

## **Role and Responsibilities of the Public Prosecution A Case Study of Khyber- Pakhtunkhwa Province**

*Mashhood Mirza*

### **Abstract**

This paper analyses various international guidelines on the role of a Public Prosecutor and on the basis of these tries to give a picture of what the responsibilities and duties of a Public Prosecutor in Pakistan could involve, using the case of the province of Khyber Pukhtunkhwa. The paper concludes that the role of the Public Prosecutor is not to seek conviction at all cost but to place before the court all the evidence.

### **Keywords**

Prosecution, Criminal Justice System, Public Prosecutor

### **Introduction**

*“The administration of justice, including law enforcement and prosecutorial agencies and, specially an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realisation of human rights and indispensable to the processes of democracy and sustainable development.”*

*The Vienna Declaration and Programme of Action of 1993*

The purpose of the criminal justice system (hereinafter CJS) is the realization of the rule of law, which is one of the most fundamental conditions for the sustainable development of societies. For this purpose, justice has to be given to those who have broken the law while protecting due process of law for which the office of 'Public Prosecutor' is created in some countries as a public authority who, on behalf of society and in the public interest, ensures the application of the law where the breach of the law carries a criminal sanction and who takes into account both the rights of the individual and the necessary effectiveness of the criminal justice system.

Prosecutors have duties to the State, to the public, to the Court and to the accused and, therefore, they have to be fair and objective while discharging their duties. Accordingly, the police are empowered to conduct investigations to give justice to suspects, whereas prosecutors are empowered to check the

investigation conducted by the police and to dispose the case for the prosecution, following the due process of law. In other words, prosecutors are vested with the responsibility of checking the police investigation against due process of law.

The 'independence' of the prosecutor's function stands at the heart of the rule of law. Prosecutors are expected to behave impartially. Prosecutors are gatekeepers to the criminal justice process as stated by Avory J in *R v. Banks*.<sup>1</sup> The learned Judge stated that the prosecutor, "throughout a case ought not to struggle for the verdict against the prisoner but... ought to bear themselves rather in the character of minister of justice assisting the administration of justice"

It is an established principle that Prosecutors are independent of the police and the Courts. While the police, the Courts and the prosecutors have responsibilities to each other, each also has legal duties that separate them from others. The prosecutor does not direct police investigations, nor does he advise the police. Public Prosecutors are part of the judicial process and are considered to be officers of the Court.

Public prosecutors must be in a position to prosecute without influence or obstruction by the executive or public officials for offences committed by such persons, particularly corruption, misuse of power, violations of human rights etc.

### **Role of Public Prosecutor as Interpreted by International Law and Guidelines**

It is important to first have a cursory look at international standards and guidelines on the role of the public prosecutors in order to evaluate national prosecutorial systems. The United Nations Guidelines on the Role of Prosecutors<sup>2</sup> require Prosecutors to perform their duties fairly, impartially, consistently, protecting human dignity, upholding human rights and avoiding all political, social, religious, racial, cultural, sexual or any other kind of discrimination.<sup>3</sup> The use of prosecutorial discretion, when permitted in a particular jurisdiction, must be exercised independently and should be free from political interference.<sup>4</sup> In order to ensure the fairness and effectiveness of prosecution, prosecutors must strive to cooperate with the police, the courts, the legal profession, public defenders and other government agencies or institutions.<sup>5</sup> Corollary to the requirements of fairness and impartiality is the condition that prosecution should not be initiated or every effort to stay proceedings should be made where an impartial investigation shows

the charge to be unfounded.<sup>6</sup> The International Association of Prosecutors standards provide that criminal proceedings should be proceeded with only when a case is well founded upon evidence, which is reasonably believed to be reliable and admissible.<sup>7</sup> When Prosecutors come into possession of evidence against suspects that has been obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they are under a duty to refuse the use of such evidence.<sup>8</sup> The Prosecutors are also required to take proper account of the position of the suspect and the victim, pay attention to all relevant circumstances, and disclose all relevant evidence irrespective of whether it is to the advantage or disadvantage of the suspect.<sup>9</sup> The Prosecutors must act objectively and also remain unaffected by individual or sectional interests and public or media pressures. They must have regard only to the public interest.<sup>10</sup>

