andra K. Chamberlin, M.A., is a trainer and child forensic interview specialist for NCAC. She has presented at local, regional, state, national, and international child abuse conferences and conducted forensic interview trainings across the United States. Ms. Chamberlin has 26 years of experience in the child maltreatment field and previously served as program director and forensic interviewer for a CAC in Texas. She assisted in the development of the forensic interviewing training program for CACs of Texas. Ms. Chamberlin received her master's degree in applied research psychology from the University of Texas of the Permian Basin.

Jennifer Anderson, MSW, LISW, is a consultant for CornerHouse, where she has worked for more than 12 years. In her tenure at CornerHouse, Ms. Anderson has published multiple articles on forensic interviewing, spoken at national conferences, and provided extensive training courses to diverse groups of multidisciplinary professionals, notably the investigators from the International Criminal Court at the Hague, multidisciplinary professionals in Chennai, Delhi, and Bangalore, India, and in Tokyo, Japan. Ms. Anderson has interviewed hundreds of children regarding alleged abuse or neglect, served in multiple managerial and leadership roles, and served on numerous task forces, committees, and boards.

Julie Kenniston, MSW, LISW, is Executive Director of The Center for Family Solutions. She presents for APSAC and the Ohio Attorney General's ChildFirst/Finding Words forensic interview courses. Ms. Kenniston coordinated the Forensic Training Institute for The Childhood Trust and trains interviewers nationally and internationally. As an APSAC board member, she co-chairs the forensic interviewer certification task force. She has conducted more than 3,000 forensic interviews. Ms. Kenniston coauthored *Handbook on Questioning Children: A Linguistic Perspective,* 3d edition, with Anne Graffam Walker, Ph.D.

Amy Russell, M.S.Ed., J.D., is Executive Director of the Gundersen National Child Protection Training Center, where she provides administrative and programmatic oversight and training and technical assistance for child protection professionals. Ms. Russell also conducts forensic interviews and provides expert testimony on child sexual abuse in multiple state and federal courts. She has worked with victims of violence and trauma in several capacities, including counseling and support work with children and adults. Ms. Russell obtained her bachelor's degree in sociology from Hope College and her master's degree in counseling from Western Illinois University and she graduated magna cum laude from SUNY Buffalo Law School with her juris doctor.

Heather Stewart, M.A., is Assistant Program Manager for the Salt Lake County Children's Justice Center, where she has supervised daily operations and services for nearly 20 years. She has developed forensic interview training and peer review curriculums. She has presented at conferences and has provided forensic interview training both nationally and internationally. Ms. Stewart has coauthored articles, book chapters, and a report to the U.S. Department of Justice about training interviewers, conducting forensic interviews, and peer review. She received her master's degree in counseling psychology from Towson University.

Viola Vaughan-Eden, Ph.D., M.J., LCSW, is President of APSAC. As a clinical and forensic social worker, she also serves as a consultant and expert witness in child maltreatment cases—principally sexual abuse. Dr. Vaughan-Eden is co-editor of the *Journal of Forensic Social Work* and of the *APSAC Practice Guidelines: Forensic Interviewing in Cases of Suspected Child Abuse.* She is recipient of the 2011 NCAC Outstanding Service Award in Mental Health and the 2012 NASW—Virginia Chapter Lifetime Achievement Award.

- **Handout F: 'Child Forensic Interviewing Best Practices' of the U.S. Department of Justice Program (September 2015)** *(continued)*

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NCJ 248749

- **Handout G: 'Guidelines for Cross-examination of Children and Persons Suffering from Mental Disability' by the District Court of Western Australia**

District Court of Western Australia
Circular to Practitioners CRIM 2010/1
Date of Issue: 8 September 2010

GUIDELINES FOR CROSS-EXAMINATION OF CHILDREN AND PERSONS SUFFERING A MENTAL DISABILITY

1. Preamble

These guidelines are meant to provide assistance to counsel as to the appropriate approach to take when cross-examining in criminal proceedings child witnesses and witnesses suffering from mental disabilities. The guidelines are not meant to be rules of the District Court and are not meant to limit or restrict the ability of counsel to represent the interests of the client (subject to s 26 of the *Evidence Act*, other rules of evidence and rules of professional conduct).

2. Guidelines

2.1 Counsel should address the witness by the name the witness prefers. For a young child this will usually be the child's first name. (Counsel calling the witness should generally inform the Court and opposing counsel of the name the witness prefers before the witness is called.)

2.2 Questions should be short and simple.

2.3 A witness should be given an adequate opportunity to consider the question, formulate a response and then give an answer. This will generally be longer than is required for the average adult witness. Quick fire questions are to be avoided.

2.4 As a general rule a witness' answer should not be interrupted except where it is necessary to ensure the witness responds to the question or to prevent the witness giving inadmissible evidence. It is to be taken into account that such witnesses may require greater leeway in formulating an oral response to a question.

2.5 The tone of questions should not be intimidating, annoying, insulting or sarcastic. Likewise the volume of counsel's voice should not be intimidating.

2.6 Terminology used in questions should be age or mental capacity appropriate.

2.7 Legalese is to be avoided (for example, "I put it to you", "my learned friend", "His Honour").

- **Handout G: 'Guidelines for Cross-examination of Children and Persons Suffering from Mental Disability' by the District Court of Western Australia** *(continued)*

2.8 A young child should not be accused of "lying" except where the defence case is that the child is deliberately telling lies. Rather, counsel should suggest the witness' version is "not correct", or is "wrong" or the child should be asked whether an alternative version has occurred. The purpose of this guideline is to emphasise that counsel should normally avoid an unnecessary allegation that a witness is "lying" which may cause distress to the witness.

2.9 The witness should not be subject to unduly repetitive questioning.

2.10 Counsel should not mix topics or switch between topics. Events should be dealt with in a logical and/or chronological sequence.

2.11 In cases where the witness clearly is incapable of understanding inconsistencies and the inconsistencies only go to the issue of reliability, counsel should give consideration to limiting or abandoning cross-examination on otherwise proven inconsistencies. In such cases Counsel should seek a ruling from the trial judge as to whether proven inconsistencies can be relied upon in the closing address without comment that the inconsistencies were not the subject of cross-examination.

George Kingsley
Acting Principal Registrar

- **Handout H: News Article – 'Two-year-old girl helps convict abuser after becoming youngest person in UK to give evidence in court' by Natasha Salmon. The Independent, 11 October 2017.**

News › UK › Crime

Two-year-old girl helps convict abuser after becoming youngest person in UK to give evidence in court

Man sentenced to 10-years in prison as a result of her evidence

Natasha Salmon | Wednesday 11 October 2017 11:19 BST

Concentrix is understood to be the only company being considered to become the Ministry of Justice's debt collector (Getty) *Getty*

A two-year-old girl is believed to have become the youngest person to give evidence in a UK criminal case, which led to her abuser is sent to prison for more than 10 years for sexual offences against the child.

- **Handout H: News Article – 'Two-year-old girl helps convict abuser after becoming youngest person in UK to give evidence in court' by Natasha Salmon. The Independent, 11 October 2017.** *(continued)*

The toddler was interviewed by a specialist child abuse police officer, assisted by a Ministry of Justice-registered intermediary who advised on the best way to question the child.

The decison appears to have been justified by the defendant's decision to plead guilty before the case came to trial. The man was sentenced to more than 10 years behind bars for sexual offences against the child.

> Abuse survivors are being re-traumatised by the NHS
>
> A dozen more men charged in Rotherham child sexual abuse probe
>
> Paedophile director added jokes about child abuse into new film

Neither the police force involved or the defendant has been named in order to protect the identity of the girl, according to *The Guardian* which originally reported the story.

Officers who used simple "who", "what" and "where" questions, with the child. A paper figure was used so she could point to parts of the body.

At one point the girl was put off when an officer wearing blue medical gloves attemped to take a mouth swab for forensic analysis.

But investigators turned it into a game and everyone in the room was given gloves and swabs.

They played for several minutes pretending to brush their teeth and, once comfortable, the child gave a mouth swab without difficulty.

Eventually the gilr named her abuser and described what had happened.

Children's charity the NSPCC now hope the case will demonstrate that sexual predators are wrong to believe very young children will not be able to give evidence against them.

A spokesman for the children's charity said the girl was "incredibly brave" and called on the Ministry of Justice to drastically increase the availability of "well-trained experts" in this area.

He said: "An independent specialist who can ensure children are questioned appropriately and their evidence is understood is as important for justice as providing an interpreter for a witness who can't speak the language."

Speaking on behalf of the organisation Intermediaries for Justice, criminologist Dame Joyce Plotnikoff said: "Offenders may target the most vulnerable in society in the belief that they won't be able to tell what happened, so this is an important case."

More about: | child abuse | Ministry of Justice | Crown Court | child sexual abuse

- **Handout I: 'Frequently Asked Questions' by Child Witness Service**

VICTIM SUPPORT & CHILD WITNESS SERVICE

Child Witness Service

Frequently asked questions

The police have told you about my child. What happens next? ►
A child witness worker (CWW) will be allocated to your child. You will be contacted by the CWW (usually within 48 hours of a referral being made) by telephone or letter. The CWW will tell you more about the role of the Child Witness Service and you will be offered an appointment.
Help from the Child Witness Service is free and is provided by the Department of Justice I. The service is available for all children and young people up to and including 18 years of age. The child can be either a victim (complainant) or a witness to a crime.

My child has recorded their police interview. Does he/she still have to give evidence in court? ►
Yes. Your child's police interview will only form part of your child's overall evidence.
Your CWW will discuss your child's individual circumstances at the first meeting. However, you are welcome to contact your CWW if you have any questions.

How will my child give evidence? ►
The way that your child gives evidence will depend upon a range of factors including the type of charge, age of the child and their role in the trial. Children can either give their evidence in open court or via closed circuit television (CCTV). It is not automatic for all children to give their evidence via CCTV. Please speak with your CWW to discuss your child's individual situation.

Does CWS provide counselling for children? ►
No. However, your CWW can help by referring your child to an appropriate counselling service.

Do children always have to give evidence? ►
No, not always. While children usually provide evidence, there are some situations in which they may not be required to. Your CWW will advise you of the specific situation for your child.

Which court will deal with my child's matter? ►
Children give evidence as witnesses in a number of courts. The age of the accused person and the type of the charge(s) they face will determine which court the matter will be heard in.
Children may be involved with four different courts:

Children's Court ►
A matter is usually heard in the Children's Court if the accused was under the age of 18 years when the alleged offence took place. There are some exceptions to this rule – your CWW will discuss this with you if relevant to your child's case.

Magistrate's Court ►
The Magistrates Court deals with adults aged 18 or over, required to appear in court after being charged with a criminal offence.
Some criminal offences are known as 'simple offences' and will be dealt with in the Magistrates Court.

District and Supreme Courts ►
The District Court and the Supreme Court only deal with 'indictable offences'. Indictable offences are

serious crimes for which a person may be tried by a judge and jury. Should the accused be convicted of an indictable offence, the sentencing options available to these courts are harsher than those offences dealt with in the Magistrate's Court.
The Supreme Court also hears any appeals for convictions and sentences.

How long will court take? ►
Each case is very different, however the court process is generally lengthy. Your CWW will discuss this further with you.

Who else might my child talk to during the court process? ►
In addition to your CWW, your child may have contact with the judge or magistrate, prosecutor, defence counsel, court appointed officer, usher and police.

How can I be sure my child will be safe? ►
The Child Witness Service aims to offer a safe and secure environment for your child. Please discuss any concerns you have with regards to your child's safety with your CWW.

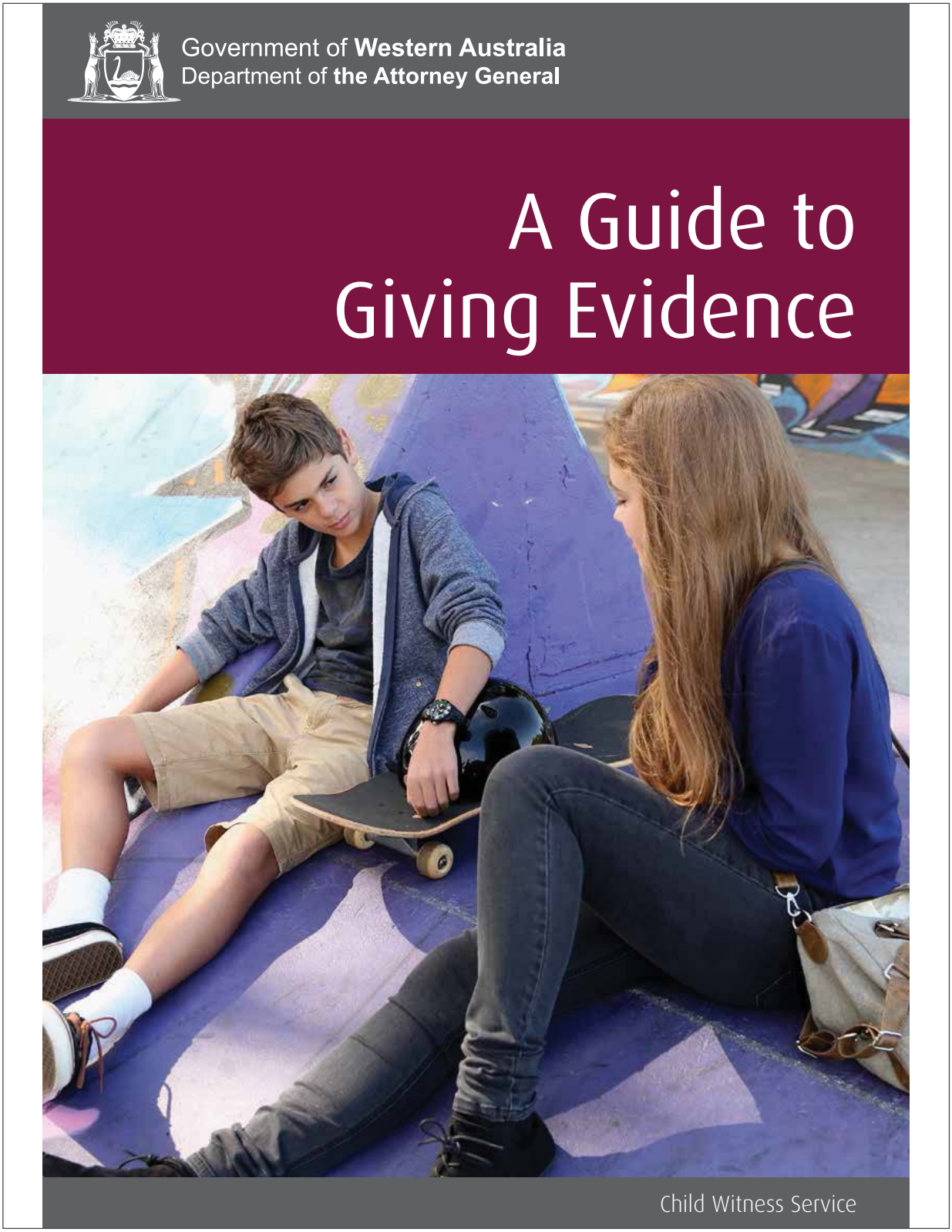
When a child gives evidence, who will ask the questions? ►
Generally your child will be asked questions by the judge or magistrate, prosecutor and defence counsel. Your CWW will be able to provide more specific information with regard to who will question your child.

