PAKISTAN'S LEGAL REGIME IN THE LIGHT OF ISLAMIC LAW AND INTERNATIONAL BEST PRACTICES: REDRESSING OF FUNDAMENTAL RIGHTS OF ACCUSED

Dissertation submitted in partial fulfillment of the requirements for the award of PhD degree in Law

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FORWARDING SHEET

The research thesis titled as *'Pakistan's Legal Regime in the Light of Islamic Law and International Best Practices: Redressing of Fundamental Rights of Accused'* submitted by Mr. Tauqeer Hussain, Reg. No. 98-SF/PHDLAW/S18 in partial fulfillment of PhD degree in Law, has been completed under my supervision and guidance. I am satisfied with the quality of this research work and allow him to submit this research work for further process of evaluation and viva voce examination as per rules and regulations of the International Islamic University Islamabad, Pakistan.

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DECLARATION

I Tauqeer Hussain hereby declare that this PhD dissertation titled "*Pakistan's Legal Regime in the light of Islamic Law and International Best Practices: Redressing the Fundamental Rights of Accused*" submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy (PhD) in Law at International Islamic University Islamabad is my original work. This dissertation has not been submitted for award of any degree or examination at any other university. All sources used in this research are properly referenced and acknowledged.

Dated: December 08, 2025

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LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights, 1969
ACHR	Arab Charter on Human Rights, 2004
AfrCHPR	African Charter on Human and Peoples' Rights, 1981
AIR	All India Reporter
ATS	Alien Tort Statute, 1948
CAT	Convention against Torture and other Cruel Inhuman and Degrading Treatment, 1984
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination, 1965
CJ	Chief Justice
CLC	Civil Law Cases
CPC	Code of Civil Procedure, 1908
Cr.PC	Code of Criminal Procedure, 1898
CRC	Convention of the Rights of the Child, 1989
ECHR	European Convention on Human Rights, 1950
FCC	Federal Constitutional Court
FSC	Federal Shariat Court
FTCA	Federal Tort Claims Act, 1946
HC	High Court
ICC	International Criminal Court

ICCPR	International Covenant on Civil and Political Rights, 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights, 1966
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
MLD	The Monthly Law Digest
NAB	National Accountability Bureau
PCIJ	Permanent Court of International Justice
PCr.LJ	Pakistan Criminal Journal
PLD	All Pakistan Legal Decisions
PLJ	Pakistan Law Journal
PPC	Pakistan Penal Code, 1860
SC	Supreme Court
SCMR	Supreme Court Monthly Review
UDHR	Universal Declaration of Human Rights, 1948
UK	United Kingdom
USA	United States of America
YLR	Yearly Law Reporter

ABSTRACT

This dissertation undertakes a critical examination of the legal regime in Pakistan, with a specific focus on the redress mechanism in case fundamental rights of the accused are violated in the course of criminal justice. The study involves an intersection of Islamic law, international best practices, and the Pakistani legal system and aims to identify areas of convergence and divergence between these frameworks and the existing legal regime in Pakistan.

The research is motivated by the widespread and flagrant violations of fundamental rights of the accused in Pakistan, in terms of arbitrary arrest, detention, enforced disappearances and torture. These violations not only contravene international human rights law standards but are also repugnant to Islamic law's emphasis on the justice, fairness, and protection of the weak and vulnerable people in the human society.

Through a doctrinal legal research and comprehensive analysis of the Pakistani legal system, including its constitutional and legal frameworks, judicial decisions, and law enforcement practices, this research reveals significant gaps in the protection of the fundamental rights of accused in Pakistan. The study finds that while Islamic law and international practices provide important provisions for the enforcement of rights of the accused in terms of redress, the Pakistan's legal regime falls short of these standards.

The study explores the concept of strict liability as a theoretical framework for understanding the state liability for violations of fundamental rights of accused in criminal justice. Strict liability as a legal doctrine holds and maintains the responsibility of the state for any harm or damage caused by its actions or omissions, regardless of fault or intention. The

framework is employed to examine the extent to which the state is liable for violations of fundamental rights of accused, and to identify the legal and institutional mechanisms that can be used to hold the state accountable.

This study argues that a right-based approach, informed by Islamic law and international best practices is essential for redressing the fundamental rights of the accused in Pakistan. It proposes a framework for reform, which includes the adoption of legislative and policy measures, judicial training, awareness programs, and institutional reforms to ensure the effective protection of the rights of the accused.

