



Legal Aid Society

Access to Justice: Strengthening Legal Awareness and
the Delivery of Legal Services in Sindh

RIGHTS? WHAT RIGHTS?

AN ANALYSIS OF EMERGING HUMAN
RIGHTS FROM CONSTITUTIONAL CASE
LAW IN PAKISTAN

Research Paper



In collaboration with

EDACE

Enhanced Democratic Accountability
and Civic Engagement

RIGHTS?
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AN ANALYSIS OF EMERGING
HUMAN RIGHTS FROM
CONSTITUTIONAL CASE LAW IN
PAKISTAN

BY MALIHA ZIA & AIYAN BHUTTA

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RIGHTS? WHAT RIGHTS?

AN ANALYSIS OF EMERGING HUMAN RIGHTS FROM CONSTITUTIONAL CASE LAW IN PAKISTAN

ABSTRACT:

The narratives of gender, minority and the rights of other marginalized groups are structured within the context of the human rights framework. Based on the core principles of equality and non-discrimination these rights, as with all human rights are interconnected, indivisible and dependant on each other. In order for any meaningful discourse and ensuring scheme, an actual and comprehensive understanding of these principles is essential.

The principles of equality and non-discrimination form the cornerstone of the entire human rights framework. They play a prominent role in any human rights movement and particularly in law, including all international human rights conventions.

The Constitution of the Islamic Republic of Pakistan 1973, in its chapter on fundamental rights, includes a number of the principles enunciated in the Universal Declaration of Human Rights, as well as other core human rights conventions, including the principle of equality and specific provisions relating to non-discrimination in certain contexts. On international forums, the Government has time and again stated that the definitions of 'equality' and 'non-discrimination', as interpreted by the international conventions to which it is a party, are understood to be included in the Constitution and are implemented as such by the courts.

Over the years, as a result of the common law system of precedents as a source of law, Public Interest Litigation has played a crucial role in not just providing jurisprudence on these particular concepts, but also in expanding the human rights framework of the Constitution of Pakistan. The superior courts, by delving into innumerable cases involving human rights case, have creatively widened the meaning and categories of fundamental and human rights, thus protecting rights which may not be specifically mentioned or originally envisaged by the Constitution itself.

Within this context, it is essential to examine the manner and methods the courts have employed in interpreting these core principles. The courts have reiterated on several occasions that it is necessary for them to interpret the fundamental rights of the Constitution broadly, allowing the courts to meet the requirement of the ever changing society. However, the question in the public arises - what actually are their rights? Within the context of today's scenario rife with intolerance, lack of trust in the criminal justice system and State institutions, this question becomes very relevant.

This paper seeks to probe the answer to this question with an analysis of emerging case law from the Courts with the objective of identifying, assessing and collating the actual nature of the rights recognized by the Courts in today's current scenario.

Examining the provision of one of the Constitutions most broadly interpreted rights i.e. Article 9, Right to Life and Liberty, it will work towards revealing a framework of rights which the superior courts have recognized to be fundamental.

The paper will go on to examine these rights from particularly with regards to the provisions relating to equality and non-discrimination i.e. Articles 22, 25, 26 and 27. It will un-pack these concepts to analyse as to how these have been defined through case law and work to establish the functional structure which has been created by the courts through such interpretation. Reference will be made to international frameworks of human rights and the concepts of equality and non-discrimination with an analysis of how they have been defined within the context of international human rights conventions ratified by Pakistan, including CEDAW, ICCPR and ICECSR.

Ultimately, this paper seeks to identify the emerging fundamental human rights as envisaged and expanded upon by the apex courts in Pakistan. It also looks to identify and discuss the development of the principles of equality and non-discrimination from a gender and religious minority perspective. The primary objective is to provide a concrete analysis which will greater inform the discussion and agenda on which the gender and religious minority rights movement is based on.

ACRONYMS AND ABBREVIATIONS

CEDAW – The Convention on the Elimination of all Forms of Discrimination against Women

CERD – Committee on the Elimination of Racial Discrimination.

ICCPR – International Covenant on Civil and Political Rights.

ICESCR – International Covenant on Economic, Social and Cultural Rights.

ILO – International Labour Organisation

PIL – Public Interest Litigation

UDHR – Universal Declaration of Human Rights

UNESCO – The United Nations Educational, Scientific and Cultural Organization

INTRODUCTION:

"Substantively, it is crucial to appreciate that our Constitution is transformative. It sets out a vision for the State that constitutes the normative State and mandates a path for development that is variously described by the Preamble, the Objectives Resolution, Fundamental Rights and the Principles of Policy.... We must continue to deliberately and rigorously evaluate our performance as State and society against the said Constitutional imperative." - Chief Justice Anwar Jamali in his address to the Senate,¹ November 2015.

Identifying the Constitution of the Islamic Republic of Pakistan 1973² as 'transformative' as has been done by Chief Justice Jamali in his speech quoted above, indicates the attitude of the superior courts in Pakistan and its adjudication on the human and fundamental rights of the people. The Constitution contains an entire chapter identifying the legally enforceable Fundamental Rights and another chapter identifying the Principles of Policy.

One of the primary functions of the Constitution is that "*in addition to laying down a framework for government, constitutions invariably embody a broader set of political values, ideals and goals. This is why constitutions cannot be neutral; they are always entangled, more or less explicitly, with ideological priorities*".³ It is therefore important for the purposes of identification of a human rights framework in a country to understand the nature of the Constitution and therefore its impact on the resulting case law and enhancement of the legally enforceable and protected human rights extended to the citizens of the State. It is based on this

¹ "Mr. Justice Anwar Zaheer Jamali, The Honorable Chief Justice of Pakistan: Address to the Senate of Pakistan, 3rd November 2015

² Hereafter referred to as the "Constitution".

³ "Politics", Andrew Heyward, Hampshire Macmillan Press Ltd 1997

reasoning and the existing Fundamental Rights and Principles of Policy in the Constitution, that Chief Justice Jamali declares the Constitution to be 'transformative'. In another speech on 10th December 2015, he stated:

"...the preamble, the Principles of Policy and Fundamental Rights. Without these elements, the Constitution would be a mechanical document structuring and distributing State power and authority. But it is precisely these elements that make our Constitution a dynamic and vibrant document in the life and development of both State and society".

Within the context of 'transformative constitution', a key feature existing in Pakistan, is that of an independent judiciary with binding decision on junior courts and wide powers of statutory interpretation. Thus, the jurisprudence emanating from the courts is almost as important as the chapter on Fundamental Rights in the Constitution itself. Resultantly, the legal human rights discourse in Pakistan has two primary sources i.e. the Constitution and the jurisprudence emanating from the Courts.

To understand the stance, the Courts have taken on human rights, it is essential to delve into the jurisprudence on some of the most important underlying concepts of human rights i.e. the principles of equality and non-discrimination. Furthermore, in order to develop and identify a human rights framework, it is necessary not only had to identify the rights provided in the Constitution, but also un-cover the additional rights that have been identified by the Courts.

This paper seeks to do exactly this. It will touch upon the nature of the Constitution of Pakistan and explain Pakistani Courts' powers and abilities to enhance the human rights framework. The paper will go on to breakdown the two core principles of human rights which support the entire jurisprudential discourse on human rights i.e. equality and non-discrimination and their applicability in Pakistan. Finally, it will

attempt to un-package the human rights framework based on the identified two sources and provide an analysis on both the Constitutional structure, the gaps identified by the emerging jurisprudence. The paper will culminate in a discussion that aims to shape future discourse on the Constitution and human rights framework in Pakistan.

THE TRANSFORMATIVE NATURE OF THE CONSTITUTION OF PAKISTAN:

The core principle of transformative constitutions is to:

"Inculcate psychological change or change things or change how things were/are done in legal terms. It entails that the state should be better positioned to fulfil and strengthen the constitutional ambition of bettering social, economic and justice services indiscriminately. Hence, transformation informed a construction of a new legal order, with opportunities being created for all, particularly to eradicate the material prejudices inherited from the past".⁴

The primary tool adopted by States, in particular the courts in interpreting the Constitution, in order to achieve this 'transformation' has been the notion of 'constitutionalism' i.e. *"a normative tool, because it identifies the set of values which should be upheld in the process of democratic governance"*⁵. Constitutionalism calls upon an approach that sees Constitution and law in general as tools which are committed to transforming political, social, economic and legal culture in such

⁴ "Transformative Constitutionalism in South Africa: 20 Years of Democracy", Mashele Rapatsa, Mediterranean Journal of Social Sciences, Vol 5, No 27, December 2014

⁵ Ibid

a way that it will radically alter existing assumptions about law, politics, economics and society in general.⁶

The successive governments of Pakistan have highlighted the importance of the Constitution and the emphasis it places on core human rights principles of 'equality' and the inherent inclusiveness of the principle of 'non-discrimination', as well as its underlying human rights nature.⁷

*"The Constitution of Pakistan was adopted in 1973. Its authors had the benefit of studying the Universal Declaration of Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights – the major international human rights instruments then in existence. Many of the principles contained in these documents are reflected in the Constitution.... The Constitution does not contain a definition or description of discrimination against women. However, the concept of non-discrimination is integral to the Constitution and is implicit in its content."*⁸

The Courts have also emphasized that the nature of the Constitution and of the interpretation of the laws by the Courts is based on core principles of natural justice⁹, human rights¹⁰ and the principles behind the Objectives Resolution to the Constitution i.e.:

⁶ Ibid

⁷ Combined initial, second and third periodic reports of State parties: Pakistan to the CEDAW Committee; National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Pakistan, 2012

⁸ Combined initial, second and third periodic reports of State parties: Pakistan to the CEDAW Committee

⁹ Anisa Rehman vs. P.I.A.C. 1994 SCMR 2232

¹⁰ Baz Muhammad Kakar vs. Federation of Pakistan [PLD 2012 Supreme Court 923]

"The principles and provisions set out in the Objectives Resolution are.....that principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam that be observed...that the citizens of Pakistan shall have fundamental rights qua equality of status, equality of opportunity, equality before law, social, economic and political justice, freedom of thought and expression, belief, faith, worship and association (subject to law and public morality), the minorities shall have adequate freedom to profess and practice their religion and develop their cultures, the legitimate rights of the minorities shall be safeguarded..."¹¹

The term 'transformative constitution' is most often linked to that of constitutions that were promulgated in more recent years, the most common example being that of South Africa, where not only is the Constitution *"zealously protects traditional civil and political rights and addresses the more fundamental elements of justice as well"*¹², but also the South African Constitutional Court added *"[it]appears to be more creatively using certain elements of its institutional authority to promote genuine justice"*¹³. The Courts provide a plethora of case law, demonstrating how purposive interpretation and creative application of a court's jurisdiction and remedial authority can advance justice.

In line with this perspective, the superior courts in Pakistan, particularly can be seen and have been acknowledged as playing a particularly proactive role in the further developing of the rights based jurisprudence. Following the principle of common

¹¹ Zulfiqar Ali Sheikh vs. Federal Public Service Commission [2002 PLC (CS) 1594]

¹² "Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice", Eric Christiansen, 13 J. of Gender, Race & Justice 575, 2010

¹³ Ibid

law and under Articles 189¹⁴ and 201¹⁵ of the Constitution, the decisions of the Supreme Court and High Court respectively are binding on junior courts. Accordingly, any precedent set by the superior court is a source of law in Pakistan, thereby not only interpreting the law, but also expanding the legal rights framework.

A key factor within this context, which is of primary relevance in the identification of the Pakistani Constitution as 'transformative', is the freedom given to the Courts to respond to issues of 'public importance' under Articles 184¹⁶ and 199.¹⁷ This freedom allows the superior courts to adjudicate on key issues relating to the rights of the people, providing a direct access to the State for the resolution of his/her grievance. This has led to a plethora of jurisprudence resulting for a proactive judiciary, as stated by a former Chief Justice of Pakistan, Justice Jilani: *"...the Supreme Court has time and again affirmed that the essence of constitutional interpretation is, and has to be, the betterment of the people whilst still remaining within the bounds of the law".*¹⁸

¹⁴**Article 189.** Any decision of the Supreme Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all other courts in Pakistan.

¹⁵**Article 201.** Subject to Article 189, any decision of a High Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all courts subordinate to it.

¹⁶**Article 184 (3).** Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved have the power to make an order of the nature mentioned in the said Article.