What is a victim impact statement? ►
A victim impact statement (VIS) is a document that allows your child to tell the judge or magistrate about any impact that the offence(s) have had on their life. The VIS can only be used if the matter proceeds to sentencing. Your CWW will be able to provide you with further information about a VIS, as well as advising you when it is time to complete one.

How do I find out what is happening in court? ►
Your child's witness worker will contact you each time the accused person appears in court and will advise you of the next court appearance date.
The CWW will contact you well before the date your child is required to give evidence to arrange court preparation sessions.

Does my child need to go to every court appearance? ►
No. It is not necessary for you or your child to attend all court appearances, as your CWW can tell you what happened. If you or your child want to go to court, contact your CWW to talk about whether this is appropriate and the court support that is available.

- **Handout J: 'A Guide to Giving Evidence' by Child Witness Service, Department of the Attorney General, Government of Western Australia**



BEING A WITNESS

This magazine will help you understand your role as a witness. Lots of young people feel scared, worried, nervous and confused when they have to give evidence.

You will learn about giving evidence, the rules for witnesses and some contact numbers that may help you as the case moves through the court process.

WHAT IS A WITNESS?

A witness is a victim, or someone who has seen or heard something that is important for a court to know during a trial.

If you are going to give evidence, you would have provided a statement to police. A statement can be done in two different ways. Some people talk to the police and their statement is then typed and signed. Other witnesses will sit in a room with a police officer and answer questions which are recorded onto a DVD. This is called a Visually Recorded Interview (VRI).

There are different types of courts in Western Australia including:

- Children's Court
- Magistrates Court
- District Court
- Supreme Court.

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- **Handout J: 'A Guide to Giving Evidence' by Child Witness Service, Department of the Attorney General, Government of Western Australia** *(continued)*

BEFORE YOU GIVE EVIDENCE

Once you know that you have to give evidence the Child Witness Service will be available to help you. A child witness worker will support you through the court process and answer your questions.

If you are required to give evidence at any court you should be given a summons. A summons is a legal document that tells you the date of the trial and which court you need to attend.

> "YOU CANNOT JUST IGNORE A SUMMONS AS IT IS A LEGAL DOCUMENT THAT STATES YOU HAVE TO ATTEND COURT. THE SUMMONS IS USUALLY GIVEN TO YOU BY A POLICE OFFICER OR SOMEONE FROM THE SHERIFF'S OFFICE."

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In most cases you will also meet with the prosecutor before you give evidence.

> THE PROSECUTOR WORKS FOR THE STATE TO PRESENT EVIDENCE ABOUT THE ALLEGED OFFENCE. THIS MEETING IS CALLED PROOFING. THE PROOFING ALLOWS YOU TO TALK ABOUT YOUR EVIDENCE TO MAKE SURE IT IS CORRECT AND YOU HAVE INCLUDED EVERYTHING

If you have a written statement the prosecutor will sit and talk with you about the content of your statement. If you did a visually recorded interview, the prosecutor will sit with you while you watch the DVD before the trial.

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- **Handout J: 'A Guide to Giving Evidence' by Child Witness Service, Department of the Attorney General, Government of Western Australia** *(continued)*

HOW DO I GIVE EVIDENCE?

There are two ways to give evidence: open court or closed-circuit television (CCTV).

Open court

When a witness gives evidence in open court this means they appear in the actual courtroom to answer the questions. Other people in the courtroom at this time will include the judge and jury or magistrate, prosecutor, defence lawyer, security and the accused.

Closed-circuit television (CCTV)

When a witness gives evidence via CCTV, they will link into the courtroom live via TVs and cameras. There will be two TV screens in front of them and the witness will see the judge or magistrate on one TV and the prosecutor or defence lawyer on the other TV. If you use CCTV you will not see the accused person.

Some people are automatically allowed to give their evidence in the CCTV room but this is not the case for everyone. If you are worried about giving your evidence in the courtroom it is important that you let your child witness worker know straight away.

> "YOUR CHILD WITNESS WORKER CAN SHOW YOU WHAT EITHER A COURTROOM, OR CCTV LOOKS LIKE, DEPENDING ON HOW YOU ARE GIVING YOUR EVIDENCE"

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WHAT TO EXPECT WHEN GIVING EVIDENCE

When you first start giving your evidence the court will ask you to state your full name. It is important that you also provide your middle names if you have any. After you have provided your full name you will have to make a promise to the court that you will tell the truth when giving your evidence. You can choose between saying the **oath** or the **affirmation** (see definitions on page 10).

There are three parts to giving evidence:

Evidence in chief

These are the questions that will be asked by the prosecutor. If you have provided a visually recorded interview this will generally be part of your evidence in chief.

Cross examination

This is the part of your evidence where the defence lawyer will ask you questions. The defence lawyer works for the accused person and represents their case in court.

Re-examination

Once the defence lawyer has finished asking questions the prosecutor can speak with you again. This is called re-examination and allows the prosecutor to clarify anything said during cross examination or to allow you to explain an answer where necessary. Re-examination does not happen in all cases.

- **Handout J: 'A Guide to Giving Evidence' by Child Witness Service, Department of the Attorney General, Government of Western Australia** *(continued)*

SOME RULES TO HELP WITNESSES

- **You must tell the truth.** This is the most important rule.
- **Tell the lawyers if you don't understand a question.** Sometimes the questions might be hard to understand or they might be confusing. It is important that you tell the lawyers if you don't understand so they can ask the question in a way that is easier for you to understand.
- **It is OK to say you don't remember.** If you are asked a question and the truth is you don't remember the answer then it is OK for you to tell the court that you don't remember. It is important that you don't guess your answers. No one is going to be angry with you if you don't remember an answer.
- **It's OK to say you don't know the answer.** If you are asked a question and you don't know the answer it is OK to tell the court that you don't know.
- **It is OK to ask for a break.** If you are giving evidence and start to feel upset, confused or tired it is a good idea to ask for a break.
- **You can correct the lawyers.** The lawyers may suggest that things happened in a certain way and if you don't agree it is OK to tell them they are wrong.
- **You must answer all of the questions.** If an inappropriate question is asked the judge or magistrate, or one of the lawyers will say something. Sometimes there will be questions that you don't like or you can't see why they matter but you will still have to answer them.
- **Do not discuss your evidence with other witnesses.** It is very important that you do not discuss your evidence with other witnesses.

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TIPS FOR GIVING EVIDENCE

- Sometimes you may be asked the same question more than once. It doesn't mean that you have given a wrong answer. The lawyers just need to clarify what you are saying.
- If you do not hear a question properly it is OK to ask the lawyers to repeat the question.
- Take your time to answer the questions. There is no time limit so it is OK to think about your answers.
- Sometimes the lawyer asking the questions may have a firm voice but just remember you are not in any trouble and no one is angry with you.
- If you are feeling nervous or upset it may help to take some deep breaths. A glass of water and tissues will be available.
- When some people get nervous their voice can be very quiet. If the court is having trouble hearing your answers they may ask you to speak louder. No one is angry with you but it is important that everyone can hear your answers.
- The judge/magistrate is called "Your Honour."
- There is no chewing gum or eating in the court or CCTV room.
- Mobile phones have to be turned off when you are giving evidence.

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- **Handout J: 'A Guide to Giving Evidence' by Child Witness Service, Department of the Attorney General, Government of Western Australia** *(continued)*

FREQUENTLY ASKED QUESTIONS

Below are some of the questions that young people ask us about the day they attend to give evidence.

What should I wear when I come to court as a witness? It is important that you wear clean clothing that is respectful to the court. Don't wear t shirts with offensive slogans or pictures. Low cut tops are also inappropriate. While jeans with rips can be fashionable it is best not to wear them to court. You will also need to remove hats and sunglasses when giving evidence. Bring a jacket because it can be cold in court.

What time should I arrive at the court? The summons will generally provide you with a time for attending court however you may be given a different time by the prosecutor or child witness worker. The court will normally start at 10am and finish at 4pm.

Do I need to bring anything with me? Bring some snacks as you may have to wait prior to giving evidence. You may also want to bring a book, magazine, hand held games (ie Nintendo DS) or an iPod/iPad. Depending on the court that you are attending there may also be a DVD player for you to watch movies.

How many days will I need to attend the court? You will need to attend court until you have completed your evidence. This can sometimes mean that you need to attend court for two days in a row.

Who can I bring for support? You are welcome to bring your parents or an adult you feel comfortable with on the day you give evidence. There can be limited space available at some of the courts so it is best to only bring a couple of people with you.

If you are giving evidence in the CCTV room you can nominate a support person to sit in the CCTV room with you. The person has to be over 18 years old and they cannot be a witness in the trial. The support person also has to be approved by the court. It is best to discuss this with your worker from the Child Witness Service.

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DEFINITIONS

Accused: The person who has been charged with a crime. This person can also be known as the defendant.

Adjourned: When a court matter is postponed to another date.

Affirmation: A promise that you make to the court that you will tell the truth when giving evidence. It states the following:

"I sincerely declare and affirm that the evidence I give in this case will be the truth, the whole truth and nothing but the truth"

You can choose between the affirmation and oath (see oath)

Alleged: When someone has been accused of committing a crime but it is yet to be proven in court.

Bail: When the accused person is allowed to remain in the community whilst the matter goes through the court process. Sometimes there are special rules that the accused has to follow and these are called bail conditions.

Child Witness Service: The staff will support you as the matter moves through court. This support can include a tour of the courts or CCTV room, counselling referrals, providing information and preparation on your role as a witness and answering questions about the court process.

Closed Circuit Television (CCTV): The CCTV room that is separate to the courtroom where a young person can give their evidence instead of being in the courtroom. Please speak with your child witness worker to see if you can use the CCTV room to give your evidence.

Complainant: The person who has been the victim of a crime.

Court Appointed Officer (CAO): The person who sits in the CCTV room with you when you give evidence.

Cross Examination: The part of your evidence where you answer questions from the defence lawyer.

Defence Lawyer: The lawyer who works for the accused person and represents their case in court.

Evidence: Information that witnesses provide to the court about the alleged crime.

Evidence in Chief: The first part of your evidence when you answer questions asked by the prosecutor. If you have done a visually recorded interview with the police this will be part of your evidence in chief.

Guilty: This means that there was enough evidence to prove that the accused person has committed the crime.

Judge: The person in charge of all court matters in the District and Supreme Court.

Jury: The 12 people from the community who listen to all the evidence presented at a trial and decide if the accused person is guilty or not guilty of a crime (see verdict).

Magistrate: The person in charge of a court matter when it is heard in the Magistrates or Children's Court. In a trial the magistrate will listen to the evidence and decide if the accused person is guilty or not guilty of the charge.

Not Guilty: This means that there was not enough evidence during the trial to prove that the accused person had committed a crime.

Oath: A promise that you make to the court that you will tell the truth when giving evidence. It states the following:

"I swear by almighty God that the evidence I give in this case will be the truth, the whole truth and nothing but the truth"

You will hold the bible in your hand when reading out the oath. You can choose between the affirmation and oath (see affirmation)

Offence: When someone has been charged with breaking the law it is alleged that they have committed an offence.

Office of the Director of Public Prosecutions: The lawyers in this office represent the state in criminal matters. The lawyers will appear in the District and Supreme Courts. The office is also known as the DPP.

Open Court: When a witness provides their evidence in the courtroom. The judge/magistrate, lawyers and the accused person will be in the courtroom with the witness when they are giving evidence.

Plea: When the accused person tells the court if they are going to plead guilty or not guilty to the charges.

Police Prosecutor: A police officer who is trained to present the case against the accused person in the Magistrate and Children's Court.

Police Statement: The statement that you provide to police which has the details of what happened.

Proofing: The appointment that you will have with the state Prosecutor to review your evidence before a trial.

Prosecutor: The lawyer who works on behalf of the state to present evidence against the accused person.

Sentencing: When a judge or magistrate will decide on the penalty for someone convicted of a crime.

Summons: The legal document that is given to you and explains when you must attend court to give evidence.

Support Person: A person that is approved by the court to sit with you in the CCTV room when you give evidence. The person cannot be a witness in the same court matter and must be over 18 years old.

