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JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P. No. 4037 of 2019

Khadim Hussain

Vs

Secretary, Ministry of Human Rights, Islamabad, etc.

DATES OF HEARING: 18-01-2020, 15-02-2020,
14-03-2020.

PETITIONER BY: Nemo.

RESPONDENTS BY: Syed Muhammad Tayyab, Deputy
Attorney General.
Mr Saleem Murtaza, Additional
Assistant General, Punjab.
Mr Sadaqat Ali Jahangir, State Counsel.
M/s Shahida Parveen Sukhera and
Fozia Azhar Advocates, for Ministry of
Human Rights.
Ms Shireen Mazari, Federal Minister for
Human Rights, Islamabad.
Mr Zafar Iqbal, Deputy Secretary,
Ministry of Health, Islamabad.
Mr Muhammad Arshat, Director
General, Ministry of Human Rights,
Islamabad.
Mian Zahid Mehmood, Law Officer
Human Rights Affairs Department, Lahore.

ATHAR MINALLAH, CJ.- Through this consolidated
judgment, I will dispose of the instant petition and the
connected petitions listed in "Annexure-A" attached hereto.

2. The proceedings before this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 [hereinafter referred to as the "**Constitution**"] have highlighted unprecedented and grave conditions prevailing in the prisons across the country. The living conditions and the treatment of prisoners in overflowing and inadequately equipped prisons has raised serious constitutional and human rights concerns. The proceedings which had emanated from applications under Article 199 of the Constitution, received from incarcerated prisoners through the post, have affirmed the vulnerability of the criminal justice system, which inevitably causes grave violations of constitutionally guaranteed rights and irretrievable miscarriages of justice. Most of the victims of the deteriorating criminal justice system are those who belong to economically and socially marginalized sections of the society. They do not have the means to access the courts nor has the State fulfilled its constitutional obligation in ensuring that each citizen receives 'inexpensive and expeditious' justice mandated under Article 37(d) of the Constitution. Justice is denied to the weak and vulnerable because the prevailing criminal justice system allows its exploitation by the privileged and those who wield influence. These proceedings have highlighted the shockingly abysmal conditions in the prisons, which under the law have been established as institutions for the reformation and social rehabilitation of those prisoners who have been convicted by a competent court following a fair trial. Regrettably, the proceedings in these petitions have affirmed otherwise. The

worst victims of what appears to be a dysfunctional criminal justice system are the pre trial or under trial incarcerated persons. They are presumed to be innocent but, due to several factors, are treated as condemned prisoners before the State can discharge the duty of proving their guilt before a competent court and that too on conclusion of trial. As will be discussed later, an innocent person who may have been a victim of compromised police officials and who does not have access to proper legal advice or the weaknesses of the judicial system forces him to spend years in incarceration because bail is denied, is likely to walk into the four walls of a State prison and upon acquittal leave as a hardened criminal. This Court had received applications from prisoners who had raised grievances through applications received through the post regarding denial of their fundamental rights. The prisoners had stated in their respective applications that they could not access the courts and that they feared being punished by the prison authorities, drawing the attention of this Court to their plight. It was obvious to this constitutional Court that, though the applicants/petitioners were taking the risk of reprisal from the prison authorities, they were attempting to raise grievances of serious violations of fundamental rights guaranteed under the Constitution and treatment not in conformity with the commitments of the State of Pakistan under various international treaties, conventions and other instruments ratified by the Government of Pakistan. It is noted that the implementation of international conventions is covered under items 3 and 32

of the Federal Legislative List under the Fourth Schedule of the Constitution. Keeping in view the gravity of the matter, notices were issued to the Ministry of Human Rights, Government of Pakistan and other concerned public functionaries. Moreover, notices were also issued to the administrative authorities of Islamabad Capital Territory because the applications had raised serious concerns regarding the wellbeing and right of life of the under trial prisoners whose cases are pending before various courts under the jurisdiction of this High Court. It is noted that 1362 under trial prisoners, allegedly involved in cases pending before various courts under the jurisdiction of this High Court, are incarcerated in the overcrowded Central Prison, Rawalpindi. The most alarming grievance implicit in the applications was denial of access to the courts and thus denial of justice, because most of the incarcerated prisoners are poor and inadequately educated or they fear complaining against the prison regimes. In the light of the law laid down by the august Supreme Court in the case titled "*Dr Imran Khattak v. Ms Sofia Waqar Khattak, PSO to Chief Justice*" [2014 SCMR 122] the applications were numbered under Article 199 of the Constitution.