¹⁷**Article 199 (2).** Subject to the Constitution, the right to move a High Court for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II shall not be abridged

¹⁸ "Inaugural and Keynote Address", Chief Justice Tasadduq Hussain Jilani, International Judicial Conference 2014, Islamabad April 2014

THE IMPACT OF PUBLIC INTEREST LITIGATION ON EXPANDING THE HUMAN RIGHTS FRAMEWORK:

The concept of 'judicial activism' in Pakistan has become popularly associated with the name and tenure of former Chief Justice of Pakistan Iftikhar Muhammad Chaudhry. The term of Justice Chaudhry (March 2009 – December 2013) included many controversial high profile cases where the Supreme Court directly challenged and confronted numerous state institutions, including the executive, the legislature, the election commission and other government departments.¹⁹

This era has been deemed highly controversial with many arguing that the personal bias, desire for populism and political aspirations were the motivations for this particular movement as opposed to altruistic intentions.²⁰ Many openly challenged this activism stating that the judiciary was over stepping its boundaries and taking on a role not attributed to it (i.e. as the executive), thereby placing in jeopardy the tenacious balance of the separation of powers. This school of thought agreed that the misuse and motivated use of public interest litigation and attempts to use public interest litigation for populist pursuits have undermined the concept itself.²¹

Proponents of this 'judicial activism' counter this argument by advocating that the judiciary was fulfilling its role within the context of rule of law and separation of powers, countering the previously unrestricted power of the government and playing a positive role in bringing democratic governance on the norms of justice and fair play. This activism on the part of judges in the context of present day

¹⁹ "2014: From judicial activism to judicial restraint", Hasnaat Malik, 31 December 2014, The Express Tribune

²⁰ "Judicial Activism vs. Democratic Consolidation in Pakistan", Harris Gazdar, Letters from South Asia, Economic and Political Weekly, Vol XLIV No 32, August 8, 2009

²¹ "Public Interest Litigation: Scope and Problems", Report of HRCP Seminar, March 28, 2010

Pakistan, is therefore seen as a result of the political weaknesses and lack of political will to truly improve the system.²²

While judicial activism may have gained notoriety in recent years due to this time period, it is in fact not a new phenomenon in Pakistan. It has not only long been the subject of academic and legal discourse but has also been practiced within the realm of Public Interest Litigation (PIL), resulting in a strong body of positive case law and precedent which cannot be ignored. Strongly associated with the notion of 'constitutionalism', PIL has been identified as an important tool to effectively enforce the fundamental rights enshrined within the Constitution of the Islamic Republic of Pakistan 1973. This approach is based on the idea that rights of groups of people can be achieved with the law recognising the enforcement of rights beyond the concept of aggrieved person.²³

It is necessary to appreciate that PIL is a '*procedural deviation*' to provide remedy of infringed fundamental right. The superior courts have two roles: Firstly they must act as appellate courts and follow procedures of ordinary courts; Secondly, they function as constitutional courts and are therefore mandated to ensure that justice is administered in its entirety, thereby holding up the principles of the Constitution and its interpretation.²⁴ This function is ensured by Article 184 (3) through the canon of Article 199 of the Constitution.

²² "Judicial Activism Shaping the Future of Pakistan", Syeda Saima Shabbir

²³ "Address," PLD 1987 Journal 229 at p. 232 and "Public Interest Litigation as a means of social justice," PLD 1993 Journal 31 at p. 33; "Public Interest Litigation and the Role of the Judiciary", Ahmed Rafay Alam, International Judicial Conference, 2006

²⁴ "Public Interest Litigation in Supreme Court of Pakistan", Muhammad Amir Munir, 2007

At this juncture, it is also important to understand what Public Interest Litigation (PIL) entails. Based on case law generated in the superior courts, PILs can be classified into three distinct categories:²⁵

- **“Pure” PIL:** Cases where the procedure of the Court is determined by the public issue at hand. This has resulted in cases where the Superior Courts have converted letters into petitions, conducted inquiries, summoned public officials for explanation or carry out ‘rolling reviews’ of its orders.
- **Petitions with a Public Interest Component:** These include regular writ petitions filed within the Constitutional Jurisdiction of the Superior Courts, except that they contain a public interest component i.e. petitioners seek relief not only for themselves but also for the ‘public’.
- **The Suo Moto Jurisdiction:** This category allows the Superior Courts to take up cases of public interest on their own accord, doing away with the procedural requirements of an aggrieved person and precedent.

In today’s context, PIL has developed into a strategy whereby it plays several key roles. It has been seen to play a marked role in democratic functions. Ideally, in any democratic republic, the Constitutional protections and rights are made enforceable and protected through legislation passed by a representative institution. However, in countries, such as Pakistan, where democratic institutions have remained weak and have historically been unable to not only implement law, but also to provide relief and security to its citizens, a major challenge citizens face is a forum to challenge their elected representatives and the Government. The PIL

²⁵ Taken from “Public Interest Litigation and the Role of the Judiciary”, Ahmed Rafay Alam, International Judicial Conference, 2006

system has thus provided the public with a forum for them to voice their grievances – thus creating public accountability through the PIL jurisdiction.²⁶

It has increased the provision of access to justice by relaxing the strict protocols, specifically with regards to locus standi on issues affecting the public at large.

It has used creative methods to provide relief to the petitioners, for example temporary compensation etc. It has also been proactive through the use of judicial investigation and inquiry – demanding reports and updates from governmental institutions (for example women shelters, police etc.), while also appointing its own commissions of inquiry or delegating its own officials for investigations. Through these methods, it has worked to ensure the provision and protection of human rights.

An example of this last point would be the leading judgment of Justice Jilani in 2014²⁷ regarding the status of religious minorities in Pakistan. In addition to conducting an inquiry through reports of government bodies in the courtroom, the Court mandated the setup of taskforces at the provinces to ensure the implementation of the judgment. As a result, these taskforces have in fact been set up by the provincial governments who are overseeing the judgment's implementation.

Lastly, and most importantly for the purposes of this paper, through the doctrines of statutory interpretation²⁸ and precedent,²⁹ the superior courts have widened the

²⁶ “Public Interest Litigation as a means of social justice,” PLD 1993 Journal 31 at p. 33; “Public Interest Litigation and the Role of the Judiciary”, Ahmed Rafay Alam, International Judicial Conference, 2006

²⁷ S.M.C. No. 1 of 2014 and C.M.A. No. 217-K/2014 [PLD 2014 Supreme Court 699]

²⁸ Statutory interpretation is the process whereby courts interpret and apply legislation to the cases appearing before them. This is particularly relevant where the statute may be somewhat ambiguous and must be resolved by the court.

²⁹ Precedent, or ‘*stare decisis*’ is the principle whereby the decisions of a superior court are binding on the lower court i.e. lower courts when deciding a later case with similar issues or facts, must follow the ruling of the higher

meaning and categories of fundamental and human rights, specifically through interpretation of Articles in the Fundamental Rights chapter in the Constitution, particularly through the Articles on right to life. Based on the core principles of equality and non-discrimination, the courts have developed a new human rights framework, recognizing and protecting rights which may not be specifically mentioned or envisaged by the Constitution itself. As noted by the superior courts.

"Where there was a conflict between a basic natural right born out of natural justice and a provision of law, the former (basic natural right born out of natural justice), would prevail, even though right was not specifically mentioned in the list of rights guaranteed under the Constitution. Person could not be denied their natural right of security merely on technical ground of jurisdiction."³⁰

PIL is seen as a 'tool of the people'. It breaks from the constraints of current legal, practical and procedural practice to deliver justice, primarily social justice to any vulnerable class or the public, who are for unable to bring a claim before the court of law in other circumstances. It promises real and fundamental justice to the masses, particularly the poor and disadvantaged sectors.³¹ It helps deliver civic justice through speedy, adequate and effective redress upon violation of constitutionally guaranteed rights. It also brings questions of public importance before a court of law which calls attention to issues legislators or the executive have not taken steps to address.³²

From the perspective of human rights, PIL has been singularly the most important instrument in the further development and creation of a human rights framework

court. In Pakistan, this is a source of law provided in Article 189 and 201 of the Constitution of the Islamic Republic of Pakistan 1973

³⁰ Customs Appeal No. K-895 of 2004 [2006 PTD 857]

³¹ "Public interest litigation in Pakistan; A voice of silent victims", H. M. Azeem Advocate, 19-02-2015

³² Ibid

in Pakistan that is reflective of the current day discourse on human rights across the world.

HUMAN RIGHTS – A CORE FEATURE IN THE CONSTITUTION:

Human rights are an operative part of Pakistani law as universally accepted standards and specifically through the chapter on fundamental rights in the Constitution of Pakistan.

The Constitution contains a wide range of fundamental rights which tally with internationally recognised human rights. The State through the Courts has upheld the importance of these rights as a core basis for its effective functioning.

The State has on many forums emphasized that the incorporation of Islamic laws in the Constitution and other domestic laws support the promotion and protection of human rights which is not in contradiction with international human rights law.³³ In fact, it states that whilst the sources may be different, the objective remains the same. In this regard, the State has reiterated that Articles 8 – 28 of the Constitution protect human rights and fundamental freedoms. Any laws inconsistent with or in derogation of the Fundamental Rights would be void by virtue of Article 4 of the Constitution. Further, no law or customary practice against the spirit of the Constitution can be enacted or allowed to continue.³⁴

³³ “Replies of Pakistan to the list of issues to be taken up in connection with the consideration of its fourth periodic report”, shared with the Committee on the Elimination of Discrimination against Women, Fifty fourth session, 11th February – 1st March 2013

³⁴ Ibid

There is a great amount of jurisprudence with regards to the fundamental rights from the superior courts in Pakistan. These judgments reiterate the importance of these while also emphasising its links with international human rights.

“Fundamental Rights guaranteed by the Constitution are not meant merely to be pious enunciations of certain principles supposed to be the basis of the Constitution. The characteristic of a Fundamental Right is its paramouncy to ordinary State-made laws... The sanctity of the Fundamental Rights is protected by Article 8(2) of the Constitution which prohibits the state which includes the Legislature not to make any law by which way Fundamental Right may be curtailed or taken away and if any law is made to this effect, then to the extent of such contravention, it shall be void.... Fundamental Rights cannot be waived. No right which is based on public policy, can be waived. Citizens cannot waive themselves out of the various Fundamental Rights which the Constitution grants them. The Fundamental Rights are not to be a road as if they included the words subject to a contract to the contrary...”³⁵

The Courts stress that internationally recognized human rights are not only part of the Constitution, but also can be read into the Constitution where they are not specifically mentioned.

“We should not be oblivious of the fact that our Constitution guarantees fundamental rights and Article 2A thereof enshrines Islamic mandates and we are living in an era in which the enforcement of the human rights has become an international issue. So the Courts while construing the provisions of statutes should make extra efforts that the interpretation of the relevant provisions of the relevant statute should be in consonance

³⁵ Pakistan Muslim League (N) vs. Federation of Pakistan [PLD 2007 Supreme Court 642]

*with the above Articles of the Constitution and the grund norms of human rights.*³⁶

The Courts have emphasized in particular, that the Universal Declaration of Human Rights, to which Pakistan is a signatory, holds the position of customary international law and is therefore applicable in Pakistani law.³⁷

Whilst appreciating the wide protections given to fundamental and human rights in the Constitution, the courts however recognize that "*Constitution is a living document which portrays the aspiration and genius of the people and aims at creating progress, peace, welfare, amity among the citizens and the nations abroad; it is the basic structure on which the entire edifice is built, therefore, it has to be interpreted in a manner which may keep it alive and blossom under all circumstance and in every situation*".³⁸

As seen, the superior courts have delved into innumerable cases involving human rights issues. Of primary importance in the un-packaging of a human rights framework in Pakistan, is to understand how the courts have interpreted some of the core underlying principles of human rights, specifically the principles of 'equality' and 'non-discrimination as this has a direct impact on the thought process and recognition of emerging human rights.

³⁶ The State vs. Qaim Ali Shah [1992 SCMR 2192]

³⁷ Pakistan Muslim League (N) vs. Federation of Pakistan [PLD 2007 Supreme Court 642]; Al-Jehad Trust vs. Federation of Pakistan [1990 SCMR 1379]; Human Rights Cases [1993 SCMR 2001]

³⁸ Government of Baluchistan through Additional Chief Secretary v. Azizullah Memon and 16 others [PLD 1993 SC 341]

THE EQUALITY PRINCIPLE:

WHAT IS EQUALITY?³⁹

A. DEFINITION OF EQUALITY:

Equality has been described as a “treacherously simple concept”.⁴⁰ However, there are numerous diverse opinions as to what ‘equality’ is and how it should be incorporated into a society, revealing it to be a multi-faceted issue. Recent debate and discussion have worked to develop a more sophisticated concept of equality, accepting and acknowledging that human relations have a direct and deep impact on it; and the variety of human behaviour and its subtle characteristics can lead to discrimination and disadvantage.⁴¹

FORMAL EQUALITY:

The traditional understanding of ‘equality’ i.e. the ‘formal model of equality’ means ‘things that are alike should be treated as alike’. It is based on the proposition of consistent and equal treatment. Thus, it supports the position that “*a person’s individual physical or personal characteristic should be viewed as irrelevant in determining whether they have a right to some social benefit or gain*”. This model is based on eliminating irrational and unfair decisions based on arbitrary criteria.