Trial: The date where all of the evidence is presented to the court by witnesses and a decision is made on whether or not the accused is guilty or not guilty. It is important to remember that a trial will normally last for more than one day.

Verdict: The outcome of the trial. In the District and Supreme Court the verdict is decided by the jury. In the Children's and Magistrates Court it is decided by the magistrate. The accused person can be found guilty or not guilty.

Victim Impact Statement: A document that allows the complainant to tell the court about the impact the crime has had on their life. The victim impact statement is given to the court at the time of sentencing.

Visually Recorded Interview (VRI): Some young people will give a statement to police that is recorded on a DVD. This statement is called a visually recorded interview.

Witness: A witness is someone who gives evidence about something they heard or saw. A witness will answer questions from both the prosecutor and defence lawyer when the case goes to a trial.

- **Handout J: 'A Guide to Giving Evidence' by Child Witness Service, Department of the Attorney General, Government of Western Australia** *(continued)*

USEFUL CONTACTS

Child Witness Service
Phone 9425 2850
Email mbxcws@justice.wa.gov.au

Office of the Director of Public Prosecutions
Phone 9425 3999

Police Prosecutions
Phone 9218 5200

Kids Help Line
Phone 1800 551 800

Lifeline
Phone 13 11 14

Crisis Care
Phone 9223 1111

Youth Beyond Blue
Phone 1300 224 636
Web www.youthbeyondblue.com

Headspace
Web www.headspace.org.au

Victims of Crime Website
Web www.victimsofcrime.wa.gov.au

Sexual Assault Resource Centre
Phone 9340 1828

Police
Phone 131 444

QUESTIONS TO ASK YOUR WORKER

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Child Witness Service
Department of the Attorney General
Phone 9425 2850
Email mbxcws@justice.wa.gov.au
Web www.dotag.wa.gov.au

INTERNATIONAL INSTRUMENTS AND DOMESTIC LAWS ON WOMEN AND GIRLS

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

UNIVERSAL DECLARATION OF HUMAN RIGHTS[30] (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.

- **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.

30 Declaration adopted by the UN General Assembly, 10 December 1948

DECLARATION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN[31] (1967)

- **Article 1**

  Discrimination against women, denying or limiting as it does their equality of rights with men, is fundamentally unjust and constitutes an offence against human dignity.

- **Article 2**

  All appropriate measures shall be taken to abolish existing laws, customs, regulations and practices which are discriminatory against women, and to establish adequate legal protection for equal rights of men and women, in particular:

  a. The principle of equality of rights shall be embodied in the constitution or otherwise guaranteed by law;
  b. The international instruments of the United Nations and the specialized agencies relating to the elimination of discrimination against women shall be ratified or acceded to and fully implemented as soon as practicable.

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (SIGNED: 1979; ENTRY INTO FORCE: 1981)

- **Article 1 - Definition of Discrimination**

  For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

- **Article 2 - Measures to be Taken to Eliminate Discrimination**

  States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

  (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
  (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
  (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
  (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

[31] Resolution adopted by the UN General Assembly, 7 November 1967

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
(g) To repeal all national penal provisions which constitute discrimination against women

- **Article 3 - Guarantees full development and advancement of women**

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

- **Article 4 - Special Measures**

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

- **Article 5 - Modifying Social and Cultural Patterns of Conduct**

States Parties shall take all appropriate measures:
(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;
(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

- **Article 11 – Equality in Employment**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:
(a) The right to work as an inalienable right of all human beings;
(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
(c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.
2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

- **Article 15 – Equality Before the Law**

1. States Parties shall accord to women equality with men before the law.
2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.
3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.
4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

- **Article 16 – Marriage**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
(a) The same right to enter into marriage;
(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
(c) The same rights and responsibilities during marriage and at its dissolution;
(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

BANGALORE PRINCIPLES (1988) – ON DOMESTICATION OF INTERNATIONAL HUMAN RIGHTS NORMS

1. Fundamental human rights and freedoms are inherent in all humankind and find expression in constitutions and legal systems throughout the world and in the international human rights instruments.
2. These international human rights instruments provide important guidance in cases concerning fundamental human rights and freedoms.
3. There is an impressive body of jurisprudence, both international and national, concerning the interpretation of particular human rights and freedoms and their application. This body of jurisprudence is of practical relevance and value to judges and lawyers generally.
4. In most countries whose legal systems are based upon the common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. However, there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law – whether constitutional, statute or common law – is uncertain or incomplete.
5. This tendency is entirely welcome because it respects the universality of fundamental human rights and freedoms and the vital role of an independent judiciary in reconciling the competing claims of individuals and groups of persons with the general interests of the community.
6. While it is desirable for the norms contained in the international human rights instruments to be still more widely recognised and applied by national courts, this process must take fully into account local laws, traditions, circumstances and needs.
7. It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.
8. However, where national law is clear and inconsistent with the international obligation of the state concerned, in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.
9. It is essential to redress a situation where, by reason of traditional legal training which has tended to ignore the international dimension, judges and practising lawyers are often unaware of the remarkable and comprehensive developments of statements of international human rights norms. For the practical implementation of these views it is desirable to make provision for appropriate courses in universities and colleges, and for lawyers and law enforcement officials; and meetings for exchanges of relevant information and experience.
10. These views are expressed in recognition of the fact that judges and lawyers have a special contribution to make in the administration of justice in fostering universal respect for fundamental human rights and freedoms.

CEDAW COMMITTEE GENERAL RECOMMENDATION NO. 12[32] (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[33] (1992) – GENDER-BASED VIOLENCE

General comments

6. The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.

7. Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include:

(a) The right to life;
(b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment;
(c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict;
(d) The right to liberty and security of person;
(e) The right to equal protection under the law;
(f) The right to equality in the family;
(g) The right to the highest standard attainable of physical and mental health;
(h) The right to just and favourable conditions of work.

[...]

9. [...] Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to

32 http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom12

33 http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19

investigate and punish acts of violence, and for providing compensation.
Comments on specific articles of the Convention

[...]

Articles 2(f), 5 and 10(c)

11. Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. While this comment addresses mainly actual or threatened violence the underlying consequences of these forms of gender-based violence help to maintain women in subordinate roles and contribute to the low level of political participation and to their lower level of education, skills and work opportunities.

12. These attitudes also contribute to the propagation of pornography and the depiction and other commercial exploitation of women as sexual objects, rather than as individuals. This in turn contributes to gender-based violence.

[...]

Article 11

17. Equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace.

18. Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.

[...]

Article 14

21. Rural women are at risk of gender-based violence because traditional attitudes regarding the subordinate role of women that persist in many rural communities. Girls from rural communities are at special risk of violence and sexual exploitation when they leave the rural community to seek employment in towns.

[...]

Article 16 (and article 5)

23. Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which

are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence, and coercion. These forms of violence put women's health at risk and impair their ability to participate in family life and public life on a basis of equality.

Specific recommendation

24. In light of these comments, the Committee on the Elimination of Discrimination against Women recommends that:

(a) States parties should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act;

(b) States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity. Appropriate protective and support services should be provided for victims. Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention;

[...]

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

[...]

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

[...]

(k) States parties should establish or support services for victims of family violence, rape, sexual assault and other forms of gender-based violence, including refuges, specially trained health workers, rehabilitation and counselling;

[...]

(r) Measures that are necessary to overcome family violence should include:

(i) Criminal penalties where necessary and civil remedies in cases of domestic violence;
(ii) Legislation to remove the defence of honour in regard to the assault or murder of a female family member;
(iii) Services to ensure the safety and security of victims of family violence, including refuges, counselling and rehabilitation programmes;
(iv) Rehabilitation programmes for perpetrators of domestic violence;
(v) Support services for families where incest or sexual abuse has occurred;

[...]

(t) States parties should take all legal and other measures that are necessary to provide effective protection of women against gender-based violence, including, inter alia:

(i) Effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including inter alia violence and abuse in the family, sexual assault and sexual harassment in the workplace;
(ii) Preventive measures, including public information and education programmes to change attitudes concerning the roles and status of men and women;
(iii) Protective measures, including refuges, counselling, rehabilitation and support services for women who are the victims of violence or who are at risk of violence;

[...]

CEDAW COMMITTEE GENERAL RECOMMENDATION NO. 28[34] (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[35] (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.

[...]

34 CEDAW/C/2010/47/GC.2 (19 October 2010)
35 EDAW/C/GC/33 (23 July 2015)

5. The scope of the right of access to justice also includes plural justice systems. The term "plural justice systems" refers to the coexistence within a State party of State laws, regulations, procedures and decisions on one hand, and of religious, customary, indigenous or community laws and practices on the other hand. Therefore, plural justice systems include multiple sources of law, whether formal or informal – State, non-State and mixed – that women may encounter when seeking to exercise their right of access to justice. Religious, customary, indigenous and community justice systems – called traditional justice systems in this general recommendation – may be formally recognized by the State, operate with the State's acquiescence with or without any explicit status, or function outside of the State's regulatory framework.

[...]

9. Other factors also making it harder for women to access justice include: illiteracy, trafficking of women, armed conflict, seeking asylum, internal displacement, statelessness, migration, women heading households, widowhood, living with HIV/AIDS, deprivation of liberty, criminalization of prostitution, geographical remoteness, and stigmatization of women fighting for their rights. The fact that human rights defenders and organizations are frequently targeted because of their work must be emphasized and their own right to access justice protected.

[...]

13. The Committee has observed that the centralization of courts and quasi-judicial bodies in the main cities, their non-availability in rural and remote regions, the time and money needed to access them, the complexity of proceedings, the physical barriers for women with disabilities, the lack of access to quality, gender competent legal advice, including legal aid, as well as the deficiencies often noted in the quality of justice systems (gender-insensitive judgments/decisions due to the lack of trainings, delays and excessive length of proceedings, corruption, etc.) all prevent women from accessing justice.

14. Six interrelated and essential components — justiciability, availability, accessibility, good-quality, accountability of justice systems, and the provision of remedies for victims — are therefore necessary to ensure access to justice. While differences in prevailing legal, social, cultural, political and economic conditions will necessitate a differentiated application of these features in each State party, the basic elements of the approach are of universal relevance and of immediate application. Accordingly:

(a) Justiciability requires the unhindered access by women to justice as well as their ability and empowerment to claim their rights under the Convention as legal entitlements;

(b) Availability requires the establishment of courts and other quasi-judicial or other bodies across the State Party in both urban, rural and remote areas, as well as their maintenance and funding;

(c) Accessibility requires that all justice systems, both formal and quasi-judicial systems, are secure, affordable and physically accessible to women, and are adapted and appropriate to the needs of women including those who face intersectional or compounded forms of discrimination;

(d) Good quality of justice systems requires that all components of the system adhere to international standards of competence, efficiency, independence and impartiality5 and provide, in a timely fashion, appropriate and effective remedies that are enforced and that lead to sustainable gender-sensitive dispute resolution for all women. It also requires that justice systems are contextualized, dynamic, participatory, open to innovative practical measures, gender-sensitive, and take account of the increasing demands for justice by women;

(e) Provision of remedies requires the ability of women to receive from justice systems viable protection and meaningful redress for any harm that they may suffer (see article 2 of the Convention); and
(f) Accountability of justice systems is ensured through the monitoring of the functioning of justice systems to guarantee that they are in accordance with the principles of justiciability, availability, accessibility, good quality and provision of remedies. The accountability of justice systems also refers to the monitoring o f the actions of justice system professionals and of their legal responsibility in cases in which they violate the law.

[...]

22. Women, nonetheless, face many difficulties in gaining access to justice as a result of direct and indirect discrimination, as defined in paragraph 16 of General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention. Such inequality is not only apparent in the discriminatory content and/or impact of laws, regulations, procedures, customs and practices, but also in the lack of capacity and awareness of judicial and quasi-judicial institutions to address violations of women's human rights adequately. In its General Recommendation No. 28, the Committee therefore notes that judicial institutions must apply the principle of substantive or de facto equality as embodied in the Convention and interpret laws, including national, religious and customary laws, in line with that obligation. Article 15 of the Convention encompasses obligations for States parties to ensure that women enjoy substantive equality with men in all areas of the law.

[...]

26. Stereotyping and gender bias in the justice system have far-reaching consequences on women's full enjoyment of their human rights. They impede women's access to justice in all areas of law, and may particularly impact on women victims and survivors of violence. Stereotyping distorts perceptions and results in decisions based on preconceived beliefs and myths rather than relevant facts. Often judges adopt rigid standards about what they consider to be appropriate behavior for women and penalize those who do not conform to these stereotypes. Stereotyping as well affects the credibility given to women's voices, arguments and testimonies, as parties and witnesses. Such stereotyping can cause judges to misinterpret or misapply laws. This has far reaching consequences, for example, in criminal law where it results in perpetrators not being held legally accountable for violations of women's rights, thereby upholding a culture of impunity. In all areas of law, stereotyping compromises the impartiality and integrity of the justice system, which can, in turn, lead to miscarriages of justice, including the revictimization of complainants.

27. Judges, magistrates and adjudicators are not the only actors in the justice system who apply, reinforce and perpetuate stereotypes. Prosecutors, law enforcement officials and other actors often allow stereotypes to influence investigations and trials, especially in cases of gender-based violence, with stereotypes, undermining the claims of the victim/survivor and simultaneously supporting the defences advanced by the alleged perpetrator. Stereotyping, therefore, permeates both the investigation and trial phases and finally shapes the judgment.

[...]

62. The presence of plural justice systems can in itself limit women's access to justice by perpetuating and reinforcing discriminatory social norms. In many contexts, the availability of multiple avenues for gaining access to justice within plural justice systems notwithstanding, women are unable to

effectively exercise a choice of forum. The Committee has observed that, in some States parties in which systems of family and/or personal law based on customs, religion or community norms coexist alongside civil law systems, individual women may not be as familiar with both systems and/or at liberty to decide which regime applies to them.

