



### FINAL APPROVAL

It is certified that we have gone through and evaluated the dissertation submitted by Mr. Hastam Khan, a student of LL.M. Human Rights Law under University Registration No. 75-FSL/LLMHRL/F11 titled "The Right of access to Justice in Pakistan: A critical analysis of the trial procedure in the light of Human Rights" in partial fulfillment for the award of degree of LL.M. Human Rights Law. We have evaluated the dissertation and found it up to the requirement in its scope and quality for the award of degree.

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## **DECLARATION**

I hereby declare that to the best of my knowledge this thesis is authentic except where the acknowledgement is made in the text. This thesis has not been submitted for the degree or any examination at any other institution.

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## **DEDICATION**

This work is a dedication to my parents whose prayers always lift me up when I fall.



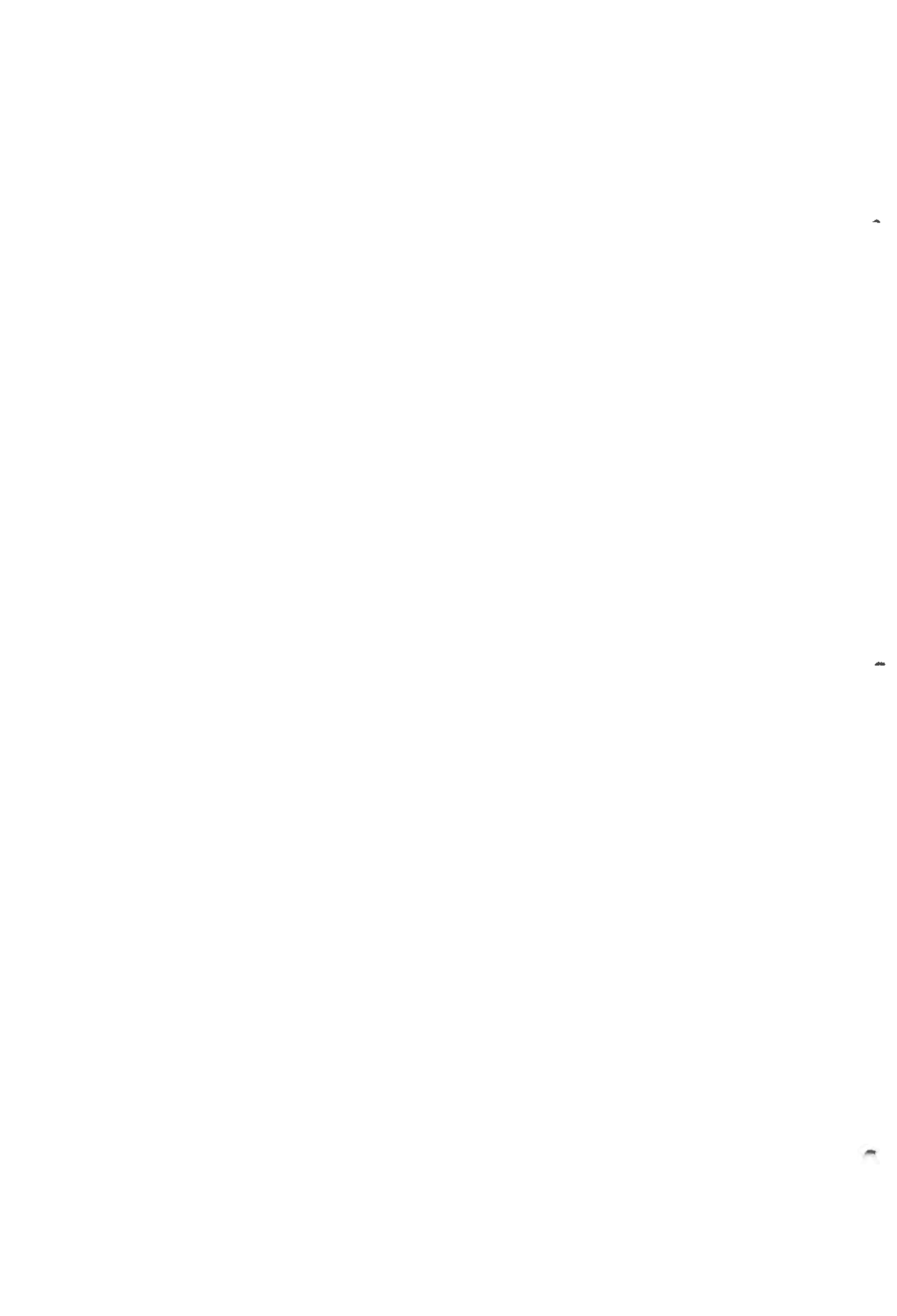
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First of all, I thank Almighty Allah who is most merciful and compassionate whose blessing and grace made me successful.

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## **TABLE OF CASES**

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**Benazir Bhutto v. President of Pakistan**

**(PLD 1998 SC 388)**

**Elahi Cotton Mills v. Federation of Pakistan**

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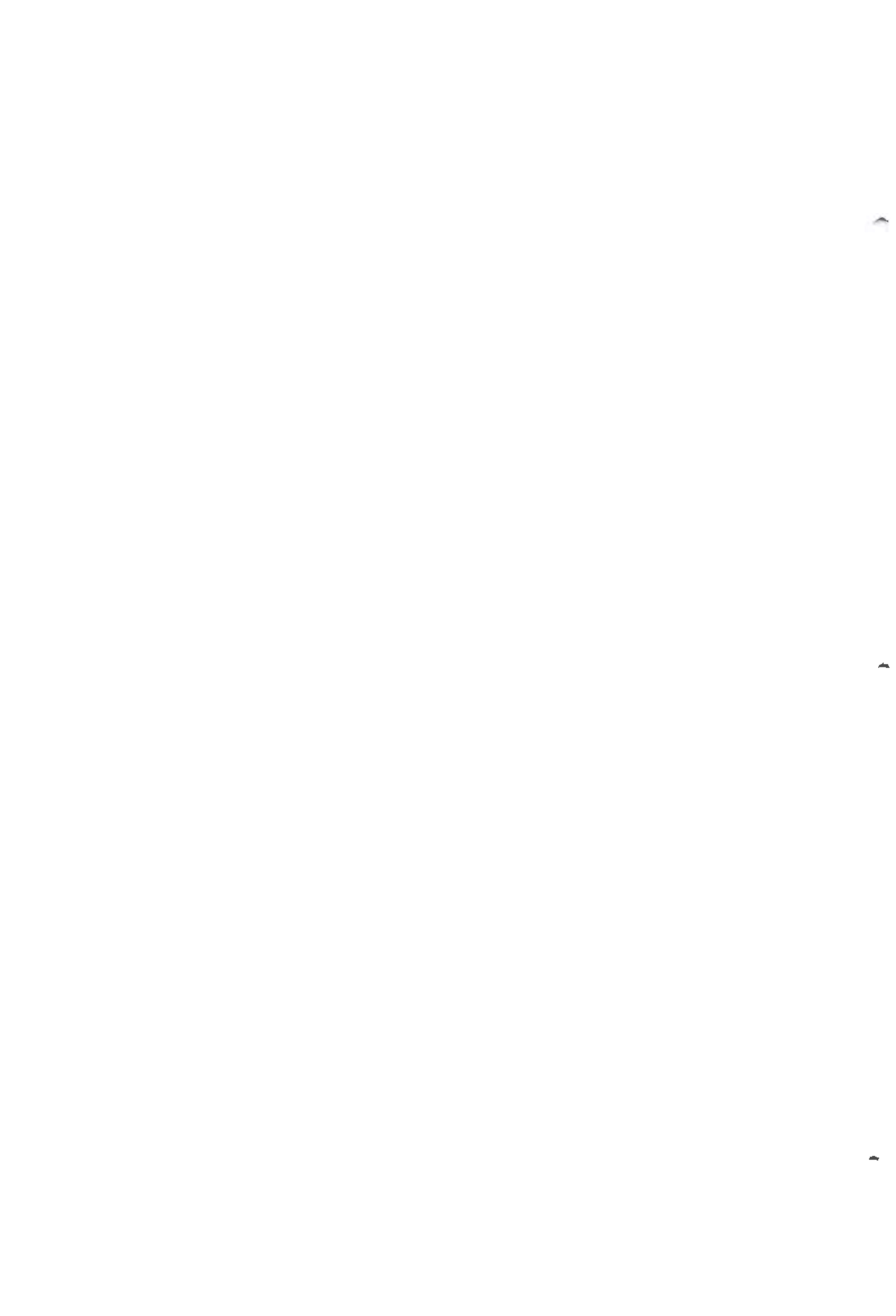
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## **LIST OF ABBREVIATIONS**

<b>A. S. C.</b>	<b>Advocate Supreme Court</b>
<b>Art.</b>	<b>Article</b>
<b>ADR</b>	<b>Alternate Dispute Resolution</b>
<b>C. J.</b>	<b>Chief Justice</b>
<b>Cr. P.C.</b>	<b>Criminal Procedure Code</b>
<b>D. I. G.</b>	<b>Deputy Inspector General of Police</b>
<b>D. S. P.</b>	<b>Deputy Superintendent of Police</b>
<b>D. P.O.</b>	<b>District Police Officer</b>
<b>F. R.</b>	<b>Fundamental Rights</b>
<b>FIR</b>	<b>First Information Report</b>
<b>IHRL</b>	<b>International Human Rights Law</b>
<b>ICCPR</b>	<b>International Covenant on Civil and Political Rights, 1966</b>
<b>ICESCR</b>	<b>International Covenant on Economic Social and Cultural Rights, 1966</b>
<b>I.O</b>	<b>Investigating Officer</b>
<b>NAB</b>	<b>National Accountability Bureau</b>
<b>NGO</b>	<b>Non-Governmental Organization</b>
<b>P.P.C</b>	<b>Pakistan Penal Code</b>

<b>PLD</b>	<b>Pakistan Legal Decision</b>
<b>SC</b>	<b>Supreme Court</b>
<b>SOPs</b>	<b>Standard Operating Procedures</b>
<b>SSP</b>	<b>Senior Superintendent of Police</b>
<b>SHO</b>	<b>Station House Officer</b>
<b>UDHR</b>	<b>Universal Declaration of Human Rights</b>

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## INTRODUCTION:

If peace does not exist in a society there would not be any progress and prosperity, but the question is what are the causes, sources and reasons that disturb and destroy the peace and prosperity in the society. The sole answer to the question would necessarily be the infringement of rights. Actually nothing else but the infringement of rights is hurting the feeling of individuals and the society at large. As a result altercations take place, hatred increase and well-being of society is thus adversely affected. This principle is explained in the 'Preamble of Universal Declaration of Human Rights' as, "Whereas it is essential, if man is not to be compelled to have recourse, a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law"<sup>1</sup>. It is clear from this statement that protection of all individuals is one of the foremost duties of a state and that infringement of rights bring nothing but fights and quarrels. There is an important saying "if you desire peace cultivate justice"<sup>2</sup>. It means that justice is mandatory for keeping peace in the society, but the question is what Justice itself is? Justice is an ideal concept of functional specialization which has different meanings in different context. Ordinarily it means just conduct, fairness or the exercise of authority in the maintenance of right, However the proper definition of justice is, "The fair and proper administration of Law"<sup>3</sup>. Also according to Plato justice also means "giving to everyone his due"<sup>4</sup>. For an equitable and just society there should not only be good principles of justice and laws but such basic principles of justice and

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<sup>1</sup> Preamble to the Universal Declaration of Human Rights, 1948, Para 3

<sup>2</sup> "Si vis pacem, cole justitiam", ILO (International Labor Organization) motto, engraved at the headquarter building at Geneva. Available at [http://www.nobleprize.org/noble\\_price/peace/laureal/1969](http://www.nobleprize.org/noble_price/peace/laureal/1969) (last accessed 10,10,2012)

<sup>3</sup> Black's Law Dictionary, 7th edition 1999.

<sup>4</sup> G.M. Chaudhry, Essays on Law, Justice, Human Rights and Legal System (Rawalpindi: Federal law House, 2009), 114.

laws should be effective and in action without any discrimination with full force supported by a scientific system of administration of justice.

Justice delayed is justice denied are the words which are generally attributed to 'William e.Gladstone a British statesman and prime minister.'<sup>5</sup> This maxim leads to the right to fair trial and other human rights including right to have speedy trial which is necessary for the redressal of grievances of aggrieved party. As in the present justice system the courts and other institutions do not provide the remedy to the aggrieved litigants by delaying decisions hence this is the cry of the day that our legal system should be reformed in the light of said maxim.

Justice hurried is justice buried is a quote which is always quoted whenever the quote justice delayed is justice denied is used for provision of speedy justice. Purpose of the quote is to point out the disadvantages of unnecessary hurry as haste makes waste.

Hence 'justice delayed is justice denied and justice hurried is justice buried' are relevant expressions and only the full analysis of all the aspects of a case may enable us to determine whether it is hurried or delayed justice. However in empirical and substantial terms justice delayed and justice hurried are not appreciated modes of dispensation of justice by courts of law.