3. This Court was informed by the officials who had initially appeared on behalf of the Ministry of Human Rights, Government of Pakistan that various international treaties, conventions and other instruments have been ratified, setting out obligations required to be fulfilled by the State of

Pakistan. It was also informed that the prevailing conditions in the prisons were not in conformity with the minimum standards set out in the ratified international conventions and treaties. Keeping in view the public importance of the questions raised in these proceedings and the grave concerns regarding safeguarding constitutionally guaranteed rights which are consistent with the commitments of the State of Pakistan under the ratified international conventions and treaties, a commission headed by Ms Shireen Mazari, Federal Minister of Human Rights [hereinafter referred to as the "**Commission**"] was constituted to, inter-alia, investigate and submit a report regarding human rights violations of the incarcerated petitioners as well as other prisoners and their treatment, with regard to the obligations under the ratified conventions and treaties. The Ministry of Human Rights, therefore, vide notification, dated 27.11.2019, constituted a Commission which included Secretaries of the Ministry of Interior and Health, representative of the Human Rights Commission of Pakistan, Mr Ghazi Salah ud Din, Journalist, Mr Zia Awan, Advocate Supreme Court, the respective Chief Secretaries of the four provinces and the Secretary Ministry of Human Rights as members. The Commission submitted its first report on 13.12.2019, while the final report was submitted on 17.01.2020. The report has been made an integral part of this judgment.

STATUS OF FUNDAMENTAL RIGHTS IN THE PRISONS

4. The prevailing conditions described in the report submitted by the Commission are indeed shocking and cannot be tolerated in a society governed under a Constitution which guarantees fundamental rights. The prison population at the time of filing of the report was approximately 77000 while the authorized capacity of all the prisons in Pakistan was to accommodate 55634 inmates. In the Province of Punjab, 29 out of 41 prisons have been reported to be overcrowded and 8 in Sindh. The most disturbing feature is the exceptionally high number of prisoners who retain their presumption of "innocence" till a competent court has handed down a conviction following a fair trial. Out of 73,721 prisoners incarcerated in prisons across the country more than sixty percent i.e. 44847 are un-convicted prisoners. The other alarming factor is the large number of prisoners who are suffering from serious illnesses such as HIV, Hepatitis, Tuberculosis and mental diseases. The province wise status of prisoners suffering from various illnesses is as follows.-

Prisoners	Punjab		Sindh		KPK		Balochistan	
	Male	F	Male	F	Male	F	Male	F
Hepatitis	1047	34	461	1	208	0	72	0
HIV	255	2	115	1	39	0	13	0
TB	87	0	50	2	27	0	07	0
Mental disease	290	8	50	0	235	0	11	0
Other sickness	1453	27	50	0	642	20	0	0

5. The Commission, in its report, has highlighted the devastating and harmful consequences of overcrowding in prisons. It has been pointed out that the prisoners are generally not aware of their rights nor have an adequate opportunity to access the courts. The report also highlights the cumbersome process involved in having access to timely medical facilities. As an illustration an example of one of the prisoners has been cited who has become permanently disabled due to the negligence of the prison authorities because of delay in medical treatment. The report also highlights inadequate medical facilities available to incarcerated prisoners and deficient training and discipline of prison staff/authorities. The Commission, in its report, has made recommendations which essentially emphasize the need for ensuring the treatment of prisoners in conformity with the commitments of the State of Pakistan under the ratified conventions, treaties or other instruments. Although it is public knowledge that the treatment of prisoners is in breach of their constitutionally guaranteed rights and the commitments under the ratified conventions and treaties and the report of the Commission unequivocally affirms the same. It would not be out of place to mention that during the historic lawyer's movement of 2007, which was aimed at upholding the rule of law and the supremacy of the Constitution, lawyers and members of civil society were detained and incarcerated in prisons across the country. None had committed any crime but it gave them an insight into the hidden and elusive world within the high walls of the State

prisons. They witnessed the irretrievable physical and mental harm likely to be caused on account of overcrowding, deplorable sanitation conditions and inadequate training of the prison authorities. The hardened convicted criminals and pre trial or under trial prisoners were kept together. Even juveniles, having impressionable minds, were exposed to being influenced by hard core convicted prisoners. Abuse of juveniles and women by the prison authorities and confined inmates has been widely alleged and reported by entities who have carried out credible research. Even otherwise, the fact that juveniles and women are vulnerable to abuse cannot be ruled out given the intolerable conditions in the prisons. In many overcrowded barracks prisoners are reported to take turns to sleep and when they do get an opportunity they sleep without having the space to turn over. While the toilets lack sanitation, the prisoners may have to wait for hours for their turn because of overcrowding. The hospitals are understaffed and lack proper equipment. The privileged manage to exploit the system by getting themselves admitted to a hospital even when not in need, while those who require urgent attention become victims to apathy and red tapism of the executive bureaucracy managing the prison regimes. It cannot be denied that the prison system is exploited by the privileged and powerful and victimizes the marginalized and vulnerable inmates. The ordinary prisoners are not respected as humans and the manner in which they are treated violates their constitutionally guaranteed rights. The fear of reprisals from the inadequately trained prison authorities, rampant

corruption, brutality and complete lack of accountability virtually prohibits the inmates from raising grievances and this has been reportedly the cause of riots in many prisons. The abysmal, inhuman and degrading treatment and living conditions ought to be a cause of serious concern for the Constitutional Courts, particularly when the majority of incarcerated prisoners, which include those who are presumed to be innocent, have no access to courts nor proper legal advice merely because it is out of reach for them. The report submitted by the Commission only reflects the tip of the iceberg. However, its findings and recommendations were not objected to. Needless to mention that the Federal Government has the jurisdiction of ensuring that its international obligations under ratified treaties and conventions are complied with. Moreover, under item 13 of Part II of the Federal Legislative List of the Constitution, inter provincial matters and coordination falls within the ambit of the jurisdiction of the Federal Government and the Majlis-e-Shoora (Parliament). As the above described treatment of prisoners in prisons across the country falls much below the prescribed standards, therefore, vide order, dated 15.02.2020, the Commission notified vide notification, dated 27.11.2019, was directed to continue as the Implementation Commission. The Implementation Commission has submitted its report regarding its meeting held on 06.02.2020. This Court cannot restrain itself from recording appreciation for the dedicated and earnest efforts made by the members of the Commission, particularly its Chairperson, namely Dr