The findings of this research have significant implications for the promotion of justice, rule of law, and human rights in Pakistan, and contribute to the ongoing debates on the rule of law, fundamental rights, role of Islamic law and international best practices in shaping legal regimes in Muslim-majority countries. The recommendations of the study offer a pathway for reform, empowering policy makers, legal practitioners and civil society to address the systematic failure that perpetuate violations of fundamental rights of the accused in Pakistan.

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INTRODUCTION TO THE STUDY

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i. Thesis Statement

Because of lack of proper legislative framework in Pakistan, violations of fundamental rights are not adequately redressed, which necessitates a thorough revamping of the system in the light of principles of Islamic law and international best practices.

ii. Introduction

Pakistan, after its independence in August 1947, adopted the British laws that were made for British India and continued to run its affairs with same legal regime with some modifications.[1] In this regard, the Government of India Act, 1935 was adopted as interim constitution of Pakistan and remained in practice for about nine years. A major development, however, happened in 1949 when the First Constituent Assembly of Pakistan adopted the Objectives Resolution declaring Almighty Allah as an absolute sovereign of the entire universe. One of the core distinctions of the Objectives Resolution is that it formally acknowledges and declares that "sovereignty over the entire Universe belongs to Allah Almighty alone and the authority which He has delegated to the State of Pakistan, through its people for being exercised within the limits prescribed by Him is a sacred trust."[2]

[1] This happened by virtue of section 18 (3) of Indian Independence Act, 1947 passed by the British Parliament giving effect to the plan of partition and independence of British India. Section 18(3) provides that: "Save as otherwise expressly provided in this Act, the law of British India and of the several parts thereof existing immediately before the appointed day shall, so far as applicable and with the necessary adaptations, continue as the law of each of the new Dominions and the several parts thereof until other provision is made by laws of the Legislature of the Dominion in question or by any other Legislature or other authority having power in that behalf."

[2] See the Objectives Resolution as given in the Annex of the Constitution of Pakistan, 1973. National Assembly of Pakistan, *The Constitution of the Islamic Republic of Pakistan*, May 2018.

The Objectives Resolution had laid that Pakistan would be a 'sovereign independent state' that shall fully observe the principles of "democracy, freedom, equality, tolerance and social justice as enunciated by Islam". It was avowed that the state will enable the Muslims of Pakistan "to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Quran and Sunnah."[3]

Similarly, Article 1 of the Constitution of the Constitution of the Islamic Republic of Pakistan 1973 declares Pakistan as an 'Islamic Republic of Pakistan' whereas Article 2 of the Constitution declares Islam as a 'State religion' of Pakistan. Besides, the Constitution promises that no law shall be made contrary to the injunctions of Islam. Besides, the Constitution provides that "all existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Holy Quran and Sunnah... and no law shall be enacted which is repugnant to such injunctions."[4]

The Constitution of Pakistan also provides guarantee about the protection and enforcement of the fundamental rights of the people.[5] How far these fundamental guarantees are appreciated or materialized in the lives of the people in Pakistan and how the legal system of Pakistan ensures the enjoyment and vindication of fundamental rights is a question of paramount significance.

As no legal system is perfect, all human laws need amendments, corrections, modifications and improvements with changing times and needs of society. A good 'legal system'[6]

[3] Ibid.; Article 31 of the Constitution of Pakistan.
[4] Article 227 of the Constitution of Pakistan, 1973.
[5] Articles 8 to 28 of the Constitution provide for the fundamental rights of the people and Articles 175E and 199 of the Constitution provides for the enforcement mechanism of these fundamental rights.
[6] The phrase 'legal system' (18c) refers to "the laws and the way they work in a particular jurisdiction." *Black's Law Dictionary*, 11th ed., ed. Bryan A. Garner (Thomson Reuters, 2019), 1077.

is one that keeps improving and adjusting itself with time and circumstances. Undoubtedly, there lies a room and need for improvement in various aspects and dimensions of a legal system. As for the legal regime of Pakistan, it also needs reforms and improvement in many aspects including in terms of enforcement of fundamental rights of accused.[7] This study aims to focus on the enforcement or vindication of fundamental rights of accused in Pakistan in the light of Islamic law and international best practices.

Admittedly, neither guilty should be allowed to avoid or escape justice nor innocent must be punished or harmed is a basic principle of a justice system. Therefore, precautions or safeguards are incorporated in the law to "achieve the effect of lessening the likelihood that an innocent person will be convicted or harassed."[8] In this regard, a legal system not only contains rules that govern the mechanism of investigation, prosecution, adjudication, and punishment for crimes, but it also includes and preserves the protection of rights of 'accused'.[9] Undoubtedly, a balancing consideration in the 'criminal justice system'[10] is required not to unduly restrict or curtail the

[7] 'The rights of accused' refer to "various aspects of criminal procedure designed to safeguard the innocent from harassment and conviction." See Stuart S. Nagel, *The Rights of the Accused in Law and Action*, 1. Sage Criminal Justice System Annuals (USA: Sage Publication. Inc., 1972), 15.

