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Pakistan's Preventive Detention Regime in the Age of Human Rights

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ABSTRACT

The current application of preventive detention laws is complex in many countries, with a significant challenge being the detention of suspects before they are brought before a magistrate or judge. There is an immediate need for reforms. In countries like Pakistan, the raison d'être for this practice has been the war against terrorism and the need to thwart insurgent activities preemptively. Thus, leeway is afforded to the branches of the executive that are involved in the controversial practices of enforced disappearances, preventive detention, and pretrial detention. A flawed understanding of the presumption of innocence principle and incorrect application of detention laws have further violated the human rights of suspects. This study aims to explore these challenges through an analysis of preventive detention laws. It seeks to distinguish preventive detention from similar practices prevalent in Pakistan. In doing so, it makes a case for the country to enhance its detention policies to better protect human rights. It contributes to the intellectual discourse on Pakistan's struggle to comply with internationally binding and non-binding legal frameworks with concrete recommendations.

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I. Introduction

Preventive Detention Laws in the Indian Subcontinent originated during the days of the British Raj (Mian, 1970); they were adopted by the nascent government of Pakistan post-independence and are now considered etched in the criminal justice system of Pakistan, so much so that even the members of the national legislature were not exempted from its execution (The Members of Majlis-e-Shoora (Parliament) Immunities and Privileges Act, 2023). This practice, reportedly, has the potential to curtail the human rights of the detained and encourage public disdain for the legal organs of the state, both internally and externally, yet there appears to be no sign of a revocation.

This research aims to assess the constitutionality of the pretrial or preventive detention regime in force in Pakistan and its compliance, or lack thereof, with International Law and broader human rights laws. Therefore, as a caveat, it needs to be mentioned here that the constitutional treatise on preventive detention, i.e., Article 10 of the Constitution of Pakistan, is, in fact, an eidetic copy of Article 10 of the International Covenant on Civil and Political Rights, which is the core International Human Rights Document on the matter. Therefore, an analysis of one covers both sets of principles.

It is also important to clarify that preventive detention is considered a form of pretrial detention (Pervou, 2023); however, there appear to be distinct nuances between pretrial and preventive detention. Regardless, these have been sequestered in this discussion to focus on the predominant theme. Based on the fact that the two phenomena have a shared intent of thwarting future criminal activities, clarity has been prioritized over confusion. Therefore, preventive detention will be the sole focus of this article and referred to as ‘PD’ hereinafter.

Another important caveat is that the focus of the article is on PD arising out of potential crimes and offences, hence any detention that can be classified as preventive but does not involve a crime would not be the subject of this study, for instance, temporary detention of individuals exposed to contagious diseases (e.g., COVID-19, Ebola) to prevent spread, or the detention of asylum seekers or undocumented migrants pending identity verification or deportation, not due to criminal charges. Similarly, protective custody of police or emergency citizen internment during war times by the military, or witness protection programs would not fall under the scope of the article.

The article follows the following structure: First, the article would attempt to define and expound PD and its place in International human rights law; a deep dive into the PD regime applicable in Pakistan, with a focus on the relevant laws and leading cases, would follow this. An analysis of rules and practices and the challenges arising out of them will precede the conclusion. Finally, the paper will conclude with recommendations to improve the PD Law in force, thereby increasing its compliance with international

commitments and human rights standards.

1.1 Preventive Detention: Towards a definition:

Like most transnational phenomena, preventive detention does not hold a universally accepted nor widely appraised definition. However, there is a differential nuance among human rights organizations and legislative instruments worldwide. The transnational legislative understanding of PD is encapsulated by Macken, who purports its legislative definition to be a "precautionary measure against persons who are predicted to be involved in criminal conduct in the future (Macken, 2005). On the other hand, the United Nations defines preventative detention as a process through which persons are "arrested or imprisoned without a charge (Pervou, 2023)." Similarly, the International Committee of the Red Cross (ICRC) defines detention as the "deprivation of liberty ordered by the executive authorities when no specific criminal charge is made against the individual concerned (Macken, 2005)."