Access to justice is meant, "access by people, in particularly the poor and disadvantaged groups to fair, effective and accountable mechanisms for the protection of rights, control of abuse of power and resolution of conflicts. This includes the ability of people to seek and obtain a remedy through formal and informal justice systems, and the

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<sup>5</sup> Ibid, 122.

ability to seek and exercise influence of law making and law implementing processes and institutions".<sup>6</sup>

Access to justice is a basic right of individual recognized by IHRL. This is not only a fundamental right in itself but it also means to protect and enjoy other rights. UDHR provides:

“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by constitution or law.”<sup>7</sup> The Right of access to justice has two aspects: one relating to procedural law and the other relating to substantive law. Protection of right of access to justice is to be ascertained from registration of FIR in police station to the trial of the case before the court of law.

The right of access to justice has been recognized by the IHRL instruments as well as by the local laws but still the individuals can not exercise this right practically. On the part of Pakistan this right has been violated, the reasons are the complex and complicated procedure of the courts of law, poverty defeats justice, use of delaying tactics by the lawyers, police excessive powers in registration of FIR, the burden of cases on the courts. These and so many other factors create hurdles in the exercise of right of access to justice.

From the above discussion it is obvious that ‘system of administration of justice’ in Pakistan is not so efficient and competent to perform the function and achieve the objectives which are necessary for establishing peace and order in a state. Hence there is a need to provide a sound and updated mechanism which may develop the system of administration of

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<sup>6</sup> G.M. Chaudhry, *Essays on Law, Justice, Human Rights and Legal System* (Rawalpindi: Federal Law House, 2009), 504.

<sup>7</sup> Article-8 Universal Declaration of Human Rights, 1948.

justice for the protection of rights of individuals without delays keeping in view the changing circumstances and needs.

This work is an attempt to provide some reasonable and considerable suggestions for the improvement of our criminal justice system and to highlight that where are the loopholes and lacuna in the whole criminal justice process and procedure which ail our criminal justice. In this thesis, different stages of criminal procedure are highlighted. For example pre-investigation stage or stage of registration of FIR, investigation stage and trial stage.

The thesis is divided into four chapters, chapter one deals with the right of access to justice, its meaning and a brief introduction. This chapter further discusses the importance and status of right of access to justice in the eyes of International Human Rights Law and the Constitution of Islamic Republic of Pakistan. Chapter two deals with the criminal justice system in Pakistan, its foundation and components and its scope and importance. Moreover the chapter states that whether the laws which govern the criminal justice system, having any defects or deficiencies? Chapter three deals with the Pakistani Legal System, norms of human rights and criminal trial. The most important part of the chapter deals with criminal trial and the defects in trial procedure which create hurdles in exercise of right of access to justice, in spite of the fact that this right is recognized by the Constitution and International Human Rights Law. Chapter four gives conclusion and recommendations which may prove beneficial for the reforms in criminal justice system of our Country.

## **CHAPTER ONE:**

# **THE RIGHT TO EXPEDITIOUS AND FAIR HEARING IN CRIMINAL TRIAL**

### **Introduction:**

The right of access to justice simply means access of the individuals to the courts for obtaining the remedies for their grievances. The people, especially the poor and illiterate, firstly feel hardships to access the courts and if they get access they don't get justice for them. It would be wrong to say that the poor has equal right of access to justice as the rich is enjoying this right. Indeed right of access to justice is a fundamental right which is declared by International Human Rights Law and there are international covenants and treaties which guarantee the protection of this right. Pakistan is a Party to some of these covenants as well and thus comes under obligation to ensure the protection of right of access to justice. Our Country made some arrangements in this regard and added some specific articles in the Constitution to ensure the recognition and protection of this right. But still there is a need of radical changes in the legal system and some keen and solid steps are necessary to be taken to protect right of access to justice in letter and spirit. Because every good system of administration of justice should not only have good principles of justice but these principles should be seen in action.

## 1.1 What is meant by Right of Access to Justice?

The right of access to justice is one of those words which cannot be found as a phrase in dictionaries; however a clearer understanding of the concept is needed. For this purpose before we understand access to justice firstly, we try to understand what justice is?<sup>1</sup> Different philosophers and lawyers explain this concept in different ways but we here mention a few.<sup>2</sup> According to Aristotle “Justice is that virtue of the soul which is distributive according to desert”.

Thomas Aquinas says that “justice is certain rectitude of mind where by a man does what he ought to do in the circumstances confronting him”.

According to Voltaire, ‘All men have equal rights to Liberty, to their, Property, and to the protection of the laws’.

Black’s Law Dictionary defines justice as “the fair and proper administration of Laws.”<sup>3</sup>

The right of access to justice means, “Access by people in particularly from poor and disadvantage groups to fair, effective and accountable mechanisms for the protection of rights, control of abuse of power and resolution of conflicts. This includes the ability of people to seek and obtain a remedy through formal and informal justice system, and the ability to seek and exercise influence on law making and law implementing processes and institutions”.<sup>4</sup>

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<sup>1</sup> Smith, H.1919, quoted by Christian Legal Services in “Administer justice’ available at <http://www.adminsterjustice.org/legal/legal-Home.htm>

<http://www.adminsterjustice.org/legal/legal-home.htm> Last accessed 12-10-2014

<sup>2</sup> ibid

<sup>3</sup> Black’s Law Dictionary, 7<sup>th</sup> edition 1999

<sup>4</sup> G. M Chaudhry, Op.Cit. P. 504

Right of access to justice has two dimensions, one is procedural (having a fair hearing before the court, tribunal etc. or fair trial) and other is substantive (to receive a fair and just remedy for a violation of ones right).

The right of access to justice is considered a fundamental and universal right but still it must be recognized that there is no fundamental and universally applicable mean of satisfying this right in practice. The challenge is how the right of access to justice is achieved materially or physically? <sup>5</sup>

All over the world, people are different from others in status and level. People who are poor regarding the wealth, health and education, could they equally enjoy, the right of access to justice as compared the rest of the society? From here it is assured that access to justice is reserved only for rich people.<sup>6</sup>

## **1.2 Right of Access to Justice in International Human Rights Law**

Access to justice is a fundamental right of individual recognized by IHRL. It is not only a Fundamental Right itself but it also means to protect and enjoy other rights as well. The right of access to justice is protected by IHRL.<sup>7</sup> For instance ‘Universal Declaration of Human Rights 1948’ provides:

“All are equal before law and are entitled without any discrimination to equal protection of law”<sup>8</sup> and “everyone is entitled in full equality to a fair and public hearing by an independent

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<sup>5</sup> Smith, H.1919, quoted by Christian Legal Services in “Administer justice’ Op.Cit.

<sup>6</sup> Bolivar Rene NJUPOUEN, Access to Justice for the Poor;What Role for Bar Associations?(University of Birmingham, 2005). Available at [www.ibanet.org/document/Default.aspx.....](http://www.ibanet.org/document/Default.aspx.....)(last accessed 16-01-2017)

<sup>7</sup> ibid

<sup>8</sup> Article 7 of Universal Declaration of Human Rights, 1948.



and impartial tribunal in the determination of his right and obligation and of any criminal charge against him.”<sup>9</sup>

UDHR further provides: “everyone has the right to an effective remedy by the competent national tribunal for acts violating the fundamental rights granted to him by constitution or law.”<sup>10</sup>

International Covenant on Civil and Political Rights 1966 (ICCPR) also provides that:

“All persons shall be equal before the courts and tribunal 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 fair and public hearing by competent, independent and impartial tribunal established by law”.<sup>11</sup>

In particular, “everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”<sup>12</sup>

It further provides:

“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantee, in full equality.”<sup>13</sup>

- (a) “To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him”.
- (b) “To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing”.

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<sup>9</sup> Article 10 of Universal Declaration of Human Rights, 1948.

<sup>10</sup> Article 8 of Universal Declaration of Human Rights, 1948.

<sup>11</sup> Article 14(1) of Covenant on Civil and Political Rights 1966.

<sup>12</sup> Article 14(2) of International Covenant on Civil & Political Rights, 1966 (ICCPR).

<sup>13</sup> Article 14(3) of ICCPR 1966

(c) "To be tried without undue delay".

(d) "To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing, to be informed , if he does not have legal assistance, of his right, and to have legal assistance assigned to him, in any case where the interest of justice so requires, and without payment by him in any such case if he does not have sufficient means to pay for it".

(e). "to examine, or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witness against him".

(f). "To have the assistance of interpreter if he cannot understand or speak the language used in court".

(g). "Not to be compelled to testify against himself or to confess guilt".

It also further provides:

"Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."<sup>14</sup>

It particularly states that:

"When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."<sup>15</sup>

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<sup>14</sup> Article 14 (5) of International Covenant on Civil and Political Rights,1966.

<sup>15</sup> Article 14 (6) of International Covenant on Civil and Political Rights,1966.

From the above mentioned international human rights law documents, it is evident that right of access to justice is a fundamental right of individual recognized by the world community. Further it is not only a fundamental right but it also means to protect and enjoy other rights as well.

### **1.3 Right of Access to Justice in the Constitution of Islamic Republic of Pakistan, 1973**

The right of access to justice is ensured by the Constitution of Pakistan. It is evident from the following Articles of the Constitution of Islamic Republic of Pakistan.<sup>16</sup>

“To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be and of every other person for the time being in Pakistan.”<sup>17</sup>

It further provides that:<sup>18</sup>

- (a) “No action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;
- (b) “No person shall be prevented from or be hindered in doing that which is not prohibited by law.”
- (c) “No person shall be compelled to do that which the law does not require him to do.”

‘Article 9 of the ‘Constitution of Islamic Republic of Pakistan’ states that

“No person shall be deprived of life and liberty, save in accordance with law”<sup>19</sup>

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<sup>16</sup>PLD 2007 Karachi 544

<sup>17</sup> Article 4(1) Constitution of Islamic Republic of Pakistan, 1973

<sup>18</sup> Article 4(2) Constitution of Islamic Republic of Pakistan, 1973

<sup>19</sup> Article 9 Constitution of Islamic Republic of Pakistan, 1973

In the case of *Benazir Bhutto v. President of Pakistan*, it had been commented that for the protection of fundamental right and for the benefit of the people, the approach of the court shall be dynamic, progressive and liberal, while interpreting the article of the Constitution.<sup>20</sup> The Constitution gives guarantee to the citizens for their fundamental rights as enshrined in article 4 and 9 etc.<sup>21</sup>

## 1.4 The Right of Access to Justice in the Eyes of Apex Courts

The Rights of access to justice is a well-recognized and inalienable right. The right of access to justice includes to be treated according to law, the right to have fair and proper trial and the right to have an impartial court or tribunal.<sup>22</sup>

“The right of access to justice is enshrined in article 10-A which means that an accused person should have a fair trial before a court of competent jurisdiction”.<sup>23</sup>

In the case of *Government of Baluchistan v. Azizullah*, it was held that:

“The right of access to justice includes the right to be treated according to law, the right to have a fair and proper trial...”,<sup>24</sup>

If the right of access to justice includes the right to have a fair trial, then the question arises that whether a fair trial be possible if a financially weak accused does not have an advocate.<sup>25</sup>

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<sup>20</sup> PLD 1998 SC 388

<sup>21</sup> PLD 2007 Karachi 544

<sup>22</sup> *ibid.*

<sup>23</sup> Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973

<sup>24</sup> *Government of Baluchistan v. Azizullah* (PLD 1993 SC 341)

<sup>25</sup> PLD 2007 Karachi 544

This question was examined and following observation was given in the case of Gideon v. Wainright(1963),<sup>26</sup>

“ Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice , any person who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him...,”

Similarly in the case of Richard Argersinger v.Raymond Hamlin(1972), it was observed by Douglas J. as under.<sup>27</sup>

The right to be heard would be, in many cases of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the sciences of law. If charged with crime, he is incapable, generally of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel the may be put on trial without a proper charge, and convicted upon incompetent evidence or evidence irrelevant to the issue or inadmissible...

As for the article 4 and article 9 and 10-A of the Constitution are concerned the right of access to justice cannot be ensured without the accused person is assisted by a lawyer. In particular about 70% of the population of Pakistan reside in rural areas and also they are illiterate and due to the poverty and illiteracy, the law ceases to protect their fundamental rights which are ensured by the Constitution and hence the factors of poverty, illiteracy, and unawareness provide the grounds for exploitation, deprivation and deception.<sup>28</sup>

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<sup>26</sup> Gideon v.Wainright (1963)372 US 335

<sup>27</sup> Jon Richard Argersinger v. Raymond Hamlin (1972)

<sup>28</sup> PLD 2007 Karachi 544

It is revealed from the above, that right of access to justice is the fundamental right of an individual which is to be protected by the state that if he is an accused he should be provided and represented by a legal expert i.e. an advocate but unfortunately no such system exists in our Country in a proper way.