Shireen Marazi, the then Secretary, Ministry of Human Rights Ms Rabia Javeri, Director General Mohammad Arshat and the officials of the Ministry for submitting a comprehensive report in a short time. Before concluding it would be beneficial to examine the relevant laws, ratified conventions and treaties so as to determine the rights of the incarcerated prisoners.

LEGAL REGIME GOVERNING ESTABLISHMENT AND MANAGEMENT OF PRISONS.

6. The prisons have been established and are being managed under various primary legislations as well as rules/regulations. They deal with almost every aspect, from admission, incarceration of the prisoners and their treatment till release. The Prisons Act 1894 provides for establishing prisons and their maintenance and administration but also describes how prisoners are to be dealt with and prescribes the prison offences. The Prisoners' Act 1900 was enacted with an object to consolidate the law relating to prisoners who are confined pursuant to an order passed by a competent court. The Reformatory Schools Act 1987 was enacted to make provisions for dealing with youthful offenders. The expression "youthful offender" has been defined in section 4(a) as meaning a person who has been convicted for an offence punishable with transportation or imprisonment and who, at the time of such conviction, was under the age of 15 years. Section 5 provides for establishing Reformatory Schools. The Punjab Borstal Act, 1926 was enacted to establish borstal institutions. The Probation of Offenders Ordinance, 1960

provides for the mechanism for release of an offender on probation. Pursuant to powers conferred under section 14 read with section 15 of the Probation of Offenders Ordinance, 1960 the Probation of Offenders Rules, 1961 have been framed. The Good Conduct Prisoners Probational Release Act, 1926 empowers the provincial government to release a person confined under a sentence of imprisonment on conditions imposed and prescribed under a license. The Good Conduct Prisoners' Probational Release Rules, 1927 have been framed in exercise of powers conferred under the Good Conduct Prisoners' Probational Release Act, 1926. The Mental Health Ordinance, 2000 was enacted to establish the Federal Mental Health Authority. The most significant legislation promulgated in the context of the right of access to the court and justice of a prisoner was the Public Defender and Legal Aid Office Act, 2009 which aims at promoting justice throughout Pakistan by providing quality and free legal services, protecting individual rights and advocating effective defender services and a fair justice system. Its purpose is to ensure equal protection of law to such persons through legal assistance, advice and representation in courts and outside who cannot afford the high costs of gaining access the courts. Regrettably, the said law, although enacted, remains un operational. The prisons established under the law and the prisoners incarcerated therein are governed and regulated under the Pakistan Prison Rules, 1978 [hereinafter referred to as the "***Jail Manual***"].

JAIL MANUAL.

7. The Jail Manual regulates the establishment and management of prisons, confinement, treatment and transfer of prisoners. The maintenance of discipline and matters relating to prisoners has been comprehensively covered in 1250 rules which have been divided into 50 chapters. Rule 1065 describes the duties of the prison authorities relating to treatment of the prisoners and the same is reproduced as follows:

“Rule 1065. (i) Every officer of a prison shall at all times avoid all conduct likely to unduly irritate or annoy any prisoner, and shall treat every prisoner humanly and with fact, good temper, and strict impartiality. He shall listen, without displaying impatience or irritation, to every complaint or report which any prisoner may at any time make to him, and shall show all such kindness and consideration to every prisoner as is compatible with the firm and effective discharge of his duties. Subject to the foregoing provisions every officer shall firmly maintain strict discipline and enforce all rules, regulations and orders applicable to the discharge of his duties. (ii) It is important that every complaint made by a prisoner should be listened with attention, so that, if genuine, the grievance may be redressed or remedied, and there should not be any just cause for discontentment.”

8. Chapter-6 describes the classification of prisoners. The prisoners have been divided into four broad categories; i)

criminal prisoners, which has been further divided into convicted and non-convicted or under trial prisoner, (ii) a civil prisoner, (iii) a prisoner ordered to be detained in prison without trial under a particular law and, lastly (iv) those persons who are detained under the orders of a Magistrate on account of being lunatics. Rule 222 divides the convicted prisoners into three classes i.e. (a) superior class; (b) ordinary class; and (c) political class. Rule 226 further divides convicted persons into casual and habitual. The former are persons who are first offenders and who lapse into crime not because of a criminal mentality but on account of surroundings or some physical disability or mental deficiency. Habitual convicted prisoners are classified as ordinary habitual or professionals or repeaters. Rule 227 has classified convicted prisoners on the basis of age into three categories; i.e. (i) "Juvenile" under the age of 18; (b) "Adolescent" over 18 and under 21 years of age and lastly "Adults" over the age of 21. Rule 229 has classified under trial prisoners into two categories i.e. (a) committed to sessions and (b) committed to other courts. Rule 231 makes it mandatory to keep the classes described therein separate from each other. It provides that juveniles shall be kept separate from all other prisoners while under trial prisoners shall be kept separate from convicted prisoners. Chapter 12 provides that juvenile and youthful offenders will be sent to Borstal Institutions and Reformatory Schools, respectively. Rule 295 describes the manner in which juveniles are to be treated. It is mandatory under rule 298 to maintain a well stocked library in the