These definitions reveal that rights organizations are more concerned with violations of an individual's liberty than legislatures, which aim to justify the curtailment of freedom by potentially intercepting and preventing crime. Similarly, the rights definition emphasizes the need for a formal indictment or charging of the accused, indicating the non-existent role of state courts and other judicial organs. It is relevant to highlight here that due to the minimal role of courts in PD, it is seldom referred to as administrative detention.

In the absence of a globally agreed-upon definition, some elements can be identified in Macken's work as consistent in the cross-jurisdictional preventive detention definition: First, a restriction on individual liberty. Second, a lack of formal indictment or criminal charges preceding the detention. Thirdly and importantly, the judiciary plays a minimal role before the formal indictment. Finally, the purpose of the detention ranges from severe criminal offenses to matters of national security (Macken, 2005).

1.2 Preventive Detention and Enforced Disappearances

In the Pakistani context, both PD and forced or enforced disappearances are sometimes used interchangeably by citizens and journalists. Technically, both are related phenomena; the difference is that in forced disappearances, the culprits can also be non-state actors or state actors who deny responsibility for disappearances. However, the Working Group on Enforced or Involuntary Disappearances at the United Nations Human Rights Office of the High Commissioner requires the involvement or acquiescence of the government as an essential element of enforced disappearances (OHCHR, n.d.). Therefore, the difference between the two terms has more to do with lexical connotation,

and not much with legal discourse. The authors, however, contend that enforced disappearances, when sanctioned by the government, are the manifestation of the doctrine of preventive detention. Hence, this discussion applies to this context.

1.3 Detention and International Human Rights Law

In principle, preventive detention is permissible in International law as long as it is not arbitrary (Macken, 2005). Macken gives a two-pronged test to recognize arbitrariness, also called the two interpretations of PD; first, PD may entail arbitrariness if the procedure according to the applicable law was not followed, or second, when the applicable law contravenes principles of natural justice (Macken, 2005). Hence, the first interpretation focuses more on the procedural aspects of PD, while the second prioritizes substance. Moreover, the first interpretation allows states more flexibility in establishing a stricter and more invasive detention law that cannot be labeled as arbitrary simply because there was no procedural violation; however, this is balanced by the second requirement, which would intervene and challenge any provisions that breach principles of natural justice.

International law accepts the possibility of PD under the criminal justice procedure in peacetime as well as during war. PD in wartime is beyond the scope of this article. We will explore peacekeeping in peacetime through the lens of International Human Rights Law. This analysis will, however, focus on the International standards Pakistan is bound to follow.

Most International instruments have envisaged PD as a curtailment of the right to liberty (Kälin & Künzli, 2019). The Universal Declaration of Human Rights (UDHR), one of the landmark International Human Rights documents (Morsink, 1999) and considered an amalgamation of customary international practices (Hannum, 1998), states, "*No one shall be subjected to arbitrary arrest, detention or exile* (United Nations, 1948)." This highly influential and persuasive document is not strictly binding (Henkin, 1990). Nevertheless, its coterminous document, the International Covenant on Civil and Political Rights (ICCPR) includes a corresponding substantive right. Article 9 states:

"1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings,

and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation (United Nations, 1966)*."*

Even a cursory reading reveals that these documents only apply in cases where the detention can be termed as "arbitrary," fortifying the hypothesis that PD, in general, is not a violation of International Law. This affords significance to Macken's two-pronged tests of arbitrariness; the first interpretation of arbitrariness would regard PD "*even as a result of despotic, tyrannical, objectively unreasonable legislation, would therefore be acceptable under this Article of the ICCPR* (Macken, 2005. On the other hand, the second interpretation not only emphasizes the correct implementation of the law but also envisions that the law itself must *"conform to the principles of justice and dignity of the human person, and must not be inappropriate or unjust."*.