This model is criticised for being overly simplistic and failing to recognize that comparison is required, and the question of who will be the ‘objective’ model for comparison. The comparator, is most commonly a member of the dominant group,

³⁹ Taken from “Law, Discrimination and Women in Pakistan”, Maliha Zia, International Alert, 2015

⁴⁰ Ibid

⁴¹ Ibid

thereby resulting in lack of recognition of the differences between him/her and another.

SUBSTANTIVE EQUALITY:

Substantive equality recognizes that policies and practices put in place to suit everyone may appear to be non-discriminatory, but may not address the specific needs of certain groups of people.

Thus, it insists on going behind the facade of similarities and differences. It asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances.

In effect it seeks to identify whether the policies or practices are indirectly discriminatory, creating systemic discrimination.⁴² On the converse, the inquiry may reveal that differential treatment is required in order to ameliorate the actual situation of the claimant group.

Thus substantive equality recognizes differences and classifications between groups, and with a reasonable justification, allows for such differentiation to take place.

Thus, substantive equality requires government and private actors to take the steps necessary to advance access by all citizens to benefits, supports, programs, goods and services in a way that is responsive to their particular needs. Its goal might also be thought of as full "citizenship" in society.

Taking the principles expounded by CEDAW, which promotes the substantive model of equality, there are central approaches to equality.⁴³

⁴² <http://www.eoc.wa.gov.au/substantive-equality>

⁴³ Ibid

Obligation of Means: This requires a framework of laws and policies, supported by institutions and mechanisms for their operation placing every person on equal terms.

Obligation of Results: The State must go beyond frameworks of equality on paper and equality must inform the practice of institutions. People or groups may be treated differently in order for them to benefit equally. This may take the form of providing enabling conditions and or affirmative action.⁴⁴

This model recognizes that formal equality i.e. the neutral policies and law may result in de facto (indirect) discrimination and therefore not allow for equality of results.

Therefore, it requires that any programme, policy, project, law must examine the entire socio-political-economic background and context as to why this disparity exists, and then identify and employ mechanisms to cater to the differences and ensure equal opportunity.

This is considered the corrective approach.

In essence, the corrective or substantive approach to equality places an obligation on the State to ensure:

- Equality of opportunity
- Equality of access to the opportunity
- Equality of results⁴⁵

Under international law, 'equality' is based on two concepts:

1. Equality for all before the law;

⁴⁴ Ibid

⁴⁵ Ibid

2. Equal protection of the law without discrimination.

B. EQUALITY FOR ALL BEFORE THE LAW:

This concept requires all parties to be treated fairly, regardless of gender, ethnicity, disability, sexuality, age, religious affiliation, socio-economic background or any other characteristic. Respect and courtesy should be the hallmarks of judicial conduct. Paternalistic or patronizing attitudes have no place in the court room.⁴⁶

However, this principle recognizes that equality before the law does not necessarily mean 'same treatment'. Thus, it can treat different groups and categories differently as long as it is based on a reasonable justification. This concept will be discussed below in the section relating to discrimination.

C. EQUAL PROTECTION OF THE LAW WITHOUT DISCRIMINATION:

This concept requires that all persons have the same access to the law and courts, and to be treated equally by the law and courts, both in procedures and in the substance of the law. It is akin to the right to due process of law. It however also recognizes that there are differences amongst groups and people and treating them equally could lead to inequality of result. Thus, this concept states that the government should treat similar persons similarly and should not treat people of different circumstances as if they were the same.

“EQUALITY” IN PAKISTANI LAW:

The source of the principle of “Equality” lies in the Constitution of Pakistan 1973, namely under Article 25:

⁴⁶ Equality before the Law Bench Book, New South Wales Government, June 2015

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."

The basic premise of this Article is that *"all persons subjected to a law should be treated alike under all circumstances and conditions both in privileges conferred and in the liabilities imposed"*.⁴⁷ The provisions of 'equality before law' and 'equal protection' are both based on the principle of equal justice.

The concept of 'equality before the law' enjoins that *"equality should not be in terms of mathematical calculations and exactness. It must be amongst equals. The equality has to be between persons who are placed in the same set of circumstances"*.

The guarantee of 'equal protection' provides is that *"no person or class of persons shall be denied the same protection of law which is enjoyed by other persons or other classes in the same circumstances"*.⁴⁸

However, it is important to realize that 'the equality clause, *"particularly the provision about equal protection of the law does not mean that all citizens shall be treated alike under all set of circumstances and conditions; both in respect of privileges conferred and liabilities imposed... The conception of equality before the law does not involve the idea of absolute equality among human beings which is*

⁴⁷ NWFP Public Service Commission vs. Muhammad Arif [2011 SCMR 848]; Pakcom limited vs. Federation of Pakistan [PLD 2011 Supreme Court 44]

⁴⁸ Ibid

a physical impossibility. The Article guarantees a similarity of treatment and not identical treatment".⁴⁹

Thus, "*the guarantee of equal protection of law does not mean that all laws must be general in character and universal in application and the State has no power to distinguish and classify persons or things for the purpose of legislation".⁵⁰*

Instead, the Article mandates the '*among equals the law should be equally administered and that the like should be treated alike, and there should be equally administered and that the like should be treated alike, and that there should be no denial of any special privilege by reason of birth, creed or the like and also equal subjection of all individuals and classes to the ordinary law of the land'.⁵¹*

Thus, the principle of equality mandates the equal subjection of all individuals and classes to the ordinary law of the land, but is also based on the acknowledgement that while no person is above the law i.e. the Constitution itself does not forbid reasonable classification, as long as it is not "*arbitrary, capricious or in violation of the doctrine of equality".⁵² The guarantee of equality "does not prohibit discrimination with respect to things that are different. The State has the power to classify persons or things and to make laws applicable only to the persons or things within the class".⁵³ This concept is "premised on the principles that the object is not to secure nominal or formal equality amongst different classes or group of citizens".⁵⁴*

⁴⁹ Ibid

⁵⁰ Pakcom limited vs. Federation of Pakistan [PLD 2011 Supreme Court 44]

⁵¹ NWFP Public Service Commission vs. Muhammad Arif [2011 SCMR 848]; Pakcom limited vs. Federation of Pakistan [PLD 2011 Supreme Court 44]

⁵² Ibid

⁵³ Pakcom limited vs. Federation of Pakistan [PLD 2011 Supreme Court 44]

⁵⁴ Attiya Bibi Khan v. Federation of Pakistan [2001 SCMR 1161]

The Supreme Court has also stated that "*doctrine of equality...enshrines the golden rules of Islam and states that every citizen, no matter how high ever, must be accorded equal treatment with similarly situated persons*".⁵⁵ The Courts have also held that Article 2A and the Objectives Resolution reiterate and guarantee fundamental rights, including equality.⁵⁶

In some cases, the Court have further elaborated on the principle of equality, breaking it down to include quality of status, opportunity and before law.⁵⁷

The principle of "equity" has also been read into the laws of Pakistan by the Supreme Court. It states that the principle of "*equity is merged in the law in Pakistan but the principles are recognised and relief can be granted on the basis of such principles*".⁵⁸

It goes on to note that there "*is a difference between law and equity as law is based upon set rules which may not be attracted when justice is done on the basis of equity. Equity is defined as justice administered according to fairness as contrasted with the strictly formulated rules of common law*".⁵⁹

The Courts have dealt with a variety of different issues within the context of equality. Some examples include mandating that:

- Contract employees would be entitled to be treated fairly;⁶⁰

⁵⁵ Government of the Punjab vs. Naseer Ahmad Khan [2010 SCMR 431]

⁵⁶ Workers' Party Pakistan vs. Federation of Pakistan [PLD 2012 Supreme Court 681]; Haq Nawaz vs. Province of the Punjab [1997 MLD 299]

⁵⁷ Haq Nawaz vs. Province of the Punjab [1997 MLD 299]; Tauseef Hussain Shah vs. District Magistrate, Chakwal [2001 PCrLJ 1173]

⁵⁸ Benazir Bhutto vs. President of Pakistan [PLD 1998 Supreme Court 388]

⁵⁹ Ibid

⁶⁰ Aamir Junaid vs. Government of Punjab [20144 PLC(CS) 1] Lahore High Court;

- Superiority based on any customary practices e.g. superiority on account of being a nawab, sardar, malik or any other title is forbidden;⁶¹
- The adoption of sex as a criteria of discrimination against females is prohibited;⁶²
- Equal work for equal pay⁶³
- Equal entitlement to pension of individuals of the same department;⁶⁴
- Equal opportunity for businesses to carry on production if rivals were allowed the same;⁶⁵
- Land similarly situated and circumstanced was to be treated alike.⁶⁶

⁶¹ Asmatullah Khan vs. Government of Balochistan [2013 PLD 13] Quetta High Court

⁶² Pakistan International Airlines Corporation vs. Samina Masood [2005 PLC (CS) 1335]; Chairman, Pakistan International Airlines Corporation vs. Sherin Dokhth [1996 SCMR 1520]

⁶³ Secretary Establishment, Government of Khyber Pakhtukhwa vs. Shamsher Khan [2013 SCMR 559]

⁶⁴ Ghulam Shabbir v Federation of Pakistan [2009 PLC (CS) 428 Islamabad High Court]

⁶⁵ Farkhanda Bibi v State [1997 MLD 729 Peshawar High Court]

⁶⁶ Saleem Akhtar Rajput etc v Karachi Metropolitan Corporation [1994 CLC 211 Karachi High Court]

THE PRINCIPLE OF “NON DISCRIMINATION”

WHAT IS “DISCRIMINATION”?⁶⁷

While the principle of non-discrimination is a core component of the international human rights framework and has been mentioned specifically in the UDHR, as well as the ICCPR and ICESCR, it has not been defined by either. ‘Discrimination’ was first described by CERD, and then adapted by CEDAW. From these two Conventions, and international jurisprudence, the term ‘discrimination’ should be understood to imply *“any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status which has the purpose of effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms”*.

In effect, it has 3 primary elements:

- Stipulates a difference in treatment;
- And has a certain effect;
- Which is based on a certain prohibited ground.

A. DIFFERENTIAL TREATMENT:

The language used in defining ‘discrimination’ requires an act of unreasonable differentiation between groups or individuals. It thus becomes necessary, to measure the treatment by the relative treatment of somebody else.⁶⁸

⁶⁷ Taken from “Law, Discrimination and Women in Pakistan”, Maliha Zia, International Alert, 2015

⁶⁸ “Equality and Non-Discrimination under International Human Rights Law”, Lu Weiwei, Norwegian Centre for Human Rights, 2004

However, not all differential treatment is discriminatory. Differential treatment is permissible if:

- The goal is to achieve a legitimate purpose;
- The criteria for such differentiation are reasonable and objective.⁶⁹

Thus, there is only violation if the distinction has no 'reasonable or objective' basis. However, in order to substantiate the 'justification', the existence of such justification must be assessed in relation to the aim and effects of the measures under consideration i.e. requiring proportionality between the legitimate aim of differentiation and the discriminatory measure under review.⁷⁰ Hence, the objective of differentiation must be legitimate, and the means chosen must be appropriate and proportionate to that objective.⁷¹

B. PURPOSE OR EFFECT:

In international law, there are four human right treaties which contain explicit definitions of discrimination:

- CERD
- CEDAW
- ILO Convention 111 (Discrimination in Respect of Employment 1958)
- UNESCO Convention Against Discrimination in Education 1966

All four refer to the effect of that 'differential treatment'. All except for the ILO Convention find discrimination by looking at 'purpose or effect'.⁷²

⁶⁹ Ibid

⁷⁰ Ibid

⁷¹ Ibid

⁷² Ibid

The focus on 'effect' of any policy or law under these Conventions leads to the summation that the intention is not a crucial aspect to discrimination. Thus even a neutral measure would be considered 'discriminatory' if it has a negative impact on a group in society that has been singled out for protection.⁷³

This is supported by the evidence that suggests that disadvantageous differential treatment frequently occurs in the absence of prejudice or hostility, and that it due to the inherent difficulty in defining or proving prejudice or hostility i.e. to prove discrimination, the common assumption is to first identify that the intention of the act/policy etc., was in fact to be discriminatory against a group or segment of society.⁷⁴

C. GROUNDS UPON WHICH DISCRIMINATION IS PROHIBITED:

Under international law, there have been three main methods used to address the issue of 'grounds'.⁷⁵

1. Framing broad open-textured equality guarantee stating simply that all persons are equal before the law, without specifying any particular grounds. This allows judges to have discretion to decide the grounds subject to each individual situation.⁷⁶
2. To formulate legislation containing an exhaustive list of grounds, leaving no discretion to the judges.⁷⁷

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ Ibid

⁷⁶ Ibid

⁷⁷ Ibid

3. To specify a list of grounds of discrimination, but indicate that the list is not exhaustive.⁷⁸ This does not impose any standard whatsoever as to how to assess what constitutes unequal treatment – it is left to the courts. It gives judges some discretion to adopt variable standards, lends weight to the notion of reasonable justification and extends the list according to a set of judicially generated principles.⁷⁹

International human rights law recognizes that there are many different types of discrimination. Human Rights Conventions include a focus on most direct and indirect discrimination. These also cover discrimination both discrimination by the State and discrimination by private actors i.e. individuals, families, communities, religious, political, social, economic circles etc.