Borstal Institution and Reformatory Centre while rule 299 makes it obligatory to provide for a spacious play ground in every prison and opportunities of physical activities/sports to the prisoners. The treatment of women and children prisoners has been described in Chapter-13. Chapter-15 deals with under trial prisoners. The minimum standard for diet, clothing, equipment, sanitation and accommodation/space has been specified in the respective chapters. The administration of the prisons in a province is headed by an "Inspector General" appointed under rule 888. Rule 898 describes the duty of the Inspector General and clause (d) thereof provides that during inspection the latter shall ensure that accommodation is ample and there is no overcrowding. Chapter-37 empowers the Deputy Commissioner or the District Coordination Officer, as the case may be, to visit prisons and to exercise powers mentioned in rules 908 and 909, respectively. Chapter-38 empowers the Government to appoint visitors for inspection of the prisons. Rule 913 has divided the visitors into two categories i.e. (a) ex-officio officials, and (b) non-officials appointed by name.

9. A plain reading of the Jail Manual as a whole shows that it prescribes minimum standards for treating a prisoner while the latter remains in the custody of the prison authorities. It is a comprehensive set of rules most of which is consistent with the constitutionally guaranteed rights of the prisoner. It also has set out rules regarding classification of prisoners and their mandatory segregation. This classification

is aimed at achieving the fundamental principle of reformation and rehabilitation of an incarcerated convicted person while safeguarding an under trial non convict from being exposed to the influence of a hardened criminal. These minimum standards guarantees to a prisoner that the latter has a right to be treated in a humane manner and shall be respected as a human. It, therefore, prescribes duties and obligations of the State and prison authorities on the one hand and, on the other, rights are accrued in favour of the incarcerated inmate to be treated in accordance with the set out minimum standards. The Jail Manual, read with the relevant primary statutes, makes it a statutory duty of the prison authorities and the respective governments to treat prisoners in accordance with the minimum standards elaborated therein. A breach of such statutory duty, depending on the facts and circumstances of each case, may expose the prison authorities and the concerned government to an action under the law of tort. Likewise, depending on the circumstances, the conditions of incarceration may give rise to cause of action for false imprisonment. As an illustration, incarceration of a juvenile in the same cell or barrack with convicted hardened criminals and that too under intolerable living conditions would constitute illegal detention and thus render it as false imprisonment. This would indeed not make the prisoner entitled to be released but it would give rise to a cause of action under tort for as long as the false imprisonment would continue. It is important to note that the Jail Manual provides for various modes of accountability in order to remedy breach

of the minimum standards set out for treatment of the prisoners. The prison authorities can be proceeded against by treating the breach of the Jail Manual as misconduct. The Inspector General and respective Superintendents are mandated to conduct visits aimed at ensuring that the prisoners are being treated in conformity with standards prescribed under the Jail Manual. The District Co Ordination Officer or the Deputy Commissioner, as the case may be, has wide powers for the purposes of oversight. The District and Sessions Judge, the ex officio visitors described in Rule 193 (ii) are also empowered to take appropriate action to remedy breaches of the Jail Manual. The non official visitors have also been entrusted such a role. Under Rule 917 (vi) members of the National Assembly, Senate and the Provincial Assembly can be appointed as ex officio members. It appears that, despite such oversight mechanism, the prisoners are treated in the most inhuman and degrading manner and thus the provisions of the Jail Manual are flagrantly violated leading to the breach of constitutionally guaranteed rights. Such blatant unconstitutional treatment and violation of unambiguous provisions can by no stretch of the imagination be justified in a State governed under the Constitution.

INTERNATIONAL CONVENTIONS/TREATIES RATIFIED BY THE STATE OF PAKISTAN.

10. The Government of Pakistan has ratified seven crucial conventions having relevance to the rights of prisoners and which are as follows.-

- i. International Convention on the Elimination of All Forms of Racial Discrimination.*
- ii. Convention on the Rights of the Child.*
- iii. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.*
- iv. International Covenant on Civil and Political Rights.*
- v. International Covenant on Economic Social and Cultural Rights.*
- vi. Convention on the Elimination of All Forms of Discrimination against Women.*
- vii. Convention on the Rights of Persons with Disabilities*

11. The preamble of the International Covenant on Civil & Political Rights recognizes that the rights described therein derive from the inherent dignity of the human person while Article 10 (3) explicitly provides that the object of incarceration of a prisoner is reformation and rehabilitation. Moreover, it makes it an obligation of the State to ensure that juvenile offenders are segregated from adults and provided with appropriate treatment according to their age and legal status. The United Nations Standard Minimum Rules for the Treatment of Prisoners was adopted in 1957 and later amended in 2016 in recognition of the great struggle of the South African legend, *Nelson Mandela*, who had spent 27 years in incarceration. The said rules were adopted as the "***Nelson Mandela Rules***". Rule 1 describes that all prisoners shall be treated with respect due to their inherent dignity and value as human beings and that no prisoner shall be

subjected to and all prisoners shall be protected from torture and other cruel, inhuman or degrading treatment or punishment for which no circumstances whatsoever may be invoked as a justification.