[8] Ibid., 17.

[9] The term 'accused' refers to: (1) "someone who has been blamed for wrongdoing; especially a person who has been arrested and brought before a magistrate or who has been formally charged with a crime (as by indictment or information), or (2) a person against whom legal proceedings have been initiated." Garner, *Black's Law Dictionary* (11th ed.), 27; The term "accused" is, however, not defined in the Code of Criminal Procedure, 1898 that contains the procedure of trial. Similarly, the term is not used in the International Covenant on Civil and Political Rights, 1966. Generally, every person who is formally alleged to commit an offence, is considered to be an 'accused. In this study, the term 'accused' means a person against whom legal proceedings are initiated.

[10] The term 'criminal justice system (1929)' refers to "the methods by which a society deals with those who are accused of having committed crimes." Garner, *Black's Law Dictionary* (11th ed.), 1034. A criminal justice system may also be defined as "the set of agencies and processes formed by the state government for the purpose of controlling the crimes and imposing punishments on the criminals". Parveen Gul and Bahadar Ali, "The Criminal Justice System in Pakistan," *Journal of Law and Social Policy* 2, (September 2022): 97; A criminal justice system consists of "the collective institutions through which an accused offender passes until the accusations have been disposed of or the assessed punishment concluded. The system typically has three components: law enforcement (police, sheriff, marshals), the judicial (judges, prosecutors, defense lawyers), and corrections (prison officials, probation officers, and parole officers) _ also termed *law-enforcement system*." Garner, *Black's Law Dictionary* (11th ed.), 472.

sphere of activities of the State and, at the same time, to afford sufficient protections for the fundamental rights of the accused and provide 'redress'[11] to the aggrieved individuals.[12]

An accused person has a 'right to be presumed innocent' until the charges leveled against him are finally proved and he is convicted by a competent court in accordance with the prescribed procedure of law. This right arises as soon as the formal accusation is levied upon an accused and continues throughout the continuance of the criminal proceeding until the court declares him to be guilty and punishes him.[13]

On the other hand, it is a common practice throughout the world, several people are accused, arrested, detained and sometime tortured in prisons and jails with regard to the alleged offence. They are kept detained in jails until a court disposes off the case through its judgment.[14] Thus, intentionally or unintentionally, the rights of accused persons are jeopardized in the criminal justice system.

For instance, the *raison d'etre* of the pre-trial detention of an accused is quite understandable, yet this 'inevitable' mechanism involves a big irony attached to it; it is a penalty even without determination of guilt. Yet more ironic and painful, is the fact that it works in favor of the person who is declared guilty and not to the acquitted one at the end of criminal proceedings. When a person is ultimately convicted and sentenced to imprisonment, his earlier

[11] Redress means "relief; remedy; a means of seeking relief or remedy". Garner, *Black's Law Dictionary* (11th ed.), 1531. In this particular study, the term "redress" is used to mean the civil remedy provided to the aggrieved accused person whose fundamental rights are violated in the criminal justice.

[12] Farkhanda Zia Mansoor, "Reassessing Packer in the light of international human rights norms," *Connecticut Public Interest Law Journal* 4, no. 2 (2005): 279-280. https://cpilj.law.uconn.edu/wp-content/uploads/sites/2515/2018/10/4.2-Reassessing-Packer-in-the-Light-of-International-Human-Rights-Norms-by-Farkhanda-Zia-Mansoor.pdf. Accessed December 27, 2021.

[13] Ashish Kumar Singhal, Eakramuddi, and Abroo Khan, "The Status of the Rights of Accused under Different Indian Laws," *Academia Arena* 5, no. 5 (2013): 37.

[14] Centre for Human Rights Geneva and Crimes prevention and Criminal Justice Branch, *Professional Training Series No. 3_ Human Rights and Pre-trial Detention: A handbook of international standards relating to Pre-trial detention* (New York and Geneva: United Nation, 1994), iii.

time spent in prison is adjusted with the sentence awarded to him by the court.[15] Thus, the pre-trial detention does not cause additional harm or injury to him.