Furthermore, the test of arbitrariness is not a static but a constant affair. The United Nations Human Rights Committee (UNHRC), in its General Comments, emphasizes the need for periodic evaluations and maintains that detention may become arbitrary if the requirement of periodic reevaluation of PD's justifications is not observed (UN Human Rights Committee, 2014). It calls for an independent, impartial "specialized tribunal," empowered to release the detainee if need be (UN Human Rights Committee, 2014), to conduct 'periodic evaluations (UN Human Rights Committee, 2014).' During an evaluation, the detainee should be informed of the grounds of his detention (UN Human Rights Committee, 2014). Such grounds are required to be a part of a formally promulgated law. Notably, the law should not be too general or broad, as a broadly applicable law has an inherent tendency to augment arbitrariness (UN Human Rights Committee, 2014); an independent legal counsel should represent the detainee (UN Human Rights Committee, 2014). Notably, the general comments call for intermittent evaluations and a right to review the status of detention. Still, no right to challenge or appeal against the lawfulness of detention itself is envisaged (UN Human Rights Committee, 2014).

These General Comments, though not legally binding (Keller & Grover, 2012), are essential for the interpretation as well as reflective of the legislative intent behind international rules and treaties. Aside from UDHR, ICCPR, and General Comments of the UNHRC, there are other rules, namely: Body of principles for the protection of all persons under any form of detention or imprisonment, Standard Minimum Rules for the Treatment of Prisoners (or Nelson Mandela Rules), United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (or Bangkok Rules),

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), United Nations Rules for the Protection of Juveniles Deprived of their Liberty. These are specialized rules that reiterate the principles produced above, but their focus is on alternative and dedicated rules for the marginalized and protected groups under the principle of positive discrimination (Office of the United Nations High Commissioner for Human Rights, n.d.).

ICCPR is binding upon Pakistan by virtue of its being a signatory to the treaty. Pakistan ratified it on 23rd June 2010 (Shah, 2016). UDHR is more complicated, however. The document is not inherently binding, but due to it being regarded as reflective of Customary International Law, it is considered wholly applicable across all jurisdictions (Mantu, 2019). Pakistan is its signatory, yet there certainly are limitations to implementation owing to its non-binding nature (Steiner, Alston, & Goodman, 2008).

Hence, it is evident that there is hard law as well as persuasive soft law on PD that applies to Pakistan as a signatory or as a member of the community of nations. The problem, therefore, has more to do with an implementation gap and less to do with a dearth of laws.

2. Pakistan & Preventive Detention

2.1 Historical Development of the PD Regime in Pakistan

Pakistan's preventive detention law can be traced back to the Regulating Act of 1773, which introduced the implicit but non-accidental PD regime. This was followed by the much more explicit East India Company Act of 1793, a tool for suppression and oppression enforced by a colonialist power. Subsequent acts include the Defence of India Acts, passed in 1915 and 1939, with similar provisions (Harding & Hatchard, 1993, p. 173). These laws were carried over post-independence to Pakistan via legislative orders.

Unlike the British, who used detention as an exceptional measure in emergencies and hostilities, Pakistan adopted it permanently (Harding & Hatchard, 1993, p. 173). Hence, changing the nature of this law from an emergency fixture to a part and parcel of the criminal justice system. Following its adaptation, this extraordinary law has been an essential feature in all three of the country's constitutions with only minor amendments; this reflects the priorities of the past and present governments (Harding & Hatchard, 1993, p. 174). The amendments were indicative of the political turmoil in the country, with each such amendment meant to increase or decrease the purview of the PD regime. For instance, the power of judicial review exercised by the Higher Courts in cases of PD was curtailed in the Fourth and Fifth Constitutional Amendment Acts enacted in 1975 and 1976, respectively. The Courts were inhibited from hearing bail applications, hearing a case challenging the executive's detention order, or passing "any other interim order" on the plea of a detainee. The restrictions were tightened further after the declaration of

martial law in 1977. Nevertheless, a political power shift in 1985 resulted in a reversal of all these amendments.

Aside from the constitution, the PD regime in Pakistan includes the Public Safety Ordinances of 1949 and 1952, the Security of Pakistan Act of 1952, the Maintenance of Public Order Ordinance of 1960, the Defense of Pakistan Ordinances, and the Martial Law Order No. 12 (Harding & Hatchard, 1993, pp. 180–191). Recent acts that have a PD regime include the Anti-Terrorism Act (1997), the Actions (in Aid of Civil Power) Regulations, 2011, and the Protection of Pakistan Act (2014).

