



Global Scientific JOURNALS

GSJ: Volume 9, Issue 8, August 2021, Online: ISSN 2320-9186
www.globalscientificjournal.com

**Elements of Right to Fair Trial under International Human Rights,
Domestic Legislation of Pakistan and Obligations of the State.**

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Words Count: 4169 (Abstract, Table of Contents, References and
Table No.1 excluded).

Abstract:

Pakistan is among the countries with intensity of violation of all kinds of Human Rights on day to day basis. Right to a fair trial is recognized as fundamental right in both the Universal Instruments and the Constitutions of the Islamic Republic of Pakistan coupled with other Domestic Legislation. Pakistan being signatory to most of the International Human Rights Instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment is under obligation to comply with the same standards as set forth in those Instruments. This research paper aims at exploring the right of fair coupled with other ancillary components associated herewith as envisaged in Universal Human Rights Deeds and incorporated in Domestic Legislations of Pakistan. The article is also based on ascertaining obligations of Pakistan towards the fulfillment of right to fair trial under the Universal Instruments. This paper further investigates the current situation of the country with reference to ensuring the Right to Fair Trial in the light of prevalent circumstances and reports of various International Organizations having an eye on human rights in the country. The qualitative research methodology dominates and the quantitative methodology to some extent has been adopted to accomplish the work. However, both the primary and secondary sources of data collection have been looked into to comply with the task.

Key Words: Domestic Legislation; Fair Trial; Current Situation; Fundamental Right; International Instruments; Obligations; Pakistan; Signatory.

List of Acronyms:

| | |
|----------------|--|
| A.I: | Amnesty International. |
| ATA: | Anti-Terrorism Act, 1997 |
| CAT: | Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment |
| Cr.P.C: | The Code of Criminal Procedure, 1898 |
| ECHR: | European Convention on Human Rights |
| FIDH: | The International Federation for Human Rights. |
| FIR: | First Information Report. |
| ICCPR: | International Covenant on Civil and Political Rights. |
| IHRL: | International Human Rights Law. |
| P.P.C: | Pakistan Penal Code 1860. |
| PLD: | Pakistan Legal Decisions. |
| Q.S.O: | The Qanoon-e-Shahadat Order, 1984. |
| SC: | Supreme Court. |
| UDHR: | The Universal Declaration of Human Rights, 1948. |
| UNO: | The United Nations Organization. |
| WJP: | World Justice Project. |

Table of Contents:

| | |
|--|----|
| Abstract: | 1 |
| List of Acronyms: | 2 |
| Table of Contents: | 2 |
| Introduction: | 4 |
| Domestic Laws of Pakistan Regarding Fair Trial: | 4 |
| Necessary Elements of Fair Trial: | 6 |
| Administrative Stage | 6 |
| Judicial/Trial Stage: | 9 |
| Current Situation: | 14 |
| Extrajudicial Killings in Pakistan: | 16 |
| International Obligations of the State | 17 |
| Conclusion: | 18 |
| Table No: 1 | 19 |
| References: | 19 |

Introduction:

Fair trial means impartial proceedings under the provisions of the relevant law. The right to fair trial is a fundamental right which is applicable to everyone in the free world. Without its provision under the relevant law, the people could suffer persecution at the State's hands treating them as criminals even there is no cause for doing so. The right to fair trial is associated with other human or fundamental rights like right of hearing, right to life and liberty and due process of law. Under the International Human Rights Law, the right to a fair trial is to cater protection for the right to life and liberty of the person¹. The right to a fair trial is interpreted as administration of justice by the courts in accordance with the legislated norms to safeguard rights of the litigants. The rules associated with the fair trial refer to provide a fair and public hearing with the presumption of innocence till proved guilty through the independent and impartial courts/tribunals. Pakistan judicial system is bifurcated into Civil and Criminal Justice System and both these systems have different pre-trial, trial and post-trial phenomena which all require the right to fair trial.