The State is also under a duty to ensure that Prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.<sup>11</sup> The State is further required to provide reasonable conditions of service to Prosecutors, adequate remuneration, and where applicable, tenure and pension.<sup>12</sup> Moreover, the promotion of Prosecutors should be based on objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures.<sup>13</sup> If in a State, non-prosecutorial authorities have the right to give general or specific instructions to Prosecutors or right of directing the institution of proceedings or right to stop legally instituted proceedings, such instructions should be transparent, consistent with lawful authority and subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.<sup>14</sup> The Council of Europe recommendations go further and state that instructions not to prosecute in a specific case should in principle be prohibited. Should that not be the case, such instructions must remain exceptional and be subjected to transparency and appropriate control.<sup>15</sup> The Council of Europe recommendations also state that Public Prosecutors should account periodically and publicly for their activities as a whole and, in particular, about the way in which their priorities are implemented.<sup>16</sup>

### **Prosecution Services in Pakistan**

Prosecutors are covered under section 492 of the CrPC which provides that the provincial government may appoint "generally or in any case, or for any specified class of cases, in any local area, one or more officers to be called Public Prosecutors".<sup>17</sup> Until recently, the prosecution services in all the provinces were under the Home Department and were administered by the police.<sup>18</sup> There was a separate prosecution branch of the police consisting of law graduates in the ranks of

Deputy Superintendents of Police, Inspectors and Sub-Inspectors. This was considered, however, to be a major reason for poor prosecution and delay in the resolution of court cases. During the 1980s, a first attempt was made to transfer administrative control of prosecution powers from the police to law departments.<sup>19</sup> The ongoing vacillation between the Home Departments and the Law Departments on this question continued until prosecution services were permanently placed under the administrative control of the Law Departments with the promulgation of the Police Order, 2002. At present, all the provinces have laws for separate prosecution services and the respective provincial prosecution services are at nascent stages of development.<sup>20</sup>

### **How the Criminal Justice System Works in Pakistan**

When a person is apprehended for committing a crime, after investigation that is to be completed within 14 days u/Sec. 173 of Criminal Procedure Code (hereinafter CrPC) he or she is subjected to a rigorous trial in the prescribed criminal court that has jurisdiction in the said matter. The Court is duty-bound to allow an alleged offender to appoint a defence counsel of his or her choice under Article 10 of Constitution of Pakistan. Then Court pronounces a Charge against an alleged offender that describes the nature of offence and the nature of act or omission that constitutes a specific crime. Thereafter, prosecution is required to produce evidence that it has against the alleged offender. The defence counsel of the alleged offender is given full opportunity to cross-examine and object to the prosecution evidence,

within the prescribed limits of law. Though prosecution being the duty of the state is to be conducted by the state-appointed counsels, any person aggrieved by the offence can appoint his or her own prosecution counsel, in addition to the state counsels. After the prosecution concludes its evidence the presiding Judge puts certain questions u/Sec. 342 Cr PC to the alleged offender. These questions are very crucial as the presiding Judge gives an opportunity to alleged offender to explain incriminating evidence against him or her. The alleged offender is also given an opportunity to appear as his own witness. Moreover he or she is also given an opportunity to present documentary evidence and witnesses in his or her defence. After the conclusion of defence evidence the trial is concluded and the Presiding Judge pronounces the judgment. The judgment could be of acquittal or punishment. In both cases prosecution and alleged offender has right to appeal against the judgment of the trial court. The appeal is made to the immediate superior court of the trial court.

Punishment is universally accepted mode of retribution and deterrence. Punishment varies with the nature of crime. Different punishment can be given for the same crime. But retrospective punishment and double punishment in any case is specifically prohibited by the Constitution of Pakistan. Article 12 states: “No law

shall authorize the punishment of a person for an act or omission that was not punishable at the time of the act or omission”, similarly Article 13 states: “No person shall be punished for the same offence more than once”. Article 13(b) also states: “No person shall, when accused of an offence, be compelled to be witness against himself”. Constitution of Pakistan specifically demarcates the contours of Criminal Law of Pakistan by stating unequivocally in Article 9: “No person shall be deprived of life or liberty save in accordance with law”. And the Law shall never be against the universally accepted Fundamental Rights, this is specifically and explicitly enshrined in Article 8 of the Constitution of Pakistan.