12. The august Supreme Court in the case titled "*Human Rights case No. 29388-K of 2013*" [PLD 2014 S.C 305] has observed and held in the context of forced disappearance as follows:

"It is pertinent to note that Pakistan has also not ratified this Convention. The Supreme Court of Nepal applied the principles of the 2006 Convention in light of the right to life guaranteed in the Interim Constitution of Nepal, 2007. Our Constitution at Article 9 lays down the right to life which has received an expansive interpretation from this Court. Moreover, Article 10 provides direct protection from enforced disappearances. Thus the crime against humanity of enforced disappearances is clearly violative of the Constitution of Pakistan. Therefore, this Court can also apply the principles enshrined in the 2006 Convention in order to achieve the ends of justice."

13. In the case titled "*Ms. Shehla Zia and others vs. WAPDA*" [PLD 1994 S.C 693] the august Supreme Court has observed as under:

"An international agreement between the nations if signed by any country is always subject to ratification, but it can be enforced as a law only when legislation is made by the country through its legislature. Without framing a law in terms of the international agreement the covenants of such agreement cannot be implemented as a law nor do they bind down any party. This is the legal position of such documents, but the fact remains that they have a persuasive value and command respect. The Rio Declaration is the product of hectic discussion among the leaders of the nations of the world and it was after negotiations between the developed and the developing countries that an almost consensus declaration had been sorted out."

14. It is, therefore, settled law that a ratified convention or treaty can be relied upon as long as it is not in conflict with the law enacted in Pakistan. However, in the case in hand, the provisions of the aforementioned, rather than being in conflict are in conformity with the fundamental rights guaranteed under the Constitution. The fundamental rights

under Article 9 and 14 in fact contemplate the obligations of the State under the aforementioned ratified conventions.

PRISONER'S RIGHTS.

15. A prisoner has been defined as 'a person legally committed to prison as a punishment for a crime or while awaiting a trial'. As discussed above, there are two broad categories of prisoners involved in crime i.e convicted or non convicted. The latter is presumed to be innocent till guilt is established by a competent court of law. Convicted prisoners are imprisoned because they are required to undergo a period of sentence. The object of undergoing a sentence pursuant to being convicted by a competent court of law is to make the convicted person and others realise that what the former has done or his/her acts, omissions and conduct which have led to conviction and hence the handing down of the sentence was acceptable. The sentence deprives the prisoner of his/her liberty and the freedom to be free and this curtailment of liberty may have limited consequences regarding some other rights. But by no stretch of the imagination is the right to life restricted or curtailed, rather a heavy burden lies on the State to safeguard this most fundamental right, because a prisoner does not have the freedom to make choices or decisions. On the other hand, a non convicted prisoner has altogether a different status. The latter retains the presumption of innocence, which is an integral and fundamental part of the right to a fair trial. The prisoner, whether convicted or non

convicted, is compelled to place reliance for his right to life and medical needs solely on the authorities holding him/her in custody. This reliance gives rise to a duty of care on the part of the State and its functionaries. The Constitution of the Islamic Republic of Pakistan, 1973 guarantees the right to life under Article 9. It is implicit in Article 9 that it is the duty of the State to ensure that every person incarcerated in the prisons of Pakistan, including those who are convicted for an offence and undergoing sentence, are treated in a manner that does not expose him/her to harm and that proper medical treatment is made available in case it is required. The status of a prisoner is similar to that of a ward of the State because he or she, as the case may be, is in its legal custody and care. The prisoner is thus entirely dependent on the State and at its mercy for the purposes of safeguarding the right to life and to meet medical needs. The State, therefore, owes a duty of care to every prisoner regardless of his or her nature of imprisonment. It is only liberty and the right of free movement that has been curtailed and definitely not the constitutional rights to life and to be treated with respect, having regard to the fundamental right of inviolability of the dignity of man guaranteed under Article 14 of the Constitution. The incarcerated person loses freedom of movement but not his or her status as a human being. Every prisoner, without discrimination, has to be treated as a human. Inhumane treatment of a prisoner is a serious violation of the constitutional rights guaranteed under Articles 9 and 14 of the Constitution. The most hardened offender,