Domestic Laws of Pakistan Regarding Fair Trial:

Obviously, fairness in proceedings is essence of both the civil and criminal trials but this right is considered more important in criminal proceedings than civil proceedings due to its more severe consequences in criminal trial. The proceedings of a criminal case take place in bifurcation of administrative and a judicial stage both requiring fairness throughout the proceedings and the right to a fair trial is applicable to both administrative and

¹Zia Ullah Ranjha "Perspectives Right to Fair Trial"; The Daily Times; [Lahore, January 13, 2020]

judicial proceedings. So far as domestic legislation of Pakistan relating to the right of a fair trial is concerned, the Constitution of the Islamic Republic of Pakistan 1973 contains a number of articles providing rights ancillary to the right of a fair trial, however, Article 10-A of the Constitution categorically providing for the right to a fair trial was incorporated through eighteenth (18th) amendment in 2010. Moreover, the country adopted the English Criminal Justice System and mutatis mutandis adopted Cr.P.C 1898 containing scattered provisions providing basis for a fair trial recognized interpreted and given due weight by the Superior Judiciary of the Country from time to time. So, in this scenario without any explicit provision of fundamental rights to a fair trial, the Superior Courts of Pakistan not only interpreted the requirements and procedure but also laid down some principles ensuring the protection of this right. Notwithstanding, Article 10-A of the Constitution does not only relate to proceedings before a Court or Tribunal but also extends to all proceedings governing the determination of rights and liabilities of a person¹. Whereas the other requirements for compliance of this article exist in other criminal laws and interpreted by the Apex Judiciary of the Country. Notwithstanding the International Instruments of Human Rights and Constitution of Pakistan describe components of a fair trial nonetheless, Articles 6 & 7 of the ECHR may cater guidance tracing out these components including fair and open hearing by an independent and impartial tribunal, Expeditious trial, pronouncement of orders in open courts, presumption of

¹Fahad Ahmed Siddiqi Advocate; Application of the Principles of Fair Play, Natural Justice and process, in Guardianship/Child Custody Legal proceedings.

innocence, immediate information of charge, provision of interpreter, tender defence and cross examine the prosecution witnesses¹.

Necessary Elements of Fair Trial:

From the provisions contained in the International Human Rights Conventions, Domestic Laws of Pakistan and Rulings of the Apex Court, the elements associated with a fair trial may be sorted out in Administrative/Pre-trial and Judicial/Trial stages.

Administrative Stage:

With the occurrence of an offence, the procedure of criminal law makes its way from reporting the matter to the concerned Law Enforcement Agency for Collection of evidence till final adjudication of the case. The rights coming under the administrative stage of the proceedings as contained in Domestic Legislations of the country are as under:

Prompt Registration of Case:

Any person victim of a cognizance offence is entitled to registration of his case by the concerned Law Enforcement Agency under section 154 of Cr.P.C 1898 and in non-cognizance case incorporating report of the crime and submission of complaint to the concerned Area Magistrate under section 155 Cr.P.C 1898. At this stage, the Law Enforcement Agency or its representatives cannot deny this right. This right was further identified and interpreted by the Supreme Court of Pakistan in a judgment observing that

¹Articles 6 & 7 of the European Convention on Human Rights (ECHR), 1950

SHO is duty bound to register case on receipt of information oral or written of a cognizable offence.¹

Prevention from Arbitrary Arrest:

Article 3 of the UDHR gives the right of life, liberty and security of person whereas Article 9 of the UDHR and Article 9 (1) of ICCPR provide a safeguard against arbitrary arrest, detention or exile. The law of the land puts an embargo on arrest of any person without reasonable complaint against him. Under the Law a person can only be arrested on receiving a complaint or considerable suspicion of commission of offence.

Intimation about Grounds of Arrest:

Many countries have their own variations of what a right to fair trial should entail but some of the provisions are applicable in most of the countries i.e. repudiation of arbitrary detention of an individual without any cause or the indefinite holding of people without informing them of their offence. As per criminal justice system of Pakistan, after registration of case, there comes stage of arrest of the accused. Article 9 of the ICCPR puts an embargo on State Machinery to arrest any person arbitrarily and to inform the person arrested about the reasons behind his arrest. Article 10 of the Constitution of the Islamic Republic of Pakistan 1973 further articulates this matter requiring the Investigating/Arresting Agencies to inform the accused of the grounds for his arrest.

¹Haider Ali and another vs. DPO Chakwal and others; 2015 SCMR 1724 [Supreme Court of Pakistan].