63. The Committee has observed a range of models through which practices embedded in plural justice systems could be harmonized with the Convention in order to minimize conflict of laws and guarantee that women have access to justice. They include the adoption of legislation that clearly defines the relationship between existing plural justice systems, the creation of State review mechanisms and the formal recognition and codification of religious, customary, indigenous, community and other systems. Joint efforts by States parties and non-State actors will be necessary to examine ways in which plural justice systems can work together to reinforce protection for women's rights.

CEDAW COMMITTEE GENERAL RECOMMENDATION NO. 35[36] (2017) - ON GENDER-BASED VIOLENCE AGAINST WOMEN, UPDATING GENERAL RECOMMENDATION NO. 19

2. For over 25 years, the practice of States parties has endorsed the Committee's interpretation. The opinio juris and State practice suggest that the prohibition of gender-based violence against women has evolved into a principle of customary international law. General Recommendation No. 19 has been a key catalyst for this process.

[...]

15. Women's right to a life free from gender-based violence is indivisible from and interdependent with other human rights, including the right to life, health, liberty and security of the person, the right to equality and equal protection within the family, freedom from torture, cruel, inhumane or degrading treatment, freedom of expression, movement, participation, assembly and association.

16. Gender-based violence against women, may amount to torture or cruel, inhuman or degrading treatment in certain circumstances, including in cases of rape, domestic violence or harmful practices, among others. In some cases, some forms of gender-based violence against women may also constitute international crimes.

17. The Committee endorses the view of other human rights treaty bodies and special procedures mandate-holders that in making the determination of when acts of gender-based violence against women amount to torture or cruel, inhuman or degrading treatment, a gender sensitive approach is required to understand the level of pain and suffering experienced by women, and that the purpose and intent requirement of torture are satisfied when acts or omissions are gender specific or perpetrated against a person on the basis of sex.

[...]

III. General obligations of States parties under the Convention relating to gender-based violence against women

36 CEDAW/C/GC/35 (14 July 2017)

21. Gender-based violence against women constitutes discrimination against women under article 1 and therefore engages all of the obligations in the Convention. Article 2 establishes that the overarching obligation of States parties is to pursue by all appropriate means and without delay a policy of eliminating discrimination against women, including gender-based violence against women. This is an obligation of an immediate nature; delays cannot be justified on any grounds, including on economic, cultural or religious grounds. General recommendation No. 19 indicates that in respect of gender-based violence against women this obligation comprises two aspects of State responsibility: for such violence resulting from the actions or omissions of (a) the State party or its actors, and (b) non-State actors.

Responsibility for acts or omissions of State actors

22. Under the Convention and general international law, a State party is responsible for acts and omissions by its organs and agents that constitute gender-based violence against women. These include the acts or omissions of officials in its executive, legislative and judicial branches. Article 2 (d) of the Convention requires that States parties, and their organs and agents, refrain from engaging in any act or practice of direct or indirect discrimination against women and ensure that public authorities and institutions act in conformity with this obligation. Besides ensuring that laws, policies, programmes and procedures do not discriminate against women, according to article 2 (c) and (g), States parties must have an effective and accessible legal and services framework in place to address all forms of gender-based violence against women committed by State agents, on their territory or extraterritorially.

23. States parties are responsible for preventing these acts or omissions by their own organs and agents –including through training and the adoption, implementation and monitoring of legal provisions, administrative regulations and codes of conduct- and to investigate, prosecute and apply appropriate legal or disciplinary sanctions as well as provide reparation in all cases of gender-based violence against women, including those constituting international crimes, as well as in cases of failure, negligence or omission on the part of public authorities. In so doing, women's diversity and the risks of intersectional discrimination stemming from it should be taken into consideration.

Responsibility for acts or omissions of non-State actors

24. Under general international law, as well as under international treaties, a private actor's acts or omissions may engage the international responsibility of the State in certain cases. These include:

(a) Acts and omissions by non-state actors attributable to the States. The acts or omissions of private actors empowered by the law of that State to exercise elements of the governmental authority, including private bodies providing public services, such as healthcare or education, or operating places of detention, shall be considered as acts attributable to the State itself, as well as the acts or omissions of private agents in fact acting on the instructions of, or under the direction or control of that State, including when operating abroad.
(b) Due diligence obligations for acts and omissions of non-State actors. Article 2 (e) of the Convention explicitly provides that States parties are required to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise. This obligation, frequently referred to as an obligation of due diligence, underpins the Convention as a whole and accordingly States parties will be responsible if they fail to take all appropriate measures to prevent as well as to investigate, prosecute, punish and provide

reparation for acts or omissions by non-State actors which result in gender-based violence against women. This includes actions by corporations operating extraterritorially. In particular, States Parties are required to take necessary steps to prevent human rights violations abroad by corporations over which they may exercise influence, whether by regulatory means or by the use of incentives, including economic incentives. Under the obligation of due diligence, States parties have to adopt and implement diverse measures to tackle gender-based violence against women committed by non-State actors. They are required to have laws, institutions and a system in place to address such violence. Also, States parties are obliged to ensure that these function effectively in practice, and are supported and diligently enforced by all State agents and bodies. The failure of a State party to take all appropriate measures to prevent acts of gender-based violence against women when its authorities know or should know of the danger of violence, or a failure to investigate, prosecute and punish, and to provide reparation to victims/survivors of such acts, provides tacit permission or encouragement to acts of gender-based violence against women. These failures or omissions constitute human rights violations.

25. In addition, both international humanitarian law and human rights law have recognised the direct obligations of non-State actors, including as parties to an armed conflict, in specific circumstances. These include the prohibition of torture, which is part of customary international law and has become a peremptory norm (jus cogens).

26. The general obligations described in the paragraphs above encompass all areas of State action, including the legislative, executive and judicial branches, at the federal, national, sub-national, local and decentralised levels as well as privatised services. They require the formulation of legal norms, including at the constitutional level, the design of public policies, programmes, institutional frameworks and monitoring mechanisms, aimed at eliminating all forms of gender-based violence against women, whether committed by State or non-State actors. They also require, in accordance with articles 2 (f) and 5 (a) of the Convention, the adoption and implementation of measures to eradicate prejudices, stereotypes and practices that are the root cause of gender-based violence against women. In general terms, and without prejudice to the specific recommendations provided in the following section, these obligations include:

(a) At the legislative level, according to article 2 (b), (c), (e), (f) and (g) and article 5 (a), States are required to adopt legislation prohibiting all forms of gender-based violence against women and girls, harmonising domestic law with the Convention. This legislation should consider women victims/survivors as right holders and include age and gender-sensitive provisions and effective legal protection, including sanctions and reparation in cases of such violence. The Convention also requires the harmonization of any existing religious, customary, indigenous and community justice system norms with its standards, as well as the repeal of all laws that constitute discrimination against women, including those which cause, promote or justify gender-based violence or perpetuate impunity for these acts. Such norms may be part of statutory, customary, religious, indigenous or common law, constitutional, civil, family, criminal or administrative law, evidentiary and procedural law, such as provisions based on discriminatory or stereotypical attitudes or practices which allow for gender-based violence against women or mitigate sentences in this context.

(b) At the executive level, according to article 2 (c), (d) and (f) and article 5 (a), States are obliged to adopt and adequately budget diverse institutional measures, in coordination

with the relevant State branches. They include the design of focused public policies, the development and implementation of monitoring mechanisms and the establishment and/or funding of competent national tribunals. States parties should provide accessible, affordable and adequate services to protect women from gender-based violence, prevent its reoccurrence and provide or ensure funding for reparation to all its victims/survivors. States parties must also eliminate institutional practices and individual conduct and behaviours of public officials that constitute gender-based violence against women or tolerate such violence and which provide a context for lack of or for a negligent response. These include adequate investigation and sanctions for inefficiency, complicity and negligence by public authorities responsible for registration, prevention or investigation of this violence or for providing services to victims/survivors. Appropriate measures to modify or eradicate customs and practices that constitute discrimination against women, including those that justify or promote gender-based violence against women, must also be taken at this level.

(c) At the judicial level, according to articles 2 (d), (f) and 5 (a), all judicial bodies are required to refrain from engaging in any act or practice of discrimination or gender-based violence against women; and to strictly apply all criminal law provisions punishing this violence, ensuring all legal procedures in cases involving allegations of gender-based violence against women are impartial and fair, and unaffected by gender stereotypes or discriminatory interpretation of legal provisions, including international law. The application of preconceived and stereotyped notions of what constitutes gender-based violence against women, what women's responses to such violence should be and the standard of proof required to substantiate its occurrence can affect women's right to the enjoyment of equality before the law, fair trial and the right to an effective remedy established in articles 2 and 15 of the Convention.

IV. Recommendations

[...]

Protection

40. Adopt and implement effective measures to protect and assist women complainants and witnesses of gender-based violence before, during and after legal proceedings, including through:

(a) Protecting their privacy and safety, in line with general recommendation No. 33, including through gender-sensitive court procedures and measures, bearing in mind the victim/survivor's, witnesses' and defendant's due process rights.

(b) Providing appropriate and accessible protection mechanisms to prevent further or potential violence, without the precondition for victims/survivors to initiate legal actions, including through removal of communication barriers for victims with disabilities. This should include immediate risk assessment and protection, comprising a wide range of effective measures and, where appropriate, the issuance and monitoring of eviction, protection, restraining or emergency barring orders against alleged perpetrators, including adequate sanctions for non-compliance. Protection measures should avoid imposing an undue financial, bureaucratic or personal burden on women victims/survivors. Perpetrators or alleged perpetrators' rights or claims during and after judicial proceedings, including with respect to property, privacy, child custody, access, contact and visitation, should be determined in the light of

women's and children's human rights to life and physical, sexual and psychological integrity, and guided by the principle of the best interests of the child.

(c) Ensuring access to financial aid and free or low-cost high quality legal aid, medical, psychosocial and counselling services, education, affordable housing, land, child care, training and employment opportunities for women victims/survivors and their family members. Healthcare services should be responsive to trauma and include timely and comprehensive mental, sexual, reproductive health services, including emergency contraception and HIV Post Exposure Prophylaxis (PEP). States should provide specialist women's support services such as free of charge 24-hour helplines, and sufficient numbers of safe and adequately equipped crisis, support and referral centres, as well as adequate shelters for women, their children, and other family members as required;

(d) Providing protective and support measures in relation to gender-based violence to women in institutions, including residential care homes, asylum centres and places of deprivation of liberty;

(e) Establishing and implementing appropriate multi-sectoral referral mechanisms to ensure effective access of women survivors to comprehensive services, ensuring full participation of and cooperation with non-governmental women's organizations.

41. Ensuring all legal proceedings, protection and support measures and services to women's victims/survivors of gender-based violence respect and strengthen their autonomy. They should be accessible to all women, in particular to those affected by intersecting forms of discrimination, and take account of any specific needs of their children and other dependent persons. They should be available in the whole territory of the State party, and provided irrespective of women's residence status and their ability or willingness to cooperate in proceedings against the alleged perpetrator. States should also respect the principle of non-refoulement.

42. Addressing factors that heighten women's risk of exposure to serious forms of gender-based violence, such as the accessibility and availability of firearms, including their exportation, high rates of criminality and pervasiveness of impunity, which may be increased by armed conflict or heightened insecurity. Efforts to control the availability and accessibility of acid and other substances used to attack women should be undertaken.

43. Developing and disseminating accessible information aimed at women, in particular those affected by intersecting forms of discrimination such as those who live with a disability, are illiterate, or have no or limited knowledge of the official languages of the country, of the legal and social resources available to victims/survivors of gender-based violence against women, including reparation, through diverse and accessible media and community dialogue.

Prosecution and punishment

44. Ensure effective access of victims to courts and tribunals; ensure authorities adequately respond to all cases of gender-based violence against women, including by applying criminal law and as appropriate ex officio prosecution to bring the alleged perpetrators to trial in a fair, impartial, timely and expeditious manner and imposing adequate penalties. Fees or court charges should not be imposed on victims/survivors.

45. Ensure that gender-based violence against women is not mandatorily referred to alternative dispute resolution procedures, including mediation and conciliation. The use of these procedures should be strictly regulated and allowed only when a previous evaluation by a specialised team ensures the free and informed consent by the affected victim/survivor and that there are no indicators of further risks for the victim/survivor or their family members. These procedures should empower the women victims/survivors and be provided by professionals specially trained to understand and adequately intervene in cases of gender-based violence against women, ensuring an adequate protection of women's and children's rights as well as an intervention with no stereotyping or re-victimisation of women. These alternative procedures should not constitute an obstacle to women's access to formal justice.

Reparations

46. Provide effective reparation to women victims/survivors of gender-based violence. Reparation should include different measures, such as monetary compensation and the provision of legal, social and health services including sexual, reproductive and mental health for a complete recovery, and satisfaction and guarantees of non-repetition in line with general recommendations No. 28, 30 and 33. Such reparations should be adequate, promptly attributed, holistic and proportionate to the gravity of the harm suffered.

47. States parties should establish specific reparation funds, or include allocations for gender-based violence against women within existing funds, including under transitional justice mechanisms. States parties should implement administrative reparations schemes without prejudice to victims/survivors' rights to seek judicial remedies. States should design transformative reparation programmes that help to address the underlying discrimination or disadvantage which caused or contributed significantly to the violation, taking account of individual, institutional and structural aspects. Priority should be given to the victim/survivor's agency, wishes and decisions, safety, dignity and integrity.

Coordination, monitoring and data collection

48. Develop and evaluate all legislation, policies and programmes in consultation with civil society organisations, in particular women's organisations, including those that represent women who experience intersecting forms of discrimination. States parties should encourage cooperation among all levels and branches of the justice system and the organisations that work to protect and support women victims/survivors of gender-based violence, taking into account their views and expertise. States parties should encourage the work of human rights and women's non-governmental organisations.