regardless of the nature of his/her offence, has to be treated as a human. A prisoner who is held in custody in an overcrowded prison, having lack of sanitation, tantamounts to cruel and inhuman treatment for which the State ought to be accountable because it amounts to a breach of its fiduciary duty of care. Likewise, neglect of medical needs is a serious violation of Article 9 i.e. the right to life. It is implicit in Article 14 that even a condemned prisoner is to be treated in a manner that is consistent with the fundamental right guaranteed under Article 14 i.e. inviolability of integrity. It is undoubtedly embedded in Article 9 that every person in the legal custody of the State is, inter alia, treated in the manner contemplated in rule 1065 and the minimum standards set out in the other provisions of the Jail Manual. Moreover, it is a right of every person incarcerated in the prison to have access to medical care and medical opinion. The purpose and object of rules 143 and 145 of the Prisons Rules and section 401 of the Cr.P.C. is to empower the competent authorities and the Government to fulfill its duty of care towards the prisoners in safeguarding their most valuable and crucial fundamental right i.e. their right to life. This fiduciary duty cannot be neglected by the State and its functionaries. It is the duty of the latter to ensure that a prisoner suffering from a serious illness or disease is not only provided with the highest attainable standard of health services but, in exceptional circumstances, to suspend the sentence by exercising powers vested under the Prisons Rules read with section 401 of Cr.P.C. 10.

16. It is noted that, when a prisoner invokes the jurisdiction of a competent Court, seeking bail and suspension of sentence solely on medical grounds, then in such an eventuality, prima facie, it gives rise to a presumption that public functionaries on behalf of the State had failed in taking all reasonable steps stemming from their obligations under the Prison Rules read with section 401 of the Cr. P. C, unless such presumption can be rebutted to the satisfaction of the Court. When cases end up in the Courts relating to prisoners suffering from serious illnesses and disease and seeking bail or suspension of sentence, it manifests that the executive authorities had failed to perform their functions and exercise powers stemming from obligations imposed under the law and the Constitution. In such an eventuality the State is indeed in breach of the fiduciary duty to safeguard the right to life of a person in its custody. Every time an incarcerated prisoner or detainee approaches a court raising a grievance of neglect, as in the case of the present petitioners, the onus will be on the State to show to the satisfaction of the court that its functionaries had not neglected the duty of care by at least fulfilling duties and obligations under the Jail Manual.

17. In the context of the rights of a prisoner relating to receiving medical assistance it would be relevant to refer to a judgment of the Supreme Court of the United States titled "ESTELLE V GAMBLE" [429 US 97, 50 L Ed 2d 251, 97 S Ct 285]. The relevant portion is reproduced as follows:

"[6, 7] *These elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical "torture or a lingering death," In re Kemmler, supra, the evils of most immediate concern to the drafters of the Amendment. In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. Cf. Gregg v. Georgia, supra, at 173, 49 L Ed 2d 859, 96 S Ct 2909 (joint opinion). The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common-law view that "it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself."*

[8] *We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain," Gregg v. Georgia, supra, at 182-183, 49 L Ed 2d 859, 96 S Ct 2909 (joint opinion), proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced,*

deliberate indifference to a prisoner's serious illness or injury states a cause of action under s 1983."

18. The United Nations Committee on Economic, Social and Cultural Rights, which monitors States' obligations under the International Economic, Social and Cultural Rights has stated that 'health is a fundamental human right indispensable from exercising of other human rights'. The International Covenant on Civil and Political Rights provides in Article 6(1) that every human being has the inherent right to life and that this right shall be protected by the law. The Constitution of the Islamic Republic of Pakistan, 1973 guarantees the right to life of every person. The right to life is the most fundamental amongst human rights. The august Supreme Court in the case titled "Ms Shehla Zia and others v. WAPDA"[PLD 1994 SC 693] has observed and held that the word life is very significant because it covers every facet of human existence. "Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally". We have no hesitation in concurring with the aforementioned judgment of the United States of America and to hold that deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain.

19. There is yet another crucial and constitutionally guaranteed right to a fair trial. Access to a court and proper legal advice is inevitable to ensure a fair trial and guarantee

the right to life. Most of the prisoners belong to economically and socially underprivileged classes. They are either illiterate or inadequately educated. Poverty and lack of resources prevents them from seeking proper legal advice, nor can they afford the high cost required for gaining access to the courts. The lack of access to proper legal advice and the courts makes them the obvious victims of miscarriages of justice. If they are fortunate to apply for bail before a trial court and it is wrongly denied they have no option but to accept it as an act of fate and suffer the agony of incarceration because they cannot afford the high cost of further litigation. Besides serious miscarriage of justice the constitutionally guaranteed right to a fair trial is violated. It is, therefore, a fundamental right of an incarcerated prisoner to have access to proper legal advice and a court of law. The duty of care that is owed by the State makes it a constitutional duty to put in place an effective mechanism so that every prisoner has access to proper legal advice and the courts. As already noted above, the promulgation of the Public Defender and Legal Aid Office Act 2009 was in conformity with the obligations of the State to ensure the right to a fair trial. The Federal Government is, therefore, obligated to make the said enacted law operational at the earliest. It is also a duty of the courts to ensure an effective mechanism so that the right of access to proper legal advice and the courts is not hampered or denied.

20. The Commission, in its report, has highlighted that the inmates of the prisons are generally unaware about their

rights. They also have no knowledge of the rights of prisoners and duties of the State and the prison authorities under the Jail Manual. The duty of the State to provide every prisoner with information regarding the latter's rights in general and the Jail Manual in particular is implicit in Article 19 A because it owes him/her a duty of care. This fiduciary duty makes it mandatory for the State to keep the person in its custody informed about the rights provided under the Jail Manual. Needless to mention that access to a competent forum or a court to raise a grievance or complaint without any fear whatsoever is protected under Article 19 of the Constitution.

