

# Accessing Justice for Registered Afghan Citizens Living in Pakistan:



A Guide to Pakistani Institutions,  
Laws and Procedures



Community  
Appraisal  
& Motivation  
Programme



# **Accessing Justice for Registered Afghan Citizens Living in Pakistan:**

## **A Guide to Pakistani Institutions, Laws and Procedures**

Community Appraisal & Motivation Programme, Islamabad

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# Foreword

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Following the Soviet invasion of Afghanistan in 1979, Afghans began arriving in Pakistan in unprecedented numbers. Ongoing civil strife in Afghanistan under various regimes led to further displacement into neighboring countries over the past three decades. While many Afghans have repatriated to their country of origin, at present, approximately 1.7 million of the Afghan citizens who had been registered by the Government of Pakistan [GoP] from 2006-2007, with assistance from the United Nations High Commissioner for Refugees [UNHCR], still remain in the country. Those registered were provided 'Proof of Registration' [PoR] cards, and are referred to as registered Afghan citizens living in Pakistan in this Manual, to distinguish them from 'illegal Afghan migrants' i.e. those without legal authorization to remain.

Given the scale of Afghan migration to Pakistan surprisingly little legal research has been conducted with respect to the legal environment in the country for registered Afghan citizens. In particular, very little is known about the domestic and international legal frameworks operative in Pakistan, and the extent to which these serve the legal interests of registered Afghan citizens living here. Therefore, Community Appraisal and Motivation Programme [CAMP] undertook a study entitled 'The Legal Environment for Registered Afghans in Pakistan' as an attempt to bridge some of the gaps which exist with respect to knowledge of the legal position and experiences of registered Afghan citizens living in Pakistan.

The research study was conducted in 2010-2011, and formed part of CAMP's Rule of Law Programming in Pakistan [RLPP]. A number of research tools were employed, including: a literature review; a content review of news' reports; compilation of legal case studies; in-depth interviews with key stakeholders across the country; a national stakeholder consultation; a self-administered stakeholder questionnaire; focus groups with registered Afghan citizens involved in community-based dispute resolution; and a one-shot quantitative survey with 1500 adult registered Afghan citizens in Khyber Pakhtunkhwa [KP], which formed the backbone of the final report.

The findings of CAMP's research study led to the development of evidence-based programming which is responsive to registered Afghan citizens' particular experiences of the Pakistani legal system and gaps in the legal assistance and protection framework. In particular, during 2011/2012, CAMP undertook the following activities:

- 1] Development of a Manual on 'Researching Forced Migration in Pakistan: An Introduction to Research Ethics, Quantitative & Qualitative Methods'.
- 2] Development of a Manual on 'International Human Rights Protection for Registered Afghans in Pakistan: An Introduction to International Mechanisms & Procedures', which was developed in collaboration with the Max Planck Institute for Comparative Public Law & International Law, Heidelberg, Germany.
- 3] Development of the present Manual on 'Accessing Justice for Registered Afghan Citizens Living in Pakistan: A Guide to Pakistani Institutions, Laws and Procedures'.
- 4] Each of these three Manuals formed the basis of capacity-building trainings on 'Research' manual [held in November, 2011], on 'Pakistani Laws & Institutions' manual [held in December, 2011], and finally, on 'International Human Rights Law' [held in January, 2012]. The trainings were attended by government, NGO actors, as well as concerned UN agencies.

The present publication focuses on the protections and safeguards that Pakistani laws and policies provide to registered Afghan citizens living in Pakistan whilst identifying gaps in the current laws or their effective implementation, and providing suggestions for reform. This Manual is intended for government institutions [such as the Commissionerate for Afghan Refugees [CAR], Ministry of Refugees and Repatriations [MoRR, and so on], I/NGOs, UN agencies, human rights advocates, and other concerned Civil Society Organisations [CSOs].

As is clear from CAMP's publications, when it comes to registered Afghan citizens living in Pakistan, the GoP is subject to a wide variety of international and domestic legal norms and standards. Pakistani State practice, however, has not always conformed to these international and domestic legal standards. Nevertheless, on the whole, most observers would agree that the GoP and Pakistani people have been generous and accommodating



towards Afghans in general, especially in light of such unprecedented scale migration. There are of course areas for improvement, documented in both CAMP's research study as well as in this Manual. As Pakistan transitions from a 'forced migration' to a 'migration management' orientation towards Afghans, the GoP must take heed of its constitutional and legal obligations towards non-citizens under domestic law, and there is no better time to begin doing so than now.



**Naveed Ahmad Shinwari**  
Chief Executive Officer, CAMP

# Glossary of terms

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- The Slavery Convention 1926
- ILO Convention [No. 29] concerning Forced or Compulsory Labour [1930]
- Pakistan Penal Code [PPC] 1860
- Code of Criminal Procedure [CrPC] 1898
- Code of Civil Procedure [CPC] 1908
- Labour System [Abolition] Act 1992
- United Nations Convention on the Rights of the Child [UNCRC]
- Employment of Children Rules 1995
- Foreigners Act 1946
- Wafaqi Mohtasib [Ombudsman] Order 1983
- Khyber Pakhtunkhwa Provincial Ombudsman Act 2010
- Foreigners Order 1951
- West Pakistan Maintenance of Public Order Ordinance 1960
- Organization of African Unity [OAU] Convention Governing the Specific Aspects of Refugee Problems in Africa 1969
- Pakistan Citizenship Act 1951
- Pakistan Citizenship Rules 1952
- Naturalization Act 1926
- Pakistan Naturalization Rules 1952
- Pakistan Citizenship [Amendment] Ordinance 2000
- Private Member's Bill for Amendment in Foreigners' Act 1946 [First introduced in National Assembly in April 2004, and the reintroduced in 30 March 2010]
- Convention Relating to the Status of Refugees 1951
- Tripartite Agreement 2010
- International Covenant on Civil & Political Rights [ICCPR]
- International Covenant on Economic, Social & Cultural Rights [ICESCR]
- International Convention on the Elimination of all Forms of Racial Discrimination [ICERD]
- Freedom of Association and Protection of the Right to Organize Convention 1948 [ILO Convention No. 87]
- Contract Act 1872
- Employment of Children Act 1991
- Employment of Children Rules 1995
- February 2, 2001, GoP circular [Notification No. F.12 [8]-AR.1/96]
- Muslim Family Laws Ordinance 1961
- West Pakistan Muslim Personal Law [Shariat Application] Act 1962
- Qanoon-e-Shahadat 1984
- Dissolution of Muslim Marriages Ordinance 1939
- Child Marriages Restraint Act 1929
- Guardianship & Wards Act 1890
- West Pakistan Family Courts Act 1964

# CHAPTER 1



## Introduction: Background & Objectives of Manual



# Introduction: Background & Objectives of Manual

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This chapter introduces the objectives of this Manual, its target audience, training requirements and expectations, duration of the training and background of the need for preparing this training Manual.

## Background: Rule of Law Programming in Pakistan [RLPP]

The ‘Rule of Law Programming in Pakistan’ [hereinafter referred to as RLPP] is one of the major research projects of Community Appraisal & Motivation Programme [hereinafter referred to as CAMP] out of more than a total of twenty similar projects completed thus far. In July 2010, with financial support from the Foreign Office of the Federal Republic of Germany, Islamabad, in addition to legal and technical assistance from the Max Planck Institute for Comparative & International Law, Heidelberg, Germany, CAMP initiated two detailed research components of the RLPP project:

- ‘Assessing the Legal Environment for Registered Afghans in Pakistan’, and
- “Understanding *Jirga*: Legality and Legitimacy in Pakistan’s Federally Administered Tribal Areas’.

The research study titled ‘The Legal Environment for Registered Afghans in Pakistan’ undertook an in-depth analysis of the Pakistani legal system and the assistance it extends for the protection of registered Afghan citizens<sup>1</sup> living throughout the country. To this end an extensive one-shot survey was conducted in Khyber Pakhtunkhwa [hereinafter referred to as KP] province, one of the areas in Pakistan, where a majority of registered Afghan citizens live, in order to assess their knowledge of legal rights, and existing remedies which they may have pursued in Pakistan.

## Purpose & Aim of Training Manual

The study mentioned above [‘Assessing the Legal Environment for Registered Afghans in Pakistan’] has been concluded with a detailed report on the state of access to justice, and this training Manual has been consequently compiled for the aid of government institutions [such as CAR, MoRR], I/NGOs, UN agencies, CSO workers<sup>2</sup> and other individuals/organisations currently working in this field in order to enable participants to develop a comprehensive understanding of the legal protection for Afghans in general through domestic laws and policies, and where necessary, to develop strategies to meet gaps in the present legal framework and their effective implementation.

### ■ Target audience:

This Manual is targeted towards those government agencies [such as CAR, MoRR], I/NGOs [SHARP, SEHER, CRS, and so on], UN agencies [specifically UNHCR – United Nations High Commissioner for Refugees] and other CSO workers which are currently working for the assistance of Afghans. It is also intended to serve as a tool of guidance for those individuals/organisations that intend to work for the assistance of Afghans in general in the future.

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<sup>1</sup> The focus of the survey was registered Afghan citizens residing in Pakistan as its target group, and to avoid confusion, the terminology ‘registered Afghan citizens living in Pakistan’ is used throughout this Manual to refer to those Afghan citizens who hold the requisite registration documents [for example, Proof of Registration Card, or Secure Card for Afghan Citizens] and are officially registered as ‘temporary residents’ in accordance with the policies of GoP. Where the discussion refers to all Afghans as a community, the term ‘Afghans in general’ is used, which includes all Afghans who are present in Pakistan regardless of being registered or not.

<sup>2</sup> Please refer to Glossary

### ■ Aim of training Manual:

This training Manual aims to benefit all organisations working in the field of human rights and development by introducing the laws and their general application, and then refining the discussion to the legal protections available to resident Afghans in general, especially in light of the repatriation policy of the Government of Pakistan [hereinafter referred to as GoP].

### ■ Purpose of developing training Manual & training sessions:

The rationale for developing this training Manual is to introduce the Pakistani laws and policies in place for the protection of all people, specifically registered Afghan citizens residing here. This is especially relevant for those government agencies, I/NGOs and UN agencies that are working for Afghans in general; it is envisioned that a comprehensive training formula is necessary to familiarize all actors that are currently working in this field and as a result, to raise awareness amongst them in relation to laws that protect their basic rights as human beings.

This training Manual is a representation of the findings and analysis of CAMP during the study, 'Assessing the Legal Environment For Registered Afghans in Pakistan', and as a result, the following content was developed to form the subject matter of this Manual and an appropriate methodology was devised to implement the training sessions for the benefit of the relevant individuals/organisations.

### ■ Content of training Manual:

This Manual outlines the laws and mechanisms available for legal recourse for Afghans in general and includes an analysis of the prevailing legal framework with suggestions for reform and advocacy strategies at the end of each module. The Manual begins with a discussion on constitutional provisions with respect to fundamental rights and freedoms in order to determine the rights of registered Afghan citizens living in Pakistan; secondly, an analysis of the administrative remedies that may be available to them is provided with a special reference to the KP Ombudsman system; and, includes a discussion on the foreigners' laws that govern registered Afghan citizens during their stay, as well as possibilities of citizenship and naturalization [if any] for those who have been living in the country for many decades, and for their children who are born here. A reference is also made to the criminal laws and special attention is given to specific legal problems Afghans in general face in their interactions with State representatives, such as the police or other authorities in relation to specific issues such as arrest and preventative detention which is arbitrarily practiced by law enforcement agencies which allegedly target Afghans in general.

A brief outline of the contents of the Manual is as follows:

- ❖ Constitutional Safeguards & Protections: Fundamental Rights & Applicability to Registered Afghan Citizens Living in Pakistan
- ❖ Administrative Remedies: Accessibility to The Federal & Provincial Ombudsman Office[s]
- ❖ Regulation of Registered Afghan Citizens under Foreigner's Laws and Criminal Laws in relation to Arrest & Detention
- ❖ Citizenship & Naturalization Laws: Relevance & Applicability to Registered Afghan Citizens living in Pakistan
- ❖ Employment & Labour Laws & their Application to Registered Afghan Citizens Living in Pakistan
- ❖ Family Law Matters & Mechanisms for Registered Afghan Citizens for Resolving Family Disputes

### ■ Methodology of training sessions:

The training sessions based on this Manual are envisioned to be the basis of informing and educating the target audience with knowledge about Pakistani laws as applicable to registered Afghan citizens. A brief outline of the training and break down of activities provided in the table below.

The activities provided in the right hand column of the table are divided into three stages, namely:

- ❖ Stage 1: Presentation on laws and policies of Pakistan to provide participants with the requisite background knowledge on the relevant topic using visual aids such as Microsoft Powerpoint presentations and handouts.
- ❖ Stage 2: Question & Answer sessions at the end of each presentation to generate debate in the form of round table discussions on the state of the laws and to formulate appropriate advocacy strategies [See Annex 3].
- ❖ Stage 3: Group exercises where participants are given real life scenarios to apply their knowledge in practice to generate debate on relevant issues. Samples of group exercises are attached in the form of annexed material to this training Manual [Please see Annex 2].

DAY 1			
MODULE	TOPIC	DURATION	ACTIVITIES
	Welcome & Introduction to training	30 minutes	Formal introductions & ice breaking activities
1	Constitutional Safeguards & Protections for Registered Afghans Living in Pakistan	Session 1 3 hours	Formal presentation with visual aids (1 hour 30 minutes) Question & Answer session (30 minutes) Group activity (30 minutes): Participants are divided into 3 groups and given handouts for practical application (Please see Annex 2 Group Exercise 1) and then requested to report their findings to the larger group
2	Administrative Remedies for Registered Afghans living in Pakistan	Session 2 2 hours	Formal presentation with visual aids (1 hour 30 minutes) Round table discussion (30 minutes) to generate debate (Please see Annex 3 Roundtable Discussion 1)
DAY 2			
MODULE	TOPIC	DURATION	ACTIVITIES
	Ice breaking exercises	30 minutes	Informal activities to start the day
3	Citizenship & Naturalization Laws: Relevance & Applicability to Registered Afghans living in Pakistan	Session 1 3 hours	Formal presentation with visual aids (1 hour 30 minutes) Question & Answer session (30 minutes) Round table discussion (60 minutes) to generate debate using practical examples
4	Regulation of Registered Afghans under Foreigners' Laws & Criminal Laws in respect of Arrest & Detention	Session 4 2 hours 30 minutes	Formal presentation with visual aids (1 hour 30 minutes) Round table discussion (60 minutes) to generate debate on arrest, preventative detention, access to remedies, etc., & suggestions for advocacy strategies (Please see Annex 3 Roundtable Discussion 2)
DAY 3			
MODULE	TOPIC	DURATION	ACTIVITIES
	Ice breaking exercises	30 minutes	Informal activities to start the day
5	Employment & Labour Laws: Relevance & Applicability to Registered Afghans	Session 1 2 hours 30 minutes	Formal presentation with visual aids (1 hour 30 minutes) Round table discussion (60 minutes) to generate debate & advocacy strategies (Please see Annex 3 Roundtable Discussion 3)
6	Family Law Matters and Utilization of Relevant Mechanisms by Registered Afghans	Session 2 2 hours 30 minutes	Formal presentation with visual aids (1 hour 30 minutes) Group exercise (60 minutes): Participants are divided into 4 groups to discuss real life scenarios and to suggest solutions (Please see Annexure 2, Group Exercise 2)
	Concluding remarks & closing ceremony	30 minutes	





## CHAPTER 2



# Constitutional Safeguards & Protections for Registered Afghan Citizens Living in Pakistan



# Constitutional Safeguards & Protections for Registered Afghan Citizens Living in Pakistan

## Introduction: Why do we need to study the Constitution?

### ■ Purpose & Content of Chapter:

This chapter introduces the constitutional safeguards and protections available for registered Afghan citizens living in Pakistan in an attempt to resolve the prevalent confusion about their legal status during their presence in the country. And in doing so, it is necessary to identify and analyze if registered Afghan citizens living in Pakistan have the requisite rights to claim the protection of law or not; since their presence in the country qualifies them as being within the ambit of domestic laws and policies, it is then deemed necessary to apply the requisite laws and procedures to them as well especially in the case of maltreatment or legal issues faced by them in their interactions with both the State and individuals.

Therefore, such a state of affairs warrants an introduction to the constitutional safeguards and protections provided to registered Afghan citizens living in Pakistan, who are neither citizens of Pakistan nor refugees. In the prevailing situation, the need to analyze their current legal position as non citizens living in the country arises to clarify any confusion as to their rights and status; the Constitution of Pakistan 1973 [hereinafter referred to as the Constitution] outlines certain fundamental rights and freedoms provided to both citizens and non citizens – the term ‘persons’ is used in some provisions, and hence the manual proceeds on the assumption that this term includes citizens and all other categories of non citizens, which in turn, is applicable to registered Afghan citizens living in Pakistan. The requisite part dealing with fundamental rights and freedoms is titled ‘Part II, Fundamental Rights and Policy’ and is divided into ‘Chapter 1, Fundamental Rights’ and Chapter 2 ‘Principles of Policy’<sup>3</sup>. The relevant articles relating to fundamental rights and freedoms are in Part I and they form the subject of discussion in this chapter.

Although there are numerous articles which employ the term ‘persons’, this training manual will strictly focus on a few of them only in order to illustrate the application of such provisions to registered Afghan citizens living in Pakistan, and therefore it must be kept in mind that this discussion is not to be understood as relating to the entire Constitution. Instead, in keeping with the goal of universal appeal – especially for those readers with no background in legal studies – this chapter will serve as a guiding tool for those individuals/organizations which work for the protection of rights of registered Afghan citizens living in Pakistan.

The content of this chapter is divided into the following parts:

- ❖ Detailed discussion on constitutional provisions relating to fundamental rights & freedoms: Article 9 [security of person], Article 10 [safeguards as to arrest & detention], Article 10A [right to fair trial], Article 11 [slavery, forced labour prohibited, etc], Article 14 [dignity of man, etc], Article 24 [protection of property rights] and Article 25A [right to education] to illustrate their applicability to registered Afghans living in Pakistan;
- ❖ Providing a mode of protection for fundamental rights via filing a writ petition; the types of writs and who can file them is discussed in detail; and
- ❖ Enforcement of fundamental rights via granting of writ petitions in the District Courts, High Courts and Supreme Court of Pakistan and a detailed discussion on their jurisdiction in relation to constitutional matters. It is important to note here that the section on jurisdiction of High Court and Supreme Court is

<sup>3</sup> Please see Annex 1 for complete reference of Part II, Fundamental Rights & Policy, Chapter 1 & Chapter 2

strictly limited to the violation and enforcement of fundamental rights mentioned above; in no way will the discussion attempt to cover the entire jurisdictional range of the respective courts.

The discussion that follows below will focus on the articles provided above, and keeping in view the legal terms and phrases that are not comprehensible to laymen, the relevant articles have been broken down into individual elements for the sake of clarity and simplicity to enable more understanding.

### ■ Methodology in Training Sessions

The training sessions relating to this chapter will focus on developing an informed opinion of the relevant articles and fundamental rights applicable to registered Afghan citizens living in Pakistan in order to clarify the extent of their rights within Pakistani law. The training sessions will be conducted by:

- ❖ Lectures by experts on various aspects of the Constitution in order to enable an understanding about legal aspects
- ❖ Generation of discussion with the help of visual aids, handouts, roundtable discussions and group exercises.

Note: Keeping in mind that many participants do not have a background in law, the content in this manual as well as the training sessions is kept simple and basic.

## Fundamental Rights in Constitution of Islamic Republic of Pakistan 1973

The Constitution of the Islamic Republic of Pakistan 1973 [hereinafter referred to as the Constitution] provides fundamental rights and freedoms which are inviolable applying to both citizens and non citizens within the territorial limits of Pakistan. In Part II, Chapter 1, of the Constitution some of the fundamental rights outlined use the term “persons” rather than “citizens” and hence it may be inferred that their protection may be extended to foreigners [or non citizens] in Pakistan as well.<sup>4</sup>

To illustrate, an analysis of Article 9 [security of person], Article 10 [safeguards as to arrest & detention], Article 10A [right to fair trial], Article 11 [slavery, forced labour, etc., prohibited], Article 14 [inviolability of dignity of man], Article 24 [protection of property rights] and Article 25A [right to education], which provide the same level of protection to both citizens and non citizens, with application to registered Afghan citizens temporarily residing in Pakistan is as presented below.

### ■ Article 9: Security of person

*“No person shall be deprived of life or liberty, save in accordance with law.”*

Article 9 of the Constitution states that no person [which includes citizens of the State as well as persons who are not citizens] can be deprived of his or her life and/or liberty except as provided by the law. In other words, if the law requires the deprivation of the life [right to an existence in which all fundamental rights of a person are guaranteed extending also to the right to justice, privacy and dignity] and/or liberty [personal freedom as in the right to live freely without fear or restriction of one’s freedom to associate and/or move in society according to one’s free will] of a person or persons is necessary for its execution, this is the one and only situation where such a denial of these rights is justified.

### Elements of Article 9:

1. **‘Person’** – Article 9 and some subsequent articles use the term ‘person’ instead of citizen which clearly denote its application to non citizens, including all foreigners and registered Afghan citizens who are legally present ‘temporary’ residents of Pakistan.
2. **‘Deprivation’** – The term ‘deprived’ denotes total loss rather than just restriction of freedom<sup>5</sup>, not only for the time being but for a continued period; therefore, present as well as continued detention of a ‘person’ is

<sup>4</sup> A table of the constitutional provisions and their applicability to citizens and ‘persons’ is provided in a table in Annex 1 [Table of Constitutional Provisions Applying to Citizens & ‘Persons’]

<sup>5</sup> Blackstone’s Commentaries definition of ‘deprivation’ [Quoted in Mahmood, M., “The Constitution of Islamic Republic of Pakistan 1973 [as amended by 18th Constitution Amendment act]”, 9th edition, 2010 [hereinafter referred to a Mahmood, 2010]

capable of violating this provision. The loss applies equally to both life and liberty, thus further stressing the importance of both concepts. Hence, according to the Article, any kind of unlawful deprivation of life or liberty is deemed a violation of the security of a person; an important exception to this principle is the detention of foreigners who are held for the purpose of impending deportation to their country of origin<sup>6</sup>.

3. **'Life'** – This term has not been defined in the Constitution but instead has been given a wide interpretation to denote not only human existence in the narrow sense, but extending to all the facilities and necessities required for a life with dignity, without interference and/or the threat of harm.

Article 9 of the Constitution guarantees the right to life of a person only with the exception of any state law requiring a person to be deprived of his or her life; capital punishment comes to mind where the State is justified in depriving a person of his or her life, although certain schools of thought deem it inhumane and a violation of the right of life. However, in a state like Pakistan where it is still practiced, it is lawfully applicable where the person liable to be punished by death has been tried and convicted of a heinous crime such as murder – for example, a person convicted under Section 302 of the Pakistan Penal Code 1860 [PPC] is liable to be punished with death. In modern times, it has been seen that the power of the State to interfere with the life and/or liberty of a person has steadily expanded – especially in the context of anti terrorism laws which are in place in numerous States throughout the world including Pakistan – has caused much concern; ranging from telephone tapping to 'preventative' detention on suspicion, the State has widened its pretext of interfering with any one's life and right to privacy. Thus, the State has the power to lawfully deprive a person of life and/or liberty in certain situations which may remain unchallengeable in the face of legal and/or political justifications.

It is important to note that the term 'life' is used to mean not only a mere existence but includes all the basic necessities for living with dignity and respect<sup>7</sup>; thus life denotes all facts of human existence, and it has been extended, inter alia, to include:

- ❖ The right to live a private life free from State interference or surveillance forming part of the right to privacy of person<sup>8</sup>;
- ❖ Privacy of the home<sup>9</sup>;
- ❖ The right to receive public utilities such as electricity<sup>10</sup>, pension<sup>11</sup>, medical treatment<sup>12</sup>, etc;
- ❖ The right to live in a pollution free environment<sup>13</sup>, which includes the right to breathe clean air<sup>14</sup>;
- ❖ The right to education<sup>15</sup>; and,
- ❖ The right to recreation and enjoyment of public parks<sup>16</sup>.

It is in line with constitutional and public policy principles that the wider interpretation of 'life' has been afforded to all 'persons' under the Constitution, which no doubt extends to all non citizens including registered Afghan citizens residing for the time being in Pakistan, because they are also subject to the law as long as they are present in the country. This list is by no means exhaustive and has been expanded by the court's interpretation over time which provides this concept the required flexibility to evolve and change over time; this is evidenced by the fact that in modern times, the right to life includes previously unrecognized concepts such as the right to education, the right to breathe clean air, the right to enjoyment and recreation, and so on.

Thus, the right to life encompasses the right to live peacefully with all the necessities of human existence including the above given rights, and the guarantee that any unlawful encroachment upon this right is

<sup>6</sup> See discussion on Foreigners' Act 1946 in Chapter 4: Arrest & Detention of Registered Afghans under Foreigners' Laws and Criminal Laws of Pakistan

<sup>7</sup> Imdad Hussain v Province of Sindh through Secretary of Government of Sindh [PLD 2007 Karachi 116]

<sup>8</sup> The right of privacy of a woman of easy virtue is also included: M.D Tahir Advocate v Director, State Bank of Pakistan [Lahore 2004 CLD 1680]

<sup>9</sup> Riaz v Station House Officer, Police Station Jhang City [PLD 1998 Lahore 35]

<sup>10</sup> Erum Heights Residents Welfare Association v Karachi Electric Supply Corporation Ltd [2001 CLC 321]

<sup>11</sup> Mahmood Ali Butt v Inspector General of Police, Punjab [PLD 1997 SC 823]

<sup>12</sup> Muhammad & Ahmad [Corporate and Tax Counsel] through Muhammad Azhar v Government of Pakistan through Home Secretary [PLD 2007 Lahore 346]

<sup>13</sup> Ardeshir Cowasjee v Sindh Province [2004 CLC 1353]; Nazim UC Allah Bachavo Shore v The State [2004 YLR 2077]

<sup>14</sup> Islam Hussain v City District Government [2007 CLC 530]

<sup>15</sup> American case of Brown v Board of Education [1953] [2001 YLR 1139]

<sup>16</sup> Muhammad Tariq Abbasi v Defence Housing Authority [2007 CLC 1358]

unimaginable; it ensures equality of all humans before the law by providing penalties for those who attempt to violate or interfere with this right, because the right to life is so fundamental that if violated, all other corresponding rights of a human being will also be deemed to have been violated<sup>17</sup>. And, on the other hand, it ensures remedial action to the person whose right to life [along with corresponding rights] is violated by ensuring compensation which is payable either by the state or the perpetrator and/or enforcement of the right to life under Article 184[3] of the Constitution<sup>18</sup>.

The term 'life' has also been extended to include the right of access to justice covering the concepts of due process of law and adherence to the principles of natural justice; a detailed explanation of the right of access to justice is given below but here it is imperative to note here that this right is an important ingredient of the right to life as well.

4. **'Liberty'** – This term denotes not only physical freedom from control in the traditional sense but also a person's freedom to make certain choices regarding his or her life; including, inter alia:

- ❖ The right/freedom to take all the necessary measures to enjoy one's life, be it the right to sell and purchase property;
- ❖ The right/freedom to earn a livelihood or choose a vocation of one's own choice;
- ❖ The right/freedom to enter into contracts for personal and/or financial gain; and,
- ❖ In general, the right to enjoy one's life in a society free from fear of oppression and violence<sup>19</sup>.

Here again, the underlying assumption is based on every person's right to exercise free will and independence [prescribed within certain limits of the law] to safeguard his or her life and dignity as well as to maintain social order in the sense of affording protection to all subjects of a State from risks to their well being to enable them to live their lives peacefully<sup>20</sup>.

Thus the term 'liberty' is also given a wide interpretation; keeping in line with the principles of natural justice, an infringement upon a person's freedom in the broader sense is undoubtedly a violation of his or her liberty. Looking from a societal perspective, keeping in mind the State's role, the concept therefore entails the "absence of arbitrary restraint with reasonable regulations and/or prohibitions imposed in the interest of society"<sup>21</sup>. For example, under Article 24 of the Constitution, no person can be deprived of his property except as required by State law<sup>22</sup>; in case any property is being used for unlawful purposes [such as trafficking of drugs] the State has the right to interfere and any subsequent action [such a forfeiture] will not be a infringement of a person's liberty because the state will be exercising its regulatory powers because the reasonable limitations set by the law upon a person's liberty have been exceeded.

5. **'In accordance with law'** – In general, this phrase denotes that the law of the land is supreme and legal procedures must be adhered to in all matters. In Article 9, an exception where a person can be deprived of his or her life and/or liberty is present, but it is specified that this can be done only in accordance with the procedures and requirements as specified by the law. There are two aspects of this exception:

- ❖ One, that any deprivation of a person's life and/or liberty must be in accordance with established legal principles and procedures; and
- ❖ Two, the courts are empowered with the prerogative to analyse whether the act of depriving a person of his or her life and/or liberty was lawful in itself. This concept can be further explained as follows; under Article 9, the courts are deemed under a duty to firstly determine if the deprivation was lawful, and then to examine the laws and/or authority under which such denial of fundamental rights has occurred.

Thus, it is the inalienable right of every person to be dealt with according to the law; this applies to both the relationship amongst people as well as to the relation between a person and the State – any action by the

<sup>17</sup> Montarma Benazir Bhutto v President of Pakistan [PLD 1998 SC 388]

<sup>18</sup> Article 184: Original Jurisdiction of the Supreme Court – "[3] Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that 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."

<sup>19</sup> American Jurisprudence Vol. II quoted in Mahmood [2010]

<sup>20</sup> Adeel-ur-Rehman v Federation of Pakistan [2004 PTD 534]

<sup>21</sup> 'Fundamental Rights in Pakistan', page 166 quoted in Mahmood [2010]

<sup>22</sup> Tariq Irshad v The State [2006 P.Cr.L.J 23]

executive interfering with the rights of a person which is arbitrary or not in accordance with the established principles and rules of law, is liable to be held ultra vires<sup>23</sup>.

Therefore, it is the courts' duty to uphold the law in the sense of validating or invalidating action taken by a person or authority to deprive someone else of his or her life and/or liberty. The courts must safeguard the fundamental rights of all which, amongst others, includes the right to life and liberty; if any action depriving a person of his or her life and/or liberty does not have the backing of law, then the courts are under an obligation to declare it invalid<sup>24</sup> and provide recourse to the victim. For example, if a person is taken into custody by the police and such an action is mala fide without cause, the courts will intervene to provide relief to the detainee<sup>25</sup>. Hence the police is also under a duty to act within the limits set by the law; if they violate the given laws and/or procedures, such as those relating to arrest, detention, and evidence, they are liable to criminal prosecution<sup>26</sup>. Thus any arbitrary exercise of power on behalf of the police or State functionaries is capable of violating Article 9, specifically in relation to arrest and detention procedures.

The concept of right of access to justice and due process is an important component of this part of the article; for procedures and practices to be in accordance with law, justice must be accessible to all subjects without discrimination. However, this right does not stop here; in order for the requirements of this concept to be completely fulfilled, subjects must not only be able to access courts for relief, but they must also be given the complete guarantee that they will be fairly heard without prejudice<sup>27</sup> and that their civil rights will be enforced in case of any infringements along with compensation and/or rectification of the matter; this forms part of the principle of 'due process'<sup>28</sup>. Therefore, in brief, the right of access to justice, now enshrined in Articles 4<sup>29</sup> and 9 of the Constitution, includes the right to be treated according to the law with every person having an equal opportunity to approach the courts without discrimination or exception, and the right to a free and fair trial by an impartial and unprejudiced court or tribunal<sup>30</sup>.

The interpretation of 'in accordance with law' is also in line with the wider interpretations given to the Constitution as evidenced by the courts' decisions in numerous cases; the Constitution is held to be interpreted in a "liberal and beneficial manner" to incorporate its spirit<sup>31</sup>; as an "evolving scripture which must portray the aspirations of the people and aim at the progress, welfare and amity of the public"<sup>32</sup>; and, the interpretation of such articles to extend to all persons to enable all their fundamental rights to fall within the sphere of constitutional protection<sup>33</sup>. Therefore, the ambit of due process has been extended by judicial interpretation to the right of access to justice encompassing, in turn, the right of access to justice as well as due process of law which include the right to a free and fair trial by an impartial, unprejudiced court/tribunal, as well as equal protection of the law<sup>34</sup> which must be available to every person without discrimination.

**6. Application to registered Afghan citizens living in Pakistan** – The protection of due process of law and principles of natural justice is available to registered Afghan citizens living in Pakistan under the Constitution;

<sup>23</sup> Khalil ur Rahman v Deputy Commissioner Larkana & Others [PLD 1963 [W.P] Karachi 213 BD]

<sup>24</sup> Mahmood, p. 231 [2010]

<sup>25</sup> Muhammad Aslam [Amir Aslam] & Others v District Police Officer Rawalpindi & Others [2009 SCMR 141]; See also Article 10: Safeguards as to Arrest & Detention

<sup>26</sup> Amir Ullah v The State [2004 P.Cr.L.J 821]

<sup>27</sup> Article 10A: Right to fair trial [inserted by s 5 of the Constitution Amendment Act 2010] – "For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process".

<sup>28</sup> Muhammad Umar Rathore v Federation of Pakistan [PLD 2009 Lahore 268]

<sup>29</sup> Article 4: Right of individuals to be dealt with in accordance with law, etc – "[1] To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.

[2] In Particular –

[a] no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;

[b] no person shall be prevented from or be hindered in doing that which is not prohibited by law; and

[c] no person shall be compelled to do that which the law does not require him to do."

<sup>30</sup> The right of access to an impartial and independent court/tribunal is a fundamental right [PLD 1999 SC 504]

<sup>31</sup> Benazir Bhutto v President of Pakistan [PLD 1998 SC 193]

<sup>32</sup> Arshad Mahmood v Government of Punjab [PLD 2005 SC 388]

<sup>33</sup> Mushtaq Ahmed Mohal v Honorable Lahore High Court [1997 SCMR 1043]

<sup>34</sup> Babar Kahn Ghori v Federation of Pakistan [PLD 1999 Karachi 402]



they are entitled to the same standards of life and liberty as citizens because the article refers to ‘persons’ rather than citizens, and so it is safe to say that the term ‘persons’ refers to all residents in the country. As a result, it is rational to extend the protection of the concepts of life, liberty, right of access to justice and due process of law to foreigners and thus amenities such as water, electricity, medical treatment cannot be denied to them on the basis of their nationality. Medical colleges forcing exorbitant tuition fees on foreign students have been held to violate the rights of Afghan students under Article 9 as well as under Article 25 [right to education] and hence the courts have fixed a uniform rate to be charged irrespective of the institution in the Punjab province<sup>35</sup>.

■ **Article 10: Safeguards as to arrest and detention**

*[1] No person who is **arrested** shall be **detained in custody without being informed**, as soon as may be, of the **grounds for such arrest**, nor shall he be denied the **right to consult and be defended by a legal practitioner of his choice**.*

*[2] Every person who is arrested and detained in custody shall be **produced before a magistrate within a period of 24 hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the nearest magistrate**, and no such person shall be detained in custody **beyond the said period without the authority of a magistrate**.*

*[3] Nothing in clauses [1] and [2] shall apply to any person who is arrested or detained under any law providing for **preventive detention**.*

*[4] No law providing for preventive detention shall be made except to deal with persons acting in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof, or external affairs of Pakistan, or public order, or the maintenance of supplies or services, and no law shall authorize the detention of a person for a period exceeding [three months] unless the appropriate Review Board has, after affording him an opportunity of being heard in person, reviewed his case and reported, before the expiration of the said period, that there is, in its opinion, sufficient cause for such detention, and, if the detention is continued after the said period of [three months], unless the appropriate Review Board has reviewed his case and reported, before the expiration of each period of three months, that there is, in its opinion, sufficient cause for such detention.*

*Explanation I: In this Article, “**the appropriate Review Board**” means,*

*[i] In the case of a person detained under Federal law, a Board appointed by the Chief Justice of Pakistan and consisting of a Chairman and two other persons, each of whom is or has been a Judge of the Supreme Court or a High Court; and*

*[ii] In the case of a person detained under a Provincial law, a Board appointed by the Chief Justice of the High Court concerned and consisting of a Chairman and two other persons, each of whom is or has been a Judge of a High Court.*

*Explanation II: The opinion of a Review Board shall be expressed in terms of the views of the majority of its members.*

*[5] When any person is detained in pursuance of an **order made under any law providing for preventive detention**, the authority making the order shall, **[within fifteen days] from such detention, communicate to such person the grounds on which the order has been made**, and shall afford him the earliest opportunity of making a representation against the order:*

*Provided that the authority making any such order may refuse to disclose facts which such authority considers it to be **against the public interest to disclose**.*

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<sup>35</sup> Anwar-ul-Haq Ahmad v Secretary Economics Affairs Division Islamabad [PLD 2004 Lahore 771]



[6] *The authority making the order shall furnish to the appropriate Review Board all documents relevant to the case unless a certificate, signed by a Secretary to the Government concerned, to the effect that it is not in the public interest to furnish any documents is produced.*

[7] *Within period of **twenty four months commencing on the day of his first detention in pursuance of an order made under the law providing for preventive detention, no person shall be detained in pursuance of any such order for more than a total period of eight months in the case of a person detained for acting in a manner prejudicial to public order and twelve months in any other case:***

*Provided that this clause shall not apply to any person who is employed by, or works for, or acts on instructions received from, the enemy [or who is acting or attempting to act in a manner prejudicial to the integrity, security or defense of Pakistan or any part thereof or who commits or attempts to commit any act which amounts to an anti national activity as defined in a Federal law or is a member of any association which has for its objects, or which indulges in, any such anti national activity.*

[8] *The appropriate Review Board shall determine the **place of detention of the person detained and fix a reasonable subsistence allowance for his family.***

[9] *Nothing in this Article shall apply to any person who for the time being is an enemy alien.”*

Article 10 provides every person with safeguards against arbitrary/illegal arrest or detention either under ordinary law or under ‘preventative detention’ procedures. A person arrested under ordinary law must be informed of the grounds of his arrest as soon as possible; he must be allowed to consult and appoint a legal consultant of his or her choice; he must be brought before a Magistrate within 24 hours of his arrest; and, he must not be detained longer than the period determined by the Magistrate. A person arrested under the laws of preventive detention must not be detained for longer than 3 months [unless the State and Review Board hold it expedient to extend his custody for another 3 months]; at the expiration of each said period, the State must get a direction from the Review Board if there is sufficient cause to extend detention; the relevant authority ordering the detention must communicate the grounds of detention to the detainee within 15 days [if relating to a matter of public interest, however, the grounds may be withheld] and enable him to defend himself against them in court.

The arrest must fulfil two tests before it can be deemed valid: it must be authorized by an order of the Executive or by way of a legal warrant, and there must be an accusation of a certain offence and not merely based on suspicion. Under Article 10A [right to fair trial], the accused has a constitutional right to access legal counsel and any denial of such right will be challengeable in court. The accused has the right to engage counsel of his or her choice, either on State or personal expense. The court must also analyse whether there is, in actual fact, a just cause for detaining the accused, and in this context the High Court is under a duty to “satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner”; the mere issuance of a detention order from the lower courts is not sufficient, the High Court must inquire into the nature and cause of the detention. This is in accordance with the envisioned principle of Article 10: these measures attempt to curtail the arbitrary powers of the State in relation to detention which is in direct violation of the fundamental right to protection from arrest and detention.

In general, however, a person has the right to be informed of the reason of his or her arrest, has the right to demand an arrest warrant, and be produced before a Magistrate within 24 hours of detention, and on being arraigned, has the right to defend himself or herself through legal counsel. Therefore, it is an established fact that prolonged detention without cause is a violation of the fundamental right of protection from arbitrary arrest under this article and can be challenged in court through a writ petition for Habeas Corpus.

<sup>35</sup> For the purposes of clauses [1] and [2]

### Elements of Article 10:

1. **'Arrest'** – The term 'arrest' denotes the taking into physical custody of a person accused of an offence by the police or the relevant authority either under a legal warrant by the Executive and/or when he is suspected of committing an offence or is involved in some activity which necessitates the deprivation of his or her liberty<sup>36</sup>.
2. **Protection against arbitrary arrest** – In Article 10, a person who has been arrested is afforded protection against being held for a prolonged period against his will, and places a duty on the police or other detaining authority to adhere to certain procedures which must be followed in order to legalise the arrest; in other words, they provide a safeguard against arbitrary arrest. In Clause [1], the person arrested and in custody under ordinary law, must be informed, as soon as possible, of the grounds of his arrest, and secondly, he or she has the right to consult and be defended by a legal counsellor of his or her own choice<sup>37</sup>. The rationale for communicating the grounds of arrest to the detainee is to provide him or her with sufficient knowledge to enable action to be taken; the next step for the detainee will naturally be appointing of a legal counsellor who will represent his or her cause in court and prepare for defence or file a Habeas Corpus petition against detention. A mere reference to the relevant law or provision under which a person has been detained does not fulfil this requirement<sup>38</sup>. Where the detainee is not able to read and write, oral communication of the grounds of detention is sufficient for the purposes of the constitutional provision<sup>39</sup>.