49. Establish a system to regularly collect, analyse and publish statistical data on the number of complaints about all forms of gender-based violence against women, including technology mediated violence, the number and types of protection orders issued, the rates of dismissal and withdrawal of complaints, prosecution and conviction rates as well as time taken for disposal of cases. The system should include information on the sentences imposed on perpetrators and the reparation, including compensation, provided for victims/survivors. All data should be disaggregated by type of violence, relationship between the victim/survivor and the perpetrator, as well as in relation to intersecting forms of discrimination against women and other relevant socio-demographic characteristics, including the age of the victim. The analysis of the data should enable the identification of

protection failures and serve to improve and further develop preventive measures. This should, if necessary, include the establishment or designation of gender-based killing of women observatories to collect administrative data on gender related killings and attempted killings of women, also referred to as 'femicide' or 'feminicide.

50. Undertake or support surveys, research programmes and studies on gender-based violence against women, in order to, among other things, assess the prevalence of gender-based violence experienced by women and the social or cultural beliefs exacerbating such violence and shaping gender relations. These studies and surveys should take into account intersecting forms of discrimination, based upon the principle of self-identification.

51. Ensure that the process of collecting and maintaining data on gender-based violence against women complies with established international standards and safeguards, including legislation on data protection. The collection and use of statistics should conform to internationally accepted norms to protect human rights and fundamental freedoms and ethical principles.

52. Set up a mechanism or body, or mandate an existing mechanism or body, to coordinate, monitor and assess regularly the national, regional and local implementation and effectiveness of the measures, including those recommended in this document as well as other relevant regional and international standards and guidelines, to prevent and eliminate all forms of gender-based violence against women.

53. Allocate appropriate human and financial resources at national, regional and local levels to effectively implement laws and policies for the prevention, protection and victim/survivor support, investigation, prosecution and provision of reparations to victims/survivors of all forms of gender-based violence against women, including support to women's organisations.

DECLARATION ON THE ELIMINATION OF VIOLENCE AGAINST WOMEN[37] (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;

[37] Resolution No. 48/104 adopted by the General Assembly on 19 December 1993

(e) Consider the possibility of developing national plans of action to promote the protection of women against any form of violence, or to include provisions for that purpose in plans already existing, taking into account, as appropriate, such cooperation as can be provided by non-governmental organizations, particularly those concerned with the issue of violence against women;
(f) Develop, in a comprehensive way, preventive approaches and all those measures of a legal, political, administrative and cultural nature that promote the protection of women against any form of violence, and ensure that the re-victimization of women does not occur because of laws insensitive to gender considerations, enforcement practices or other interventions;
(g) Work to ensure, to the maximum extent feasible in the light of their available resources and, where needed, within the framework of international cooperation, that women subjected to violence and, where appropriate, their children have specialized assistance, such as rehabilitation, assistance in child care and maintenance, treatment, counselling, and health and social services, facilities and programmes, as well as support structures, and should take all other appropriate measures to promote their safety and physical and psychological rehabilitation;
(h) Include in government budgets adequate resources for their activities related to the elimination of violence against women;
(i) Take measures to ensure that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish violence against women receive training to sensitize them to the needs of women;
(j) Adopt all appropriate measures, especially in the field of education, to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for men and women;
(k) Promote research, collect data and compile statistics, especially concerning domestic violence, relating to the prevalence of different forms of violence against women and encourage research on the causes, nature, seriousness and consequences of violence against women and on the effectiveness of measures implemented to prevent and redress violence against women; those statistics and findings of the research will be made public;
(l) Adopt measures directed towards the elimination of violence against women who are especially vulnerable to violence;
(m) Include, in submitting reports as required under relevant human rights instruments of the United Nations, information pertaining to violence against women and measures taken to implement the present Declaration;
(n) Encourage the development of appropriate guidelines to assist in the implementation of the principles set forth in the present Declaration;
(o) Recognize the important role of the women's movement and non-governmental organizations world wide in raising awareness and alleviating the problem of violence against women;
(p) Facilitate and enhance the work of the women's movement and non-governmental organizations and cooperate with them at local, national and regional levels;
(q) Encourage intergovernmental regional organizations of which they are members to include the elimination of violence against women in their programmes, as appropriate.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (SIGNED: 1966; ENTRY INTO FORCE: 1976)

- **Article 2**

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:

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

- **Article 14 – Criminal Cases**

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) To be tried without undue delay;
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
(g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

- **Article 26 – Equality Before the Law**

  All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (SIGNED: 1966; ENTRY INTO FORCE: 1976)

- **Article 2**

  1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
  2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
  3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

- **Article 3**

  The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

CONVENTION ON THE RIGHTS OF THE CHILD (SIGNED: 1990; ENTRY INTO FORCE: 1990)

- **Article 3**

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

ECOSOC RESOLUTION 2005/20: GUIDELINES ON JUSTICE IN MATTERS INVOLVING CHILD VICTIMS AND WITNESSES OF CRIME (2005)

III. Principles

8. As stated in international instruments and in particular the Convention on the Rights of the Child as reflected in the work of the Committee on the Rights of the Child, and in order to ensure justice for child victims and witnesses of crime, professionals and others responsible for the well-being of those children must respect the following cross-cutting principles:

(a) Dignity. Every child is a unique and valuable human being and as such his or her individual dignity, special needs, interests and privacy should be respected and protected;

(b) Non-discrimination. Every child has the right to be treated fairly and equally, regardless of his or her or the parent's or legal guardian's race, ethnicity, colour, gender, language, religion, political or other opinion, national, ethnic or social origin, property, disability and birth or other status;

(c) Best interests of the child. While the rights of accused and convicted offenders should be safeguarded, every child has the right to have his or her best interests given primary consideration. This includes the right to protection and to a chance for harmonious development:

(i) Protection. Every child has the right to life and survival and to be shielded from any form of hardship, abuse or neglect, including physical, psychological, mental and emotional abuse and neglect;
(ii) Harmonious development. Every child has the right to a chance for harmonious development and to a standard of living adequate for physical, mental, spiritual, moral and social growth. In the case of a child who has been traumatized, every step should be taken to enable the child to enjoy healthy development;

(d) Right to participation. Every child has, subject to national procedural law, the right to express his or her views, opinions and beliefs freely, in his or her own words, and to contribute especially to the

decisions affecting his or her life, including those taken in any judicial processes, and to have those views taken into consideration according to his or her abilities, age, intellectual maturity and evolving capacity.

[...]

V. The right to be treated with dignity and compassion

10. Child victims and witnesses should be treated in a caring and sensitive manner throughout the justice process, taking into account their personal situation and immediate needs, age, gender, disability and level of maturity and fully respecting their physical, mental and moral integrity.

11. Every child should be treated as an individual with his or her individual needs, wishes and feelings.

12. Interference in the child's private life should be limited to the minimum needed at the same time as high standards of evidence collection are maintained in order to ensure fair and equitable outcomes of the justice process.

13. In order to avoid further hardship to the child, interviews, examinations and other forms of investigation should be conducted by trained professionals who proceed in a sensitive, respectful and thorough manner.

14. All interactions described in these Guidelines should be conducted in a child-sensitive manner in a suitable environment that accommodates the special needs of the child, according to his or her abilities, age, intellectual maturity and evolving capacity. They should also take place in a language that the child uses and understands.

VI. The right to be protected from discrimination

15. Child victims and witnesses should have access to a justice process that protects them from discrimination based on the child's, parent's or legal guardian's race, colour, gender, language, religion, political or other opinion, national, ethnic or social origin, property, disability and birth or other status.

16. The justice process and support services available to child victims and witnesses and their families should be sensitive to the child's age, wishes, understanding, gender, sexual orientation, ethnic, cultural, religious, linguistic and social background, caste, socio-economic condition and immigration or refugee status, as well as to the special needs of the child, including health, abilities and capacities. Professionals should be trained and educated about such differences.

17. In certain cases, special services and protection will need to be instituted to take account of gender and the different nature of specific offences against children, such as sexual assault involving children.

18. Age should not be a barrier to a child's right to participate fully in the justice process. Every child should be treated as a capable witness, subject to examination, and his or her testimony should not be presumed invalid or untrustworthy by reason of the child's age alone as long as his or her age and maturity allow the giving of intelligible and credible testimony, with or without communication aids and other assistance.

VII. The right to be informed

19. Child victims and witnesses, their parents or guardians and legal representatives, from their first contact with the justice process and throughout that process, should be promptly and adequately informed, to the extent feasible and appropriate, of, inter alia:

(a) The availability of health, psychological, social and other relevant services as well as the means of accessing such services along with legal or other advice or representation, compensation and emergency financial support, where applicable;

(b) The procedures for the adult and juvenile criminal justice process, including the role of child victims and witnesses, the importance, timing and manner of testimony, and ways in which "questioning" will be conducted during the investigation and trial;

(c) The existing support mechanisms for the child when making a complaint and participating in the investigation and court proceedings;

(d) The specific places and times of hearings and other relevant events;

(e) The availability of protective measures;

(f) The existing mechanisms for review of decisions affecting child victims and witnesses;

(g) The relevant rights for child victims and witnesses pursuant to the Convention on the Rights of the Child and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

20. In addition, child victims, their parents or guardians and legal representatives should be promptly and adequately informed, to the extent feasible and appropriate, of:

(a) The progress and disposition of the specific case, including the apprehension, arrest and custodial status of the accused and any pending changes to that status, the prosecutorial decision and relevant post-trial developments and the outcome of the case;

(b) The existing opportunities to obtain reparation from the offender or from the State through the justice process, through alternative civil proceedings or through other processes.

VIII. The right to be heard and to express views and concerns

21. Professionals should make every effort to enable child victims and witnesses to express their views and concerns related to their involvement in the justice process, including by:

(a) Ensuring that child victims and where appropriate witnesses are consulted on the matters set forth in paragraph 19 above;

(b) Ensuring that child victims and witnesses are enabled to express freely and in their own manner their views and concerns regarding their involvement in the justice process, their concerns regarding safety in relation to the accused, the manner in which they prefer to provide testimony and their feelings about the conclusions of the process;

(c) Giving due regard to the child's views and concerns and, if they are unable to accommodate them, explain the reasons to the child.

IX. The right to effective assistance

22. Child victims and witnesses and, where appropriate, family members should have access to assistance provided by professionals who have received relevant training as set out in paragraphs 40 to 42 below. This may include assistance and support services such as financial, legal, counselling, health, social and educational services, physical and psychological recovery services and other services necessary for the child's reintegration. All such assistance should address the child's needs and enable him or her to participate effectively at all stages of the justice process.

23. In assisting child victims and witnesses, professionals should make every effort to coordinate support so that the child is not subjected to excessive interventions.

24. Child victims and witnesses should receive assistance from support persons, such as child victim/witness specialists, commencing at the initial report and continuing until such services are no longer required.

25. Professionals should develop and implement measures to make it easier for children to testify or give evidence to improve communication and understanding at the pre-trial and trial stages. These measures may include:

(a) Child victim and witness specialists to address the child's special needs;

(b) Support persons, including specialists and appropriate family members to accompany the child during testimony;

(c) Where appropriate, to appoint guardians to protect the child's legal interests.

X. The right to privacy

26. Child victims and witnesses should have their privacy protected as a matter of primary importance.

27. Information relating to a child's involvement in the justice process should be protected. This can be achieved through maintaining confidentiality and restricting disclosure of information that may lead to identification of a child who is a victim or witness in the justice process.

28. Measures should be taken to protect children from undue exposure to the public by, for example, excluding the public and the media from the courtroom during the child's testimony, where permitted by national law.

XI. The right to be protected from hardship during the justice process

29. Professionals should take measures to prevent hardship during the detection, investigation and prosecution process in order to ensure that the best interests and dignity of child victims and witnesses are respected.

30. Professionals should approach child victims and witnesses with sensitivity, so that they:

(a) Provide support for child victims and witnesses, including accompanying the child throughout his or her involvement in the justice process, when it is in his or her best interests;

(b) Provide certainty about the process, including providing child victims and witnesses with clear expectations as to what to expect in the process, with as much certainty as possible. The child's participation in hearings and trials should be planned ahead of time and every effort should be made to ensure continuity in the relationships between children and the professionals in contact with them throughout the process;

(c) Ensure that trials take place as soon as practical, unless delays are in the child's best interest. Investigation of crimes involving child victims and witnesses should also be expedited and there should be procedures, laws or court rules that provide for cases involving child victims and witnesses to be expedited;

(d) Use child-sensitive procedures, including interview rooms designed for children, interdisciplinary services for child victims integrated in the same location, modified court environments that take child witnesses into consideration, recesses during a child's testimony, hearings scheduled at times of day appropriate to the age and maturity of the child, an appropriate notification system to ensure the child goes to court only when necessary and other appropriate measures to facilitate the child's testimony.

31. Professionals should also implement measures:

(a) To limit the number of interviews: special procedures for collection of evidence from child victims and witnesses should be implemented in order to reduce the number of interviews, statements, hearings and, specifically, unnecessary contact with the justice process, such as through use of video recording;

(b) To ensure that child victims and witnesses are protected, if compatible with the legal system and with due respect for the rights of the defence, from being cross-examined by the alleged perpetrator: as necessary, child victims and witnesses should be interviewed, and examined in court, out of sight of the alleged perpetrator, and separate courthouse waiting rooms and private interview areas should be provided;

(c) To ensure that child victims and witnesses are questioned in a child-sensitive manner and allow for the exercise of supervision by judges, facilitate testimony and reduce potential intimidation, for example by using testimonial aids or appointing psychological experts.

XII. The right to safety

32. Where the safety of a child victim or witness may be at risk, appropriate measures should be taken to require the reporting of those safety risks to appropriate authorities and to protect the child from such risk before, during and after the justice process.

