



The Right to Liberty and Security: A Comparative Jurisprudential Analysis of Article 5 ECHR and the Constitutional Framework of Pakistan

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| ARTICLE INFO | ABSTRACT |
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| <p>Keywords: Right to Liberty, Article 5 ECHR, Pakistan Constitution, Preventive Detention, Judicial Independence.</p> <p>Corresponding Author: Ali Ahmar Mushtaq, Bachelor of Laws, The University of Faisalabad, Email: aliahmarmushtaq7@gmail.com</p> | <p>The right to liberty is one of the pillars of modern constitutionalism, which is still quite different when implementing it in regional, supranational, and national systems. In Pakistan, the 2024 and 2025 legislative changes, namely the adoption of the 26th and 27th Constitutional amendments and the renewal of the Anti-Terrorism (Amendment) Act 2025, have brought about an immediate necessity of the comparative reconsideration of protective rights of personal liberty. The study uses qualitative doctrinal approach to compare structural and jurisprudential differences under Article 5 of the European Convention on Human Rights (ECHR) and Articles 9 and 10 of the Constitution of Pakistan. The paper demonstrates that the ECHR approach of exhaustive list provides a better degree of predictability and judicial control than the Pakistan (in accordance with law) approach. It is concluded that Pakistan needs to include more stringent procedures, check-gates and provide independence of Constitutional Benches which have just been formed to avoid executive overreach and be in line with world- best practices on human rights.</p> |

Introduction

The hereditary conflict between the demands of state security, and the very principle of individual liberty is the most disputed boundary of the 21st century of constitutional law. Freedom and safety of an individual is not a procedural guarantee of rights; it is a substantive requirement of the implementation of all other basic rights. Under the condition that there is no strong assurance that somebody will not be arrested at will, freedom of speech, assembly, and political representation is a mirage. This paper will examine this tension in a comparative study, which is the European Convention on Human Rights (ECHR) and the constitutional system of the Islamic Republic of Pakistan.

Article 5 of the ECHR regime has been considered as a standard of liberty protection. It operates in the principle of exhaustivity, which implies that the state is only allowed to be deprived of

the liberty of a person under a strictly defined and closed list of circumstances. The European Court of Human Rights (ECtHR) has over decades established a complex jurisprudential system that leaves quite minimal scope to the discretion of the executive. On the other hand, the Pakistani constitutional structure which is majorly governed by Articles 9 and 10 has in the past been typified by its elasticity. Article 9 (in accordance with law) has been applied by the higher judiciary of Pakistan of different intensity usually depending on the socio-political environment of the nation. This comparative research can be explained by the fact that the legal changes that took place in Pakistan in 2024-2025 were unprecedented. With the enactment of the 26th Constitutional Amendment in October 2024, a radical restructuring of the Pakistani judiciary commenced. The amendment was a signal that the courts were to become more influenced by legislature by introducing a specialized system of appointing the judiciary and changing the makeup of the Judicial Commission of Pakistan (JCP). Other critics such as the International Commission of Jurists (ICJ) said that these reforms would have the effect of undermining the ability of the judiciary to act as an important balance to state abuses.

This was succeeded by the 27th Constitutional Amendment in 2025 which further narrowed down the jurisdictional limits of the superior courts. Though the government introduced these changes as a way of streamlining justice, the real consequence was that it would establish a specialized body of constitutional adjudication that was feared by some observers to be more prone to politics. At the same time, the authority of security apparatus of the state was also increased in accordance with the Anti-Terrorism (Amendment) Act 2025. This Act reinstated the power of the security agencies to be able to hold suspects in custody of up to three months without prosecution based on inquiry and reasonable suspicion.

Such occurrences have given rise to a constitutional crisis of freedom in Pakistan. Reintroduction of three months preventive detention is a serious deviation in the requirement of the ECHR that the oversight by the court must be conducted immediately. Although the ECHR usually demands that a detainee should be presented in court between 48 to 96 hours, the current Pakistani state has ensured that the suspect can be held without formal indictment and a judicial hearing in a court of law in 90 days. This loophole poses deeper concerns of the legality of these detentions of the international laws on human rights such as the International Covenant on Civil and Political Rights (ICCPR), which Pakistan is a signatory.