## **1.5 Right of Access to Justice and Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973**

The right of 'access to justice' and 'fair trial' is enshrined in Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973. Article 10-A was introduced for the first time in a judgment of Supreme Court of Pakistan in the case of Syed Yousuf Raza Gillani, the Prime Minister of Pakistan. Para.18 of the judgment says that:

“the learned counsel appeared for the respondent raised a preliminary objection to the very trial of contempt by this Bench on the ground that since it initiated the proceedings suo motu, issued show cause notice and framed charge, it no longer remained competent to proceed with the trial, for to do so would be in violation of the principle of 'fair trial' now guaranteed as a fundamental right under Article 10-A incorporated in the Constitution by the Constitution(Eighteenth Amendment) Act, 2010.”<sup>29</sup>

Article 10-A reads: For the determination of his civil rights and obligations or any criminal charge against him a person shall be entitled to a fair trial and due process”.<sup>30</sup>

The principle of fair trial must fulfill two conditions, firstly 'no one shall be condemned unheard' and secondly that 'a person cannot be judge in his own cause'. The incorporation of article 10-A in the Constitution, brought about a radical change in the scope

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<sup>29</sup> 2012 SCMR 909

<sup>30</sup> Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973

of law relating to determination of civil rights and obligations as well as criminal charge, ensuring that everyone shall be entitled to 'fair trial and due process'.<sup>31</sup>

Other fundamental rights enshrined in the Constitution have been made limited or subject to law where as such limits have not been imposed on the fundamental right under article 10-A. Another point of distinction is that article 10-A confers a Constitutional right upon the individuals to a 'fair trial' regardless of, and notwithstanding, any provision in a sub constitutional law.<sup>32</sup>

The principle of right to a 'fair trial' has been acknowledged and recognized by our courts since long and is by now well entrenched in our jurisprudence. The right to a 'fair trial' undoubtedly means a right to proper hearing by an unbiased competent forum. The latter component of a 'fair trial' is based on the maxim "nemo debet esse iudex in propria sua causa" that "no man can be judge in his own cause". This principle has been further expounded to mean that a person must not hear a case if he has personal interest, whether or not his decision is influenced by his interest, for "justice should not only be done but be seen to have been done."<sup>33</sup>

The inclusion of the principle of right to a fair trial is now a constitutionally guaranteed fundamental right and has been to a higher pedestal; consequently a law, or a custom or usage having the force of law, which is inconsistent with the right to a fair trial would be void by virtue of article.8 of the Constitution.<sup>34</sup>

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<sup>31</sup> 2012 SCMR 909

<sup>32</sup> *ibid*

<sup>33</sup> *ibid*

<sup>34</sup> *ibid*

The Supreme Court of Pakistan has gone to the extent of associating the right to a 'fair trial' with the fundamental right of 'access to justice'.<sup>35</sup>

## **1.6 Right of Access to Justice and Fair Trial**

The right of access to justice and right to fair trial are interlinked and associated each other. These fundamental rights are established and recognized by Constitutional and Statutory provisions.

Section 340(1) of Cr.P.C. reads:

Any person accused of an offence before a criminal court or against whom proceedings are initiated under this Code in any such Court, may of right be defended by a pleader.

It is the statutory right of an accused to be defended by a pleader and also it is the duty of State to provide a counsel for a pauper accused at state expense. This section not only gives right to the accused who is to be at liberty to have a counsel of his choice not only at the time when judicial proceedings are initiated but also he should be having an opportunity to communicate with his lawyer during the police custody.<sup>36</sup>

The same principle is guaranteed by Art.10 of the Constitution of Islamic Republic of Pakistan, which reads:

"No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice".<sup>37</sup>

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<sup>35</sup> PLD 1999 SC 1126

<sup>36</sup> Section 340 of Code of Criminal Procedure, 1898

<sup>37</sup> Art.10 of the Constitution of Islamic Republic of Pakistan, 1973



Arts.13 and 14 are also relevant in this regard which grant the similar fundamental rights to the accused. Art. 13 reads: No person,<sup>38</sup>

- (a) Shall be prosecuted or punished for the same offence more than once, or
- (b) Shall, when accused of an offence, be compelled to be a witness against himself.

Art.14 reads:<sup>39</sup>

- (1) The dignity of man and subject to law, the privacy of home, shall be inviolable
- (2) No person shall be subjected to torture for the purpose of extracting evidence.

The right to a fair trial is originally granted by Art.10 of the Universal Declaration of Human Rights (UDHR), 1948. Pakistan is a signatory to the UN Declaration but unfortunately this basic right was incorporated in the Constitution very late i.e. by the 18<sup>th</sup> amendment in 2010. It is argued that despite the incorporation of the right to fair trial, yet its realization does not meet the standard originally envisioned under the UN Declaration. It is supported by the violation of this right occurring in actual practice of arrest and detention. The violations of right to fair trial and other fundamental right are seen in cases of caution warnings, custodial torture, confessions and identification parades. More importantly, right to fair trial is not a single dimensional right rather it is a tri-dimensional right and for its full realization, it is essential that the interests of all the parties of a criminal case i.e. the accused, the victim and the society at large must be kept in balance.<sup>40</sup>

Art.10 of the of UDHR reads:<sup>41</sup>

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<sup>38</sup> Art.13 of the Constitution of Islamic Republic of Pakistan, 1973

<sup>39</sup> Art.14 of the Constitution of Islamic Republic of Pakistan, 1973

<sup>40</sup> <https://sahsol.lums.edu.pk/law-journal/right-fair-trial-better-late-never> last accessed 12-01-2018

<sup>41</sup> Art.10 of Universal Declaration of Human Rights, 1948

“Everyone is entitled in full equality to fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”.

The right to fair trial is now a fundamental Constitutional right belonging to every citizen of Pakistan. The Constitution does not define the right to fair trial, the international human rights documents such as European Convention on Human Rights (ECHR) are helpful in this regard. Art.6 of ECHR describes the essential elements of right to fair trial which are (a) a fair and public hearing both in civil and criminal cases (b) by an independent and impartial tribunal (c) within a reasonable time (d) announcement of the judgment in open court, though for a number of reasons restrictions may be placed on the press and public from attending all or part of a trial,(e) presumption of innocence of accused in a criminal offence until he is shown to be guilty beyond reasonable doubt, (f) availability of safeguards to a person charged with a criminal offence, including the right to be informed of the charge against him, to have adequate time,(g) facilities to prepare his defence, (h) to be defended through counsel or in person,(i) to avail legal aid if required, (j) to produce witnesses or have witnesses summoned and examined, (k), and to have an interpreter in case of a language problem.<sup>42</sup>

The right to fair trial is linked with and dependent on other fundamental rights guaranteed by the Constitution. Generally the Constitution gives every citizen the right to be dealt with in accordance with law, provides for their equality before law and equal protection, gives protection against illegal actions which are detrimental to their rights, liberty, body, reputation or property, allow them to do all that is lawful and protects them from being compelled to do anything which the law does not require them to do. More importantly, in the context of ‘fair trial’, the Constitution embodies provision for protection against illegal deprivation of life and

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<sup>42</sup> <https://sahsol.lums.edu.pk/law-journal/right-fair-trial-better-late-never> last accessed 12-01-2018

liberty, including safeguards as to arrest and detention which requires that an accused and detained person be informed of the reason for his arrest, have the right to consult and be defended by a counsel of his choice and have the right to be produced before the magistrate within 24 hours of his arrest.<sup>43</sup>

### **1.6.1 Right of Access to justice and Fair Trial in Practice**

In the context of right of access to justice and fair trial, the Constitution provides safeguards against retrospective punishment, double punishment, self-incrimination and upholds the privacy of a person's home, his dignity and protection against torture intended for extracting evidence. However in actual practice, right of access to justice and fair trial do not exist. Many times these fundamental rights are violated. In support following examples are given.<sup>44</sup>

#### **Caution Warnings:**

When a person or a suspect is picked up by the police, mostly his arrest is not promptly recorded in the relevant register, in order to avoid the constitutional requirement of producing an arrested person before a magistrate within 24 hours. Resultantly an accused person lies in police lock-ups or in private 'deras' or holding cells, until a writ for habeas corpus is issued or an arrest is finally and formally recorded. There is no concept of informing a person so detained and arrested of the reason of his arrest, also access to counsel is seldom provided or facilitated and a caution warning is seldom given. There is a common practice to put the accused to torture until he confesses the crime, regardless of whether he committed the crime or not.<sup>45</sup>

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<sup>43</sup> Ibid

<sup>44</sup> Ibid

<sup>45</sup> Ibid

## **Custodial Torture:**

The law confers power on the magistrate to prevent the incidences of custodial torture. The problem begins when the magistrate without the application of judicial mind and blindly gives the accused into police custody for physical remand. The problem becomes worse when this is done without ensuring that the accused is produced in court, further when the physical remand is blindly and mechanically extended, even when allegations of physical torture exist. The accused is also to be given an opportunity to raise an objection against the remand but this opportunity is rarely given. Such a practice violates right of access to justice and fair trial.

## **Confession:**

Though the confession made by the accused during custody of the police is inadmissible, still it may be used as basis of determination of the guilt of the accused. Similarly the opinion of investigation officer about the guilt or innocence of the accused, is not binding on the court, still it is given a weight. The Supreme Court of Pakistan has repeatedly held that it is not the job of an investigation officer to give his 'opinion' in this regard as it is the sole prerogative of the courts:<sup>46</sup>

Before we part with this judgment, we would like to make a mention of some illegalities which we have noticed not only in the present trial but which now appear to have become a norm at almost every trial and which were not being noticed even by the High Court... We feel that the time is perhaps ripe when we need to remind ourselves of the legal role of the police in the matter of investigations and the law regulating the admissibility and relevancy of evidence which could be recorded at a trial in the said context ... It will thus be noticed, as mentioned above, that the job of a police officer conducting an investigation was confined only to collection of

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<sup>46</sup> PLD 2011 SC 350,360-362

evidence which evidence, when collected, had to be placed by him before the competent court and it was then the authority and the obligation of this court to form an opinion about the guilt or innocence of an accused person and to adjudicate accordingly. Conceding formation of such an opinion to a police officer would be a grave illegality which could lead to grave injustice and serious resulting consequences.

The Constitution grants the right to be defended by a legal counsel of his own choice before a court of law in addition to the fundamental right of consulting and meeting with counsel or his relatives and any refusal or hurdle on part of the police in this regard is a violation of the accused fundamental right. Unfortunately, the practice for the common man is totally against the law and precedents established by the superior courts. It is however drastically different for the rich and influential people who are allowed all sorts of amenities and facilities.<sup>47</sup>

Examples of the facts mentioned in the above judgment of honorable Supreme Court of Pakistan include the house arrest of Moonis Elahi, the son of a former chief minister of Punjab who was implicated in a corruption case involving billions of rupees. Former President Pervez Musharraf was also granted house arrest by an anti-terrorism court in Benazir Bhutto murder case. <sup>48</sup>

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<sup>47</sup> ibid

<sup>48</sup> <https://sahsol.lums.edu.pk/law-journal/right-fair-trial-better-late-never> Last accessed 12-01-2018

## **Identification Parade:**

Sometimes an 'identification parade' is conducted to identify a suspect. The legal procedure for an identification parade is to get permission from the district and session's judge who deposes a magistrate to go into jail and conduct the same in accordance with the procedure. The procedure requires that witness do not see the suspect prior to the identification process and that there should be no delay between the time of occurrence of the offence and the time when the parade is conducted which shows that the memory recall of the witness is fresh and reliable. The proper procedure is that a certain number of 'dummies' have to be mixed up with the real suspect in a line who are identical in height, physique, feature and appearance and dress. In practice, the police after procuring or apprehending the suspect invite the witnesses to the police station, prior to the identification parade, to acquaint themselves with the suspects and in most cases take their photographs. This is a clear violation of the rights of 'access to justice' and 'fair trial'.<sup>49</sup>

### **1.6.2 Right to fair trial and triangulation of interests**

In civil cases the right to fair trial extends to both the parties. However in criminal cases this right leans towards the accused. It is argued that a victim of an offence should have the same right as the accused in the context of right of 'access to justice and fair trial'.<sup>50</sup> In our criminal justice system, the complainant or the victim is at the mercy of mostly ill-prepared and disinterested public prosecutor, and inefficient and poor police investigation. The low conviction rate is a proof of this fact. A private counsel engaged by the complainant cannot plead his case without the permission and supervision of the public prosecutor nor is he allowed direct involvement in relation to collection of evidence by the police. So the question is, if a

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<sup>49</sup> *ibid*

<sup>50</sup> *ibid*

complainant or a victim cannot get justice because his case was not investigated fairly, nor was any evidence which would connect the accused to the offence committed, collected properly, nor was the prosecutor bothered enough to prosecute, or if the quality of a victim's testimony was weakened because of harassment or exposure to the perpetrator or if the complainant witnesses resiled because of no protection, could that still be called a 'fair trial'.<sup>51</sup>

Similarly if an accused not given access to counsel and is kept ignorant of his legal options, if the searches and recoveries made and the evidence collected is illegal and fabricated, if court gives undue weight to an investigation officer's opinion at remand, bail hearing and trial stage, if witnesses are bought and do not uphold the sanctity of an oath, if there is no concept of punishment of perjury, if there is no restriction on media trial, if there is reverse presumption of 'guilty until proven innocent' if there is violation of disclosure rules, if physical remand is given automatically, if identification parade is pre-staged at police lock-ups, if due process is applicable selectively, then it must be said there is no right of 'access to justice and fair trial' despite the fact that these are fundamental, constitutional rights.<sup>52</sup>

Thus the right of access to justice and fair trial can only be realized through the effective implementation of the rights of all the parties in a criminal case i.e. the accused, the victim and the society at large. The Pakistani Constitutional jurisprudence has been slow to appreciate this, the Indian Supreme Court is a step ahead in recognizing that the right to a fair trial is not a single dimensional right, rather it has to balance the interests of the accused, the victim, and the society at large.<sup>53</sup>

It was held in *Zahira Habibullah Sheikh v. State of Gujrat* that:

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<sup>51</sup> *ibid*

<sup>52</sup> *ibid*

<sup>53</sup> *ibid*

This court has often emphasized that in a criminal case, the fate of the proceedings cannot always be left entirely in the hands of the parties, crime being public wrong in breach and violation of public rights and duties which affects the whole community and is harmful to society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim, and the society...If a criminal court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest, and elicit all relevant materials necessary for reaching the correct conclusion, and to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. The court administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings.<sup>54</sup>

## **1.7 The Meaning and Scope of Two Basic Legal Maxims**

For an equitable and just society there should not only be good principles of justice and laws but such principles of justice and laws should be effective and in action without any discrimination with full force supported by a scientific system of administration of justice.<sup>55</sup>

“Justice delayed is justice denied” are the words which are generally attributed to William e. Gladstone a British statesman and Prime Minister.<sup>56</sup> This principle is the basis for the recognition of right to a speedy trial and similar rights which are meant to expedite the legal system because it is unfair for the injured party to have sustain of the injury with little hope or to have wait for an indefinite time for his grievance to be redressed. In the modern times this legal maxim has become a rallying cry for the legal reformers who view courts or government as performing slowly in resolving legal issues either because the existing system is too much

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<sup>54</sup> Zahira Habibullah Sheikh v. State of Gujrat ( AIR 2006 SC 1367)

<sup>55</sup> G. M Chaudhry, op.cit., 114

<sup>56</sup>ibid. 12



complex or overburdened or because the issue or party in question lacks political favor or he is poor.