33. Professionals who come into contact with children should be required to notify appropriate authorities if they suspect that a child victim or witness has been harmed, is being harmed or is likely to be harmed.

34. Professionals should be trained in recognizing and preventing intimidation, threats and harm to child victims and witnesses. Where child victims and witnesses may be the subject of intimidation, threats or harm, appropriate conditions should be put in place to ensure the safety of the child. Such safeguards could include:

(a) Avoiding direct contact between child victims and witnesses and the alleged perpetrators at any point in the justice process;

(b) Using court-ordered restraining orders supported by a registry system;

(c) Ordering pre-trial detention of the accused and setting special "no contact" bail conditions;

(d) Placing the accused under house arrest;

(e) Wherever possible and appropriate, giving child victims and witnesses protection by the police or other relevant agencies and safeguarding their whereabouts from disclosure.

XIII. The right to reparation

35. Child victims should, wherever possible, receive reparation in order to achieve full redress, reintegration and recovery. Procedures for obtaining and enforcing reparation should be readily accessible and child-sensitive.

36. Provided the proceedings are child-sensitive and respect these Guidelines, combined criminal and reparations proceedings should be encouraged, together with informal and community justice procedures such as restorative justice.

37. Reparation may include restitution from the offender ordered in the criminal court, aid from victim compensation programmes administered by the State and damages ordered to be paid in civil proceedings. Where possible, costs of social and educational reintegration, medical treatment, mental health care and legal services should be addressed. Procedures should be instituted to ensure enforcement of reparation orders and payment of reparation before fines.

XIV. The right to special preventive measures

38. In addition to preventive measures that should be in place for all children, special strategies are required for child victims and witnesses who are particularly vulnerable to recurring victimization or offending.

39. Professionals should develop and implement comprehensive and specially tailored strategies and interventions in cases where there are risks that child victims may be victimized further. These strategies and interventions should take into account the nature of the victimization, including victimization related to abuse in the home, sexual exploitation, abuse in institutional settings and trafficking. The strategies may include those based on government, neighbourhood and citizen initiatives.

[...]

COMMITTEE AGAINST TORTURE GENERAL COMMENT NO. 2[38] (2008)

18. The Committee has made clear that where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.

[...]

22. State reports frequently lack specific and sufficient information on the implementation of the Convention with respect to women. The Committee emphasizes that gender is a key factor. Being female intersects with other identifying characteristics or status of the person such as race, nationality, religion, sexual orientation, age, immigrant status etc. to determine the ways that women and girls are subject to or at risk of torture or ill-treatment and the consequences thereof. The contexts in which females are at risk include deprivation of liberty, medical treatment, particularly involving reproductive decisions, and violence by private actors in communities and homes. Men are also subject to certain gendered violations of the Convention such as rape or sexual violence and abuse. Both men and women and boys and girls may be subject to violations of the Convention on the basis of their actual or perceived non-conformity with socially determined gender roles. States parties are requested to identify these situations and the measures taken to punish and prevent them in their reports.

VIENNA CONVENTION ON THE LAW OF TREATIES (1969)

- **Article 26: *Pacta sunt servanda***

  Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

- **Article 27: Internal law and observance of treaties**

  A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

- **Article 46 - Provisions of internal law regarding competence to conclude treaties**

  1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
  2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

38 CAT/C/GC/2, 24 January 2008

UNESCO UNIVERSAL DECLARATION ON CULTURAL DIVERSITY (2001)

- Culture should be considered as a set of distinctive spiritual, material, intellectual and emotional features of society or a social group.

- **Article 4 – Human rights as guarantees of cultural diversity**
  The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.

FRIBOURG DECLARATION OF CULTURAL RIGHTS

- Cultural rights encompass ways of life language, literature, music, song, religion, belief systems, rites, ceremonies, sports, clothing, customs and traditions through which individuals and groups express their humanity, meaning they give to existence and build a worldview.

2012 REPORT OF UN SPECIAL RAPPORTEUR IN THE FIELD OF CULTURAL RIGHTS

- Preserving the existence and cohesion of a specific cultural community, national or subnational, should not be achieved to the detriment of one group within the community, for example, women.
- Importantly, combating cultural practices that are detrimental to human rights, far from jeopardizing the existence and cohesion of a specific cultural community, stimulates discussion, which facilitates an evolution towards embracing human rights, including in a very culturally specific way.

LIST OF PRO-WOMEN ACTS / PROVISIONS (DOMESTIC LAW)

CONSTITUTION

- **Article 25 - Equality of citizens**

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

- **Article 28 - Preservation of language, script and culture**

  Subject to Article 251 any section of citizens having a distinct language, script or culture shall have the right to preserve and promote the same and subject to law, establish institutions for that purpose.

- **Article 34 - Full participation of women in national life**

  Steps shall be taken to ensure full participation of women in all spheres of national life.

- **Article 35 - Protection of family, etc.**

  The State shall protect the marriage, the family, the mother and the child.

- **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.[39]

39 Punjab Commission on the Status of Women. http://pcsw.punjab.gov.pk/constitutional_rights_of_women

NATIONAL LAWS[40]

- **Pakistan Penal Code, 1860**

  Offenses covered in the PPC include (but are not limited to):

Physical harm of any sort (illegal touching, violence and abuse)	Wrongful restraint	Assault and criminal force against a woman with intent to strip her of her clothes or outrage her modesty	Forced abortions and miscarriages
Mental harm	Trespass of all types and criminal offences committed during trespass	Unnatural Offences	Exchange of women for purposes of settling a dispute
Assault	Kidnapping and Abducting children and women	Human Trafficking	Depriving a woman of her inheritance
Murder	Deceiving a woman in affairs relating to marriage	Forced prostitution	Attempted Offences (including aiding and abetting)
Honour Killings	Wrongful confinement	Forced marriages	Marriage to the Holy Quran

Source: UN Women (http://asiapacific.unwomen.org/en/countries/pakistan/evaw-pakistan/legislation-on-vaw)

- **Child Marriage Restraint Act, 1929**

  The law defines "child", if male, as under eighteen years of age, and if female, as under sixteen years of age. The punishment for contracting marriage with a minor is imprisonment up to six month and fine of fifty thousand rupees. Similar punishments are prescribed for the person solemnizing the marriage. The parents or guardians are also liable to same punishment under the law.

- **Muslim Family Law Ordinance (MFLO), 1961**

  This law deals with all matters relating to marriage, including registration, polygamy, divorce, maintenance and other relevant processes and procedures.[41]

40 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.

41 http://asiapacific.unwomen.org/en/countries/pakistan/evaw-pakistan/legislation-on-vaw

- **The Dissolution of Muslim Marriages Act, 1939**

  If a woman has not been delegated the right of divorce under section 8 of MFLO, the only course open to her if she wants to dissolve her marriage is Section 2[42] of the Dissolution of Muslim Marriage Act.

- **The Family Courts Act, 1964**

  The law as amended provides for special Family Courts to deal with all family-related issues, with at least one female judge in family courts in each district. The law has made the dissolution (khula) process easier for the woman. Prior to amendment, the law required the wife suing on the basis of khula to surrender 100% of the dower money. The amendment states that the Family Court may direct the wife to surrender 50% deferred dower and up to 25% admitted prompt dower to the husband. The Court shall also fix interim maintenance amount on first appearance of defendant. The Family Court may also exempt the personal appearance of pardahnashin lady (a lady who does not want to appear before men) and may permit her to be represented by an agent.

- **Dowry and Bridal Gifts (Restriction) Act, 1976**

  This law places restrictions on the amount of gifts to a bride and groom, while also requiring limited expenditure on the wedding functions. It also mandates all dowry items to be vested property of the bride. It further requires listing and valuation of all dowry and gift items.[43]

- **Anti-Terrorism Act 1997**

  This Act provides for the prevention of terrorism and sectarian violence and for speedy trial of

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42 *2. Grounds for decree for dissolution of marriage.*

A woman married under Muslim Law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:

(i) that the whereabouts of the husband have not been known for a period of four years;

(ii) that the husband has neglected or has filed to provide for her maintenance for a period of two years;

(ii-A) that the husband has taken an additional wife in contravention of the provisions of the Muslim Family Laws Ordinance, 1961;

(iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards;

(iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;

(v) that the husband was impotent at the time of the marriage and continues to be so;

(vi) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;

(vii) that she, having been given in marriage by her father or other guardian before she attained the age of sixteen years, repudiated the marriage before attaining the age of eighteen years:

Provided that the marriage has not been consumated;

(viii) that the husband treats her with cruelty, that is to say,

- (a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or
- (b) associates with women of evil repute of leads an infamous life, or
- (c) attempts to force her to lead an immoral life, or
- (d) disposes of her property or prevents her exercising her legal rights over it, or
- (e obstructs her in the observance of her religious profession or practice, or
- (f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran,

(ix) on any other ground which is recognized as valid for the dissolution of marriages under Muslim Law,

Provided that:

(a) no decree passed on ground (i) shall take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfies the Court he is prepared to perform his conjugal duties the Court shall set aside the said decree; and

(b) before passing a decree on ground (v) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfied the Court within such period, no decree shall be passed on the said ground.

43 http://asiapacific.unwomen.org/en/countries/pakistan/evaw-pakistan/legislation-on-vaw

heinous offences (such as kidnapping for ransom). The law covers issues of child molestation and gang rape.[44]

- **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.[45]

- **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.[46]

- **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.[47] Section 5A[48] which states that no zina-bil-jabr complaint will be converted to zina, was inserted.

- **The Protection Against Harassment of Women at the Workplace Act, 2010**

  This law introduced the definition of harassment at the workplace as an offense. It provides for wide descriptions of the workplace to include premises out of the place of work, where any official work or work activity is being carried out. Harassment is defined within the concept of work. A number of penalties are identified for those found guilty of harassment, varying upon the degree and extent of harassment. It also spells out the procedures where cases of harassment come forward. It also requires all workplaces to set up a committee to deal with such cases. It also requires the Government to appoint an Ombudsman to deal with any such cases.[49]

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44 Id.

45 Id.

46 Id.

47 Id.

48 *Offence of Zina (Enforcement of Hadood) Ordinance, 1979 Section.5A (Inserted by Protection of Women (Criminal Laws Amendment) Act, 2006-Section.12A)*

No case to be converted, lodged or registered under certain provisions:- No complaint of zina under section 5 read with section 203A of the Code of Criminal Procedure, 1898 and no case where an allegation of rape is made shall at any stage be converted into a complaint of fornication under section 496A of the Pakistan Penal Code (Act XLV of 1860) and no complaint of lewdness shall at any stage be converted into a complaint of zina under section 5 of the Offence of Zina (Enforcement of Hudood) Ordinance 1979 (Ordinance No. VII of 1979) or an offence of similar nature under any other law for the time being in force.

49 http://asiapacific.unwomen.org/en/countries/pakistan/evaw-pakistan/legislation-on-vaw

- **Criminal Law Amendment Act, 2010**

  The law amended Section 509 of the PPC, replacing the original section with the offence of sexual harassment, which has a wide definition. This law deals specifically about harassment at public places.[50]

- **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."[51]

- **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.[52] 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.[53] Section 11 states the powers of the NCSW thus:
  - To examine policy, programs and other measures taken by the government for gender equality, women's empowerment, political participation, representation, assess implementation and make suitable recommendations.
  - To review all laws, rules, and regulations affecting the status of rights of women and suggest repeal, amendment, or new legislation essential to eliminate discrimination, safeguard and promote the interest of women and achieve gender equality before law in accordance with the constitution and obligations under international covenants and commitments.
  - To sponsor, steer, encourage research to generate information, analysis and studies and maintain a database relating to women and gender issues to provide knowledge and awareness for national policy and strategic action for women empowerment
  - To recommend to the government of Pakistan to sign [sic] and ratify international instruments designed to protect human rights.
  - To develop and maintain interaction and dialogue with non-governmental organizations, experts and individuals in society and active association with similar commission and institutions in other countries for collaboration and action to achieve gender equality at the national, regional and international level.
  - To mobilize grants from domestic and international including multi and bilateral agencies, for meeting any of its obligations or performing its functions.
  - To monitor the implementation of international instruments that Pakistan has signed

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50 Id.

51 Sec.336 A of Pakistan Penal Code, Hurt Caused by Coercive Substance: Whoever with the intention or knowingly causes or attempts to cause hurt by means of a coercive substance or any substance which is deleterious to human body when it is swallowed, inhaled, comes into contract or received into human body or otherwise shall he said to cause hurt by coercive substance.

52 http://asiapacific.unwomen.org/en/countries/pakistan/evaw-pakistan/legislation-on-vaw

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

- **Criminal Law (Amendment) (Offences Relating to Rape) Act 2016 –** This law amended sections of the Pakistan Penal Code, 1860, the Code of Criminal Procedures, 1898, and the Qanoon-i-Shahadat Order, 1984. The significant portions refer to: (i) tougher penalties for rape; (ii) mandatory collection and use of DNA evidence to prove that rape has been committed; (iii) provisions allowing in-camera trials and the use of technology such as video links to record statements of the victim and witnesses; and (iv) non-disclosure of the identity of the victim.
    - Rape, defined: When a man has sexual intercourse (penetration) with a woman
        - against her will;
        - without her consent;
        - with forced consent (due to fear of death or of hurt);
        - where the woman gives her consent because believes she is married to him, but in fac there is no marriage; or
        - with or without her consent if she is under sixteen years of age.
    - A female police officer or a female family member of the victim or any other person with the consent of the complainant must be present when the victim's statement is being recorded.
    - Medical examination of the victim can only be done by a female registered medical practitioner only after obtaining consent from the victim. DNA and other forensic evidence (from both the accused and the victim) will be collected during the examination.
    - Trial for rape and related crimes will now be conducted confidentially (in camera).[54]
    - 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.[55]
        - 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.[56]

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54 "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

55 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.