The main aim of the study is to determine the jurisprudential gaps that would exist between the ECHR and the Pakistani legal system by 2025. Through a review of the historic decisions made by the ECtHR in the deprivation of liberty cases and a reflection of how these rulings relate to the ECtHR's emerging position in the area of preventive detention and judicial independence, this paper attempts to outline a path towards reform. The thesis of the argument is that the Pakistani framework is open-ended, which enables the legislature to legalize what would amount to arbitrariness under the ECHR. To ensure the fundamental rights of the citizens, Pakistan should shift towards more closed and exhaustive list of grounds of detention.

Literature Review

The literature on individual freedom is more mature and detailed regime based on the ECHR as compared to the more fragmented literature on security that seems to be dominant in Pakistan.

William A. Schabas (2015) confirms that Article 5 is one of the most detailed provisions of the Convention. According to Schabas, the right to liberty is not absolute but the exceptions in paragraph 1 are exhaustive. It Implies that in case a detention does not belong to one of the six categories, including conviction in a competent court to the prevention of the spread of infectious diseases, it is *per se* illegal. In the same manner, Bernadette Rainey, Elizabeth Wicks, and Clare Ovey (2020) address the changing meaning of deprivation of liberty. They emphasize that the distinction between a simple limitation on movement and a deprivation is

relative and is found in the degree and intensity, rather than in nature. Basing the argument on the landmark case of *Guzzardi v.* They observe that issues such as the length of time, nature, and manner of the restraint are important in Italy case. Their labor highlights the fact that Article 5 represents a basic safeguard against the fact that the state is creating new conditions of detention.

There are even critics of the strong ECHR regime. According to Michelle-Louise Coleman (2020), the method of determining reasonableness of suspicion that is currently used by the Court is not rigorous enough. According to Coleman, in the case of counterterrorism, the ECtHR frequently provides a broad margin of appreciation to states, and this may result in variations in deprivation of liberty evaluation. This critique, especially concerning Pakistani scholars is very pertinent because it demonstrates that tension between security and liberty is never completely addressed even in a highly developed system.

The Pakistani scheme of analysis of the scholarship usually bases its analysis on the historical struggle of independence of the judiciary. Muhammad Abubakar, M. Hammad Iqbal Thakur, and Minahil Waseem (2024) claim that the Criminal Procedure Code (CrPC) is still a colonial artifact that contributes to the extension of pre-trial detention. They underline the fact that although the Constitution in Article 9 guarantees liberty, discriminatory bail policies in most cases favor the wealthy.

Research Society of International Law (RSIL) offers historical tracing of the detention laws. They point out that laws such as the Security of Pakistan Act 1952 and the Maintenance of Public Order (MPO) ordinance have been employed to evade normal criminal protection. RSIL observes that the protections aired in Article 10 are in most instances shallow in the wake of wide executive authorities. The study is crucial in the reason behind why the amendments in the 2025 Anti-Terrorism Act (ATA) are not an isolated incident but an ongoing state of exception within the Pakistani law.

Khansa Shaikh (2022) compares Articles 9, 10, and 10A. She observes that with the introduction of the 18th Amendment Article 10A, the business was a first, but the introduction of due process is still compromised by the executive intervention. Shaikh draws attention to the explicit constitutional requirement of timely production before a magistrate (within 24 hours), which is often disregarded in the cases of enforced disappearances, in which the international institutions such as Amnesty International and Human Rights Watch have recorded it in great detail.

Research Methodology

The qualitative method of the doctrinal approach is the most suitable methodology to use in this type of jurisprudential enquiry. The research is based on the interpretation of the black-letter law of constitutional texts and international treaties as well as judicial precedents. The research design is divided into three stages namely data collection, comparative analysis, and normative synthesis. The main sources of data are the text of the European Convention on Human Rights (ECHR) and the Constitution of the Islamic Republic of Pakistan, 1973 (updating with the 26th and 27th Amendments up to 2025). Moreover, the paper looks at new laws, namely, the Anti-Terrorism (Amendment) Act 2025. Data on Judicial cases were gathered using HUDOC database of ECHR cases and Pakistan Law Digest (PLD) of Pakistani cases.

The comparative analysis is based on the thematic and functional approach and not on the chronological comparison of the two systems. It looks at the effectiveness of each legal system working on the basis of certain liberty checkpoints, looking at the practical operation of protections of the right to liberty. These checkpoints involve the standard of lawfulness, which measures the level of promptness in investigating the legality of detention, the speed of judicial review, which measures the requirement of the timeliness in assessment of the case dealing with deprivation of liberty and the impartiality of the tribunal, which measures the effects of

recent changes in the judicial system on the impartiality demanded in the case concerning deprivation of liberty.

Results

The comparative analysis shows that there are several major differences in structure and procedure between the ECHR and the Pakistani constitutional system as of 2025.