2.2 Pre-Analysis

The acts mentioned above together form the PD regime in Pakistan. Most of these acts overlap with each other and deal with security and public order, yet there is dissonance in terms of punishments and sentences awarded for similar offences. Some lay down general rules like the Protection of Pakistan Act, whilst others are more detailed, like the Anti-Terrorism Act. Therefore, for the sake of brevity, the article will solely focus on the Constitution's Article 10. First, it is the Grundnorm that transcends and guides all legislation (Khan, 2009). Second, Article 10 is reflective of ICCPR, the binding International Instrument that deals with PD. Lastly, the scheme in Article 10 of the Constitution provides the legal basis and guidelines for all and any forms of preventive detention law.

2.3 Analysis

2.3.1 Subjects and Justifications of Preventive Detention Law in Pakistan

According to Article 10 of the Pakistani constitution, any "person" can be detained; citizenship is not considered a requirement. An alien can also be detained, provided there are cogent reasons under the law. An alien can be hostile or an "enemy alien," but the term has been left undefined within the Constitution (Constitution of Pakistan, 1973, art. 10(4)).

The following grounds for detention are enumerated in the Constitution:

> *"persons acting in a manner prejudicial to the integrity, security or defense of Pakistan or any part thereof, or external affairs of Pakistan, or public order, or the maintenance of supplies or services* (Constitution of Pakistan, 1973, art. 10(7))*"*

The Article creates another category of individuals who can be detained:

> *"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* (Constitution of Pakistan,

1973, art. 10(7))*."*

The majority of these terms are left undefined, creating vagueness in interpretation. The generality and broad nature of these categories contribute to the arbitrariness of this law in line with the discussion above. What is understandable are the three categories of potential detainees: individuals who act against Pakistan on their own free will, individuals whom enemies of Pakistan employ, and, thirdly, the indeterminate alien enemies. The three categories are different from each other in terms of time limitation. The challenge exists in assessing whether an individual's actions have been prejudicial to the integrity of the country. Moreover, this judgment does not purport to be made by a learned judge but can be made by an administrative state official; this itself raises doubts about its fairness, both inherently and practically.

2.3.2 Limitations on Detention

A maximum of 3 months of detention is prescribed under the constitution before a person must be presented before a review board. The review board is required to conduct a review every three months. Accumulatively, detention can last for eight months in a twenty-four-month period; this is for a person detained for acting in a manner prejudicial to public order, or twelve months for other cases (Constitution of Pakistan, 1973, art. 10(7)). There is no limitation on the detention of *those employed by or working on behalf of the enemy* (Constitution of Pakistan, 1973, art. 10(7)). Similarly, there are no limitations to the detention of enemy aliens. The International Commission of Jurists has reported that these limitations are not effectively being applied, especially in the more sensitive regions that are already under the eyes of the global human rights watchdogs (Shah, 2014).

2.3.3 Safeguards

Article 10 provides for a judicial review in preventive detention cases. Moreover, orders of detention can be challenged through the invocation of the writ of *habeas corpus* of a High Court under Article 199. The article provides:

> *"(1) Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law,-*
>
> *(b) on the application of any person, make an order-*
>
> *(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* (Constitution of Pakistan, 1973, art. 199(1)(b)(i))*."*

As discussed above, during certain governments, predominantly the ones formed following martial law, the judicial review of PD cases has been suspended only to be reinstated after a regime change (Shah, 2014). As for writ jurisdiction, the courts in Pakistan rank 130th among 142 nations in the rule of law index (World Justice Project, 2022) and have a history of supporting military dictatorships. This casts serious doubts not only on the independence of the judiciary but on their willingness to impart justice through their inherent powers, which are at play when the writ jurisdiction is invoked (Hussain, 2018).