It goes without saying that the CJS in Pakistan must function within the framework of the principles enunciated by the Constitution. Broadly speaking, these are as follows:

- The guarantee of equality before the law
- Equal protection of the laws
- Prohibition of discrimination imposed upon the State
- Deprivation of life /personal liberty only in accordance with procedure established by law
- Presumption of innocence of the accused
- The requirement of proof beyond reasonable doubt
- The right of the accused to remain silent
- Arrest and detention in accordance with law and judicial guidelines
- Protection against double jeopardy
- Non-retrospective punishment

No appraisal of the CJS can suggest derogation from these principles. Rather, it is these very principles that are the indicators on the basis of which any evaluation of the criminal justice system may be made. The independence of the judicial system is a key element of the basic structure of constitution via the separation of powers between the Legislature, Executive and Judiciary.<sup>21</sup>

### **Prosecution Service in Khyber Pukhtunkhwa Province**

The prosecutorial services in Khyber Pukhtunkhwa were introduced through the North-West Frontier Province Prosecution Service (Constitution, Functions and Powers) Act, 2005. After this Act came into operation, the total prosecution services in Khyber Pukhtunkhwa province, from the registration of the FIR up to the conclusion of the case by the Supreme Court of Pakistan, came under the Khyber Pukhtunkhwa Directorate of Prosecution.

The 2005 Act is a short Act having 12 sections, but the powers of the prosecutor are immense and are given in its Chapter III.<sup>22</sup> The public prosecutor under the said ordinance is appointed under section 492 of the CrPC.<sup>23</sup> Once the prosecutor receives a case file from the police, which the police have already decided to pursue, the prosecutor reviews it and has the option to continue with the prosecution, take no further action or divert it away from the criminal proceedings.<sup>24</sup>

One thing must be clarified here that in Pakistan like Brazil, El Salvador, India, Kenya, Malaysia, and England as well as other countries - prosecutors are not investigators. They are not involved in criminal investigations because they do not have the authority to investigate crimes on their own. Upon completion of an investigation, in these countries the police refer the investigation report to the prosecutor who will then scrutinize or screen the investigation paper thoroughly and decide whether or not to prosecute the suspects based on the evidence available. The prosecutors would then be in a position to advise the police on further investigation, if necessary, so as to ensure that the prosecution has adequate and tangible evidence for prosecution.

### Organizational Structure and Responsibilities

The Directorate is classified into three sections, namely, prosecution and administration and the accounts section, whereas the establishment lies with the Home Department. It is headed by a Director General assisted by a Public Prosecutor, Director Legal and Director Administration / Accounts. The Director General in essence is the head of Prosecution in the Directorate. He looks after the Establishment and Accounts Branches and exercises overall control over officers of the Prosecution Directorate. The District Public Prosecutors over see the prosecution functions in the respective districts and all the Assistant Public Prosecutors report and take guidance from the District Public Prosecutor. In cases where the sanctioned posts cannot be filled, the Prosecution Directorate can as a stop-gap measure appoint Special Public Prosecutors from the respective Bars Associations. The current strength of the Directorate of Prosecution in Khyber Pukhtunkhwa is as under:

Table I: Sanctioned Strength of the Prosecution Directorate

Posts	BS	Sanctioned Posts	Filled
Public Prosecutors	18	65	50
District Public Prosecutors	18	65	14
Assistant Public Prosecutors	16	126	96
<b>Total</b>		<b>256</b>	<b>160</b>

*Source: Home Department, Khyber Pukhtunkhwa Province*

There are 50 Public Prosecutors currently working against the sanctioned strength of 65. Surprisingly, there are only 14 District Public Prosecutors at present working against the sanctioned strength of 65 in 24 Districts; however 24 new recruitments have been recently made by the Public Service Commission. The Directorate of Prosecution has got 126 sanctioned posts of Assistant Public Prosecutors, out of which 96 posts have been filled to date. Hence the prosecution directorate in Khyber Pukhtunkhwa province lacks 94 prosecutors.