The grounds must be communicated "as soon as may be", implying this must occur within a reasonable time as soon as possible – although there is no time limit given in the provision, it is assumed that the grounds for detention should be communicated within 15 days [as in the case of a person detained under an order of preventive detention]<sup>40</sup>. The requirement of communicating the grounds of detention to the person in custody presupposes that there must be, in actual fact, one or more grounds for the arrest and subsequent custody; hence, it follows that arrest without concrete grounds would be unlawful. The existence of material grounds for arrest, therefore, is a prerequisite for arrest; if there are none, and arrest is still affected, the court will certainly allow a petition for Habeas Corpus<sup>41</sup>.

In addition, where the grounds are vague, giving no clear indication of the charges made against the detainee, and do not afford him the opportunity to represent himself in accordance with constitutional requirements, the detention will be held to be unlawful<sup>42</sup>. Therefore, the grounds must be relatable to specific provisions of a statute upon which the authority has relied upon to arrest the concerned person; in the absence of such a requirement the relevant authority could easily protect itself by providing vague, unclear grounds for arrest without proper reference to a valid law, and such a situation would undermine the presumption of innocence if people in detention were to remain in custody awaiting trial indefinitely<sup>43</sup>. The reasonableness of the detention will also be inevitably examined by the court; along with prima facie cause for detention and valid grounds, the order of detention will also be scrutinized in order to check the legality of arrest and continued detention<sup>44</sup>.

The second part of this clause relates to the requirement of the right to counsel that forms part of the right of access to justice and due process. Denying a detainee access to legal representation is an infringement of a constitutional right available to every person; this right includes being able to appoint a legal counsel of the detainee's free choice if he or she is able to engage one. All accused persons have the inherent constitutional right to be defended in line with the presumption of innocence, irrespective of whether domestic law makes provision for such a right or not<sup>45</sup>. The only exception is where the detainee is not capable of engaging counsel; in such a situation, one will be assigned to him or her by the court, but even in this case, the detainee may object to the representation if he or she is not satisfied with it<sup>46</sup>.

<sup>36</sup> For the purposes of clauses [1] and [2]

<sup>37</sup> Hassan v Fancy Foundation [PLD 1975 SC 1]

<sup>38</sup> Vimal Kishore Mehta v State of Uttar Pradesh [AIR 1956 All 56]

<sup>39</sup> Jumma Khan Baluch v The Government of Pakistan & Others [PLD 1957 Karachi 939]

<sup>40</sup> Mahmood, p. 242 [2010] "Communication of grounds"

<sup>41</sup> Mamoona Saeed v Government of Punjab [2007 P.Cr.L.J 268]

<sup>42</sup> Mrs. R.B Shaukat v Government of East Pakistan [PLD 1965 Dacca 241]

<sup>43</sup> Federation of Pakistan through Secretary, Ministry of Interior, Islamabad v Amatul Jalil Khwaja [PLD 2003 SC 442]

<sup>44</sup> Ibid

<sup>45</sup> Mrs. R.B Shaukat v Government of East Pakistan [PLD 1965 Dacca 241]

<sup>46</sup> Hakim Khan v The State [PLD 1975 SCMR 1]

The requirements of communication of grounds and the right to consult a legal practitioner of the detainee's choice are in consonance with the 'right of individuals to be dealt with in accordance with the law' in Article 4 as well as the exception in Article 9 as discussed above that any deprivation of life and/or liberty must be within the limits as provided by the law.

3. **'Preventive detention'** – An exception to the above discussed provisions of Article 10 is provided where the authorities are exempted from adhering to the constitutional requirements of life and/or liberty of a person in certain situations as elucidated in Clause [3]; namely, where detention is necessary to prevent a person from acting prejudicially towards State integrity, security, and/or public interest. However, the grounds of detention must also be communicated to the detainee where he or she has been detained under an order of preventive detention; Clause [5] provides that the grounds of detention must be communicated to a detainee within a maximum of 15 days.

For this the authority making an order of 'preventative' detention must be reasonably satisfied that the intended detainee will act in a manner that is prejudicial to State and/or public interests, and not just for an ulterior motive<sup>47</sup>. If an order of preventive detention does not fulfil the following conditions, it will not stand as valid in court:

- The relevant authority was satisfied with certain material and/or information in its possession of the prejudicial act to be committed by the intended detainee; each of the grounds of detention should be valid and based in law – even if one of the grounds is shown to be bad, the entire order of detention will be invalidated;
- The authority making the order must be able to prove the legality of the order during initial proceedings in court; and,
- All material and/or information upon which the order was based is to be presented in court notwithstanding any claim of privilege to withhold such information – one exception is available only where the authority may refuse to disclose any facts material to the detention which are considered to be against public interest and/or state security<sup>48</sup>.

In addition, the court must be satisfied that the order for preventive detention is based on law, and each of the legal requirements of preventive detention have been complied with; that such detention was in fact necessary, and the grounds for detention are not irrelevant and vague; and, the purpose of detention should not be extraneous to legal considerations that are capable of being struck down as of malicious or mala fide intent<sup>49</sup>.

4. **Powers, Jurisdiction & Composition of the 'appropriate Review Board'** – the Review Board is an authority that has the power to order detention of a proposed detainee [for a period of 3 months] and to renew the detention of a person who is already in custody [for another 3 months]. At the expiration of each period given in the provision, the Review Board [hereinafter referred to as 'the Board'] must review the purpose of the detention; if the detaining authority is able to satisfy the board that detention must be continued, then the Board will provide an extension, again only for a maximum of three months, at the end of which, another review must be held<sup>50</sup>.

The composition of the Board is outlined in Clause [4]; where detention is based on federal law, the Chief Justice of the Supreme Court of Pakistan [SCP] will appoint a Chairman and 2 other members [all of whom are either present or retired judges of the SCP], and in the case of detention under Provincial law, the power of appointment lies with the Chief Justice of the relevant provincial High Court of a Chairman and 2 members

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<sup>47</sup> Federation of Pakistan through Secretary, Ministry of Interior, Islamabad v Amatul Jalil Khwaja [PLD 2003 SC 442]

<sup>48</sup> Article 10, clause [5]: "...Provided that the authority making any such order may refuse to disclose facts which such authority considers it to be against the public interest to disclose" [2004 YLR 1680]

<sup>49</sup> Federation of Pakistan through Secretary, Ministry of Interior, Islamabad v Amatul Jalil Khwaja [PLD 2003 SC 442]

<sup>50</sup> Article 10: "[4]..no law shall authorize the detention of a person exceeding [three months] unless the appropriate Review Board has, after affording him an opportunity of being heard in person, reviewed his case and reported, before the expiration of the said period, that there is, in its opinion, sufficient cause for such detention, and if the detention is continued after the said period of [three months], unless the appropriate Review Board has reviewed his case and reported, before the expiration of each period of three months, that there is, in its opinion, sufficient cause for such detention."

[all of whom are either current or retired judges of the High Court]<sup>51</sup>. In the case of a person detained under an order of preventive detention, the maximum period for continuous detention is 8 months where he or she has been detained for acting in a manner prejudicial to public order and 12 months if detained on any other ground; in other words, a person cannot be detained for a second time within 2 years if he or she has already been in detention for the full length of time provided – 8 months in case of a person acting in a manner prejudicial to public order, and 12 months for any other reason, which implies that a person previously detained, if made the subject of subsequent preventive detention order, cannot be taken into custody unless 2 years have passed from the day of his first detention<sup>52</sup>. The only exception to this provision is in case of a person who is suspected to be in association of the declared enemies of the State.

The Board also has the power to determine the appropriate place of detention of the detainee in case of either an objection raised by counsel or the detaining authority, or of its own accord. And where the detainee is the sole provider for his or her family, the Board will, taking into account the financial circumstances of the detainee, fix a reasonable subsistence allowance for his or her family for the period of time he or she is in detention<sup>53</sup>.

- 5. Application to registered Afghan citizens living in Pakistan** – Where the detainee is a registered Afghan citizen living in Pakistan, the safeguards under Article 10 of the Constitution are available; this is because of the principle that the provisions of laws applicable to non citizens must not be interpreted and/or applied in a manner which violates the fundamental rights and guarantees provided in the Constitution. Where a person who is a bona fide citizen [with apparent residence and family linkages in the country for a certain period of time] is in detention for a prolonged time without being given an opportunity to be heard by the Board, will be held to be detained in contravention of Article 10 without legal effect and thus will be allowed a writ of Habeas Corpus<sup>54</sup>. Similarly, where a non citizen – and specifically a registered Afghan citizen living in Pakistan – is in continuous detention under Clause [7] of Article 10 for more than 8 months without recourse to review by the Board, the same situation will arise. Where only a direction has been issued in writing by the Federal Board to the relevant Provincial Board to take further action, it cannot be held to be equivalent to a review, hearing and report within the meaning of Clause [4] and thus such detention will be held unlawful<sup>55</sup>.

Even where a registered Afghan citizen living in Pakistan is detained under an order of preventive detention, he or she is entitled to the remedy of filing for representation without delay; Clause [5] of Article 10 stipulates that a detainee held under such an order has to the right to know the grounds of his or her detention within 15 days since the commencement of his detention without any delay; if this requirement is not adhered to, the detention will be considered to be based on mala fide intention and thus be liable to be struck down by the High Court in pursuance to its constitutional jurisdiction<sup>56</sup>. Therefore it is essential that the detention order [whether ‘preventative’ or otherwise] even in the case of a registered Afghan detainee must be first passed by a competent authority based on valid, lawful grounds and he or she must be given an opportunity for representation, otherwise, the order for detention may be quashed<sup>57</sup>.

However, where a registered Afghan citizen [as in the case of any other foreigner] has entered into the country by illegal means and as a result is in detention precisely because of his illegal entry and stay, no writ of Habeas Corpus is available and he or she must remain in detention to await deportation back to his country<sup>58</sup>.

<sup>51</sup> Article 10: “[4] Explanation I – In this Article, “the appropriate Review Board” means,

[i] In the case of a person detained under Federal law, a Board appointed by the Chief Justice of Pakistan and consisting of a Chairman and two other persons, each of whom is or has been a Judge of the Supreme Court of the Supreme Court or a High Court; and

[ii] In the case of a person detained under a Provincial Law, a Board appointed by the Chief Justice of the High Court concerned and consisting of a Chairman and two other persons, each of whom is or has been a Judge of a High Court.”

<sup>52</sup> Article 10: “[7] Within a period of twenty-four months commencing on the day of his first detention in pursuance of an order made under the law providing for preventive detention, no person shall be detained in pursuance of any such order for more than a total period of eight months in the case of a person detained for acting in a manner prejudicial to public order and twelve months in any other case...”

<sup>53</sup> Article 10: “[8] The appropriate Review Board shall determine the place of detention of the person detained and fix a reasonable subsistence allowance for his family”.

<sup>54</sup> *Mst Bakhtawar v The State & 3 Others* [1976 P.Cr.L.J 393]

<sup>55</sup> *Muhammad Akbar Cheema [Advocate] v Superintendent Jail Kot Lakhpat 1994* [P.Cr.L.J 2362]

<sup>56</sup> *Syed Shamim Akhtar v The Government of Pakistan & 3 Others 1996* [P.Cr.L.J 326]

<sup>57</sup> *Ibid*

<sup>58</sup> *Syed Ahmad-ud-Din v Superintendent, District Jail Lahore & 2 Others* [1977 P.Cr.L.J]

## ■ Article 10A: Right to fair trial

*“For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.”*

Article 10A incorporates the principle of due process of law and access to justice which denotes that a person must not only be tried by a fair, partial, and transparent court/tribunal but also that he or she must have access to legal advice and representation which are the sine qua non of law; the absence of any one of these deemed as violating the law. Among the factors that are taken into account to determine a fair trial for an accused, inter alia, are: legal counsel and representation, the opportunity to present evidence and witnesses, the opportunity to rebut the opposition’s evidence and cross examine the opposition’s witnesses, an impartial, fair, and objective tribunal/court, the judge’s unbiased appraisal, and so on.

An important issue in relation to a fair trial is whether it can be held with or without legal counsel irrespective of the financial condition of an accused, because he or she may either be unable to afford legal services or be unfamiliar with the requisite legal technicalities. Thus the right to fair trial has also been held to include “free legal assistance at State cost” where an individual is accused of an offence; it is an undeniable fact that “a trial and proceedings without counsel cannot be called a fair trial and proceedings and hence the same would be a violation of Article 9 of the Constitution”. This is a fundamental constitutional right of every accused person who is unable to engage legal counselling “on account of reasons such as poverty, indigence or incommunicado situation” and the State is under a duty to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to a certain legal counsellor.

There are several mechanisms in place to provide legal counsel to an accused: for example, the Pakistan Bar Council Free Legal Aid Scheme 1988 [and 1999 Rules] provides legal aid and free representation to all categories of people who are entitled to Zakat [“the poor, destitute, orphans, widows, indigent, invalid or other deserving litigants”] in a variety of cases including public interest litigation – including a writ to enforce fundamental rights; the High Court Rules and Orders [Criminal] also makes provision for counsel to be appointed at state expense where the accused cannot afford one; and, the Civil Procedure Code 1908, Order XXXIII [Suits by Paupers] enables civil litigants to be declared as “paupers” [persons not possessed of sufficient means to engage legal representation] who are to be given free access to counsel. Another mechanism in place is the Punjab Public Defender Service Act 2007 which purports to provide free legal assistance to “indigent persons” who cannot afford it.

### Elements of article 10A:

1. **‘Determination of Civil rights and obligations’** – The Article points out that the right to a fair trial will be enforced in the case of determination of a person’s civil rights and obligations; ‘civil rights’ being those personal liberties and privileges that are available to persons usually by virtue of citizenship, and at times, also extended to foreigners living in a certain country. For example, Pakistani citizens and non citizens alike are provided civil rights and liberties under the section on fundamental rights in the Constitution, which includes the right to a fair trial. ‘Obligations’ on the other hand, denote the legally binding duties and/or responsibilities that the State enforces mostly upon citizens, both in relation to each other and with respect to the State itself. Such duties encompass all actions that the law requires an individual to perform or to refrain from, in violation of which he or she can be penalized by a contracting party and/or the State. People are granted civil rights in the form of some fundamental rights – such as the right to life and/or liberty [Article 9], safeguards against arrest and detention [Article 10], right to a fair trial [Article 10A], and right to education [Article 25A] and so on – as well as by virtue of federal and provincial laws.

The determination and enforcement of a person’s civil rights will take place only in a court of law in accordance with the principle of due process and equality before the law. A court will determine whether an individual’s civil rights have been breached – for example, in the case of illegal detention, a person’s right to personal liberty under Article 9 and the conditions of legal detention under Article 10 will stand as violated – and if so, the court will have the power to enforce the right, and/or grant a remedy. Using the above example, a court, upon finding that a person has been illegally detained in violation of Articles 9 and 10 of the Constitution, will order the detaining authority to immediately produce the detainee in court to provide him



or her an opportunity to be heard [writ of Habeas Corpus] and decide the matter on its merits.

2. **‘In any criminal charge’** – A criminal charge is a formal accusation by the State on a person who is alleged to have committed a crime; a ‘crime’ is defined as “an action or an instance of negligence that is deemed injurious to the public welfare or morals or to the interests of the State and that is legally prohibited”<sup>59</sup>. A formal charge involves the process of presenting the allegation in a statement of the offence [complaint], any supplementing information, and the indictment [stating the details of the concerned law under which the accused is being charged]. The term ‘in any criminal charge’ refers to all crimes alleged to have been committed so the scope of Article 10A extends to all criminal activity under the law.
3. **‘Fair trial’** – As noted in the discussion of Article 9, the right to fair trial encompasses multiple elements: the right to be dealt with in accordance to the law; the right of access to justice which includes the right to legal representation; the right to be heard by an impartial, unprejudiced court/tribunal; and, due process of law. In consonance with the fundamental rights and freedoms available to all persons under the Constitution, the guarantee to a fair trial is an important one because it upholds the concept of equality of law and its application to all persons without exception. A fair trial, by definition, is the guarantee that a trial is conducted fairly and justly, with all the requisite procedural regularity supervised by an impartial, unprejudiced judge, during the course of which the accused/defendant is given full opportunity to be heard and submit his arguments in court under the appropriate constitutional provisions or State law. Amongst the factors that are used to determine if the accused/defendant has received a fair trial include the opportunity of presenting evidence and arguments by his or her counsel, the opportunity to answer and rebut the opposition’s accusations and arguments and cross examine the opposition’s witnesses, and lastly, the presence of an impartial jury, and the judge’s freedom from bias<sup>60</sup>.
4. **‘Due process of law’** – This concept takes the right of individuals to be dealt with according to the law further by emphasizing the need for due process; this qualifies that all legal procedures must be open, fair, and transparent, and determination of innocence or guilt must be undertaken by an unbiased court/tribunal – anything contrary to these requirements will be deemed as violating the parameters set by the law<sup>61</sup>. This duty also extends to the legislature which is under a duty to enact laws within the framework envisioned by the Constitution, and places a corresponding obligation on the judiciary to examine the constitutionality of legal practices through judicial review<sup>62</sup>. Article 4 concerns the right of individuals to be treated in accordance with the law which signifies that no action adversely affecting, inter alia, the life, personal liberty, welfare, privacy and property of any person must be taken unless it is required by the law.

Thus, the requirement of a fair trial is part of due process as well as equality before the law; the administration and dispensation of justice is necessary to maintain the rule of law and therefore all matters pertaining to a person’s civil, political, social, legal and economic rights must be determinable and enforceable without fear of persecution<sup>63</sup>.

5. **Applicability to registered Afghan citizens living in Pakistan** – Therefore, as is apparent from the above discussion, the right to a fair trial encompasses both the concepts of due process of law as well as the right to legal aid and representation, and this right applies not only to citizens but extends to registered Afghan citizens living in Pakistan as well since the Article addresses ‘persons’.

The situation, however, even for registered Afghan citizens living in Pakistan is far from satisfactory: due to the inherent bias of Pakistani officials towards them, they are subject to arrest without due cause and often languish behind bars with little or no recourse to legal representation which is an infringement of their basic human rights as well as a violation of the right to fair trial under this

According to Human Rights Commission of Pakistan [HRC] reports, Afghans in general get arrested for minor offenses [such as not possessing the requisite paper work] and at times for “wandering” at late hours without excuse<sup>64</sup>. Similarly, the Revolutionary Association of the Women of Afghanistan [RAWA] wrote an

<sup>59</sup> Definition of ‘crime’: <http://dictionary.reference.com/browse/crime>

<sup>60</sup> American case of King v Panther Lumber Co. [171 US 437]

<sup>61</sup> Muhammad Umar Rathore v Federation of Pakistan [2009 CLD 257]

<sup>62</sup> Fauji Foundation v Shamimur Rehman [PLD 1983 SC 457]

<sup>63</sup> M.Z. Khan v Aziz-Ud-Din Ahmad Khan [2004 YLR 84]

<sup>64</sup> “Afghan Culture: Afghans Behind Bars” – Mati Ullah Abid [referring to HRC research by Dr. Rahat Ali, activist at HRC]

appeal to then President of Pakistan, Gen. [R] Pervaz Musharraf, requesting release of innocent Afghan women and children in Rawalpindi and Islamabad jails: they had been arrested due to the police officials' unreasonable insistence for Pakistani visas – whereas they are only required to have Proof of Registration [PoR] cards under the joint regulations by CAR and the GoP – which is surprising especially since the Pakistani State does not issue visas to registered Afghan citizens living in Pakistan.

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

*“[1] Slavery is non-existent and forbidden and no law shall permit or facilitate its introduction into Pakistan in any form.*

*[2] All forms of forced labour and traffic in human beings are prohibited.*

*[3] No child below the age of fourteen shall be engaged in any factory or any other hazardous employment.*

*[4] Nothing in this article shall be deemed to affect compulsory service –*

*[a] by any person undergoing punishment for an offence against any law, or  
[b] required by any law for public purpose:*

*Provided that no compulsory service shall be of a cruel nature or incompatible with human dignity.”*

Article 11 makes reference to ‘slavery’ [a condition arising from total denial of a free subject’s rights], ‘forced labour’ [when a person is made to work under a threat or compulsion], and ‘traffic in human beings’ [the movement of people by force, coercion or deception into situations of exploitation]. It prohibits the employment of children under the age of 14 years [especially in mines, factories or other “hazardous employment”] in furtherance to the policy of eradicating child labour in Pakistan. The Article goes on to state that any form of “compulsory service” [i.e. a sentence/punishment for an offence and that “required by any law for public purpose”] should also not be conducted in a cruel manner so as to affect human dignity and respect.

In keeping with the constitutional provision prohibiting forced labour and its variants, the Bonded Labour System [Abolition] Act 1992 abolished bonded labour and all forms of forced labour with respect to liability to pay any creditor[s] as well as all customs, practices, traditions, etc., of any such outstanding agreements. Such acts, if continued are punishable under the 1992 Act as well as the Pakistan Penal Code 1860 [PPC]. The 1992 Act provides a maximum sentence of 5 years in case an employer is found to be practicing forced/bonded labour, while the PPC recommends a maximum sentence of 10 years and a fine for a person dealing in slaves as an occupation [ss. 370 & 371], and in relation to a person compelling others to forced labour, it metes out a maximum sentence of 5 years and a fine, or both [s. 374]. In addition, the PPC also provides for penalties relating to human trafficking, especially of minor girls [ss. 366A & 366B], kidnapping or abducting a woman to force her to marry against her will [s. 365B], and selling or buying persons for purpose of prostitution [s. 371A & 371B].

**Elements of Article 11:**

1. **‘Slavery’** – There is no definition of slavery in the provision itself but the generally accepted meaning given to this term is the “state of servitude, including forced subjection under conditions of strong influence”. Being held against one’s will falls in this category; to be a slave means being in the control of another person or persons in a manner so that one cannot exercise one’s will and/or determine one’s own life course, and the rewards for work are not one’s own to claim: in other words, a ‘slave’ is not able to exercise free will and for all practical purposes, is considered as someone else’s property<sup>65</sup>. The Article refers to slavery as non-existent and prohibited in Pakistan, and any law or legal procedure that induces such a state of a person will be declared void according to Clause [1]. The scope of slavery is further expanded by taking into account

<sup>65</sup> The Slavery Convention 1926, Article 1.1 defines slavery as: “...the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”. Pakistan became acceded to this Convention [as amended] on 30 Sept 1955.

contemporary society, and thus it includes “...people enslaved by violence and held against their wills for the purpose of exploitation; although the ancient perception of slavery is abhorred in modern times, certain kinds of economic and social exploitation exists due to excessive poverty, lawlessness and violence<sup>66</sup>. The Pakistan Penal Code makes it a punishable offence for anyone dealing with slaves, or to practice the slave trade<sup>67</sup>.

Situations involving slavery include debt bondage<sup>68</sup>, serfdom<sup>69</sup>, servile forms of marriage<sup>70</sup>, the exploitation of children and adolescents<sup>71</sup>, and so on. In order to determine what exactly constitutes slavery, it is necessary to examine the circumstances of any kind of servitude and/or regular employment to differentiate it from ‘slavery’ per se: the degree of restriction of the individual’s inherent right to freedom of movement; the degree of control of the individual’s personal belongings; the existence of informed consent and a full understanding of the nature of the relationship between the parties<sup>72</sup>. A case in point is the practice of giving a bride “in lieu of sister of bridegroom” which is quite common in some rural areas of Pakistan; such a practice is clearly in violation of Article 11 and amounts to a form of slavery – being a servile form of marriage - since the woman given as a bride does not have the option of refusal and is bound by the decision of her elders and/or male relatives<sup>73</sup>.

Thus, the provisions in Article 11 are in line with the international norm relating to slavery: the Universal Declaration of Human Rights [hereinafter UDHR] states: “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all forms”<sup>74</sup>. In Pakistan’s case, where there is no definition available, it can be safely assumed that the above interpretation can be appropriately applied to Article 11 of the Constitution<sup>75</sup>.

2. **‘Forced labour’** – This term is again not defined but left to interpretation according to generally accepted definitions: forced or compulsory labour may be defined as any work or service “which is exacted from a person under the menace of any penalty and for which the subjected person has not offered himself voluntarily”<sup>76</sup>. Under the PPC 1860, it is made a punishable offence to compel a person to labour against his or her will<sup>77</sup>. Also, a contract under which a person agrees to render his or her services either with or without wages, forfeiting his or her freedom of employment and/or movement or forfeiting the right to appropriate or sell at proper market value any of his or her property or produce of his labour will be deemed void and having no effect in law<sup>78</sup>. The High Courts, under Article 199 of the Constitution, have the power to enforce fundamental rights including where a person is subjected to slavery or bonded labour etc., not only against

<sup>66</sup> Kevin Bales “Disposable People: New Slavery in the Global Economy” University of California Press, 1999: Bales estimated that there were 27 million slaves in the world in 1999.

<sup>67</sup> Section 370 [Buying or disposing of any person as a slave], and section 371 [Habitual dealing in slaves]

<sup>68</sup> “The status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security as a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined”: Human Rights Education Associates [HREA] 2004

<sup>69</sup> The condition of status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person, whether for reward or not, and is not free to change his status”: HREA 2004

<sup>70</sup> “A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or the husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or a woman on the death of her husband is liable to be inherited by another person”: HREA 2004

<sup>71</sup> “Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour”: HREA 2004

<sup>72</sup> HREA 2004 at [http://www.hrea.org/index.php?doc\\_id=430](http://www.hrea.org/index.php?doc_id=430)

<sup>73</sup> Haseena v Senior Superintendent of Police, Dera Ghazi Khan [2000 YLR 2882]

<sup>74</sup> Article 4 of the Universal Declaration of Human Rights

<sup>75</sup> Mahmood, [2010]

<sup>76</sup> ILO Convention [No. 29] concerning Forced or Compulsory Labour in 1930 included forced or compulsory labour into the 1926 Convention’s definition of ‘slavery’

<sup>77</sup> Section 374: Unlawful compulsory labour – “[1] Whoever unlawfully compels any person to labour against the will of that person, shall be punished with imprisonment of either description for a term which may extend to five years or with fine, or with both.”

<sup>78</sup> Human Rights Commission of Pakistan v Government of Pakistan [PLD 2009 SC 507]



individuals but also against public authorities. In such cases, where there has been an infringement of Article 11, the High Court will issue a direction which will require enforcement against the offending parties<sup>79</sup>.

The Bonded Labour System [Abolition] Act 1992, which provides that even a prima facie voluntary contract whereby any person is required to render services as a bonded labourer will be void and inoperative<sup>80</sup>. A comprehensive discussion on 'bonded labour' is available in the 1992 Act which provides an insight into all the situations where labour is forced under a bonded debt situation<sup>81</sup>. An important point to note here is that while the recovery of a debt is prohibited through forced or bonded labour; a creditor is entitled to recover his loan via normal legal channels. Nevertheless, taking into account the unfair terms and bargaining position of the creditor, such a situation leaves room for exploitation of the debtor<sup>82</sup> especially where he or she is not aware of his or her legal rights. The solution to this situation is offered by section 6[2] which bars any suit or proceedings for recovery of a bonded debt, while section 8 prohibits a creditor from accepting any payment against a bonded debt and makes it a punishable offence with imprisonment of up to 3 years<sup>83</sup>.

As a result of provincial initiative, the Centre for the Improvement of Working Conditions and Environment [CIWCE] was established to enforce these laws at the grass root level which included the setting up of a Legal Aid Service Unit [LASU] – currently functional in Punjab and Khyber Pakhtunkhwa only – that provides legal assistance to workers looking to free themselves from bonded or forced labour. The complainants may contact the unit either by calling a toll free number or by filing an application to the LASU Law Officer;

<sup>79</sup> Ibid

<sup>80</sup> Section 5, Bonded Labour System [Abolition] Act 1992: "Agreement, custom, etc., to be void – Any custom or tradition or practice or any contract, agreement or other instrument, whether entered into or executed before or after commencement of this Act, by virtue of which any person, or any member of his family, is required to do work or render any service as a bonded labourer, shall be void and inoperative".

Section 2: Definitions – "...[b] 'bonded debt' means an advance [peshgi] obtained, or presumed to have been obtained, by a bonded labourer under, or in pursuance of, the bonded labour system;

[c] 'bonded labour' means any labour or service rendered under the bonded labour system;

[d] 'bonded labourer' means a labourer who incurs, or has, or presumed to have, incurred, a bonded debt;

[e] 'bonded labour system' means the system of forced, or partly forced, labour under which a debtor enters, or has, or is presumed to have, entered into an agreement with the creditor to the effect that –

[i] in consideration of an advance [peshgi] obtained by him or by any of the members of his family [whether or not such advance [peshgi] is evidenced by any document] and in consideration of the interest, if any, due on such advance [peshgi], or

[ii] in pursuance of any customary or social obligation, or

[iii] for any economic consideration received by him or by any of the members of his family;

He would –

[1] Render, by himself or through any member of his family, or any person dependent on him, labour or service to the creditor, or for the benefit of the creditor, for a specified period or for an unspecified period, either without wages or for nominal wages, or

[2] Forfeit the freedom of employment or adopting other means of livelihood for a specified period or for an unspecified period, or

[3] Forfeit the right to move freely from place to place, or

[4] Forfeit the right to appropriate or sell at market value any of his property or product of his labour or the labour of a member of his family or any person dependent on him,

And includes the system of forced, or partly forced, labour under which a surety for a debtor enters, or has or is presumed to have, entered, into an agreement with the creditor to the effect that, in the event of failure of the debtor to repay the debt, he would render the bonded labour on behalf of the debtor."

[f] 'family' means –

[i] in the case of a male bonded labourer, the wife or wives, and in the case of a female bonded labourer, the husband of the bonded labourer; and

[ii] the parents, children, minor brother, and unmarried, divorced or widowed sisters of the bonded labourer wholly dependent on him;

[g] 'nominal wages' in relation to any labour, means a wage which is less than –

[a] the minimum wages fixed by the Government, in relation to the same or similar labour, under any law for the time being in force; and

[b] where no such minimum wage has been fixed in relation to any form of labour, the wages that are normally paid, for the same of similar labour, to the labourers working in the same locality; and

[h] 'prescribed means prescribed by rules made under this Act."

<sup>82</sup> Darshan Masih's Case [PLD 1990 SC 513]

<sup>83</sup> Human Rights Commission of Pakistan v Government of Pakistan [PLD 2009 SC 507]

however, the formalities require the provision of a Computerized National Identity Card [hereinafter referred to as CNIC] issued by the National Database Registration Authority [hereinafter referred to as NADRA] which usually only Pakistani nationals possess. But nevertheless, these laws and provincial initiatives illustrate a positive step towards the eradication of bonded/forced labour, slavery, and human trafficking, thus providing the affected with much needed relief and remedy in keeping with the vision of Article 11.

3. **‘Traffic in human beings’** – The international definition of trafficking in human beings was formulated in the United Nations ‘Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children’ as forced labour and exploitation induced by threats; at times it is deemed the modern equivalent of slavery because it inherently includes the sale/trade, transport and profit from human beings<sup>84</sup>. Article 11 of the Constitution prohibits all forms of traffic in human beings, and the PPC makes it punishable to engage in such activities<sup>85</sup>. In relation to women, procuring a minor girl, bringing a girl from another country into Pakistan, as well as buying and selling a person for the purposes of prostitution are in place to discourage traffic in human beings for sexual and/or economic exploitation.
4. **Employment of children** – The Article prohibits the employment of children below the age of fourteen in any factory or for any other kind of ‘hazardous’ services. The Employment of Children Act 1991 regulates the employment of children in the country and prohibits the employment of underage or adolescent children in specific fields, like mines, at railway stations, cement manufacture, carpet weaving, and other manufacturing processes that include toxic substances and/or explosives which may harm a child’s health<sup>86</sup>. The National Committee on the Rights of the Child is a regulatory body which performs functions as set out in Article 43 of the United Nations Convention on the Rights of the Child<sup>87</sup> [UNCRC] to protect children’s rights. The 1991 Act specifies that where a child is employed, he or she must not be engaged in the employments or services listed as ‘hazardous employment’ which can affect a child’s health and growth. Therefore, a child worker can only be employed in areas or services apart from the prohibited categories set out in the Schedule to the 1991 Act, and certain conditions must be adhered to such as reasonable hours of work, regular periods of rest, weekly holidays and notice to a local inspector from the person who is the owner or manager of an establishment that employs underage or adolescent children.

In furtherance of this commitment to the UNCRC, the GoP has established a National Coalition against Bonded Labour, which amongst other things, works to discourage the employment of children in hard

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<sup>84</sup> “[a] ‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability [interpretive note [63]] or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other form of sexual exploitation [interpretive note [64]], forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

Interpretive note [63]: The travaux préparatoires should indicate that the reference to the abuse of a position of vulnerability is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.

Interpretive note [64]: The travaux préparatoires should indicate that the Protocol addresses the exploitation of prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. The term ‘exploitation of the prostitution of others’ or ‘other forms of sexual exploitation’ are not defined in the Protocol, which is therefore without prejudice to how States Parties address prostitution in their respective domestic laws.

[b] The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph [a] of this article shall be irrelevant where any of the means set forth in subparagraph [a] have been used [interpretive note [68]],

Interpretive note [68]: The travaux préparatoires should indicate that Subparagraph [b] should not be interpreted as imposing any restriction on the right of accused persons to a full defence and to the presumption of innocence. They should also indicate that it should not be interpreted as imposing on the victim the burden of proof. As in any criminal case, the burden of proof is on the State or public prosecutor, in accordance with domestic law[...].”

<sup>85</sup> Sections 366A [Procurator of minor girl]; 366B [Importation of girl from foreign country]; 371A [Selling persons for the purposes of prostitution, etc]; 371B [Buying person for purposes of prostitution]; 374 [Unlawful compulsory labour]

<sup>86</sup> Part II of Schedule to Employment of Children Act 1991 lists the prohibited tasks, services, and employment for children in accordance with section 3

<sup>87</sup> Article 43: “1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided...”

manual labour; the Employment of Children Rules 1995 provides for a certification of health from a medical practitioner/surgeon for determining the fitness of a child, thus attempting to protect sick, disabled and underage children<sup>88</sup> by making it the responsibility of an owner or manager of an establishment employing children to submit them to a medical/physical examination by a certified surgeon or medical practitioner<sup>89</sup>. This way, there is a definite chance of determining a child's age, where disputed, and also a way of screening younger children from hard manual labour. Thus, the 1995 Rules as well as the 1991 Act both provide protection to children who are at a risk of being economically exploited; another example is of Rule 15 which specifies that no underage or adolescent child worker can be allowed to carry a weight of more than 10 kilograms<sup>90</sup>.

5. **'Compulsory service'** – This term refers to the obligatory performance of duties that are placed on citizens by the government, and/or certain kinds of penalties, especially those persons in State confinement who have been found guilty of certain offences and are serving a sentence in prison. Thus compulsory service may be deemed an exception to forced labour in Article 11, especially labour during imprisonment; however, the Article goes on to state that even where any person is in prison undergoing a sentence as punishment for committing an offence, the conditions of any manual labour must not be of “a cruel nature of incompatible with human dignity”. In other words, any prisoner undergoing compulsory manual labour must not be subjected to inhumane, cruel, or degrading treatment and the tasks he or she must perform should be in keeping with the standards set out in the Constitution as well as in the Universal Declaration of Human Rights [UDHR]<sup>91</sup>.
6. **Application to registered Afghan citizens living in Pakistan** – The Article applies equally to foreign children including children of registered Afghan citizens living in Pakistan. Unfortunately, the ground reality in Pakistan in terms of forced land bonded labour, trafficking, human smuggling, etc. of Afghans in general is still very stark despite some efforts at the state level. Numerous reports suggest that Afghan children in Pakistan are exceedingly exploited and forced into work arrangements due to their economically disadvantaged status: young boys and girls [including adults] are trafficked into Pakistan for commercial sexual exploitation, subjected to forced marriage to settle disputes or debts, forced begging, and forced or bonded labour in the brick kilns and carpet weaving industry rampant with underprivileged youth – which includes Afghans in general – as well as in domestic and commercial service<sup>92</sup>.

This is no doubt in clear violation of Article 11 of the Constitution; an agreement under which a person is forced to render services without adequate wages – or none at all – while giving up personal freedom altogether due to exploitation, threat or abuse will be deemed as void<sup>93</sup>. It has also been held that no one can keep another person who is sui juris in confinement or custody; any kind of restraint on the liberty of a person – be it due to any reason – is actionable under Article 4, 9, 11, and 199 of the Constitution and also a crime under the Code of Criminal Procedure 1898 [hereinafter referred to as CrPC]<sup>94</sup>.

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<sup>88</sup> Employment of Children Rules 1995, Rule 4: “Certificate of fitness. – [1] A certifying surgeon shall, on the application of any child or adolescent who wishes to work in an establishment on which the provisions of Act are applicable, or, of the parent guardian of such person, or of the occupier of the establishment in which such person wishes to work, examine such person to ascertain his age and fitness to work.

[2] The certifying surgeon, after examination, may grant to such person, in form ‘C’, a certificate of fitness to work in an establishment as a child worker if he is satisfied that such person has completed his twelfth year of age but has not yet reached his fourteenth year of age and a certificate of fitness to work in an establishment as an adolescent if he is satisfied that such person has completed his fourteenth year of age, but his not completed his eighteenth year.

[3] The inspector in the absence of a certificate of age in respect of a person working in an establishment shall refer him to the certifying surgeon for ascertaining the age and issuance of certificate and fee to the surgeon shall be paid by the occupier.”

<sup>89</sup> Ibid

<sup>90</sup> Employment of Children Rules 1995, Rule 15: “No child worker shall be allowed to lift or carry any weight in excess of 10 kg.”

<sup>91</sup> The Universal Declaration of Human Rights [UDHR], Article 5: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”, which, although not legally enforceable in

<sup>92</sup> US State Department Trafficking in Persons Report, June 2009

<sup>93</sup> Human Rights Commission of Pakistan v Government of Pakistan [PLD 2009 SC 507]

<sup>94</sup> Section 491: Power of High Court to issue directions of the nature of habeas corpus – “[1] Any High Court may, whenever it thinks fit, direct:-

[a] That a person within the limits of its appellate criminal jurisdiction be brought up before the Court to be dealt with according to law;

[b] That a person illegally or improperly detained in public or private custody within such limits be set at liberty;

## ■ Article 14: Inviolability of dignity of man, etc.

*"[1] The dignity of man and, subject to law, the privacy of home, shall be inviolable.*

*[2] No person shall be subjected to torture for the purpose of extracting evidence."*

Article 14 addresses two aspects of 'human dignity': in Clause [1] the dignity of man and privacy of home, subject to law is protected, while Clause [2] states that, "No person shall be subjected to torture for the purpose of extracting evidence". Reference to the dignity of man is quite unique as it originates from the Islamic social and cultural norms of Pakistani society denoting the respect and status a human enjoys in society; the Islamic conception carried forward in the Constitution relates to self respect, self worth and mutual acceptance amongst all people. Therefore, this provision aims at preventing people from disgracing or defaming others; if that is to happen, it would diminish, decrease, and degrade human worth, respect, dignity, reputation and, overall, value of life. It goes on to refer to privacy of home which is again in accordance with the Islamic conception of the sanctity of the home and protects peoples' homes from arbitrary intrusions by law enforcement agencies [and other institutions] without any authority or valid excuse.

Clause [2] gives protection from torture as a means of extracting evidence; it is directed towards the well being of a person in custody/detention and also prevents the authorities from tormenting detainees; confessions, statements and other evidence given under torture are universally recognized as unreliable and invalid and are almost always excluded from evidence presented in court. The SCP has time and again dealt with the issue of persons in detention being brutally tortured by law enforcing agencies and has considered such acts to be an affront to the dignity and worth of human life; torture in custody is also a severe violation of the basic human rights of persons in custody. This right is extended to torture in disobedience of High Court order [especially where police officials deploy torture tactics, confinement under inhuman and degrading conditions, as well as entering a domestic abode without a search warrant].