Right to Consult the Attorney/Counsel:

Access to an attorney/counsel is the fundamental right of both the parties and this right has been envisaged and recognized under Article 10 of the Constitution of the Islamic Republic of Pakistan 1973 which states that a person arrested shall not be denied the right to consult and defend by the legal practitioner of his choice. Another guarantee under the right to a fair trial is the right of individual through adequate representation in the form of a lawyer or attorney and the right of such people. With the initiation of adversary proceedings, right of representation of an accused through a counsel commences which is a necessity for fulfillment of fair trial¹.

Protection against Un-Authorized Detention:

Illegal detention of any person is also a component of Fair Trial. This is not only the matter enunciated in Article 9 (3) of the ICCPR but also occupies protection under Article 10 of the Constitution of the Islamic Republic of Pakistan, 1973 and Section 61 of the Cr.P.C 1898. However, the period for production of accused before a Court or Tribunal is twenty-four (24) hours within which the accused is to be taken to a Court of a Magistrate.

Prohibition of Torture:

Pakistan is a signatory to the UDHR and CAT and Article 5 of this Declaration proscribes torture whereas Article 2 of the Convention requires all the State Parties to draft effective legislation to prevent torture. The Constitution of the country in its Article 14 (2) prohibits torturing any person for eliciting evidence against him. Therefore, it is also an essentiality

¹Brewer vs. Williams; 430 U.S 387 [1977]

of fair trial that a person must not be subject to any kind of torture to be a witness against himself.

Right to Remain Silent:

The primary purpose of the investigation is the collection of evidence and it is duty of the complainant/prosecution to prove its allegations against the accused. By this way, it is fundamental right of an accused and a particular of fair trial that he cannot be constrained to speak against him or against any other person. In other words, an accused is not bound to answer the questions put to him.

Judicial/Trial Stage:

With the completion of investigation/inquiry and submission of report of investigation/inquiry to the court for taking cognizance, the trial/judicial stage takes place. This is a crucial stage in determination of rights of the parties. This stage not only evaluates the evidence collected during investigation but also determines rights and obligations of the parties. At this stage both the parties have numerous rights to be followed for ensuring fairness of trial. This stage may involve the following ingredients to fulfill the requirement of fair trial:

Competent, Independent and Impartial Court/Tribunal:

The first and the most significant substance of a Fair Trial is competency and impartiality of the Court/Tribunal. Rights of the parties can only be determined by a competent, disinterested and impartial Court/Tribunal set up under laws of the Country. Article 8 of the UDHR declares all the persons entitled to access a competent National Tribunal. All the

courts/tribunals are under obligation to guarantee right to fair trial based on impartiality, unbiasedness and independence of judiciary.¹

Public Hearing:

It is universally acknowledged and settled principle that justice should not only be done but also be seen to be done. Open and Public justice is a source for the general public to reckon the standards of justice being administered in a judicature. The right to public/open hearing not only brings to light the proceedings of the case and evidence against a person but also enables him to give his defence in the light of such material. Article 10 of the Universal Declaration of Human Rights entitles every person to have fair and public hearing by an independent and impartial Tribunal.

Provision of Translator/Interpreter to an Accused:

The courts are to protect rights of the parties through dispensation of justice which require awareness of the proceedings to the parties. Court proceedings are usually conducted in English Language which is not understandable by majority of the litigants; therefore, the courts are required to translate the proceedings in the language understandable by the accused or to provide a translator for the purpose.

Presumption of Innocence:

The Universal Declaration of Human Rights in Article 11 articulates that every person charged with an offence has the right of presumption of innocence until proved guilty. The same principle has been recognized as fundamental right in Article 14 (2) of the ICCPR. Jeremy

¹Mina Safian Bolandji ; The Role of Police in Humanization of Criminal Procedure

Bentham believes that the guilty must be provided an opportunity to escape the punishment¹. The Supreme Court of Pakistan held that presumption of innocence is cornerstone of the administration of justice². The Supreme Court of Pakistan also observed that “Presumption of innocence remains throughout the case until such time the prosecution on the evidence satisfies the Court beyond reasonable doubt that the accused is guilty of the offence alleged against him.”³

Hearsay Evidence is no Evidence:

It is a settled and universally acknowledged principle that any person should not be awarded sentence on the basis of hearsay evidence rather there must be direct evidence of the commission of offence by the accused. This fact is recognized in Pakistan under Articles 64 & 71 of the Q.S.O, 1984 which has further been elaborated by Apex Judicature of the Country.