A fresh example of “justice delayed is justice denied” is the case of two brothers Ghulam Qadir and Ghulam Sarwar who were executed with death penalty by the prison authorities just before a year the Supreme Court of Pakistan eventually announced them innocent.<sup>57</sup>

The society loses the peace where the courts or authorities do not deliver justice expedite and with certainty. The causes of delays in our justice system are mainly the old and inadequate court procedures, inefficient case management methods and techniques, irresponsible, incompetent judges and lawyers and corrupt prosecution and police.<sup>58</sup>

### **1.7.1 Justice Delayed is Justice Denied and Justice Hurried is Justice Buried**

Justice hurried is justice buried is a legal maxim which has always been quoted whenever the maxim ‘justice delayed is justice denied’ is quoted. It is necessary to make a balance in the administration of justice. As true, justice delayed is justice denied but equally justice hurried is justice buried, a reconciliation of these maxims is the need of an equitable, just and reasonable administration of justice. Both these maxims are to be examined in respect of each other. One is showing need of urgency while the other is giving adverse consequences of such urgency. So both these extremes are not to be appreciated and a middle and reasonable way is to be followed.<sup>59</sup>

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<sup>57</sup> Salahuddin Ahmed, ‘Justice delayed is Justice denied’, Dawn (December 19, 2016) available online at: <https://www.dawn.com/news> last accessed 12-10-2016

<sup>58</sup> Ibid.

<sup>59</sup> G. M Chaudhry, Op. Cit., PP. 128, 129

The question is what is reasonable? The word reasonable is defined by Black's Law Dictionary seventh edition, 1999, which means, "fair, proper, or moderate under the circumstances."<sup>60</sup>

John Salmond in his book 'jurisprudence' says about the word 'reasonableness' "it is extremely difficult to state what lawyers mean when they speak of "reasonableness". In part the expression refers to ordinary ideas of natural law or natural justice, in part to logical thought working upon the basis of rules of law."<sup>61</sup>

In the case of *Elahi Cotton mills v. Federation of Pakistan*, the word reasonable was interpreted. "it, inter alia, connotes agreeable to reason, comfortable, having the faculty of reason, rational; thinking speaking, or acting rationally; or according to the dictates of reason; sensible, just, proper and equitable or to act within the constitutional bounds."<sup>62</sup>

It is to be said that justice hurried is justice buried if the court does not decide the matter before it, in accordance with the prescribed procedure provided by the law and the parties are not given sufficient time to present their case for adjudication.<sup>63</sup>

It means that such ways and means are required which ensure the adjudication of cases within a responsible time period which will neither be delayed nor hurried.<sup>64</sup>

In short the reasonableness is the only formula which can be applied in any case keeping in view the circumstances of each case whether it requires justice by a speedy trial or a slow trial.

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<sup>60</sup> Black's Law Dictionary, 7<sup>th</sup> edition 1999

<sup>61</sup> John Salmond, *Jurisprudence*, (Glanville L. Williams, 10<sup>th</sup> edition, 1947), 183.

<sup>62</sup> PLD 1997 SC 582

<sup>63</sup> G. M. Chaudhry, *op. cit.*, P. 131

<sup>64</sup> *ibid.*, P.132

## **Conclusion:**

The right of access to justice is a fundamental and universally recognized right of all individuals even in Pakistan. Its recognition is ensured by documents and instruments of international human rights law. As Pakistan is a member of international community and also is a Party to some of these International Human Rights Law's conventions, so the Constitution of Pakistan gives the guarantee for the protection of right of access to justice for all citizens. The Constitution guarantees that this right shall be protected. But unfortunately in practice right of access to justice is not available to the citizens as sometimes this is violated as justice is delayed while sometimes is violated as justice is hurried.

This discussion may be concluded as that right of access to justice has two phases one is out of court or before the commencement of trial i.e. the registration and investigation stage of a criminal case and other is inside the court i.e. the trial stage.

## CHAPTER TWO:

# THE DISPENSATION OF CRIMINAL JUSTICE IN PAKISTAN

### Introduction:

Justice, like many other words does not have a definite meaning; different scholars and philosophers explained this word in their own way. The Greek philosophers, including Plato and Aristotle, explained that each thing or person has its or his proper sphere, to overstep which is unjust. The most famous definition in the entire discussion of justice is the one which is enshrined by the Roman lawyers in Justinian Code which says that justice is the constant and perpetual means to render to each his rights.<sup>65</sup>

It must be clear that whenever we talk about justice, it means legal justice not abstract or philosophical justice. And further legal justice means justice in accordance with law.<sup>66</sup> In Ali Nawaz Gardezi case, Shabbir Ahmed, J. said:<sup>67</sup>

“The invocation of the oft-quoted judicial maxim to the effect that justice should not only be done but must be seen to be done would not be apt in a case where the court has followed the law because in a court of law justice means neither more nor less than the administration of the law of land.”

Justice is the ultimate goal of criminal justice and criminal justice cannot be achieved without social justice which is an ideal embraces all aspects of civilized life and which is linked

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<sup>65</sup> Justice (R) Fazal Karim, *The Law of Criminal Procedure*, (Pakistan Law House, 2010), p.21

<sup>66</sup> *ibid.* pp. 21, 22

<sup>67</sup> Ali Nawaz Gardezi v. Muhammad Yousuf, (PLD 1962 Lahore 558,619)

to fundamental notions of fairness and cultural beliefs about right and wrong.<sup>68</sup> Criminal justice and civil justice are two aspects of social justice. Civil justice deals with fairness in relationships between citizens, government agencies and business in private matters involving contractual obligations, business dealings etc. Criminal justice refers to the violations of the criminal law. Wherever criminal law is violated, interests of the public would be damaged which demand apprehension and punishment of the law violators. At the same time criminal justice system extends to the protection of innocent, the fair treatment of offenders , and fair play by the law enforcement agencies.<sup>69</sup>

Under the Constitution of Islamic Republic of Pakistan, there are three organs of the state. The legislature, the executive and the judiciary; the legislature makes the laws which define offences and penalties and provide procedure for their enforcement. The executive executes these laws by detecting crimes, arresting the offenders, collecting the evidence and determining whether the criminal case requires process and prosecution and the judiciary tries the alleged offender to determine his guilt, and if found guilty to punish him in accordance with law. This all forms the basis of criminal justice system.<sup>70</sup>

## **2.1 Criminal Justice System in Pakistan**

Article 4 of the Constitution of Pakistan forbids any action detrimental to the life, liberty, body, reputation or property to be taken except in accordance with law and similarly Article 9 and 24 of the constitution guarantee the fundamental rights of life, liberty and

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<sup>68</sup> Justice (R) Fazal Karim, *The Law of Criminal Procedure*, op.cit. P.22

<sup>69</sup> *ibid* , pp. 22, 23

<sup>70</sup> *ibid*, pp. 27, 28

property. According to these Articles no person shall be deprived of life, liberty and property save in accordance with law.<sup>71</sup>

It is clear from the above that the fundamental rights of protection of life, liberty, body, reputation or property of all the individuals are guaranteed by the Constitution i.e. Supreme law of the country and the individuals will only lose their basic rights if the law of the land permits to do so. Meaning thereby if an individual violates the rights and interest of other individuals in the society, his own rights regarding life, liberty and property etc. would be put in danger as he would be prosecuted according to the law of the land.<sup>72</sup>

## **2.2 The Laws Which Govern Criminal Justice System in Pakistan**

The criminal justice system is governed by criminal laws in Pakistan. Pakistan Penal Code (P.P.C), Code of Criminal Procedure (Cr.P.C.) and the Law of Evidence (Qanun-e Shahadat Order) are the basic laws of criminal justice in Pakistan. PPC forms substantive criminal law as it creates the offences and provides punishments for these offences while Cr. P. C. and the Law of Evidence provide the procedure for these offences and punishments.<sup>73</sup>

We can say that all matters concerning penal criminal law are contained in PPC, while the matters regarding criminal procedure are included in Cr.P.C. P.P.C and Cr.P.C. are the mother criminal laws. Beside these laws, there are some special laws working in the field of criminal justice in Pakistan. Under the Constitution, Parliament and Provincial Assemblies can legislate on criminal law and criminal procedure.<sup>74</sup>

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<sup>71</sup> Ibid. p. 19

<sup>72</sup> Ibid. p. 19

<sup>73</sup> Ibid. p. 19

<sup>74</sup> Ibid. p. 27

The basic responsibility of the state is to protect the rights and interest of individuals in the society so that society can live with peace and harmony. Again for maintaining peace in the society, the state comes under obligation to control the crimes in society which is only possible through having a criminal justice system.<sup>75</sup>

### **2.3 Defects in Substantive and Procedural Criminal Laws**

The legal framework of criminal justice in Pakistan is basically formed by P.P.C. (1860), Cr.P.C. (1898) and Evidence Act (presently the Qanun-e-Shahadat Order, 1984). These Criminal Laws were enacted by British rulers while their stay in subcontinent. The aim was to take control of this part of the world as colony and to exploit the resources of it. After the creation of Pakistan, some efforts were made in shape of amendments in the prevailing laws to bring the existing Criminal laws in consonance with the religion, culture and traditions of the people of this country, and to meet the present day needs of justice and standards of Human Rights. But inspite of these efforts the objectives were not attained as the main spirit embodied in these laws remained the same.<sup>76</sup> The terrorists involved in heinous offences of terrorism acquitted by Anti-Terrorism Courts (ATCs) because of defects and lacunas embodied in the Criminal Laws and Procedure<sup>77</sup>. To prevent the abuse and misuse of section 154 of Cr.P.C. quantum of punishment under section 182 P.P.C. should be increased so as to discourage false accusation against the innocent citizens. Also for good results quantum of punishment under sections 184,186,187,188, P.P.C. and punishments in sections 269,270,271,272,273,277,279,

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<sup>75</sup> *ibid.* p. 27, 28

<sup>76</sup> Sardar Hamza Ali, "An Analytical Study of Criminal Justice System of Pakistan (with special reference to the Province of Punjab)" *Journal of Political Studies*, vol.22 issue 1, 2015. Available at

<https://www.questia.com/library/journal/1P3-3703186471/an-analytical-study-of-criminal-justice-system-of>

Last accessed 12-10-2013

<sup>77</sup> *ibid*

P.P.C. may be revised and increased. To discourage malafidies on the part of police, strict application of sections 155 to 157 of the Police Order, 2002 is required.<sup>78</sup> Sections 22-A and 22-B were introduced in Cr.P.C. to ensure the application of 154 Cr.P.C. The purpose of this was twofold to reduce the burden of High Court under Article 199 of the Constitution as well as to stop the abuse of section 154 Cr.P.C. but instead of resolving the issue it created issues. After the addition of 22-A and 22-B in criminal Law, extra burden of cases lays on courts and also this extra exercise is prolonging the administration of justice. On the other hand new trend of false and frivolous litigation came into the field as the party started to convert civil litigation into criminal case.<sup>79</sup> Under section 173 Cr.P.C, investigating officer is duty-bound to submit police report within 14 days with a grace period of 3 days, after completion of investigation before the court of competent jurisdiction. It is seen that period of 17 days is not sufficient for a quality investigation and hence in practice it is seen that even after the lapse of months, I.O does not submit report which delays the trial of the case.<sup>80</sup> Section 54 of Cr.P.C. gives vast and unbounded power to the Police. The biased and corrupt Police officials use these powers for ulterior motives, instead of maintaining peace and harmony in the society, by taking precautionary measures against the criminals. This section empowers the police officer, “ to arrest any person without warrant of a Magistrate under the circumstances specified in the various clauses of the section”. The section was misused by the police officer by harassing and arresting innocent people. Under section 167 Cr.P.C. after arrest of innocent person planted recovery is affected by physically torturing him and retained the accused in custody unnecessarily for extorting money from him and his relatives. To prevent the abuse and misuse of these sections, the apex court in “Ghulam Sarwar case (1984)”, gave guidelines for the