On the positive end, it is established through case law that individuals detained preventively are not required to await their appearance before the Review Board to seek judicial review of their detention (AIR 1952 Cal 26). The Court has also held that when PD is ordained through instruments passed in a "routine and mechanical manner, without giving due care and caution," this corrodes the validity of such documents, consequently turning the act of PD into an arbitrary action (Abdul Ghafoor v. Crown, PLD 1952 Lah 624). It further iterated that it is not the "satisfaction of the detaining authority alone which is sufficient" because the authority also has a duty "to satisfy the Court that there existed material on which any reasonable person could have formulated the opinion as to the necessity of the detention (Abdul Ghafoor v. Crown, PLD 1952 Lah 624)."

Key cases that have met their logical conclusion are discussed below. It is, however, acknowledged that some other cases that are still pending before the superior courts have been intentionally left out due to their pending nature.

Ghulam Jilani v. Government of West Pakistan is a landmark case on PD; this judgment empowered the courts to strike down PD. It made the courts more potent than the executive in this regard (Ghulam Jilani v. Government of West Pakistan, PLD 1967 SC 373). It also modified the *standard of review performed by the courts from subjective to objective*; it held that "the existence of reasonable grounds is essential, *and a mere declaration of satisfaction is not sufficient."* The Supreme Court subsequently held that *it was no longer acceptable for the authority to merely state its satisfaction before the court, the validity and reasonableness of the action required demonstration* (Hussain, 1993). The Karachi High Court further fortified this position in *Muhammad Yunus v. Government of Sindh*. It held, *"The exercise of power by the detaining authority is subject to the ascertainment of responsible grounds, which is a judicial or quasi-judicial function* (PLD 1973 Kar 694, pp. 709–710)*."*

Moreover, Article 10(5) of the Constitution of Pakistan states that when a person is preventively detained, the detaining authority must, within fifteen days, communicate the grounds on which the order for preventative detention was made. The language is plain in that fifteen days is the maximum time limit for the supply of grounds of detention (Mamoona Saeed v. Government of Punjab, 2007 P. Cr. L J 268,

para. 8).

The Lahore High Court considered the communication of the grounds of detention to be essential because "it is the material ingredient upon which the authority relies to pass orders of detention." The Court further held that the grounds of detention must precede the order, meaning that "first there should be grounds in the form of material which is to be considered by the authority (Mamoona Saeed v. Government of Punjab, 2007 P. Cr. L J 268, para. 10)." The Supreme Court of Pakistan held that the grounds given by the authority must be "complete and full," to share with the detainee the allegations permitting their detention (Govt of E. Pakistan v. Mrs R. B. Shaukat, PLD 1966 SC 286).

Article 10 of the Constitution preserves the right to challenge a detention order. A detainee must be afforded the earliest opportunity to make a representation against such an order, but there is no guarantee of legal counsel during this process. Enemy aliens have been completely denied a right to representation, as evident from the Kalbhushan Yadav case (Naseem, 2019). In most cases, the production of a detainee before the Review Board after a three-month detention period is often the earliest opportunity for detainees to have their case reviewed (Research Society in International Law, 2019). Article 10-A of the Constitution also calls for a fair trial and due process to be maintained throughout criminal proceedings (Constitution of Pakistan, 1973, art. 10-A).

According to Khan and others, in Pakistan, the provision of bail also safeguards against detention. Bail, enshrined in sections 496, 497, and 498 of the Criminal Procedure Code (Cr.P.C), can be used as a legal tool by a person to assert their innocence and protect themselves from unmerited detention; on the other hand, others can abuse it to avoid accountability (Khan, Ijaz, & Saadat, 2021). To summarise, Articles 9 and 10-A of the constitution of the country protect the right to freedom and presumption of innocence, and the Cr. P.C. safeguards this through the right to bail.'

2.3.4 Issues

Aside from the inherent adverse nature of the PD regime to the spirit of the International Human Rights Documents, there are ample practical issues with it as well. Firstly, a lack of implementation of the international human rights standards has created an implementation gap, which has exacerbated the trust issues the people of the country have in their poorly ranked judiciary (World Justice Project, 2022). The dearth of implementation is substantiated by the ignorant actions of law enforcement agencies, who are used to detaining people without paying heed to any of the protective frameworks; this has given rise to the infamous "missing persons" debate (Hassan, 2009).