Conversely, when an accused person is acquitted, then the whole episode of pre-trial detention proves for him as a nightmare and he is affected by the stigma, torment and trauma in addition to the social and financial costs. Despite of proven not guilty, he faces or suffers an enormous loss and massive harm in terms of time, health, liberty, reputation, wealth, and finance, which is not possibly re-compensated alike aforementioned adjustment or deduction of sentence.[16]

Such instances pose a question-mark to the justice system where a convict or guilty gets compensation[17] but innocent is left to suffer. The Supreme Court of Pakistan in *Adan Prince v. State* in a case of bail to the accused, acknowledged the sad fact. It observed that in case an accused who is held in pre-trial detention is acquitted on the conclusion of trial, he cannot be compensated in any manner for the wrong caused to him due to lengthy detention pending his trial. On the other hand, if he is convicted at the end of the trial, he can be rearrested and imprisoned as per his sentence and this would not cause any prejudice to the complainant or prosecution too.[18]

Quite understandably, a person might be apprehended on bona fide grounds but the trial may not lead to conviction, but the treatment meted out to such person during criminal proceedings and, at the time of his acquittal or release, is very important. Occasionally people are even unlawfully arrested or detained and their fundamental rights are flagrantly violated by the police or other state authorities. How such a person should he be remedied for undue detention,

[15] Section 382-B of Code of Criminal Procedure, 1898 provides for this adjustment of sentence of the convict.
[16] Tauqeer Hussain, "Pre-Trial Detention and Its Compensation in International and Pakistani Law," *Policy Perspectives* 15, no. 3 (2018): 59.
[17] For instance, the law provides for the deduction of the pre-trial detention period from his sentence of imprisonment. See 382 (2) (b) of Code of the Criminal Procedure, 1898.
[18] *Adan Prince v. State* PLD 2017 Supreme Court 147.

is a question that has motivated this study as the subject of redress for violations of fundamental rights has been mostly unattended in any previous study done on rights of accused persons or prison reforms in Pakistan.

One thing that may redress or recompense to the suffering, to some extent, could be corresponding monetary and non-monetary compensation[19] for the harms suffered by such aggrieved individuals. Thus, this study aims to highlight and focus this dimension of the protection and enforcement of fundamental rights. It attempts to analyze, and compare the redress mechanism provided in the legal regime of Pakistan, Islamic jurisprudence and international best practices for the violations of fundamental rights of accused person. In this regard, the dimension of remedial justice regarding fundamental rights of accused in the light contemporary international human rights law has also been discussed in detail.

The study also intends to shed light on the judicial practice and trends regarding redressing of fundamental rights of accused when they are violated by the state authorities. It also discusses particular standards of international human rights instrument for the human rights of the accused and comparative discussion in light of Islamic law and international best practices.

iii. Theoretical Framework

This doctrinal legal research takes into account the laws and policy related to the redress for violations of fundamental rights of accused in criminal justice. The work intends to appraise and

[19] The term 'compensation' means payment of damages, or any other act that a court orders to be done by a person who has caused injury to another. In theory, "compensation makes the injured party whole." Garner, *Black's Law Dictionary* (11th ed.), 354; in this study, the term 'compensation' is used in the broader sense including pecuniary and non-pecuniary compensation. In this regard, both terms 'compensation' and 'redress' are interchangeably used.

examine the legal framework of Pakistan in the light of principles of Islamic law and international best practices, based on strict and vicarious liability.[20]

According to professor Edwin M. Borchard, the strict liability theory implies that when any great undertaking, such as the administration of criminal justice, results in error or accident, those who derive benefit of such an undertaking i.e. community, should bear the loss incurred by the victim of that error or accident, not the individual injured alone.[21]

The strict liability denotes that civil liability of juristic persons including governments and corporations is to be judged by the same standards that govern private sector defendants, as it is unfair that a few individuals are to bear the burden of errors of the criminal justice system when everyone reaps the benefits of that system.[22]

The principles of strict and vicarious liability applicable in civil and criminal law, cover both intentional an unintentional aspect of violations of fundamental rights, thus they provide sufficient basis for redress whether a particular action or omission is done through state apparatus, corporate veil or in individual capacity. This framework also ensures inalienability and inviolability aspects of fundamental rights of accused by securing the adequate redress. The framework is aligned and compatible with Islamic legal maxims like "harm must be removed or

[20] "Strict liability does not depend on proof of negligence or intent to do harm but that is based instead on a duty to compensate the harms proximately caused by the activity or behavior subject to the liability rule." Garner, *Black's Law*, 1099; The strict liability is applicable to civil and criminal law, under which a person is legally responsible for the consequences flowing from an activity even in the absence of fault or criminal intent, whereas vicarious liability requires liability of a person without personal fault for the criminal conduct of another (usually an employee or dependent). Imran Ahsan Nyazee, *General Principles of Criminal Law: Islamic and Western*, (Islamabad: Shariah Academy International Islamic University, 2007), 116.