CAN A PRISONER SEEK COMPENSATION FOR INHUMAN AND DEGRADING TREATMENT.

21. David Feldman in the celebrated book titled "Civil Liberties & Human Rights in England and Wales" has discussed the remedies available to a person in detention under the common law for poor, inhuman and degrading conditions. The remedies are in the nature of a cause of action under the law of tort.

22. The august Supreme Court has consistently observed and desired the need for promoting the law of tort and reference in this regard may be made to "*Punjab Road Transport Corporation v. Zahida Afzal, etc.*" [2006 SCMR 207] and "*Islamic Republic of Pakistan through Secretary, Ministry of Railways, etc. v. Abdul Wahid, etc.*" [2011 SCMR 1836]. Recognizing the applicability of the law of tort, it was held in

"*Abdul Majeed Khan v. Tawseen Abdul Haleem*" [PLD 2012 SC 80], that the law is applicable and administered in Pakistan as rules of justice, equity and good conscience.

23. The remedies available under the law of tort, therefore, are enforceable in Pakistan as well. An action can be brought for false imprisonment, breach of statutory duty, violation of fundamental rights, misfeasance in a public office or on the ground of negligence.

24. In the case titled "*Middleweek v Chief Constable of the Merseyside Police and another*" [1990]3 ALL ER 662, it has been observed by Ackner LJ as follows:

"We agree with the views expressed by the Divisional Court that it must be possible to conceive of hypothetical cases in which the conditions of detention are so intolerable as to render the detention unlawful and thereby provide a remedy to the prisoner in damages for false imprisonment. A person lawfully detained in a prison cell would, in our judgment, cease to be so lawfully detained if the conditions in that cell were such as to be seriously prejudicial to his health if he continued to occupy, it because it became and remained seriously flooded, or contained a fractured gas pipe allowing gas to escape into the cell. We do not therefore accept

as an absolute proposition that, if detention is initially lawful, it can never become unlawfully by reason of changes in the conditions of imprisonment.”

25. The intolerable and shockingly inhuman and degrading treatment highlighted in the proceedings in hand meets the threshold of the hypothetical illustration in the above judgment. It is, therefore, obvious that the incarcerated prisoners, subjected to the unimaginable degrading and inhuman treatment highlighted in these proceedings, may have become entitled to seek damages against the prison authorities and the State. A prisoner, therefore, has a right to sue in respect of torts committed in a prison.

26. The abysmal conditions in the overcrowded prisons and the inhuman and degrading treatment of prisoners is indeed unconstitutional and a serious violation of the fundamental rights guaranteed under the Constitution. It manifests a compromised, weak, ineffective and failing criminal justice system. It is not only a grave travesty of justice but also undermines the rule of law. The World Justice Project is recognized as a leading source for independent data on the rule of law and each year issues 'The World Justice Project Rule of Law Index'. The Index issued for 2020 ranks Pakistan as 120th out of 128 countries. The rankings are based on eight factors; (i) constraints on government powers,

(ii) absence of corruption, (iii) open government, (iv) status of protection of fundamental rights, (v) order and security. (vi) regulatory enforcement, (vi) civil justice and, lastly, criminal justice. The factor of criminal justice is further divided into (i) criminal investigation system is effective, (ii) criminal adjudication system is timely and effective (iii) correctional system is effective in reducing criminal behaviour (iv) criminal justice system is impartial (v) criminal justice system is free from corruption (vii) criminal justice system is free of improper government influence and (viii) due processes of the law and rights of the accused. Without going into the authenticity of the rankings, the aforementioned factors are crucial. The police, prisons, prosecution, judiciary and parliament are all integral part of the criminal justice system. I have no hesitation in conceding that the answers to the factors relating to the criminal justice system are disturbing and require urgent introspection by each stakeholder. Every branch of the State involved in running the criminal justice system is under an obligation to urgently remedy the wrongs which are a source of grave violations of constitutionally guaranteed rights. No branch or institution can absolve itself from the suffering and excruciating agony faced by the real stakeholder of the criminal justice system i.e the accused, the victim and the general public. It is a system which can be exploited by the privileged and powerful and the victims are those belonging to politically, economically and socially marginalized and underprivileged classes. A system that does not protect and enforce rights alienates people.

Without an effective and responsive criminal justice system people lose faith in the Constitution. A weak and compromised criminal justice system undermines the rule of law and thus encourages corruption and is a source for economic and social inequality. An effective criminal justice system, free from political interference and corruption, is a fundamental right of every citizen. The living conditions in the prisons and the treatment of incarcerated prisoners is a violation of the law enunciated by the Holy Prophet Mohammad (SAW), who had said fourteen hundred years ago that it is better to let go a hundred guilty persons than to punish one innocent and this became embedded in Islamic law as the foundational principle of a fair trial i.e the presumption of innocence. It is beyond comprehension how many innocent persons must be subjected in the prisons across the country to inhuman and degrading treatment despite not having committed any crime. There is, therefore, an urgent need to reform the criminal justice system and it is the duty of every branch of the State i.e the Executive, Judiciary and the Legislature, to fulfill its commitments. The criminal justice system will serve its actual stakeholders in the true sense if they have trust and confidence in a system which is fair, impartial, accessible, responsive, independent and free from corruption or any other influence. The prison regime has a pivotal role in making the criminal justice system what it ought to be.