Moreover, there is a plethora of laws applicable in the context of PD; this has contributed to the confusion about which of the laws shall be appropriate under a particular situation. The provincial nature of some of the statutes affords little certainty, but the question of procedural compliance remains. What adds to this predicament is the sporadic shift of the country's government from Democracy to Dictatorship (Memon et al., 2011). This political instability leads to amendments, which the new government later undoes, and the cycle of uncertainty continues.

As a developing country, Pakistan faces the challenge of rampant corruption (Khan, 2018). Officials are bribed to misuse bail(Tariq, 2019). What aggravates the plight of the general population is the sheer ignorance of the Police and law enforcers, who have negligible awareness of the legal standards and Human Rights considerations (Perito & Parvez, 2013). Even among the citizens, there are misconceptions regarding their rights; for instance, under a common misconception, custodial torture is considered permissible in the less educated segments of the population. This has contributed to an increase in cases of forced confessions, which are ultimately put out of the court's consideration (Burki, 2021). Bribery and corruption can also be regarded as contributors to the lack of transparent implementation of detention laws in Pakistan. Wachi and others report that bribery and corruption are some of the main factors behind the violation of the human rights of ordinary people in the country (Pickworth & Dimmock, 2021).

3 Analysis

We have analyzed the definition of the doctrine of PD and explored its relationship with International Human Rights Law. We have also discussed Pakistan's international obligations concerning PD together with its incumbent PD regime. Our discussion will now logically culminate in an analysis of the Pakistani PD laws and International Law standards, both comparatively and independently of each other. The final chapter, with solutions and recommendations, will follow.

In the spirit of comparative law, it is pertinent to mention here that other countries also have impugned PD detention regimes. The majority of such countries are authoritarian monarchies and dictatorships, and not constitutional democracies (Spytska, 2023). Pakistan is not the only country that claims to be a democracy but supports draconian laws such as PD. Japan, a first-world country, possesses peculiar PD laws that leave much to be desired (Arnold, 2023).

Fitzgerald said,

> "The criminal justice system is where we go to investigate a crime that has been committed, and then we try to find the person who committed the crime (Fitzgerald, 2005)."

Pakistani PD law is one step further on the ladder and seeks to respond preemptively to future

crimes committed by potential criminals. Additionally, International Human Rights Law considers PD as an extraordinary recourse to be invoked in unprecedented exceptional circumstances. Pakistan has foregone this vital element and made PD a permanent feature in its legal paradigm. Resultantly, instead of being used sparingly, PD has been the order of the day, even when dealing with political rivals ("LHC Suspends Preventive Detention of 123 PTI Activists," 2023), critical journalists, and even artists ("YouTuber Aun Ali Khosa Goes Missing in Lahore," 2023).

Article 10 of the Pakistani Constitution corresponds to Article 10 of the ICCPR as 'transplanted law (Pakistan Constitution, 1973, art. 10).' Juxtaposing the two articles reveals the identical nature of their texts, with the constitutional article designed in the mirror image of its corresponding article in the ICCPR. Yet, without the backing of implementation, this can be relegated to a mere cosmetic measure. This act of legal transplantation (Watson, 1974) also means that all the shortcomings of the original law are carried over to the constitutional provision; moreover, due to the social, cultural, and legislative differences between a domestic legal system and an International regime, the issue of homogeneity may cause lower levels of efficiency (Örücü, 2002).

Regarding specificity, Pakistani detention laws are supposedly specific, with severe and profound matters of *inter alia* terrorism, national security, and public order as their subject. Yet, as previously mentioned, their erratic and politically motivated application with an expansive interpretation has resulted in political opponents, activists, journalists, and even harmless comedians being targeted by state institutions.