[21] Edwin M. Borchard, State Indemnity for Errors of Criminal Justice, *The Annals of the American Academy of Political and Social Science* 52 (March 1914): 110.

[22] Lauren C. Boucher, "Advancing the Argument in favour of State Compensation for the Erroneously Convicted and Wrongfully Incarcerated," *Catholic University law Review* 56, no. 3 (2007):1072.

compensated" and English legal principles like "*Ubi jus ibi remedium"*, discussed in detail in this study.

Thus, strict liability is a relevant theoretical framework for this study because it provides a legal and conceptual basis for understanding the state's responsibility for protecting fundamental rights. By applying this framework, the study explores the legal and institutional mechanisms that can be used to hold the state accountable for redressing violations of fundamental rights of accused in Pakistan.

iv. Literature Review

The subject of rights of the accused finds vibrant manifestation in International human rights law and Islamic jurisprudence. Similarly, considerable attention is given to fundamental rights of accused in general terms in Pakistani jurisprudence. There is some work on tort law and tortious liability in Pakistan. However, the particular subject of right of accused to redress in terms of reparation or compensation for violations of fundamental rights has not been precisely covered or attended. Thus, there exists a research gap for right of accused to redress for violations of his fundamental rights. Nevertheless, to have a broader and holistic picture about relevant aspects of this proposed study, a thematic review of some important literature including books, research articles and case law is given in following: -

a) Statistical Data and Case Studies

As stated earlier, the fundamental rights of accused are violated in terms of wrongful convictions, excessive pre-trial detention or lack of payment of compensation to the victims of miscarriage of justice. Various reports and case studies on false and wrongful accusation and

prosecution, acquittal and lack of compensation reveal the serious and systematic issues in the criminal justice of Pakistan.

There is a lack of any centralized "Miscarriage of Justice Registry" but still the available various reports, statistical data and case studies, reveal the alarming and horrible picture of the justice system. For instance, the high acquittal rates indicate the faulty prosecution and systematic failure of the justice system. In 2016, a PILDAT report indicated that the conviction rate in Pakistan is just 8.66%, versus provincial data suggesting a rate of around 12%.[23] Likewise, a recent study by the Law & Justice Commission of Pakistan (LJCP) on gender-based violence cases reveals that the conviction rate is as low as 5%.[24] Also, the data shows that the acquittal rate is exceptionally high between 70% to 80% in Anti-Terrorism Act (ATA) and blasphemy cases respectively in Pakistan.[25]

Also, the under-trial crisis in Pakistan reflects a grave miscarriage in the justice system. The prison data consistently shows the high rates of pre-trial detention. According to a report, the ratio of pre-trial prisoners in Pakistan is about 66% of the total population and this is

[23] PILDAT, Media Brief: Prosecution Services and Media in Pakistan, *Pakistan Institute of Legislative Development and Transparency*, (2016), 6; See also Abdul Lateef, Low Conviction Rate in Pakistan: Causes and Way Forward, *Pakistan Perspectives*, Vol. 27, No.1, January-June 2022, 5-24; Muhammad Arif Rajput, Farid Samir Benavides-Vanegas, Reformation of Criminal Justice System of Pakistan, *European Scientific Journal*, February 2022, 88, 87-108. See also

[24] Law and Justice Commission of Pakistan, *Unveiling shadows: Gender-Based Violence in Pakistan*, 2023, https://ljcp.gov.pk/SiteImage/Misc/files/gbv-3%20(1).pdf; National Commission for Human Rights, *Pakistan, Submission to the UN Human Rights Committee on the Government of Pakistan's Second Periodic Report on Compliance with the International Covenant on Civil and Political Rights (ICCPR)*, (2024), https://nchr.gov.pk/wp-content/uploads/2024/10/Report-on-ICCPR-2024.pdf; Hafiz Muhammad Azeem, Muhammad Sohail Thaheem, Muhammad Ramzan Kasuri, Exploring Factors Contributing to the Low Conviction Ratio of Rape Cases in Punjab, Pakistan, *Journal of Social Sciences and Perspective*, 4(2), 2023, 342.