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<sup>78</sup> ibid

<sup>79</sup> ibid

<sup>80</sup> ibid



subordinate judiciary but these are not applied in letter and spirit. <sup>81</sup>Remedies against the misuse of powers of police under Ss.54 and 167 were given under Ss.342 of P.P.C. and 491 Cr.P.C. Section 342 of P.P.C provides punishment against illegal detention which is not sufficient. Under section 491 of Cr.P.C. “writ of habeas corpus” can be filed before the High Court against the illegal detention and for the recovery of the detenu. Same powers are given to the Sessions Judge or Additional Sessions Judge under s.491 of Cr.P.C. But this section is not self-executory and no strict action is taken against the unlawful acts of the Police. Moreover the unlawful acts of the police got shelter by introducing “article 155(2) of the police order,2002”. After this article, private complaint against the unlawful acts of the police was barred. By section 169 of Cr.P.C .the S.H.O and I.O are empowered “to release an accused (if he is in custody) on his executing a bond with or without sureties when they find that there is not sufficient evidence or reasonable grounds of suspicion to justify the forwarding of the accused to the Magistrate”. There is no check and balance or permission from a higher police officer such as SSP investigation or D.I.G mentioned in the section before releasing the accused. Hence the corrupt and dishonest police officers misuse the section as they wish. Moreover the police demand and extort money from the innocent citizens involved falsely in cases, for their release, they also release the influential criminals under this section.<sup>82</sup>

## **2.4 The Police and Prosecution System**

If our police is poor and corrupt, our prosecution is also irresponsible and weak. Inefficient investigation and weak prosecution are also significant factors in the failure of our criminal justice. The Supreme Court of Pakistan in Haider Ali and another v. DPO Chakwal & others observed:

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<sup>81</sup> ibid

<sup>82</sup> Ibid

“It would be an understatement to say that the state of our criminal justice system which led to this case, and many others like it, is deficient. The majority of human right cases which come before us concern in one way or another police abuse of powers or inefficiency. Even as we hear this case, we noted many instances of police excesses..., ineffective investigation and weak prosecution is similarly another matter which created deep raptures in our justice system and which we identify on a daily basis.”<sup>83</sup>

#### **2.4.1 Pre Investigation Stage (Registration of FIR)**

It is known that the provisions of section 154 Cr.P.C are flouted and misused by the police. Section 154 Cr.P.C provides, that

“every information given to an officer incharge of a police station relating to the commission of a cognizable offence, whether given in writing to him or reduced in writing by an officer in charge of a police station, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the provincial govt. may prescribe in this behalf.”<sup>84</sup>

Although this provision is mandatory but even then the concerned police officer refuses to register the FIR even after knowing that the information relates to the commission of a cognizable offence. Khwaja Haris, learned Sr,ASC, noted that in year 2011 alone, 419,365 FIRs lodged in the province of Punjab out of which 28,787 cases were got registered by the orders of justices of the peace under section 22-A(6) Cr.P.C. This reluctance of the police from their duty, leads to the quarrels and civil litigations among the people. Such SHO shall be prosecuted under Art.155 of the police order, 2002, but even such order for proceeding against

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<sup>83</sup> Haider Ali & another v. D.P.O. Chakwal and others, (2015 SCMR 1724)

<sup>84</sup> Sec.154 of Cr.P.C.

the police SHO is not implemented by higher police officials.<sup>85</sup> Another issue is of false complaints and FIRs against innocent people just to harass them by using the provision of 154 Cr.P.C. The sentence against such offenders of law is provided under Section 182 and 211 P.P.C but due to non-implementation of Section 182 and 211 P.P.C such criminals and the police who misuse the law are not prosecuted.<sup>86</sup>

## 2.4.2 Investigation Stage

While the registration of a FIR is mandatory, initiating investigation is not. Reading section 156 Cr.P.C. with Section 157 Cr.P.C. it appears that the officer in charge of a police station shall proceed to initiate investigation of a case only where, inter alia, from information received; he has reason to suspect the commission of an offence. This interpretation is further fortified when we read clause (b) of the proviso to sub-section (1) of Section 157 Cr.P.C. which provides that “if it appears to the incharge of a police station that there is not sufficient ground for entering on an investigation he shall not investigate the case.” Yet we often find that on registration of FIR, the concerned police officer without application of mind directly proceeds to arrest the accused.<sup>87</sup>

The police should not move for the arrest of the accused nominated in the FIR unless sufficient evidence is available for the arrest. Yet to our dismay we have to deal with such matters on a daily basis. Perhaps, as some of the reports referred to above point out, the issue lies in the fact that there are no real guidelines available to the police which would channel their discretion and judgment. This coupled with their lack of training, makes defective investigation almost a near possibility.<sup>88</sup>

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<sup>85</sup> Haider Ali & another v. D.P.O. Chakwal and Others, (2015 SCMR 1724)

<sup>86</sup> *ibid.*

<sup>87</sup> *ibid.*

<sup>88</sup> PLD 2007 SC 539

During the course of investigation the I.O. records statements of the witnesses u/sec.161 of Cr.P.C. These statements are not recorded in question and answer form rather recorded in a narrative form or in the style of I.O. and thus it becomes difficult to determine the actual statement or answer given by the person to the I.O. during interrogation.<sup>89</sup>

As the accused is the favourite child of law hence there is a well-established principle of criminal law that the prosecution shall prove its case beyond any shadow of doubt. The defence counsel creates such a doubt so easily from the contradiction in the statements of witnesses which are recorded under sec.161 of Cr.P.C. by the police and thus the real offender gets acquitted from the court.<sup>90</sup> So it should be ensured that statements of the witnesses or of the party are recorded in their own words without undue influence, harassment, and dictating.

After collection of evidence the police prepares a report which is called challan. Challan is submitted by the police u/sec.173 of Cr.P.C. before the trial court. Sometimes the police takes bribe and mentions name of the accused in column no.2 which means that the accused is found innocent during the course of investigation. Though the police opinion is not binding on the court but still report u/sec.173 of Cr.P.C. forms the foundation of prosecution case.<sup>91</sup>

The investigating agencies are required to collect all available evidence during investigations. If painstaking and timely investigations are not conducted, valuable evidence may be lost. Sometimes the police fail to collect vital evidence from the site such as blood stains, fingerprints and other evidence in cases of physical violence, due either to lack of training or inefficiency. At times, the statements of key witnesses are not recorded as their importance in proving the case is not understood. Statements may also be recorded in a casual

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<sup>89</sup> Zia ullah Ranjha, Criminal Trials, available at: <https://www.pakistantoday.com.pk/2016/04/06/criminal-trials/>  
Last Accessed 23-09-2017

<sup>90</sup> Ibid

<sup>91</sup> Ibid

and slipshod manner by the investigating officer which leaves gaps in the evidence. Occasionally, the police fail to work in collaboration with forensic experts. As a result, forensic evidence is not collected for use against the offender.<sup>92</sup>

Investigations are often conducted by low-ranking officers who are new in service and lack experience. As the caliber of such officers is not high, they may be deficient in procedures. The lacunae left are often harmful in trial. Sometimes senior officers are unable to monitor and supervise investigations in a timely manner due to heavy work load or indifference. Hence, vital lacunae are left in cases and are exploited at the trial stage.<sup>93</sup>

Investigating agencies do not have well qualified officers in sufficient numbers. Often they after have excessive work load and the quality of investigation is adversely affected. Efficient investigation necessitates qualified personnel commensurate with the work load. Besides, lack of resources such as transportation, communication and office equipment may affect the quality of investigations. The lack of training and emphasis on the development of specialized investigation Officers and facilities are perhaps indicative of the wider issue in policing.<sup>94</sup>

### **2.4.3 Trial Stage and Prosecution**

The main objective of the criminal trial is to determine whether an accused person has violated the penal law and where found guilty, to prescribe appropriate sanction. Prosecution is at the center stage of a criminal trial and plays an important role in conducting of trial. Prosecution is an executive function of State and is usually discharged through the prosecutor.<sup>95</sup>

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<sup>92</sup> [www.unafei.or.jp/english/pdf/RS\\_No53/No53\\_31RC\\_Group3](http://www.unafei.or.jp/english/pdf/RS_No53/No53_31RC_Group3) Last accessed 13-03-2018

<sup>93</sup> *ibid*

<sup>94</sup> *ibid*

<sup>95</sup> [www.unafei.or.jp/english/pdf/RS\\_No53/No53\\_31RC\\_Group3](http://www.unafei.or.jp/english/pdf/RS_No53/No53_31RC_Group3).Last accessed 13-03-2018

This is an established principle of criminal law that burden of proof lies on the prosecution and that the prosecution shall prove its case beyond any shadow of doubt. The prosecutor faces some problems in proving the guilt of the accused. Some of these factors are the legal framework, the law enforcement infrastructure and the quality of the personnel of operating within the legal system.<sup>96</sup>

When the prosecutors do not enjoy the statutory authority to guide and supervise police investigations, they are not usually consulted by the police during investigation even when legal advice is necessary. Sometimes, prosecutors are consulted but their directions are not complied with due to departmentalized perceptions.<sup>97</sup> It is the primary responsibility of prosecutor to prove the guilt of the accused. To conduct a trial is one of the most important functions of the prosecutor. It is observed that sometimes the prosecutors are not prepared for the trial and fail to examine the witnesses in a professional manner. As a result, court time is wasted.<sup>98</sup>

For successful prosecution, the need for cooperation and understanding between the police and prosecution is emphasized. The police is required to secure the presence of witnesses when they are needed in court. Generally, the prosecutor also ensures the execution of court orders through the police agency. Any lack of cooperation may result in inefficient prosecution and delayed trial. The prosecutor should secure the police cooperation to ensure the production of witnesses in court on the appointed dates.<sup>99</sup> The work load of the prosecutor should be kept within reasonable limits so that the quality of his output is not adversely affected. The prosecutor should vehemently oppose frivolous applications by the defense counsel for unnecessary adjournments. Prosecutors should have a good command of the law, procedure

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<sup>96</sup> *ibid*

<sup>97</sup> *ibid*

<sup>98</sup> *ibid*

<sup>99</sup> *ibid*

and enough experience for effective prosecution. It is, therefore, essential that qualified personnel be inducted into the profession from the open market. This would necessitate improving the salary scales, perks and status of prosecutors.<sup>100</sup>

It was observed in *Haider Ali & another v. D.P.O. Ghakwal & others* that:<sup>101</sup>

“We noted that how at least in Punjab more than 65% of criminal cases do not result in conviction. The learned Prosecutor General Punjab also stated that in even those cases where a person has been convicted by the trial court, substantial numbers is acquitted by the appellate forums. These figures are indicative of weak investigation and gathering of evidence, but are also a result of serious deficiencies in our prosecution system”.

In *Haider Ali & another v. D.P.O Chakwal & others* the following issues were highlighted in this regard:<sup>102</sup>

- i. Lack of cooperation between the police and prosecution at the investigation stage: there appears to be no standardized SOPs which guide the relationship between prosecutors and police officers and allow them to aid each other in the fair and timely investigation of the case.
- ii. Lack of training and competent prosecutors: Prosecutors are not provided proper training and facilities. In addition, competent prosecutors because of lack of incentives resign from their services for better opportunities. There also appears to be no effective quality review system in place to check under performing prosecutors. As a result, the best prosecutors are not being retained in service.

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<sup>100</sup> *ibid*

<sup>101</sup> *Haider Ali & another v. D.P.O. Chakwal and Others*, (2015 SCMR 1724)

<sup>102</sup> *ibid*

- iii. Protection of witnesses: we have been informed that in many cases the prosecution's case is damaged as key witnesses resile from their stated position because of pressure from the accused.
- iv. Adjournment requests by the lawyers and delay in fixation of cases by judiciary: The defendant's lawyer deliberately at times delays resolution of cases. Delay and injustice is also caused as a result backlog in the judicial system and frequent transfers of presiding judicial officers.