### **Elements of Article 14:**

1. **'Dignity of man'** – This term refers to the respect, esteem, and reputation that a person enjoys in civilized society. 'Dignity' denotes a person's standing, and his self worth as well as the capability of being respected, recognized and accepted in society; under the Constitution all persons are equal in dignity and respect, in accordance with Islamic principles where all people are treated as equally worthy of respect and honour, without discrimination on the basis of caste, colour, creed, race etc. Human dignity, honour, and respect are very important facets of life, and no one can be allowed to or even attempt to disgrace, defame, or degrade another thereby diminishing or lessening the victim's respect, reputation and value of life in the eyes of other people; thus false accusations of prostitution<sup>95</sup> and defaming another's character<sup>96</sup> are violations of a person's dignity guaranteed under Article 14. An attack on a person's character, life, profession, values, and beliefs that may potentially affect his or her quality of life by subjecting him or her to public ridicule, contempt, and stigma in any walk of life will diminish his or her dignity<sup>97</sup> and thus also amounts to an infringement of a person's right to life and liberty under Article 9.
2. **'Inviolability of privacy of home'** – The term 'privacy of home' refers to the right to be free from undue intrusion, in order for a person to live a meaningful life as envisioned in Articles 9 and 14 of the Constitution<sup>98</sup>. There are numerous ongoing international debates relating to the right of privacy but it will suffice here to say the Constitution strictly provides only privacy of home in Article 14. The privacy of home is deemed

[c] That a prisoner detained in any jail situate within such limits be brought before Court to be examined as a witness in any matter pending or to be inquired into in such Court;

[d] That a prisoner detained as aforesaid be brought before a Court-martial or any Commissioners for trial or to be examined touching any matter pending before such Court-martial or Commissioners respectively;

[e] That a prisoner within such limits be removed from one custody to another for the purpose of trial; and

[f] That the body of a defendant within such limits be brought in on the Sherrif's return of cepi corpus to a writ of attachment."

<sup>95</sup> 2006 MLD 1462

<sup>96</sup> 2006 CLC 440; PLD 1996 SC 737

<sup>97</sup> PLD 2002 Karachi 20

<sup>98</sup> PLD 1994 SC 693

inviolable, except as the law requires, and thus must not be interfered with under any circumstances; the sanctity of a person's home may only be established and preserved if he or she has privacy which enables him or her to live peacefully and carry on the affairs of the home without undue interference either from others or the State. Thus an arbitrary intrusion by the police without any authority is a violation of a person's dignity as well as his or her right to privacy of home<sup>99</sup>.

3. **Lawful exceptions to privacy** – The only exception to the inviolability of home is where a crime or offence of a heinous nature has been committed or there is suspicion of ongoing unlawful activities being carried out at a house or place of abode. The police or other authorities may then enter residential premises without a warrant and in such a case where there is suspicion of illicit activities; the right of inviolability of privacy of that home will be placed under suspension<sup>100</sup>.
4. **'Torture for the purpose of extracting evidence'** – Clause [2] of this Article provides protection from torture as a means of extracting evidence; it is directed towards the well being of a person in custody/detention and also prevents the authorities from tormenting detainees; confessions, statements and other evidence given under torture are universally recognised as unreliable and invalid and are almost always excluded from evidence presented in court. The Supreme Court of Pakistan [hereinafter referred to as SCP] has time and again dealt with the issue of persons in detention being brutally tortured by law enforcing agencies and has considered such acts to be an affront to the dignity and worth of human life; torture is also a severe violation of the basic human rights of persons in custody. This right is extended to torture in disobedience of a High Court order, where police officials deployed torture tactics<sup>101</sup>, confinement under inhuman and degrading conditions<sup>102</sup>, as well as entering a domestic abode without a search warrant<sup>103</sup>.
5. **Applicability to registered Afghan citizens living in Pakistan** – It is generally perceived that Afghans in general living in Pakistan are the target of many arbitrary practices in Pakistan. The Human Rights Watch reports that hostile policies of GoP translate to the grass root level where police and other officials often subject Afghans in general living in Pakistan to harassment, extortion, and arbitrary detention, owing to their undocumented 'invisible' status, often without any just cause or suspicion<sup>104</sup>. Similar reports reveal many horror stories that Afghans in general narrate: Amnesty International cites the case of Salahuddin Samadi, who lived in Islamabad, and was severely beaten by police because he could not fulfil their extortionist demand of bribe money, and died in a hospital in coma some days later<sup>105</sup>. Asia Calling cites the uncertain plight of Saifur Raham, living in Peshawar, who was arbitrarily arrested despite possessing the requisite PoR card, was detained for two nights in prison without any just cause being shown to him and as a result he considers himself, amongst hundreds of other registered Afghan citizens living throughout the country, unsafe and unfairly targeted by the authorities<sup>106</sup>.

Such mistreatment towards registered Afghan citizens living in Pakistan is, without any doubt, a clear infringement of their fundamental human rights under Articles 9 and 14 of the Constitution: these Articles refer to "persons" which includes both natural and artificial residents, and hence brings them within their ambit. Subjecting Afghans in general to constant harassment, psychological and mental torture, accusing them of breaking the law without any just cause or suspicion, searching of their abodes without warrants, deliberate targeting of all Afghan ethnicities, physical and verbal abuse, extortion, demanding bribes and arbitrary arrests and many other unauthorized practices against them is in clear violation of Article 14 as their dignity and respect to privacy of the home is desecrated by police and security officials<sup>107</sup>. And since there is no question of the existence of such rights if registered Afghan citizens living in Pakistan fall under the category of "persons", both clauses of this Article may be invoked for enforcing their rights since such treatment is a clear violation of fundamental rights under the above given constitutional provisions. Even the

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<sup>99</sup> PLD 2007 Karachi 405

<sup>100</sup> 2007 MLD 411

<sup>101</sup> PLD 1977 SC 545

<sup>102</sup> PLD 1974 Lahore 7

<sup>103</sup> 2000 P.Cr.L.J 1243

<sup>104</sup> "Closed Door Policy: Afghan Refugees in Pakistan and Iran", Human Rights Watch, published 27th February 2002 [last updated on 5th August 2011]

<sup>105</sup> "Pakistan: Harassment and Police Brutality against Afghan Refugees" [news release issued by the International Secretariat of Amnesty International, 02 July 2001]

<sup>106</sup> "Afghan Refugees in Pakistan Claim Abuse by Police": Asia Calling, 27 February 2010

<sup>107</sup> Ibid



manner in which they are being repatriated – despite the GoP policy of ‘voluntary’ repatriation – may come into question under Article 14 because forced entry into residences, damaging properties and harassing women and children, as well as other tactics which the Pakistani authorities employ constitute a serious infringement of basic human rights, the dignity and respect of the affectees and thus can be challenged in court.

■ **Article 24: Protection of property rights**

*“[1] No **person** shall be **deprived of his property save in accordance with law**.*

*[2] 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** therefor and either **fixes the amount of compensation** or **specifies the principles on and the manner in which compensation is to be determined and given**.*

*[3] Nothing in this Article shall affect the validity of–*

*[a] any law permitting the compulsory acquisition or taking possession of any property for **preventing danger to life, property or public health**; or*

*[b] any law permitting the taking over of any property which has been acquired by, or come into possession of, any person by any **unfair means**, or in any manner, contrary to law; or*

*[c] any law relating to the acquisition, administration or disposal of any property which is or deemed to be enemy property or evacuee property under any law [not being property which has ceased to be evacuee property under any law]; or*

*[d] any law providing for the taking over of the **management of any property by the State for a limited period**, either in the public interest or in order to **secure the proper management of the property**, or for the **benefit of its owner**; or*

*[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 of citizens; or*

*[iii] **providing maintenance** to those who, on account of unemployment, sickness, infirmity or old age, are unable to maintain themselves, or*

*[f] Any existing law or any law made in pursuance of Article 253.*

*[4] The **adequacy or otherwise of any compensation** provided for by any such law as is referred to in this Article, or determined in pursuance thereof, **shall not be called in question in any Court**.”*

Article 24 states that “no person shall be compulsorily deprived of his property save in accordance with law” and if the concerned authority does so, it will only be either for “public purpose” or “by the authority of law” and compensation will be payable to the owner according to the principles set for such matters. Hence the State cannot deprive a person of his or her property unless it can show that it is purporting to do so under valid authority. This is the substance of the right, that is, no person can be deprived of his property unless the State’s actions have been sanctioned by law. The exceptions stated in this Article, i.e., when the State may acquire private property, include: compulsory acquisition in case of property posing “danger to life, property or public health”; property acquired through “unfair means” or “in any manner contrary to law”; the “acquisition, administration or disposal” of “enemy property or evacuee property under any law”; and, when it is in the “public interest” for the State to acquire property for its “proper management”. The Article

also mentions laws that provide for compulsory acquisition of property in the following public service areas: education, medical aid, housing, public facilities [roads, gas, electricity, and sewerage], as well as maintenance for the unemployed, sick, and elderly “who are unable to maintain themselves”.

#### Elements of Article 24:

1. **Right to property & its protection** – The right to own property also forms part of the basic rights in any society, however, it is not as absolute as other rights, such as life and liberty. The State has the power to acquire land for public purposes which includes provision of utilities such as water, electricity, and so on. In general, property rights refer to a person’s ownership of property; the article does not clarify the kind of property it is referring to, but commentaries on this provision refer to land as well as chattels and therefore it is safe to assume that a person’s property includes both moveable and immovable property<sup>108</sup>.
2. **Exceptions to property rights** – The article clearly states that if and when a person is to be deprived of his or her property, it must be lawful, i.e., have the sanction of the law behind it. The term “person” includes both natural and artificial residents, hence the applicability of this Article may easily extend in general to all categories of foreign property owners living [and working] in Pakistan. In accordance with Article 4[2][a] of the Constitution, any action without authority or legal backing to deprive any person of his life, liberty, property or status is an infringement of fundamental rights; the same concept is carried further by this Article which relates specifically to property – any action backed with a lawful purpose depriving a person of his or her property will not give a cause for complaint<sup>109</sup>. “Public purpose” is a reference to general welfare of the people and the community at large rather than individual interest<sup>110</sup>. Where acquisition of private land by the state is compulsory under either “public purpose” or the mandatory purposes outlined in Clause [3] of the Article, or if sought by a company must be according to Section 40 of the Land Acquisition Act 1894. Article 24 provides the scope for judicial review of the scope of “public purpose” whenever the State [or any agency/official authorised on its behalf] purports to acquire private land<sup>111</sup>.
3. **Compensation in lieu of property** – The Article very clearly states that any compensation given to a property owner in lieu of his or her property is fixed by law. This enforces two main things; one, that under no circumstances where a person has been deprived of his land by the State for a lawful purpose can he or she be refused the right to receive compensation<sup>112</sup>; and second, that the amount of compensation will be determined by any rules and/or regulations formulated by the government or relevant authority as specified in Clause [2] of the Article. In other words, when a person’s property is forfeited by the state, it can only be done for a ‘public purpose’ according to established legal principles and the person must be awarded compensation in lieu of property and the amount will be either fixed by law or be calculated according to any rules or regulations that may exist in state law.
4. **Application to registered Afghan citizens living in Pakistan** - Ample case law is available for the enforcement of property rights under this provision which relates mostly to citizens or naturalized individuals; even foreigners who are living and working in Pakistan can own property subject to legal formalities with the Board of Investment and the Trade and Development Authority of Pakistan and thus can enforce their right to protection of property under Article 24. However, in case of registered Afghan citizens living in Pakistan, it is the opposite case: they are actively barred from owning property in Pakistan based on the Pakistani state’s policy of strict repatriation which prohibits them from being naturalized; the Afghan Management & Repatriation Strategy [herein after referred to as AMRS] aims at eventual repatriation – regardless of any personal choice or circumstance – to Afghanistan. Afghans in general have been living in Pakistan for more than 3 decades but the GoP does not intend to naturalize them; instead all registered Afghan citizens in the country have been provided ‘temporary protection’ and the process of registration – Proof of Registration [herein after referred to as PoR] card – is merely issued to identify them in furtherance of AMRS.

But it may be argued that registered Afghan citizens living in Pakistan fall within the category of “persons”

<sup>108</sup> Mahmood, 2010 [9th edition]

<sup>109</sup> PLD 2002 Lahore, 28

<sup>110</sup> PLD 1983 Lahore 355; PLD 1983 Lahore 522

<sup>111</sup> Afghan Culture: Afghans Behind Bars” – Mati Ullah Abid [referring to HRCP research by Dr. Rahat Ali, activist at HRCP]

<sup>112</sup> Ghulam Nabi v Province of Sindh and Others [PLD 1999 Karachi 372]

under the Article and, in addition, may also pursue their rights under Article 9 [security of person] to enforce their right to own property – even temporarily – for the duration they remain in the country. Nevertheless, it is also expedient to note that the state may successfully defend any such action of a registered Afghan citizen living and owning property in Pakistan on the grounds of policy and public interest. A recent development, however, may yet provide a ray of hope: the GoP has devised a new plan of action in collaboration with the GoA and the United Nations for granting permission for extension in their stay beyond the current deadline of 31st December 2012. The GoP has recognized the inevitable hurdles in repatriation and a concession has been given to registered Afghan families under which they may be able to extend their stay beyond 2012 and potentially enjoy “equal rights like other citizens of the country”<sup>113</sup>. Whether this will happen in actual fact – that the property rights of registered Afghans will be considered equal to those of Pakistani citizens – but this is highly unlikely in the near future.

■ **Article 25A: Right to education**

*“The State shall provide **free and compulsory education to all children of the age of five to sixteen years in such manner as may be determined by law.**”*

Article 25A was inserted by Section 9 of the Constitution Eighteenth Amendment Act 2010 [10 of 2010] in the section on Fundamental Rights [Chapter 1, Part II], which declares that the State must provide “free and compulsory” education to all children between the ages of 5 and 16 years. This Article was added in furtherance of Pakistan’s ‘Education For All’ [EFA] targets and an important objective in the Millennium Development Goals [MDG]; by including this right in the Constitution, the GoP has recognized the need for education on a universal scale amongst children which is an important requisite for the social and economic development of Pakistani society. If implemented in letter and in spirit, it could provide a positive development in reforming the education system as well as encouraging an increase in enrolment, especially of young girls in schools and also create a conducive environment for education in the country.

Elements of Article 25A:

1. **‘Free and compulsory education’** - It is interesting to note that the terms “free” and “compulsory” can be construed in a variety of ways; there are many ongoing academic debates about the scope of this Article, and whether the above terms should be interpreted narrowly or given a wider reading; for instance, does the term “free” include all costs of pursuing an education – such as transportation, books, stationery, uniforms, and other miscellaneous expenses – or just the costs of tuition? Furthermore, can it potentially include facilitation for parents and children in terms of access to schools, opportunity costs, and all other costs reasonably associated with educating a child between the ages of 5 and 16 years? Facilitation is an important aspect in today’s context, and if construed to be part of the right to education, may potentially play an important role in encouraging parents to send their children to State schools; take for instance, the transportation of children to and from schools: the State may have to provide a safe [secure enough for parents to entrust their children with it] and reliable [dependable and steadfast in transporting children to their respective schools] conveyance for children<sup>114</sup>.

Similarly, the term “compulsory” has numerous ramifications for both the State and for parents: it signifies an element of ‘compulsion’ which infers that it is the State’s responsibility to facilitate education, and the aspect of a liability and a positive duty of parents to send their children to school. Hence it establishes a reciprocal relationship between the State and a parent: if a child of the relevant age is not being sent to school, the parent will be liable to prosecution for neglect of duty, and on the other hand, if the State fails to provide reasonable access and facilitation to education, it will be in breach of its obligations towards its subjects. The mode of education is stated to be “in such manner as may be determined by law”, thus it

<sup>113</sup> Daily Times Online Newspaper, 14 April 2011: Frontier Regions Joint Secretary in an interview to Voice of America talking about the plan of action in collaboration with the Afghan government and UN stated, “The verification process of 120 Afghan refugee families would be completed by the end of this year. The plan has been designed to find a broad based solution to problems being faced by refugees during their temporary stay in Pakistan...Under the plan such families would be allowed to live in Pakistan even after the expiry of their stay time by year 2012 and will enjoy equal rights like other citizens of the country.”

<sup>114</sup> “Governance Issues in Girls’ Education”, Dr. Faisal Bari & Nargis Sultana, FOSI- Pakistan



implies that certain rules and regulations governing standards of education must be followed – in the absence of which, they must be formulated – to ensure adherence to the facilitation of education. Lastly, it is imperative to note that the Article refers to “all children of the age of 5 to 16 years” as its subject; hence this may infer that such children will not only be natural citizens but also foreigners residing in Pakistan and its ambit could potentially embrace children of registered Afghan citizens living in Pakistan as well.

The 18th Amendment has removed the concurrent list from the Constitution, and therefore education, among other subjects, is now entirely a provincial matter; each province must design its own laws, rules and regulations governing the provision and facilitation of “free and compulsory” education. However, unless the courts interpret this Article, its meaning and connotations will be constantly debated in all spheres of law; until then no absolute meaning can be attached to any of its provisions.

2. **‘In such manner as may be determined by law’** – This implies that the right to education is enforceable by law on the public level, and any kind of free and compulsory education must be provided in line with any statutes passed by Parliament. Unfortunately, however, no such legislation has come about until the publication of this material. The Article requires a law to be implemented to define and elaborate on the concepts of ‘free’, ‘compulsory’, and to explain in detail the modalities of education to be provided to children. Since the subject of education has been devolved to provinces under the Constitutional Amendment No 18, it is now the responsibilities of the provincial assemblies and their respective department of education to formulate rules and regulations in order to implement secondary education for children in the particular age category mentioned in the Article.

Therefore, it is now undeniable that the right to education is one of the fundamental rights of a person, in this case a child between the ages 5 and 16 years, and the State, by not providing this right is in continual violation of Article 25A until adequate measures to provide free and compulsory education available to all children are taken.

3. **Application to children of registered Afghan citizens living in Pakistan** – Since the term ‘person’ was held to apply to all citizens and non citizens alike, it is appropriate to give ‘children’ the same interpretation as well to include the children of registered Afghan citizens living in Pakistan. It is an evident fact that the children belonging to many underprivileged foreign communities residing in Pakistan – even those from registered Afghan families – within the ages of 5 and 16 years are out of school and many have never been to school at all. Although it can be argued that under Section 3 of the Foreigners Act 1946 that the movements of foreigners can be lawfully restricted to camps or restricted areas, this is no justification to deprive foreign children of education; since Article 25A does not provide any exceptions, there should be none in practice either, and thus all children between the ages of five and sixteen are entitled to education.

## Protection of Fundamental Rights: Filing of a Writ Petition

A writ may be filed before a High Court or the Supreme Court of Pakistan in case of an infringement of fundamental rights under Articles 185 and 199 of the Constitution of the Islamic Republic of Pakistan. The Supreme Court may only entertain such a writ when there is a violation of fundamental rights, but under Article 199, a writ petition can also be filed in the High Court in the case of infringement of legal rights.

### ■ Who may file a writ [Locus Standi]?

Any citizen of Pakistan can file such a writ petition, along with a foreigner – as well as a registered Afghan citizen living in Pakistan – who may also file a writ for enforcing his right to life and equality before the relevant court[s].

The test is twofold: in order to establish ‘locus standi’<sup>115</sup>, a person must establish a ‘sufficient connection’ to the law or action being challenged, and that he or she will suffer ‘harm’ if the cause of action is not addressed immediately in court; the Constitution uses the term ‘aggrieved party’ for persons who have locus standi in relation to bringing an action into court, specifically in relation to violation of fundamental rights. Registered Afghan citizens living in Pakistan are considered ‘alien friends’<sup>116</sup> and, in light of the ‘temporary protection’

<sup>115</sup> Latin term denoting ‘legal standing’ or capability to bring a cause of action to court

<sup>116</sup> Section 83, Code of Civil Procedure 1908: “Alien enemies residing in Pakistan with the permission of the Federal Government, and alien friends, may sue in the Courts in the Province, as if they were citizens of Pakistan”, and since Pakistan and Afghanistan are not at war, Afghans are considered ‘alien friends’.

they have been provided here, they are not deemed foreigners per se and thus not governed by any foreigners laws<sup>117</sup>; this implies that during their stay, all Pakistani laws applicable to citizens would also apply to them and thus they are capable of bringing an action to court for the purpose of enforcement of their fundamental rights.

#### ■ **Types of writs**

In general, a writ petition is classified into two main categories according to its nature: Civil writ petition, and Criminal writ petition. A Civil writ petition will be filed where the issue is of a civil nature; for example, a writ petition directing municipal bodies to enforce its duty of providing sanitation and water facilities to a certain area. Similarly, if the issue is related to criminal matters, a Criminal writ petition will be filed; for instance, a writ for quashing a First Information Reports [hereinafter referred to as FIR], registration of an FIR, a writ for further investigation, and so on.

Under this classification, there are five different types of writs that are available to ‘persons’ seeking to enforce their fundamental rights<sup>118</sup>:

1. **Habeas Corpus:** This writ is sought to enforce the right to life under Article 9 of the Constitution of Pakistan 1973. In theory it is to be sought when the life or liberty of a person is in peril, but in practice this writ is normally issued where detention of a person by a State authority [normally by the police] is being contested.
2. **Mandamus:** This writ is quite common as it involves petitioning for a direction to a subordinate court/tribunal or government official to enforce performance of legal duties. It is usually issued against arbitrary/illegal acts of government officials such as police officers, municipal bodies, and so on.
3. **Prohibition:** This is an extraordinary writ which involves requesting an order from an appellate court that an inferior court/tribunal be prohibited from taking further action on a case pending before it, more commonly known as a ‘*stay of proceedings*’.
4. **Certiorari:** This writ is sought to review/quash the decision of an inferior court/tribunal or any other statutory body when such a decision is found to be in contravention of the principles of natural justice or made without jurisdiction [‘*ultra vires*’]. It is also sought in service matters when the affected employee is appealing against the decision of departmental enquiry proceedings and has already been given the penalty by the concerned tribunal.

#### ■ **Against whom is a Writ to be filed?**

A writ can be filed only against the State, not against any private individual or corporate entities. However, a private individual or a corporation can be included as a party in a writ petition if relief sought in the petition affects his interest.

The ‘State’ is defined in Part III of the Constitution and includes, inter alia, the federal & provincial governments, the federal and provincial legislatures, and all authorities, local or otherwise, which are under the control of the State, in this case, the GoP. All organizations where the GoP controls the appointments or removal of employees, functions, funding fall in this domain, for example, boards, committees, universities and so on.

#### ■ **Grounds for granting a Writ**

A writ is granted whenever there is violation of fundamental or legal rights of a person, when a court/tribunal, board, or public officer has acted arbitrarily, illegally, exceeded its jurisdiction or acted without any jurisdiction at all, or where the principles of natural justice have been infringed, for example, where the petitioner has not been granted the opportunity to be heard or defend himself, or the allegations

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<sup>117</sup> Provisions of Foreigners Act 1946 and Foreigners Rules 1946 pertaining to foreign nationals residing in Pakistan do not apply to Afghans who are ‘temporary’ residents and during their stay all laws applicable to local citizens would also apply to registered Afghans “for the time being in Pakistan”: 27 July 1997, Government of Pakistan [GoP] circular.

<sup>118</sup> **Quo Warranto:** This writ enables a person to contest dismissal from a position in a government organization; the burden of proof lies on the petitioner to show under what authority he holds [or if dismissed already, if he held] his position legally. The writ will be granted when [a] the office held is/was of a public and substantive nature; [b] created by statute or by the Constitution itself; and, [c] the respondent has asserted his claim to the office. This writ is not available to Afghan nationals and hence is outside the scope of this publication.

against him have not been disclosed, and there is no other remedy available to him. The writ of Habeas Corpus, for example, can be filed if a person has remained in illegal detention for more than 24 hours and he has not been brought before a magistrate within that time. Only Issues of legal importance will be resolved in a writ if there is a disputed question of interpretation of the law. Matters of pure fact which need a separate trial will not be resolved in the writ.

## Determination of Fundamental Rights: Writ Petitions in Courts

The relevant institutions that deal with constitutional matters include the legislature and the courts [High Court and Supreme Court which adjudicate, inter alia, on constitutional matters]. Their powers and jurisdiction are derived from the Constitution: the High Court’s jurisdiction to enforce fundamental rights arises from Article 199, while the Supreme Court possesses both original and appellate jurisdiction under Articles 184 and 185 of the Constitution. In general, both the High Court and the SCP have the authority to take up the above classified writ petitions relating to infringement of fundamental rights and freedoms protected in the Constitution as well as disputes between the provincial and federal governments, adjudicate on questions of “public importance” [Article 184: original jurisdiction of SCP], mete out directions, orders, quashing of lower court decisions [Article 199: jurisdiction of High Court]. But the general powers of the High Court and Supreme Court are beyond the scope of this publication and the only aspect of jurisdiction that will be discussed here is the enforcement of fundamental rights and freedoms of individuals as provided in the Constitution.

### ■ Constitutional petitions in District Courts

The writs of habeas corpus can be entertained by District Judges [Civil Courts] & Sessions Judges [Criminal Courts], albeit only within their territorial jurisdiction. And according to Section 100, CrPC 1898 a First Class Magistrate [Criminal Court] can issue a warrant for the production of a person alleged to have been wrongfully confined.

Civil courts [Court of District Judge & Court of Civil Judge] can decide questions relating to constitutional law arising in civil suits pending before them – i.e. claim for compensation for breach of Fundamental Rights. However, certain formalities specified under Order 27-A of the Code of Civil Procedure, 1908 [hereinafter referred to as CPC] [Rules 1 & 2] must be followed, namely that notices must be issued to the Federal Attorney-General or the requisite provincial Advocate-General; and, depending upon nature of matter involved, or their addition as parties to the suit.

### ■ High Court Jurisdiction and Procedures: Determining a constitutional petition

The jurisdiction of the High Court is defined by Article 199 of the Constitution. The High Court may hear any petition relating to infringement of fundamental rights of a citizen or in certain cases, a foreigner. In Clause [1] of the Article, the jurisdiction of the High Court and the powers it has to make certain orders it outlined: Paragraph [a], confers the power to receive and adjudicate upon the writs of certiorari, mandamus and prohibition; Paragraph [b] refers to the writs of habeas corpus and quo warranto; and, in Paragraph [c] the High Court is afforded jurisdiction to enforce fundamental rights in Chapter 1, Part II of the Constitution which have extremely important interpretations and connotations<sup>119</sup>.

*“[1] Subject to the constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law...*

*[a] on the application of any aggrieved party, make an order—*

*[i] directing a person performing, within the territorial jurisdiction of the Court, functions in connection with the affairs of the Federation, a Province or a local authority, to refrain from doing anything he is not permitted by law to do, or to do anything he is required by law to do; or*

*[ii] declaring that any act done or proceeding taken within the territorial jurisdiction of the Court by a person performing functions in connection with the affairs of the Federation, a Province or a local authority has been done or taken without lawful authority and is of no legal effect; or*

*[b] on the application of any person, make an order—*

<sup>119</sup> Federation of Pakistan v Mian Muhammad Nawaz Sharif (PLD 2009 SC 284)

*[i] directing that a person in custody within the territorial jurisdiction of the Court be brought before it so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or*

*[ii] requiring a person within the territorial jurisdiction of the Court holding or purporting to hold a public office to show under what authority of law he claims to hold that office; or*

*[c] on the application of any aggrieved person, make an order giving such directions to any person or authority, including any Government exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that Court as may be appropriate for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II.*

*[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.*

*1[[3] An order shall not be made under clause [1] on application made by or in relation to a person who is a member of the Armed Forces of Pakistan, or who is for the time being subject to any law relating to any of those Forces, in respect of his terms and conditions of service, in respect of any matter arising out of his service, or in respect of any action taken in relation to him as a member of the Armed Forces of Pakistan or as a person subject to such law.]*

*[4] Where—*

*[a] an application is made to a High Court for an order under paragraph [a] or paragraph [c] of clause [1], and*

*[b] the making of an interim order would have the effect of prejudicing or interfering with the carrying out of a public work or of otherwise being harmful to the public interest <sup>3</sup>[or State property] or of impeding the assessment or collection of public revenues,*

*the Court shall not make an interim order unless the prescribed law officer has been given notice of the application and he or any person authorised by him in that behalf has had an opportunity of being heard and the Court, for reasons to be recorded in writing, is satisfied that the interim order—*

*[i] would not have such effect as aforesaid; or*

*[ii] would have the effect of suspending an order or proceeding which on the face of the record is without jurisdiction.*

*4[[4A] An interim order made by a High Court on an application made to it to question the validity or legal effect of any order made, proceeding taken or act done by any authority or person, which has been made, taken or done or purports to have been made, taken or done under any law which is specified in Part I of the First Schedule or relates to, or is connected with, State property or assessment or collection of public revenues shall cease to have effect on the expiration of a period of six months following the day on which it is made:*

*Provided that the matter shall be finally decided by the High Court within six months from the date on which the interim order is made.]*

*[5] In this Article, unless the context otherwise requires,—*

*“person” includes any body politic or corporate, any authority of or under the control of the Federal Government or of a Provincial Government, and any Court or tribunal, other than the Supreme Court, a High Court or a Court or tribunal established under a law relating to the Armed Forces of Pakistan; and*

*“prescribed law officer” means—*

*[a] in relation to an application affecting the Federal Government or an authority of or under the control of the Federal Government, the Attorney-General, and*

*[b] in any other case, the Advocate-General for the Province in which the application is made.”*

A constitutional writ petition of any nature what so ever will be upheld in the High Court where the order it challenges is found to have been made without authority<sup>120</sup> or jurisdiction [“ultra vires”], made ‘coram non iudice’ [not given before the proper court/tribunal], and/or where any public authority is in violation of the law<sup>121</sup>. In the opposite case, i.e. where such a petition will not be maintainable, the High Court will not exercise its discretion if it is found that the petitioner himself is at fault [has withheld material facts, has participated in the illegality of which he complains himself].

The requisites for the issuance of the categories of writs mentioned above are as follows:

1. **Issuance of Writ of Habeas Corpus:** The proceedings under this petition will be summary in nature, the court being concerned only with the determination of illegal detention or improper conditions of custody [if the detention is legal]; thus the scope of this petition extends to illegal detention as well as legal confinement which is unacceptable<sup>122</sup>. This includes instances where the detainee is not named as the accused in the FIR<sup>123</sup>, is found to be in police custody without an entry of this arrest in the daily diary of the concerned police station official<sup>124</sup>, or the conditions of his detention are not acceptable – he is unnecessarily bound in handcuff and fetter without any entry in the Roznamcha relating to his arrest<sup>125</sup>. Upon allowing a petition for Habeas Corpus, the concerned court will order the appearance of the person before it [if the petition is being made in absentia] to enforce his release from the arbitrary detention or unacceptable conditions of confinement. The court may also direct police officials who concoct false and ineffective defences to pay costs to the affected parties<sup>126</sup>.
2. **Issuance of Writ of Mandamus:** The writ of mandamus will only be maintainable when the applicant possesses the legal right to enforce the performance of a duty by a public authority, which includes any authority performing functions on behalf of the provincial or federal governments. An important corollary to this right is the writ to enforce the registration of FIR through the constitutional writ petition of mandamus which is available to ordinary litigants as well. The High Court may, under its discretionary jurisdiction [Article 199] may grant this writ, provided that there is no adequate remedy available – the applicant has exhausted all other avenues: namely a Magistrate at the district court level has not taken cognizance of the offence under Section 190, lodged a private complaint under s. 200, and other remedies available in Sections 201 to 203 of the CrPC 1898.
3. **Issuance of Writ of Prohibition:** This writ is granted to restrict a court/tribunal from acting outside its jurisdiction or more simply a ‘restraint’ order; it is imperative to note that this writ cannot be substantiated until the said court/tribunal complained of has acted ultra vires. An order of prohibition belongs strictly to the High Court: an ordinary injunction or ‘stay of proceedings’ order will be addressed directly to the complaining party while the prohibition will name the relevant court/ tribunal as its subject. There are two situations when a prohibition will be issued: when a court or tribunal assumes or purports to assume a jurisdiction it does not possess, thus applicable not only in excess but also want of jurisdiction, as well as where there is a “violation of the principles of natural justice”<sup>127</sup>. This may also be easily extended to public officials, such as the police, if they act in excess of the authority entrusted to them in relation to dealings with public, provided the aggrieved party has no recourse to any other remedies under ordinary law; in such a

<sup>120</sup> Aslam Hassan Qureshi v Governor, State Bank of Pakistan [2004 CLD 1407]

<sup>121</sup> Dilawar Hussain v District Coordinate Officer Okara [2004 CLC 324]; Sahid Bashir V Chairman Board of Technical Education [2001 MLD 573]; Rashid Ali v National College of Arts [2001 YLR 1428]

<sup>122</sup> PLJ 1991 Lahore 492

<sup>123</sup> Alam Kahtoon alias Malookan v SHO Qaim Pur [1997 MLD 1407]

<sup>124</sup> Ahmad Bakhsh v Saeed Ahmad, Inspector/ SHO Police Station Uch Sharif [1997 MLD 45]

<sup>125</sup> GHulma Mustafa v SHO Police Station Zahir Pir District Rahimyar Khan [1997 P.Cr.L.J 367]

<sup>126</sup> 1997 Cr.L.J 740

<sup>127</sup> Abdul Latif v Government of West Pakistan [PLD 1962 SC 384]



case the High Court will not inquire into the nature of the act, i.e., whether the action taken was judicial or quasi-judicial, and immediately make an order for relief<sup>128</sup>.

4. **Issuance of Writ of Certiorari:** The writ of certiorari, on the other hand, is issued to correct the errors of jurisdiction of an inferior court, where a court/tribunal has acted illegally or in violation of the principles of natural justice by the High court in its supervisory jurisdiction. Other grounds on which such a writ will be granted include where an order of an inferior court is mala fide and corrupted with fraud<sup>129</sup>; where an inferior court has erroneously decided a question assuming jurisdiction it did not possess<sup>130</sup>; and, where an inferior court has based a decision on erroneous understanding of law in which case the High Court will declare that decision as having no legal effect in exercise of its constitutional jurisdiction.

These writs are available to all 'persons' who are directly or indirectly affected: the writ of Habeas Corpus can easily be invoked to any one in unlawful custody or unacceptable confinement [especially in case of arbitrary arrests of registered Afghan citizens living in Pakistan made without cause], the writ of Mandamus can be employed to enforce the performance of duties by public officials [an order by the High court to register an FIR where the police officials are resisting or refusing to do so], and the writ of Prohibition can be issued to restrain court/tribunal from stepping outside its jurisdiction. Hence, it is plausible that registered Afghan citizens living in Pakistan can invoke these writs in the High Court with a fair chance of success.

#### ■ **Supreme Court of Pakistan: Jurisdiction and Procedures**

The Supreme Court of Pakistan [SCP] serves as an upholder, protector and guardian of the Constitution and the fundamental rights and freedoms it protects; to this end, Article 184[3] deals with the jurisdiction of the SCP relating to the enforcement of those fundamental rights applying to 'persons' in Chapter 1, Part II of the constitution.

*"[1] The Supreme Court shall, to the exclusion of every other Court, have original jurisdiction in any dispute between any two or more Governments.*

*Explanation.-In this clause, "Governments" means the Federal Government and the Provincial Governments.*

*[2] In the exercise of the jurisdiction conferred on it by clause [1], the Supreme Court shall pronounce declaratory judgments only.*

*[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."*

For a matter to come within this jurisdiction, three prerequisites must be fulfilled: the question should be of 'public importance', should form part of the enforcement of a fundamental right<sup>131</sup>, and the fundamental right sought to be enforced must be conferred by Chapter 1, Part II of the Constitution. The Article does not dictate any set of procedures that must be followed; the traditional rule of locus standi is dispensed with and its scope extends to all litigation initiated in the 'public interest' – instead, the SCP has been given the authority to lay down all procedural rules and matters to govern proceedings affecting either a group or class of people on a case to case basis<sup>132</sup>. A 'person' may invoke the jurisdiction of the SCP under this Article where ever a violation of his fundamental rights is of public importance such as a violation of individual freedom<sup>133</sup> in which case a writ of Habeas Corpus will be filed; however such a writ will not be entertained in the absence of 'public interest'.

The usual requirements of locus standi and establishing a violation of a fundamental right are dispensed with under the procedural powers of SCP in Clause [3]; instead of dictating procedures and related matters, it has

<sup>128</sup> PLD 1954 Lahore 401

<sup>129</sup> Anwar Hossain Talukdar v Province of East Pakistan [PLD 1961 Dacca 155]

<sup>130</sup> Abdul Rehman Pasha v The Chief Settlement & Rehabilitation Commissioner [PLD 1961 Lahore 12]

<sup>131</sup> Miss Benazir Bhutto v Federation of Pakistan [PLD 1988 SC 416]; Mian Muhammad Nawaz Sharif v President of Pakistan [PLD 1993 SC 473]

<sup>132</sup> Ibid

<sup>133</sup> Suo Moto Case No 13 of 2007 [PLD 2009 SC 217]

left it up to the highest court of the land to determine the necessary measures to deal with writs pertaining to infringements under Part 1, Chapter II of the Constitution<sup>134</sup>. This in keeping with the ‘flood gates’ argument; it is precisely to discourage sham litigation that the SCP established rules and precedents on a case to case basis in order to make way for genuine grievances of the public at large – after all, the purpose of a writ petition is for the enforcement of fundamental rights, not of analyzing modus operandi of such cases, which is better left to the lower courts to do. Such a writ will be maintainable when the petitioner furnishes evidence to the honourable court that all other avenues have been exhausted and no other remedy is available and the matter under review is not related only to a group or class of individuals but is of wider public importance; where these requisites are met, the petitioner may directly file his or her writ in the SCP<sup>135</sup>. The jurisdiction of the SCP under this Article is similar to that of the High Court under Article 199; while deciding such a petition some of the matters that will be taken into account in both courts include, inter alia, conduct of the petitioner or whether he has come to the court with ‘clean hands’<sup>136</sup> which is an important consideration. If the petitioner successfully establishes breach of any of the fundamental rights and freedoms as provided in Part 1, Chapter II, he or she will be entitled to the appropriate relief awarded by the court<sup>137</sup>.

However, it must be pointed out that the SCP cannot, of its own accord, entertain a constitutional petition under Article 184[3]; only cases which involve an issue of public importance with reference to the enforcement of any of the fundamental rights in Chapter 1, Part II of the Constitution will be allowed.

## Conclusion: Are Constitutional Protections Available to Registered Afghan Citizens Living in Pakistan?

*“To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan”.*

Article 4, Constitution of the Islamic Republic of Pakistan, 1973

The Constitution provides certain protections and safeguards to citizens and non citizens alike and therefore applies to all registered Afghan citizens during their ‘temporary stay’ in the Pakistan. In particular, all the constitutional provisions pertaining to fundamental rights and freedoms that address ‘persons’ rather than just citizens are, as noted above, applicable to all registered Afghan citizens “for the time being present in Pakistan”. They have legal standing to bring a cause of action in court, and thus are fully capable of enforcing any violation of their fundamental rights, as discussed above. Therefore, despite the fact that they are not citizens, registered Afghans, due to the fact that they are at present residing in Pakistan, have been afforded the legal protections in accord with the constitutional and Islamic injunctions that are in force through the law, and thus there is no log on the SCP or respective High Courts to entertain any writs involving a violation of fundamental rights of a registered Afghan man, woman, or child living in Pakistan.

### Group Activity 1 [See Annexure 2]

At the end of the presentation relating to the constitutional safeguards and protections available to registered Afghan citizens living in Pakistan, participants will be divided into 3 groups and given a handout to read and analyze on the Article 10 [safeguards from arrest and detention], Article 24 [protection of property] and Article 25A [right to education]. In order to develop a comprehensive understanding, participants are required to answer all the questions at the end of each handout, relating each to its practical context and implications for registered Afghan citizens living in Pakistan.

<sup>134</sup> Mian Muhammad Shahbaz Sharif v Federation of Pakistan [PLD 2004 SC 583]: Locus standi and the question of any infraction of a fundamental right of a petitioner will be determined in proceedings under Article 199 of the Constitution [Jurisdiction of High Court]

<sup>135</sup> Ibid

<sup>136</sup> Mohtarma Benazir Bhutto v President of Pakistan [PLD 1998 SC 388]

<sup>137</sup> Al Jihad Trust v President of Pakistan [PLD 2000 SC 84]







## Administrative Remedies: The Federal & Provincial Ombudsman (Mohtasib) Offices



# Administrative Remedies: The Federal & Provincial Ombudsman (Mohtasib) Offices

## Introduction: Purpose & Methodology of studying Administrative law

### ■ Purpose & Content of Chapter:

This chapter relates to the administrative laws and remedies available for registered Afghan citizens living in Pakistan. Although, the scope of administrative law is not clearly demarcated as a separate discipline, an attempt is made here to define and explain this concept in detail and to examine its relevance in relation to them.