[25] For instance, see United States Institute of Peace, *Special Report 377: An Appraisal of Pakistan's Anti-Terrorism Act*, August 2015, 2, https://www.usip.org/sites/default/files/SR377-An-Appraisal-of-Pakistan%E2%80%99s-Anti-Terrorism-Act.pdf. (Accessed on October 27, 2025); International Commission of Jurists, *On Trial: The Implementation of Pakistan's Blasphemy Laws*, November 2015, 7. https://www.icj.org/wp-content/uploads/2015/12/Pakistan-On-Trial-Blasphemy-Laws-Publications-Thematic-Reports-2015-ENG.pdf. (Accessed on October 27, 2025).

significantly higher than the global median average rate of 27%.[26] Remarkably, a recent report found that under-trial prisoners consist of 73.41% of total prison population.[27] The same is corroborated by the World Prison Brief data.[28]

The low conviction rate, high acquittal ratio and excessive use under-trial detention show the systemic miscarriage of justice and more specifically the failure of the investigation and bail system, inefficiency by the courts, and the predominant tendency of pre-trial detention over presumption of innocence. The incarcerated individuals are presumed innocent but are subjected to harsh prison conditions. This represents a blatant violation of the essential right to a fair and speedy trial and the presumption of innocence.[29]

As for the compensation claims, there is no official data on successful compensation claims for miscarriage of justice because there exists no statutory framework for it. Monetary compensation is granted in very rare cases and at the discretion of superior courts under the Constitution. Thus, it proves that the remedy is ad-hoc, exceptional, and not a recognized right.

As for the case studies on systemic failure and miscarriage of justice, Hans Sherrer, the Justice Denied's editor and publisher and the Forejustice organization has documented the cases of miscarriage of justice globally. As for Pakistan, he has documented around 50 cases of

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[26] NACTA, Addressing Overcrowding in Prisons, (May 2018) 8, https://codepak.org/wp-content/uploads/2024/03/Addressing-overcrowding-in-prisons-by-reducing-pre-conviction-detention-in-Pakistan.pdf, Accessed on October 28, 2025; See also Tauqeer Hussain, "Pre-Trial Detention and Its Compensation," 51.

[27] National Commission for Human Rights, National Academy for Prisons Administration, Justice Project Pakistan, *Prison Data Report_ Pakistan's Prison Landscape: Trends, Data, And Developments In 2024*, January 2025, 8. https://jppprisonreforms.com/wp-content/uploads/2025/01/JPP_Prison_Data_Report_2024.pdf, (Accessed on October 28, 2025).

[28] Institute for Crime & Justice Policy Research, *World Prison Brief: Pakistan*, https://www.prisonstudies.org/country/pakistan, Accessed on November 7, 2025.

[29] See Tauqeer Hussain, "Pre-Trial Detention and Its Compensation in International and Pakistani Law," *Policy Perspectives* 15, no. 3 (2018): 47-66, 51.

miscarriage of justice are documented in which the fundamental rights of the accused persons have been blatantly violated.[30] Some of these cases are discussed in this study in the relevant stage.

The statistical data and relevant case studies show that a statutory right to compensation for wrongful prosecution and detention is essential and an independent body like a Criminal Cases Review Commission should be established to investigate and archive the potential cases of miscarriage of justice in Pakistan.

b) Theories of State Liability

Well before the development of modern human rights law, Edwin M. Borchard expounds about the reasoning for compensation for wrongful detention or conviction of the accused, in his brief article *State Indemnity for Errors of Criminal Justice* (1914).[31] He maintains that states have started freely admitting the fact the compensation is due to the private individuals, for the interferences with private rights for the public interest. He elucidates the two underlying theories about the compensation for acquitted accused. First, "eminent domain" theory wherein the taking of accused freedom for the preservation of peace through administration of criminal law is analogized to the taking of property for a public use. The second theory is strict liability theory or "social welfare" theory that implies that when any great undertaking, such as the administration of criminal justice, results in error or accident, those who derive benefit of such an undertaking i.e. community, should bear the loss incurred by the victim of that error or accident, not the individual injured alone.

[30] Hans Sherrer, *Justice Denied*, http://www.justicedenied.org/ ; and the Forejustice organization, *Innocent Database*, https://forejustice.org/search_idb.htm. (Accessed on October 21, 2025).

[31] Edwin Borchard, "State Indemnity for Errors of Criminal Justice," *The ANNALS of the American Academy of Political and Social Science* 52, no.1 (1914): 108-114.

Moreover, following the pattern of legislation in other European countries, like Germany, France, Austria, Denmark, Norway, Sweden, Switzerland, Italy and Holland, he also offered a bill presented in the Senate and House of Representative of the United States for enactment about compensation for erroneous conviction or detention. The work has great momentum in the history of the compensatory jurisprudence and still enjoys significance on this subject.