Understand Charge and Evidence and Cross examine Witnesses:

Undoubtedly, evidence is major factor in a trial; therefore, it is right of an accused to have knowledge of charge framed and what kind of evidence has been adduced on part of the prosecution to prove that charge. It is also essentiality of the dispensation of justice that the accused must be afforded opportunity to cross examine the witnesses in order to evaluate their credibility and veracity. This dictum has been laid down under Article 14 (3)

¹ Jeremy Bentham; “Rationale of Judicial Evidence” 238-39 (Fred B. Rothman & Co. 1995) (1827)

²Suo Moto action concerning allegation of deal between Malik Riaz Hussain and Dr. Arsalan Iftikhar; PLD 2012 SC 664.

³The Supreme Court of Pakistan acquitted an accused of Blasphemy Laws; Aasia Bibi vs. The State etc;

(e) of the ICCPR. The logic behind the right to cross examine is the enforcement of the presumption of innocence until proved guilty¹.

Right to Defend:

Recognition of Right to defend one being principle of natural justice is an important ingredient of a Fair Trial. International Human Rights Instrument such as Article 14 (3) (b) of the ICCPR grants the right of defence to an accused.

Prohibition of Retrospective Punishment:

This concept and right is based on a maxim “nulla poena sine lege” meaning no punishment without law². A person should not be punished for an act not an offence under any law for the time being in force. This right has been established under Article 11 (2) of the UDHR and Article 15 (1) of the ICCPR and envisaged under Article 12 (1) (A) of the Constitution of the Islamic Republic of Pakistan, 1973 according to both these Articles an act which was not offence at the time of its commission, cannot constitute any offence.

Protection against Self-incrimination:

International Human Rights Instruments like the UDHR, ICCPR and CAT prohibit any kind of torture and ill treatment towards any person. This right is further identified as a fundamental right in Article 13(b) of the Constitution of the Islamic Republic of Pakistan, 1973. As per mandate of these Articles a person can neither be compelled to be his own witness nor to confess any offence. A person in custody of the police enjoys the ‘Miranda or

¹Ahmed, N., Munir, B., & Khan ; “An Assessment of Right to Fair Trial Under the Constitution of Pakistan, 1973: A Comparative Study of the US and Pakistan”; Global Security and Strategic Studies Review, V (IV), 31-39.

²Daniel Troy “Ex post Facto, The Heritage Guide to the Constitution.”

Caution Warnings' against self-incrimination in many countries without variation of wording¹.

Prohibition of Punishment Severe than Provided for Offence:

Severity of sentence for the offence should not be more than provided for the offence. If after conclusion of the trial, guilt of an accused is proved by cogent evidence by the prosecution, he/she can be awarded sentence provided for the offence irrespective of severity of offence. This right is protected under Article 12 (1) (b) of the Constitution of the Islamic Republic of Pakistan, 1973.

Protection against Double Jeopardy:

A person cannot be punished for the same offence twice. It is a rule recognized by the criminal administration of justice. This right of a person has been set up under Article 14 (7) of the ICCPR which is further identified by Article 13 (a) of the Constitution of the Islamic Republic of Pakistan, 1973 and Section 403 of the Cr.P.C 1898.

Right to Appeal:

To redress the grievance of either of the parties, right to appeal against an order has been recognized in both Universal and National Instruments. It is not only a source of accountability of the Presiding Officer of a Court/Tribunal but also a way to make up any lacunae in fair proceedings of the case. Article 8 of the UDHR guarantees this right by way of an effective remedy.

¹Hina Hafeez Ullah Ishaq; "The Right to a Fair Trial".

Current Situation:

Pakistan is an independent member of both the UNO and International Human Rights Conventions such as the UDHR, The ICCPR and CAT which require a country to ensure and comply with the right of fair trial through Report Mechanism based on adopted measures qua implementation of these rights. Right to Fair Trial is a fundamental right and requires the State's protection for everyone without any discrimination but criminal justice system of the country has overwhelmingly failed to serve the masses in true spirit in every stage from reporting the crime to conclusion of trial and is replete with plethora of shortcomings triggering the system ineffective¹.