The purpose of this chapter is to provide an insight into the Pakistani administrative law system, its scope, application, governing legislation, the institutions and departments that deal with administrative issues and their powers, limitations, as well as any issues that may arise in relation to this field of law specifically in its application to registered Afghan citizens living in Pakistan. The content is divided into the following main sections:

- ❖ A discussion on the scope, powers, and jurisdiction of the Federal Ombudsman;
- ❖ A case study on the office of the Khyber Pakhtunkhwa [hereinafter referred to as KP] Ombudsman and its availability to registered Afghan citizens living in Pakistan; its powers, procedural mechanisms, and special responsibilities and main differences from its Federal counterpart; and
- ❖ Concluding remarks on suggestions for reform and advocacy strategies followed by a roundtable discussion to engage all participants in debate to generate new ideas and solutions.

### ■ Methodology in Training Sessions

The training sessions relating to this chapter will focus on developing an informed opinion of the relevant articles and fundamental rights applicable to registered Afghan citizens living in Pakistan in order to develop a consensus about the extent of their rights within Pakistani law. The training sessions will be conducted by:

- ❖ Lectures by experts on various aspects of the Ombudsman system in order to enable an understanding about legal aspects, powers, and jurisdiction of the Federal and Provincial Mohtasib offices.
- ❖ Generation of discussion with the help of visual aids, handouts, roundtable discussions and group exercises.

Note: Keeping in mind that many participants do not have a background in law, the content in this manual as well as in the training sessions is kept simple and basic.

## Defining the Scope Administrative Law: Context & Ground Realities in Pakistan

Before discussing the application of administrative law in practice, it is important to introduce this concept in order to develop a better understanding of what this discipline entails.

### ■ Defining 'Administrative Law'

Administrative law is a relatively new field of legal study which has only just developed all over the world into a separate legal discipline and this is the case to a much lesser extent in Pakistan. The term administrative law is usually considered an extension to constitutional law, but there are key differences between the two concepts: while the latter deals with the functions and powers of the executive, the former relates more to the administration of government and certain administrative bodies which are delegated powers and functions that are to be exercised on behalf of the government.

Administrative law may be defined as a body of law arising from the activities of administrative agencies of government as opposed to the activities of private corporations or organizations. The field of law typically includes decision making of government entities that form part of regulatory schemes in areas like employment and labour laws, international laws, taxation, environment, immigration, and so on. Other common aspects of administrative law include rule making [detailed regulations for enforcing laws], adjudication [review of evidence and arguments to determine rights and obligations of disputing parties], and enforcement [either publication or remedial action]. A very important concept in administrative law is judicial review which is available in most legal systems which entails an examination of the methods and ways a decision taken by public or quasi-public agencies was arrived at and is discussed in detail below.

#### ■ **Administrative law its & Application to Registered Afghan Citizens Living in Pakistan**

As mentioned above, the field of administrative law in Pakistan is not as developed as in the rest of the world and thus seems to overlap with the discipline of constitutional law. The administrative regulation of justice in Pakistan is entirely the responsibility of the seat of the Ombudsman or Mohtasib [Federal and Provincial], which, simply defined is an administrative agency with the power to investigate maladministration in State organization[s]. As a result of the 18th Amendment, however, the Mohtasib office has been devolved to the provinces, and thereafter provincial seats of the ombudsman exist and function independently of each other in all provincial quarters. More detail on the previously existing Federal Ombudsman [Wafaqi Mohtasib] and the provincial Mohtasibs is given below.

Based on data gathered by CAMP surveys and extensive research, it has been found that there is a serious under utilization of the Ombudsman mechanism by registered Afghan citizens facing administrative justice issues throughout the country; many in fact are not even aware of any recourse despite the fact that the problems they face come within the ambit of the provincial ombudsman jurisdiction.

### **Imparting Administrative Justice: Office of Federal Ombudsman [Wafaqi Mohtasib]**

In Pakistan, the administrative court responsible for such matters is the Federal Ombudsman [and now after the 18th Amendment], the Provincial ombudsman or 'Mohtasib'. Despite the fact that the office of Federal Ombudsman does not possess its previous ambit of powers after the devolution, it is nonetheless important to discuss because of its significance in the administration of justice in the country.

#### ■ **The Office of Federal Ombudsman [Wafaqi Mohtasib]**

The office of the Federal [Wafaqi] Ombudsman [Mohtasib] is an independent Pakistani administrative agency that has the power to investigate injustice done to a person through the 'maladministration' of a government agency or its officers and to recommend remedial actions. The institution was established under the Wafaqi Mohtasib [Ombudsman] Order, 1983 [hereinafter referred to as WMOO 1983].<sup>138</sup> The WMOO 1983 specifies that the Federal Ombudsman may – on a complaint received from an "aggrieved person", or on a reference from the President or the National Assembly, or on its own motion, or on a motion of the SCP or a High Court made during

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<sup>138</sup> 'Maladministration' is defined in sec. 2[2] of the WMOO 1983 to include: "[i] a decision, process, recommendation, act of omission or commission which – [a] is contrary to law, rules or regulations or is a departure from established practice or proceeding, unless it is bona fide and for valid reasons; or [b] is perverse, arbitrary or unreasonable, unjust, biased, oppressive or discriminatory; or [c] is based on irrelevant grounds; or [d] involves the exercise of powers, or the failure or refusal to do so, for corrupt or improper motives, such as, bribery, jobbery, favoritism, nepotism and administrative excesses; and [ii] neglect, inattention, delay, incompetency, inefficiency and ineptitude, in the administration or discharge of duties and responsibilities." An 'agency' is defined in sec. 2[1] as "a Ministry, Division, Department, Commission or office of the Federal Government or a statutory corporation or other institution established or controlled by the Federal Government but does not include the Supreme Court, the Supreme Court Judicial Council, the Federal Shariat Court or a High Court." Significantly, a 'public servant' is defined in sec. 2[6] as "a public servant as defined in section 21 of the Pakistan Penal Code. . . and includes a Minister, Adviser, Parliamentary Secretary and the Chief Executive, Director or other officer or employee or member of an Agency." Also of note, sec. 3[3] provides that the Ombudsman shall perform his functions and exercise his powers "independent of the Executive, and all executive authorities throughout Pakistan shall act in aid of the Mohtasib." The WMOO is not applicable in FATA. The complementary federal regulation is the *Wafaqi Mohtasib [Ombudsman]'s [Investigation and Disposal of Complaints] Regulations, 2003*.

the course of a proceeding before it – undertake an investigation on the matter<sup>139</sup>. If maladministration is found, the Federal Ombudsman communicates his findings and recommendations – which typically include corrective and/or disciplinary action – to the concerned agency, and thenceforth the agency is obliged to take remedial action or provide reasons for not complying with the recommendations.<sup>140</sup> If it fails to do so, it is deemed to be in ‘Defiance of Recommendations’ and then the Federal Ombudsman may refer the matter to the President of Pakistan, who may – in his discretion – direct the agency to implement the recommendations.<sup>141</sup>

Moreover, the Federal Ombudsman may refer the matter to an appropriate authority for taking disciplinary actions against the person who disregarded its direction, and if the public servant is found to have acted in a manner warranting criminal or disciplinary proceedings against him, the Federal Ombudsman may refer the matter to the appropriate authority for necessary action.<sup>142</sup> In addition, the Federal Ombudsman has the power to award reasonable costs or compensation to an aggrieved party for any loss or damage suffered by him on account of any maladministration.<sup>143</sup> Finally, if a person is aggrieved by a decision or order of the Federal Ombudsman, he or she may make a representation to the President, who may in turn pass such order thereon as he deems fit.<sup>144</sup> The procedural and evidentiary requirements in relation to the conduct of investigations by the Federal Ombudsman are set out in Section 10 of the WMOO 1983, and in particular he “may adopt such procedures as he considers appropriate for such investigation” and he shall “regulate the procedure for the conduct of business or the exercise of powers under this Order.”<sup>145</sup>

#### ■ Scope of Powers of Federal Ombudsman

Section 3[3] of the WMOO 1983 provides that the Federal Ombudsman shall perform his functions and exercise his powers “independent of the Executive, and all executive authorities throughout Pakistan shall act in aid of the Mohtasib”; thus there is no accountability or responsibility of the Ombudsman to the Executive or vice versa.

Also pertinent to note is that the WMOO 1983 has no application to the Federally Administered Tribal Areas [hereinafter referred to as FATA]. The discussion on FATA is beyond the scope of this publication, but it suffices to say that FATA is not administered by the laws applicable to Pakistan and no exception is made here either.

#### ■ Locus Standi under WMOO 1983

Section 9 of WMOO 1983 specifies that the Federal Ombudsman has power to initiate an investigation in the following situations:

- a) On a complaint received by an ‘aggrieved person’;
- b) On a reference from the President or the National Assembly;
- c) On a motion of the SCP or a High Court [made during the course of a judicial proceeding]; and
- d) On its own motion.

This implies that an application by a registered Afghan citizen living in Pakistan who is an ‘aggrieved person’ may be made to the Wafaqi Mohtasib. However, at this point, there is a gap between theory and practice: in day to day dealings of administrative matters, an application to the Mohtasib can only be made by a person holding a CNIC issued by NADRA, which implies that only Pakistani citizens have access to the Mohtasib at present.

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<sup>139</sup> Section 9 of the WMOO. The Ombudsman is precluded from investigating or inquiring into any matter which [a] is sub-judice before a court or tribunal; or [b] relates to the external affairs of Pakistan; or [c] relates to the defence of Pakistan or matters covered by laws relating to the military, naval or air forces. Moreover, it cannot investigate service grievances on behalf of public servants. Interestingly, in order to ascertain the root causes of corrupt practices and injustice, the Ombudsman is empowered to arrange for research to be conducted and may recommend appropriate steps for their eradication.

<sup>140</sup> Sections 11 & 13, WMOO 1983.

<sup>141</sup> Sections 11 & 12, WMOO 1983.

<sup>142</sup> Sections 14[5] & [6], WMOO 1983. By virtue of sec. 16[1][a] of the WMOO 1983 the Ombudsman also has the power to punish persons for contempt, for instance, anyone who “abuses, interferes with, impedes, imperils, or obstructs the process of the Mohtasib in any way or disobeys any order of the Mohtasib.”

<sup>143</sup> Section 22, WMOO 1983. In cases involving illegal gratification taken by public servants, or misappropriate, criminal breach of trust or cheating, the Ombudsman may order the payment thereof as credit to the government, or pass such other order as it deems fit.

<sup>144</sup> Section 32, WMOO 1983.

<sup>145</sup> Section 10[5], WMOO 1983.

### ■ Limitations on Powers of Federal Ombudsman

The Ombudsman cannot investigate into certain matters which are:

- a) Concerning the external affairs of Pakistan;
- b) Relates to the defence of Pakistan or matters covered by laws relating to the military, naval, or air forces;
- c) Already the subject of court proceedings before a court/tribunal; and
- d) Cannot investigate service grievances on behalf of public servants.

The limitation period for the submission of a complaint is 3 months, which is calculated from the day on which the aggrieved person first had notice of the matter alleged in the complaint.

### ■ Procedural Mechanisms of Federal Ombudsman

If the Federal Ombudsman finds actual 'maladministration', then he will communicate his findings and recommendations to the concerned Agency which may include suggested corrective and/or disciplinary action. The Agency is then obliged to take remedial action or provide reasons for not complying with the recommendations within a specified time limit.

If the Agency fails to implement the recommendations, then it is deemed to be in 'Defiance of Recommendations', and in such a situation, the Federal Ombudsman may refer the matter to the President of Pakistan, and the President may – exercising his discretion – direct the agency to implement the recommendations.

The Federal Ombudsman may also refer the matter to an appropriate authority for taking disciplinary actions against the person/Agency that disregarded the direction. If the public servant is found to have acted in a manner warranting criminal or disciplinary proceedings against him, the Federal Ombudsman may refer the matter to the appropriate authority for necessary action.

### ■ Power of Federal Ombudsman to award Penalties

The Federal Ombudsman also has the power to punish persons for contempt, for example, anyone who "abuses, interferes with, impedes, imperils, or obstructs the process of the Mohtasib in any way or disobeys any order of the Mohtasib". And He may also award reasonable costs or compensation to an aggrieved party for any loss or damage suffered by him on account of any maladministration.

### ■ Review of Federal Ombudsman's Decision

If a person is aggrieved by a decision or order of the Federal Ombudsman, he may make a representation to the President, and the President may in turn pass such order thereon as he deems fit<sup>146</sup>. More significantly, Federal Ombudsman's decision, in general, is not reviewable by courts.

## The Provincial Mohtasib: Powers, Scope & Jurisdiction

The perception survey conducted by CAMP was conducted in FATA and therefore, a case study on the office of the Khyber Pakhtunkhwa [KP] Mohtasib is provided below to demonstrate the operational mechanisms of the provincial ombudsman, and the key differences of the scope of powers, procedures, and jurisdiction between the Federal and Provincial structures. At first, however, the relevant legislation establishing the provincial ombudsman offices are given below as a reference point for all provinces, followed by a detailed discussion on the KP Mohtasib office, its powers, procedures and jurisdiction.

### ■ Establishment of the Provincial Ombudsman

Provincial enactments created the office of Provincial Ombudsman in all provinces include the Establishment of the Office of Ombudsman for the Province of Balochistan Ordinance, 2001 [hereinafter referred to as EOOPBO 2001] and the Ombudsman for the Province of Balochistan [Registration, Investigation and Disposal of Complaints] Regulations, 2005<sup>147</sup>; the Punjab Office of the Ombudsman Act, 1997 and the Ombudsman Punjab [Registration, Investigation and Disposal of Complaints] Regulations, 2005; and the Establishment of the Office of Ombudsman for the Province of Sindh Act, 1992 and amending ordinance of 1996; and, the Khyber Pakhtunkhwa

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<sup>146</sup> Section 32, WMOO 1983

<sup>147</sup> Whereas both the KP and Balochistan Ordinance specify that they extend to the whole of the province, it is uncertain whether they have been expressly extended to the Provincially Administered Tribal Areas [PATA] in KP and Balochistan by their respective provincial governments

Provincial Ombudsman Act, 2010 [hereinafter referred to as KPPOA 2010]<sup>148</sup>. For the regions of Azad Jammu & Kashmir, the Azad Jammu & Kashmir Act 1992 established the office of Provincial Ombudsman/Mohtasib, but in Gilgit-Baltistan, no enactment has established this office till date.

#### ■ **Khyber Pakhtunkhwa Provincial Ombudsman**

Taking the example of the KPPOA 2010 as a case in point; the Provincial Ombudsman's office has only recently been formed by order of the Provincial Government and is in the process of fully making its statutory mandate, policies and procedures operational. The provincial legislation is substantially similar to the Federal enactment, with the following notable exceptions: the Provincial Ombudsman may initiate investigations upon a reference by the Governor or the Provincial Assembly;<sup>149</sup> the Provincial Ombudsman is tasked with promoting the rights and welfare of women and children;<sup>150</sup> the limitation period for the submission of a complaint has been extended from three to six months, calculated from the day on which the aggrieved person first had notice of the matter alleged in the complaint;<sup>151</sup> if after considering the reasons of the agency for non-compliance with his recommendations the Provincial Ombudsman is satisfied that no case of maladministration is made out, he may alter, modify, amend or recall the recommendations made;<sup>152</sup> if there is a 'Defiance of Findings' with respect to implementation of the Ombudsman's findings, he may refer the matter to the Government to direct the agency to implement the findings;<sup>153</sup> and finally, if a person is aggrieved by a decision or order of the Provincial Ombudsman, he may make a representation to the Governor, who may in turn pass such order thereon as he deems fit.<sup>154</sup> A recent discussion with KP Ombudsman's office suggests that non-citizens may experience difficulty in accessing their services, since the possession of a CNIC is technically a requirement to avail their assistance.<sup>155</sup> This policy would seem to contravene the governing legislation, which allows for any "aggrieved person" to seek relief against maladministration through the KP Ombudsman.

As such, if a registered Afghan citizen is denied service in the KP Ombudsman office, a writ of Mandamus to the provincial High Court, assuming it is willing to entertain such an action, or a representation to the Governor, may be required to compel the KP Ombudsman's office to perform their statutory duty. Alternatively, in order to ensure consistency across all provinces, and at the national level, the President of Pakistan may seek an advisory opinion from the SCP, as provided for under Article 186 of the Constitution, to clarify the question of whether 'aggrieved person' under laws governing the Federal and Provincial Ombudsman offices includes non-citizens.

#### ■ **Differences between Federal and Khyber Pakhtunkhwa Legislation**

The KP legislation is substantially similar to the federal enactment, with some notable exceptions.

1. **Reference from Governor** – Firstly and most significantly, the KP Ombudsman may initiate investigations on a reference by the Governor or the Provincial Assembly instead of the President or National Assembly as in the case of the Federal Ombudsman.
2. **Special Assignment of Tasks** – The KP Ombudsman is assigned the special task of promoting the rights and welfare of women and children, while there is no specific assignment to the Federal Ombudsman.
3. **Extension of Limitation Period** – The limitation period for submission of a complaint to the Provincial

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<sup>148</sup> Ibid

<sup>149</sup> Section 9[1], KPPOA 2001.

<sup>150</sup> Section 9[3] of the KPPOA 2001 states that: "The Provincial Ombudsman shall also promote the rights and welfare of women and children and, without prejudice to the generality of the foregoing provisions shall - [a] advise the department or the authority concerned, as may be appropriate, on the development and co-ordination of policy relating to women and children; [b] encourage public bodies, schools and voluntary hospitals to develop policies, practices and procedures designed to promote the rights, welfare and health care of women and children, as the case may be; [c] collect and disseminate information on matters relating to the rights and welfare of women and children; [d] promote awareness among members of the public [including children of such age or ages] as he considers appropriate about matters [including the principles and provisions of the United Nations Convention on the Rights of the Child, 1989] relating to the rights and welfare of children and how those rights can be enforced; [e] highlight issues relating to the rights and welfare of women and children; and [f] take such other steps as he considers necessary to preserve and promote the welfare of women and children."

<sup>151</sup> Section 10[3], KPPOA 2001.

<sup>152</sup> Section 11[3], KPPOA 2001.

<sup>153</sup> Section 12[1], KPPOA 2001.

<sup>154</sup> Section 31, KPPOA 2001.

<sup>155</sup> Telephone conversation with Mr. Habibullah Baig, KP Ombudsman's Office, December 2, 2011.



Ombudsman has been extended to 6 months instead of 3 months which is the time limit for the Federal Ombudsman.

4. **Recall/Change of Recommendations** - If after considering the reasons of the Agency for non-compliance with his recommendations, the KP Ombudsman is satisfied that no case of 'maladministration' is made out, he may alter, modify, amend or recall the recommendations made. There is no such provision for the Federal Ombudsman in the WMOO 1983.
5. **Reference to Provincial Government** – In case of a 'Defiance of Findings' with respect to implementation of the KP Ombudsman's findings, he may refer the matter to the Provincial Government to direct the agency to implement the findings. The mirroring provision in the WMOO 1983 relates to the President using his discretion to direct the Agency to implement the direction of the Federal Ombudsman.
6. **Review of Provincial Ombudsman** - Where a person is aggrieved by a decision or order of the KP Ombudsman, he can make a representation to the KP Governor, who may in turn pass such order thereon as he deems fit.

■ **Special Responsibility of KP Ombudsman for Welfare of Women and Children**

As mentioned in the previous section on the differences between the Federal and KP Ombudsman, the latter is given a special responsibility to deal with matters relating to women and children within the KP province. To this end, Section 9[3] of the KPPOA 2010 states that:

*“The Provincial Ombudsman shall also promote the rights and welfare of women and children and, without prejudice to the generality of the foregoing provisions shall*

- a] *advise the department or the authority concerned, as may be appropriate, on the development and co-ordination of policy relating to women and children;*
- b] *encourage public bodies, schools and voluntary hospitals to develop policies, practices and procedures designed to promote the rights, welfare, and health care of women and children, as the case may be;*
- c] *collect and disseminate information on matters relating to the rights and welfare of women and children;*
- d] *promote awareness among members of the public [including children of such age or ages] as he considers appropriate about matters [including the principles and provisions of the United Nations Convention on the Rights of the Child, 1989] relating to the rights and welfare of children and how those rights can be enforced;*
- e] *highlight issues relating to the rights and welfare of women and children;*
- f] *take such other steps as he considers necessary to preserve and promote the welfare of women and children.”*

To this end, UNICEF has recently partnered with the Federal Ombudsman to establish a Children's Complaint Office within the Ombudsman's Secretariat, which is charged with investigation and redressing any injustice done to a child up to the age of 18 years through the maladministration of a Federal Agency such as a school, hospital, or law enforcement agencies.

Similar offices have been established in each of the four provincial Ombudsman agencies, as well as within the AJ&K Ombudsman's office, to address children's complaints of maladministration by provincial agencies.

■ **Roadblock to Access for Registered Afghan Citizens living in Pakistan to KP Ombudsman**

As mentioned above in case of the Federal Ombudsman, non-citizens tend to experience difficulty in accessing the KP Ombudsman services, since the possession of a CNIC issued by NADRA is technically a requirement to avail their assistance, registered Afghan citizens cannot avail these services because they do not possess a validly issued CNIC. However, such a state of affairs contravenes the principles of natural justice and due process of law, as well as constitutional provisions which allows for any "aggrieved person" to seek relief against maladministration through the Ombudsman.

### ■ Solutions for Registered Afghan Citizens living in Pakistan

If a registered Afghan citizen living in Pakistan is denied service by the KP Ombudsman, some steps to rectify the situation may be as follows:

- a) A writ of Mandamus to the Peshawar High Court may be filed to compel the KP Ombudsman's office to perform their statutory duty, assuming it is willing to entertain such an action; or
- b) A direct representation may be made to the KP Governor by the aggrieved parties or their representatives; or
- c) The President may seek an advisory opinion from the SCP<sup>156</sup>, to clarify the question of whether "aggrieved person" under laws governing the Federal and Provincial Ombudsman offices includes registered Afghan citizens living in Pakistan if they can fulfil the test; or
- d) Advocate with UNDP, UNICEF, UN Women & UNHCR.

These scenarios are not meant to be an exhaustive list of solutions, and it is appreciated that some of these mentioned above may not be practical or relevant for the time being given the GoP policy of repatriation of all Afghans in general until 31st December 2012, but these suggestions are included here in order to develop a consensus as to deal with the problems that registered Afghan citizens face in their interactions with local authorities.

## Conclusion: Are Administrative Remedies Available to Registered Afghan Citizens Living in Pakistan?

In general, the Federal & Provincial Ombudsman systems are an under-utilized and less well-known administrative mechanism for relief against 'maladministration' by Government authorities and officials, which can potentially serve as a beneficial alternative to costly litigation in mainstream courts, especially for those who do not have access to legal representation. The discussion above demonstrates that the office of Ombudsman does not merely exist on paper; it has a wide range of powers that are more than just recommendatory.

Thus this discussion may inform those advocating for registered Afghan citizens living in Pakistan and provide access to the Ombudsman in order to increase its utilization by the masses by creating awareness as an aftermath of these training sessions. And more notably, one of the aims of this publication is to expand the scope of the Ombudsman office to areas like G-B and FATA and PATA, because many registered Afghan citizens reside in these areas and it could provide a fast and easy access route to justice for them to increase its utility and scope of jurisdiction.

### Roundtable Discussion 1 [See Annexure 3]

At the end of the presentation relating to the administrative remedies provided by the Federal and Provincial Mohtasib, participants will be invited to engage in debate by questions posed relating to the availability of administrative remedies for registered Afghan citizens living in Pakistan. Participants are encouraged to provide their views on the current state of affairs in relation to administrative issues faced by registered Afghan citizens living in Pakistan and to make suggestions for reform and advocacy strategies in order to help them gain easy access to the Mohtasib in order to resolve their issues due to 'maladministration' by government authorities/officials.

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<sup>156</sup> Article 186 of the Constitution



## CHAPTER 4



# Arrest & Detention of Registered Afghan Citizens under Foreigners' Laws & Criminal Laws of Pakistan



# Arrest & Detention of Registered Afghan Citizens under Foreigners' Laws & Criminal Laws of Pakistan

## Introduction: Why study Arrest & Detention of Registered Afghan Citizens Living in Pakistan?

### ■ Purpose & Content of Chapter:

This chapter focuses on the arrest and detention of registered Afghan citizens living in Pakistan, in particular under the Foreigners' and Criminal laws because maltreatment by the police and other law enforcing agencies was observed in the CAMP perception survey as one of the main issues faced by them, especially in relation to arbitrary practices such as bribery, assault by police, and preventative arrest, in their interactions with State authorities. In light of the findings of the perception survey, the analysis presented in this chapter aims to highlight the gap between the actual laws and the way they are interpreted in practice by police and other law enforcement agencies in their everyday dealings with registered Afghan citizens.

Thus it is to clear the confusion between law and practice that this content has been developed, especially in light of the fact that the basic fundamental rights and protections guaranteed in the Constitution are applicable to registered Afghan citizens during their stay in Pakistan. The content below is divided into the following parts:

- ❖ Orders for dealing with foreigners under Section 3 of the Foreigner's Act 1946 [here in after referred to as FA 1946];
- ❖ Other laws concerning the regulation of foreigners in Pakistan;
- ❖ Preventative arrest under various laws and its dynamics;
- ❖ Post arrest issues, especially bail and difficulty of obtaining bail for registered Afghan citizens;
- ❖ Illegal entry and detention pending deportation; and
- ❖ Reference to AMRS.

### ■ Methodology in Training Sessions

The training sessions relating to this chapter will focus on developing an informed opinion of the relevant laws governing the arrest and detention of registered Afghan citizens living in Pakistan in order to develop a consensus on dealing with maltreatment by the police in relation to such matters. The training sessions will be conducted by:

- ❖ Lectures by experts on various aspects of the relevant law in order to enable an understanding about legal aspects
- ❖ Generation of discussion with the help of visual aids, handouts, roundtable discussions and group exercises.

Note: Keeping in mind that many participants do not have a background in law, the content in this Manual as well as in the training sessions is kept simple and basic.

## Foreigners' Laws: Regulating Registered Afghans in Pakistan

Although the GoP has stated that the foreigners' laws governing foreigners in general does not apply to registered Afghan citizens living in Pakistan, there are some issues that arise under these laws. This section deals with the relevant issues of registered Afghan citizens arising under the above mentioned foreigners' legislation, particularly arrest and detention.

### ■ Application of Foreigners Laws to Registered Afghan Citizens Living in Pakistan

The official registration of all Afghans was required in 1979 onward<sup>157</sup>, however, Afghan ‘refugees’ [as they were referred to from that time onwards] were held to be exempt from the foreigners’ registration laws, since, in time, the movement of registered Afghans outside refugee camps were declared to be legitimate in view of the dwindling of essential resources such as food and thereafter they were not subject to mandatory registration requirement<sup>158</sup>. This declaration was made in July, 1997, when the GoP [States & Frontier Regions Division] issued a circular, where it laid down that: “During the temporary stay for Afghan Refugee in Pakistan all laws applicable to the local citizens shall apply to Afghan refugees. However ... the provisions of the foreigners’ registration act and other such rules pertaining to foreigners residing in Pakistan do not apply to Afghan refugees.”<sup>159</sup>

On February 2, 2001, the GoP issued another circular which stated that: “Henceforth, all those Afghan nationals, who do not possess ‘refugee cards’ / ‘refugee permits’ issued by UNHCR/CAR or who have not been granted visas on their passports shall be considered as illegal immigrants and will be handled as per the Foreigners’ Act and laws applicable to foreigners.”<sup>160</sup> This means that the FA 1946 and other foreigners’ laws apply to ‘illegal’ Afghan immigrants, not to ‘refugees’, and therefore Afghan ‘refugees’ – referred to in this Manual as registered Afghan citizens living in Pakistan – are still subject to orders under the FA 1946, but not the illegal entry and deportation provisions.<sup>161</sup>

This is evidenced by the fact that many such registered Afghan citizens – that is, those Afghans possessing the requisite PoR card – have been arrested, detained and deported, especially those who did not have their PoR card on their person at the relevant time, or had lost it, have been subject to arrest and detention under the FA 1946. Nevertheless, police officials arrest and detain registered Afghan citizens with PoR cards if they are found in another location distant from that mentioned on their PoR card, even though the PoR cards do not impose any such restrictions on movement within Pakistan.

Obtaining release for Afghans in general charged under the FA 1946 has been a major focus of litigation by I/NGOs providing legal counselling services to them. These organizations have also been sensitising law enforcement authorities as well as the judiciary in relation to the significance of PoR cards and the entitlements that flow under it, i.e., authorization to temporarily reside in Pakistan until the date of their expiry.

### ■ Foreigners Act 1946

The Foreigners Act 1946 provides for the regulation of foreigners into and out of the country as well as monitoring their activities during their stay in the country. It also authorises the establishment of an authority to deal with matters relating to foreigners under the FA 1946 [namely the Federal Investigation Authority; hereinafter referred to as FIA] as well the provision of delegating this authority to provincial governments. The specific powers under the FA 1946 discussed below are the powers to make orders [Section 3], power to exempt from FA 1946, dealing with attempts to contravene the Act, penalties, illegal entry, and deportation.

❖ **Section 3, Power to make orders:** This is the main governing provision which empowers the Federal Government to scrutinize the entry or exit of foreigners as well as their stay in Pakistan, and governs Afghans in general as a community of non citizens living in the country ‘temporarily’. Section 3[2] outlines the different restrictions that foreigners are subjected to during their stay in Pakistan: they can be asked to stay within ‘prescribed areas, impose restrictions on movements outside these ‘prescribed’ areas, require proof of identity on a regular basis, and even be liable to arrest “in the interest of the defence or the external affairs or the security of Pakistan”.

Thus the State may restrict entry into, or movements in its territory; this is the right of every sovereign State and cannot be hampered by any principle of natural justice or on the ground of equity<sup>162</sup>. The Federal Government has the power to appoint a civil authority – FIA established by the Ministry of Interior under the FA 1946 – to deal with arrest or detention of any foreigner in ‘such manner and at such place as may appear suitable’. An important aspect of detention under this section is that it is not arbitrary or of an undetermined

<sup>157</sup> Handbook on Refugee Management, 1981 [Revised in 1984]

<sup>158</sup> Power to exempt from RFA 1939: section 6

<sup>159</sup> Notification No. F.12[8]-AR.1796

<sup>160</sup> Notification No. F.12[8]-AR.1/96]

<sup>161</sup> This notification leaves room for such an interpretation, i.e. that registered Afghans are still subject to order under section 3, FA 1946

<sup>162</sup> PLD 1980 Peshawar 275



length of time: an order of continuous detention cannot be passed beyond a period of 3 months unless the Federal Review Board has met, heard the detainee’s argument and concluded that there is sufficient cause for continuous detention; no order detaining a person for an indefinite period of time which extend beyond a period of 3 months can be passed<sup>163</sup>.

Safeguards under Article 10[4] are available to the detainee: where a complainant has been in continuous detention for more than 3 months under Section 3[2], Clauses [b] and [c] under orders of the provincial government – no justification can defend such detention, especially when the Review Board has not convened during that time<sup>164</sup>. Such detention will be in clear violation of Article 10[4] of the constitution relating to preventive detention and its period, that is, 3 months. Where a detainee is not produced before the board within 2 months, his detention becomes unlawful and warrants an order for release; however, where detention is sanctioned by a relevant order from provincial government in respect of a period when no such order is obtained even if there is no requirement of law to produce detainee before the Review Board, such detention will be deemed legal<sup>165</sup>.

However, foreigners convicted under the FA 1946 and detained in prison for the purpose of repatriation only cannot plead illegal detention, i.e., their detention will be lawful in so far as the purpose is only for repatriation<sup>166</sup>. Where a detainee has previously been in custody under Section 3 of the 1946 Act and his release had been ordered by the Federal Review Board and so the detainee [and his family members] could not be detained under the same provision again. The order for subsequent detention passed by the government was declared unlawful and without any authority and the detainee was released accordingly<sup>167</sup>. In case of a conflict between state security/ integrity and liberty of a person, the balance will be struck and the court will uphold the security/integrity of the State<sup>168</sup>.

In addition to arrest, detention or confinement, and general regulation of the conduct of foreigners, the other types of orders that can be issued under Section 3 relate to the following matters:

- Submitting to medical examinations and furnishing biometric data to authorities;
- Restrictions on freedom of association, possessing prescribed articles or engaging in prescribed activities; and
- Entering into a bond, with or without sureties for the observance of the aforesaid.

❖ **Section 9, Burden of proof:** The burden of proving that one is not a foreigner lies on the claimant: prima facie citizenship can be established by proof of habitation and residence of a claimant and his or her relatives in the country with the production of a Pakistani passport and valid CNIC. Documentary evidence to prove citizenship acquired after birth, naturalization or migration must be furnished by to show that the claimant is not a foreigner, that is, the burden of proof under Section 9 is on the accused to establish this fact<sup>169</sup>.

❖ **Section 11, Power to give effect to orders, directions, etc:** The authority to keep any foreigner in detention as a necessary prerequisite for the purpose of deportation is vested in any agency so sanctioned under the 1946 Act – a police officer is also endowed with the power to detain any foreigner with the intent to detain in accordance with an order for deportation. Such detention is neither punitive nor preventive and therefore not illegal so foreigners are kept only as internees for the purpose of repatriation to their country with no object to keep them in custody for any other purpose or any further period of time. Therefore, release of such foreigners will be uncalled for until the purpose of their detention is fulfilled, i.e., they are repatriated to their country of nationality<sup>170</sup>.

A specific power granted to any authority under Section 11[a] is to give directions, to take such steps or “use such force as may, in its opinion, be reasonably necessary” for securing compliance with such directions or

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<sup>163</sup> 1994 P.Cr.LJ 2362

<sup>164</sup> 1994 P.Cr.LJ 2362

<sup>165</sup> 1987 MLD 1072

<sup>166</sup> 1987 MLD 855

<sup>167</sup> 1995 P.Cr.LJ 606

<sup>168</sup> 1987 MLD 1072

<sup>169</sup> 1999 MLD 1521

<sup>170</sup> PLD 1983 Quetta 97

for preventing/rectifying any breach of such direction. Also, under Section 11[2], any police officer may take such steps or use such force as may, in his opinion, be reasonably necessary to secure compliance with orders, directions etc.

Such a power can, however, be used to justify police cruelty easily and can be used to defend any kind of discretionary actions, no matter how extreme they are; it therefore undermines the concept of the rule of law by allowing police or other law enforcement authorities to act according to their free will without being held accountable for their actions under the guise of statutory power.

- ❖ **Section 13, Attempts to contravene the provisions of this Act:** This provision states that it is punishable to contravene any of the provisions of the FA 1946, and the appropriate penalties will be meted out under Section 14. It also points out that aiding, abetting, or failure to comply with any of the provisions of this Act will be penalized.
- ❖ **Section 14, Penalties:** In cases falling under Section 14, the government is only interested in securing the presence of detainee at the time of their deportation; thus a detainee can be released on bail with the direction that they shall appear in front of a Magistrate on a given date every month to validate their presence<sup>171</sup>. Where an accused foreigner has already been convicted and served the awarded sentence, but was still in custody, it has been held that the his continued detention would not be a violation of his personal liberty and thus an order for deportation, in such a case, where he was not wanted in any other proceedings, will be set aside and he can be released<sup>172</sup>. The amendment in Section 14C states clearly to this effect that a foreigner awaiting deportation cannot be made to remain in detention for more than three months; in other words, the period given for arrangements for his or her deportation is three months.

At present, in most cases involving registered Afghan citizens living in Pakistan under Section 14[2] [‘illegal entry’], FA 1946, the person is detained for a few days and then released once they are able to eventually show their PoR card to the police or court; the same, however, is not the case for ‘illegal’ entrants who are subject to deportation.

It is been observed that some unregistered Afghans arrested under the FA 1946 have confessed to entering Pakistan illegally; their rationale being that it is easier to simply confess, in which case they will be given a short sentence and deported, but if they fail to provide a confession, they may be held in pre-trial custody which can last up to 6 months or longer, and face lengthy court proceedings.

- ❖ **Section 16, Protection to persons acting under this Act: This section provides that:** “No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act.” Like Section 11, it also conflicts with the concept of the rule of law and thus is contrary to the constitutional safeguards provided in Article 9 [security of person], Article 14[1] [privacy of home] since any arbitrary action of the police in dealings with foreigners can be defended as falling within the ambit of Sections 11 and 16 of the FA 1946. Specifically in relation to Section 16, the absence of accountability mechanisms for law enforcement authorities highlights the glaring gap between the concept of the rule of law and provisions of the FA 1946 dealing with treatment of foreigners.

#### ■ **Foreigners Order 1951**

The Foreigners Order 1951 [hereinafter referred to as FO 1951] deals with the matters of foreigners’ residing in Pakistan, restrictions on their movements, conditions of employment and the powers of law enforcing agencies [or other authorized officials] to arrest and detain any foreigner without a warrant in pursuance of Section 3[3][g] and Section 3[4] of the FA 1946.

- ❖ **Section 7, Restriction on sojourn in Pakistan:** Any foreigner entering the country is required to obtain a permit from the Registration Officer authorizing his stay for a certain period of time, and according to legal requirements must leave the country before its expiry unless he or she is granted an extension.
- ❖ **Section 8, Prohibited places:** Foreigners are prohibited from entering or staying in certain places defined in the Official Secrets Act 1923 [XIX of 1923] which include areas of operation of any of the armed forces. Common householders are also placed under an obligation to report the presence of any foreigner in a

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<sup>171</sup> 1986 PCrLJ 1063

<sup>172</sup> 2008 MLD 916

prohibited place to the relevant authority.

- ❖ **Section 9, Protected areas:** A ‘protected’ area, unlike the ‘prohibited’ area in the previous section, is not entirely prohibited for a foreigner. However, continued residence in a protected area is subject to certain terms and conditions as defined by the Federal Government or any ‘civil authority’ on its behalf in the interest of the ‘public’ and ‘public safety’.
- ❖ **Section 10, Restrictions on Employment:** Although in general, foreigners can seek employment in the country, under this section, they are restricted from pursuing government jobs or any kind of employment that entails or is related to the supply of “light, petroleum, power or water” to the public or government in particular.
- ❖ **Section 11, Power to impose restrictions on movements, etc:** This provision empowers the Federal Government or any authority acting on its behalf to formulate conditions in a written order addressed to a foreigner restricting his movements, residence, association with certain persons and possession of certain articles that the authority may deem fit to include.
- ❖ **Section 12, Power to remove foreigners from cantonments:** A foreigner can be asked by the military commandant of a certain Cantonment, in a written order, to remove himself, either permanently or for a certain period of time.
- ❖ **Section 13, Power to close clubs and restaurants:** Under this provision, the relevant authority may monitor clubs, restaurants, or any other places of entertainment frequented by foreigners by restricting their timings, activities, or ordering them to be closed down altogether. This is especially relevant where the authority suspects that the foreigners regularly visiting such places are believed to be “of criminal or subversive associations or otherwise undesirable”. Any such place can be closed down if there is a belief that the concerned premises is being run in a “disorderly or improper manner, or in a manner prejudicial to the public order or interest”. And lastly, this section authorizes police officers to enter [“if necessary by force”] such premises to conduct a search on the order of the concerned authority.
- ❖ **Section 15, Power to arrest and detain:** This section authorizes the arrest without warrant of a foreigner where it is “necessary in the interest of the security of Pakistan so to do...in such manner and at such place as the civil authority may consider suitable”. A report must be made out to the Federal Government detailing the reasons for the arrest and detention and if the Federal Government is not satisfied, it may cancel the order of detention.

Section 15A grants power to civil authority to order that a foreigner shall enter into a bond without or without sureties for observance of or as an alternative to the enforcement of any or all prescribed or specified restrictions, while section 15B authorizes the Federal Government to exercise all the powers and functions of a civil authority in a particular case or class of cases.

## Illegal Entry, Arrest & Detention under Domestic and Foreigners’ Laws

The phenomenon of illegal entry is a very relevant one in Pakistan, especially in reference to the ongoing conflict in neighbouring Afghanistan; when it comes to illegal entry of Afghans into the country; it is very common to note that the Frontier Corps regularly arrest Afghans entering illegally<sup>173</sup>. Once a person who has entered illegally has been arrested, there are certain procedures that are followed in relation to his or her detention and ultimate deportation to the country of origin.