### **Major Functions of the Prosecution Directorate**

Normally, the role of the public prosecutor commences after investigation agency presents the case in the Court on the culmination of investigation. The Investigation Officer cannot be directed to consult the public prosecutor and submit a charge sheet in tune with the opinion of the public prosecutor. The public prosecutor is to deal with a different field in the administration of justice and cannot be involved in investigation. Foremost objective of the public prosecutor is to ensure a fair trial of the accused. Prosecuting officers assist law courts in the disposal of cases. The Directorate aims to deliver a prompt, efficient and speedy service to the litigant for achieving the ends of justice, ensuring judiciousness and speedy legal remedies.<sup>25</sup> Cases registered and investigated by the police are referred to the prosecution for scrutinizing charge sheets, and after their institution in the courts, the Assistant Public Prosecutors conduct the prosecution. They evaluate the evidence in each case and make their recommendations for filing revision petitions or appeals against impugned orders and judgments, as well as conduct cases in Courts. The public prosecutor has the power to withdraw prosecution if reasonable ground exists under section 494 of the CrPC. Consent will be given by the Public Prosecutor only if public justice in the larger sense is promoted rather than subverted by such withdrawal.

### **Evaluation of Prosecution Directorate Vis-à-Vis Conviction Rate**

Generally conviction rates by the prosecution have been abysmally low, but it must be emphasized here that the prosecutor places before the court all evidence in his or her possession, whether in favour of or against the accused. This is seen as proper prosecution, as opposed to single-minded persecution in seeking a conviction regardless of the evidence. However, most of the time, this motive is misinterpreted and prosecutors show no interest in winning cases in favour of their client. The data obtained from the Police Department of the Khyber Pukhtunkhwa provides an insight into the conviction rate and the working of the Prosecution Directorate:

Table II. Percentage of Rate of Conviction During 2009

S. No.	Offences	%age
1	Murder	9%
2	Attempts to Murder	4%
3	Hurts	7%
4	Zina (Rape) 5,6,10	13%
5	Zina (Rape) 377 (12)	15%
6	Kidnapping Other	11%
7	Kidnapping for Ransom	7%
8	Child Lifting	22%
9	Abduction	2%
10	Assault on Police	29%
11	Assault Other	19%
12	Ordinary Dacoity	15%
13	Highway Dacoity	0%
14	Bank Dacoity	0%
15	Ordinary Robbery	26%
16	Highway Robbery	0%
17	Bank Robbery	0%
18	Burglary	26%
19	Theft	31%
20	Car Theft	58%
21	Other Motor Vehicle Theft	26%
22	Car Snatching	44%
23	Other Motor Vehicle Snatching	24%
24	Motor Cycle Theft	42%
25	Motor Cycle Snatching	60%
26	Fatal Accident	5%

Source: Office of the Additional Inspector General Police (Investigation), Khyber Pakhtunkhwa, Pakistan.

Even though the attempt was to do to a comparative analysis of the cases instituted, disposed and the conviction rate of the cases, but due to paucity of information and credible data for the past years, the analysis was restricted to only 2009. The average conviction rate of crimes against substantive law for the year 2009 remained 15.48%. The conviction rate is very high if convictions under special laws are included, but the rate of conviction drops very low when convictions are noticed under the substantive law. The reasons can be manifold. The conviction rate however, is not an effective parameter for judging the efficiency of the Prosecution Directorate. A high or low conviction rate can be due to various sociological and economic reasons. In such a case, an analysis of the number of cases filed and disposed will make a better benchmark.

### **Problems and Suggestions**

The Directorate's problems are manifold. The Public Prosecutors Office is severely understaffed. Similar is the case with District Public Prosecutors who conduct cases in Sessions courts. Every post has a larger number of previously pending cases. It is evident that the distribution of cases is not only skewed but also creates problems of corruption, injustice and delay in provision of justice. Justice delayed is justice denied. The appointment of prosecutors is also a grey area; politicians, bureaucrats and big lawyers heavily influence the recruitment process. Even though there are many regulations regarding the appointment process, these are often overridden by the Executive, which would much rather have its preferred choices as ad hoc appointees special public prosecutors are the point of focus. The prosecutors are not treated on a par with the judges in payment of remunerations. Prosecutors should be insulated from political pressure and an incentives-based performance approach should be emphasized. Internal audit mechanism to evaluate the standards on which the case was fought should also play a significant role in increasing the overall quality of prosecution.