Pakistan, being a common law country, subscribes to the principle of presumption of innocence (Nadeem, 2024). Unlike other jurisdictions, like the US (Bell v. Wolfish, 1979), the principle is not only considered a mere principle for determining the burden of proof during trials. Still, it is a sanctimonious and axiomatic doctrine reiterated and fortified by superior Pakistani courts (Nadeem, 2024). The same principle operates in stark contrast with the PD regime, with a solid need to harmonize the two. It is rightly said that in a criminal justice system forbearing preventive detention, a presumption of guilt replaces the presumption of innocence (Kitai-Sangero, 2009).

Among the issues are the severe procedural discrepancies; for instance, the report (International Commission of Jurists, 2017) compiled by Justice Project Pakistan claims that it is permissible for a police officer in Pakistan to detain any citizen without a warrant. There is no need for the arresting or detaining officer to show probable cause or proof of mal-intent.

The United Nations High Commissioner for Human Rights (UNHCR) report has pointed out the precarious situation of detainees. It has been highlighted that the number of detention cases is increasing

at an alarming rate. It stresses the need for the country to implement constitutional safeguards and ensure that detention is not arbitrary (Minahil Khan, 2021).

Bagchi and Paul report that Pakistan believes that its PD regime stands justified on account of its role in the war on terror. This does not, however, explain the disdain of law enforcement agencies for international human rights standards that have been transposed in Pakistani law via the constitution and other complementary regimes (Bagchi & Paul, 2018). This is especially true when the majority of detainees are mere political activists, journalists, and members of civil society (Rasool et al., 2024). The state has reportedly abused the PD doctrine to silence legitimate voices for human rights, particularly in Pakistan-administered Kashmir (OHCHR, 2019).

Pakistan also hosts an alternate judiciary of military courts, which are said to have followed a similar trend of violation of international standards (Hassan, 2023). Human rights groups and civil society leaders have assailed the Military Courts for violating the Constitution and international law (ICJ, 2019). Secretive proceedings administered by military officials instead of judges have contributed to the predicament of the detained (Hassan, 2023).

Regarding compensation, a claim of false imprisonment under tort law seems to be the global remedy for wrongful detention (Ryder, 2024); the High Court of Sindh has also held that a civil suit or a claim under tortious liability is the appropriate compensation method (Mazharuddin v. State, 1998 P. Cr. L J 1035). Regardless, a general dearth of awareness among the victims, a lack of robust mechanisms, and a legislative hole have left this avenue unexplored as well.

4 Recommendations

Based on the above discussion, the article concludes with the following recommendations.

4.1 Legislative Reform

First and foremost, there is a critical need for an overhaul of the applicable laws as well as the safeguards against irregular use of the PD doctrine. This legislative gap should be filled by amending the laws to balance the country's national security needs and international commitments to Human Rights. To address this issue, Article 10 of the Constitution, which is the key provision on the matter, should be updated accordingly. Presently, it remains an identical transplantation of Article 10 of the ICCPR. Such mechanical transplantation is one of the reasons behind gaps in implementation. It should be harmonized with the country's legal system, socio-cultural values, and national security necessities. This is a critical recommendation to increase the efficiency of the incumbent regime. The main obstacle to this legislative

fix, however, is a lack of political will. It is pertinent to note that a bill introduced by Senator Mushtaq to help resolve this issue has been pending before the Law and Justice Committee for two years now (Senate of Pakistan, n.d.). Regardless, another supplementary proposal is to institute a dedicated detention system for terrorism cases within the ambit of constitutional and ICCPR commitments. This should include a screening process to separate terror cases from the rest (Imran & Nordin, 2021). Additionally, a statutory requirement needs to be inserted that requires a magistrate to authorise a PD and not any administrative or governmental official. Furthermore, a statutory right to counsel should be afforded to all detainees, including enemy aliens, with oversight by an independent legal aid authority. This would ensure compliance with international standards as well.

4.2 Limitation in Scope

PD is recognized globally as an extraordinary measure. Due to its potential to disrupt and corrode the public trust and confidence in the state in general and the judiciary in particular (Ervin, 1970), it should be reserved for exceptional cases involving gross violators, and the courts should afford it a narrow interpretation, for instance, "disruption of public order" should not be extended to journalists reporting on news subjected to a media gag by the state. Importantly, the status of PD law as a permanent feature within the criminal justice system should be revoked.