It must be emphasized that the failure to address individual grievances of citizens causes frustration amongst them which, in turn, may lead to lawlessness. It also needs to be emphasized that a functioning criminal justice system is directly linked to the enforcement and realization of various fundamental rights of citizens such as Article 9, 10, 10A, and 14."<sup>103</sup>

## **2.5 Need for Effective & Efficient Criminal Justice System**

It has been said that the criminal justice system consists of law enforcement (police), adjudication (courts) and corrections (jails/prisons, probation and parole).<sup>104</sup> The criminal justice system in Pakistan is not delivering. The reason is the defaults and defects which are embodied in it, which starts from lodging FIR, mal-practices during investigation by police, preparation of report under section 173 of Cr.P.C by investigating officer(I.O) and its submission in the trial court by Public Prosecutor without application of his independent mind leaving trial at the mercy of the defense counsel. All these steps of criminal trial and the complex and inadequate mode of criminal procedural laws in Pakistan made this system

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<sup>103</sup> *ibid*

<sup>104</sup> Sardar Hamza Ali, *op.cit.*



ineffective and outdated. The work done for the improvement of criminal justice is half-heartedly.<sup>105</sup>

An efficient and effective criminal justice system is one which provides not only to the victim of crime an appropriate remedy but it also protects the valuable rights of accused. It protects and takes care of all those who are concerned in the case just for the best interest of justice. The Supreme Court of Pakistan observed in a case, "People are losing faith in dispensation of criminal justice by ordinary criminal courts for reason that they either acquit the accused persons on technical grounds or take a lenient view in awarding sentences. It is high time that courts should realize that they owe duty to the legal heirs/relatives of the victims and also to the society. Sentences awarded should be such which should act as a deterrent to the commission of offence."<sup>106</sup>To turn the criminal justice system effective and efficient which could deliver, a whole-hearted effort is mandatory which would bring meaningful changes in the substantive as well procedural criminal laws.

## **Conclusion:**

It is said that if you desire peace cultivate justice. For maintaining peace and harmony in the society, it is mandatory upon the State to ensure justice through an effective and efficient justice system. In our country criminal justice system is based on criminal laws which are divided as substantive laws and procedural criminal laws. Substantive Criminal law creates offences and provides punishments for these offences while the Procedural Criminal law provides the procedure and method for investigation, inquiry and trial of criminal justice. We can say that substantive law are the ends and goals and procedural law are the means. Rules

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<sup>105</sup> ibid

<sup>106</sup> ibid

are the servants of mankind maintaining peace and harmony in the society by providing justice to the people but actually the technicalities and complications embodied in the the rules of law create hurdles in the way of justice. Courts deliver justice within the limits of rules of law. Hence good rules of law should be introduced in practice for attaining the high goals of Criminal justice system.

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## **CHAPTER THREE:**

# **PAKISTAN'S LEGAL SYSTEM: CRIMINAL TRIAL AND NORMS OF HUMAN RIGHTS**

### **Introduction**

The legal system of Pakistan is having its roots in the British legal system and the foundations of our Constitution and laws were laid by the Britain. Pakistan is an Islamic Republic and under the Constitution no law shall be made which is against Islam and all existing laws shall be made in accordance with the teachings of the Quran and Sunnah. The right of access to justice is declared as one of the fundamental rights of all individuals, it is not only guaranteed by international human rights law, but it is also considered and protected by Islamic law. Articles 8 to 28 of our Constitution deal with the fundamental rights. The apex courts while interpreting these articles declared that right of A2J is one of the fundamental rights. The question is that if this right is guaranteed by the Constitution then the question arises that why this right is not seen in action? The sole answer may be the complex mode of procedural laws which are out dated, enacted by the foreigner rulers and old enough that these laws do not meet the present day standards of justice. The poor role of presiding officers should also be criticized which do not deliver the speedy and expeditious justice. The corrupt police and untrained, poor prosecution is another aspect of this issue which is equally responsible for right of access to justice not being enforced in letter and spirit.

Legal system is a compact whole which encompasses the entire system relating to law and administration of justice in a country without any exception which in fact, requires a detailed study.

### 3.1 The Constitution of the Islamic Republic of Pakistan and Right of Access to Justice

The Constitution of the Islamic Republic of Pakistan, 1973 is the Supreme law of the Country which deals with state-structure and governs the State's institution. Under the Constitution Supreme Court of Pakistan and High Courts of different provinces are Constitutional courts. These Constitutional courts take cognizance of the matters relating to the enforcement of fundamental rights as well as the matters relating to the interpretation of different laws and Constitutional provisions.<sup>107</sup>

Article 9 stipulates that no person shall be deprived of life and liberty save in accordance with law.<sup>108</sup> Article 4 deals with the right of individuals to be dealt with in accordance with law. The said Article stipulates;<sup>109</sup>

“to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be and of every other person for the time being within Pakistan”.

In the case of *Arshad Mahmood v. Government of Punjab* it was held that:

the Constitution is a living document which portrays the aspirations and genius of the people and aims at creating progress, peace, welfare, amity among the citizens, therefore, while interpreting its different Articles particularly relating to the fundamental rights of the citizens, approach of the courts should be dynamic and elastic rather than static and rigid.<sup>110</sup>

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<sup>107</sup> G.M Chaudhry, op. cit., p.16

<sup>108</sup> Article 9 of the Constitution of Islamic Republic of Pakistan, 1973

<sup>109</sup> Article 4 of the Constitution of Islamic Republic of Pakistan, 1973

<sup>110</sup> PLD 1999 SC 193

Keeping in view the above principle of interpretation of articles of the Constitution relating to fundamental rights we have examined the Article 9 and found that the Constitution gives guarantee to the citizens that their life and liberty would not be deprived except in accordance with law. Right of access to justice also comes within such guarantee which means that the accused should have a fair trial. Thus a fair trial is a fundamental right of an accused person.<sup>111</sup>

The Honorable Supreme Court of Pakistan in the case of Liaqat Hussain v. Federation of Pakistan has observed that:

“the right of ‘access to justice to all’ is a well-recognized and invariable right enshrined in article 9 of the Constitution.<sup>112</sup>

This right is equally found in doctrine of ‘due process of law’. The right of access to justice includes the right to be treated according to law, the right to have a fair and proper trial and a right to have an impartial court or tribunal.<sup>113</sup>

The right of access to justice does not only mean that “the law may provide remedies for the violation of rights but it also means that every citizen should have opportunity and right to approach the courts without any discrimination”. It also envisages that normally the courts established by law shall be open for all citizen alike...<sup>114</sup>

One of the modes for blocking the road to free access to justice is to appoint or hand over the adjudication of rights and trial of offences in the hands of the executive officers.<sup>115</sup>

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<sup>111</sup> PLD 2007 Karachi 544

<sup>112</sup> PLD 1999 SC 504

<sup>113</sup> PLD 2007 Karachi 544

<sup>114</sup> PLD 1993 SC 341

<sup>115</sup> Ibid

Article 37(d) of the Constitution of Pakistan requires the state to ensure expensive and expeditious justice, so it is the main responsibility of the state to provide justice to its people. The principle of separation of powers is given by the Constitution of Pakistan as well. It is common thinking that the primary responsibility of judiciary is to provide the inexpensive and expeditious justice to the people but judiciary cannot perform this responsibility without the help of legislature and executive. The courts are required to decide cases in accordance with the Constitution and the law. There are some questions which should be kept under consideration when the law makers legislate the laws; are the law makers aware of the nature of the law, its functions and purpose? Do they ever consider the interests of the common person for whom the laws are being enacted? Do the proposed laws that are being debated by the legislative bodies serve the purpose and objectives for which these laws are going to be enacted?<sup>116</sup>

These are the questions which make a common person disappointed and he thinks that all legal system is not fair to protect his or her rights rather he considers the law of land is an enemy upon his or her rights. It is said that courts provide justice in accordance with law but if the law itself is not fair, then the courts cannot protect the rights of the people.<sup>117</sup>

Another problem is the low strength of judges in our country. 'The ratio of judge to the population in UK and USA is over 100 judges for one million people as compared to Pakistan where it is around 10 judges for one million people. Part II of our Constitution which comprises two chapters. Chapter I relating to fundamental rights from Art. 8 to 28. These fundamental rights can be enforced through the judicial system especially by approaching High Court in a

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<sup>116</sup> Mr.Nasir Aslam Zahid, The role of the judiciary in protecting the rights of the people. Judicial Activism, available at: [www.supremecourt.gov.pk/ijc/articles/16/3.pdf](http://www.supremecourt.gov.pk/ijc/articles/16/3.pdf). Last accessed 22-02-2017

<sup>117</sup> Ibid

writ petition under article 199 or under Art. 184 (3) in the Supreme Court. Article 8 of the Constitution “provides that any law which is inconsistent with the fundamental rights shall be void to the extent of such inconsistency and the same article obligates the state that it shall not make any law which takes away or abridges the fundamental rights.”<sup>118</sup>

When states fail to protect the human rights to its citizens, it creates conflicts and tensions in the societies and history shows that such states remain weak, underdeveloped and vulnerable, primarily on account of the brutal treatment of their subjects and the lack of access to justice.

### **3.2 The Norms of Human Rights and Right of Access to Justice**

The connection between justice and peace is undisputed, be it in affairs among citizens or relation between states. The preamble to United Nations Charter puts stress on “fundamental human rights, in the dignity and worth of human person, in the equal rights of men and women.” The UDHR 1948, adopted unanimously by the General Assembly, guaranteed essential, civil, economic, social and political rights. The Declaration is widely quoted, referred to in judicial decisions and invoked in the resolutions of the United Nations, its specialized agencies and other international and regional organizations. It has inspired various international conventions and National Constitutions, including our own Constitution. It was followed by covenants, namely International Covenant on Civil and Political Rights 1966 and International Covenant on Economic, Social and Cultural Rights, 1966. They established binding and enforceable human rights obligations. Numerous other HR instruments have been adopted and enforced, the prominent among these the convention against torture and other cruel, Inhumane or

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<sup>118</sup> Ibid

Degrading Treatment or Punishment 1984, the convention on the rights of the child 1989, and the convention on elimination of all forms of discrimination against Women 1979.<sup>119</sup>

Article 7 of ICCPR prohibits torture and cruel, inhuman or degrading punishment. The is interpreted to impose similar obligations to those required by the United Nations Convention Against Torture(CAT), including not just prohibition of torture, but active measures to prevent its use and a prohibition on refoulement.<sup>120</sup>

Article 9 of ICCPR recognizes the rights to liberty and security of the person. It prohibits arbitrary arrest and detention, requires any deprivation of liberty to be according to law, and obliges parties to allow those deprived of their liberty to challenge their imprisonment through the courts.<sup>121</sup> These provisions apply not just to those imprisoned as part of the criminal process, but also to those detained due to mental illness, drug addiction, or for educational or immigration purposes.<sup>122</sup>

Articles 9.3 and 9.4 impose procedural safeguards around arrest, requiring anyone arrested to be promptly informed of the charges against them, and to be brought promptly before a judge. It also restricts the use of pre-trial detention, requiring that it not be 'the general rule'.<sup>123</sup>

Article 10 of ICCPR requires anyone deprived of liberty to be treated with dignity and humanity. This applies not only to prisoners, but also to those detained for the immigration

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<sup>119</sup> Dr.Faqir Hussain, Director General, Federal Judicial Academy, Islamabad, The role of District Judiciary in Protection of Human Rights. Available at: <http://www.fja.gov.pk/articles/dg/The%20Role%20of%20District%20Judiciary%20in%20Protection%20of%20Human%20Rights.pdf> Last Accessed 20/10/2014

<sup>120</sup> Article 7 of International Covenant on Civil and Political Rights, 1966.

<sup>121</sup> Article 9 of International Covenant on Civil and Political Rights,1966.

<sup>122</sup> ibid

<sup>123</sup> ibid



purposes or psychiatric care. The article also imposes specific obligations around criminal justice, requiring prisoners in pretrial detention to be separated from convicted prisoners, and children to be separated from adults. It requires prisons to be focused reform and rehabilitation rather than punishment.<sup>124</sup>

The United Nations Convention against Torture (UNCAT) is an international human rights treaty that aims to prevent torture and other acts of cruel, inhuman, or degrading treatment or punishment around the globe.

Article 2 of UNCAT prohibits torture and requires parties to take effective measures to prevent it in any territory under their jurisdiction. This prohibition is absolute and non-derogable. No exceptional circumstances whatsoever may be invoked to justify torture, including war, threat of war, internal political instability, public emergency, terrorist acts, violent crime, or any form of armed conflict.<sup>125</sup>

Article 16 of UNCAT requires parties to prevent “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1” in any territory under the jurisdiction of State party.<sup>126</sup>

### **3.3 Principles Envisaged By International Human Rights Law and the Constitution of Pakistan**

The principles enshrined in HR documents are in consonance with the provisions of Pakistani Constitution. In the preamble of our Constitution, the state is obliged to ensure the full observance of the principles of democracy, freedom, equality, tolerance and social justice,

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<sup>124</sup> Article 10 of International Covenant on Civil and Political Rights, 1966.

<sup>125</sup> Article 2 of United Nations Convention against Torture, 1984.