After about a half of century, Joseph H. King, in his Article *Compensation for Persons Erroneously Confined by the State* (1970)[32] following the reasoning of Professor Edwin M. Borchard, maintains to redress in terms of monetary compensation, when the state power results in an erroneous detention, regardless culpable or in-culpable role of the state agent, based on "strict liability" theory. He, while concluding the journey of half century of the compensatory jurisprudence, states as: "the inadequacies of fault-based remedies and uncertain private bills leave a statutory scheme of strict governmental liability as the necessary solution".

John David Michels, in his work *Compensating Acquitted Defendants for Detention before International Criminal Courts* (2010),[33] expounds that although a number of national systems amongst others Norway, Sweden, Denmark, Austria, Germany, Netherland, Iceland, Italy and Latvia provide compensation to the acquitted accused for pre-trial detention, the international criminal courts do not provide such compensation. He postulates that the pre-trial detention does not per se violate the rights of accused; therefore, there is no obligation to provide remedy under human rights law. However, he advocates providing compensation on the other ground of public benefit and cost. As the convicted accused is compensated by reduction of the period of detention from the sentence, the acquitted defendants should be compensated by imposing strict liability on

[32] Jr. Joseph H. King, "Compensation of Persons Erroneously Confined by the State," *University of Pennsylvania Law Review* 118, no. 7 (June 1970): 1091-1112.
[33] Johan David Michal, "Compensating Acquitted Defendants for Detention before International Criminal Courts," *Journal of International Criminal Justice* 8, no. 2 (2010): 407-424.

the judicial institutions of the international community. This line of arguments of the author is also extendable to the national legal systems as well.

As for the standard for right of compensation, Gabriel Doménech and Miguel Puchades in their research article *Compensating acquitted pre-trial detainees* (2015)[34] endeavored the preposition as whether innocent detainees should receive the corresponding monetary compensation for their harm (the deprivation of their liberty). The article examines the arguments for and against provision of such compensation and discusses various models of compensation given in states jurisdictions including 'unlawfulness', 'negligence', 'proof of factual innocence', 'if not proven guilty'. Further, in order to analyze the effects of such compensation on social welfare, this paper focuses on the typical case where state agents lawfully and diligently carry out detention and it is not caused by negligence on the part of the detainee. The study, however, does not offer help about the cases where accused is detained unlawfully or negligently by state authorities.

The article concludes that indemnifying the factual innocent persons lowers the crime level by reducing the costs of being a law-abiding citizen. However, compensating the factual guilty who are acquitted after their trial, would foster crime by increasing the expected private benefits of infringing the law. The paper argues that compensating every acquitted pre-trial detainee for the time spent on remand does not have, on aggregate, a deterrent effect on the crime. This effect occurs only when the number of factually innocents who are indemnified exceeds the number of factually guilty individuals who receive compensation. Thus, this depends on accuracy of the judicial system and standard of evidence established for compensation.

[34] Gabriel Doménech and Miguel Puchades, "Compensating Acquitted Pre-Trial Detainees," *International Review of Law and Economics* 43 (2015): 167-177.

Apart from the literature that favors the obligation of the state to redress the victims of the miscarriage of justice, there exists an opponent view that contests the legitimacy of the redress by the state to the acquitted persons. Instead, it maintains that the individuals themselves should bear the burden of liability for violations of rights of accused.[35]

Lauren C. Boucher, in the article titled *Advancing the Argument in Favor of State Compensation for the Erroneously Convicted and Wrongly Incarcerated*," (2007)[36] mentions some of these arguments. For instance, there are concerns about the fiscal sustainability as practically compensating such victims may not be affordable by the state. It is argued that implementing any statutory compensation is not practically feasible for the government as any action of legislation would lead to surge of numbers of claims against state for paying out more than its affordability. Eventually, the state may not be able to afford and realize any such liability in practical terms.

However, looking at the practical trends, it seems that this apprehension is unfounded as for the reason Professor Bernhard pointed out that the cost of compensating deserving individuals has been minimal in those states where exonerations were in greatest number.[37] Besides, the State can adopt the structured or tiered compensation scheme that defines clear schedules and caps on compensation amounts. Furthermore, the State can set an adequate eligibility criteria limiting compensation claims, and this could reduce frivolous claims and aligns with international human rights standards.

[35] The detailed arguments are discussed in chapter 4 of this study.
[36] Lauren C. Boucher, "Advancing the Argument in Favor of State Compensation for the Erroneously Convicted and Wrongly Incarcerated" *Catholic University Law Review* 56, no. 3, (2007):1069-1106.
[37] Adele Bernhard, "Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated," *Drake Law Review* 52 (2004): 703-738.