27. Keeping in view the above discussion, it is declared, directed, expected or observed as follows.-

- (a) It is declared that overcrowding of prisons, failure to segregate prisoners in accordance with the provisions of the Jail Manual, inhuman and degrading treatment, denial of prompt and timely health assistance, denial of access to proper legal advice and courts, is unconstitutional and a violation of the commitments of the State of Pakistan under the ratified conventions and the constitutionally guaranteed rights.
- (b) The Federal Government is directed to take immediate steps, pursuant to its jurisdiction vested under item 13 of Part II read with items 3 and 32 of Part I of the Federal Legislative List under the Fourth Schedule of the Constitution, to ensure that prisoners incarcerated in the prisons across Pakistan are dealt with and treated in conformity with the obligations of the State of Pakistan pursuant to ratification of the conventions.
- (c) The Implementation Commission chaired by the Minister of Human Rights, Government of

Pakistan shall endeavor to give effect to the recommendations made in its report.

- (d) The Implementation Commission may consider recommending to the Federal Government the initiation of the proposed legislation by the Majlis-e-Shoora (Parliament) under item 13 of Part II read with items 3 and 32 of Part I of the Federal Legislative List under the Fourth Schedule of the Constitution, for prescribing minimum standards for the treatment of prisoners pursuant to obligations under the ratified conventions and establishing an independent oversight forum in this regard.
- (e) The Federal Government is directed to take steps for making the Public Defender and Legal Aid Office Act 2009 operational to enable the economically underprivileged to have effective access to the right of proper legal advice and the courts.
- (f) The Registrar is directed to propose a mechanism in order to ensure that each under trial prisoner, who has a case pending before any court under the jurisdiction of this Court and cannot afford the cost, has access to proper legal advice and to the courts. The

Registrar shall finalize the proposal in consultation with the Islamabad Bar Council, the High Court Bar Association and the Islamabad District Bar Association.

- (g) The Implementation Commission is expected to ensure that each province effectively enforces the oversight mechanism provided under the Jail Manual for correcting breaches of the rules and holding the delinquent prison officials accountable. The Implementation Commission may also suggest measures for ensuring transparency and effective accountability such as installation of CCTV cameras.
- (h) The Implementation Commission may propose to the respective Governments mechanism and modes for making prisoners aware of their rights and the minimum standards set out in Jail Manual.
- (i) The Implementation Commission may also consider consulting the Pakistan Bar Council and the respective provincial Bar Councils for ensuring effective oversight of compliance with the Jail Manual and treatment of incarcerated prisoners in accordance therewith.

- (j) The Implementation Commission may consider suggesting to the respective provinces the nomination of representatives of the Pakistan Bar Council and the concerned provincial Bar Council as non official visitors for effective oversight.
- (k) The Implementation Commission may consider suggesting to the respective provinces for nominating representatives of recognized bodies of the media and working journalists as non official visitors with the aim of making the oversight and accountability effective and transparent. This would also enable to keep the general public informed about treatment of prisoners in the prisons.
- (l) The Federal Government is directed to take steps for making the Mental Health Ordinance, 2001 operational so as to safeguard the fundamental rights of mentally disordered prisoners.
- (m) The Chief Commissioner Islamabad Capital Territory is directed to ensure that the construction of prison is completed expeditiously and its design meets minimum standards set out in the conventions ratified by

the State of Pakistan. It is further directed that Reformatory Schools and Borstal Institutions are established to safeguard the rights of the juvenile and youthful offenders.

- (n) The Chief Commissioner Islamabad Capital Territory is directed to appoint parole officers and fill other vacancies in order to consider release of deserving prisoners under the Good Conduct Prisoners Probational Release Act, 1926 and the Parole Rules.
- (o) The Chief Commissioner Islamabad Capital Territory is directed to ensure that the Prosecution branch is established and appointments made at the earliest, preferably within sixty days.
- (p) It is expected that the Implementation Committee shall submit a report to the Registrar of this Court on the 30th of each month regarding the progress made in implementing the recommendations.
- (q) The District and Sessions Judges under the jurisdiction of this Court are expected to visit the Central Prison, Rawalpindi alongwith the Deputy Commissioners of Rawalpindi and

Islamabad Capital Territory to enquire whether the prisoners relating to cases pending in courts within the jurisdiction of this High Court are treated in accordance with the standards specified in the Jail Manual. A report in this regard shall be submitted to the Registrar of this Court.

28. The petitions stand disposed-of in the above terms.

(CHIEF JUSTICE)

Tanveer Ahmed.

Approved for reporting.

Uploaded By : Engr. Umer Rasheed Dar

ANNEXURE-A

SR. No.	Case No.	Case Title
1.	W.P. No. 4210/2019.	Javed Iqbal v. The Secretary Ministry of Interior, etc.
2.	Crl. Orig. No. 269/2019.	The State v. The Secretary Ministry of Interior and others.