Different types of discrimination prohibited by international discrimination law include:

- Direction discrimination is when a distinction is made on the basis of a specified category and has the intention or effect of mollifying or impairing the recognition, enjoyment or exercise by any person of their rights. This is also known as de jure discrimination i.e. when it is legalized discrimination. Examples could include laws or policies which restricts access to education, places of worship, deprivation of citizenship, or movement etc.⁸⁰

⁷⁸ This is the approach adopted not only in the primarily international human rights instruments like the ICCPR, the UDHR and the ECHR but also in some domestic legislation e.g. Canada and South Africa.

⁷⁹ "Equality and Non-Discrimination under International Human Rights Law", Lu Weiwei, Norwegian Centre for Human Rights, 2004

⁸⁰ IWRAW Asia Pacific CEDAW Knowledge Resource, http://www.iwraw-ap.org/convention/non_discrimination.htm, accessed on 08-04-2014; "Non-Discrimination in International Law: A Handbook for Practitioners", Inter Rights, 2011 Edition

- Indirect discrimination is when an act or policy is not intended to discriminate against any person or group but its application and implementation results in discrimination. This is considered de facto discrimination i.e. discrimination in practice. For example, obstacles in women accessing employment opportunities due to their circumstances e.g. night shifts or long hours. Such discrimination may be unintentional.⁸¹
- Past discrimination occurs when a policy or practice that was promulgated in the past becomes entrenched into the system, culture and community and is accepted as a norm. Resultantly, it is necessary to address such inherent discrimination resulting from this.⁸²
- Crosscutting discrimination recognizes that discrimination does not function in isolation. Its impact can be seen through different field. For example, discrimination in access to education and training might result in lack of access to decision-making in the area of public policy. Discrimination in access to credit opportunities may be directly related to discrimination in civil laws ownership of property, inheritance and ability to enter into contracts.⁸³ This requires a long term, holistic examination of the situation and context to be able to identify and recognize patterns.
- Intersectional or Contextualized Approach to Discrimination recognizes that discrimination can be on many grounds apart from sex including race, caste, religion, marital status, disability etc. It is important to realize that women, for example, therefore can be targets of double

⁸¹ Ibid; “Non-Discrimination in International Law: A Handbook for Practitioners”, Inter Rights, 2011 Edition

⁸² Ibid;

⁸³ Ibid

discrimination i.e. targets of discrimination on more than one ground. That is, women who have been discriminated because of their sex and other grounds such as race, ethnicity, age, disability-status, citizenship, marital status, religion, sexuality, socio-economic status, etc.⁸⁴

As discussed above, an exception to the concept of discrimination, allows for distinction or classification based on a 'reasonable justification. Thus, a state may also be required (or permitted) to take measures to ensure the 'equality in fact' or substantive equality of protected groups.⁸⁵ This may include:

- **Positive action or affirmative measures**(also known as 'special measures') consist of specific actions taken by the government or a private institution that require preferential treatment or favor of certain members of a group in society.⁸⁶ The primary objective of this measure is to remedy the effects of past and present discrimination to achieve substantial equality. Many international instruments explicitly permit positive action without imposing an obligation on states to take such measures.⁸⁷
- **Reasonable accommodation** is a concept developed initially within the context of employment. It relates to making an adjustment for a job, employment practice, work environment, or the manner or circumstances under which a position is held or customarily performed, which makes it possible for a qualified individual to apply for, perform the essential functions of and enjoy the equal benefits and privileges of employment.⁸⁸ Most frequently, this concept has arisen within the discourse on disability,

⁸⁴ Ibid

⁸⁵ "Non-Discrimination in International Law: A Handbook for Practitioners", Inter Rights, 2011 Edition

⁸⁶ Ibid

⁸⁷ Ibid

⁸⁸ Ibid

but may be adapted to other discriminated social groups such as women and minorities. The concept has been broadened to cover not only equality in access to employment but also to the enjoyment of all human rights and fundamental freedoms.⁸⁹

DISCRIMINATION IN PAKISTANI LAW:

The principle of non-discrimination is mentioned specifically in a number of the Articles in the Fundamental Rights chapter of the Constitution.

Article 22. Safeguard as to educational institutions in respect of religion etc.

(2) In respect of any religious institution, there shall be no discrimination against any community in the granting of exemption or concessions in relation to taxation.

Article 25. Equality of citizens

(2) There shall be no discrimination on the basis of sex.

Article 26. Non-discrimination in respect of access to public places.

(1) In respect of access to places of public entertainment or resort not intended for religious purposes only, there shall be no discrimination against any citizen only of race, religion, caste, sex, residence or place of birth.

Article 27. Safeguard against discrimination in services.

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

⁸⁹Ibid

In addition to these, the Courts have emphasized the importance of the principle of non-discrimination as a base for the entire chapter on Fundamental Rights and the Constitution itself and the core principle on which justice rests under the law.⁹⁰ They recognize that if *'even handed justice is not administered it can have many adverse and negative effects on the society. It can cause discontentment and frustration in the social setup'*.⁹¹

The Supreme Court has read into Article 4 of the Constitution, which commands that all individuals shall be dealt with in accordance with the law, the principle of non-discrimination – stating that law shall be applied without discrimination. Thus *"...enforcement of the law leaves no room for creating any distinction between the citizens, except a particular class, on the basis of the intelligible differentia"*.⁹²

Discrimination has specifically been defined by the Courts⁹³ as:

"making a distinction or difference between things; a distinction, a difference, a distinguishing mark or characteristic; the power of observing differences accurately, or of making exact distinctions, discernment.

- *But discrimination against a group or an individual implies making an adverse distinction with regard to some benefit advantage or facility*
- *Discrimination thus involved an element of unfavorable bias and it is in that sense that the expression has to be understood in this context."*

Making a distinction is not an act of discrimination in itself. It only becomes 'discrimination' when the discretion exercised is done so *"improperly, or is a*

⁹⁰ Muhammad Abbas vs. Government of Punjab [2005 PLC (C.S.) 671]

⁹¹ Ibid

⁹² Mobashir Hassan vs. Federation of Pakistan [PLD 2010 Supreme Court 265]

⁹³ NWFP Public Service Commission vs. Muhammad Arif [2011 SCMR 848]; Pakcom limited vs. Federation of Pakistan [PLD 2011 Supreme Court 44]; Asdullah Mangi vs. Pakistan International Airlines Corporation [2005 PLC (CS) 771]

capricious exercise or abuse of discretionary authority".⁹⁴ It is when the distinction made is not based on any "*rational ground*"⁹⁵ and resultantly "*the person against whom that discretion is exercised faces certain appreciable disadvantages*".⁹⁶ Thus, 'discrimination' always involved an element of "*unfavourable bias*".⁹⁷

Thus, Courts across the nation have struck down actions based on discrimination, for example discrimination on the basis of religion in Punjab;⁹⁸ appointments made on nepotism and political influence as opposed to merit in Balochistan.⁹⁹ The Supreme Court has emphasized that the equality provision under Article 25 specifically condemns discrimination against women and therefore where something is not denied to men, it shall not be withheld from a female.^{100 101} Further, the Supreme Court has emphasized that the Government cannot discriminate between the citizens and therefore "*functionaries cannot be allowed to exercise discretion at their whims, sweet will or as they please rather they are bound to act fairly, evenly and justly*".¹⁰²

WHO IS BOUND?

The provisions of the Constitution are considered a contract between the State and the people. Thus, it is the State that is bound to ensure that it (including all its functionaries) does not violate any of the provisions of the Constitution, especially the chapter on fundamental rights. Furthermore, the State is responsible for

⁹⁴ Arshad and Company vs. Capital Development Authority, Islamabad [2000 SCMR 1557]

⁹⁵ Allah Yar vs. General Manager, Railways Headquarters [2001 SCMR 256]

⁹⁶ Ibid

⁹⁷ Arshad and Company vs. Capital Development Authority, Islamabad [2000 SCMR 1557]

⁹⁸ Shaukat Ali Wahla, Superintendent, Auqaf, Sargodha vs. Chief Administrator of Auqaf, Punjab, Lahore [2005 PLC (C.S.) 842]

⁹⁹ Muhammad Asif Jan vs. Chairman Selection [2013 PLC (CS) 502]

¹⁰⁰ The case raised the question of whether a female was capable of living on her own

¹⁰¹ Akhtar Qureshi vs. Nisar Ahmed [PLD 1999 Supreme Court 25]

¹⁰² Nizamuddin vs. Civil Aviation Authority [1999 SCMR 467]

ensuring legislation is produced and adhered, which further binds private individuals to follow the Constitutional principles.

However, the Constitution has ensured that individuals are not exempt from these responsibilities. Article 8 of the Constitution provides explicit protection to the fundamental rights stating:

"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."

In *Sh. Riaz-ul-Haq and another v Federation of Pakistan etc. [PLD 20143 SC 501]*, it was held by the Honourable Supreme Court that the judiciary had the authority to examine the vires of legislation at the touchstone of the Constitution.

Similarly, in *Suo Moto Case No. 4 of 2010 [PLD 2012 SC 553]*, the Supreme Court held that law, or custom or usage having the force of law, which is inconsistent with the right to a 'fair trial' would be void by virtue of Article 8 of the Constitution. Various other judgments of the Supreme Court also reiterated that the superior courts were possessed with the jurisdiction to declare a law void to the extent of inconsistency with Fundamental Rights.¹⁰³

The only exception to this Article is provided within the Article itself for "*members of the Armed Forces, or of the police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them*".¹⁰⁴

EXPECTATIONS AND AFFIRMATIVE ACTION:

¹⁰³ *Baz Muhammad Kakar v Federation of Pakistan [PLD 2012 SC 923]*, *Dr. Mubashir Hasan v Federation of Pakistan [PLD 2010 SC 265]*

¹⁰⁴ Article 8, Constitution of the Islamic Republic of Pakistan 1973

While the principles of equality and non-discrimination are upheld by the Constitution, it also provides for a number of exceptions to the general law. Thus, it itself allows for certain classifications and distinctions. The specific constitutional exceptions include:

Article 22. Safeguards as to educational institution in respect of religion, etc...

(4) Nothing in this Article shall prevent any public authority from making provision for advancement of any socially or educationally backward class of citizens.

Article 24. Protection of property rights.

(3) Nothing in this Article shall affect the validity of:

(e) Any law providing for the acquisition of any class of property for the purpose of:

- i. providing education and medical aid to all or any specified class of citizens; or*
- ii. providing housing and public facilities and services such as roads, water supply, sewerage, gas and electric power to all or any specified class or citizens; or*
- iii. providing maintenance to those who, on account of unemployment, sickness, infirmity or old age, are unable to maintain themselves;*

Article 25. Equality of citizens.

(2) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children

Article 26. Non-discrimination in respect of access to public places.

(3) Nothing in clause (1) shall prevent the State from making any special provision for women and children.

Article 27. Safeguard against discrimination in services.

(1) No citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated against in respect of any such appointment on the ground only of race, religion, caste, sex, residence or place of birth:

Provided that, for a period not exceeding forty years from the commencing day, posts may be reserved for persons belonging to any class or area to secure their adequate representation in the service of Pakistan.

Provided further that, in the interest of the said service, specified posts or services may be reserved for members of either sex if such posts or services entail the performance of duties and functions which cannot be adequately performed by members of the other sex."