### ■ Illegal Entry, Arrest & Detention

This section attempts to explain the procedures and legal requirements relating to arrest detention and deportation of illegal entrants, as well as those Afghans who are arrested and detained, specifically under the CrPC 1898, PPC 1860, FA 1946, as well as under other statutes dealing with ‘preventative’ detention.

- ❖ **Illegal entry:** In immigration law, illegal entry is defined as the entry of an alien into a country without the requisite documentation or credentials; even though there is no definition of ‘illegal entry’ in the FA 1946,

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<sup>173</sup>The Nation, 24 October 2011 reports 47 Afghans arrested by Frontier Corps for illegal entry into Pakistan:

<http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/Politics/24-Oct-2011/47-Afghans-arrested-in-Pashin-for-illegal-entry>

but it is stated that such an entry is deemed to be within the scope of Section 13 and thus an attempt to contravene the provisions of the Act.

Section 14[1] provides that, “where a person contravenes any provision of this Act, or any order made thereunder ... he shall ... be punished with imprisonment for a term which may extend to three years and shall also be liable to fine, and if such person has entered into a bond . . . his bond is liable to be forfeited”. The penalty is provided Section 14[2] which is normally utilized to charge persons of illegal entry into Pakistan, which states: “where any person knowingly enters into Pakistan illegally, he shall be guilty of an offence . . . punished with imprisonment for a term which may extend to ten years and fine which may extend to ten thousand rupees.”

- ❖ **Arrest & detention:** Section 3[2][g] of FA 1946 grants the Federal Government the power to make an order that a foreigner “shall be arrested and, in the interest of the defence or external affairs or the security of Pakistan, or any part thereof, detained or confined”. It is important to note that any arrest and detention under the FA 1946 or FO 1951 must comply with Article 10 [‘safeguards as to arrest and detention’] of the Constitution, which applies to ‘persons’, and specifically registered Afghans living in Pakistan<sup>174</sup>. A person previously detained under Section 3 of FA 1946, whose release had been ordered by the Federal Review Board, cannot be rearrested and detained under the same provision.<sup>175</sup>

Section 15 of FO 1951 grants powers to an appointed civil authority to, if it is necessary in the interests of the security of Pakistan to do so, arrest any foreigner without warrant, detain him for such time, in such manner and at such place as the civil authority may consider suitable; provided that a report of such arrest/detention is forwarded to the Federal Government, which may cancel such order or modify the manner of detention as it deems fit. And under Section 15B of FO 1951, the Federal Government may itself exercise all the powers and functions of a civil authority in a particular case or class of cases.<sup>176</sup>

- ❖ **Preventative arrest & detention:** This category of arrest and detention differs significantly from the usual arrest and detention mechanisms because it can be affected before the actual commission of a crime or any act contrary to ‘public order’ and thus can be based on suspicion. To this end, there are numerous laws and regulations that authorize preventative arrest and detention, including the following:
  - **Section 3** [‘power to arrest and detain suspected persons’] of the **West Pakistan Maintenance of Public Order Ordinance 1960**, which deals with “preventing any person from acting in any manner prejudicial to public safety or the maintenance of public order”.
  - **Section 107** [‘security for keeping the peace’] of the **Code of Criminal Procedure 1898** [CrPC] which deals with “any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb public tranquillity”.
  - **Sec 144** of the **Pakistan Penal Code 1860** [PPC] that deals with prevention of “obstruction, annoyance or injury [or risk of such occurrence] . . . to any person lawfully employed, or danger to human life, health and safety, or a disturbance of the public tranquillity, or a riot, or an affray”.
  - **Section 188** of the **PPC 1860** [‘disobedience to order duly promulgated by public servant’] for violation of an order issued under section 144 of the CrPC [‘power to issue order absolute at once in urgent cases of nuisance or apprehended danger’].
  - **Section 55** [‘power to arrest vagabonds, habitual robbers, etc.] & **Section 109** [‘security for good behaviour from vagrants and suspected persons’] **PPC 1860** which are the ‘avaragardi’ or vagrancy provisions of CrPC.<sup>177</sup> Sec. 109 is normally employed alongside sec. 55 of the CrPC, which delineates the conditions under which police officers may arrest ‘persons concealing their presence with a view to committing a cognizable offence, vagabonds, and habitual robbers’.

<sup>174</sup> Continuous detention must comply with Article 10[4] of the Constitution: 1994 [P.Cr.L.J 2362]

<sup>175</sup> 1995 [P.Cr.L.J 606]

<sup>176</sup> For example, the Assistant Inspector General of Police, Criminal Investigation Department is the Civil Authority for Karachi Federal Area, [Notification No. Visa [Gen.] LX/51, dated 17th March, 1952]

<sup>177</sup> Under Section 109 Magistrates of the First Class have the power to require “persons suspected of concealing their presence with a view to committing an offence” or “vagrants with no means of subsistence, or who cannot give a satisfactory account of themselves”, to show cause why they should not be ordered to execute a bond with sureties for good behaviour.

- ❖ **Human rights concerns relating to preventative arrest & detention:** International watchdogs and human rights advocacy groups have expressed concern over the widespread use of preventative detention provisions throughout the country, targeting certain communities such as Afghans in general. For instance, the Human Rights Watch reported in 2002 that it was common to note “systematic urban sweeps of Afghan refugees and shopkeepers, in which large numbers of refugees are rounded up and placed in detention for a few days. . . Often, these urban sweeps disproportionately impact ethnic minority groups within the general Afghan refugee population.” More recently, the Human Rights Commission of Pakistan has noted that on occasions like religious holidays and festivals, such as Muharram, Afghans from rural areas are not allowed to enter the cities. Special contingents of police deployed at entry points stop and check the movement of Afghans and reportedly harass them until they give in to extortionate demands of money.

#### ■ **Bail & Deportation**

For a person detained under the Foreigners’ laws, and who is also an illegal entrant, the next logical step is deportation, but in the case of a person arrested and detained under criminal laws, securing release on bail is more viable. However, there are certain real barriers to securing release for registered Afghan citizens living in Pakistan, whether they are arrested under the foreigners’ or criminal laws.

- ❖ **Securing release on bail:** Releasing registered Afghan citizens charged under sec. 55 & 109 of CrPC 1898 has not proven difficult for NGOs since their lawyers – with whom judges are now familiar – simply bring to the court persons who can serve as a surety for the arrestee, and thereby prove that the person is not a vagrant. Also, as a result of regular coordination meetings with police officials, it is sometimes possible to prevent the formal arrest altogether. For instance, where NGOs learn that registered Afghan citizens have been swept up by police, their lawyers will go to the police station to prevent the booking and arrest, and in such cases the police simply warn the detainee and let him go.

Certain offences under the PPC 1860 and CrPC 1898 are bailable offences, and if a person is charged with a bailable offence, in order to be released they may be required to do one of the following:

- Execute a bond for a specified sum of money, determined by the court under Section 499[1] of CrPC 1898;
- Provide personal sureties who will ensure that s/he will attend subsequent court proceedings under Section 499[1] of CrPC 1898; and/or
- Provide cash surety under Section 513 of CrPC.

If personal sureties are required under Section 499[1] of the CrPC 1898, then generally speaking the sureties must be Pakistani citizens residing in the jurisdiction of the court who possess immovable or movable property and can prove ownership thereof i.e., title documents related to immovable property, or ownership documents with respect to a vehicle. This creates problems for registered Afghan citizens – particularly those who have not accessed the assistance of a legal aid I/NGO – as they are sometimes unable to secure a Pakistani property owner to serve as their surety. And often they cannot serve as personal sureties for one another since they are not permitted to acquire, hold or dispose of immovable property in Pak, and cannot register a vehicle in their own name, since both transactions require a CNIC.

I/NGOs and advocacy groups have been able to formulate ways to get around this limitation by using the following methods:

- NGOs such as SHARP submit ‘SHARP Bonds’ in order to secure release in bailable cases, depending on the circumstances of the case;
  - If an Afghan elder is living in a specified camp in KP, and CAR declares him a recognized elder, then courts have on occasion accepted the elder’s surety as well;
  - In case of a ‘cash surety’ [Section 513 of CrPC 1898] a ‘deposit instead of recognizance’ permits a person who is required to execute a bond, with or without sureties, to deposit a sum of money or Government promissory note, as the court may fix, in lieu of executing such bond.
- ❖ **Deportation to country of origin:** Section 14A of FA 1946 any person accused of an offence under Section 14[2] [illegal entry] shall not be released on bail if there are reasonable grounds for believing that he was guilty of the offence, and in such a case, 14B of FA 1946 allows for the deportation of a foreigner while his trial under the FA 1946 is pending or while he is serving a sentence under the FA, at the discretion of the Federal Government. Referring to the time in detention awaiting deportation, Section 14C of FA 1946 provides that a



foreigner shall be held in custody for up to three months following completion of his sentence to enable arrangements to be made for his deportation. Any expenses for effecting deportation may be taken from the property of the foreigner, by virtue of Section 14 of the FO 1951.

Various provisions of the Afghan Management & Repatriation Strategy [hereinafter referred to as AMRS] deal with the issue of deportation of unregistered Afghans:

- Clause IX, sub-clause [ii]: “Unregistered refugees are to be considered as illegal immigrants and need to be deported/ dealt with under the law of land”;
- Clause IX, sub-clause [iii]: “A separate dedicated force to trace the unregistered Afghans be formed as local police has been stretched too much these days to accomplish the important task”;
- Clause IX, sub-clause [iv]: “The deportation process should be simplified and UNHCR involved to assist their return.”

## The Way Forward: Suggestions for Reform

As illustrated from the discussion above, the situation in relation to the arrest and detention of Afghans [both registered and in general] is far from satisfactory. Therefore, in such a situation, there is a great need to rectify the problems faced by registered Afghan citizen living in Pakistan by addressing the lacuna in the present foreigners’ laws in order to reduce the chance of exploitation by the police and other law enforcement agencies. The following content highlights some of the core issues as well as the recent attempts at reform of the current laws and policies relating to the regulation of foreigners in Pakistan.

### ■ The Problem: Legal Lacunae

Where detention and deportation of registered Afghan citizens is not conducted through due process of law, i.e., by following a formal charge under the FA 1946 and the requisite subsequent court process [for example, a hearing], it is in contravention of Pakistani law and this points to the larger issue here which is that the FA 1946, as presently enacted, makes no provision for consideration of an ‘illegal’ entrants’ claim of persecution in their country of origin [i.e. by an asylum seeker], or the risk of torture or ‘cruel, inhuman, or degrading treatment or punishment’ upon their return, and therefore is in urgent need of reform in order to bring it into conformity with international human rights standards.

This is not only in contravention to the concept of rule of law and due process but also a continuing violation of the fundamental constitutional safeguards and protections given to all ‘persons’ in the Constitution regardless of their legal and/or political status in the country.

### ■ Attempts at Reform: Private Member’s Bill for Amendment to FA 1946

A Private Members Bill [herein after referred to as the Bill] was presented in the National Assembly for the first time in April 2004,<sup>178</sup> seeking to amend the FA 1946, and was recently re-introduced in the National Assembly by MNA Shireen Arshad Khan on March 30, 2010 seeking the same. The National Assembly Standing Committee is yet to submit a report on the bill, and hence it has not been discussed in Parliament. The Bill proposes the following changes in the FA 1946:

- ❖ Addition of the terms ‘asylum seeker’, ‘refugee’ and ‘endorsing authority’ [namely, UNHCR, NARA & CAR] to the FA 1946;
- ❖ The definitions of ‘refugee’ derived from the Article 1A[2] of the Refugee Convention, Article 1[2] of the Protocol<sup>179</sup>, and Article 1[2] of the Organization of African Unity [OAU] Convention Governing the Specific Aspects of Refugee Problems in Africa 1969<sup>180</sup> should be incorporated into the FA 1946;

<sup>178</sup> Originally drafted and presented to the Executive Committee of the Parliamentarians Commission for Human Rights [PCHR] by Mr. Murad Ullah, on behalf of UNHCR and SHARP, the Bill was presented in the NA by Mr. Riaz Fatyana of PCHR, and was signed and endorsed by seven MNAs. However, the then Federal Minister for Parliamentary Affairs, Mr. Sher Afgan Niazi, opposed the tabling of the Bill in Parliament.

<sup>179</sup> Article 1A[2] of Ref. Convention & 1[2] of Protocol – well-founded fear of persecution based on race, religion, nationality, political opinion, membership in a particular social group.

<sup>180</sup> Under African Convention, “refugee” also includes: “every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”

- ❖ If passed, any future Afghans who seek asylum in Pakistan would be covered by the broader definition of refugee as proposed by the Bill;
- ❖ Exemption of recognized asylum seekers and refugees from the penal provisions of the FA 1946; [see secs. 14[1] & 14[2]]
- ❖ Setting a requirement that police officers must obtain a search warrant from a court before entering into a dwelling unit or property when seeking to give effect to orders, directions etc. in pursuance of the FA1946<sup>181</sup>;
- ❖ Prohibit the deportation of an asylum seeker while his status determination case is pending before the endorsing authority<sup>182</sup>; and
- ❖ Eliminate the existing bar against instituting civil or criminal proceeding against persons acting in good faith under the FA 1946.<sup>183</sup>

If this Bill were to be passed, it would go a long way towards rectifying the situation and provide the necessary protection to genuine ‘refugees’, as per the definition in the African Convention, and to prevent maltreatment of registered Afghan citizens by the police and other law enforcement agencies. It would also help in minimizing the pervasive insecurity and fear of police harassment, which registered Afghan citizens living in Pakistan have to establish goodwill and mutual trust. And lastly, but most importantly, it can prove to be the first step in eliminating the gap between theory and practice due to the prevalent confusion amongst both the private and public sectors as to the legal status of Afghans in general living in Pakistan.

## Conclusion: Is the Current Regulation of Registered Afghan Citizens’ Satisfactory?

As reflected from the above discussion, current laws and practices adopted by the police and law enforcement agencies raise genuine concerns about ongoing targeting of registered Afghan citizens living in Pakistan under preventative arrest & detention laws in Pakistan. There are very real obstacles in access to bail, but many I/NGOs have found practical solutions to work around these problems and have managed a reasonable success rate in recent times in securing the release of registered Afghan citizens living in Pakistan on bail. However, the reality of a stark contrast between theory and practice is apparent from reported cases in the media and cases uncovered by I/NGOs of police extortion, harassment, and torture of innocents who are completely unaware of their rights.

In addition, on the other hand, the regulation of registered Afghan citizens living in Pakistan under various statutes is also a source of debate: the ‘illegal entry’ and deportation provisions of the FA 1946 do not apply to them, however, they are still subject to many types of orders that may be made under the Act, and are exposed to arrest and detention if they do not have their PoR cards on their person, whenever demanded by the police. Another human rights issue is that ‘use of force’ and ‘right to access land or property’ powers granted to police officers to enforce orders under the FA 1946 undermines the rule of law and may in practice conflict with Article 9 [security of person] and Article 14 [inviolability of dignity of man, etc] of the Constitution.

One solution is the efforts at amendment of the FA 1946 that are currently underway in Parliament to ensure protection for ‘refugees’ and asylum seekers such as the Afghans in general who came to Pakistan initially to flee foreign occupation and subsequently to escape persecution [both factors are part of the requirement for a person to be a ‘refugee’ in the African Convention]. However, given the present state of affairs, and the obvious paradox between the FA 1946 and the Constitution, intensive reforms are needed in order to make protection for registered Afghan citizens living in Pakistan [as well as Afghans in general] from arbitrary state practices a real possibility.

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<sup>181</sup> Section 11[3] of FA 1946

<sup>182</sup> Section 14B of FA 1946

<sup>183</sup> Section 15 of FA 1946



**Roundtable Discussion 2 [See Annex 3]**

At the end of the presentation dealing with arrest and detention issues under the foreigners and criminal laws of Pakistan, participants are invited to engage in debate by questions posed relating to the role of CAR and I/NGOs in practice when coming to the aid of Afghans in general and dealing with police and other law enforcement agencies. Participants are encouraged to provide their views on the current state of affairs in relation to arrest and detention issues faced by registered Afghan citizens [and Afghans in general] and to make suggestions for reform and formulate relevant advocacy strategies for effective implementation.



## Citizenship & Naturalization Laws: Relevance & Applicability to Registered Afghan Citizens Living in Pakistan



# Citizenship & Naturalization Laws: Relevance & Applicability to Registered Afghan Citizens Living in Pakistan

## Introduction: Why study Citizenship & Naturalization laws?

### ■ Purpose & Content of Chapter:

An analysis of the laws relating to citizenship and naturalization in Pakistan is essential for all foreigners, but especially for registered Afghan citizens who may have lived in pockets all over the country, but have not been assimilated into the citizenry: since their influx from 1979 onwards, many Afghans have begun to call Pakistan their 'home', and hence did not consider the option of leaving. Currently, GoP only pursues a policy of 'voluntary' repatriation for these unfortunates and so they are only deemed to be living here on a temporary basis. However, it is important to overview the modes in which they can possibly acquire citizenship or be naturalized, since it is often the case that many of them are not willing to be repatriated despite the fact that the GoP policy framework currently does not account for this possibility.

In pursuance of this objective, therefore, the content below will deal with the following topics:

- ❖ The Pakistan Citizenship Act 1951 [hereinafter referred to as PCA 1951] and the possibilities of acquiring Pakistani citizenship through different modes under it;
- ❖ The Naturalization Act 1926 [hereinafter referred to as NA 1926] and the possibilities of acquiring Pakistani citizenship through naturalization; and
- ❖ Exploring the possibilities for citizenship and naturalization for registered Afghan citizens living in Pakistan.

### ■ Methodology in Training Sessions

The training sessions relating to this chapter will focus on developing an informed opinion of the relevant laws governing citizenship and naturalization and explore the possibilities for registered Afghan citizens living in Pakistan to avail citizenship through the relevant mechanisms provided in the law. The training sessions will be conducted by:

- ❖ Lectures by experts on various aspects of the relevant law in order to enable an understanding about legal aspects
- ❖ Generation of discussion with the help of visual aids, handouts, roundtable discussions and group exercises.

Note: Keeping in mind that many participants do not have a background in law, the content in this manual as well as in the training sessions is kept simple and basic.

## Governing Legislation for Acquiring Citizenship of Pakistan

The status of a citizen entails certain rights and duties; being the indigent or acquired member of a particular country makes one a citizen and it is an inviolable standing which necessitates a reciprocal relationship with the state and its subsidiaries. In Pakistan, citizenship and related matters are dealt with by the Pakistan Citizenship Act 1951 and the Pakistan Citizenship Rules 1952.

### ■ The Pakistan Citizenship Act 1951

The Pakistan Citizenship Act 1951 [PCA 1951] was promulgated on 13th April 1951 and was enacted with the purpose of providing a distinction between citizens and non citizens [foreigners]; the term “alien” is used to denote all non citizens and defined as “...a person who is not a citizen of Pakistan or a Commonwealth citizen”<sup>184</sup>. The following are some other important provisions of the PCA 1951:

- ❖ **Section 4:** This Section states that any person born after the commencement of this Act is deemed a citizen of Pakistan.
- ❖ **Section 5:** A person who is born outside Pakistan before 18 April 2000 will be a citizen if his or her father is a citizen otherwise than by descent. But the person born outside Pakistan will also be a citizen by descent if his or her father was a citizen by descent on the condition that the birth is registered with a Pakistani Consulate or High Commission abroad, or if the father was in government service at the time of birth.
- ❖ **Section 9:** This Section provides for citizenship by naturalization under the Naturalization Act 1926.
- ❖ **Section 10:** This section allows a female foreigner to acquire the citizenship of Pakistan upon marriage to a citizen.
- ❖ **Section 16:** The situations where a person will be deprived of citizenship have been outlined in this section which include, inter alia, he has been resident outside the country for more than seven years, has been sentenced in another country to imprisonment of twelve months [or more] within five years of naturalization, and any reason of ‘public interest’ according to which a person should not be deemed a citizen.
- ❖ **Section 18:** This provision delegates the powers assigned to the Federal Government under this Act to any authority or officer to act on its behalf.
- ❖ **Section 19:** Where there is a doubt as to the authenticity of a citizenship certificate, this section provides for an application to be made to the Federal Government for confirmation of its legitimacy; in the absence of ‘fraud, false representation or concealment of any material fact’, the statement will normally be issued acknowledging the validity of the document.

An important recent development to note in the PCA 1951 is the amendment in 2000 to enable Pakistani women to claim citizenship of their children born of a foreign husband; previously, this was available only to Pakistani men.

### ■ Pakistan Citizenship Rules 1952

These rules [hereinafter referred to as PCR 1952] deal with the procedures to be followed when a person is claiming to be a citizen of Pakistan and the powers of officials to act on behalf of the federal or provincial governments grant or reject citizenship applications, along with the prescribed formats and fees for such applications, and the manner in which they are to be submitted to the concerned officials.

One example of the procedure for acquiring citizenship by descent is provided to illustrate the operation of the PCR 1952. A person claiming citizenship by descent has to fulfil the procedural requirements in the Rule 9 of the PCR 1952:

- ❖ Apply in prescribed form to the Provincial Government of the area in which he has his domicile of origin as defined in Part II of the Succession Act, 1925.
- ❖ The application must be accompanied by:
  - A certificate of citizenship of Pakistan granted to his parent, and
  - Evidence establishing his relationship to his parent [for example, a birth certificate].
- ❖ Provided that where the certificate of citizenship indicates that the parent is a citizen of Pakistan by descent only, then one of the following additional documents must also be produced:
  - A certificate of registration of birth at a Pakistani Mission or Consulate in the country where the applicant was born; or

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<sup>184</sup> Section 2, CA 1951

- A certificate or documentary proof that the applicant's parent was in the service of a Government of Pakistan at the time of the applicant's birth in that other country.

The Provincial Government after making such enquiries as it deems fit may pass orders in regard to such applications, except where additional documents are required under Sub Rule [2], in which case it shall forward the papers to the Federal Government, which, in turn, shall pass such orders on the application as it deems fit.

### ■ Acquiring Citizenship of Pakistan

Sections 4 to 9 of the PCA 1951 outline the ways in which a person can acquire the citizenship of Pakistan, which include by birth, migration, and naturalization, and are outlined in brief below:

- ❖ **By Birth:** This category of acquiring citizenship by birth is the easiest and well known method which, in most cases, automatically confers nationality to a person. Sections 4 and 5 of the CA 1951 cover cases of citizenship by birth; these provisions do not apply to a person whose father is not a citizen but has been residing in the country for a long time<sup>185</sup>. It has been held that these sections must be read together and operate to provide every person born in Pakistan after 13th April 1951 [date of commencement of PCA 1951] with citizenship and subject to Section 3 which provides that a person will be a citizen by descent if his or her father is a citizen at the time of birth. Prolonged residences of foreigners cannot give them citizen status unless due process of law is followed; a case in point is the presence of registered Afghan citizens in Pakistan who have been residents for decades – it is imperative to note that the State policy towards them which entails temporary protection, so the provisions of the PCA 1951 do not apply to them.

A person claiming citizenship by birth must apply in the prescribed form<sup>186</sup> under Rule 8 of PCR 1952 to the relevant officer of the district of birth or residence, accompanied by a birth certificate issued by either a village official, police station official, Municipal/Town committee personnel or a Registrar of Births and Deaths [appointed under the Births, Deaths & Marriages Registration Act 1886]. In case the applicant is a minor, a statement by parents or guardian is also required. Upon receipt of these documents, the relevant officer will scrutinize the validity of all the information provided and upon being satisfied, request the provincial authority to grant a certificate of citizenship.

- ❖ **By Descent:** Under the principle of 'jus sanguinis'<sup>187</sup>, a person can be automatically granted citizenship if either or both of his or her parents are citizens already even if he or she is born outside the particular geographical territory. Section 5 used the term 'father' initially, but it has been substituted for 'parent' by the Pakistan Citizenship [Amendment] Ordinance 2000, hence now a person can acquire citizenship by descent under this section if either his or her mother or father is a citizen.

Rule 9 outlines the procedural requirements to be fulfilled for a person claiming citizenship under Section 5 which includes an application in the prescribed form accompanied by a certificate of citizenship of one of the parents, and evidence establishing the applicant's relationship with either of them.

- ❖ **By Migration:** Section 6 deals with citizenship by migration which entails migrants from the territories of the subcontinent as well as those from "outside these territories" which in theory at least, points to migrants from other countries as well. The one prerequisite is that the intention of permanent residence must be established for a person to be granted a certificate of domicile under this section.
- ❖ **By Naturalization:** Under Section 9, a person who has been granted a certificate of naturalization under the Naturalization Act 1926<sup>188</sup> may apply to be registered as a citizen of Pakistan by naturalization. The Federal Government is also empowered to grant citizenship without the production of a certificate of naturalization.
- ❖ **By Marriage:** Section 10 states that a woman who is not a citizen is married to a Pakistani male citizen, she will be entitled to citizenship, but not in the opposite case, i.e. when a non citizen man is married to a female Pakistani citizen. The latter prohibition has been the subject of much debate and controversy since this provision seems discriminatory towards foreign males; however, it has been held in a High Court ruling<sup>189</sup> that given the cultural and religious protection given to women in our society, it is justified to grant an alien

<sup>185</sup> PLD 1999 Peshawar 18

<sup>186</sup> Form B to be submitted to the authorized officer in the district of birth or residence

<sup>187</sup> Latin term for 'right of blood'

<sup>188</sup> Details on Naturalization Act 1926 are provided in next section in this chapter titled "Naturalization"

<sup>189</sup> PLD 1998 Lahore 59

woman married citizenship on the basis of her marriage to a Pakistani, while denying an alien man in the same position on the grounds of public policy. However, the Federal Shariat Court has called for striking down this provision as it is “discriminatory, negates gender equality and is in violation of Articles 2A and 25 of the Constitution and also against international commitments of Pakistan, and most importantly is repugnant to Holy Qur’an and Sunnah”<sup>190</sup> and recommended its amendment to allow foreign men to obtain citizenship on account of their marriage to Pakistani women.

The procedural requirements for a foreign woman to obtain citizenship on account of her marriage to a Pakistani man includes furnishing the prescribed form<sup>191</sup> accompanied by a marriage certificate, her husband’s certificate of citizenship, and if her husband is no longer alive, an oath of allegiance and certificate of domicile. Upon receipt of the necessary documents, the Federal Government will conduct the necessary inquiries and issue an order either in favor or otherwise.

## Naturalization: Laws & Procedures for Naturalizing Foreigners

The term naturalization usually denotes one of the ways to acquire citizenship or the “granting of citizenship to a foreigner under statutory authority” generally subject to the requirements of residence in the host country for a defined period and an undertaking that after naturalization, the host country will become permanent residence for the applicant; that the applicant is of a good character and has not violated any of the immigration laws of the host country; has sufficient knowledge of the local language, traditions and customs; and, lastly, an oath of allegiance to the adopted country.

Article 34 of the 1951 Convention Relating to the Status of Refugees points to the facilitation of assimilation and naturalization of refugees in all contracting states:

*“The contracting states shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.”*

Pakistan, however, is not a signatory to the 1951 Convention, and in addition does not pursue a policy of assimilation towards registered Afghan citizens living here; hence this provision is completely inapplicable to Pakistan. However, Pakistan does have its own naturalization laws to deal with assimilation of foreigners in general, namely the Naturalization Act 1926 and the Pakistan Naturalization Rules 1961, which are summarized below.

### ■ Naturalization Act 1926

The Naturalization Act 1926 [NA 1926] deals with all necessary requirements of naturalization which include an oath of allegiance, limitations to grant of naturalization, and all relevant matters pertaining to the grant or revocation of naturalization certificates to applicants. The important provisions are outlined below:

- ❖ **Section 3:** A certificate of naturalization is granted under this provision to a foreigner seeking to be naturalized subject to certain conditions such as the period of time he or she must spend in Pakistan, his character, knowledge of a local/official language, and a declaration of future permanent residence in the country.
- ❖ **Section 4:** This Section deals with the contents and form of application for a certificate, which must be in writing stating his or her age, place of birth, residence, profession, qualifications, any previous applications for naturalization [and whether they have been accepted or rejected, and whether he or she already holds such a certificate. After the application has been made, the Federal Government is entitled to conduct any necessary inquiries to satisfy itself of the accuracy of the facts reflected in the information provided by the applicant.
- ❖ **Section 5:** The grant of a certificate will be made when the Federal Government is satisfied with all the information given; it is important to note that under s. 5, the grant or otherwise of a certificate of naturalization lies in the absolute discretion of the Federal Government and there is no right of appeal against a refusal in this respect.

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<sup>190</sup> PLD 2008 Federal Shariat Court 1

<sup>191</sup> Form F



- ❖ **Section 6:** The person to whom the certificate has been granted must take an oath of allegiance to the Constitution of Pakistan within 30 days of the grant unless the Federal Government grants an extension if it is satisfied that the “failure to take and subscribe the oath within that time was due to sufficient cause”.
- ❖ **Section 7:** The grant and the oath of allegiance will operate together to naturalize a person [and any minor children he or she has] into Pakistan and from thereon he or she will be deemed a citizen and will be entitled to all rights and privileges of a person born here.
- ❖ **Section 8:** Where the Federal Government finds that the certificate of naturalization was obtained through fraud, misrepresentation or concealment of material circumstances or the person to whom it has been granted has been disloyal or disaffected, it will be revoked by written order.
- ❖ **Section 9:** Where a naturalization certificate is revoked under Section 8, the person holding it will cease to be a citizen and be deprived of all accompanying rights and privileges that he or she enjoyed while holding it.
- ❖ **Section 10:** A person may declare him or herself an ‘alien’ thereby renouncing Pakistani citizenship; such a declaration will also deprive the person’s spouse and minor children, if any. The two situations outlined in s. 10 where a declaration of alienage are when a minor who has been naturalized renounces citizenship, and where a woman, who was naturalized on account of her marriage, is either widowed or divorces her husband.

#### ■ **Pakistan Naturalization Rules 1952**

Section 13 of the NA 1926 frames the Pakistan Naturalization Rules 1952 [PNR 1952] which prescribe the forms of application [addressed to the Directorate General of Immigration and Passports through the Provincial Government] and certificate of naturalization, declarations and the oath of allegiance as required by the provisions of the NA 1926. The Director of Immigration and Passports issues certificates of naturalization under Rule 5, which are delivered to the applicant through the relevant Federal/ provincial authority. A detailed discussion on the procedural requirements for obtaining citizenship through naturalization is given in the following section.

## **Correlation between Citizenship & Naturalization**

Naturalization and citizenship are two correlated concepts; the latter is a wider concept which entails numerous modes for acquisition, while the former is one of the ways to acquire citizenship. As already explained above, both are governed by separate legislation: Section 9 of the PCA 1951 refers to the acquisition of citizenship through naturalization while naturalization itself is governed by the NA 1926.

#### ■ **Criteria for Citizenship through Naturalization**

The procedure for citizenship through naturalization is defined in the PCR 1952 which state that a person making such an application must apply in the prescribed form in triplicate to the Federal Government, with the following documents:

- [i] An affidavit swearing to the accuracy or truth of all the facts contained in the application;
- [ii] A certificate of naturalization under the NA 1926 – where an exemption from the production of the certificate is sought, a sworn statement specifying the reasons for which he seeks such an exemption must be recorded;
- [iii] A certificate confirming that the applicant has taken the oath of allegiance to the Constitution of Pakistan within the prescribed period in NA 1926.

After the submission of these documents, the Federal Government will conduct inquiries as it considers necessary and grant a certificate of registration or reject the application<sup>192</sup>.

A person seeking citizenship on the basis of naturalization must obtain the naturalization certificate, unless exempted by the Federal Government. The criteria for the grant of a certificate are set out in Section 3 of NA 1926, which entails the following:

- [i] The applicant must not be a minor;

<sup>192</sup> Rule 13 of PNR 1952

- [ii] He or she should not already be a citizen of Pakistan “nor a subject of any state of which a citizen of Pakistan is prevented under any law to become a subject by naturalization”;
- [iii] He or she has lived in Pakistan for a period of 12 consecutive months preceding the date of application, and has for seven years preceding this 12 month period, resided in Pakistan for an aggregate term of not less than 4 years which is a cumulative stay of 5 years in the country;
- [iv] He or she is of good character;
- [v] He or she has adequate knowledge of a local language which is amongst the main vernaculars of Pakistan [ for example, Urdu or any of the regional languages];
- [vi] That he or she intends Pakistan to be his or her permanent future abode or intends to enter in the service of the State in future.

The procedure for obtaining a naturalization certificate is set out in the Naturalization Rules 1961 in the following rules:

- ❖ **Rule 3:** An application should be submitted in the prescribed format addressed to the Directorate of Immigration and Passports through the Provincial Governments.
- ❖ **Rule 5:** The Director of Immigration and Passports will issue the certificate of naturalization, which will be sent to the Provincial Government for delivery to the applicant.
- ❖ **Section 6 NA 1926 & Rule 11 PNR 1952:** When the applicant is granted the certificate of naturalization, he or she must take and subscribe an oath of allegiance in the words, “I, AB, of \_\_\_\_\_ do hereby swear [or affirm] that I will be faithful and bear true allegiance to the Constitution of Pakistan” within 30 days from the date of grant of certificate. This period may, however, be extended by the Federal Government if sufficient cause is shown.

The certificate may also include, upon request, the name[s] of any minor child of the applicant who is not a citizen by birth [and was born before the issuance of the certificate] but is living with the applicant in Pakistan. The rights, privileges and capacities of naturalization under NA 1926 granted to such a minor will be subject to the same as specified in the parent’s certificate<sup>193</sup>. And when the minor reaches the age of majority, he or she must make a declaration of alienage according to Section 10 NA 1926 and Rule 8 PNR 1961.

#### ■ Possibility of Citizenship & Naturalization for Registered Afghan Citizens living in Pakistan

Given the slow progress of the Pakistan government’s policy of repatriation and resettlement for Afghans in general living here, and the fact that their willingness to go back to their parent country is waning with time; a possible alternative could be to assimilate them into the Pakistani fabric despite the many political and social arguments that exist to counteract their integration into the citizenry. Since they have been living here for over 3 decades, the government may well consider facilitating those registered Afghan citizens who fulfil the criteria of the prescribed standards given by the laws. However, the recommendations below can only be applied in practice if the government changes its current policy in relation to Afghans in general living in Pakistan and even then, whether to grant citizenship or not falls completely within its domain, with no right to challenge whatsoever.

Integration of Afghans in general may be a viable option in the light of the backdrop of their continued presence in Pakistan; over the past 10 years or so, repatriation has been exceedingly slow, with many reported instances of forced return along with abuse and harassment by Pakistani authorities. Afghans in general living in Pakistan have been deprived of all rights and privileges precisely because of their ‘temporary’ stay, but some have been living here for decades, with no possibility of returning; thus it is necessary to consider the option of assimilating at least the registered Afghan citizens in order to uplift them from their state of economic and social depravity. However, formal integration would prove to be an administrative and logistical burden for the GoP, and in light of the prevailing economic and political scenario, this may not be a viable option at all, and the policy of repatriation will most likely be the preferred strategy in dealing with registered Afghan citizens living in Pakistan.

#### ■ Naturalization of Registered Afghan Citizens Living in Pakistan

Even though the courts have held that registered Afghan citizens living in Pakistan are temporary residents in the

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<sup>193</sup> Section 5[2], NA 1926

country and that they shall be governed by domestic law and not the FA 1946<sup>194</sup>, a case may be made out for them to be naturalized under the PCA 1951 and the NA 1926 in theory. The PCA 1951 is not only applicable to citizens but also to persons who hope to be citizens, and its provisions outline the various procedures under which an application for citizenship can be made. The same is the case with the NA 1926 which provides for naturalization for non citizens or foreigners who live in Pakistan and continue to do so in future.

Thus a registered Afghan citizen living in Pakistan may apply for naturalization under the NA 1926 when he or she has resided in Pakistan for 5 years: that is, 12 months immediately before filing an application for naturalization and an aggregate of 4 years stay during a total of 7 years during the preceding 12 month period. Provided all the above given criteria are met, the Federal Government, in its discretion, may issue a certificate of naturalization to a registered Afghan citizen living here. Section 9 of NA 1926 may easily cater to Afghans in general who are not eligible for citizenship by other modes such as birth or descent; it provides an exemption to a person who does not have a certificate to be naturalized in the Federal Government's discretion. Hence, where a registered Afghan citizen who does not fulfil any of the requirements of naturalization under Section 3, can still be naturalized under the exemption in Section 9 by the Federal Government without a certificate of naturalization.

Therefore, it appears from the examination of PCA 1951, NA 1926, PCR 1952, and PNR 1952 that there is no bar against registered Afghan citizen applying for a 'Certificate of Naturalization' and then submit a claim for Pakistani citizenship. However, even if a person – more specifically a registered Afghan citizen living in Pakistan – fulfils all the requirements for eligibility to be granted a 'Certificate of Naturalization', it is still in the absolute discretion of the Federal Government to grant the Certificate or reject it, and there is no right of appeal against any refusal in this regard.<sup>195</sup> Nevertheless, wherever a discretionary power is given to any state functionary under a specific law, such discretion has to be exercised fairly, justly and in a non-discriminatory and reasonable manner.

#### ■ **Citizenship for Registered Afghan Citizens living in Pakistan through Other Modes**

It is a possibility that a registered Afghan citizen living in Pakistan may be eligible for citizenship under other options apart from naturalization. Two in particular, birth and marriage are practically viable, while the possibility of obtaining citizenship through a certificate of domicile and dual citizenship, although only theoretical, is also discussed.

1. **Birth and Descent:** These two are the most inviolable modes of obtaining citizenship and recognized in international law as a very strong right of a person when interpreting rights of citizens anywhere. In relation to registered Afghans who also hold citizenship of Pakistan the case is very straightforward; their children will be citizens both by birth [whether born inside the country or not] and by descent [on account of their parents citizenship]. Initially, this was only possible when a child's father was a citizen, but in 2000, the PCA 1951 was amended [Ordinance XIII of 2000, dated 18th July 2000] to replace the term 'father' with 'parent'. Thus it is possible that if either one's mother or father is a Pakistani married to a registered Afghan citizen living in Pakistan, their offspring will be citizen by birth and/or descent.
2. **Marriage:** Due to the fact that Afghans in general have been living in Pakistan for over 3 decades, it is highly possible [and a cultural fact] that intermarriages between families on both sides of the border have been taking place. For a registered Afghan woman who is married to a Pakistani man, the case is very straightforward; she may claim citizenship by marriage under Section 10 of PCA 1951. However, the exact opposite is not true; that is, a registered Afghan man married to a Pakistani woman is not eligible for citizenship because of the many policy reasons cited by the Federal Government for such discrimination, with the rationale being to deny immigration for all foreign men [especially Indian men] and discourage their entry into Pakistan amongst them. However, this policy has been challenged by the Federal Shariat Court as being discriminatory and repugnant to the injunctions of Islam since it undermines the equality of all citizens in denying a woman to have her foreign husband assimilated into the citizenry. The matter is still pending in the Supreme Court of Pakistan where the Federal Government through the Ministry of Interior has filed an appeal against the judgment; until a final verdict is given, the policy of the government stands and foreign men are therefore not eligible for citizenship through marriage to a Pakistani woman.
3. **Certificate of Domicile:** A domicile certificate is essentially a proof of residence and refers to all the rights and privileges awarded under citizenship which may easily be obtained under Section 17 of PCA 1951 depending

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<sup>194</sup> PLD Lahore 223

<sup>195</sup> Section 5, NA 1926

upon one year of residence preceding the application for it and evidence of permanent future residence in Pakistan. The application must be accompanied by a sworn affidavit about the facts contained forthwith, and made out to a District Coordination Officer in the prescribed form, who will adjudge the truth of all necessary particulars and if all requirements have been fulfilled. A certificate of domicile, hence, is evidence of permanent abode of a person at a particular place; thus it can be inferred that since Afghans in general have been residents for over 3 decades in Pakistan, they can be eligible for such certificates. At present, there is no bar against the grant of domicile certificates to at least registered Afghan citizens and therefore, in this respect, it can be argued that they are in the same position as any Pakistani citizen.