<sup>126</sup> Article 16 of United Nations Convention against Torture, 1984.

as enunciated by Islam and to guarantee to all citizens, Fundamental Rights(FR), including the equality of status, of opportunity and before law. Article 4 deals with the rights of the individuals to enjoy the protection of law. This provision as per superior courts observations is the equivalent of the doctrine of “rule of law”.<sup>127</sup>

The principles of non-discrimination on the basis of sex finds special mention in Articles.25, 26 and 27 of the Constitution.Art.25 provides for equality of law and equal protection of law. Art.26 and 27 provide for equal access to public places and appointment in services. The Constitution contains specific provisions for protecting women against abuse and exploitation.<sup>128</sup>

### **3.4 Non-enforcement of the Constitutional Provisions**

As the provisions of the Constitution regarding the FRs of citizens are concerned, the legislative measures and policy guidelines are not implemented; and also there are some statutory provisions which infringe rights of individuals. For example there is problem in enforcement of laws which protect rights of women. Law of inheritance is an example of it. As governments are failed to implement rights of individuals, the Constitution gives mandate to the judiciary to enforce and protect the human rights of individuals.<sup>129</sup>

In the case of Ms Benazir Bhutto v. Federation, it was observed by Supreme Court that access to justice is a fundamental right of the citizens of Pakistan. Similarly the State is given the mandate to take effective steps for access to justice through executive and judiciary.<sup>130</sup>

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<sup>127</sup> Ibid

<sup>128</sup> Ibid

<sup>129</sup> Ibid.

<sup>130</sup> PLD 1988 SC 416

### 3.5 Criminal Procedure and Trial

Substantive law defines a crime and if it is committed in the society, what will be its punishment? Now how this crime would be proved and appropriate punishment will be given to the offender and if the accused is not the offender actually but falsely involved and prosecuted in the case, how his innocence will be proved, and if he proved innocent how he will be compensated. This is left for procedural law.<sup>131</sup>

In S.M.Junaid case, Karan Elahi Chohan J.says,

“Substantive law is concerned with the ends but the procedural law with the means and instruments by which those ends are to be attained.”<sup>132</sup>

Further, Substantive Criminal Law are the goals, for attaining these goals, procedural criminal law shall be effective. We can say that criminal procedure is the criminal justice system in action. For attaining the goals of criminal justice system, which is maintaining peace and harmony in the society and controlling crimes; an effective criminal procedure is needed.<sup>133</sup>

The importance of criminal procedure is quoted by Warren C.J:

“The quality of a nation’s civilization can be largely measured by the methods it uses in the enforcement of its criminal law.”<sup>134</sup>

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<sup>131</sup> Justice (R) Fazal Karim, *The Law of Criminal Procedure*, op. cit. p. 29

<sup>132</sup> PLD 1981 SC 12

<sup>133</sup> Justice (R) Fazal Karim, *The Law of Criminal Procedure*, op. cit. p. 33

<sup>134</sup> *Miranda v. Arizona* (384 US 436)

Rules of Procedure are the means of ascertaining and reaching the truth and doing justice in accordance with law.”<sup>135</sup>

Sometimes rules of procedure defeat the justice rather than to deliver it and it is done actually by those technicalities which are embodied in the rules of procedure. About these unnecessary and justice killing technicalities, Kaikaus J.said in *Imtiaz Ahmed v. Ghulam Ali* case:

“The proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All technicalities have to be avoided unless it is essential to comply with them on the ground of public policy. The English system of administration of justice on which our own is based may be to a certain extent technical but we are not to take from that system its defects. Any system, which by giving effect to the form and not to the substance defeats substantive rights and is defective to that extent. The ideal must always be a system that gives to every person what is his.”<sup>136</sup>

Similarly ‘Lord Donaldson MR’ said in an English case,

“The rules are the servants of the courts and of their customers not their masters; unless expressed in a wholly mandatory and exclusive fashion....”<sup>137</sup>

### **3.6 What is a Criminal Trial?**

The word ‘Trial’ is not defined in the Code of Criminal Procedure, 1898 but in the Code of Criminal Procedure,1872 it was defined as “ the

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<sup>135</sup> *ibid*

<sup>136</sup> *Imtiaz Ahmed v. Ghulam Ali* (PLD 1963 SC 382, 400)

<sup>137</sup> *Kennthe Ali Lison Ltd. v. A.E. Lime House*, (1990) 2 A11 ER 723,727)

proceedings taken in court after the charge has been drawn up and includes the punishment of the offender". So trial is the means and machinery provided by law for bringing the alleged offender to justice.<sup>138</sup>

### **3.6.1 The Aim of Criminal Trial:**

The two-fold purpose of criminal trial is that guilt shall not escape as well as innocence shall not suffer. The ultimate object of trial is to ensure a fair trial.

<sup>139</sup>'Fair Trial' means, for an accused that he should have;

- I. Full information as to the offence he is charged with.
- II. The opportunity to cross examine the witnesses who depose against him in his presence.
- III. The opportunity to explain the circumstances disclosed in evidence against him and,
- IV. The opportunity to produce his evidence in defence.

The fairness of a trial should not be one-sided, it requires that those who are undoubtedly guilty should be convicted where as those alleged offender as to whose guilt there is any reasonable doubt should be acquitted.<sup>140</sup>

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<sup>138</sup>Fazal Karim, Access to Justice in Pakistan, .Op. Cit. p.191

<sup>139</sup> Ibid, P.192

<sup>140</sup> AIR 1944 FC 1

### 3.7 Procedure for Criminal trial in Pakistan

The basic purpose of government is to protect the life, liberty and property of its citizens and this purpose is largely achieved by the enforcement of its criminal law. The stress is on the preservation of social order and values.

By enforcement we mean the detection and investigation of criminals, and the arrest, charging, adjudication, sentencing and execution of punishment. A system of criminal law, including its enforcement by the state, is therefore an essential component in the existence of a civilized society under the rule of law.<sup>141</sup>

When any person is apprehended for the commission of an offence, he is investigated by the police. The investigation is completed within 14 days with a grace period of 3 days. After investigation is completed the police submit a report u/sec.173 of Cr PC in the Court of competent jurisdiction.<sup>142</sup>

Before the commencement of trial, the Court is duty bound u/Art.10 of the Constitution to permit the accused to have a counsel of his choice. Art.10 reads:

- (1) "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the ground for such arrest nor shall he be denied the right to consult and be defended by a legal practitioner of his choice".

When accused is presented before the Court, a formal charge is framed against the accused u/sec.221 of Cr PC which states the description of the alleged offence. The prosecution is given the opportunity to put evidence against the accused. Then the defence counsel is given

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<sup>141</sup> R v. Cornel (2004) 1 A11 ER 925, 965

<sup>142</sup> Zaman Vardag Law Associates, what is Criminal Trial Procedure in Pakistan, available at: <https://pakistanilaws.wordpress.com/tag/what-is-criminal-trial-procedure-in-pakistan/> last accessed 25-09-2017

the opportunity of cross examination. State is being a Party in criminal cases has the duty to appoint a prosecutor who conducts the prosecution. Besides the prosecutor the complainant or the aggrieved person can appoint a private counsel as well to plead his case. After conclusion of prosecution evidence the Presiding Officer of the Court puts some questions before the accused u/sec.342 of Cr PC regarding the incriminating evidence of the prosecution. The purpose of these questions is to give an opportunity to the accused to explain and object the prosecution evidence if he is innocent.<sup>143</sup>

The accused is also given an opportunity to present evidence in his defence. After completion of evidence stage the Presiding Officer of the court invites counsels from both the sides for final arguments. After this, trial is concluded and presiding officer of the court pronounces judgment. Judgment could be of acquittal or conviction.<sup>144</sup>

### **3.7.1 Defects in the Procedure of Criminal Trial**

Due to the lacuna and defects in trial procedure, our criminal justice system is failing to deliver. There are many reasons and situations which elaborate this fact.

#### **(a) The Complications and technicalities in trial procedure**

The complications and technicalities in trial procedure are one of those reasons which bring delay in decision of a criminal case and thus prejudice one party in favour of other. The opponent counsel takes unfair advantage from these technicalities and thus delays the matter intentionally just to harm the other party.

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<sup>143</sup> Zaman Vardag Law Associates, what is Criminal Trial Procedure in Pakistan, available at: <https://pakistanilaws.wordpress.com/tag/what-is-criminal-trial-procedure-in-pakistan/> last accessed 25-09-2017

<sup>144</sup>ibid

For example u/sec.497 of Cr.P.C. even the accused of murder becomes entitled to bail if the trial is not concluded within two years after the arrest of the accused.<sup>145</sup> The accused should be brought to justice as speedy as possible, so that if found guilty he is punished and if innocent he is acquitted or discharged.<sup>146</sup>

**(b) Delay in trial is caused by unnecessary adjournments:**

Day to day hearing is a rule and adjournment is an exception to this rule.<sup>147</sup> To elaborate this point, sec.344 of Cr.P.C. should be discussed, which reads:

“ Power to postpone or adjourn proceedings... (1) If, from the absence of a witness or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefor, from time to time, postpone or adjourn the same on such terms as it thinks fit for such time as it considers reasonable, and by a warrant remand the accused if in custody”. This section empowers the ‘court’ including the court of Magistrate to postpone the commencement of trial on the fulfillment of certain conditions which are specifically mentioned in the section. This is discretion of the court to adjourn the case in certain conditions but unfortunately the parties or their counsels get adjournments unnecessarily as their right. If unnecessary delay in trial is caused by unnecessary adjournments the judges and the parties or their counsels both are responsible for it. The judges are responsible for they don’t realize their duty as to adjourn the case only in certain conditions and on the application of their judicial mind. The parties are involved because they get adjournment unnecessarily and often with malafide intention just to harm the interest of opponent party.<sup>148</sup> Sometimes Prosecution fails to produce witnesses or

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<sup>145</sup> Zia ullah Ranjha, Criminal Trials, available at: <https://www.pakistantoday.com.pk/2016/04/06/criminal-trials/> Last accessed 24-09-2017

<sup>146</sup> Fazal Karim, Access to Justice in Pakistan, .op. cit. p.213

<sup>147</sup> ibid

<sup>148</sup> Fazal Karim, Access to Justice in Pakistan, .op. cit. p.213



doesn't produce witnesses intentionally and deliberately and gets adjournment just to harm the accused. While sometimes the same attitude is shown from the defence side.<sup>149</sup>

The technicalities also help the parties to take unfair advantage. Whether these are technicalities in the procedure or delaying tactics which are used by the lawyers, they amount to abuse of process of the law or the court. Consequently, trial is delayed and 'justice delayed is justice denied'.<sup>150</sup>

### **3.8 Duty of Court in case of abuse or Delay**

When the prosecution fails without any reasonable cause to produce its evidence and seeks adjournments unjustifiably, the court may in such a situation proceed to judgment immediately just to prevent the abuse or delay as "justice delayed is justice denied".<sup>151</sup> The accused must suffer by lapse of time and the prosecution may also suffer likewise. A fair and speedy trial is the essence and essential of judicial administration in a civilized country. Prolonged proceedings are a mockery of law and must be deemed as an abuse of process of courts.<sup>152</sup>

Whether it is abuse of process of law or process of court, it's the prime duty of presiding judge to stop it.<sup>153</sup> The power rests on the judge to prevent the abuse of process of law and process of court. It was further elaborated by Lord Denning MR in *Goldsmith v. Sperrings Ltd.*<sup>154</sup>

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<sup>149</sup> *ibid*

<sup>150</sup> PLD 1959 WP Lahore 322,330

<sup>151</sup> Fazal Karim, *Access to Justice in Pakistan*, .op. cit. p.215

<sup>152</sup> *ibid*, p.216

<sup>153</sup> *ibid*

<sup>154</sup> 1992 P Cr. LJ 229

“In a civilized society, legal process is the machinery for keeping order and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men’s rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer”.

### **3.9 Role of Judiciary and Right of Access to Justice**

The enforcement of the right of A2J now rests on the judiciary whether it is Supreme Court, High Court, Special Court or Subordinate Court, after the failure of the executive not fulfilling its responsibility regarding the enforcement of rights of individuals. The court, whether superior or inferior, is the Court of law, and has to decide in accordance with the law. Its jurisdiction and powers are prescribed by the law. The courts are duty bound to apply the law equally and evenly to all citizens because laws are made for the betterment of society and benefits of people. The district courts play an important role in the enforcement of constitutional safeguards, which are duly incorporated in statutes, both substantive and procedural. The District Judiciary must ensure compliance with the legal and constitutional safeguard namely rule of law, fair trial, due process, equality before law, and equal protection of law and prohibition of torture for extracting confession or evidence. It has an obligation to prevent the acts of brazen violation of human rights including incidents of extra-judicial killing, death in custody, and arbitrary arrest or detention. It must protect the rights and interests of weak and vulnerable groups of society. The courts must attempt to minimize delay and control

the cost of litigation. The judge should through his ability and better performance is in effective control of court proceedings. This will surely expedite trial proceedings.<sup>155</sup>

### **3.10 System of Judicial Procedure in Pakistan**

When we talk about the trial procedure, delay in disposal of cases, its impact on dispensation of justice and the role of presiding officers in this regard we have to discuss the prevailing system of judicial procedure. There are two well-known modes of judicial procedure;<sup>156</sup>

A) Adversarial System

B) Inquisitorial or Non-adversarial System

In Adversarial Procedure, the parties to the case are responsible to prepare and present their case during interlocutory stages and at trial. They decide the legal and factual issues to be presented to the court and have complete control in the matter of factual investigation for that purpose. This means that pace at which the proceedings are pursued is largely dictated by the parties and the role of the court is only to adjudicate when called upon to do so.<sup>157</sup>

In Non-adversarial or Inquisitorial system, on the other hand it is the duty of the judge to find out the truth.<sup>158</sup> In this type of procedure the judge directly connects to the case of the parties, proceeds the trial for just conclusion, prepares some relevant questions regarding the

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<sup>155</sup> Ibid

<sup>156</sup> Justice (R), Fazal Karim, Access to Justice in Pakistan, op. cit. p.155

<sup>157</sup> ibid

<sup>158</sup> Justice (R), Fazal Karim, op.cit.

case and determines the scope and extent of inquiry.<sup>159</sup> About Inquisitorial System, Lon L. Fuller, says:<sup>160</sup>

“We should remember that in the inquisitorial court, the role of prosecutor, defender and judge, are combined in one person or group of persons. It is no accident that such a court commonly holds its sessions in secret. The usual explanation for this is that the methods by which it extracts confessions cannot stand public scrutiny.....”