The doctrine of equality enshrines equal treatment for every citizen. It allows for the State to "*classify persons and objects for the purposes of legislation and make laws applicable only to persons or objects within a class. In fact all legislations involve some kind of classification whereby some people acquire rights or suffer disabilities whereas other do not*".¹⁰⁵ This would not be considered discrimination.

The Courts follow suit and do in fact recognize and accept that certain distinctions or classifications are allowed. As stated by the Supreme Court:¹⁰⁶

¹⁰⁵ Government of the Punjab vs. Naseer Ahmad Khan [2010 SCMR 431]

¹⁰⁶ Government of NWFP vs. Mejee Flour and General Mills (PVT.) Ltd, Mardan [1997 SCMR 1804]

"Mere differentiation or inequality of treatment does not per se amount to discrimination but it is necessary to show that selection or differentiation is not unreasonable or arbitrary."¹⁰⁷

"Classification may be due to geographical situation or it may be based on territorial, economic and other similar considerations. The Constitution itself contemplates passing of different laws for different Provinces by their respective legislatures. The doctrine of reasonable classification is founded on the assumption that the State has to perform multifarious activities and deal with a vast number of problems. It, therefore, should have the power to make a reasonable classification of persons and things to which different treatment may be accorded, provided there is legitimate basis for such difference the State can make laws to attain special objects, and the administrative authorities may make classification, in pursuance of such law".¹⁰⁸

What however is prohibited under principles of reasonable classification is legislation favouring some within a class and unduly burdening others.¹⁰⁹

Distinction or classification can be made on the basis of an 'intelligible differentia'. This means that if any law or provision differentiates between two sets of people or objects, the differentiation must be based on "logical"¹¹⁰ and "lucid"¹¹¹ basis and

¹⁰⁷ Ibid

¹⁰⁸ Shahnaz Wajid vs. Federation of Pakistan [2012 PLC (CS) 1052]

¹⁰⁹ Government of the Punjab vs. Naseer Ahmad Khan [2010 SCMR 431]

¹¹⁰ Mobashir Hassan vs. Federation of Pakistan [PLD 2010 Supreme Court 265]

¹¹¹ Ibid

"it should not be not be artificial or contrived. Intelligible differentia distinguishes persons or things from the other persons or things, who have been left out".^{112 113}

The Courts have recognized that the *"notion of human inequality had emerged as a reaction to adhering artificial distinctions between man and man or between one class of men and another class based on consideration, inter alia, of personal likes and dislikes under the garb of discretion".¹¹⁴*

This has a negative impact on certain segments of society, as was recognized by the Sindh High Court, where the Court noted that *"[b]ecause of uneven economic development and lack of appropriate educational facilities in certain parts of the country, residents of those areas came to be so handicapped that they were unable to compete with their more fortunate counterparts in the developed areas on the basis of straight open competition".¹¹⁵*

The Supreme Court has on many occasions acknowledged that reasonable classification is a valid exception to the principles of non-discrimination and equality. It has identified a set of principles to be applied to cases of reasonable classification:¹¹⁶

- (i) That equal protection of law does not envisage that every citizen is to be treated alike in all circumstances, but it contemplates that person similarly situated or similarly placed are to be treated alike;

¹¹² Ibid

¹¹³ For example, different fee structure for admissions based on merit and those on Self-Finance Scheme was seen to be classification based on an intelligible differentia (Secretary Economic Affairs Division, Islamabad vs. Anwarul Haq Ahmad [2013 SCMR 1687])

¹¹⁴ Government of NWFP vs. Mejee Flour and General Mills (PVT.) Ltd, Mardan [1997 SCMR 1804]

¹¹⁵ Ayaz Muhammad Khan vs. Province of Sindh [2003 PLC (CS) 304]

¹¹⁶ Shirin Munir vs. Government of Punjab [PLD 1990 Supreme Court 295]; I.A. Sherwani vs. Government of Pakistan [1991 SCMR 1041]

- (ii) That reasonable classification is permissible but it must be founded on reasonable distinction or reasonable basis;
- (iii) That different laws can validly be enacted for different sexes, persons in different age groups, persons having different financial standings, and persons accused of heinous crimes
- (iv) That no standard of universal application to test reasonableness of a classification can be laid down as what may be reasonable classification in a particular set of circumstances, may be unreasonable in the other set of circumstances;
- (v) That a law applying to one person or one class of persons may be Constitutionally valid if there is sufficient basis or reason for it, but a classification which is arbitrary and is not founded on any rational basis is no classification as to warrant its exclusion from the mischief of Article 25;
- (vi) That equal protection of law means that all persons equally placed but be treated alike both in privileges conferred and liabilities imposed;
- (vii) That in order to make a classification reasonable, it should be based:
 - (a) on an intelligible differentia which distinguished persons or things that are grouped together from those who have been left out;
 - (b) that the differentia must have rational nexus to the object sought to be achieved by such classification:

The allowance for classification or distinction forms the basis for legally backed affirmative action. The primary objective of these exceptions is to be able to attain objective of genuine equality of opportunities rather than mere nominal equality

in accordance with true spirit of Islam.¹¹⁷ Examples of the usage of these exceptions and affirmative action have included:

- Quotas for reserved for persons belonging to any class or area to secure their adequate representation in service of Pakistan as per Article 27(1) of the Constitution;¹¹⁸;
- Special provisions for socially or educationally backward class of citizens;¹¹⁹
- Quotas for persons from backward and underdeveloped regions;¹²⁰
- Fixation of seats for women in educational institutions;¹²¹
- Quotas for special persons/handicapped in government educational institutions;¹²²
- Reservation of seats for women for election to local bodies;¹²³
- Laws promulgated for specific classes such as women¹²⁴ or children.¹²⁵

RESTRICTIONS/LIMITATIONS:

There have been some restrictions placed on the fundamental rights. These restrictions include:

- Any restriction in accordance with the law (Articles 9, 14, 18, 20, 22, 24)
- Privacy of the home (Article 14)

¹¹⁷ Ayaz Muhammad Khan vs. Province of Sindh [2003 PLC (CS) 304]

¹¹⁸ Ayaz Muhammad Khan vs. Province of Sindh [2003 PLC (CS) 304]; Muqqadus Haider vs. Federal Public Service Commission [2008 SCMR 773]; Federation of Pakistan vs. Muhammad Tayyab [2006 SCMR 326]

¹¹⁹ Ibid

¹²⁰ Miss Shazia Batool v Government of Balochistan [2007 SCMR 410]

¹²¹ Shrin Munir v Government of Punjab [PLD 1990 SC 295]

¹²² Tahir Habib Cheema v Federation of Pakistan [2001 CLC 1732]

¹²³ Ata Elahi v Perveen Zohra [PLD 1958 SC 298]

¹²⁴ Examples may include Protection of Women (Criminal Law Amendment) Act 2006, Protection against Harassment at the Workplace Act 2010

¹²⁵ Examples may include Sindh Child Protection Authority 2011; Punjab Child Marriage Restraint Act 2015

- Reasonable restriction imposed by law¹²⁶ (Articles 15, 16, 19, 19A)
- In the interest of public order (Articles 16, 17, 20)
- Morality (Article 17, 20)
- Public interest (Article 23)

The principles of equality and non-discrimination remain largely unrestricted. The Courts have also ruled that there are very narrow margins where any such restriction can be implemented.

"The phrase 'subject to law', does neither invest the legislature with unlimited power to unduly restrict or take away the Fundamental Rights guaranteed in the Constitution, nor can they be completely ignored or bypassed as non-existent. A balance thus to be struck between the two, by resorting to a reasonable interpretation, keeping in view the peculiar circumstances of each case."¹²⁷

PROTECTED CHARACTERISTICS:

As noted above, not every classification or distinction is considered discriminatory. In fact, the Courts have clearly enunciated that legislation often classifies persons for a variety of reasons,¹²⁸ including for the purposes of any affirmative action.¹²⁹

The fundamental rights chapter provides characteristics that are considered special and protected characteristics. These include:

- Sex (Articles 25, 26, 27);

¹²⁶ Article 19, Freedom of speech is subject to reasonable restrictions imposed by law in the inter of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, ir in relation to contempt of court, or commission of incitement to an offence

¹²⁷ Zaheeruddin vs. The State [1993 SCMR 1718]

¹²⁸ Ardeshir Cowasjee and 11 others v Sindh Province [2004 CLC 1353]

¹²⁹ Haroon-ur-Rasheed v Registrar Balochistan High Court, Quetta [2013 PLC (CS) 81]

- Class (Articles 22, 24, 27),
- Religion (Articles 20, 21, 22, 26, 27)
- Race (Articles 22, 26, 27)
- Caste (Articles 22, 26, 27)
- Residence (Articles 26 & 27); and
- Place of birth (Articles 22, 26, 27).

The Constitution also mentioned special classes for special protection and affirmative action is permitted under specific Articles and circumstances within the context of these Articles. These include:

- Women (Article 25 & 26);
- Children (Articles 11, 25, 25A);
- Religious community or denomination (Articles 20 & 22);
- Socially backward class of citizens (Article 22)
- Educationally backward class of citizens (Article 22)
- Unemployment (Article 24)
- Sickness (Article 24)
- Infirmary (Article 24)
- Old age (Article 24)
- Unable to maintain themselves (Article 24)
- Under-represented class in services of Pakistan (Article 27); and
- Any class of citizens specified by the State (Article 24 & 27)

It is important to note at this point that notably absent from this list are disability, sexual orientation and old age – all categories known to be vulnerable to discrimination, exploitation and violence. Furthermore, the protected categories identified by the Constitution are exhaustive i.e. they do not allow for the Court in its discretion to include any other specific categories.

However, the Courts has been creative in avoiding this lack of discretion in furthering the protected characteristics or groups under the law. Using the principles of natural justice, Islamic law and the provision of right to life, further elaborated on the topic of protected characteristics and categories.¹³⁰ Interestingly, protections have even been extended to cattle's and animals.¹³¹ This has resulted in an enhancement of the list identified in the Constitution. The extension of special protection by the Courts include the following classes and characteristics:¹³²

- Colour¹³³
- Territory¹³⁴
- Reputation¹³⁵
- Eunuchs (including all rights, obligations and protections such as life, liberty and dignity under the Constitution , as well as right to property (movable and immoveable, inherit property, education, franchise, employment, respect by all segments of society and equality;¹³⁶ and

¹³⁰ Customs Appeal No. K-895 of 2004 [2006 PTD 857]; Syed Saeed Muhammad Shah vs. The State 1993 SCMR 550; Anisa Rehman vs. P.I.A.C. 1994 SCMR 2232; Haq Nawaz vs. Province of the Punjab [1997 MLD 299]

¹³¹ Muhammad Arif vs SHO City Police Depalpur [PLD 1994 Lahore 521]

¹³² It is important to note that some of the judgments are made by the provincial High Courts, and therefore they will be legal precedents only in those provinces but may be used as guiding principles in other provinces.

¹³³ Dr. Shaheena Nusrat vs. Province of Punjab [1997 CLC 1308] – Punjab High Court

¹³⁴ Dr. Shaheena Nusrat vs. Province of Punjab [1997 CLC 1308] – Punjab High Court

¹³⁵ Muhammad Mumtaz Javed vs. Pakistan through Secretary Ministry of Communication [1988 PLC (C.S.) 705] - Sindh High Court

¹³⁶ Dr. Muhammad Aslam Khaki vs. Senior Superintendent of Police (operation), Ralwalpindi [2013 SCMR 187] – Supreme Court

- Shelter less women.¹³⁷

The Courts have provided greater elaboration with regards to the rights and protection to religious minorities. The rights and protections specifically provided to them have been summarized below.