Due to the incompetence of the investigating officers the deadline of 14 days for the submission of the Challan (final report) u/s 173 of the CrPC is missed as a matter of routine, thus causing undue delay in the processing of the case. It has been observed that the number of courts is more than the number of public prosecutors in the province as alluded from Table-1 above.

The weak service structure of the prosecution Directorate is one of the causes of resentment among the public prosecutors as the three key posts in the prosecution directorate have been usually occupied by officials from outside .i.e. director general, director legal and director administration, although in the rules it is clearly mentioned that the post of director (legal) shall be filled from amongst the public prosecutors.

It is clear that the office of the Public Prosecutor needs more attention and more autonomy to ensure greater success. However, success cannot be measured in numbers of convictions. All too often the rate of convictions becomes the sole indicator of the health of the Pakistani CJS. Concerns about its condition are valid, but the prognosis and diagnosis has to be accurate to avoid further deterioration.

## **Conclusion**

It cannot be emphasized enough that the health of the criminal justice system cannot be judged from conviction rates or death sentences alone. Such analysis is not only faulty and misleading but also often contrary to legal and constitutional safeguards, with dangerous implications for citizens. The challenge before the Public Prosecutor is to maintain impartiality and neutrality while prosecuting any and all persons facing criminal prosecution. The assumption here is that the State is committed to safeguarding and promoting the interests and rights of all constituents of society.

To make prosecution more reliable and credible, it is necessary to do an internal evaluation of the parameters on which cases are fought. As generally prosecution deals with underprivileged sections, it is important that cases are defended in such a way that the guilty party is convicted. Oversight committees for evaluating cases that were lost will check the quality of prosecution.

For any prosecution department to be successful and submit cases with best evidence before the courts, good relationship with the police is crucial. If the prosecution department and the police department are at loggerheads, or are working without any coordination, then the cases churned out will be like the cases in Pakistan that lack sufficient evidence and thus result in the acquittal of dangerous terrorists who had been arrested with great difficulties. It is to be seen whether police have accepted the supervisory role of the prosecutor?

## **End Notes**

1. Per Avory J in R v Banks [1916] 2 KB 621.
2. There are various international guidelines elaborating upon the role of Public Prosecutors. The most important of these are “United Nations Guidelines on the Role of Prosecutors” (adopted by the United Nations during the United Nations Congress on the Prevention of Crime and Treatment of Offenders in Havana in 1990), “Recommendation 19 (2000) on the Role of Public Prosecution in the Criminal Justice System”, adopted by Council of Europe in 2000 and general standards entitled the “Standards of Professional Responsibility and Statement of the Essential Duties and Right of Procedures”, formulated by the International Association of Prosecutors in 1999

3. Articles 12 and 13(a), United Nations Guidelines on the Role of Prosecutors
4. Article 2.1, International Association of Prosecution's Standards of Professional Responsibility and Statement of the Essential Duties and Right of Procedures
5. Article 20, United Nations Guidelines on the Role of Prosecutors
6. Article 14, United Nations Guidelines on the Role of Prosecutors
7. Article 4.2(d), International Association of Prosecution's Standards of Professional Responsibility and Statement of the Essential Duties and Right of Procedures
8. Article 16, United Nations Guidelines on the Role of Prosecutors; Article 4.3(f), International Association of Prosecution's Standards of Professional Responsibility and Statement of the Essential Duties and Right of Procedures
9. Article 3(d), International Association of Prosecution's Standards of Professional Responsibility and Statement of the Essential Duties and Right of Procedures
10. Article 13(b), United Nations Guidelines on the Role of Prosecutors; Articles 3(e) and (f); International Association of Prosecution's Standards of Professional Responsibility and Statement of the Essential Duties and Right of Procedures
11. Article 4, United Nations Guidelines on the Role of Prosecutors; Article 6(a), International Association of Prosecution's Standards of Professional Responsibility and Statement of the Essential Duties and Right of Procedures
12. Article 6, United Nations Guidelines on the Role of Prosecutors; Article 6(c), International Association of Prosecution's Standards of Professional Responsibility and Statement of the Essential Duties and Right of Procedures
13. Article 7, United Nations Guidelines on the Role of Prosecutors; Article 6(e), International Association of Prosecution's Standards of Professional Responsibility and Statement of the Essential Duties and Right of Procedures
14. Articles 2.2 and 2.3, International Association of Prosecution's Standards of Professional Responsibility and Statement of the Essential Duties and Right of Procedures
15. Article 13(f), Recommendation No. 19(2000) on the Role of Public Prosecution in the Criminal Justice System, adopted by Council of Europe in 2000
16. Article 11, Recommendation No. 19(2000) on the Role of Public Prosecution in the Criminal Justice System, adopted by Council of Europe in 2000