The Adversarial mode of proceedings is open to abuse because it results in unjustifiable and inexcusable delays. The delay in delivering justice is dangerous enough that it affects badly the litigants trust in the court and the litigants lose confidence even in state system.<sup>161</sup>

### **3.10.1 Whether the Mode provided by the Code of Criminal Procedure is Adversarial or not?**

The relevant and important question is whether the mode provided by criminal procedural law is adversarial in nature or inquisitorial? If we read the history of Pakistani legal system, we find that the Code of criminal procedure was enacted by British empire and the system being followed by England was adversarial so in this context it may be said that the procedure adopted in Pakistan is adversarial.<sup>162</sup> On the other hand Pakistan is an Islamic Country under the Constitution and in Hamood-u-Rahman Commission Report, a comparative survey of different procedural systems was made and it was declared that

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<sup>159</sup> G.M Chaudhry, op. cit.P.1141

<sup>160</sup> Ibid p.1142

<sup>161</sup> Justice (R), Fazal Karim, op.cit. p.156

<sup>162</sup> Ibid p.156

procedural law of Islam is more inquisitorial in nature than adversarial.<sup>163</sup> Thus it can be said that the mode of criminal procedural law in our country is a mixture of both adversarial and inquisitorial system.

Delay in trial of a case leads to denial of justice, so speedy trial is declared as a fundamental right of every individual by the Constitutions of developed countries like U.K and U.S.A etc.<sup>164</sup> As for as the issue of expeditious and speedy trial is concerned the adversarial system is not suitable for it. Particularly where judge seems helpless in controlling the delays in conclusion of trial and unable to prevent the misuse or abuse of the process of law by one party against the other party.<sup>165</sup> In Cr.P.C there are provisions which enable the judge not to follow purely the adversarial mode of procedure. In other words these provisions empower the judge to choose that mode of procedure which is best for dispensation of justice.<sup>166</sup> For example section 561-A which give inherent powers to the High Court. It states "that nothing in the Code shall be deemed to limit or affect the inherent powers of the High Court to make such order as may be necessary to give effect to any order under the Code or to prevent abuse of the process of any court or otherwise to secure the ends of justice". Similarly section 249-A and section 265-K give such powers to the Court of Magistrate and Court of Session respectively. Section 249-A states "Nothing in this chapter shall be deemed to prevent a Magistrate from acquitting an accused at any stage of the case if after hearing the prosecutor and the accused and for reasons to be recorded, he considers that the charge is groundless or that there is no probability of the accused being convicted of any offence". Section 265-K of Cr.P.C states : "Nothing in this chapter shall be deemed to prevent a court from acquitting an accused at any stage of the case, if after hearing the prosecutor and the

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<sup>163</sup> Justice (R), Fazal Karim, Access to Justice in Pakistan, op.cit, pp156,157

<sup>164</sup> Ibid p157

<sup>165</sup> Justice (R), Fazal Karim, Access to Justice in Pakistan, op.cit. p.157

<sup>166</sup> Ibid

accused and for reasons to be recorded, it considers that there is no probability of the accused being convicted of any offence”.

### **3.11 Where Does the Fault Lie in Dispensation of Justice?**

Where does the fault lie in dispensation of criminal justice? This is an important question in this whole discussion. If P.P.C and Cr.P.C containing the provisions which delay and deny the justice, there are specific provisions which empower the courts to provide expeditious and speedy justice. In this respect role of Presiding Officer of the court is important. In the case of *Zafar Ahmad v. Abdul Khalid, Manzur Qadir CJ*, states that :

“That the court is not a helpless creature at the mercy of the litigants. It is the obligation and the function of the court to be the master of its procedure and its determination”<sup>167</sup>

One of the settled rules of interpretation of procedural laws is that the court should proceed on the principle that “every procedure which furthers administration of justice is permissible even if there is no express provision permitting it”. The court should not have to act on the principle that every procedure is to be taken prohibited unless it is expressly provided for.<sup>168</sup> Hence we can say that the procedural provisions are subject to strict scrutiny of the court which must see itself as having a crucial supervisory role to ensure that the cases are proceeding expeditiously.<sup>169</sup>

Irshad Hasan Khan J. emphasized in *Mehram Ali* case;

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<sup>167</sup> PLD 1964 Karachi 149,154

<sup>168</sup> Justice (R), Fazal Karim, *Access to Justice in Pakistan*, op.cit. p.158

<sup>169</sup> *ibid*

“It is for the presiding officer of the court to evolve strategies within the parameters of the law/procedure for accelerating the pace of dispensation of civil and criminal cases, resulting in reduction of delay and clearance of backlog”.<sup>170</sup>

Thus it is the responsibility of the presiding judge, who should make the system, within the limits of law, adversarial or inquisitorial as the circumstances of the case demands for the ends of justice.<sup>171</sup> To explain this view again we quote Irshad Hasan Khan J. in Mehram Ali case;

“Delay in disposition of cases can be eliminated to a larger extent through good court management and not necessarily by creation of new courts and increase in the strength of judges”<sup>172</sup>

The issue of delay in dispensation of justice can be resolved by providing the subordinate court judges a necessary legal authority, which can be done by the High Court’s rule-making power, making a general provision such as that “that the court may, in the interest of expeditious disposal of cases and to prevent abuse of the process of the law, adopt any procedure not inconsistent with the express provision of the code”. For obtaining best possible results this necessary legal authority of the subordinate courts shall be coupled with good court management.<sup>173</sup>

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<sup>170</sup> PLD 1998 SC 1445,1498

<sup>171</sup> Justice (R), Fazal Karim, Access to Justice in Pakistan, op.cit. p.159

<sup>172</sup> PLD 1998 SC 1445,1498

<sup>173</sup> Justice (R), Fazal Karim, Access to Justice in Pakistan, Op.Cit. p159

## **Conclusion:**

The roots of Pakistani Legal System are based in British legal system. Laws in Pakistan have different sources. The precedent of British courts is one of these sources which deeply impact the legal system of our country. Some efforts have been made in the Constitutional and legal history of Pakistan to introduce some radical changes for the protection of the rights of public but these efforts have brought no fruit as all these efforts were done half-heartedly. Our country is a Party to different human rights documents. International treaties and conventions which put some responsibilities for the protection of right of access to justice. Our Country made some amendments in its constitution and now there are some specific provisions which guarantee the protection of right of access to justice for all citizens. But in fact the common man is still suffering and feels hardships in this System because the criminal justice system is not delivering. The main reasons are not only the deficiencies in the laws which govern criminal justice but also the corrupt police, weak prosecution, dishonest counsels, inefficient and incompetent judges are equally responsible for it.



## **CHAPTER FOUR:**

### **CONCLUSIONS AND RECOMMENDATIONS**

The right of access to justice means that every individual has a right to the remedy for the redressal of his or her grievance through a court or a government institution without hesitation. But practically it is not possible without excessive money and longtime struggle. So the court fee, counsel fees and other legal expenses should be reduced and rationalized so that the poor people particularly afford it, otherwise they would lose their valuable rights.

It is said that justice delayed is justice denied and justice hurried is justice buried, so the presiding officer of the court should adjudicate upon the matters of the parties within the reasonable time for just conclusion of the cases. Further for this purpose, some necessary changes are mandatory in the substantive and the procedural criminal laws through legislation.

In prosecution system, there are some formalities and technicalities on the part of police and prosecution which defeat justice. These can be removed by introducing an effective and efficient prosecution system, and by punishing the corrupt and incompetent police officials. As ignorance of law is no excuse, so every individual should be aware and will informed about his or her rights, and also about the process and procedure to be adopted in case of the infringement of his or her rights. For this purpose some special programs and shows are to be launched on media for legal education of the public.

Due to complicated mechanism, technicalities and formalities the layman often cannot apply for the protection of rights before courts, so there is need of amendment in the laws of British colonial time, particularly in the procedural law of criminal justice. These procedural technicalities not only discourage the layman but also create hurdles for presiding officers of the court to reach just conclusion of the case within a reasonable time. In this regard,

the observations of superior courts and the experiences of lawyers should be considered. Courts are having discretion to adjudicate upon the matters but this discretion should be used in a reasonable way. Sometimes the excessive use of discretion defeats justice and vice versa. An efficient and effective case management system is necessary where the presiding officer acts effectively while managing the cases under the supervision and monitoring of higher courts.

A whole-hearted effort is required for making policy and strategy for ensuring speedy and expeditious justice. In criminal justice system the concept of compensation and damages should be adopted, that if the court found the accused innocent after the conclusion of the trial, he would be compensated properly, and also the complainant should be charged for false accusation.

The code of conduct and legal ethics should be applied strictly both for the bench and bar. Moreover, legal ethics should be taught to the lawyers and in case of misconduct, strong disciplinary actions should be taken against them by Bar Councils and Bar Associations.

One of the elements of corruption is low remuneration of the judicial officers, so a reasonable and suitable remuneration and salary should be fixed for the presiding officers and prosecutor. So that they perform their functions actively and honestly.

Protection of witnesses should be ensured by the state and an overall environment should be created where the true testimony of the witnesses is to be honoured and rewarded because in sensitive cases like murder the key marginal witnesses due to life threats and pressure from opponent party resile from their statements.

The hench and bar should be combined to create an environment where cases would be disposed of speedily and expeditiously and this would be possible only when the

lawyers stop using delaying tactics and taking adjournments while the judges become determined not to delay the disposal of the cases by giving long dates and adjournments.

# BIBLIOGRAPHY

## Books

- Aikman, Alexander B. et al. Friends of the Court: Lawyers as Supplemental Judicial Resources. USA: National Centre for State Courts, 1987.
- Chaudhary, G.M Essays on Law, Justice, Human Rights and Legal System. Rawalpindi: Federal Law House, December 2009.
- Karim, Fazal. Access to Justice in Pakistan. Karachi: Pakistan Law House, 2003.
- Jacob, John. The Reform of Civil Procedure Laws .London: Sweet & Maxwell Ltd, 1982.
- Myren, Richard .A. Law and Justice. California :Books/Cole Publishing Company, 1988.
- Rudolf V. Comprehensive Legal and Judicial Development: Towards an Agenda for a Just and Equitable Society in 21<sup>st</sup> Century. Washington D.C, USA, 2001.
- Sasson, John. Ancient Laws and Modern Problems: The Balance between Justice and Legal System. Third Millennium Publishing, 2001.
- Tamanaha, B.Z. On the rule of Law, History, Theory, Politics. Cambridge: Cambridge University Press, 2005.
- Yasin, Mohammad. Banuri, Tariq. The Dispensation of Justice in Pakistan. Oxford: Oxford University Press, 2004.
- Zulla, Mohammad Afzal. Human Rights in Pakistan. London: Common Wealth Law Secretariat, 1992.

## Articles

- Chan, Gary K Y, "The Right of Access to Justice: Judicial Discourse in Singapore and Malaysia", *Asian Journal of Comparative Law*, Vol.2:1(2007).
- Matti Ugo," Access to Justice: A renewed Global Issue " , *Electronic Journal of Comparative Law*, Vol.11:3(2007).
- Vickey William C.et al. "Access to Justice: A Broader Perspective", *Loyola of Los Angeles Law Review*, Vol.42:1147(2009).

## Laws

- The Constitution of the Islamic Republic of Pakistan, 1973
- The Code of Criminal Procedure, 1898.
- The Pakistan Penal Code, 1860
- Universal Declaration of Human Rights, 1948.
- International Covenant on Civil and Political Rights, 1966.
- UN Convention against Torture, 1984.
- International Covenant on Economic Social and Cultural Rights, 1966.

## Webliography

- Abregu, Martin. Barricades or Obstacles: the Challenge of Access to justice.  
<http://www.siteresources.worldbank.org/comprehensive> Legal and Judicial Development:Towards an Agenda for a Just and Equitable Society. Last accessed 10/10/2012.
- Malik,Shahdeen.Access to Justice: A Truncated View from Bangladesh. Available at [:http://www.siteresources.worldbank.org/comprehensive](http://www.siteresources.worldbank.org/comprehensive) Legal and Judicial

Development:Towards an Agenda for a Just and Equitable Society. Last accessed 10/10/2012.

- Khan,Arshad Hasan .The Judicial System of Pakistan: Measures for Maintaining Independence and Enforcing Accountability. Available at:

:<http://www.siteresources.worldbank.org/comprehensive> Legal and Judicial

Development:Towards an Agenda for a Just and Equitable Society. Last accessed 10/10/2012.