A citizen belonging to a different religion or sect cannot be denied his right under Article 20 (right to process or practice any religion) because it is objected to by someone belonging to another sect or religion¹³⁸

- The words “the right to establish, subject to law, religious institutions” cannot and do not mean that such institutions may be abolished altogether by the law.¹³⁹
- The phrase ‘subject to law’, does neither invest the legislature with unlimited power to unduly restrict or take away the Fundamental Rights guaranteed in the Constitution, nor can they be completely ignored or bypassed as non-existent;¹⁴⁰
- Special quotas for minorities allowed under Article 22(4) while also being allowed to compete on seats on the basis of merit;¹⁴¹
- Constitution cannot be interpreted in a manner which has the effect on encroaching upon religious freedom of minority religions in the country;¹⁴²
- Freedom of religion must be construed liberally to include freedom of conscience, thought, expression, belief and faith;¹⁴³

¹³⁷ Zubaida Khatoon vs. Chief Secretary, Government of Punjab [PLD 2003 Lahore 53] – Punjab High Court

¹³⁸ Abdur Rehman Shah vs. Superintendent of Police, Mansehra [1999 CLC 855] – KP High Court

¹³⁹ Zaheeruddin vs. The State [1993 SCMR 1718] – Supreme Court

¹⁴⁰ Zaheeruddin vs. The State [1993 SCMR 1718] – Supreme Court

¹⁴¹ Ejaz Azam and Others vs. University of Peshawar [PLD 1975 Peshawar 186] - KP High Court

¹⁴² SMC No. 1 of 2014 and CMA No. 217-K/2014 [PLD 2014 Supreme Court 699] – Supreme Court

¹⁴³ SMC No. 1 of 2014 and CMA No. 217-K/2014 [PLD 2014 Supreme Court 699] – Supreme Court

- Freedom of religion must not be curtailed by attributing an interpretation of the right to religious belief and practice exclusively as a community-based freedom;¹⁴⁴
- Right to religion had both individual and community based connotations;¹⁴⁵
- There must be protection of sects within religious denominations;¹⁴⁶
- Art. 20 must be interpreted to guarantee the rights of the community as well as the rights of the individual against those from his own or other religious communities;¹⁴⁷
- Art 20 does not distinguish between majority and minority or Muslim and non-Muslim;¹⁴⁸
- Restriction of “law, public order and morality” are non-religious terms as the notion of law or public order or morality was not reducible to the Islamic meaning of said terms;¹⁴⁹
- Sects within religious denominations have been conferred additional rights to establish, maintain and manage its religious institutions – thus sects have been protected against their own co-religious denominations;¹⁵⁰ and
- Right of religious conscience conferred on every citizen is a right conferring three distinct rights i.e. to profess, practice and propagate.¹⁵¹

¹⁴⁴ SMC No. 1 of 2014 and CMA No. 217-K/2014 [PLD 2014 Supreme Court 699] – Supreme Court

¹⁴⁵ SMC No. 1 of 2014 and CMA No. 217-K/2014 [PLD 2014 Supreme Court 699] – Supreme Court

¹⁴⁶ SMC No. 1 of 2014 and CMA No. 217-K/2014 [PLD 2014 Supreme Court 699] – Supreme Court

¹⁴⁷ SMC No. 1 of 2014 and CMA No. 217-K/2014 [PLD 2014 Supreme Court 699] – Supreme Court

¹⁴⁸ SMC No. 1 of 2014 and CMA No. 217-K/2014 [PLD 2014 Supreme Court 699] – Supreme Court

¹⁴⁹ SMC No. 1 of 2014 and CMA No. 217-K/2014 [PLD 2014 Supreme Court 699] – Supreme Court

¹⁵⁰ SMC No. 1 of 2014 and CMA No. 217-K/2014 [PLD 2014 Supreme Court 699] – Supreme Court

¹⁵¹ SMC No. 1 of 2014 and CMA No. 217-K/2014 [PLD 2014 Supreme Court 699] – Supreme Court

ANALYSIS ON PRINCIPLES OF “EQUALITY” AND “NON DISCRIMINATION” IN PAKISTANI LAW:

The principles of 'equality' and 'non-discrimination' have come up time and again before the Courts under a variety of circumstances. There is no doubt that the Courts have looked to international human rights law for the definitions of these principles, including identifying restrictions and exclusions to try to ensure effective implementation of the concepts.

However, the majority of the judgments can be seen referring to precedent (as is required), but completely copying and pasting the text from previous judgments. While this follows the rule of consistency and ensures that the principles are institutionalized and sustained in case law a precedent, there has been little discussion on these principles beyond the initial cases, which in some cases date back to two decades.

There is a failure to recognize that there has been rampant discourse at the international level, expanding and further clarifying these concepts in order to ensure the implementation is holistic and remains relevant in the current context.

The discourse on equality in the Courts has been expansive, specifically recognizing the principles of classification, as well as emphasizing equal protection under the law and equal treatment by the law. However, it focuses more on formal equality and holds that as a standard of review as opposed to substantive equality. It is important for courts to recognize the concept of substantial equality in order to not just assess the cases and policies that come before it, but also to recognize cases which have resulted in manifest discrimination against a group or an individual and to ensure relevant and in-depth discussion on the issue, in order to ensure widening of the concept of equality,

While the provincial High Courts have recognized the different categories of equality (equality before law, equality of opportunities and equality of result), the Supreme Court has not yet recognized these concepts at a national level. Thus, the core understanding of true equality has not yet permeated into the human rights law and human rights framework in Pakistan, apart from the provinces which have specifically identified them.

The Courts in Pakistan are starting to fall behind in instituting any such discussion. For example, there has been little to no mention or discussion on the different types of discrimination or who is held responsible. The lack of focus on indirect discrimination or the intersectional or contextualized approach to discrimination results in a lapse in effectively targeting institutionalized discrimination in the systems in Pakistan. While affirmative action is a recognized practice in Pakistan, there has been no recognition of reasonable accommodation – which if discussed and implemented could potentially play a massive role in changing Pakistani systems.

It is time for the Honourable Judges and the Superior Courts to acknowledge that while the rule of consistency and the principle of precedent must be followed there is room for further interpretation and introduction of new ideas, philosophies and thoughts. As one of the sources of law, judges have a responsibility to stay abreast of in-depth academic discussions and practical application of international human rights law in order to ensure the same level of implementation in Pakistan and to all its citizens.

HUMAN RIGHTS IN THE CONSTITUTION OF PAKISTAN – 1973:

Chapter 1 Part II of the Constitution of the Islamic Republic of Pakistan 1973 contains a number of legally enforceable 'fundamental rights'. However, despite this, there are many contradictions within the Constitution itself, which go against these rights. The most notable is Article 41(b), requiring the President to be Muslim, contradicting Article 20 (freedom of religion) and Article 25 (equality). citizens. These fundamental rights recognised in the Constitution are listed below:

Article 8: Laws inconsistent with or in derogation of fundamental rights to be void:

This Article states the importance of fundamental rights of citizens – declaring any law, custom or usage to be void if it abrogates the fundamental rights of a citizen. This also applies to any law promulgated by the State found to be infringing on the rights of any person.

However, this can be suspended if the suspension is carried out according to the rules laid down by the Constitution itself.

Article 9. Security of Person:

This Article emphasizes the right to life and liberty of citizens. Right to life is defined in greater detail through case law, which emphasizes not just the right to be alive, but to lead a life of quality and therefore the right to aspects of life and the environment within which we live, to ensure a quality life.

Article 10. Safeguards as to arrest and detention:

Any person arrested must be informed as to the reasons of his arrest and be produced in front of a magistrate within 24 hours. If the arrest is for the purposes of preventative detention, the rules and guidelines have been identified.

Article 10A. Right to fair trial:

This works to ensure a fair trial and due process for all those arrested. The international standards of fair trials including transparency, fair justice etc be an integral part of the process.

Article 11. Slavery, forced labour, etc. prohibited:

This article includes modern day slavery e.g. bonded labour, trafficking and labour of children below the age of 14 in a factory, a mine or hazardous employment.

Article 12. Protection against retrospective punishment:

This Article prohibits any laws that seek to change the law relating to the past – for example a retrospective law may make people criminally responsible for doing something that was not actually against the law when they did it.

It also prohibits punishing acts that were not against the law at the time that they were committed but they also extend to preventing a heavier punishment being handed down than one that was available at the time the offence was committed.

Article 13. Protection against double punishment and self-incrimination:

This Article protects any person from being tried again on the same (or similar) charges in the same case following a legitimate acquittal or conviction.

It also protects a person against being compelled to be a witness against himself or herself in a criminal case.

Article 14. Inviolability of dignity:

This article emphasizes on the protection of dignity but also emphasizes the protection of the home – however, subject to the law. It also states that no person shall be tortured for the purposes of extracting evidence.

Article 15. Freedom of movement:

All citizens are free to move anywhere in and out of Pakistan.

Article 16. Freedom of assembly:

Assembly without arms is considered an important right of citizens. However, the possibility of reasonable restrictions according to law remains.

Article 17. Freedom of association:

This allows for the formation of unions, political parties and associations, as long as they are not acting against the sovereignty or integrity of Pakistan.

Article 18. Freedom of trade, business or profession:

This allows for any person to enter into any lawful trade, occupation or business.

Article 19. Freedom of Speech:

Every citizen has the right of free speech and expression. It also emphasizes the freedom of the press subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defense of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court.

19. A. Right to Information:

This article protects the right of citizens to have access to all information of public importance.

Article 20. Freedom to profess religion and to manage religious institutions:

This article protects the rights of religious minorities to profess, practice and propagate his religion and to establish and manage its own religious institutions.

Article 21:

This article ensures that no special tax shall be imposed on an individual for the purpose of propagation or maintenance of any religion other than his own.

Article 22:

This article ensures that no person attending an educational institution shall be made to receive religious instruction, attend a religious ceremony or attend religious worship of any religion other than his own. Moreover, this article states that there will be no discrimination against any religious community in the granting of exemption or concession in relation to taxation of any religious institution. This article also guarantees that no religious community or denomination shall be prevented from providing religious instructions for pupils of that community or denomination in any education institution maintained wholly by that community/denomination. This provision also provides that no individual shall be denied admission to an education institution receiving public funding on account of race, caste, religion or place of birth. Moreover, this article also makes clear that nothing will prevent the State from making special provisions for socially or educationally backward class of citizens.

Article 23. Provision as to property:

Every citizen has the right to acquire, hold and dispose of property.

Article 24. Protection of property rights:

This ensures that no property shall be taken away from a person, unless subject to law. It goes on to state that no property shall be compulsorily acquired or taken possession of save for a public purpose, and save by the authority of law which

provides for compensation therefore and either fixes the amount of compensation or specifies the principles on and the manner in which compensation is to be determined and given.

Article 25. Equality of citizens:

This ensures equality of citizens under the law and no discrimination on the basis of sex. It also allows for affirmative action laws for women and children.

Article 25A. Right to education:

This Article provides for free and compulsory education to all children of the age of five to sixteen years.

Article 26. Non-discrimination in respect of access to public places:

This ensures no discrimination against any citizen on the ground only of race, religion, caste, sex, residence or place of birth with respect to access to places of public entertainment or resort not intended for religious purposes only. It does allow for special considerations for women and children.

Article 27. Safeguard Against Discrimination in Services:

This seeks to ensure no discrimination with regards to appointment in the service of Pakistan on the ground only of race, religion, caste, sex, residence or place of birth. It does allow for quotas to be announced for persons belonging to any class or area to secure their adequate representation in the service of Pakistan.

It does however allow for discrimination on the basis of sex for specified posts or services may be reserved for members of either sex if such posts or services entail the performance of duties and functions which cannot be adequately performed by members of the other sex.

Article 28. Preservation of Language, Script and Culture:

This Article seeks to protect the different cultural, language and scripts of different communities within Pakistan.

EXPANSION OF FUNDAMENTAL HUMAN RIGHTS BY THE COURTS:

As discussed earlier, the superior courts in Pakistan have been extremely proactive in using their interpretative powers in identifying new and more current forms of human rights. Through general case law on all the Articles in the Chapter on Fundamental Rights and through the specific expansion of Article 9, the Right to Life and Liberty, the number of 'rights' has emerged which derive their status of a 'fundamental right' by virtue of the principle of precedent.

For purposes of this paper, the identified rights have been divided according to the rights identified under Article 9 and rights identified through the other Articles. The primary reason behind this is that Article 9 has resulting in a judicial discourse which raises numerous questions relating to the standard of care of the Constitution and requires a separate discussion on its own.