4. **Dual Citizenship:** Section 14 of PCA 1951 prohibits Pakistani citizens to acquire the nationality of another country, unless that person renounces the foreign citizenship and retains Pakistani nationality. In relation to registered Afghan citizens [including those who legalise their stay by registering themselves in the requisite manner] who want to continue living in Pakistan, it would be an interesting way of acquiring citizenship. However, questions in relation to their Afghani citizenship must first be addressed: the first one is the current status of their citizenship of Afghanistan given that many have been living in Pakistan for decades; and, second, if they are desirous of legally renouncing their Afghani nationality, whether there are any provisions or processes under Afghanistan laws to do so. But this is subject to a suitable arrangement between the governments of the respective countries; a dual nationality scheme can be formulated to exempt Afghans from the general rule – however, this is again dependent upon a change in the Pakistani government’s policy of repatriation of Afghan citizens. However, there may be a significant number of Afghans in general living in Pakistan who do not want to renounce their citizenship; given their prolonged and uncertain presence in Pakistan, the GoP may allow a limited one time or once for all waiver to registered Afghan citizens to enable them to become dual citizens, again incumbent upon a drastic change in policy. And until such a change, all debates remain purely academic, and those registered Afghan citizens living in Pakistan cannot avail citizenship under the general provision in Section 14, PCA 1951.

## Paving the Way for Citizenship & Naturalization of Registered Afghan Citizens

As evidenced from the discussion in this chapter, there are some hurdles for registered Afghan citizens living in Pakistan to acquire citizenship and/or be naturalized; despite the fact that the law does leave room for interpretation in their favour, it is nonetheless difficult for them to gain citizenship through whatever means due to lack of knowledge of the relevant laws, and in many cases, access to legal advice as to their rights. Thus it is necessary to formulate practical solutions in order to provide registered Afghan citizens living in Pakistan with a real possibility of acquiring citizenship if they choose to, some of which are provided below:

### ■ Possibility for citizenship for registered Afghan women heading households

A suggestion for allowing permanent settlement of those registered Afghan women who have lost their husbands or male companions has been put forward in the Afghan Management & Repatriation Strategy [hereinafter referred to as AMRS]:

*“Those single women who have lost their bread-earners and have no one to support them should be allowed to settle in Pakistan”.*

Clause IX, sub-clause [xi], AMRS

In other words, female-headed households should be allowed to remain in Pakistan due to practical considerations, but whether such women will be able to access Pakistani citizenship by naturalization, and whether their children will be able to access citizenship as well, is uncertain at this point in time.

### ■ ‘Preservation of Family Unity’: Tripartite Agreement 2010

The Tripartite Agreement of 2010 provides the possibility of Pakistani citizens acquiring Afghan citizenship as an outcome of voluntary repatriation:

*“In order to preserve the unity of the family, spouses and/or children of repatriating Afghan citizens who are themselves not citizens of Afghanistan shall be allowed to enter and remain in Afghanistan. The principle established herein shall also apply to non-Afghan spouses as well as children of deceased Afghan citizens who may wish to enter and remain in Afghanistan to preserve family links. Accordingly ... Afghanistan shall regularize their entry and stay in Afghanistan in accordance with the provisions*

*under its laws on the entry and stay of foreigners and will favorably consider their naturalization.”*

Article 16[2] on ‘Preservation of Family Unity’

This is a very relevant suggestion, given that over the 3 or so decades of Afghan presence in Pakistan, the possibility of inter marriages is a very natural and real possibility for many families, and such a provision clearly reflect the significance of the family unit in both countries; it would be a well received gesture of good will if the GoP would reciprocate this for such families living in Pakistan.

## **Conclusion: Is the Possibility of Pakistani Citizenship for Registered Afghan Citizens a Real One?**

As discussed above, even though there are numerous possibilities for acquiring citizenship for foreigners in general, some practical hurdles do exist for registered Afghan citizens living in Pakistan. Nevertheless, despite difficulties, some of the pathways to citizenship can be available to registered Afghan citizens, which are:

- ❖ **By Descent:** Children of Pakistani national father or mother;
- ❖ **By Birth in Pakistan:** but would require fresh petition to High Court, and would likely need to take into consideration the Peshawar High Court decision;
- ❖ **By Marriage:** Registered Afghan women married to Pakistani men; and
- ❖ **Naturalization:** Period of five years stay in Pakistan as required by law, but grant depends entirely on the discretion of the Government.

However, given the prevalent situation where there is some confusion about the legal status of registered Afghan citizens living in Pakistan, it is necessary for I/NGOs and advocacy groups to reduce the gap between theory and practice in order to make the acquiring of citizenship for them a reality.

### **Roundtable Discussion 3 [See Annexure 3]**

At the end of the presentation dealing with citizenship and naturalization, participants are invited to engage in debate by questions posed relating to the possibility of citizenship for registered Afghan citizens living in Pakistan and the success of I/NGOs in doing so. Participants are encouraged to provide their views on the current state of affairs in relation to the ground realities regarding citizenship for them and to make suggestions for reform and formulate relevant advocacy strategies for effective implementation.



## CHAPTER 6



# Employment & Labour Laws: Relevance & Applicability to Registered Afghans Citizens Living in Pakistan





# Employment & Labour Laws: Relevance & Applicability to Registered Afghans Citizens Living in Pakistan

## Introduction: Why study Employment & Labour Laws?

### ■ Purpose & Content of Chapter:

This chapter focuses on the employment and labour policies and laws from the point of view of registered Afghan citizens who work in Pakistan and to what extent they are protected under them. The purpose of studying the employment and labour laws is to provide an analysis of economic rights of registered Afghans working in Pakistan, and in light of the current policies of GoP and AMRS, to examine the ground realities faced by them.

The content of this chapter is divided into the following:

- ❖ Labour policies: Historical perspective & development in Pakistan
- ❖ Significance of the 18th Amendment in labour laws
- ❖ Constitutional Right versus Labour Laws: The Right to Freedom of Association & the Right of Enter a Profession/Occupation of one's own choice in the light of labour laws of Pakistan
- ❖ Reference to ILO Convention: Analyzing Pakistan's commitment to international labour conventions
- ❖ AMRS perspective
- ❖ Employment laws
- ❖ Application to Registered Afghans working in Pakistan

### ■ Methodology in Training Sessions

The training sessions relating to this chapter will focus on developing an informed opinion of the relevant laws governing employment and labour of registered Afghan citizens living in Pakistan through analysis of the relevant mechanisms provided in the law. The training sessions will be conducted by:

- ❖ Lectures by experts on various aspects of the relevant law in order to enable an understanding about legal aspects
- ❖ Generation of discussion with the help of visual aids, handouts, roundtable discussions and group exercises.

Note: Keeping in mind that many participants do not have a background in law, the content in this manual as well as in the training sessions is kept simple and basic.

## History & Development of Employment & Labour Laws in Pakistan

Pakistan inherited many of its laws governing employment from pre-partition India, but through the introduction of successive 'Labour Policies' – in 1955, 1959, 1969, 1972, 2002 and 2010 – the Federal Government has attempted to address Pakistan's particular socioeconomic conditions and state of industrial development, in view of expanding the labour force and trade unions. To this end, additional labour relations and employment laws have been enacted in the post-partition period to keep up with a changing economic environment.

The purpose of 'Labour Policies' was to provide a road map to enact new laws and reform existing labour relations and employment laws and accompanying administrative mechanisms. However, despite such efforts, it has been observed that in practice, laws protecting workers' interests – to which the Government committed itself in the Labour Policies – often did not materialize, and as a result workers' rights steadily eroded over the passage of time. Therefore, in order to analyze the situation, it is important to look at the situation in the light of the 18th Amendment which has brought about certain changes in relation to labour laws of Pakistan, which is provided in the discussion below:

#### ■ Labour laws and policies before 18th Amendment [Pre 2010]

'Labour' – which includes both labour relations & employment – used to be a 'Concurrent Subject' under the Constitution, meaning that it fell within the legislative competence of both the Federal and Provincial Governments. The relevant portions of the Concurrent list were:

*"Welfare of labour, conditions of labour, provident funds, employers liability and workmen's compensation, health insurance including invalidity pensions, old age pensions."*

Entry No. 26 of the Concurrent Legislative List

*"Regulation of labour and safety in mines, factories and oil fields..."*

Entry No. 30 of the Concurrent Legislative List

In order to ensure uniformity of labour relations and employment laws across the country the Federal Government usually enacted legislation allowing for Provincial Governments to make rules and regulations there under to meet the particular conditions or requirements of the provinces. In relation to the Federally and Provincially administered areas, many Federal and Provincial 'labour' laws were adapted in Azad Jammu and Kashmir [AJK] and Gilgit-Baltistan [G-b]<sup>196</sup> and also extended to the Provincially Administered Tribal Areas [hereinafter referred to as PATA] of KP province, but none were extended to FATA or PATA of the Balochistan province.

#### ■ Labour laws and policies after 18th Amendment [Post 2010]

With the passage of the 18th Amendment, the Concurrent Legislative List stands altogether abolished from Article 70[4] of the Constitution, and as a result, 'labour' is no longer a Federal subject. Even though the Federal Legislative List is retained, it does not include 'labour' since it was a subject both the centre and provinces could legislate on.

Instead, Article 142[c] granted Provincial Assemblies the exclusive power to make laws with respect to matters not enumerated in the Federal Legislative List. Therefore, Federal Labour Ministry was dissolved, and provincial Labour Departments took on what used to be federal responsibilities, which includes the subject of 'labour'. And consequently, all federal labour relations and employment laws were required to be converted into provincial laws [by June 30, 2011]. This was relatively expedient through minor amendments in some statutes such as those listed below:

- ❖ Factories Act 1934
- ❖ Mines Act 1923
- ❖ West Pakistan Industrial and Commercial Employment [Standing Orders] Ordinance 1968
- ❖ West Pakistan Shops and Establishments Ordinance 1969
- ❖ Workmen's Compensation Act, 1923
- ❖ West Pakistan Minimum Wages for Unskilled Workers Ordinance 1969
- ❖ Payment of Wages Act 1936
- ❖ Employment of Children Act 1991

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<sup>196</sup> Adaption is possible in AJ&K & G-B because they each have their own legislative assemblies, whereas laws can only be expressly extended with respect to FATA [by President] & PATA [by Governor], as per Article 247 of the Constitution

- ❖ Bonded Labour System [Abolition] Act 1992

However, there are certain laws whose basic administrative structure was of a federal nature and thus required substantial overhaul, which include:

- ❖ Industrial Relations Act 2008
- ❖ Workers' Welfare Funds Ordinance 1971
- ❖ Companies Profits [Workers' Participation] Act 1968
- ❖ Employees' Old-Age Benefit Act 1976

At this point in time, it is uncertain if the 'provincialisation' of labour laws has been completed, and if the new laws are consistent from one province to the next, or if the laws have been enhanced or diluted from their original form. It also remains to be seen if each province will be able to overcome the inefficiencies of previous Labour Courts which were faced with problems such as limited jurisdiction and power, staff shortages, poor equipment, inadequate physical infrastructure, and delays in judgments.

## Employment & Labour Rights: Constitutional Safeguards, State & International Laws

### ■ Freedom of Association

Article 17[1] of the Constitution provides:

*“Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan, public order or morality”.*

This is essentially a right granted to citizens only, and encompasses the freedom to form any associations including labour unions in any field, subject to certain restrictions that the State can place on an individual's freedom in any case. One example of such a restriction would be Section 3[2][e][vi] of FA 1946 grants the Federal Government the power to make orders “prohibiting him from association with persons of a prescribed or specified description”.

### ■ Labour Relations Laws in Pakistan

After the 18th Amendment, all Federal laws governing labour relations have been converted into provincial legislation, which include:

- ❖ Khyber Pakhtunkhwa Industrial Relations Act 2010
- ❖ Balochistan Industrial Relations Act 2010
- ❖ Punjab Industrial Relations Act 2010
- ❖ Sindh Industrial Relations Act 2011

These laws deal – among other things – with the formation and functioning of labour unions and federations, and the establishment of judicial forums i.e. the re-establishment of Labour Appellate Tribunals, which had been abolished under the Industrial Relations Ordinance 2002.

### ■ International Labour Office [ILO] Conventions

The Constitutional limitation of the right to form associations or unions to citizens in Article 17[1] conflicts with Pakistan's international obligations under ILO Conventions and various international human rights treaties. Some of these include:

- ❖ International Covenant on Civil & Political Rights [ICCPR]
- ❖ International Covenant on Economic, Social & Cultural Rights [ICESCR]
- ❖ International Convention on the Elimination of all Forms of Racial Discrimination [ICERD]

The 'Freedom of Association and Protection of the Right to Organize Convention 1948' [ILO Convention No. 87] was ratified by Pakistan on Feb. 14, 1951, and therefore, the GoP is bound by this principle:

*“All ILO Conventions apply to migrant workers, who should not receive differential treatment because they are not nationals of the countries in which they work.”<sup>197</sup>*

ILO Conventions are an important source of socioeconomic rights which may be invoked by registered Afghan citizens where they have been permitted to work in Pakistan, and certainly by those 150,000 skilled and unskilled registered Afghan workers who will be granted work permits under the AMRS. Convention No. 87 guarantees the right of workers and employers to establish and join organizations of their own choosing without previous authorization.

Similarly, the ‘Right to Organise and Collective Bargaining Convention 1949’ [Convention No. 98] was ratified by Pak on May 26, 1952, which protects workers and employers who exercise the right to organize, forbids interference in the activities of workers’ and employers’ organizations, and promotes voluntary collective bargaining.

The Committee of Experts on the Application of Conventions and Recommendations [CEACR] and the Committee on Freedom of Association [CFA] have repeatedly affirmed the fundamental rights of workers, including migrants and those in irregular status, to form and join trade unions and to be protected against any act of discrimination on the grounds of trade union activities.<sup>198</sup>

### ■ Trade Unions in Pakistan

On the national level, the All Pakistan Federation of Trade Unions has been active in promoting human rights of migrant workers by establishing a separate section for the welfare of migrant workers in the 1990s<sup>199</sup> and has held seminars dealing with the promotion of welfare facilities for migrant workers and their families.<sup>200</sup> However, the formation and registration of trade unions under Pakistan Industrial Relations laws has been restricted to the formal sector labour force.

Consequently, workers in the informal economy often form and register associations and organizations under the Voluntary Sector Welfare Agencies [Registration and Control] Ordinance 1961, which are established on the pattern of traditional community-based, voluntary organizations, such workers’ associations have come to play an important role in the labour movement in Pakistan. From hawkers and vendors to workers in small scale manufacturing and services sectors, the workers come together to pursue collective interests as workers: notable in terms of activism and struggles are the workers’ organizations in brick kiln, power looms, glass bangles, fisheries and transportation sectors. The most powerful struggle to emerge recently is of agricultural workers under the umbrella of Anjuman Mazarain Punjab which is not registered under any Ordinance or Act. A 2011 study by UNHCR/SAFRON/CCAR confirms the presence of registered Afghan citizens and representation in such voluntary workers’ associations in Pakistan.

### ■ Freedom of Profession or Occupation

Article 18 of the Constitution provides:

*“Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation . . . : Provided that nothing in this Article shall prevent – [a] the regulation of any trade or profession by a licensing system . . .”*

Thus, Constitutional protection of the right to enter upon a lawful profession or occupation<sup>201</sup> is limited to citizens

<sup>197</sup> International Labour Office, “International Labour Migration: A Rights Based Approach” [Geneva: 2011] at 120. [hereinafter International Labour Office]

<sup>198</sup> International Labour Office, ‘International Labour Migration: A Rights Based Approach’ [Geneva: 2011] at 121-122.

<sup>199</sup> It is uncertain if this section is still active

<sup>200</sup> Source: International Labour Office. Migrant Workers: ‘General Survey on the Reports on the Migration for Employment Convention’ [Revised] [No. 97], and Recommendation [Revised] [No. 86], 1949, and the Migrant Workers [Supplementary Provisions] Convention [No. 143], and Recommendation [No. 151], 1975, International Labour Conference, 87th Session [Geneva: 1999] at 35.

<sup>201</sup> Pakistan, like most developing countries, has 3 economies: [i] formal regulated economy i.e. registered businesses that pay income taxes and other taxes and are entitled to government subsidies and grants [ii] informal, unregulated economy i.e. unregistered business, usually home based but may be from separate commercial spaces that are owned by the business operator or leased/rented w/o written contract; such unregistered businesses do not pay income taxes, but are subject to other taxes such as utility taxes [gas, electricity, phones etc.], cell phone taxes, high way tolls [transportation business] etc.; and [iii] black market – unlawful trade or profession.

of Pakistan. However, many non-citizens are legally employed in Pakistan through the issuance of work visas by the Directorate General of Immigration and Passports, Ministry of Interior, GoP.

Thus, Article 18 does not prohibit a non-citizen to work in Pakistan, provided he or she has valid authorization to do so from concerned authorities<sup>202</sup>. Instead, it simply declares that any labour market entry restrictions with respect to citizens must be prescribed by law.

#### ■ **Employment Rights under Contract Act 1872**

Employment contracts in Pakistan are governed by the Contract Act, 1872 [hereinafter referred to as CA 1872], which allows for adults of sound mind who are not disqualified from contracting by way of any law to which they are subject to enter into contracts. Therefore, registered Afghan citizens living in Pakistan are not subject to disqualification from forming employment contracts under any existing laws.<sup>203</sup>

In order to seek relief under the CA 1872, agreements do not have to be written, and this is important in reference to those registered Afghan citizens who work in the informal economy. Thus, in the case of domestic workers, farm workers, or skilled or unskilled casual labourers engaged by contractors, whose employment agreements tend to be unwritten, these agreements can be enforced through civil courts on the basis of oral evidence or past practice.

Children are excluded from seeking relief for breach of employment agreements under the CA 1872, as they are unable to form legally valid contracts. Since a minor cannot bind himself in contract, Order 32 of the CPC 1898 provides that every suit by a minor shall be instituted in his name by the 'next friend' of the minor [usually an adult guardian] and where the minor is the defendant the court appoints a guardian for the purpose of the suit.

#### ■ **Is there a definition of 'worker' in Pakistani labour or employment law?**

In order to claim protection for registered Afghan citizens as employees or labourers, it is important to ascertain their economic rights as foreigners working in Pakistan. Looking at some of the major pre-18th Amendment laws reveals that they describe 'employee,' 'worker' or 'workman' in their respective definition sections as 'any person' and/or 'body of persons', which include the following:

- ❖ S. 2[xxx], Industrial Relations Act 2008
- ❖ S. 2[h], Factories Act 1934
- ❖ S. 2[n], Workmen's Compensation Act 1923
- ❖ S. 2[a], Employers' Liability Act 1938
- ❖ S. 2[f], Companies Profit [Workers Participation] Act 1968
- ❖ S.2[9], Minimum Wages Ordinance 1961
- ❖ S.2[i], Industrial & Commercial Employment [Standing Orders] Ordinance 1968
- ❖ S.2[i], Minimum Wages for Unskilled Workers Ordinance 1969

Meanwhile, in other relevant 'employee' or 'worker' is not defined explicitly, however, 'person' is used in the applicable sections, such as in s. 1[4] of The Payment of Wages Act 1936, and s. 3[c] and [d] of The Mines Act 1923. It is important to note that all of these federal labour and employment laws have been converted into provincial enactments due to the 18th Amendment, but it is likely that the term 'person' was retained in the definition of 'employee' or 'worker' during the process of amendment into provincial laws.

#### ■ **Child Labour Laws**

Article 11[3] of the Constitution stipulates that:

*"No child below the age of fourteen years shall be engaged in any factory or mine or any other hazardous employment".*

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<sup>202</sup> Board of Investment & Ministry of Interior, processed by Pak Missions abroad, see: <http://www.dgip.gov.pk/Files/Visa.html>; See also section 14D [3] of FA regarding NARA's power to issue work permits to illegal entrants.

<sup>203</sup> See 1997 GoP circular

The national list of hazardous occupations – expanded in December, 2005 – now comprises 34 occupations and processes. The relevant federal legislation dealing with child labour before the 18th Amendment includes the following:

- ❖ Employment of Children Act 1991 [hereinafter referred to as ECA 1991]
- ❖ Employment of Children Rules 1995 [hereinafter referred to as ECR 1995]
- ❖ Mines Act 1923
- ❖ Factories Act 1934

However the ECA 1991 did not apply to the employment of children as domestic workers; in other words, the conditions of their employment were left to the employer’s discretion and many children were [and still are] employed in family-run establishments where they are exposed to hazardous substances and processes.

As a result of 18th Amendment, child labour laws have been devolved to the provinces, which now possess exclusive legislative competence with respect to the subject. Thus, the aforementioned federal laws with respect to child labour have been converted into provincial legislation; the post-18th Amendment provincial child labour laws are likely very similar, with minor amendments.

## Employment & Labour of Registered Afghan Citizens Living in Pakistan: AMRS & Ground Realities

After examining the relevant laws, both international and domestic, in relation to employment and labour, as well as the economic rights guaranteed by the Constitution, it is now important to analyze to what extent registered Afghans are afforded with economic protection in the light of certain ground realities such as child labour, gender issues and the policy guiding framework of the AMRS.

### ■ Employment of Registered Afghan Citizens Living in Pakistan

In July, 1997, the GoP [States & Frontier Regions Division] issued a circular, where it laid down that:

*“During the temporary stay for Afghan Refugee in Pakistan all laws applicable to the local citizens shall apply to Afghan refugee...”*

Notification No. F.12 [8]-AR.1796

Therefore registered Afghan citizens are subject to Pakistani labour relations and employment laws. The 1997 circular went on to add that:

*“All along their stay the Afghan refugees have never been confined to the camps. The above is also necessitated by the fact that almost all the food and shelter assistance previously provided by the international agencies, have been discontinued w.e.f October, 1995. The Afghan refugees have, therefore, to earn their livelihood outside the camps in Pakistan to support themselves as well as their families. The movement/presence of Afghan Refugees outside the refugee camps in, therefore, legitimate.”*

In other words, Afghans ‘refugees’ – that is, registered Afghan citizens living in Pakistan – were legally authorized to work in Pakistan from 1997 onwards.

Another circular was issued by the GoP on February 2, 2001, the GoP which declared:

*“Henceforth, all those Afghan nationals, who do not possess ‘refugee cards’ / ‘refugee permits’ issued by UNHCR/CAR or who have not been granted visas on their passports shall be considered as illegal immigrants and will be handled as per The Foreigners’ Act [FA] and laws applicable to foreigners.”*

Notification No. F.12 [8]-AR.1/96

The 2001 circular suggests that the arrest & deportation provisions of FA 1946 apply only to ‘illegal’ Afghan migrants, not to ‘refugees’, however, contravention of orders issued under s. 3 of the FA 1946 likely still applies to registered Afghans.



Notably, the following are the only such orders issued under Section 3 of the FA 1946:

- ❖ 1997 and 2001 circulars
- ❖ Foreigners Order 1951
- ❖ Enemy Foreigners Order 1965<sup>204</sup>
- ❖ Foreigners [Parolees] Order 1965

No other orders have been issued under Section 3 of FA 1946 dealing with employment of registered Afghan citizens living in Pakistan.

Nevertheless, the above mentioned orders are relevant in certain aspects, such as, Section 10 of FO 1951 places restrictions on unauthorized employment in public undertakings e.g. supply of light, petroleum, power or water etc.<sup>205</sup> However, enforcement of the FO 1951 is through an appointed civil authority [appointed through notification], and this has only taken place with respect to Karachi in 1952; although the Federal Government also retains enforcement powers under the FO 1951.

Meanwhile, the FA 1946, for its part, does not expressly regulate the employment registered Afghan citizens living in Pakistan. However, important to note is Section 13B which prohibits anyone from employing an illegal entrant, clearly excluding registered Afghan citizens who have been issued PoR cards.<sup>206</sup> Also, Section 3[2][e][vii] of the FA 1946 grants power to the Federal Government to issue orders “prohibiting him [i.e. a foreigner] from engaging in activities of a prescribed nature or specified description”.<sup>207</sup> And Section 14D of FA 1946 allows for the Federal Government to establish a National Alien Registration Authority [hereinafter referred to as NARA], which is authorized to issue work permits to illegal immigrants.<sup>208</sup>

#### ■ **Afghan Management & Repatriation Strategy [AMRS]**

Until recently, registered Afghan citizens enjoyed relatively open access to the labour market in Pakistan, as workers, with very few apparent restrictions on the types of activities or sectors in which they are involved, and it can be safely assumed that “Afghans generally operated in the same sectors and types of activities as the host population in general”.<sup>209</sup> However, much of this labour and business activity happened in the informal, unregulated, economy i.e. unregistered businesses primarily due to the fact that when entering formal labour market registered Afghan citizens living in Pakistan do not have work permits and often Pakistani employers ask them to produce a letter from CAR for verification of PoR card as well as a police clearance certificate, which proved to be economic barriers for them.

But recent limitations imposed on certain types of employment for registered Afghans derive from public policy i.e. the AMRS, and it is at present uncertain if AMRS can be considered an order of the Federal Government under Section 3 of FA 1946, although it has received Cabinet approval. The AMRS imposes restrictions on the ability of registered Afghan citizens living here to enter into employment relationships with Pakistani employers in certain fields. Clause IX, sub-clause [xviii] states:

*“All businessmen and other Pakistani citizens to report Afghan employees working with them to the Commissioner, Afghan Refugees and local police stations and such employments must be discouraged”.*

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<sup>204</sup> Foreigners’ Order has been applied on a very limited basis since practically speaking the terms ‘enemy foreigners’ and ‘foreign parolees’ do not apply to registered Afghans

<sup>205</sup> See Chapter 5 on Foreigners’ Laws

<sup>206</sup> Ibid

<sup>207</sup> Ibid

<sup>208</sup> National Aliens Registration Authority [NARA], which was established through the addition of sec. 14D [‘registration of illegal entrants’] to the FA in 2000, is charged with registration of all foreigners who immediately before the enactment of sec. 14D had no permission to stay in Pakistan, and issuance of Alien Registration Cards to them. Significantly, NARA also has the power to issue work permits to those aliens seeking employment or running their own business. NARA is no longer involved in registration of ‘illegal’ Afghans, although it did so for a short period prior to the registration exercise undertaken by NADRA and the UNHCR, which resulted in the issuance of PoR cards.

<sup>209</sup> CSSR, Pesh, 30

This likely means that registered Afghan citizens living in Pakistan are to be discouraged from employment in any form of commercial establishment, or as domestic, agricultural or casual [daily-wage] labourers with private individual employers, among other sectors. However, the discouragement of employment in the aforementioned sectors does not seem to extend to registered Afghan citizens working for Afghan employers.

In an effort to monitor the labour market participation of registered Afghan citizens living in Pakistan, Clause IX, sub-clause [xv] of the AMRS provides that “all industrial establishments employing Afghan labour should report them for registration.” By regulating the employment of registered Afghan citizens in industrial establishments, instead of discouraging it altogether as in the case of those employed in other sectors or occupations, this clause adds an element of confusion to the policy framework. The GoP’s rationale for governing distinct types of Afghan workers differently – based on their place of employment – is not known at present.

On the other hand, Clause IX, sub-clause [ix] of the AMRS recognizes that:

*“Afghan refugees had a stabilizing effect on labor market in Pakistan. This advantage should be retained. The Government should consider granting renewable visas to one hundred and fifty thousand skilled and unskilled Afghans. The figure comes to 0.093% of the Pakistani population and 0.29% of the work force.”*

The GoP intends to implement the work visa arrangement simultaneously while also encouraging the voluntary repatriation of registered Afghan citizens living here, i.e., they will be allowed to apply for work visas from within Pakistan.<sup>210</sup> SAFRON will assume the role of the Board of Investment for the purposes of processing work visa applications along with the Ministry of Interior that will handle security clearance.<sup>211</sup>

These new restrictions should be viewed in the context of the ‘migration management’ orientation of the AMRS since the overall aim of the policy is to repatriate the majority of registered and ‘illegal’ Afghans and simultaneously implement a modern migration system through the issuance of renewable work visas to skilled and unskilled Afghan workers. However, it seems that one of the suppressed aims is to deprive registered Afghans presently employed in certain sectors of their means of subsistence in order to thereby encourage them to return to Afghanistan; although this may not be the intent expressed by the GoP. Nonetheless, this calls into question the voluntariness of the repatriation drive and may indeed amount to defacto refoulement, against the terms of the Voluntary Repatriation Agreement.

#### ■ Gender Issues in Employment: Registered Afghan Women Workers

Among registered Afghan citizens living in Pakistan, gender discrimination with respect to the right to enter into paid work does not necessarily emanate from the public sphere of the State or market:

*“... The option of undertaking remunerative economic activities outside the family context is severely conditioned by strong patriarchal norms governing women’s mobility outside the home. While in the relatively affluent and urbane setting of Hayatabad [Afghan] women were mobile, educated and employed, female segregation and seclusion were the norms in the refugee camps and irregular settlements. There were interesting ethnic differences, however, in the mobility and work participation of women . . . ethnic Pashtun women were less mobile than their non-Pashtun [e.g. Hazara/Tajick etc.] counterparts.”<sup>212</sup>*

The employment of registered Afghan women, in general, is often confined to home-based work or unpaid work in family businesses.

#### ■ Child Afghan workers/labourers

Despite the Constitutional and statutory limitations on child labour in Pakistan, the reality for Afghan children is somewhat different:

*“Afghan refugee children, from 5 to 18 years of age, are the most poorly paid in Pakistan. They mostly are scavengers, street vendors, automobile apprentices and*

<sup>210</sup> In 2011, 1000 pilot work visas were issued in KP as a pilot issuance which was later stopped.

<sup>211</sup> SAFRON does not have sufficient power within Cabinet, and implementation strategy of AMRS needs to be approved by Ministry of Interior in Cabinet.

<sup>212</sup> Source: Collective for Social Sciences Research, Afghans in Peshawar, 33-34.

*waiters at road-side restaurants, where they toil from dusk to dawn . . . Afghan refugee parents . . .knew that putting children to labor is an offence, yet they deem it necessary for the family's economic prosperity. It is generally due to poverty, illiteracy and absence of any exclusive program for the prevention of child labor that Afghan refugee children continue to suffer.”<sup>213</sup>*

Also, it has been reported that: “Most rag-pickers, an overwhelming majority of whom are children, are Afghan refugees.”<sup>214</sup>

## **Conclusion: Are Registered Afghan Workers & Labourers Protected in Pakistan?**

It is evident from the above discussion, that Pakistan’s Federal labour policies traditionally did not always advance workers’ interests, whether they were citizens or otherwise. However, the 18th Amendment has resulted in substantial changes, including dissolution of the federal Labour Ministry, and conversion of federal laws into provincial ones, which can be a positive development towards improving the environment for workers in general.

It has also been found that the right to form associations or unions under Article 17 of the Constitution has not been guaranteed to non-citizens, however, Pakistan’s international obligations require otherwise, but workers’ associations have cropped up in the informal sector over time. While non-citizens are not guaranteed the right to enter into a lawful profession or occupation under Article 18, they are able to legally work in Pakistan. In relation to registered Afghan citizens living here, the 1997 circular makes it clear that they have been subject to Pakistani labour and employment laws, and were legally authorized to work in the country.

In relation to regulation of employment of foreigners legally authorized to work in Pakistan, the FA 1946 does not expressly do so, but Section 3 grants powers to the Federal Government to issue orders prohibiting a foreigner from engaging in prescribed activities, which can and does often include certain professions. But certain hindrances for registered Afghan workers/labourers/employees already exist in practice: to enter formal labour market in the absence of a work permit, they often need to provide their employers with a verification of PoR and police clearance. The AMRS has instituted substantial changes in the availability of opportunities for registered Afghan citizens to legally work in Pakistan, which contributes to further difficulties for them in obtaining work or jobs.

Nevertheless, in general registered Afghan citizens living in Pakistan do have certain limited economic rights. For example, under the CA 1872, registered Afghan citizens living here can form and/or enter into contract. And thus they can arguably fall with the scope of many Pakistani laws dealing with labour and employment due to the use of the term ‘person’ in their provisions. Other issues related to registered Afghan citizens’ economic rights include gender discrimination with respect to registered Afghan women’s entry into the labour market, which often arises from the private sphere of the home. Afghan children are also unlawfully part of the labour force due to extreme poverty, illiteracy and economic deprivation despite constitutional, legal and ILO restrictions on child labour.

### **Roundtable Discussion 4 [See Annexure 3]**

At the end of the presentation dealing with employment and labour laws, participants are invited to engage in debate by questions posed relating to the problems faced by registered Afghan citizens in employment/labour disputes and the success of I/NGOs in doing so. Participants are encouraged to provide their views on the current state of affairs in relation to the ground realities regarding labour and employment of registered Afghan citizens living in Pakistan and to make suggestions for reform and/or formulate relevant advocacy strategies for effective implementation.

<sup>213</sup> Insan Foundation Trust. Footsteps: A Study on Afghan Refugee Children in Pakistan [Rawalpindi: 2006] at 45.

<sup>214</sup> Yusufzai, Rahimullah. “Refugees: An easy mix,” [Islamabad: The News, June 26, 2005].



## CHAPTER 7



# Family Laws: Relevance & Applicability to Registered Afghans



# Family Laws: Relevance & Applicability to Registered Afghan Citizens Living in Pakistan

## Introduction: Why study Family Laws?

### ■ Purpose & Content of Chapter:

This chapter analyses the family laws of Pakistan and the relief they provide to registered Afghan citizens living in Pakistan in family law issues such as inheritance, divorce, maintenance, custody, etc. Despite the presence of informal mechanisms to resolve family disputes in Afghan communities, it is nonetheless important to provide a legal overview of the laws and formal regulation of family issues by the State.

The content of this chapter is divided into the following parts:

- ❖ Findings CAMP perception survey in relation to family issues faced by registered Afghan citizens living in Pakistan
- ❖ Overview of Family laws & courts of Pakistan
- ❖ Specific Issues: Freedom of Choice in Marriage & Child Marriage
- ❖ Recent Developments & attempts at Reform

### ■ Methodology in Training Sessions

The training sessions relating to this chapter will focus on developing an informed opinion of the relevant laws governing family issues registered Afghan citizens face in Pakistan through analysis of the relevant mechanisms provided in the law. The training sessions will be conducted by:

- ❖ Lectures by experts on various aspects of the relevant law in order to enable an understanding about legal aspects
- ❖ Generation of discussion with the help of visual aids, handouts, roundtable discussions and group exercises.

Note: Keeping in mind that many participants do not have a background in law, the content in this manual as well as in the training sessions is kept simple and basic.

## Identifying Family Law Issues: CAMP Perception Survey of Registered Afghan Citizens Living in Pakistan

A perception survey was conducted by CAMP to analyse the legal status of registered Afghan citizens living in Pakistan and to compile data on the legal issues faced by them during their stay here. Family disputes are amongst the many issues that arise, and the findings of the survey are reported below:

### ■ CAMP perception survey data: Do Registered Afghan Citizens living in Pakistan have family disputes?

The perception survey conducted by CAMP asked respondents if they or their close family had experienced any family law issues in past decade [e.g. divorce, maintenance, child custody, guardianship, inheritance]. The resulting data found is as follows:

- ❖ Respondents answering yes: 0.5% [7] of 1500 registered Afghan citizens living in Pakistan who were interviewed.
- ❖ But it was also found that:



- 80.2% of respondents were married,
- 14.1% never married,
- 4.3% were widows, and
- 1.4% were separated or divorced.

### ■ Survey findings

If respondents had only been asked about problems related to marital breakdown [i.e. divorce, maintenance, child custody] then it would seem plausible that a very small fraction had given affirmative responses, but they are also interviewed about guardianship and inheritance, issues that usually arise from the death, disappearance or incapacitation of a family member.<sup>215</sup>

In relation to children, it is possible that legal guardianship of children is not a well understood concept among registered Afghans, and that children are instead supported by the wider family or kin group with limited reliance on court-ordered guardianship. Similarly, inheritance [estates] disputes may be limited given the lack of property ownership rights, and therefore limited ability to accumulate assets, of Afghans in Pakistan

There is also the possibility of under reporting on family law issues due to social stigmas attached to marital breakdown, as well as limited privacy during interviews, especially where registered Afghan women were asked questions about family issues. Another factor contributing to under reporting may be that respondents recognized that affirming the existence of family disputes in their communities may give ‘outsiders’ – state officials and NGOs – justification for intervening in their ‘private’ spheres, which they may prefer to regulate on their own terms.

On the other hand, however, many I/NGOs providing legal aid to Afghans in general have reported dealing with family law matters. For instance, where an Afghan woman or child is abandoned by her husbands or fathers, or the male disappears, this puts the woman and child’s legal status in limbo since she cannot remarry – in the absence of a formal divorce – or be secure in the guardianship of her children.

A registered Afghan mother in such a situation facing marital breakdown cannot be resettled formally until she can prove legal custody of her children and/or show valid documentation of divorce. In such cases, I/NGOs assist such women by seeking a divorce decree for the wife and/or a guardianship certificate for a mother. However, the Ministry of Refugees & Repatriation [MoRR] in Balochistan confirmed that family law disputes such as divorce are usually handled by the local *mullah* [religious leader] and/or within the kin group by the community elders.

## Governing Family Legislation & Family Courts in Pakistan

### ■ Family Laws of Pakistan: Personal Laws for Muslims & Non Muslims

In Pakistan, there is no universal family law code, and Muslims are regulated by a separate set of laws in general from non-Muslims, which include:

- ❖ Muslim Family Laws Ordinance 1961 [hereinafter referred to as MFLO 1961]
- ❖ West Pakistan Rules under the MFLO 1961
- ❖ West Pakistan Muslim Personal Law [Shariat Application] Act 1962 [hereinafter referred to as SAA 1962]
- ❖ Dissolution of Muslim Marriages Ordinance 1939 [hereinafter referred to as DMMO 1939]
- ❖ Child Marriages Restraint Act 1929 [hereinafter referred to as CMRA 1929]
- ❖ Guardianship & Wards Act 1890 [hereinafter GWA 1890]

In their practical application, personal laws for Muslims and non-Muslims in Pakistan are traditionally tied to other laws, including the 1979 Hudood laws and the Qanoon-e-Shahadat 1984 [also known as the Law of Evidence Act 1984 and hereinafter referred to as EA 1984].

On the other hand, personal laws of religious minorities in Pakistan include: the

- ❖ Christian Marriage Act 1872

<sup>215</sup> It seems possible that the majority of these separations and divorces happened more than 10 years ago

- ❖ Births, Deaths & Marriages Registration Act 1886
- ❖ Divorce Act 1869
- ❖ Parsi Marriage & Divorce Act 1936
- ❖ Hindu Widow's Marriage Act 1856
- ❖ Hindu Marriage [Disabilities Removal] Act 1946
- ❖ Hindu Law of Inheritance [Amendment] Act 1929
- ❖ Hindu Married Woman's Rights to Separate Residence & Maintenance Act 1946
- ❖ Anand Marriage Act 1909
- ❖ Buddhist Law of Marriages 1909
- ❖ Arya Marriage Validation Act 1937

However, with respect to the personal laws of religious minorities, it has been reported that they are antiquated since they were enacted in pre-independence period, and have never been reviewed since then and thus are a source of human rights violations in modern times.<sup>216</sup>

However, subsequent 'Islamic' legislation has changed the application of the personal laws of religious minorities; for example, adultery is one of the main grounds for dissolution of a Christian marriage under the 1979 Hudood laws, punishable by imprisonment for 25 years. Christians, therefore, in the circumstances of dissolution of marriage, cannot invoke their own personal law due to the common 'Islamic' laws which illustrates another legal lacuna. In other words, Christians are subject to the penal provisions of 'Islamic' Hudood laws, rather than their own Personal Laws, which do not penalize adultery. The matter was further complicated when the qualifications for a court testimony reduced the value of a non-Muslim witness the 1979 Hudood laws and the EA 1984.

#### ■ Family Courts: Jurisdiction & Procedures

Family Courts in Pakistan are constituted under the West Pakistan Family Courts Act 1964 [hereinafter referred to as FCA 1964], and the West Pakistan Family Court Rules 1965 there under regulate the procedural mechanisms of these courts.

Section 5 of the FCA 1964 outlines jurisdiction to the Family Courts to decide many types of family disputes. Under section 14 states an appeal of a decision or decree issued by a judicial officer subordinate to the District Court lies to the District Court, and otherwise to the High Court.

Concerning the question of whether registered Afghan citizens living in Pakistan can approach family courts, in a case involving *talaq* [Islamic divorce], it was ruled that foreign citizens can invoke the plenary jurisdiction of civil courts under Section 20 of the CPC to decide any suit as long as they are residing within its local limits at the commencement of suit; thus, foreign citizens can seek redress for their grievances by approaching High Courts as per Article 199 of the Constitution.<sup>217</sup> Thereafter, in another decision, it was held that the FCA 1964 is applicable to non-citizens living in Pakistan as well,<sup>218</sup> and as a result registered Afghans can seek relief in the family courts.