56 ""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**[57]
  - 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**[58]
  - Amendment to Inheritance Laws
    - It was observed that rights of female heirs are not properly safeguarded due to existing lacunas in the laws and rules governing land administration. Hence, after sanctioning of inheritance mutation, commencement of proceedings for partition of joint holding without submission of application has been made mandatory upon Revenue Officers through Punjab Land Revenue (Amendment) Act 2012. Punjab Assembly passed the amendment bill on Dec 27, 2012 and the Act was notified on January 5, 2013. This is a landmark step for protection of right to property, in general, and for women's right to property, in particular.
    - Following amendments have been made in the Punjab Land Revenue Rules 1968 vide Board of Revenue notification No. 2052-2012/777 dated 3-9-2012 to safeguard property rights of female heirs:
      - Upon the death of a land owner, the Revenue officer shall record the statements of at least two respectable persons in respect of legal heirs of the deceased.
      - Reference to CNIC and B form has been made mandatory while sanctioning inheritance mutation so as to ensure that no legal heir is deprived of his/her fundamental right to property.
  - Penal Action against Delinquent Revenue Officers
    - Historically, when inheritance mutation is sanctioned without legal heirs, aggrieved parties agitate at different forum at a later stage. There was a need to ensure that there is appropriate operation against those delinquent officers who due to collusion, non-exercise of due diligence or malafide intention deprive a legal heir of his/her right or award less share

57 Explanatory text from: http://pcsw.punjab.gov.pk/acidcrimes

58 Explanatory text from: http://pcsw.punjab.gov.pk/acidcrimes

or less valuable land in the mutation/partition. Accordingly, in order to create institutional accountability against any malfeasance or abuse of authority, through amendment in Punjab Land Revenue Rules 1968, District Enforcement of Inheritance Rights Committees have been constituted in every district of the province with the following salient features:

- The committee comprises DCO, District Attorney, District Public Prosecutor, ADC(R) and Assistant Commissioner of the concerned sub-division.
- If any appellate or revisional authority dealing with inheritance mutations finds that any of the legal heirs was deprived of his/her fundamental right of inheritance during sanction of mutation, the appellate/revision authority, while passing the order for correction of mutation, shall send a copy of the same to the Committee.
- The Committee will scrutinize the facts reported in the order of the appellate/revision authority and upon ascertaining that a legal heir was deprived of inheritance right due to malafide intention or negligence of the Revenue Officer or any other person it may order penal or disciplinary action.
- The Committee shall meet at least once in a month. Minutes of each meeting shall be sent to the Chief Secretary, SMBR, DG Anti-Corruption and the concerned Commissioner.

- **The Punjab Partition of Immovable Property Act 2012 (Act IV Of 2013)**[59]

  Punjab Partition of Immovable Property Bill 2012 was enacted for expeditious partition of immovable property and alleviate the suffering of joint owners specially women due to protracted litigation. The bill was passed by Punjab Assembly on Dec 27, 2012 and the Act was notified on January 5, 2013. Partition Act of 1893 has simultaneously been repealed.

  - Salient features of the new law are as follows:
    - A joint owner may file a suit for partition of joint urban property by making all the co-owners as respondents/defendants in the suit. The Court shall immediately serve a notice not later than ten days, on the defendants / respondents to submit private settlement.
    - If the parties submit the private settlement, the Court shall incorporate such settlement as decree of the Court. If all the parties agree on partition of the joint property through appointment of local commission, the Court shall appoint local commission for partition of the property.
    - If any party objects to partition of the joint property, the Court shall proceed to auction the property amongst the co-owners after fixing the base price. If a co-owner fails to pay the price in case of being successful in this limited auction, he shall be debarred from participation in the next restricted auction of the joint property amongst the co-owners. If the co-owners fail or refuse to participate in restricted auction, the Court shall order open auction of the joint property giving the co-owner right to participate in open auction.
    - If any person disputes, title or share in the joint property, the Court shall decide such question before resorting to auction of the joint property. The parties may, at any stage of proceedings before any successful auction, enter into private settlement and the Court shall give effect to such settlement.
    - The Court shall finally dispose of the suit / proceedings or partition / sale of joint urban property within six months from the date of institution of the suit. Failing which, the Court shall submit the case to the District judge seeking extension of time for disposal of the suit / proceedings. The District Judge may, grant extension in time for disposal of the suit/ proceedings taking into consideration the facts and circumstances of the case.

59 Explanatory text from: http://pcsw.punjab.gov.pk/immovable_property_2012

- **The Punjab Commission on Status of Women Act 2014**[60]

  The Punjab Commission on the Status of Women (PCSW) was established through the PCSW Act of 2014. PCSW is an oversight body that works towards women's empowerment and achievement of gender equality.
  - It monitors implementation of pro-women laws and policies and recommends changes to relevant departments; and reviews laws, policies and programs to eliminate discrimination and safeguard the rights and interests of women.
  - PCSW can initiate research to generate information and collect data for analysis and studies, and strategic actions for women empowerment.
  - PCSW has the authority to inquire into complaints of violation of women's rights and make appropriate recommendations for action to concerned authorities. For the purpose of inquiry and data collection, PCSW has powers of a Civil Court to obtain information from any public or private body or individual.
  - PCSW's Divisional members, who are specialists in women's issues, represent the Commission in all divisions of Punjab, and coordinate with local government bodies to ensure that rights of women are protected.
  - The Commission monitors the Government's compliance to Pakistan's international commitments, including inter alia, the Convention on Elimination of Discrimination against Women (CEDAW) and the Sustainable Development Goals (SDGs), and reports progress made in upholding the status and rights of women to the CEDAW Committee.

- **Punjab Muslim Family Laws (Amendment) Act 2015**[61]

  The Provincial Assembly of Punjab amended the Muslim Family Laws Ordinance 1961 (MFLO) in 2015, to include some important provisions for the protection of women.
  - Registration of marriages by licensed nikah - Registrars has been made compulsory, while marriages not solemnized by a licensed nikah Registrar can be reported and the person responsible punished with imprisonment of up to 3 months and fine of up to Rs. 1000/-.
  - Nikah Registrars are bound to accurately fill all columns of the nikahnama. Failure to fill all columns will result in fine of Rs. 25,000 and imprisonment of 1 month.
  - Succession: if the son/daughter of a deceased person dies before opening of succession, the children of the son/daughter (if they are living) shall receive their parent's share as inheritance.
  - Polygamy: No married man can remarry if he does not have permission from the Arbitration Council (a body which is headed by the Chairman, Union Council, for the purposes of divorce). A marriage contracted without permission cannot be registered, and carries a penalty of Rs. 500,000 and imprisonment of up to 1 year, along with payment of entire dower (if it was not given at the time of nikah) to the existing wife/wives.
  - Upon receiving an Application for permission, the Arbitration Council will obtain permission from the existing wife/wives' before granting the Applicant permission to remarry. If the Chairman Arbitration Council does not take permission from the existing wife, he will be liable to a fine of Rs. 100,000 and imprisonment of 3 months.
  - Divorce (talaq): any man who wishes to divorce his wife must write an Application to the Chairman Union Council. If the man does not do so, divorce cannot be final, and he can face imprisonment of up to 1 year, along with a fine of up to Rs. 5000.
  - Divorce will be effective after 90 days have passed from the day on which the notice was first presented to the Chairman. Before expiry of 90 days, divorce can be revoked by the husband.

60 Explanatory text from http://pcsw.punjab.gov.pk/pcswact

61 Explanatory text from: https://pcsw.punjab.gov.pk/family_laws

In case the wife is pregnant at the time of pronouncement of talaq, talaq will not be effective until expiry of 90 days or end of pregnancy, whichever period ends later.
- If the husband has delegated the right to divorce to the wife (haq-e-tafveez), she can divorce her husband according to the procedure mentioned above. Before expiry of 90 days, divorce can be revoked by the wife.
- Maintenance: if a husband does not maintain his wife, or wives, his wife/wives can make an application to the Chairman Union Council, who will determine an appropriate amount of maintenance to be given to the wife/wives, and issue a certificate specifying this amount, and a date on which it has to be given by the husband every month.
- Maintenance Certificates can also be issued by the Chairman Union Council if a father fails to maintain his children.

- **Punjab Family Courts (Amendment) Act 2015**[62]
  - 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**[63]
  - Under the Punjab Marriage Restraint Act, any adult who marries a child, defined as a boy under 18 years and a girl under 16 years of age, can be punished with imprisonment of up to 6 months and a fine of Rs. 50,000. The same punishment will apply to a Nikah Registrar who solemnizes or conducts a marriage between two children, or a marriage of an adult with a child.
  - Additionally, parents or guardians of either party will be punished if they facilitate or organize the marriage of a minor (anyone under the age of 18) or a child. Parents and/or guardians will be punished with imprisonment of up to 6 months and fine of Rs. 50,000.
  - A Complainant who wishes to report a case of child marriage will need to submit a complaint to the Union Council. The Chairman Union Council will then report the case to the Family Court, which will punish the accused person according to the penalties mentioned above.
  - The Court can forbid any party from solemnizing, facilitating or organizing a child marriage through an Injunction (a Court Order preventing child marriage). This includes the groom, parents or guardians, nikah Registrars and any other person involved. Violation of an injunction is punishable with imprisonment of up to 3 months and fine of Rs. 1000.

- **Punjab Land Revenue Amendment Act 2015**[64]

  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

62 Explanatory text from: https://pcsw.punjab.gov.pk/family_laws

63 Explanatory text from: https://pcsw.punjab.gov.pk/child_marriage

64 Explanatory text from: http://pcsw.punjab.gov.pk/land_ammendment_act

on the person to whom it is addressed or, failing him, (b) on his authorised agent or (c) an adult male member of his family usually residing with him.
(4) A summons may, if the Revenue Officer so directs be served on the person named therein, either in addition to, or in substitution for, any other mode of service by forwarding the summons by registered post to the person concerned.
(5) When a summons is forwarded as aforesaid, the Revenue Officer may presume that the summons was served at the time when the letter would be delivered in the ordinary course of post.

➔In clause (c), "adult male" has been changed to "adult". In subsections (4) and (5), changes have been made to allow for electronic means of communication.

- **Section 141. Disposal of questions as to title in the property to be divided.**
(1) If a question of title in the holding is raised in the partition proceedings, the Revenue Officer shall inquire into the substance of such question.
(2) If as a result of the inquiry, the Revenue Officer is of the opinion that the question of title raised in a partition proceedings–
    (a) is well founded, he may, for reasons to be recorded, require a party specified by him to file a suit in the competent court, within such period not exceeding thirty days from the date of his order, for obtaining a decision regarding the question; or
    (b) is not well founded, he shall proceed with the partition of the holding.
(3) In case the suit is filed under subsection (2), the Revenue Officer shall suspend further action on the partition proceedings till the decision of the suit and submission before him the order or decree of the Court.
(4) In case the suit is not filed within the specified period, the Revenue Officer shall proceed to decide the question of title and on that basis, the partition of the holding.
(5) Where the Revenue Officer himself proceeds to determine the question, the following rules shall apply, namely:- (a)...(e).

➔ This section has been substituted with the following:
"141. Question of title of holding – If a question of title in the holding is raised in the partition proceedings, the Revenue Officer shall inquire into the substance of such question and decide the matter after hearing the parties".
➔ The succeeding subsections (2) to (5) have been done away with, as the parties concerned are no longer required to file suit.
➔ Together with the Punjab Land Revenue (Amendment) Act 2015, this amendment ensures that the litigation is facilitated and conducted without discrimination to women. The Revenue Officer is now required by law to decide the question of the partition of the property himself after the Inheritance Mutation (Intiqal), instead of requiring a party to file civil suit. This will curtail the practice of making women give up their land ownership in favour of the male heirs. A further change allows the inclusion of using electronic means and devices as valid modes of serving the summons.

- **Punjab Partition of Immovable Property (Amendment) Act 2015**[65]

  Punjab Partition of Immovable Property (Amendment) Act 2015 omits the subsection (3) in section 9 of the Punjab Partition of Immovable Property Act 2012 (Act IV of 2013):

  > Section 9. Appointment of referee for partition
  > (3) Notwithstanding anything in subsection (1) but subject to subsection(2), the Court may, on an application of one or more co-owners who desires his or their shares in the immovable property partitioned, appoint a referee who shall determine whether such share or shares is partible and if so, he shall propose partition of the property to that extent.

  - This subsection provided for appointment of a referee for partition of the joint property at the request of one of the co-owners in suit for partition of an immovable property. In the new Act, the provision has been omitted so as to ensure that the referee may only be appointed in event of consent of all the co-owners. This will ensure early disposal of partition cases.
  - Together with the Punjab Land Revenue (Amendment) Act 2015, this amendment ensures that partition cases will curtail litigation delays and discrimination against women.

- **Punjab Protection of Women Against Violence Act 2016**

  This law recognized and established remedies for different forms of violence against women, including economic, domestic, psychological and sexual violence. It also established a toll-free hotline for reporting abuse, and mandates the establishment of Violence Against Women Centres in Punjab.[66] It also establishes district-level panels to investigate reports of abuse, and requires the use of GPS bracelets to keep track of offenders.[67] 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.[68] The relevant provisions in terms of legal remedies are:

  - **4. Complaint to Court.–**
    (1) An aggrieved person, or a person authorized by the aggrieved person or the Women Protection Officer may submit a complaint for obtaining a protection, residence or monetary order in favour of the aggrieved person in the Court within whose jurisdiction:
    (a) the aggrieved person resides or carries on business;
    (b) the defendant resides or carries on business; or
    (c) the aggrieved person and the defendant last resided together.
    (2) The Court shall proceed with the complaint under this Act and the Court shall fix the first date of hearing which shall not be beyond seven days from the date of the receipt of the complaint by the Court.
    (3) On receipt of the complaint, the Court shall issue a notice to the defendant calling upon him to show cause within seven days of the receipt of notice as to why any order under the Act may not be made and if the defendant fails to file a reply within the specified time, the Court, subject to service of the notice on the defendant, shall assume that the defendant has no plausible defense and proceed to pass any order under this Act.
    (4) The Court shall finally decide the complaint within ninety days from the date of the receipt of the complaint, as nearly as possible, under Chapter XXII of the Code relating to the summary trials.