The 'rights' identified by the Courts through case law on Fundamental Rights includes:

- Right to travel abroad;¹⁵²
- Right to education means quality of education and extended to include awareness of rights and duties, growth of civic consciousness;¹⁵³

¹⁵² Jehangir Mehmood Cheema vs. Government of Pakistan, Ministry of Interior [2015 PLD 301] – Lahore High Court; Pervez Musharraf vs. Pakistan [2014 PLD 389] Karachi High Court – Sindh High Court

¹⁵³ Rana Aamer Raza Ashfaq vs. Dr. Minhaj Ahmad Khan [2012 SCMR 66]

- Right of a citizen to have access to complete for any public office/post through a lawful and transparent recruitment process;¹⁵⁴
- Right of electricity, including supply of electricity;¹⁵⁵
- Right of possession, use and dispossession of intellectual production;¹⁵⁶
- Political justice;¹⁵⁷
- Democracy as a fundamental constitutional dictate;¹⁵⁸
- National resources like air, sea, waters and forests are like 'public trust' and freely available to everyone irrespective of status;¹⁵⁹
- Access to justice;¹⁶⁰
- Right to vote;¹⁶¹
- Minimum food;¹⁶²
- Clothing;¹⁶³
- Housing;¹⁶⁴
- Freedom of conscience and belief;¹⁶⁵
- No discrimination between citizens and non-citizens;¹⁶⁶

¹⁵⁴ Irfan Naseer Baig vs. Province of Punjab [2011 PLC(CS) 1537] - Lahore High Court

¹⁵⁵ Dr. Noor Muhammad Raja vs. Deputy Manager, Fresco [2003 CLC 1874]

¹⁵⁶ Fakhar Zaman vs. Secretary to the Govt. of Punjab [1996 PLD 577]

¹⁵⁷ Pakistan Muslim League (N) vs. Federation of Pakistan [PLD 2007 Supreme Court 642]

¹⁵⁸ Workers' Party Pakistan vs. Federation of Pakistan [PLD 2012 Supreme Court 681]

¹⁵⁹ Chamber of Commerce and Industry Quetta Balochistan vs. Director General Quetta Development Authority [PLD 2012 Balochistan 31]

¹⁶⁰ Baz Muhammad Kakar vs. Federation of Pakistan [PLD 2012 Supreme Court 923]

¹⁶¹ Province of Sindh vs. MQM through Deputy Convener [PLD 2014 Supreme Court 531]

¹⁶² Al-Rahim Travels and Tours (PVT.) LTD vs. Ministry of Religious Affairs, Hajj, Zakat and Ushr [2011 SCMR 1621]

¹⁶³ Al-Rahim Travels and Tours (PVT.) LTD vs. Ministry of Religious Affairs, Hajj, Zakat and Ushr [2011 SCMR 1621]

¹⁶⁴ Al-Rahim Travels and Tours (PVT.) LTD vs. Ministry of Religious Affairs, Hajj, Zakat and Ushr [2011 SCMR 1621]

¹⁶⁵ Tauseef Hussain Shah vs. District Magistrate, Chakwal [2001 PCrLJ 1173]

¹⁶⁶ Al-Jehad Trust vs. Federation of Pakistan [1990 SCMR 1379]

- Playgrounds, parks, green belts and other places of public use belong to all citizens of the country;¹⁶⁷
- Good economic governance;¹⁶⁸
- Effective safeguards for economic wellbeing;¹⁶⁹
- Retention and access to public parks;¹⁷⁰
- Right to lie in a peaceful environment;¹⁷¹
- Right to clear atmosphere;¹⁷²
- Right to protection;¹⁷³
- Protection from encroachment on privacy and property.¹⁷⁴

EXPANSION OF ARTICLE 9 – RIGHT TO LIFE:

Article 9 of the Constitution, the right to life and liberty, has become one of the most critical provisions of the Constitution. The definition of 'life' has been expanded greatly and has in fact formed the cornerstone for including rights under the framework of fundamental rights, which have not been expressly mentioned otherwise.

In the landmark case of *Shehla Zia vs. WAPDA*¹⁷⁵, the concept of the word 'life' was discussed. It was stated that it covers 'all facets of human existence' and does not

¹⁶⁷ *Syed Waqar Hussain Gillani vs. Capital Development Authority* [2013 CLC 1095] – Islamabad High Court

¹⁶⁸ *Muhammad Yasin vs. Federation of Pakistan* [PLD 2012 Supreme Court 132]

¹⁶⁹ *Muhammad Yasin vs. Federation of Pakistan* [PLD 2012 Supreme Court 132]

¹⁷⁰ *Iqbal Haider vs. Capital Development Authority* [PLD 2006 Supreme Court 394]

¹⁷¹ *Muhammad Anas Kapadia vs. M. Faor Haji Abdullah* [2007 CLC 943] - Sindh High Court

¹⁷² *Muhammad Anas Kapadia vs. M. Faor Haji Abdullah* [2007 CLC 943] - Sindh High Court

¹⁷³ *Muhammad Anas Kapadia vs. M. Faor Haji Abdullah* [2007 CLC 943] - Sindh High Court

¹⁷⁴ *Muhammad Anas Kapadia vs. M. Faor Haji Abdullah* [2007 CLC 943] - Sindh High Court

¹⁷⁵ *Shehla Zia vs. WAPDA* [PLD 1994 Supreme Court 693]

merely touch upon the idea of being alive or dead. As Justice Saleem Akhtar stated in the judgment:

“Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally.... The word “life” in the Constitution has not been issued in a limited manner. A wide meaning should be given to enable a man not only to sustain life but to enjoy it.”

Thus, it is understood to mean, not just being alive, but also the quality of the life being led.

“Where life of citizens is degraded, the quality of life is adversely affected and health hazards are created affecting a large number of people...”

The word “life” is very significant as it covers all facets of human existence. The word “life” has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity legally and constitutionally.”

As a result of this case, a series of cases expanded on the concept of ‘Life’ under this expanded definition. A list of rights has emerged, that have also been recognized as ‘fundamental rights’ that are to be protected. These include:

- Right to livelihood;¹⁷⁶

¹⁷⁶ Pir Imran Sajid vs. Managing Director/General Manager (Manager Finance) Telephone Industries of Pakistan and others [2015 SCMR 1257]

- All such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitution;¹⁷⁷
- Better standard of living;¹⁷⁸
- Hygienic conditions in the workplace;¹⁷⁹
- Leisure;¹⁸⁰
- Economic development;¹⁸¹
- Right to work;¹⁸²
- Right to participate in political life of the nation: freedom to exercise political choice, right to choose a political leader and elect the government of his or her choice;¹⁸³
- Right to self-determination;¹⁸⁴
- Right to autonomy;¹⁸⁵
- Right to civil rights;¹⁸⁶
- Rights to sovereignty;¹⁸⁷
- Right to self-government;¹⁸⁸
- Right of enjoying pollution free air for full enjoyment or life;¹⁸⁹

¹⁷⁷ Watan Party vs. Federation of Pakistan [PLD 2012 Supreme Court 292]

¹⁷⁸ Watan Party vs. Federation of Pakistan [PLD 2012 Supreme Court 292]

¹⁷⁹ Watan Party vs. Federation of Pakistan [PLD 2012 Supreme Court 292]

¹⁸⁰ Watan Party vs. Federation of Pakistan [PLD 2012 Supreme Court 292]

¹⁸¹ Watan Party vs. Federation of Pakistan [PLD 2012 Supreme Court 292]

¹⁸² Dr. Naveeda Tufail vs. Government of Punjab [2003 SCMR 291]

¹⁸³ Arshad Mehmood vs. Commission/Delimitation Authority, Gujranwala [2014 PLD 221]

¹⁸⁴ Arshad Mehmood vs. Commission/Delimitation Authority, Gujranwala [2014 PLD 221]

¹⁸⁵ Arshad Mehmood vs. Commission/Delimitation Authority, Gujranwala [2014 PLD 221]

¹⁸⁶ Arshad Mehmood vs. Commission/Delimitation Authority, Gujranwala [2014 PLD 221]

¹⁸⁷ Arshad Mehmood vs. Commission/Delimitation Authority, Gujranwala [2014 PLD 221]

¹⁸⁸ Arshad Mehmood vs. Commission/Delimitation Authority, Gujranwala [2014 PLD 221]

¹⁸⁹ Haji Mullah Noor Ullah vs. Secretary Mines and Mierals [2015 YLR 2349]

- Right to life and education enhanced to include– right to develop their sporting skills and potential;¹⁹⁰
- Right to life included providing a healthy environment to each citizen¹⁹¹
- Right to provision of sports and recreation facilities;¹⁹²
- Right of protection of environment;^{193 194}
- Right to life including "reputation", "Status" and all other ancillary privileges conferred on a citizen by law;¹⁹⁵
- Right to electricity;¹⁹⁶
- Right to sustenance;¹⁹⁷
- Right to be governed by representatives by the free will of the people;¹⁹⁸
- Right to life and dignity include essential commodities like gas or electricity;¹⁹⁹
- Right to clean drinking water;²⁰⁰
- Right of privacy, light and air;²⁰¹
- Right of protection against air pollution;²⁰²

¹⁹⁰ Akhtar Hussain Langovr vs. Inspector General of Police, Balochistan [2015 YLR 58]

¹⁹¹ Akhtar Hussain Langovr vs. Inspector General of Police, Balochistan [2015 YLR 58]

¹⁹² Akhtar Hussain Langovr vs. Inspector General of Police, Balochistan [2015 YLR 58]

¹⁹³ This includes international environment principles of sustainable development, precautionary principle, environmental impact assessment, inter and intra-generational equity and public trust doctrine

¹⁹⁴ Imrana Tiwana vs. Province of Punjab [2015 CLD 983]

¹⁹⁵ Contempt Proceedings against Chief Secretary, Sindh [2014 PLC(CS) 82]

¹⁹⁶ OGRA vs. MIDWAY II, CNG Station [2014 SCMR 220]; Iqbal Zafar Jhagra and Senator Rukshana Zuberi vs. Federation of Pakistan [2014 PTD 243]

¹⁹⁷ Chairman NPT vs. Shafqat Tanvir Mirza [2014 PLC (CS) 567]

¹⁹⁸ Arshad Mehmood vs. Commissioner/Delimitation Authority, Gujranwala [2014 PLD 221]

¹⁹⁹ Master Textile Mills vs. Federation of Pakistan [2014 PLD]

²⁰⁰ Suo Moto Case no. 13 of 2010 [2013 SCMR 591]

²⁰¹ Muhammad Anas Kapadia vs. M. Farooq Haji Abdullah [2007 CLC 943]

²⁰² Syed Mansoor Ali Shah vs. Government of Punjab [2007 CLC 533]

- Right to a counsel: State responsibility;²⁰³
- Right to enjoy access to public parks;²⁰⁴
- Right to public recreation;²⁰⁵
- Right of free access to the beach and other coastal areas – established place of public recreation;²⁰⁶
- Right to payment for employees;²⁰⁷
- Right to protection from pollution, environmental degradation and impure food items;²⁰⁸
- Right to proper food;²⁰⁹
- Right to clothing;²¹⁰
- Right to shelter;²¹¹
- Right to health care;²¹²
- Right to clean atmosphere;²¹³
- Right to unpolluted environment;²¹⁴

²⁰³ Faisal vs. The State [PLD 2007 Karachi 544]

²⁰⁴ Ardeshir Cowasjee vs. KBCA [1999 SCMR 2998]

²⁰⁵ Ardeshir Cowasjee vs. KBCA [1999 SCMR 2998]

²⁰⁶ Muhammad Tariq Abbasi vs. Defence Housing Authority [2007 CLC 138]

²⁰⁷ Ghulam Umar Kazi vs. General Manager [2006 PLC (CS) 1143]

²⁰⁸ Adeel ur Rehman vs. Federation of Pakistan [2005 PTD 172]

²⁰⁹ Nazim, U.C. Allah Bachayo Shore vs. The State [2004 YLR 2077]

²¹⁰ Nazim, U.C. Allah Bachayo Shore vs. The State [2004 YLR 2077]

²¹¹ Nazim, U.C. Allah Bachayo Shore vs. The State [2004 YLR 2077]

²¹² Nazim, U.C. Allah Bachayo Shore vs. The State [2004 YLR 2077]

²¹³ Nazim, U.C. Allah Bachayo Shore vs. The State [2004 YLR 2077]

²¹⁴ Shehla Zia vs. WAPDA [PLD 1994 Supreme Court 693]; Nazim, U.C. Allah Bachayo Shore vs. The State [2004 YLR 2077]; Human Rights Case (Environment Pollution in Balochistan) [PLD 1994 Supreme Court 102]; Anjuman Tajran Charan vs. The Commissioner, Faisalaba [1997 CLC 1281]

- Right to unpolluted water;²¹⁵
- Right to employment;²¹⁶
- Right to enjoy recreation from Children Park, gardens and green belts meant for public purpose and established for the interest of public at large;²¹⁷
- Right to life in a clean and healthy environment, including open spaces, parks and gardens;²¹⁸
- Protection to life from diseases and inconvenience;²¹⁹
- Right of people in public to limited personal space and privacy;²²⁰
- Right to minimum wage for all employees is mandated, notwithstanding where permanent or contractual employees;²²¹
- Right to protection from nuclear waste.²²²

EMERGING HUMAN RIGHTS FRAMEWORK OF PAKISTAN:

Viewing the fundamental human rights identified in the Constitution, the ones recognised rights by the superior Courts, and the expansion of the right to life by

²¹⁵ Nazim, U.C. Allah Bachayo Shore vs. The State [2004 YLR 2077]; General Secretary West Pakistan Salt Mines Labour Union (CBA) Khewra, Jehlum vs. Director, Industries and Mineral Development, Punjab, Lahore [1994 SCMR 2061]; Suo Moto Case No. 10 of 2010 [2011 SCMR 73]

²¹⁶ Dr. Naveeda Tufail vs. Government of Punjab [2003 PLC (CS) 69]

²¹⁷ Manzoor Bhatti vs. Executive Officer, Cantonment Board, Multan [PLD 2002 Lahore 412]; Chamber of Commerce and Industry Quetta Balochistan vs. Director General Quetta Development Authority [PLD 2012 Balochistan] 31

²¹⁸ Shehri vs. Province of Sindh [2001 YLR 1139]

²¹⁹ Ameer Bano vs. S.E. Highways [PLD 1996 Lahore 592]

²²⁰ Chamber of Commerce and Industry Quetta Balochistan vs. Director General Quetta Development Authority [PLD 2012 Balochistan 31]

²²¹ H.R. Cases No. 1360 of 2009, 1859-S and 14292-P of 2010 [2011 PLC 123]

²²² Human Rights Case (Environment Pollution in Balochistan) [PLD 1994 Supreme Court 102]

the Courts, results in the realization a new framework of human rights has developed.