17. '**Public Prosecutor**', means any person appointed under section 492, and includes any person acting under the directions of a Public Prosecutor and any person conducting a prosecution on behalf of the State in any High Court in the exercise of its original criminal jurisdiction. He is bound to assist the Court with his fairly considered view and the Court is entitled to have the benefit of the fair exercise of his function. AIR 1957 S.C. 389.

18. An Asian Development Bank soft loan to Pakistan is de facto primarily responsible for the Access to Justice Program, in which the state is engaged "in improving justice delivery, strengthening public oversight over the police, and establishing specialized and independent prosecution services? In this we see the Police Act 1861 being replaced by the Police Order 2002 and new laws to constitute and provide for the functions of independent prosecution services in Pakistan, thus, divorcing prosecution from the investigative arm of the police. Arguably, more valid grounds can be cited for the creation of an independent prosecution service in Pakistan, being article 175(3) of the constitution, which mandates that "the judiciary shall be separated progressively from the executive within three years from the commencing day? Thereafter, there was the appeal decided in Govt. of Sindh v. Sharaf Faridi (PLD 1994 SC 105).

19. In Sindh, for instance, it was done in 1986; see Zahid, Nasir and Wasim, Akmal, *The province of Sindh as a case study on the prosecution service*: <http://www.article2.org/mainfile.php/0704/333/> as on 12 July, 2010.

20. The laws providing for independent prosecution services are The Sindh Criminal Prosecution Service (Constitution, Functions and Powers) Act, 2009, The Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act, 2006, The North-West Frontier Province Prosecution Service (Constitution, Functions and Powers) Act, 2005, The Balochistan Prosecution Service (Constitution, Functions And Powers) Act, 2003

21. Article 37(i) of the Constitution, which notes that: "The state shall decentralize government administration so as to facilitate expeditious disposal of its business to meet the convenience and requirements of the public.

22. See generally Chapter III of the North-West Frontier Province Prosecution Service (Constitution, Functions and Powers) Act, 2005.

23. 'Public Prosecutor' means a person appointed as Public Prosecutor under this Act for the purpose of section 492 of Cr.PC and includes District Public Prosecutor, Additional Public Prosecutor, Deputy Public Prosecutor and Assistant Public Prosecutor as well as Special Public Prosecutor.

24. A District Public Prosecutor in case of offences carrying seven years or less imprisonment and the Director General Prosecution for all other offences may

withdraw prosecution subject to prior approval of Court. Provided that prosecution of an offence falling under the Anti Terrorism Act, 1997 (XXVII of 1997), shall not be withdrawn without prior permission in writing of the Secretary to Government, Home and Tribal Affairs Department. See also Section 494 of CrPC, “Effect of withdrawal from prosecution. Any Public Prosecutor may, with the ....] consent of the Court, before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried, and upon such withdrawal: (a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences; (b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences”

25. Preamble of the The North-West Frontier Province Prosecution Service (Constitution, Functions and Powers) Act, 2005 states that.” WHEREAS it is expedient to reorganize and establish a Prosecution Institution with a view to achieving a speedy justice process in the North-West Frontier Province and for matters ancillary or incidental thereto.

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The author Mashhood Mirza has done his M.A. in International Relations from the University of Peshawar and LLM in International Human Rights Law from the University of Essex, UK as a British Council Chevening Scholar. He is a Civil Servant by profession. He has served in the Ministry of Human Rights for nine years and is currently serving as Director in the Federal Ombudsman, Khyber Pakhtunkhwa, Pakistan.