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65 Explanatory text from pcsw.punjab.gov.pk/immovable_property_2015

66 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

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

68 Id.

- **5. Right to reside in house –**
  Notwithstanding anything contained in any other law, the aggrieved person, who is the victim of domestic violence:
  (a) shall not be evicted, save in accordance with law, from the house without her consent or if wrongfully evicted, the Court shall restore the position maintaining before the eviction of the aggrieved person if the aggrieved person has right, title or beneficial interest in the house; or
  (b) may choose to reside in the house, or in an alternative accommodation to be arranged by the defendant as per his financial resources, or in a shelter home.

- **6. Interim order.–**
  (1) Pending proceedings under this Act, the Court may, at any stage of the complaint, pass such interim order as it deems just and proper.
  (2) If the Court is satisfied that the complaint prima facie shows that the defendant has committed an act of violence or is likely to commit an act of violence, it may issue an order on the basis of an affidavit of the aggrieved person or any other material before the Court.

- **7. Protection order.–**
  (1) If the Court is satisfied that any violence has been committed or is likely to be committed, the Court may pass a protection order in favour of the aggrieved person and direct the defendant:
    (a) not to have any communication with the aggrieved person, with or without exceptions;
    (b) stay away from the aggrieved person, with or without exceptions;
    (c) stay at such distance from the aggrieved person as may, keeping in view the peculiar facts and circumstances of the case, be determined by the Court;
    (d) wear ankle or wrist bracelet GPS tracker for any act of grave violence or likely grave violence which may endanger the life, dignity or reputation of the aggrieved person;
    (e) move out of the house in case of an act of grave violence if the life, dignity or reputation of the aggrieved person is in danger;
    (f) surrender any weapon or firearm which the defendant lawfully possesses or prohibit the defendant from purchasing a firearm or obtaining license of a firearm;
    (g) refrain from aiding or abetting an act of violence;
    (h) refrain from entering the place of employment of the aggrieved person or any other place frequently visited by the aggrieved person;
    (i) refrain from causing violence to a dependent, other relative or any person who provides assistance to the aggrieved person against violence; or
    (j) refrain from committing such other acts as may be specified in the protection order.
  (2) The Court may issue one or more directions contained in subsection (1) even if the aggrieved person has not prayed for such direction and may, keeping in view the peculiar facts and circumstances of the case, specify the period for which the protection order shall remain operative.
  (3) The Court may impose any additional conditions or pass any other direction which it may deem reasonably necessary to protect and provide for the safety of the aggrieved person or any dependent child of the aggrieved person.
  (4) The Court may require the defendant to execute a bond, with or without sureties, for preventing the commission of violence.
  (5) While making an order under this section or section 8, the Court may, pass an order directing the Women Protection Officer to provide protection to the aggrieved person or to assist the aggrieved person or the person making a complaint on behalf of the aggrieved person.

(6) The Court may direct the police to assist the Women Protection Officer in the implementation of the protection or residence order.

- **8. Residence order.–**
(1) The Court, in case of domestic violence, may in addition to any order under section 7, pass a residence order directing that:
(a) the aggrieved person shall not be evicted, save in accordance with law, from the house;
(b) the aggrieved person has the right to stay in the house;
(c) the aggrieved person may be relocated from the house to the shelter home for purposes of relief, protection and rehabilitation;
(d) the defendant shall deliver the possession of any property or documents to the aggrieved person to which the aggrieved person is entitled;
(e) the defendant or any relative of the defendant is restrained from entering the shelter home or place of employment or any other place frequently visited by the aggrieved person; or
(f) shall arrange an alternative accommodation for the aggrieved person or to pay rent for the alternative accommodation.
(2) The Court may, keeping in view the peculiar facts and circumstances of the case, issue one or more directions contained in subsection (1) even if the aggrieved person has not prayed for such direction and may specify the period for which the residence order shall remain in force.
(3) The Court shall have due regard to the financial needs and resources of the parties before passing any order having financial implications.

- **9. Monetary order.–**
(1) The Court may, at any stage of the trial of a case, pass an order directing the defendant to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and such relief may include:
(a) such compensation, as the Court may determine, to the aggrieved person for suffering as a consequence of economic abuse;
(b) loss of earning;
(c) medical expense;
(d) loss caused due to the destruction, damage or removal of any property from the control of the aggrieved person to which the aggrieved person is entitled;
(e) payment of reasonable rent and meals for shelter provided to the aggrieved person and dependent children in a shelter home if the defendant is mandated by the law to provide shelter to the aggrieved person and dependent children; and
(f) reasonable maintenance for the aggrieved person and her dependent children, if any, in addition to an order of maintenance under family laws.
(2) The Court shall have due regard to the financial needs and resources of the parties before passing any order under subsection (1).
(3) The defendant shall pay monetary relief to the aggrieved person within the period specified in the order made under subsection (1).
(4) If the defendant fails to make payment within the period mentioned in the order, the Court shall direct the employer or debtor of the defendant, directly to pay the aggrieved person or to deposit with the Court a portion of the wages or debt due to or accrued to the credit of the defendant.
(5) The amount paid or deposited under subsection (4) shall be adjusted by the employer or debtor towards payment to the defendant.

(6) The Court may direct that the monetary relief payable or paid on account of shelter being provided in the shelter home shall be credited to the protection system.

- **15. Power to enter.–**
  (1) The District Women Protection Officer or a Women Protection Officer, at any time, enter in any place or house for the purpose of rescuing an aggrieved person but such officer or official shall not rescue the aggrieved person without her consent.
  (2) The District Women Protection Officer or a Women Protection Officer shall give reasonable notice to the incharge of the place or house before entering and the incharge shall allow free access and afford all reasonable facilities to meet a woman residing or kept in the place or house.
  (3) If access to such place or house cannot be obtained under sub-section (2), it shall be lawful for the District Women Protection Officer or a Women Protection Officer to enter such place or house in collaboration with district authorities including police and to meet an aggrieved person residing or kept in the place or house, and in order to effect an entrance into such place or house, to force her entry into the house or place.
  (4) If the District Women Protection Officer or a Women Protection Officer who enters a place or house under this Act is detained in the house or place, she may force her exit from any house or place.
  (5) Notwithstanding anything contained in this section, the powers of entry in a house or place of abode of a woman shall only be exercised by a female officer of the protection system.

- **16. Assistance on request.–**
  (1) The District Women Protection Officer or a Women Protection Officer shall provide all reasonable assistance to an aggrieved person or to any other woman who needs such assistance in accordance with the provisions of this Act.
  (2) The District Women Protection Officer or a Women Protection Officer may provide or offer to provide assistance under the Act on the request of the aggrieved person or on information or complaint received from any corner in collaboration with district authorities including police.
  (3) Nothing in this Act shall be construed to provide assistance to an aggrieved person when the woman or aggrieved person has voluntarily refused to accept such assistance.

- **17. Assistance to officers.–**
  (1) For protection of an aggrieved person, the designated police officer, agency or local government shall be bound to assist the District Women Protection Officer or the Women Protection Officer in the performance of their functions under the Act.
  (2) In the performance of their functions under the Act, the District Women Protection Committee may call for any information from any agency of the Government or a local government in the district and such agency or local government shall be bound to provide the requisite information.

- **18. Penalty for obstructing a Protection Officer.**– Any person, who obstructs the District Woman Protection Officer or a Woman Protection Officer in the performance of the duties under this Act, shall be liable to imprisonment for a term which may extend to six months or fine which may extend five hundred thousand rupees or both.

- **19. Penalty for filing false complaint.**– A person, who gives false information about the commission of violence which that person knows or has reason to believe to be false, shall be liable to punishment of imprisonment for a term which may extend to three months or fine which may extend to one hundred thousand rupees but which shall not be less than fifty thousand rupees or both.

- **20. Penalty for breach of orders.–**
(1) A defendant, who commits breach of an interim order, protection order, residence order or monetary order, or illegally interferes with the working of the GPS tracker, shall be punished with imprisonment for a term which may extend to one year or fine which may extend to two hundred thousand rupees but which shall not be less than fifty thousand rupees or both.
(2) A defendant, who violates the interim order, protection order, residence order or monetary order more than once, shall be liable to punishment which may extend to two years but which shall not be less than one year and to fine which may extend to five hundred thousand rupees but which shall not be less than one hundred thousand rupees.

ADB TEAM BIOGRAPHIES

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.

Samar Minallah Khan

Since obtaining her Mphil in Anthropology and Development from the University of Cambridge, United Kingdowm, Ms. Khan has been challenging child marriages and various forms of culturally sanctioned forms of violence against women and girls. This she does by reaching out to different audiences through trainings and screenings of documentaries. She has been part of training programs at the National Judicial Academy, National Police Academy and the Civil Services Academy.

Referred to by the media as 'The Savior of Soul',' Women who Rock the world', and 'The Crusader with the Camera', she continues to advocate against child marriages.

In parts of Pakistan, girls are given away as compensation to settle disputes or to pay for crimes committed by men in their family or tribe. The family receiving the girl can make her a child bride, enslaving her for the rest of her life. Swara, as this practice is known, was practiced in parts of Pakistan for generations—until one woman, Samar Minallah Khan, used a camera to catalyze change.

In 2003, Ms. Khan created a documentary on 'Swara'. Her goal was to raise awareness of the horrific custom and mobilize policymakers to abolish it. Thanks in part to her campaign, swara was made illegal in Pakistan in 2004. Dozens of girls were rescued.

She did not stop there — she made sure that the law was implemented. She took the cause to Pakistanis of all backgrounds, even convincing truck drivers to paint anti-swara slogans on their vehicles.

She sees her documentaries as a way to give voice to those who are seldom heard. Her films are made in regional languages and screened locally, so that people can relate and see themselves through her stories. She uses her lens to focus on unsung heroes within rural communities, such as Pakistani fathers who take enormous risks to stand up for their daughters. She believes in engaging men in order to end violence against women.

Ms. Khan has won several national and international awards including Vanguard Award 2015, DVF Award 2015, Women With Wings 2014, Roberto Rossellini Award, Canon Premio Internationale, Vital Voices Global Leadership Award, Pakistan Women's Day Award, The Asia Society Young Leader, Asia Foundation's Chang Lin Tein Fellowship, and Asia Society's Perdita Huston Award. She serves on the board of various reputable organizations.

Saima Amin Khawaja

Partner, Progressive Advocates and Legal Consultants (Feb 2010-)
Partner, Afridi, Shah & Minallah, Advocates and Legal Consultants (Feb 2005-2010)
Senior-Associate, Afridi, Shah & Minallah, Advocates and Legal Consultants (1998-2005)
Associate, Surridge & Beecheno, (Advocates and legal consultants) 1995-1996.

Saima did her LLM from Kings College London. Her initial experience was in corporate and constitutional litigation, which subsequently expanded to transactional work and consultancy relating to legal reforms and development.

Her areas of interest include the Environmental, Constitution, Corporate Governance, Regulatory Laws, Land Acquisition, Not for Profit Laws and Public Interest Litigation. She has handled numerous development consultancies which vary from environment enforcement, development of SMEs, improvement in the Lower Judiciary, development in legal and regulatory framework for not for profit organizations, bringing in policy change in regulatory frame work of taxation regime, improving Urban development, Governance and corruption issues in water and sanitation and reforms in acquisition laws. She has received special training in Environment laws from M.C Metha Foundation Rishkish, India. She has also been trained in mediation and is an accredited mediator. She has taught various subjects at TILS, UCL, LUMS, Civil Services Academy and the Judicial Academy.

She has been an amicus and part of many commissions at the High Court, presently part of the Climate Change Commission constituted by the Lahore High Court. She is also a Board Member of LUMS Board of Trustees. Concurrently, she is part of the Board of Governors National Management Fund, Gurmani Foundation, The Citizens Foundation, LEAD Pakistan and Bali Memorial Trust.

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.

Prior to joining ADB, Ms. Sicangco was a Fellow at the International Development Law Organization (IDLO) headquartered in Rome, Italy. IDLO is an international organization that supports developing and transitional economies in strengthening the rule of law to reduce poverty, stimulate sustainable economic and social development, and adhere to human rights commitments.

She holds a Bachelor of Applied Economics and Accountancy double degree (cum laude) from De La Salle University and a Bachelor of Laws degree (cum laude, salutatorian) from the University of the Philippines. Thereafter, she pursued a Master of Laws in International Legal Studies degree from New York University where she was the Starr Foundation Global Scholar, Hauser Scholar, and Thomas M. Franck Scholar in International Law.

She is qualified as an Attorney and Counsellor at Law in the State of New York (United States of America) and the Republic of the Philippines.

About the Asian Development Bank

ADB's vision is an Asia and Pacific region free of poverty. Its mission is to help its developing member countries reduce poverty and improve the quality of life of their people. Despite the region's many successes, it remains home to a large share of the world's poor. ADB is committed to reducing poverty through inclusive economic growth, environmentally sustainable growth, and regional integration.

Based in Manila, ADB is owned by 67 members, including 48 from the region. Its main instruments for helping its developing member countries are policy dialogue, loans, equity investments, guarantees, grants, and technical assistance.

ADB

ASIAN DEVELOPMENT BANK
6 ADB Avenue, Mandaluyong City
1550 Metro Manila, Philippines
www.adb.org