A comparison of this framework with the international framework leads to a number of realizations which have been summarized below.

The Constitutionally identified fundamental rights primarily focus on the first generation of rights i.e. civil rights²²³ and political rights²²⁴, while only touching upon a few of the economic,²²⁵ social²²⁶ and cultural rights.²²⁷ This can be evidenced by the table below. Please note that certain Articles fall under two categories and are therefore mentioned twice.

²²³ A civil right is an enforceable right or privilege, which if interfered with by another gives rise to an action for injury. Recognised as those dealing with people's physical and mental integrity, they include right to life, protection from physical violence, slavery etc; protection from discrimination on grounds such as sex, race, religion etc; and individual rights such as privacy, movement etc. Although not strictly an integrity right, equality provisions (including protection and treatment) qualify as civil laws.

Another group of civil rights is referred to under the collective term 'due process rights'. These pertain, among other things, to the right to a public hearing by an independent and impartial tribunal, the 'presumption of innocence', and freedom from double jeopardy and legal assistance.

²²⁴ Political rights relate to powers to participate directly or indirectly in the establishment or administration of the government. They include freedom of expression, freedom of association and assembly, the right to take part in the government of one's country etc.

²²⁵ Economic rights are as rights whose purpose is to assure that human beings have the ability to obtain and maintain a minimum decent standard of living consistent with human dignity. Examples of economic rights include right to property, right to work, right of free choice of employment, just and favorable conditions of work, right to fair wage and working conditions, right to form and join trade unions etc.

²²⁶ Social rights have been defined as rights necessary for an adequate standard of living and rights with regard to relationships in society. Examples may include right to health, shelter, and food, social care, and education, right to family and to form trade unions.

²²⁷ Cultural rights refer to the right to develop or participate in the cultural life of a community. They can also be understood as an umbrella concept under which is included all the rights that serve to protect aspects of culture such as the right to freedom of religion and freedom of expression. Although it is difficult to argue that a broad right to cultural identity is justiciable, respect for cultural identity is an animating principle that guides the interpretation of any right in a cultural context. When other rights are made justiciable in respect of cultural claims, the right to cultural identity indirectly becomes justiciable.

Economic	Social	Cultural ²²⁸	Political	Civil
Article 18. Freedom of trade, business or profession	Article 25A. Right to education	Article 20. Freedom to profess religion and to manage religious institutions	Article 16. Freedom of Assembly	Article 9. Security of a Person
Article 23. Provision as to property		Article 21. Safeguard against taxation for purposes of any particular religion	Article 17. Freedom of Association	Article 10. Safeguards as to arrest and detention
Article 24. Protection of property rights		Article 22. Safeguards as to educational institutions in respect of religion, etc.	Article 19. Freedom of speech	Article 10A. Right to Fair Trial
Article 25A. Right to education		Article 28. Preservation of language, script and culture	Article 19A. Right to Information	Article 11. Slavery, forced labour etc. prohibited
				Article 12. Protection against retrospective punishment
				Article 13. Protection against double punishment and self-incrimination
				Article 14. Inviolability of dignity of man, etc.
				Article 15. Freedom of movement
				Article 20. Freedom to profess religion and to manage religious institutions
				Article 21. Safeguard against taxation of any particular religion
				Article 22. Safeguards as to educational institutions in respect of religion
				Article 25. Equality of citizens

²²⁸ Articles 20 – 22 are included within the context of defining cultural rights with the umbrella concept identified above.

Economic	Social	Cultural ²²⁸	Political	Civil
				Article 27. Safeguard against discrimination in services

An examination of this table reveals that the primary focus of the Constitution of Pakistan has been on first generational rights²²⁹ and civil and political rights. Furthermore, a number of rights which are enunciated in the UDHR are not explicitly mentioned as fundamental rights, but some appear as Principles of Policy (which are not legally enforceable). Rights not touched upon in the Constitution include right to health, family, rest and leisure, nationality, self-determination etc. Third generation rights are completely absent from the Constitution.

The Courts have attempted to address a number of the gaps within the civil and political rights, as can be seen by the lists above. Thus, fundamental rights have been interpreted to include right to livelihood, privacy, good governance, access to justice, political justice, democracy etc.

The vast realm of the second generation²³⁰ and third generation²³¹ rights i.e. economic, cultural and social and environmental and collective rights have been

²²⁹ First generation human rights, often called “blue” rights essentially deal with civil and political rights. They primarily evolved as rights to protect the individual from the excesses of the State. They are strongly individualistic and negatively constructed to protect the individual from the state. The rights of the first generation belong to a person from the moment of birth, are inalienable and are not subjected to any limitation by any part of the State. They include the right to life and liberty, equality before law, freedom of speech, religion, fair trial etc.

²³⁰ Second generation rights, often referred to as “red” rights, are primarily socio-economic human rights, which guarantee equal conditions and treatment. They are not rights directly possessed by individuals but constitute positive duties upon the government to respect and fulfil them. These reflect the ideas of the assignment of socio-economic and cultural conditions of living of a person in the sphere of labour, employment, welfare, and social security. The volume and degree of realization of these rights to a large extent depend on the country’s economy. These are “security-orientated” rights, for example the rights to work; education; a reasonable standard of living; food; shelter and health care.

²³¹ Third generation rights, known as “green” rights, and include environmental, cultural and development rights. These emerged as a result of the fight of many nations in the world for national sovereignty and decolonization. Most often, these rights are called the rights of solidarity or “collective-developmental” rights of peoples and

touched upon by the Courts as well, specifically through the Right to Life. This expansion has included new fundamental rights such as right to electricity, clean water, hygienic environment, health, sports, recreational facilities, fair wages, shelter, food etc.

It can therefore be seen that while the Fundamental Rights chapter focuses primarily on political and civil rights, it is the Courts that have advanced the human rights framework to extend to economic cultural and social rights, developmental and collective rights and environmental rights.

There has been debate on the international fora with regards to including socio-economic rights in the Constitutions of States. Arguments in favour of inclusion that *'it makes little sense to tell people that their civil and political rights will be protected, if they continue to be at the mercy of the elements and of social exploitation. Freedom of expression means little to someone who is dying of hunger. If socio-economic rights were not given meaningful protection by the Constitution...the legitimacy of the Constitution would suffer because would be bound to say it does not deal with their most fundamental needs'*.²³²

The argument against inclusion of these rights in the Constitution is simply that it would be *"equally erosive to the legitimacy of the Constitution if it promised too much. Rights impose corresponding duties, and the Constitution would lose its*

groups held against their respective states aligns with the final tenet of "fraternity"²³¹. They reflect the idea of fraternity of the world's nations because they are collective rights.

These include the right to peace, the right to disarmament, the right to development, the right to proper environment, right to the common heritage of mankind, right of nations to self-determination, right to be free from genocide, apartheid, and many others²³¹. In addition to this, these rights include the rights of certain groups: rights of children, of aged people and people with limited abilities, women, homeless, the unemployed, etc.

²³²"Introduction to socio-economic rights in the South African Constitution", Christof Heyns & Danie Brand, LDD, Southern African Legal Information Institute, 1998

credibility if it told people they have rights in respect of which the state cannot deliver, due to lack of resources".²³³

There has generally been a reluctance of States to recognize second and third generation rights as they are seen to be require high levels of investment from the State, while the civil and political rights are said to simply require the State to refrain from interfering with individual freedoms. While this theory is challenged with the fact that State investment is in fact required for the protection of civil and political rights, States nevertheless often choose not to include economic, cultural and social rights to avoid the substantial increase in the 'burden' or budget and resource allocation which is required. While the 18th Amendment did expand the list of rights to include, for example education and information, and remove the discrimination in the equality clause – there are many critiques that it did not go far enough. Furthermore, the fact that the Constitutional Committee which finalized the 18th Amendment included no women or members of religious minorities can hardly be said to have been truly representative of the people and their wishes and needs.²³⁴

Pakistan has demonstrated its low commitment to socio-economic rights through a variety of different means. For example, an analysis of the Federal budget 2015-2015 reveals bare minimum allocations to health and education.²³⁵ Cultural heritages etc. continue to be violated by acts of State officials such as holding a performance and constructing huge stages on UNESCO protected ruins;²³⁶

²³³ "Introduction to socio-economic rights in the South African Constitution", Christof Heyns & Danie Brand, LDD. Southern African Legal Information Institute, 1998

²³⁴ "NGO Alternative Report to the CEDAW Committee", Aurat Foundation, 2012

²³⁵ Only Rs. 71.5bn has been allocated for education and 20bn for health. A country whose population is 200 million plus will have to manage with Rs. 20bn (Rs.100 for each); Federal Budget 2015 -16 A Review, institute of Policy Studies

²³⁶ "Moenjodaro 'in danger' after Sindh Festival", Jamal Shahid, 24-02-2014, Dawn News

endangering historical and cultural sites for purposes of building a metro²³⁷ and buildings for the production of a metro, the lack of protection given to places of worship of religious minorities etc.²³⁸

It becomes essential to initiate a discourse to examine the potential inclusion of greater socio-economic rights into the Constitution in order to give it legitimacy, while recognizing the fundamental nature of these rights for citizens. The Courts have clearly demonstrated a trend towards the recognition of these rights as fundamental rights. There are different avenues that can take, for example to follow the route of example South Africa, which includes the right of access to adequate housing, access to health care services, including reproductive health care, sufficient food and water, and social security etc."²³⁹ With the current socio-economic and political situation in Pakistan, the time is ripe for Pakistan to re-assess its Constitution and the rights it recognizes for its citizens and those within its borders.

²³⁷ "Orange line may cause serious damage to Shalamar: UNESO", Khalid Husain, 10-11-2015, Dawn News

²³⁸ "In the crosshairs: Assault on places of worship", Report of HRCP Expert Group on Communities Vulnerable because of their Belief, HRCP, 2014

²³⁹ "Introduction to socio-economic rights in the South African Constitution", Christof Heyns & Danie Brand, LDD 9, Southern African Legal Information Institute, 1998

CONCLUSION:

This paper has sought to identify and define the human rights framework in Pakistan based on its primary sources of law i.e. legislation and legal precedent. It has also endeavoured to un-package the principles of 'equality' and 'non-discrimination' with the intention of recognizing how these have been expanded under case law, thereby formulating the core base upon which the human rights framework is erected upon.

It becomes clear that there is an essential need for the initiation of a course on the potential expansion of the Constitution with regards to the fundamental rights chapter. The lack of recognition of economic, cultural and social rights, few political rights, along with the clear indication from the Courts, reveals that the needs and demands of the people are focused on economic and social rights. The lack of focus on environmental and cultural degradation is having a long term, irreversible impact on Pakistan and its environment. The lack of clear focus of the State on true, actual sustainable development,²⁴⁰ leads to the indisputable conclusion that the status quo cannot be maintained and the State must take action.

Furthermore, the Courts must recognize the dynamic role they play in not just adjudicating upon cases, but also the forward thinking displayed in dealing with cases with current day issues. Starting with ensuring dynamism, clarity and in-depth research and understanding of the core basics of the human rights framework, specifically the principles of equality and non-discrimination, the Courts have the potential to set the agenda for the State and the people with regards to human rights and development. It is crucial that at this stage, they take on the mantle and lead the way.

²⁴⁰ As can also be seen by the failure to meet the MDG goals.

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