Section 5 of the FCA 1964, which deals with jurisdiction, provides that Family Courts can decide the following types of cases:

- ❖ Dissolution of marriage
- ❖ Dower
- ❖ Maintenance
- ❖ Restitution of conjugal rights

<sup>216</sup> National Commission for Justice & Peace, 'Discrimination Lingers On: A Report on the Compliance of CEDAW in Pakistan [Lahore, 2007] at 55

<sup>217</sup> 1995 MLD 34

<sup>218</sup> 1996 CLC 1406

- ❖ Custody of children
- ❖ Visitation rights of parents to them
- ❖ Guardianship
- ❖ Jactitation of marriage<sup>219</sup>
- ❖ Dowry
- ❖ Personal property of the wife
- ❖ A number of offences specified under the CrPC where one of the spouses is a victim of an offence committed by the other, etc.

Under the FCA 1964, judges are obligated to attempt reconciliation at the pre-trial stage [Section 10], and after the close of evidence [Section 12], therefore opportunity for referral to Musalihat Anjuman bodies which conduct alternative dispute resolution.

#### ■ **Muslim Personal Laws: MFLO 1961 & SAA 1962**

This section outlines the provisions of the MFLO 1961 and SAA 1962 and compares them as follows:

- ❖ **MFLO 1961:** The MFLO is only applicable to Muslim citizens of Pakistan, wherever they may be, as per Section 1[2]. It defines and regulates many of the matters mentioned above such as dissolution of marriage, maintenance, custody and guardianship of children, and so on.
- ❖ **SAA 1962:** This Act does not make a distinction between Muslim and Muslim non-citizens, but in Section 2, states that:

*“notwithstanding any custom or usage, in all questions ... regarding succession [whether testate or intestate], special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, legitimacy or bastardy, family relations, wills, legacies, gifts ... the rule of decision ... shall be Muslim Personal Law [Shariat] in cases where the parties are Muslim.”*

- ❖ **Conflict between MFLO & Shariat:** It has been that where there is a conflict between the MFLO and general Muslim Personal Law, the latter will be presumed to apply to Muslim non-citizens:

*“it is not necessary that all Muslims residing in Pak irrespective of their nationality, should be governed by this [MFLO], on the contrary the presumption would be that they would be governed by the ordinary Muslim law of inheritance, as that is the law of the land in Pak in so far as the general body of Muslims is concerned. In case of non-citizen Muslims residing in Pak the general law governing succession, i.e. the Muslim Personal Law would apply.”<sup>220</sup>*

In practice, however, both Family Courts and High Courts have decided family law disputes involving Muslim non-citizens by way of reference to the MFLO, so long as the Ordinance does not depart from the generally accepted principles of Shariat.

## Human Rights Issues in Family Law: Forced & Child Marriages in Pakistan

Many human rights I/NGOs have raised concerns over the status of women in family law issues such as inheritance and in relation to their freedom to marry by choice. Two issues, the freedom of choice in marriage, and child marriages are discussed below in the light of human rights concerns, the MFLO and Shariat, concluding with suggestions for reform.

<sup>219</sup> In English law, jactitation is the maliciously boasting or giving out by one party that he or she is married to the other. In such a case, in order to prevent the common reputation of their marriage that might ensue, the procedure is by suit of jactitation of marriage, in which the petitioner alleges that the respondent boasts that he or she is married to the petitioner, and prays a declaration of nullity and a decree putting the respondent to perpetual silence thereafter. To the suit there are three defences: [i] denial of the boasting; [ii] the truth of the representations; [iii] allegation [by way of estoppel] that the petitioner acquiesced in the boasting of the respondent.

<sup>220</sup> PLD 1968 Lahore 520

## ■ Freedom of Choice in Marriage & Forced Marriages

While the magnitude of forced marriages in Afghan communities in Pakistan is unknown, the secondary literature reveals:

*“in Pakistan, girls from the Afghan refugee community were reported getting married as early as 12 years of age. This includes Valwer marriages, a type of forced marriage where a young girl is given in marriage as a payback system, either for a debt or other commitment.”<sup>221</sup>*

Comparative statistics on prevalence of forced marriage in Pakistan were unavailable, however, the Human Rights Commission of Pakistan observed in its 2010 report that:

*“[Pakistani] girls and women continued to be forced into marriage against their will, killed or intimidated for asserting their right to choose their spouse or generally to make decisions about their own life. The practice of giving away women and even baby girls in marriage to settle men’s disputes also continued.”<sup>222</sup>*

During the CAMP perception survey, registered Afghan citizens were asked “Do you have the right to freely choose who you will marry? The results were as follows:

- ❖ ‘Yes’ – 61.6%
- ❖ ‘No’ – 23.2%
- ❖ ‘Don’t know’ – 11.4%
- ❖ ‘No response’ – 3.8%

A stark difference was noted in the responses of males versus females, with 92.3% of males stating ‘Yes’ compared to only 30.9% of females, and only 1.5% of males did not know compared to 21.3% of females. On the other hand, only 0.9% [13] of respondents stated that they or their close family members experienced forced marriage in the past decade in Pakistan.<sup>223</sup> Here again, cultural and social factors are seen coming into play because of the contrasting responses.

The standard marriage contract [*nikanamah*] – formulated as part of the MFLO – recognizes women and girls’ vulnerability to forced marriage by making the bride’s signature a requirement while permitting a representative to sign for the groom. However, there are other significant gaps in the MFLO which cause problems which are:

- ❖ Forced marriage is mentioned left undefined [cause]
- ❖ Does not specify the requirements of a valid marriage [preventative measure]
- ❖ Does not specify the effects of an invalid or void marriage [consequence]

In fact, none of the Pakistani legislation relating to personal laws or Shariat specifies that forced marriages, once registered, are invalid or otherwise. This overall weak approach of the law is also reflected in the courts’ decisions. While Section 23 of the FCA 1964 stipulates that the validity of a marriage registered under the MFLO cannot be challenged, the SCP has ruled that if a woman complains of fraud, deception, coercion, lack of consent, etc., then even a ‘valid’ registered marriage can be challenged<sup>224</sup>. It has also been held that marriage without consent is void<sup>225</sup>; more controversially it has been alleged that courts have permitted a woman to apply for dissolution under the DMMA 1939 in cases of forced marriage. But in general, the courts have accepted that Muslim adult females are permitted to marry without the consent of their ‘wali’ [or male guardian].<sup>226</sup>

Recently, the Peshawar High Court held that the practice of *swara*, i.e. the giving of a female in marriage as part of

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<sup>221</sup> Da Costa, Rosa, ‘The Administration of Justice in Refugee Camps: A Study of Practice’, Legal & Policy Protection Series [Geneva: UNHCR, March 2006]

<sup>222</sup> HRCR, 2011, at 211

<sup>223</sup> The figures were roughly equal to the aggregate average for camp-dwellers and those who resided outside camps

<sup>224</sup> PLD 1984 SC 95 Shariat Bench

<sup>225</sup> PLD 1999 Lahore 494

<sup>226</sup> 1999 P.Cr.L.J. 638; PLD 1981 FSC 308

a settlement in a feud, was illegal, and the resulting contracted marriage should be considered invalid. Following this, giving of a female in marriage or otherwise in 'badal-i-sulh' [in exchange for settlement of a dispute] was made punishable under s. 310A of the PPC 1860 through the Criminal Law Amendment Act 2004. However, the giving of an adult female in marriage without her consent outside the context of a dispute settlement as not been criminalized yet.

#### ■ Freedom of Choice in Marriage & Forced Marriages

CMRA 1929 established the minimum age for marriage as 18 years for boys and 16 years for girls, or when a girl reaches puberty. Women's rights advocates, however, have countered that since most girls reach puberty prior to reaching 16 years of age, in practice the law legitimizes marriages of minor girls. This is backed by the fact that the resultant marriage does not become invalid on account of the tender age of the minor, as held in a decision of a court.<sup>227</sup>

Even though the CMRA 1929 makes the adult husband contracting the marriage and the persons who have solemnized the marriage [such as the 'qazi' or 'mullah'] criminally liable<sup>228</sup>, the rather lenient penalty defeats the purpose: for the adult male contracting the marriage, the person solemnizing it, and the father or guardian who condoned or negligently failed to prevent it, the punishment is imprisonment of up to one month, or a fine up to Rs. 1000. And another fact to note is that the penalty is directed at the males, not at any female involved; the mother of the minor girl or her guardian cannot be imprisoned or fined.

#### ■ Recent Developments in Law: Legislators Come Alive in 2011

On November 15, 2011 the National Assembly unanimously passed the Prevention of Anti-Women Practices [Criminal Law Amendment] Bill which will punish those who force females into marriages, or deny them inheritance. The Bill aims to substitute Section 310A of the PPC [the 2004 amendment that made giving a female or otherwise as *badl-i-sulh* punishable] and provides clear definitions of the terms such as 'forced marriage', and enunciates the penalties for discriminatory cultural practices against women such as depriving them of a share in inheritance. Some of the definitions and the penalties in the Bill are provided below:

##### ❖ Forced marriage of women:

*"Whosoever coerces or in any whatsoever compels a woman to enter to marriage shall be punished with imprisonment of either description for a term, which may extend to ten years or for a term which shall not be less than three years and shall also be liable to fine of five hundred thousand rupees."*

##### ❖ Forced marriage of females as customary practice:

*"Whoever gives a female in marriage or otherwise compels her to enter into marriage, as badal-e-sulh, Wani or Sawara or any other custom or practice under name, in consideration of settling a civil dispute or a criminal liability, shall be punished with imprisonment of wither description for a term which may extend to seven years but shall not be less than three years and shall be liable to fine of five hundred thousand rupees."*

##### ❖ Depriving women of inheritance:

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

##### ❖ Marriage to the Holy Quran<sup>229</sup>:

*"Whosoever compels or arranges or facilitate the marriage of woman with the Holy Quran shall be punished with imprisonment of with description which may extend to seven years which shall not be less than three years and shall be liable to fine of five hundred thousand rupees."*

<sup>227</sup> PLD 1962 Karachi 442

<sup>228</sup> PLD 1970 SC 323

<sup>229</sup> Forcing a woman to marry the Quran is an act aimed at preventing women from leaving the home or receiving inheritance.

However, human rights advocates have raised concerns in relation to how the legislation will be enforced due to the prevailing cultural norms and social attitude towards women in Pakistan, particularly in rural areas. For the moment, however, the Bill still has to pass through the Upper House of Parliament, where it may be subject to dilution or amendment, before it becomes an enforceable law, and until then, the current legislation will prevail.

## **Conclusion: Can Registered Afghan Citizens Living in Pakistan seek relief for Family Law Issues?**

Although registered Afghan citizens living in Pakistan reported low incidence of family disputes in CAMP's survey, the legal aid work of I/NGOs suggests otherwise; many cases have been reported through these platforms which points towards the reluctance of interviewed persons to disclose their family problems.

However, it is an established fact that registered Afghan citizens generally do have access to the Family Courts which resolve all disputes on the basis of MFLO and Shariat [as long as there is no conflict between the two]. In relation to family law cases of registered Afghan citizens living in Pakistan, and the subsequent issues faced by them, there is a need for further enunciation of principles

Freedom of choice in marriage has been recognized by Pakistani courts, and increasingly by legislators as well in light of the recent Bill relating to discriminatory practices against women which penalizes forced marriages in general and in specific cases as well.

### **Group Activity 2 [See Annexure 2]**

At the end of the presentation relating to family laws, participants will be divided into 4 groups and given a handout to read and analyse the case study provided in light of any family disputes or issues that have been brought to their notice. In order to develop a comprehensive understanding, participants are required to answer all the questions at the end of each handout, relating each to its practical context and implications for registered Afghan citizens living in Pakistan.







## Appendices & Annexures



# Constitutional Provisions

## Constitutional Provisions Applying to Citizens & ‘Persons’

The following are all the provisions found in the Constitution of the Islamic Republic of Pakistan 1973, Part 1 ‘Introductory’ and Part 2, ‘Chapter 1: Fundamental Rights’ which will be the subject of discussion throughout the training session. This handout will be a useful source for participants to cross reference during the discussions; the relevant provisions are on the left side of the table, while their applications to citizens or ‘persons’ is shown in the next two columns. For example, if a provision applies to citizens, a ‘Yes’ can be seen in the Citizens column, and the same can be seen in the column on Persons if applicable. Although the table below includes all provisions found in Parts 1 and 2, the articles that will be the subject of discussion during the session are in bold, and will be debated in detail.

<b>PART 1: INTRODUCTORY</b>	<b>CITIZENS</b>	<b>PERSONS<sup>230</sup></b>
Article 1: The Republic and its territories	YES	YES
Article 2: Islam to be State religion	YES	YES
Article 2A: The Objectives Resolution to form part of substantive provisions	YES	YES
Article 3: Elimination of exploitation	YES	YES
Article 4: Right of individuals to be dealt with in accordance with law, etc	YES	YES
Article 5: Loyalty to State and obedience to Constitution and law	YES	YES
Article 6: High treason	YES	YES

<b>PART 2: FUNDAMENTAL RIGHTS &amp; PRINCIPLES OF POLICY</b>	<b>CITIZENS</b>	<b>PERSONS</b>
<b>CHAPTER 1 – FUNDAMENTAL RIGHTS</b>		
Article 8 : Laws inconsistent with or in derogation of fundamental rights to be void	YES	YES
Article 9: Security of person	YES	YES
Article 10: Safeguards as to arrest and detention	YES	YES
Article 10A: Right to fair trial	YES	YES
Article 11: Slavery, forced labour, etc., prohibited	YES	YES
Article 12: Protection against retrospective punishment	YES	YES
Article 13: Protection against double punishment & self incrimination	YES	YES
Article 14: Inviolability of dignity of man, etc	YES	YES
Article 15: Freedom of movement, etc	YES	NO
Article 16: Freedom of assembly	YES	NO

<sup>230</sup> The term ‘persons’ will be used to denote all citizens and non citizens, and therefore is deemed to be an all encompassing term for all those who are not Pakistanis, which includes registered Afghan citizens living in Pakistan

<b>PART 2: FUNDAMENTAL RIGHTS &amp; PRINCIPLES OF POLICY</b>	<b>CITIZENS</b>	<b>PERSONS</b>
Article 17: Freedom of association	YES	NO
Article 18: Freedom of trade, business or profession	YES	NO
Article 19: Freedom of speech, etc	YES	NO
Article 19A: Right to information	YES	NO
Article 20: Freedom to profess religion and to manage religious institutions	YES	NO
Article 21: Safeguard against taxation for purposes of any particular religion	YES	YES
Article 22: Safeguards as to educational institutions in respect of religion, etc	YES	YES
Article 23: Provision as to property	YES	NO
Article 24: Protection of property rights	YES	YES
Article 25: Equality of citizens	YES	NO
Article 25A: Right to education	YES	YES
Article 26: Non-discrimination in respect of access to public places	YES	NO
Article 27: Safeguard against discrimination in services	YES	NO
Article 28: Preservation of language, script and culture	YES	NO

## Part 1 & Part 2: Constitution of Islamic Republic of Pakistan 1973

Articles 4 & 5 are found under Part 1, Introductory section of the Constitution; whereas Articles 5(2), 9, 10, 10A, 11, 12, 13, 14, 21, 22, 24 & 25A form part of the Fundamental Rights guaranteed under Part II, Chapter 1, of the Constitution. The section below reproduces all the articles in Parts 1 and 2 of the Constitution:

### Part 1: Introductory

**Article 1: The Republic and its territories** – (1) Pakistan shall be a Federal Republic to be known as the Islamic Republic of Pakistan, hereinafter referred to as Pakistan.

**[(2) The territories of Pakistan shall comprise—]**<sup>231</sup>

- (a) the Provinces of **[Balochistan]**<sup>232</sup>, the **[Khyber Pakhtunkhwa]**<sup>233</sup>, the Punjab and **[Sindh]**<sup>234</sup>;
- (b) the Islamabad Capital Territory, hereinafter referred to as the Federal Capital;
- (c) the Federally Administered Tribal Areas; and
- (d) such States and territories as are or may be included in Pakistan, whether by accession or otherwise.

**[(3) Omitted.]**<sup>235</sup>

**[(3)<sup>236</sup> [Majlis-e-Shoora (Parliament)]<sup>237</sup> may by law admit into the Federation new States or areas on such terms and conditions as it thinks fit.]**

- **Article 2: Islam to be State religion** – “Islam shall be the State religion of Pakistan.”
- **Article 2A: The Objective Resolution to form part of substantive provisions**<sup>238</sup> – “The principles and provisions set out in the Objectives Resolution reproduced in the Annex are hereby made substantive part of the Constitution and shall have effect accordingly.”
- **Article 3: Elimination of exploitation** – “The State shall ensure the elimination of all forms of exploitation and the gradual fulfillment of the fundamental principle, from each according to his ability to each according to his work.”
- **Article 4: Right of individuals to be dealt with in accordance with law, etc. – (1)** “To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.  
**(2)** In particular:
  - (a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;
  - (b) no person shall be prevented from or be hindered in doing that which is not prohibited by law; and
  - (c) no person shall be compelled to do that which the law does not require him to do.”

<sup>231</sup> Section 2 of the Constitution (First Amendment) Act, 1974 (33 of 1974) substituted the said words in clause (2) of Art. 1, (w.e.f. May 4, 1974), in place of the words and colon “The Constitution shall apply to the following territories of Pakistan :” and omitted clause (3) of Art. 1. The deleted clause (3), adopted in 1973, read:

(3) The Constitution shall be appropriately amended so as to enable the people of the Province of East Pakistan, as and when foreign aggression in that Province and its effects are eliminated, to be represented in the affairs of the Federation.

Section 2 of the Constitution (First Amendment) Act, 1974 (33 of 1974), also renumbered clause (4) as clause (3) of Art. 1, (w.e.f. May 4, 1974)

<sup>232</sup> Section 3 of the Constitution (Eighteenth Amendment) Act, 2010 (10 of 2010), substituted the said words, in place of the words, “Baluchistan”, “North West Frontier” and “Sind”, in paragraph (a) of clause (1) of Art. 1, (w.e.f. April 19, 2010).

<sup>233</sup> Ibid

<sup>234</sup> Ibid

<sup>235</sup> Section 3 of the Constitution (Eighteenth Amendment) Act, 2010 (10 of 2010), substituted the said words, in place of the words, “Baluchistan”, “North West Frontier” and “Sind”, in paragraph (a) of clause (1) of Art. 1, (w.e.f. April 19, 2010)

<sup>236</sup> See Footnote 2

<sup>237</sup> Item 1 of the Schedule to the Revival of the Constitution of 1973 Order, 1985, Presidents Order No. 14 of 1985 (hereinafter referred to as P.O. No. 14 of 1985), substituted the words and brackets “Majlis-e-Shoora (Parliament)”, in place of the word “Parliament” in clause 3 of Art. 1 and wherever it appears in the succeeding provisions of the Constitution, (w.e.f. March 2, 1985)

<sup>238</sup> Item 2 of the Schedule to P.O. No. 14 of 1985 inserted Art. 2A. (w.e.f. March 2, 1985)

- **Article 5: Loyalty to State and obedience to Constitution and law – (2)** “Obedience to the Constitution and law is the [inviolable]<sup>239</sup> obligation of every citizen wherever he may be and of every other person for the time being within Pakistan.”
- **Article 6: High Treason<sup>240</sup>** – “Any person who abrogates or subverts or suspends or holds in abeyance, or attempts or conspires to abrogate or subvert or suspend or hold in abeyance, the Constitution by use of force or show of force or by any other unconstitutional means shall be guilty of high treason.  
(2) Any person aiding or abetting [or collaborating]<sup>241</sup> the acts mentioned in clause (1) shall likewise be guilty of high treason.  
[(2A) An act of high treason mentioned in clause (1) or clause (2) shall not be validated by any court including the Supreme Court and a High Court.]<sup>242</sup>  
(3) [Majlis-e-Shoora (Parliament)]<sup>243</sup> shall by law provide for the punishment of persons found guilty of high treason.

## Part 2: Fundamental Rights and Principles of Policy

- **Article 7: Definition of the State** – “In this Part, unless the context otherwise requires, “the State” means the Federal Government, [Majlis-e-Shoora (Parliament)]<sup>244</sup>, a Provincial Government, a Provincial Assembly, and such local or other authorities in Pakistan as are by law empowered to impose any tax or cess.”

### Chapter 1: Fundamental Rights

- **Article 8: Laws inconsistent with or in derogation of Fundamental Rights to be void** – “(1) 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.  
(2) The State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void.  
(3) The provisions of this Article shall not apply to–  
(a) Any law relating to 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; or  
(b) any of the–  
(i) laws specified in the First Schedule as in force immediately before the commencing day or as amended by any of the laws specified in that Schedule;  
(ii) other laws specified in, Part I of the First Schedule;<sup>245</sup>  
and no such law nor any provision thereof shall be void on the ground that such law or provision is

<sup>239</sup> Item 3 of the Schedule to P.O. No. 14 of 1985 substituted the said word, in place of the word “basic” in clause (2) of Art. 5, (w.e.f. March 2, 1985)

<sup>240</sup> Section 4(i) of the Constitution (Eighteenth Amendment) Act, 2010 (10 of 2010), substituted the said clause, in its present form, (w.e.f. April 19, 2010), in place of the clause (1) of Art. 6, as adopted in 1973, that read :

(1) Any person who abrogates or attempts or conspires to abrogate, subverts or attempts or conspires to subvert the Constitution by use of force or show of force or by other unconstitutional means shall be guilty of high treason.

<sup>241</sup> Section 4(ii) of the Constitution (Eighteenth Amendment) Act, 2010 (10 of 2010), inserted the said word after the word “abetting” in clause (2) of Art. 6, (w.e.f. April 19, 2010)

<sup>242</sup> Section 4(iii) of the Constitution (Eighteenth Amendment) Act, 2010 (10 of 2010), inserted a new clause (2A), in its present form, after clause (2) of Art. 6, (w.e.f. April 19, 2010).

<sup>243</sup> Item 1 of the Schedule to the Revival of the Constitution of 1973 Order, 1985, Presidents Order No. 14 of 1985 (hereinafter referred to as P.O. No. 14 of 1985), substituted the words and brackets “Majlis-e-Shoora (Parliament)”, in place of the word “Parliament” in clause 3 of Art. 1 and wherever it appears in the succeeding provisions of the Constitution, (w.e.f. March 2, 1985)

<sup>244</sup> Ibid

<sup>245</sup> Section 2 of the Constitution (Fourth Amendment) Act, 1975 (71 of 1975), substituted paragraph (b) of clause 3 of Art. 8, in its present form, (w.e.f. November 21, 1975), in place of the paragraph as adopted in 1973, that read:

“(b) any of the laws specified in the first schedule as in force immediately before the commencing day a\*[or as amended by any of the laws specified in that schedule; ]

a\* Section 3 of the Constitution (First Amendment) Act, 1974, added the said words to paragraph (b) of clause 3 of Art. 8, (w.e.f. May 4, 1974).

inconsistent with, or repugnant to, any provision of this Chapter.

(4) Notwithstanding anything contained in paragraph (b) of clause (3), within a period of two years from the commencing day, the appropriate Legislature shall bring the laws specified in **[Part II of the First Schedule]**<sup>246</sup> into conformity with the rights conferred by this Chapter:

Provided that the appropriate Legislature may by resolution extend the said period of two years by a period not exceeding six months.

**Explanation** – If in respect of any law **[Majlis-e-Shoora (Parliament)]**<sup>247</sup> is the appropriate Legislature, such resolution shall be a resolution of the National Assembly.

(5) The rights conferred by this Chapter shall not be suspended except as expressly provided by the Constitution.

- **Article 9: Security of person** – “No person shall be deprived of life or liberty save in accordance with law.”
- **Article 10: Safeguards as to arrest and detention – (1)** “No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.  
**(2)** Every person who is arrested and detained in custody shall be produced before a magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the nearest magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate.  
**(3)** Nothing in clauses (1) and (2) shall apply to any person who is arrested or detained under any law providing for preventive detention.  
**(4)** No law providing for preventive detention shall be made except to deal with persons acting in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof, or external affairs of Pakistan, or public order, or the maintenance of supplies or services, and no such law shall authorise the detention of a person for a period exceeding [three months]<sup>248</sup> unless the appropriate Review Board has, after affording him an opportunity of being heard in person, reviewed his case and reported, before the expiration of the said period, that there is, in its opinion, sufficient cause for such detention, and, if the detention is continued after the said period of [three months],<sup>249</sup> unless the appropriate Review Board has reviewed his case and reported, before the expiration of each period of three months, that there is, in its opinion, sufficient cause for such detention.

Explanation I – In this Article, “the appropriate Review Board” means,

- (i) in the case of a person detained under a Federal Law, a Board appointed by the Chief Justice of Pakistan and consisting of a Chairman and two other persons, each of whom is or has been a Judge of the Supreme Court or a High Court: and
- (ii) in the case of a person detained under a Provincial Law, a Board appointed by the Chief Justice of the High Court concerned and consisting of a Chairman and two other persons, each of whom is or has been a Judge of a High Court.

Explanation II - The opinion of a Review Board shall be expressed in terms of the views of the majority of its members.

**(5)** When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, [within fifteen days]<sup>250</sup> from such detention, communicate to such person the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order: Provided that the authority making any such order may refuse to disclose facts which such authority considers it to be against the public interest to disclose.

<sup>246</sup> Section 2(b) of the Constitution (Fourth Amendment) Act, 1975 (71 of 1975), substituted the said words in place of the words “the First Schedule, not being a law which relates to, or is connected with economic reforms” in clause 4 of Art. 8, (w.e.f. November 21, 1975).

<sup>247</sup> Item 1 of the Schedule to the Revival of the Constitution of 1973 Order, 1985, Presidents Order No. 14 of 1985 (hereinafter referred to as P.O. No. 14 of 1985), substituted the words and brackets “Majlis-e-Shoora (Parliament)”, in place of the word “Parliament” in clause 3 of Art. 1 and wherever it appears in the succeeding provisions of the Constitution, (w.e.f. March 2, 1985)

<sup>248</sup> Section 2 of the Constitution (Third Amendment) Act, 1975 (22 of 1975) substituted the said words in place of the words “one month”, in clause (4) of Art. 10, (w.e.f. February 18, 1975).

<sup>249</sup> Ibid

<sup>250</sup> Section 2 of the Constitution (Third Amendment) Act, 1975 (22 of 1975) also substituted the said words in place of the words “as soon as may be, but not later than one week”, in clause (5) of Art. 10, (w.e.f. February 18, 1975).



(6) The authority making the order shall furnish to the appropriate Review Board all documents relevant to the case unless a certificate, signed by a Secretary to the Government concerned, to the effect that it is not in the public interest to furnish any documents, is produced.

(7) Within a period of twenty-four months commencing on the day of his first detention in pursuance of an order made under a law providing for preventive detention, no person shall be detained in pursuance of any such order for more than a total period of eight months in the case of a person detained for acting in a manner prejudicial to public order and twelve months in any other case:

Provided that this clause shall not apply to any person who is employed by, or works for, or acts on instructions received from, the enemy [or who is acting or attempting to act in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof or who commits or attempts to commit any act which amounts to an anti-national activity as defined in a Federal law or is a member of any association which has for its objects, or which indulges in, any such anti-national activity.]<sup>251</sup>

(8) The appropriate Review Board shall determine the place of detention of the person detained and fix a reasonable subsistence allowance for his family.

(9) Nothing in this Article shall apply to any person who for the time being is an enemy alien.”

- **Article 10A: Right to fair trial**<sup>252</sup> – “For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.”
- **Article 11: Slavery, forced labour, etc., prohibited – (1)** “Slavery is non-existent and forbidden and no law shall permit or facilitate its introduction into Pakistan in any form. **(2)** All forms of forced labour and traffic in human beings are prohibited.  
**(3)** No child below the age of fourteen years shall be engaged in any factory or mine or any other hazardous employment.  
**(4)** Nothing in this Article shall be deemed to affect compulsory service:  
(a) by any person undergoing punishment for an offence against any law; or  
(b) required by any law for public purpose provided that no compulsory service shall be of a cruel nature or incompatible with human dignity.””
- **Article 12: Protection from retrospective punishment – (1)** “No law shall authorize the punishment of a person:  
(a) for an act or omission that was not punishable by law at the time of the act or omission; or  
(b) for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed.”
- **Article 13: Protection against double punishment –** “No person:  
(a) shall be prosecuted or punished for the same offence more than once; or  
(b) shall, when accused of an offence, be compelled to be a witness against himself.”
- **Article 14: Inviolability of dignity of man – (1)** “The dignity of man and, subject to law, the privacy of home, shall be inviolable.  
**(2)** No persons shall be subject to torture for the purpose of extracting evidence.”
- **Article 15: Freedom of movement, etc –** “Every citizen shall have the right to remain in, and, subject, to any reasonable restriction imposed by law in the public interest, enter and move freely throughout Pakistan and to reside and settle in any part thereof.”
- **Article 16: Freedom of assembly –** “Every citizen shall have the right to assemble peacefully and without arms, subject to any reasonable restrictions imposed by law in the interest of public order.”
- **Article 17: Freedom of association**<sup>253</sup> – “**(1)** Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan,

<sup>251</sup> Section 2 of the Constitution (Third Amendment) Act, 1975 (22 of 1975) added the said words, in the proviso to clause (7) of Art. 10, (w.e.f. February 18, 1975)

<sup>252</sup> Section 5 of the Constitution (Eighteenth Amendment) Act, 2010 (10 of 2010), inserted a new Art. 10A, after Art. 10 of the Constitution, (w.e.f. April 19, 2010).

<sup>253</sup> Section 6 of the Constitution (Eighteenth Amendment) Act, 2010 (10 of 2010), substituted Art. 17, in its present form, (w.e.f. April 19, 2010), in place of Art. 17 as amended by the Constitution (Seventeenth Amendment) Act, 2003 (3 of 2003), (w.e.f. December 31, 2003), that read :

public order or morality.

(2) Every citizen, not being in the service of Pakistan, shall have the right to form or be a member of a political party, subject to any reasonable restrictions imposed by law in the interest of the sovereignty or integrity of Pakistan and such law shall provide that where the Federal Government declares that any political party has been formed or is operating in a manner prejudicial to the sovereignty or integrity of Pakistan, the Federal Government shall, within fifteen days of such declaration, refer the matter to the Supreme Court whose decision on such reference shall be final.

(3) Every political party shall account for the source of its funds in accordance with law.”

- **Article 18: Freedom of trade, business, or profession** – “Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business:

Provided that nothing in this Article shall prevent:

- (a) the regulation of any trade or profession by a licensing system; or
- (b) the regulation of trade, commerce or industry in the interest of free competition therein; or
- (c) the carrying on, by the Federal Government or a Provincial Government, or by a corporation controlled by any such Government, of any trade, business, industry or service, to the exclusion, complete or partial, of other persons.”

- **Article 19: Freedom of speech, etc:** Every citizen shall have the right to freedom of speech and expression, and there shall be 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 defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, [commission of]<sup>254</sup> or incitement to an offence.”
- **Article 19A: Right to information**<sup>255</sup> – “Every citizen shall have the right to have access to information in all

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17. Freedom of association—(1) Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interest of a[sovereignty or integrity of Pakistan, public order or morality.]

b[(2) Every citizen, not being in the service of Pakistan, shall have the right to form or be a member of a political party, subject to any reasonable restrictions imposed by law in the interest of the sovereignty or integrity of Pakistan c[or public order] and such law shall provide that where the Federal Government declares that any political party has been formed or is operating in a manner prejudicial to the sovereignty or integrity of Pakistan, c[or public order] the Federal Government shall, within fifteen days of such declaration, refer the matter to the Supreme Court whose decision on such reference shall be final d[:]

d[Provided that no political party shall promote sectarian, ethnic, regional hatred or animosity, or be titled or constituted as a militant group of section.]

(3) Every political party shall account for the source of its funds in accordance with law.]

e[(4) Every political party shall, subject to law, hold intra-party elections to elect its office-bearers and party leaders.]

a. Section 3 of the Constitution (Fourth Amendment) Act, 1975 (71 of 1975) substituted the said words in place of the words “morality or public Order”, in clause 1 of Art. 17, (w.e.f. November 21, 1975).

b. Section 4 of the Constitution (First Amendment) Act, 1974 (33 of 1974) substituted clauses (2) and (3) of Art. 17, in their present form, (w.e.f. May 4, 1974), in place of clause (2) as adopted in 1973, that read:

“(2) Every citizen, not being in the service of Pakistan, shall have the right to form or be a member of a political party. Every political party shall account for the source of its funds in accordance with law.”

c. Section 10 of the Constitution (Seventeenth Amendment) Act, 2003 (3 of 2003), had validated the insertion in clause (2) of Art. 17, (w.e.f. December 31, 2003). Item 1 of the schedule to the Legal Framework Order, 2002, Chief Executive Order No. 24 of 2002, (hereinafter referred to as LFO (C.E.O. No. 24 of 2002)), had inserted the said words in clause (2) of Art. 17, (w.e.f. August 21, 2002).

d. Section 10 of the Constitution (Seventeenth Amendment) Act, 2003 (3 of 2003), had validated the addition of the proviso at the end of clause (2) of Art. 17, (w.e.f. December 31, 2003). Item 1 of the schedule to LFO (C.E.O. No. 24 of 2002), had substituted a colon, in place of the full stop, at the end of clause (2) of Art. 17 and added the said proviso thereto, (w.e.f. August 21, 2002).

e. Section 10 of the Constitution (Seventeenth Amendment) Act, 2003 (3 of 2003), had validated the addition of clause (4) to Art. 17, (w.e.f. December 31, 2003). Item 1 of the schedule to LFO (C.E.O. No. 24 of 2002), had added the said clause (4) to Art. 17, (w.e.f. August 21, 2002).

<sup>254</sup> Section 4 of the Constitution (Fourth Amendment) Act, 1975 (71 of 1975) substituted the said words in place of the word “defamation”, in Art. 19, (w.e.f. November 21, 1975).

<sup>255</sup> Section 7 of the Constitution (Eighteenth Amendment) Act, 2010 (10 of 2010), inserted a new Art. 19A, after Art. 19 of the Constitution, (w.e.f. April 19, 2010).

matters of public importance subject to regulation and reasonable restrictions imposed by law.”

- **Article 20: Freedom to profess religion and to manage religious institutions** – “Subject to law, public order and morality –
  - (a) every citizen shall have the right to profess, practise and propagate his religion; and
  - (b) every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions.”
- **Article 21: Safeguard against taxation for purposes of any particular religion** – “No person shall be compelled to pay any special tax the proceeds of which are to be spent on the propagation or maintenance of any religion other than his own.”
- **Article 22: Safeguards as to educational institutions in respect of religion** – (1) “No person attending any educational institution shall be required to receive religious instruction, or take part in any religious ceremony, or attend religious instruction, if such instruction, ceremony or worship relates to a religion other than his own.  
(2) In respect of any religious institution, there shall be no discrimination against any community in granting of exemption or concession in relation to taxation.  
(3) Subject to law,
  - (a) no religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any educational institution maintained wholly by that community or denomination; and
  - (b) no citizen shall be denied admission to any educational institution receiving aid from public revenues on the ground only of race, religion, caste or birth.(4) Nothing in this Article shall prevent any public authority from making provision for the advancement of any socially or educationally backward class of citizens.”
- **Article 23: Provision as to property** – “Every citizen shall have the right to acquire, hold and dispose of property in any part of Pakistan, subject to the Constitution and any reasonable restrictions imposed by law in the public interest.”
- **Article 24: Protection of property rights** – (1) “No person shall be compulsorily deprived of his property save in accordance with law.  
(2) 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.  
(3) Nothing in this Article shall affect the validity of:
  - (a) any law permitting the compulsory acquisition or taking possession of any property for preventing danger to life, property or public health; or
  - (b) any law permitting the taking over of any property which has been acquired by, or come into the possession of, any person by any unfair means, or in any manner, contrary to law; or
  - (c) any law relating to the acquisition, administration or disposal of any property which is or is deemed to be enemy property or evacuee property under any law (not being property which has ceased to be evacuee property under any law); or
  - (d) any law providing for the taking over of the management of any property by the State for a limited period, either in the public interest or in order to secure the proper management of the property, or for the benefit of its owner; or
  - (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 of citizens; or
    - (iii) providing maintenance to those who, on account of unemployment, sickness, infirmity or old age, are unable to maintain themselves; or
  - (f) any existing law or any law made in pursuance of Article 253.(4) The adequacy or otherwise of any compensation provided for by any such law as is referred to in this Article, or determined in pursuance thereof, shall not be called in question in any court.”

- **Article 25A: Right to education**<sup>256</sup> – “The State shall provide free and compulsory education to all children of the age of five to sixteen years in such manner as may be determined by law.”
- **Article 26: Non-discrimination in respect of public places** – “(1) In respect of access to places of entertainment or resort, not intended for religious purposes only, there shall be no discrimination against any citizen on the ground only of race, religion, caste, sex, residence or place of birth  
(2) 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]<sup>257</sup> 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 [:]<sup>258</sup>  
**[Provided also that under-representation of any class or area in the service of Pakistan may be redressed in such manner as may be determined by an Act of Majlis-e-Shoora (Parliament)]**<sup>259</sup>  
(2) Nothing in clause(1) shall prevent any Provincial Government, or any local or other authority in a Province, from prescribing, in relation to any post or class of service under that Government or authority, conditions as to residence in the Province, for a period not exceeding three years, prior to appointment under that Government or authority.
- **Article 28: Preservation of language, script and culture** – “Subject to Article 251 any section of citizens having a distinct language, script or culture shall have the right to preserve and promote the same and subject to law, establish institutions for that purpose.”

<sup>256</sup> Section 9 of the Constitution (Eighteenth Amendment) Act, 2010 (10 of 2010), inserted a new Art. 25A, after Art. 25 of the Constitution, (w.e.f. April 19, 2010).

<sup>257</sup> Section 2 of the Constitution (Sixteenth) Amendment Act, 1999 (7 of 1999), substituted the said word in place of the word “twenty”, in the proviso to clause (1) of Art. 27, (w.e.f. August 5, 1999). The proviso, as first adopted in 1973, contained the word “Ten” and by virtue of Item 4 of the Schedule to P.O. No. 14 of 1985 the word “twenty” was substituted therefor (w.e.f. March 2, 1985).

<sup>258</sup> Section 10 of the Constitution (Eighteenth Amendment) Act, 2010 (10 of 2010), substituted a colon, in place of the full stop, at the end of the second proviso to clause (1) of Art. 27 and added a new proviso thereto, (w.e.f. April 19, 2010).

<sup>259</sup> Ibid

# Group Activities

## Group Activity 1

### Fundamental Rights & Freedoms in the Constitution

In this group activity, participants are divided into 3 groups and are allocated 30 minutes to read and discuss the questions provided at the end of each handout, after which they are required to report their findings and present the conclusions they have drawn from their knowledge and experience in practice.

The material given to the groups contains a constitutional provision, brief background, reference to AMRS provisions, and an analysis of the relevant issues faced by registered Afghan citizens living in Pakistan. The content allocated to each of the groups and the questions and issues posed are provided below

#### Exercise 1

##### Freedom from Torture

*“No persons shall be subject to torture for the purpose of extracting evidence.”*

Article 14[2], Inviolability of dignity of man, etc

##### Background on Torture in Pakistan:

It is said that the main reasons behind police torture in Pakistan are:

*“ [i] to recover weapon of crime or some other piece of evidence; [ii] to extract confession or other information; or/and [iii] extortion [i.e. bribery].”<sup>260</sup> Assault or torture by police is so widespread in some parts of Pakistan that in a recent suo moto hearing on the matter, the SCP criticized the Provincial Governments on “rampant police torture” and “the level of tolerance in senior officers like Inspectors-General on such incidents”, directing them to “shut down private torture cells being run by police.”<sup>261</sup> Indeed, “according to a report compiled by a civil society organisation, 441 women, 340 men, and 417 children were tortured by the police from January to November 2010. The organization has recorded 9,364 cases of police torture in the last nine years.”<sup>262</sup>*

##### Background on Torture Faced by Registered Afghan Citizens Living in Pakistan:

CAMP conducted a survey of 1500 adult registered Afghan citizens living in KP in 2011. The findings of the survey reveal that in the last 10 years 17.9% of respondents or their close family members experienced bribery by police, and 11.9% were victims of assault or torture by police. The extent to which registered Afghan citizens interviewed, or their family members, have been subject to illegal actions – bribery, assault or torture – by Pakistani police authorities over the past decade is alarming, and begs for increased efforts to prevent and respond to such unlawful practices. It must be kept in mind that the unlawful use of force and extortion tactics by Pakistani law enforcement authorities is an issue that also affects many Pakistani citizens. However, many

<sup>260</sup> Jamal, Asad [ed.]. ‘Revisiting Police Laws’ [Lahore: Human Rights Commission of Pakistan, January, 2011] at 1-2. [hereinafter Jamal]

<sup>261</sup> Human Rights Commission of Pakistan. ‘State Of Human Rights In 2010’ [Lahore: 2011] at 49.