4.3 Education, Awareness, and Training

Educating law enforcement officers as well as judges and prosecutors about the PD's substantive laws, procedures, and HR standards is also necessary. The syllabi of police training should incorporate these vital documents. Moreover, mandatory refresher courses should be administered to all law enforcement officials. We would stress that such training should involve conscientious civil society leaders of aptitude rather than career law enforcement officials who are already part of the same system. This will serve the dual purpose of maximizing efficiency and effectiveness as well as increasing community and state relations. Collaboration can be sought with International Human Rights Organizations to design and deliver such training modules for more effective and efficient training.

4.4 Fixing Institutional Fragmentation

Pakistan harbors a hodgepodge of detention laws that are not complementary to each other, and each of these has a strong individual character, leading to confusion. Moreover, another issue is the lack of coordination between law enforcement agencies, as well as the legal departments and the attorney general's office. This can be rectified by establishing a central authority with a streamlined system to

coordinate and deal with detention and other similar issues. An authority with a review and oversight procedure would also be able to substantially reduce bribery, corruption, and abuse of procedure by shyster officials.

4.5 Judicial Oversight

The authority resting with the judges in detention should also be increased in Pakistan; the judge's involvement before detention should be envisaged to ensure fairness and justice. On top of judicial review, the judge should be given the prerogative to oversee and even control detention in sensitive cases. The 'review board' envisaged in the constitution should be made into a judicial authority, with mandatory representation from judges of the High Courts. Its purview should be extended, and its decisions should also be subject to appeal.

4.6 Empirical and Artificial Intelligence Governance

Reforms to PD laws should be made in the light of objective and empirical data. Without jeopardizing the individual nature of each case, the utility and prospective value of detention should be measured using advanced data analytical tools, and such determinants should guide detention practices. Using tried and tested empirical tools would ensure objectivity whilst minimizing interference and mitigating corrupt practices. In this age of Artificial Intelligence (AI) and technology, where AI has been successfully employed to predict and thwart terrorist attacks (Davis, 2021), Pakistan needs to draw inspiration from such global best practices and use this technology to deal with crimes and offences. A Data Analytics Unit can be set up that can assist the law enforcement agencies in preventing wrongful PD of innocent individuals.

4.7 International Best Practices

While this paper does not undertake a detailed comparative analysis of preventive detention regimes, some international practices are referenced here that can be a benchmark for Pakistan to assess its own international obligations to reform its PD regime in line with international human rights standards. The United Kingdom, for instance, enforces PD under the Terrorism Act 2000, which mandates judicial authorisation, strict time limits, and access to legal counsel, thereby ensuring procedural safeguards (Walker, 2011). Canada's use of security certificates under the Immigration and Refugee Protection Act similarly incorporates judicial oversight and the appointment of special advocates to represent detainees in closed hearings, balancing national security with individual rights (Forcese & Roach, 2015). South Africa's post-apartheid constitutional framework prohibits detention without trial except during declared

emergencies, reinforcing the principle that PD should be an exceptional measure (Currie & De Waal, 2013). Germany's *Sicherungsverwahrung* system, applied only after conviction, includes periodic judicial review and rehabilitative assessments, demonstrating a rights-conscious approach to PD (Bumiller, 2010). New Zealand also restricts PD to serious offenders post-conviction, with transparent criteria and judicial discretion (New Zealand Law Commission, 2017). These models are not immaculate but provide inspiration to Pakistan to reform its PD regime, ensuring it serves as an emergency tool rather than a permanent fixture of criminal justice, thereby enhancing international law compliance and restoring public trust in its legal institutions.

To conclude, cases that merit detention in extraordinary circumstances should be handled through a versatile and dedicated system, while eliminating expansive "blanket clauses" that are open to exploitation. There should be consistency and uniformity in the execution of measures pertaining to PD with respect for Human Rights as a guiding principle at the forefront. Ultimately, reforming Pakistan's preventive detention regime is not merely a legal necessity but a democratic imperative. It is a test of the state's commitment to constitutionalism, human dignity, and the rule of law.

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