The major finding is the first one which is the Grounds Gap. In article 5(1) ECHR, there is a closed list of six purposes of detention. Any law enforcement that arrests without such grounds regardless of the fact that it is on legitimate grounds due to national security is a *per se* violation. However, Articles 9 and 10 of the Pakistani Constitution do not list exhaustively. Rather, the standard of, in accordance with the law, of Article 9 enables the Parliament to enact legislations (such as the Anti-Terrorism Act 2025) that introduce new types of detention.

Comparing the judicial oversight, timelines depict a sharp deviation. Under Article 5(3) ECHR, the need to be arraigned in presence of a judge timely has been construed to include 4 days or less even in cases of terrorism (*Brogan v. United Kingdom*). In Pakistan, there is a Dual Track System that has been developed by the 2025 amendments. Whereas the normal criminal arrest procedure works on the production of the suspect within 24 hours, the ATA 2025 allows security agencies to hold a person taking a maximum of 90 days to carry out investigations prior to filing a charge. The aggregate outcomes of this comparative study point to a structural protection distance, which has increased after the 2024-2025 legislative session in Pakistan. Although the ECHR Article 5 represents a closed-door system wherein liberty can only be denied by use of an exhaustive list of six distinct grounds, the Pakistani system is more an open-ended system, wherein by the standard, in accordance with law, the legislature may create broad, and generally indeterminate, new grounds to detain. Moreover, institutional and temporal protection is dissimilar. ECHR requires that a judicial control is done at any cost and in real time, but the 2025 Anti-Terrorism amendments of Pakistan allow a 90-day detention period under review by administrative boards and not independent courts. This deviation is enhanced by the remedial aspect: Article 5(5) of the ECHR entitles a constitutional right of compensation policy against unlawful detention, which is a preventive mechanism that is still not reflective in the Pakistani constitutional text.

Discussion

The findings on this research indicate that the right to liberty in Pakistan is threatened. The level of development is relative to the international level. The implication of the expanded standard of Article 9 and the dangers of a militarized exercise of detention power is the subject of discussion. The largest point of discussion is the interpretative difference of legality. At the ECHR, the law should be available, predictable and in harmony with the Rule of Law. In Pakistan, legal practice is based on the Parliament passing whatever it wants to, as long as it does not indicate a blatant breach of the Constitution. The amendments of 2025 ATA reveal that the state has exercised this elasticity to re-legalize a three-month imprisonment. This Rule by Law model is essentially conflicting with the Rule of Law that the ECHR is advocating. The amendments in the 2025 Anti-Terrorism Act introduce Oversight Boards to examine the preventive detentions. But we can indicate that these boards are not alternatives to a court. Under Article 5(4) of ECHR, detainee must be capable of launching proceedings through which the legality of his or her detention will be determined promptly through a court verdict. A tribunal made up of executive and military officials is not the quality of an independent and impartial tribunal.

Conclusion and Recommendations.

The Article 5 ECHR and Articles 9 and 10 of the Pakistani Constitution are comparatively analyzed, and the inescapable conclusion is that the personal liberty in the country is systemically worse than in Europe. The study has revealed that the principle of exhaustivity used by the ECHR is the most successful in protecting against arbitrary arrest. Pakistan on the

other hand uses an open-ended standard which is manipulated by the legislature. The reinstatement of three months preventive detention in the Anti-Terrorism (Amendment) Act 2025 is the distinct breach of the international norm of timely judicial review. Moreover, the judiciary restructuring through the 26th and the 27th Amendments has undermined the same institutions that it was the protectors of Article 9. The paper suggests that there should be a set of structural and constitutional changes to enhance protection of the right to liberty in Pakistan. To reduce doubts over authoritarian powerlessness, the first one is that Parliament needs to amend Article 10 of the Constitution to include a detailed list of acceptable reasons that can result in the deprivation of liberty in the European Convention on Human Rights manner of Article 5(1). Second, the Anti-Terrorism Act 2025 must be immediately revised to provide a judicial check on such detentions within seventy-two hours such that any individual arrested preemptively must be produced before a High Court Constitutional Bench during this period. Third, taking the example of Article 5(5) ECHR, the Constitution must be revised in order to explicitly enshrine a right to compensation to victims of illegal detention. Lastly, the process of appointing the newly formed Constitutional Benches should be isolated of the influence of the political majority to prevent the interference into the independence of the Constitutional Benches and their capability to deliver their verdict with an independent mind in cases pertaining to liberty.

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