<sup>262</sup> Jamal, supra, note 2, at 1.

registered Afghan citizens overall have been particularly vulnerable to such illegal actions given their uncertain legal status in Pakistan over the past ten years. In February 2001 a circular was issued by the GoP declaring all Afghans without ‘refugee cards/permits’ to be ‘illegal’ immigrants subject to the Foreigners Act 1946, a process that led to heightened scrutiny of all Afghans – irrespective of their registered status – and many arrests. Yet only five years earlier – in 1997 – the GoP had declared in a circular that the movement outside of camps was legitimate. To a great extent this was due to the fact that the World Food Programme [WFP] had stopped providing food assistance to Afghan ‘refugees’ – as they were termed at the time – in Pakistan in 1995, which forced them to leave camps to find employment in order to meet their basic needs. Many Afghan ‘refugees’ who left the camps from 1995 onward would not have felt the need to hang on to their ‘refugee cards/permits’, whose main purpose was to secure rations from governmental and humanitarian agencies. However, without such identification documents, in 2001 they were deemed ‘illegal’ immigrants, subject to arrest and deportation under the FA 1946. Also, it was only in 2006/2007 that the GoP and UNHCR issued PoR cards to Afghans, which served as identity documents and proof that the bearer was legally entitled to be in Pakistan.

CAMP’s survey also asked registered adult Afghan citizens the following question: “If you have been arrested or detained by Pakistani police, is it against the law for them to torture you during your arrest or detention?” Only 60.1% of registered Afghans sampled said ‘Yes’, while 20.3% said ‘No’, 16.3% said that they ‘Don’t Know’, while 3.3% gave no response to this question about freedom from torture. There was stark gender variance, with 92.9% of males saying ‘Yes’ compared to 27.2% of females, while 2.0% of males did not know compared to 30.5% of females. While 68.8% of camp residents and 51.3% of non-camp residents said ‘Yes’, 6.0% of camp-dwellers and 26.5% of non-camp-dwellers said that they ‘Don’t Know’. It is uncertain whether the following was an extreme case but the Human Rights Commission of Pakistan reported in 2009 that: “when a local government representative of Jalozi was shot, the police arrested more than 50 men in the camp, tortured them to the extent that they became physically disabled despite the fact that the charges against them were never proved.”<sup>263</sup>

#### **Afghan Management & Repatriation Strategy 2010-2012**

[AMRS] provisions that empower law enforcement officials:

- **Clause IX, sub-clause [ii]:** “Unregistered refugees are to be considered as illegal immigrants and need to be deported/ dealt with under the law of land.”
- **Clause IX, sub-clause [iii]:** “A separate dedicated force to trace the unregistered Afghans be formed as local police has been stretched too much these days to accomplish the important task.”
- **Clause IX, sub-clause [iv]:** “It must be mandatory that all Afghans living in areas other than camps be registered with the local police stations.”
- **Clause IX, sub-clause [xxvi]:** Increased and effective role and responsibilities of Frontier Corps, Frontier Constabulary, Levies and border force to effectively control cross border movements.”
- **Clause IX, sub-clause [xxviii]:** “After setting a deadline through media campaign, unregistered refugees may be repatriated through the provincial governments, local police/authorities with the assistance of UNHCR.”

#### **Discuss:**

- 1] In light of the many ways in which Pakistani law enforcement authorities already interact with registered Afghan citizens under the AMRS, is there any cause for concern that they may be subjected to torture?
- 2] In your work, have you heard of, or come across, registered Afghan citizens who have been, or have alleged that they were, tortured by Pakistani authorities? What actions did you take in response?
- 3] Is Article 14[2] of the Constitution, which is a Fundamental Right, subject to any limitations or derogations? Based on the express wording of Article 14[2], other than when it is used as an investigative technique, is torture prohibited in other circumstances? For instance, in order to extract a bribe, or for discriminatory purposes?
- 4] Can Article 14[2] be used in a writ application or civil suit on behalf of registered Afghan citizens living in Pakistan? If so, what kind of writ application, and what kind of civil suit? Who has standing to bring such a writ application or suit? Can Article 14[2] be used in political advocacy on behalf of Afghans in general by I/NGOs? How?

<sup>263</sup> Human Rights Commission of Pakistan. ‘Afghan Refugees in Pakistan: Push Comes to Shove’ [Lahore: April 2009] at 16.







*[d] any law providing for the taking over of the management of any property by the State for a limited period, either in the public interest or in order to secure the proper management of the property, or for the benefit of its owner; or*  
*[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 of citizens; or*  
*[iii] providing maintenance to those who, on account of unemployment, sickness, infirmity or old age, are unable to maintain themselves; or*  
*[f] any existing law or any law made in pursuance of Article 253. [4] The adequacy or otherwise of any compensation provided for by any such law as is referred to in this Article, or determined in pursuance thereof, shall not be called in question in any court."*

#### Article 24, Protection of property rights

In summary, registered Afghan citizens living in Pakistan are secured from unlawful dispossession of their property, but are not guaranteed the right to purchase, possess and sell their property, moveable or immovable.

#### **Immovable Property [The Reality]:**

The reality is that registered Afghan citizens living in Pakistan who can afford to purchase immovable property have found creative ways to overcome the absence of property acquisition, possession, and sale rights, including through the unlawful acquisition of Pakistani National Identity Cards [CNIC] and passports which guarantee them the right to acquire, hold and dispose of property, or by purchasing property under the name of a trusted Pakistani relative or associate, amongst other means. "Both such types of transactions, however, are fraught with risks, and in the case of a dispute the Afghan party would always be in a weaker legal position. The security of transactions, therefore, depends upon the ability of a party to use its financial power to bribe officials, or its ability to influence outcomes through political and social connections. In this way registered Afghan citizens face higher transactions costs in securing and maintaining property rights . . ." <sup>265</sup> It must be noted that transactions in the formal property market are limited to relatively small, but affluent, segment of the registered Afghan population, with the majority operating in the informal property market due to their limited financial means. Also, a significant proportion of registered Afghan citizens live on informal and irregular settlements in urban areas of Pakistan, which do not have full legal security of tenure.

#### **Movable Property [The Reality]:**

As with immovable property, the 'right to acquire, hold and dispose' of movable property is not guaranteed for registered Afghan citizens living in Pakistan, but they are protected against unlawful dispossession of their existing property. The problem for registered Afghan citizens arises when the purchase or usage of such property involves some form of registration or issuance of licences by the GoP, which require the person to hold a CNIC or passport. As a result of such regulatory barriers registered Afghan citizens living in Pakistan – the vast majority of whom do not hold a Pakistani CNIC and have not been issued a passport by the GoA – are restricted from accounts in most banks [although a limited number of banks have allowed them to use their PoR cards as identification], they cannot be issued SIM cards for their mobile phones, and cannot purchase or register a vehicle in the formal market, among other restrictions, since all these transactions require a CNIC or passport. Even if they acquire a vehicle, the issuance of driving licences by traffic police also requires a CNIC or passport. However, in practice, registered Afghan citizens with financial means 'acquire, hold and dispose' of all manner of movable property in Pakistan. As with immovable property, the registration process is either done in the name of a Pakistani associate, or in their own name where they have unlawfully obtained a CNIC. As with immovable property acquired through such methods, if a dispute arises, the Afghan party is in a considerably weaker legal position, and relief usually depends on the amount of financial, political or social capital that he/she has in order to bribe officials or influence the outcome.

<sup>265</sup> Collective for Social Science Research. 'Afghans in Peshawar: Migration, Settlements and Social Networks' [Karachi: January 2006] at 27.

When discussing registered Afghan citizens' movable property in Pakistan it is worthwhile to look at the Tripartite Agreement's provisions with respect to movement of goods in the context of repatriation to Afghanistan. The Agreement speaks of the exemption from all custom duties, charges and tariffs with respect to returnees' household, non-commercial items i.e. "personal or communal property, including household and electronic items, food [UNHCR/WFP food packages] and livestock" as well as waiver of fees and taxes for "vehicles, including those, which are part of the personal property of returnees . . ." Clearly, it would not be possible to speak of movement of personal goods across borders if registered Afghan citizens living in Pakistan never had the defacto right to purchase and own movable property in the country to begin with.

**Afghan Management & Repatriation Strategy 2010-2012:**

- **Clause IX, sub-clause [v]:** "NADRA should launch a special drive to detect and cancel NICs passports etc, fraudulently obtained by refugees and discourage the tendency of obtaining illegal NICs, passports and domicile certificates etc."
- **Clause IX, sub-clause [vii]:** "Those refugees who have unproductive investments as in houses should be given reasonable time to dispose off their properties. They should be allowed stay visa for one year." The underlying aim of this provision seems to be to prepare these individuals for eventual repatriation. Thus, the one year time frame seems reasonable, as long as the repatriation that is being facilitated is voluntary.
- **Clause IX, sub-clause [vi]:** "Those refugees who have invested over 5 million in productive business should be allowed to continue their businesses and may be given work permits for a specific period of time."
- **Clause IX, sub-clause [viii]:** "If an Afghan or groups of Afghans want to bring investment to Pakistan of over Rs.50 million, they may be encouraged to do so. All countries in the world encourage investment." It remains uncertain how the GoP plans to encourage Afghan investment in Pakistan without ownership rights for investors, that can be protected through the courts, and that extend to a moveable and immovable property.
- **Clause IX, sub-clause [xvi]:** "All land lords to report their Afghan tenants to the respective Commissioners for Afghan Refugees and local police stations in the urban and rural areas. Land lords to rent properties to Afghans very sparingly and in genuine cases only to registered refugees."

**Discuss:**

- 1] If NADRA detected that a registered Afghan citizen had unlawfully obtained a CNIC and used it to purchase a house in Pakistan, what do you think would happen to an Afghan purchaser? To the house? Would Article 24 of the Constitution afford any protection to the registered Afghan purchaser?
- 2] Do you think the inability of registered Afghan citizens to "acquire, hold and dispose" of property in Pakistan contributes to the high incidence of Afghans unlawfully obtaining Pakistani CNICs? What solutions would you propose?
- 3] From your knowledge or experience, are there any other kinds of property transactions that registered Afghans are legally restricted from engaging in, other than those discussed above?
- 4] Is Articles 24 [Fundamental Rights] subject to any limitations or derogations? Are the limitations reasonable?
- 5] Can Article 24 be used in a writ application or civil suit on behalf of registered Afghan citizens? If so, what kind of writ application, and what kind of civil suit? Who has standing to bring such an application or suit? Can Article 24 be used in political advocacy on behalf of registered Afghan citizens by I/NGOs? How?

**PLEASE TAKE NOTES FOR PRESENTATION:**

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### Exercise 3

#### Right to Education

*[1] No person attending any educational institution shall be required to receive religious instruction, or take part in any religious ceremony, or attend religious instruction, if such instruction, ceremony or worship relates to a religion other than his own.*

*[2] In respect of any religious institution, there shall be no discrimination against any community in granting of exemption or concession in relation to taxation.*

*[3] Subject to law,*

*[a] no religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any educational institution maintained wholly by that community or denomination; and*

*[b] no citizen shall be denied admission to any educational institution receiving aid from public revenues on the ground only of race, religion, caste or birth.*

*[4] Nothing in this Article shall prevent any public authority from making provision for the advancement of any socially or educationally backward class of citizens."*

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

*"The State shall provide free and compulsory education to all children of the age of five to sixteen years in such manner as may be determined by law."*

Article 25A, Right to education

#### Afghan Management & Repatriation Strategy 2010-2012:

- **Clause IX, sub-clause [x]:** "Afghan students should be allowed to study and complete their education in Pakistan. They should in fact be encouraged to study here. This may be regarded as a battle for the hearts and minds of future generations of Afghans."
- **Clause IX, sub-clause [xix]:** "The details of the already enrolled Afghan students in Pakistani madrissahs be shared with Ministries of SAFRON and Interior. However, all madrissahs be advised to discourage enrollment of Afghan students."

However, Pakistan is facing what has been termed an "education emergency" with a mere 1.5% of GDP currently being spent on education, the result of which is that one in ten of the world's out-of-school children is Pakistani.<sup>266</sup>

#### Discuss:

- 1] From your knowledge, what kinds of educational opportunities do registered Afghan children and youth have in Pakistan? Primary? Secondary? Tertiary or Professional Education? Scholarships? Reserved seats?
- 2] Are there any barriers to accessing education that registered Afghan children or youth in particular face? If yes, how can these barriers be overcome? Are registered Afghan girls and boys afforded equal educational opportunities? If not, how can the differences in opportunities be overcome?
- 3] Does Clause IX, sub-clause [xix] of the AMRS dealing with registered Afghan students in Madrassas conflict at all with Article 22[3] of the Constitution?
- 4] Are Articles 22 & 25A [Fundamental Rights] subject to any limitations or derogations? Is Article 37 [Principles of Policy] subject to any limitations or derogations? Are the limitations real or perceived i.e. does Pakistan have sufficient resources to provide for the education of registered Afghan children? If not, are there other sources of funding for education that are being, or could be, tapped?
- 5] Can Articles 22 & 25A be used in a writ application or civil suit on behalf of registered Afghan children? If so, what kind of writ application, and what kind of civil suit? Who has standing to bring such an application or suit? Can Articles 22 & 25A be used in political advocacy on behalf of registered Afghan citizens by I/NGOs? If so, How?

<sup>266</sup> The Pakistan Education Task Force, 'Education Emergency Pakistan,' DAWN, March 9, 2011 [Accessed online on April 9, 2011 at: <http://www.dawn.com/2011/03/09/education-emergency-pakistan.html>].

PLEASE TAKE NOTES FOR PRESENTATION:

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## Group Activity 2

### Family law issues

The participants will be divided into 4 groups and presented with hypothetical scenarios of family law disputes arising between two parties. The scenarios are meant to engage participants in a discussion and relate their knowledge of family law to practice.

Each group will apply the relevant laws to the scenario it has been assigned and formulate a plan of action and advice for the parties involved and report their findings and present an analysis of the hypothetical dispute.

The four scenarios are given below:

#### Scenario 1

##### *Divorce/'khula'*

<b>Title of case</b>	<b>Plaintiff [female] v Defendant [Lahore]</b>
<b>Subject matter</b>	Suit for dissolution of marriage on the basis of <i>Khula</i> <sup>267</sup>
<b>Summary of Facts</b>	The marriage took place between the parties – both registered Afghan citizens living in Pakistan – in 2008. Initially for a few months the relations between the spouses remained cordial, however, with the passage of time the behavior of the defendant towards the plaintiff changed. The plaintiff was subject to ill-treatment by the defendant, and he sometimes physically assaulted her following petty disputes which made the relations between the parties so strained that “extreme hatred developed in the heart of the plaintiff for the defendant.” Therefore she is said to have preferred death instead of remaining with the defendant as his wedded wife, hence the suit for dissolution of marriage by the plaintiff on the ground of <i>Khula</i> .
<b>Procedural History &amp; Decision</b>	The case was filed in 2010 and the family trial court, initially through a summons and later through a newspaper publication, summoned the defendant to appear before the court and answer the claim. He did not appear therefore the court decided the case ex-parte against the defendant with the observation that “in absence of rebuttal the case is decreed ex-parte”.
<b>Relevant legislation</b>	Family Court Act 1964; Muslim Family Laws Ordinance 1961; West Pakistan Muslim Personal Law [Shariat Application] Act 1962.

<sup>267</sup> ‘Khula’ is a form of separation in which the wife alleges that it is not possible for her to live with her husband. Rather than forcing them to live in a hateful union, the law grants the separation but usually also requires the wife to return any tangible benefits conferred on her by her husband.

PLEASE TAKE NOTES FOR PRESENTATION

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**Scenario 2**

**Custody**

Title of case	Applicant [female] v Respondent [Quetta]
Subject matter	Civil case for guardianship and custody of children, following a <i>jirga</i> decision
Summary of Facts	The registered Afghan applicant married with the registered Afghan respondent after the death of her first husband, in accordance with Islamic injunctions. Her first husband – who was the brother of the respondent – died due to natural causes and from that marriage four children were born, while from the marriage with the respondent one child was born. The applicant alleged that the respondent was a drug addict and always used abusive language towards her. She further alleged that his treatment of her was cruel and inhuman, which made her and her children’s lives miserable. One day, she was thrown out by the respondent from his house, and he forcibly kept her two elder children from her. Since that time the applicant has been living in her brother’s house and the respondent neglected his maintenance obligations toward her.
Procedural History & Decision	Four years earlier – before the present case – the applicant obtained a divorce from the respondent through a court decree. The applicant is now seeking guardianship and custody of all her children aged 7-12 years; hence the present case was filed in 2010. The respondent is contesting the case alleging that the applicant left his home, and while the divorce litigation was pending in the civil court he divorced her through a <i>jirga</i> based on mutual agreement and free consent. According to the <i>jirga</i> ’s decision, the respondent is entitled to custody of the children. Hence, the respondent alleges that the application is devoid of merit and should be dismissed. The case is under process before a Family Court.
Relevant legislation	Guardians & Wards Act 1890; Family Court Act 1964; Muslim Family Laws Ordinance 1961; West Pakistan Muslim Personal Law [Shariat Application] Act 1962.

## PLEASE TAKE NOTES FOR PRESENTATION

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### Scenario 3

#### *Jactitation of Marriage*<sup>268</sup>

<b>Title of case</b>	<b>Plaintiff [female] v. Defendant No. 1 [male] &amp; Defendant No. 2 [male] [Quetta]</b>
<b>Subject matter</b>	Family law suit for jactitation of marriage
<b>Summary of Facts</b>	A registered Afghan woman [plaintiff] alleged that being an adult she solemnized a marriage of her choice with a registered Afghan man [‘A’] according to Muslim rites before a court of competent jurisdiction in Quetta and duly registered the marriage in 2009. She was living happily with her husband but one day when her husband was away, a dispute took place between her and her mother-in-law following which she approached the local police to register a domestic violence report against her in-laws. The police took her before the court of a Judicial Magistrate. The Magistrate ordered to have her sent to a <i>Dar ul Aman</i> (house of safety), a state shelter for women and children. After sometime her husband held a meeting with her in the <i>Dar ul Aman</i> and she agreed to return to his home, therefore, the husband filed an application before the competent court to have her released from the <i>Dar ul Aman</i> . During the court proceedings an elderly woman claimed that the plaintiff is married with her son i.e. defendant # 1. Since the plaintiff had married someone of her own choosing – against the wishes of her parents – therefore the plaintiff’s father also filed different applications alleging that the plaintiff is already married with defendant # 2.
<b>Procedural History &amp; Decision</b>	The plaintiff instituted a constitutional writ petition before the Balochistan High Court. However, the High Court directed the plaintiff to approach the family courts since they are competent to decide such cases involving factual determinations which are not normally considered in writ petitions, hence the plaintiff instituted the present case in 2010. The plaintiff requested the court to: restrain the defendants from raising allegations that they were married to her; declare that their <i>Nikahnama</i> [s] [if any] were forged, and therefore null and void; and further to declare that plaintiff is lawfully married to ‘A’ only. The plaintiff is still residing in the <i>Dar ul Aman</i> and is likely to remain there till the case is decided. The case is in progress before the Family Court, Quetta.
<b>Relevant legislation</b>	Family Court Act 1964; Muslim Family Laws Ordinance 1961; West Pakistan Muslim Personal Law [Shariat Application] Act 1962, Qanoon-e-Shahadat Order 1984

<sup>268</sup> Jactitation is when one party maliciously boasts or gives the impression that he or she is married to the other. In such cases, in order to prevent everyone getting the impression that they are married, the aggrieved party will bring a suit of ‘jactitation of marriage’, in which the petitioner alleges that the respondent is boasting that he or she is married to the petitioner, and prays for the court to make a declaration of nullity, and a decree putting the respondent to perpetual silence thereafter. To the suit, the respondent has three defences: [i] denial of boasting; [ii] the truth of the representations [impressions] he or she has given; and [iii] allegation that the petition acquiesced [passively took part in, or did not actively stop] in the boasting of the respondent.

## PLEASE TAKE NOTES FOR PRESENTATION

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### Scenario 4

#### Family reunification

<b>Title of case</b>	<b>Petitioner v. Respondent and others [Quetta]</b>
<b>Subject matter</b>	Family reunification; constitutional petition under Article 199 of the <i>Constitution of Pakistan</i> , 1973 to the effect that petitioners' daughter along with his grandchildren be produced before the court
<b>Summary of Facts</b>	According to the petitioner – a registered Afghan citizen living in Pakistan – his daughter and son were married to the respondent's – also a registered Afghan citizen living in Pakistan – son and daughter respectively on the basis of ' <i>Watta Satta</i> '. <sup>269</sup> After sometime, the petitioners' son-in-law started to beat his wife [i.e. the petitioners' daughter]. The maltreatment and cruelty of the respondent made the life of the petitioners' daughter miserable. As a result, the petitioner involved the local elders to resolve the issue through a <i>jirga</i> but the respondent did not repent his ways and instead moved away with the petitioner's daughter without informing him of their whereabouts. After much effort the petitioner traced the respondent's location and went there but was not permitted to meet his daughter and was threatened not to return. Thereafter the petitioner visited the local police station to seek assistance to meet with his daughter but was unsuccessful.
<b>Procedural History &amp; Decision</b>	A petition was instituted before the Balochistan High Court in 2009 requesting that the petitioner's daughter and grandchildren be produced before the Court, so that he may be satisfied that they are alive and well. Through various inquiries and issuing strict directives to the local police, the petitioners' daughter was finally produced before the court. The court gave her the option of either going with her parents or staying with her husband. She opted to go and stay with her parents. The court ordered that the petitioner's daughter may stay with the petitioner as long as she desires and the minors may not be taken from her possession, save in accordance with law. The father of the children, however, was entitled to visitation with his children.
<b>Relevant legislation</b>	Constitution of Pakistan 1973; Code of Criminal Procedure 1898; Code of Civil Procedure 1908, High Court Rules & Orders 1974

<sup>269</sup> *Watta Satta* is a tribal custom of exchanging daughters in marriage between two families. That is, both families must have a daughter and a son and be willing to betroth them to a daughter and son of the other family.





# Roundtable Discussions

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## Roundtable Discussion 1

### Administrative Remedies: The Federal & Provincial Ombudsman [Mohtasib] Offices

Participants are required to answer the following questions and engage in debate over the effectiveness of the Mohtasib for registered Afghan citizens living in Pakistan for resolution of administrative issues, that is, maltreatment by public authorities, such as the police and other law enforcement agencies.

#### **Question 1**

##### ***Referral to Federal/Provincial Mohtasib***

**Have you ever referred your registered Afghan clients to the Federal or Provincial Ombudsman?**

YES

NO

**If yes, what was the issue?**

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**How was it dealt with?**

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**Were your clients satisfied with the result?**

YES

NO

**If not, what were the reasons for their dissatisfaction?**

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**Question 2**

**No referral to Federal/Provincial Mohtasib**

**If you have never referred registered Afghan citizens living in Pakistan to the Federal or Provincial Ombudsman, what are the reasons?**

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**Would you do things differently now that you are aware of their mandate?**

YES

NO

**If no, what are the reasons?**

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**If yes, explain what convinced you to do so?**

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## Roundtable Discussion 2

### Arrest & Detention of Registered Afghan Citizens under Criminal & Foreigners' Laws

Participants are required to answer the following questions and engage in debate on the practices of arrest & detention of registered Afghan citizens living in Pakistan by analyzing current mechanisms for their protection, in particular the role of the Commissionerate of Afghan Refugees [CAR], and advocacy strategies such as awareness campaigns to lobby for change.

#### Question 1

##### *CAR Protection Mechanisms*

To what extent is the 'protection' related mechanism of CAR formalised?

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Would it be worthwhile to have a focal person for 'protection' or a 'Protection Division' within CAR to coordinate and facilitate political advocacy between I/NGOs and the government actors [Home Department, Ministry of Interior, etc.]?

YES

NO

If no, what are the reasons?

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If yes, explain the reasons why you think so?

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#### Question 2

##### *Endorsement of Private Member's Bill: Call for Change*

Do you think an awareness raising campaign to endorse the adoption of the Private Members Bill is worthwhile? What practical strategies would you suggest to get it off the ground?

YES

NO

Please state your reasons

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# Roundtable Discussion 3

## Citizenship & Naturalization of Registered Afghan Citizens Living in Pakistan

Participants are required to answer the following questions and engage in debate on the prevailing laws governing citizenship and naturalization and their application to registered Afghan citizens living in Pakistan, by analysing the practical hurdles that prohibit this option for them, and make suggestions for advocacy or reform.

### Question 1

#### *Acquiring Citizenship for Registered Afghan Citizens living in Pakistan*

Have any of your registered Afghan clients ever tried to access to Pakistani citizenship through any of the above means?

YES

NO

If yes, what were their experiences?

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Were they successful in acquiring Pakistani citizenship?

YES

NO

If yes, what sorts of challenges did they face?

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What is the best way to engage in advocacy regarding citizenship by birth or naturalization for registered Afghan citizens living in Pakistan?

LEGAL ADVOCACY

POLITICAL LOBBYING

Please state your reasons

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## Roundtable Discussion 4

### Employment & Labour of Registered Afghan Citizens Living in Pakistan

Participants are required to answer the following questions and engage in debate on the prevailing laws governing employment and labour of registered Afghan citizens living and working in Pakistan, and the role of I/NGOs, UN agencies, and CSOs in providing relief and aiding resolution of such disputes.

#### Question 1

##### *Employment & Labour Disputes Concerning Registered Afghan Citizens living in Pakistan*

Have any of your registered Afghan clients ever come to you with labour or employment disputes?

YES

NO

If yes, what types of disputes?

[Please tick the relevant option. You may choose more than one option]

Delayed payment of wages

Unpaid wages

Health & safety at work issues

Workplace harassment

Discrimination in employment

Wrongful dismissal

Debt bondage/forced labour, etc

Others, if any:

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#### Question 2

##### *Towards Resolution of Employment & Labour Disputes*

In what ways did you assist them?

[Please tick the relevant option. You may choose more than one option]

Legal action in Civil Courts

Legal action in Labour Courts

Alternative Dispute Resolution

Community based resolution mechanisms  
[for example, Afghan Jirga, etc]

Other forums, if any:

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**Please state your reasons for choosing one of the above dispute resolution mechanisms**

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**Were these forums successful in resolving their disputes?**

YES

NO

**If yes, please state why they were successful**

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**If unsuccessful, what sorts of challenges were faced?**

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# Ministry of States & Frontier Regions Policy for Registered Afghan Citizens Living in Pakistan: Afghan Management & Repatriation Strategy 2010 – 2012

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## Afghan Management & Repatriation Strategy 2010 – 2012

### Background

The strategy for Afghan refugees for the years 2007-2009, framed in consultation with all the relevant stakeholders, was approved by the Cabinet on 9th May, 2007 following the recommendations of a Cabinet Committee. The targets of the strategy, which aimed at complete repatriation of the refugees up to end of 2009 could not be achieved as the concerned government departments and provincial governments did not keep up with the given timeframe and the security situation in the region deteriorated. UNHCR stressed for a flexible and open ended policy as early as 2007, while the Government of Afghanistan also requested for review of the targets for repatriation due to non-conducive environment in the region. As a consequence there are still 1.7 million registered besides and estimated 1.00 million unregistered Afghan refugees residing in Pakistan. The issues which continue to overshadow the repatriation process include lack of sustainability and recycling, lack of conducive environment and absorption capacity in Afghanistan, overall security situation in the region besides the absence of required level of international support and funding from the donor agencies.

### AMRS 2010-2012

During a meeting of the Prime Minister with the UN High Commissioner for Refugees in August, 2008, it was agreed that a revised repatriation strategy will go beyond 2009. Subsequently, in the 15th Tripartite meeting held in Islamabad on 29th August, 2008 the Government of Pakistan announced that the Repatriation Strategy 2007-2009, would be reviewed beyond 2009. It was also decided that the revised strategy will be on a medium term basis and linked with the Afghanistan National Development Strategy (ANDS) for the period 2009-2013.

2. In accordance with the announcement of the government and to regulate and manage the Afghan refugees in Pakistan in future, a revised **Management and repatriation strategy for Afghan refugees for the years 2010-2012** has been framed which encompasses all aspects of the refugees' issues including repatriation and reintegration. So far, inputs have been received from Ministry of Interior and its departments such as FIA, NADRA, Ministry of Foreign Affairs and the Provincial Governments of NWFP and Punjab besides the Project Director, Afghan Refugees Repatriation Cell. This Management Strategy takes into account the legal and illegal Afghan refugees living in Pakistan. The revised strategy will focus on the following:
  - I. Repatriation to and reintegration of refugees in Afghanistan
  - II. International support for refugees and repatriation
  - III. Host community development
  - IV. Development of refugees affected areas
  - V. Addressing security concerns in Pakistan due to refugees presence
  - VI. Border Management/ crossing to control recycling
  - VII. Constitution of a high powered body to address Afghan refugees issues both in Pakistan and Afghanistan for durable solutions

## REPATRIATION OF AFGHAN REFUGEES IN PAKISTAN

Tripartite agreement regulates the repatriation and management of POR holders. The first agreement made in 2003 for three years and further extended in 2006 up to December, 2009. The Tripartite agreement envisages that the repatriation of Afghan refugees would be “voluntary and gradual with dignity”. This agreement is also required to be extended upto 31st December, 2012.

2. The biggest hurdle in the voluntary repatriation of the Afghan refugees has remained the non-conducive environment in Afghanistan mainly due to Government of Afghanistan's lack of infrastructural capacity and required level of focus on the returnee issues. But as decided in the Brussels Conference, Afghan National Development Strategy (ANDS) is to be implemented up to 2013. This envisages a plan for reintegration of returnees inside Afghanistan for a durable solution to the problem. Another issue which has not kept the repatriation process at desired pace is the security concern of the international community.
3. Repatriation, as a voluntary programme, is regulated by Tripartite agreement, therefore, it needs to be linked with ANDS to act as a pull factor. Linking the process with ANDS will require taking into account the absorption capacity of Government of Afghanistan and saving the returnees from inhuman suffering due to the continuation of hostilities and lack of governance inside Afghanistan. The Government of Afghanistan (Ministry of Refugees and Repatriation) has to update its counterpart in the GOP (Ministry of SAFRON) on the preparation and the yearly absorption figures inside Afghanistan. The GOP, as such, must have appropriate level of stakes in the ANDS.
4. The Government of Pakistan reserves the right to relocate the Afghan refugees from one camp to another or consolidate the camps due to security and administrative concerns. For repatriation purpose, Governments of Pakistan, Afghanistan and UNHCR would agree on yearly planning figure for repatriation for which GOA and UNHCR would make arrangements for reintegration.
5. The refugee camps closures and the yearly repatriation targets will be considered in consultation with members of the tripartite Commission as well as with the Provincial Governments. Presently, the following number of camps are located in different regions of Pakistan:
  - a) Total number of camps 42
  - b) Camps in NWFP 29
  - c) Camps in Baluchistan 12
  - d) Camp in Punjab 01

## II. INTERNATIONAL SUPPORT FOR REFUGEES AND REPATRIATION

The support of international community for the management of Afghan refugees in Pakistan and their repatriation to Afghanistan is deemed essential. The level of support has however varied in the past, mainly depending on the security concerns about the region. The fact that Pakistan has served as a host to largest refugee population in the region for the largest period of time and that this issue is also linked with overall security situation of the region must be highlighted at all international fora. UNHCR and other donor agencies need to attract more support not only for the refugees in Pakistan but also for providing appropriate shelters and economic incentives within Afghanistan to ensure their dignity in accordance with the international norms. The international community may also consider grant of food assistance and subsistence allowance for one year to create pull factors in Afghanistan.

2. In addition to the above, a central office in Afghanistan is necessary to ensure implementation of a sustainable reintegration plan. Exchange of information with GOP and guarantee of international support and UN agencies is also required. Model villages within Afghanistan may be established to encourage the refugees to return to their homeland.

## III. HOST COMMUNITY DEVELOPMENT

Host fatigue naturally exists in the regions with large concentration of the refugees' population for nearly three

decades. In the Brussels Conference of 2003, it was decided that the Government of Pakistan would be assisted in developing refugee impacted and host communities. While the UNHCR has extended some help to host communities in the past, the areas of concern including provision of water, sanitation, forestation, infrastructure, damage repair, burden on services etc require much more attention of the international agencies. It is imperative that the funding for the purpose produce actual results to pacify to the host communities. The concerned offices looking after the refugees such as Ministry of SAFRON/CCAR/CARs must be involved in the process to identify the areas which require the most attention for development/rehabilitation.

#### **IV. DEVELOPMENT OF REFUGEES AFFECTED AREAS**

As decided in the Brussels Conference in 2003, the international community must honour its commitment in relation to the regions which served as hosts to the refugee population and suffered land degradation, soil erosion, deforestation, shortage of water and other environmental hazards besides damage to the infrastructure and services. While the UNDP/UNHCR are set to launch the RAHA initiative, it is again important that the concerned government offices particularly the CARs as well as the Provincial Governments are taken on board to address the actual issues and to set the priorities for the affected areas' development/rehabilitation.

#### **V. SECURITY CONCERNS**

Keeping in view the prevailing security situation in the region in general and in Pakistan in particular, the Government of Pakistan will be required to strictly monitor certain Afghans. This may lead to trails under the law of the land and punitive actions. Information on such actions taken will be shared with UNHCR and other stakeholders. The unregistered/criminal Afghans will be dealt with strictly under the law.

#### **VI. BORDER MANAGEMENT**

Border management is another essential element of the security concerns arising from the illegal influx of Afghan nationals across the border. The border is porous and extends along the federally Administered Tribal Areas which are governed under a separate set of laws. The camp closure in Tribal areas has led to numerous problems in these areas including the refugees integration into the local community. The GOP has the right to address the issues of these illegal Afghans in the manner it deems fit. Any legislation required for the purpose may be promulgated in consultation with the concerned authorities.

#### **VII. CONSTITUTION OF A HIGH POWERED BODY TO ADDRESS THE AFGHAN REFUGEES PROBLEMS**

The lack of coordinated and concerted efforts in the past has proved that any attempt to successfully manage the refugees' problem may not produce the desired results in the absence of a high powered body consisting of representatives of all the concerned Federal and Provincial Government Departments as well as agencies to quickly and efficiently address the problems. Such a body would not only monitor the progress of benchmarks but look into unforeseen situations. The Committees at the Federal and Provincial levels, working with specific mandates and with periodical meetings may be constitutes as follows:

##### **FEDERAL LEVEL**

- Secretary SAFRON                      Chairman
- Secretary Interior                      Member
- Secretary Foreign Affairs
- Chief Commissioner Afghan Refugees
- Director General I.B
- Director General FIA
- Rep. of NADRA
- Home Secretary concerned (NWFP/Punjab/Baluchistan/Sindh)
- Secretary Excise and Taxation – Provincial
- Rep. of FBR
- Member Board of Revenue (Provincial)
- Rep. of FATA Sectt

##### **PROVINCIAL LEVEL**

- Secretary Home/Tribal Affairs      Chairman
- IG/DIG Police                              Member

- Commissioner Afghan Refugees
- Rep. of CCAR, Islamabad
- Rep. of FATA Sectt (not below Addl. Secy)
- Rep of I.B
- Rep of FIA
- Rep. of NADRA
- Rep. of Excise and Taxation Deptt
- Rep. of Board of Revenue

### **VIII. JOINT BILATERAL COMMISSION**

As agreed in the consultations for the Tripartite meeting, GoP and GoA will form a high level joint commission to oversee the issues/problems faced by Afghans in Pakistan and resolve so that their return and reintegration could be timely ensured. The CCAR will represent the GoP in the Commission. The GoP will also be given access to all information for smooth settlement of returnees in Afghanistan.

### **IX. TEMPORARY MANAGEMENT OF AFGHANS IN PAKISTAN**

It is understood that owing to the non-conducive environment in Afghanistan, many Afghans will not be able to return to their homeland in near future. The proposed high powered bodies at the federal and the provincial levels will therefore monitor the planning process and implementation of the following steps to manage the refugee population during the period 2010-2012:

- i) Keeping in view the voluntary nature of repatriation and lack of absorption capacity in Afghanistan, the timeframe should be reviewed in consultation with Tripartite Commission parties and extended up till 31st December, 2012. Planning figures should be set and reviewed each year.
- ii) Unregistered refugees are to be considered as illegal immigrants and need to be deported/ dealt with under the law of land.
- iii) A separate dedicated force to trace the unregistered Afghans be formed as local police has been stretched too much these days to accomplish the important task.
- iv) The deportation process should be simplified and UNHCR involved to assist their return.
- v) NADRA should launch a special drive to detect and cancel NICs passports etc, fraudulently obtained by refugees and discourage the tendency of obtaining illegal NICs, passports and domicile certificates etc.
- vi) Those refugees who have invested over 5 million in productive business should be allowed to continue their businesses and may be given work permits for a specific period of time.
- vii) Those refugees who have unproductive investments as in houses should be given reasonable time to dispose off their properties. They should be allowed stay visa for one year.
- viii) If an Afghan or groups of Afghans want to bring investment to Pakistan of over Rs.50 million, they may be encouraged to do so. All countries in the world encourage investment.
- ix) The Afghan refugees had a stabilizing effect on labour market in Pakistan. This advantage should be retained. The Government should consider granting renewable visas to one hundred and fifty thousand skilled and unskilled Afghans. The figure comes 0.093 % of the Pakistani population and 0.29% of work force.
- x) Afghan students should be allowed to study and complete their education in Pakistan. They should in fact be encouraged to study here. This may be regarded as a battle for the hearts and minds of future generation of Afghans.
- xi) Those single women who have lost their bread-earners and have no one to support them should be allowed to settle in Pakistan.
- xii) Being an international issue, the Federal Government should involve international agencies UNHCR, IOM, and other countries to resettle some Afghan refugees in other countries.
- xiii) Cross border visits of Afghan refugees elders from both countries may be arranged to exchange

information and find ways and means of sustainable return.

- xiv) It must be mandatory that all Afghans living in areas other than camps be registered with the local police stations.
- xv) All industrial establishments employing Afghan labour should report them for registration.
- xvi) All land lords to report their Afghan tenants to the respective Commissioners for Afghan Refugees and local police stations in the urban and rural areas. Land lords to rent properties to Afghans very sparingly and in genuine cases only to registered refugees.
- xvii) All businesses run by Afghans like restaurants, shops and vendors etc. to be registered and monitored.
- xviii) All businessmen and other Pakistani citizens to report Afghan employees working with them to the Commissioner, Afghan Refugees and local police stations and such employments must be discouraged.
- xix) The details of the already enrolled Afghan students in Pakistani madrissahs be shared with Ministries of SAFRON and Interior. However, all madrissahs be advised to discourage enrollment of Afghan students.
- xx) CCAR, CARs be recognized and strengthened as their existing capacity to manage and administer the camps and to monitor RAHA initiative is not sufficient. The UNHCR to provide a full time consultant for the purpose.
- xxi) Extension of PoRs to be extended up to 2012 through a notification.
- xxii) PCM (Proof of Card Modification) to correct and update the cards to continue. The PPV (Population Profiling verification) which aims to improve and verify information about the special needs of registered Afghans would be a joint venture of Pakistan and UNHCR.
- xxiii) ANDS in Afghanistan and VRC in Pakistan will be closely coordinated.
- xxiv) Camp management and camp consolidation will be decided in consultation with Provincial Governments and Provincial CARs.
- xxv) Periodic review will be carried out for identified benchmarks on repatriation.
- xxvi) Increased and effective role and responsibilities of Frontier Corps, Frontier Constabulary, Levies and border force to effectively control cross border movements.
- xxvii) The record/database of repatriated Afghans will be provided to FIA immigration check posts to prevent reentry.
- xxviii) After setting a deadline through media campaign, unregistered refugees may be repatriated through the provincial governments, local police/authorities with the assistance of UNHCR.
- xxix) NADRA, in collaboration with UNHCR, may install monitoring system to control cross border movements using the registration database to avoid recycling and illegal immigration.

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