Fairness of trials in Courts/Tribunals of a country in safeguarding the legitimate rights of its nationals portrays the administration and dispensation of justice within a nation. Unfortunately, like other human rights laws, right to fair trial has been contentious in Pakistan and has not been secured by the concerned agencies and denial of this human stands still in judicial system of Pakistan.

The significance of these rights in the security of common liberties is highlighted by the way that the execution of all basic freedoms relies on the appropriate organization of equity. At whatever point an individual's privileges are meddled with, she/he can just guard herself/himself sufficiently on the off chance that she/he appreciates a powerful plan of action to fair treatment.

¹Sardar Hamza Ali, "An Analytical Study of Criminal Justice System of Pakistan".

. In the words of Kamali: “Islam as seen since the first century of Islamic calendar has endowed a certain privacy and protection to the individuals of the society where Muslims need law of Shariah not to tell them what to believe but how to believe and live life according to the divine laws. The negligence in protection of these rights or any imbalance between them can cause a society to expose people to danger and collapse at the cost of justice in the society”¹.

Protection of Human Rights through the rule of law is the common dilemma of the whole World including Pakistan. One of these rights is the fair procedure which is more important as compared to the justice itself². As per WJP Rule of Law Index published in March, 2020; Pakistan was ranked at number 126 out of 128 countries on the Rule of Law and placed at number 6 out of 8 Countries in the South Eastern Region³.

The A.I in its Report on Right to a fair trial, 2002 about its essentiality observed that during the trial an individual is confronted with the State Machinery i.e. Police and Courts and treatment of such individuals during trial demonstrates the respect of a State for Human Rights⁴. The A.I in its recent report, 2021 went to conclude that “Arbitrary detention, torture, deaths in custody, forced disappearances, and extrajudicial executions are rampant. The government of Pakistan has failed to protect individuals—particularly women, religious minorities and children from violence and other human rights abuses committed in the home, in the community, and while in legal custody”⁵.

¹ Muhammad Hashim Kamali, “Principles of Islamic Jurisprudence.”

² Haider Zeshan, “Right to Remain Silent: Compatibility with Shari’Ah and Position in Pakistan”.

³ WJP Rule of Law Index 2020.

⁴ Amnesty International, the Right to Fair Trial, 2002.

⁵ Amnesty International, Pakistan Human Rights Concerns, 2021

The FDIH in its report published in 2019 regarding the process of Fair Trial in Pakistan articulated that “ATA Courts hold some trials in secret, raising significant concerns with regard to guarantees to the right to a fair trial. The laws that govern the anti-terrorism courts also raise several important concerns. For example, under Section 21(h) of the ATA, 1997 confessions made in police custody are admissible as evidence before anti-terrorism courts”¹.

Expeditious justice is not only constitutional responsibility of the State under Article 37 (D) of the Constitution of the Islamic Republic of Pakistan, 1973 but also an essentiality of fair trial. Timely decision of a case reduces burden of cases and backlog of the pendency in the Courts. The latest fortnight report of disposal issued by the Supreme Court of Pakistan manifests that there are about 51852 cases of different categories are pending in the Court². According to a report issued by the Geo News on June 18, 2021 there are about 2,159,655 cases pending before different courts of the Country.³ Detail is available in Table No: 1.

Extrajudicial Killings in Pakistan:

Another vast dilemma of failure of the criminal mechanism of the country to ensure fairness of trial as a right is extrajudicial killings of citizens under the garbage of Police Encounters which are usually fake and a tool to safeguard the Killers. The Asian Legal Resource Center (ALRC) in its report published in 2012 referred the “Agenda of Human Rights Council concerning Extrajudicial Killings as well as violation of freedom of express in

¹ FIDH, Punished for being Vulnerable, 2019

² Fortnightly Disposal Report dated 06.07.2021 Supreme Court of Pakistan.

³ Geo News How many Cases are Pending in Pakistan and Why? Dated 18th June, 2021

the country condemning this practice with urge to control this manifestation”¹. This act is not a new phenomena rather it is as old as the country itself and is still in practice and recently one Usama Nadeem, a 20 years old University Student was shot dead in Islamabad on not stopping the Vehicle.

Regarding the extrajudicial killings in Pakistan statistics, the data gathered and displayed on the website by “The News” reveals that during January 2014 and May 2018, 3345 persons were killed under the guise of Police Encounters which is sufficient to explore the number of Extrajudicial killings in Pakistan within a short time span depriving a large number of individuals of the right to a fair trial².

International Obligations of the State:

Right to fair trial is a universally acknowledged right. Pakistan is a member of the UNO and signed the UDHR. Thereafter, Pakistan signed the ICCPR and CAT along with Optional Protocol to the CAT on June 23, 2010. The right to fair trial is a phenomenon designed to protect the life and liberty of the persons under the IHRL. Article 10 of the UDHR provides that “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and any criminal charge against him”³.

Article 14 of the ICCPR states: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public

¹ ALRC-CWS-20-07-2012.

² The News dated January 20, 2019.

³ The Universal Declaration of Human Rights, 1948

hearing by a competent, independent and impartial tribunal established by law¹”.

Whereas article 11 of the UDHR declares a person innocent until proved guilty.

The Supreme Court of Pakistan in case of Ex-Prime Minister Yusaf Raza Gillani observed that the right to fair trial being prolonged recognized had now been entrenched in our Jurisdiction under Constitutional guarantee.² In compliance of these Instruments, Pakistan incorporated Article 10-A in the constitution of the Islamic Republic of Pakistan, 1973 through 18th Amendment in 2010. His Lordship Mr. Justice Nasir ul Mulk in a judgment held that “The legislature perhaps intended to give it the same meanings as is broadly, universally recognized and embedded in our own jurisprudence. Thus, in order to determine whether the trial of respondent by this Bench violates the condition or of a fair trial we have to fall back on the principles enunciated in this respect³”.

Conclusion:

The recapitulation of the above narrative demonstrates that Fair Trial is a fundamental Human Right acknowledged by the Universal Human Rights Instruments. A plethora of elements like Registration of Case, Prevention from Arbitrary Arrest, Intimation about reasons for Arrest, Right to Consult the Attorney/Counsel, Un-authorized Detention, Prohibition of Torture, Right to Remain Silent, Competent, Independent and Impartial Court/Tribunal, Public Hearing, Provision of Translator/Interpreter to an Accused, Presumption of Innocence, Hearsay Evidence is no Evidence, Understand Charge and Evidence and Cross examine Witnesses, Right to

¹ The International Covenant on Civil and Political Rights, 1966

² Supreme Court of Pakistan awarded sentence to the Ex-Prime Minister of Pakistan in Suo Moto Contempt petition; PLD 2012 SC 553, para 27;

³ District Bar Association Rawalpindi vs. Federation of Pakistan; PLD 2015 SC 401

Defend, Prohibition of Retrospective Punishment, Protection against Self-incrimination, Prohibition of Punishment Severe than Provided for Offence, Protection against Double Jeopardy and Right to Appeal are associated with the fair trial. Pakistan being signatory to the above referred Documents is under obligation to ensure the compliance of this Right but as per reports of International Organizations the country stands a pole a part from securing the Right to fair trial and extrajudicial killings are also large contributors to usurping the right to a fair trial.

Table No: 1.

| Sr. No: | Name of the Court | Pending Cases |
|----------------|---|----------------------|
| 01 | The Supreme Court of Pakistan | 51,138 |
| 02 | The Lahore High Court, Lahore | 193,030 |
| 03 | District Judiciary of the Punjab | 1,345,632 |
| 04 | The Sindh High Court, Karachi | 83,150 |
| 05 | District Judiciary of the Sindh. | 115,296 |
| 06 | The Peshawar High Court, Peshawar | 42,180 |
| 07 | District Judiciary of the Khybar Pakhtunkhwa | 240,436 |
| 08 | The Baluchistan High Court, Quetta. | 4,663 |
| 09 | District Judiciary of the Baluchistan | 15,729 |
| 10 | The Islamabad High Court, Islamabad. | 16,374 |
| 11 | District Judiciary Islamabad Capital Territory. | 51,849 |

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