Besides Boucher, Joseph Achile in his Article tilted *Miscarriage of Justice in Legal System*, (2023)[38] mentions the argument of possibility of error in acquittal and the compensation to guilty persons as acquittal does not necessarily amount to innocence of accused. Sometimes, in criminal justice, innocent people become victims of violations of fundamental rights and are convicted thereof, and the factual guilty are set free. In such case, compensating them would cause to foster crime as we cannot neglect the possibility of factually guilty detainees being acquitted, in which case compensation increases the expected private benefits from crime.

Arguably compensating every acquitted detainee can endanger the application of the principle of *in dubio pro reo*[39], as the courts could thus convict some accused, even though there are reasonable doubts as to their guilt, in order to avoid them being "undeservedly" compensated. This argument, however, can be countered on the ground that why judges will tend to behave in this way, especially bearing in mind that compensation is not paid out of their pockets. [40] Besides, the issues of risk of compensating guilty individuals could, however, be addressed with policy safeguards or eligibility criteria. Eligibility should require a determination on the basis of probability, not merely procedural acquittal.

Andrea Vieira, Andrea Vieira, Addie C. Rolnick and Anona Su, in their article titled *Tackling the Qualified Immunity Problem with State Law*, (2022)[41] mention the doctrine of qualified immunity as a defensive doctrine in response to the theories of redress against the government officers. It is a defence for the government officials when they are sued against the violation of civil rights of the people. The doctrine is applicable only in cases when an officer

[38] Joseph Achile, "Miscarriage of Justice in Legal System," *International Journal of Law and Policy* 8, no. 1 (2023): 37-46.
[39] That principle means that an accused is not to be convicted if there exists any doubt about his guilt.
[40] Doménech and Puchades, "Compensating Acquitted Pre-Trial Detainees," 176.
[41] Andrea Vieira, Addie C. Rolnick and Anona Su, "Tackling the Qualified Immunity Problem with State Law," *Nevada law Journal* 22, no. 3 (2022): 1029-1064.

factually acted in good faith and with probable clause. The doctrine negates and defies the public perception that official misconduct and abuse of process is rampant. It exonerates the honest government servants from instances of the miscarriage of justice in the form of fictitious and unmeritorious suits against public officials and minimizes it occurrence.[42] The immunity, however, is not granted when an officer while performing without due care or acting in bad faith, violated a criminal law or constitutional rule affecting the fundamental rights of individuals.[43] Besides the doctrine of qualified immunity has been challenged on the grounds of its legality that it is "unlawful and inconsistent with conventional principles of statutory interpretation."[44]

Similarly, one of such arguments against the state liability for the redress is the concern of judicial overreach. Critics from a strict separation of powers perspective argue that mandating the state to pay compensation from the public treasury is an essentially executive/legislative function. For judges to order such payments constitutes judicial overreach into the fiscal and policy domain of the other state organs. They caution that expansive state liability regimes empower courts excessively, intruding into legislative or executive prerogatives.[45]

The argument, however, can be rebutted on the ground that the judiciary is under duty to enforce fundamental rights. When the executive violates fundamental rights and the legislature

[42] David Crump, "Qualified Immunity: Where Do We Go From Here?," *Albany Law Review* 84, no.3 (September 2021): 577; *Pierson v. Ray*, 386 U.S. 547, 555-557 (1967).
[43] Chapman, "Fair Notice, the Rule of Law, and Reforming Qualified Immunity," 1-2.
[44] William Baude, "Is Qualified Immunity Unlawful?," *California Law Review* 106 (2018): 45.
[45] See Nasir Iqbal, Supreme Court warns against unbridled judicial overreach*, Dawn*, March 7, 2021, https://www.dawn.com/news/1611139, Accessed on November 7, 2025; Bakht Munir, Akhtar Ali Ansari, and Tahir Mahmood, "Judicial Activism in Pakistan and its Impacts on Tripartite Governance: Lessons from the US Constitutional Construct" *Global Political Review* IX, no. III (2024): 44-45, https://doi.org/10.31703/gpr.2024(IX-III).05.

fails to provide a remedy, it is not only the right but the duty of the judiciary to enforce the Constitution.[46]

c) Islamic Jurisprudence

In Islamic perspective, Muhammad Muslehuddin in his book *'Concept of Civil Liability in Islam and the law of the Torts*' (1982)[47] maintains that there is absolute duty on the community with respect to life, property and honour of any individual and breach of this duty incurs the absolute nature of civil liability. He posits that Islamic law holds the general principle "indemnity against actual damage" as the damage is the essential mark of civil liability in Islam and the defendant is liable if damage is the direct result of his act. It makes no difference whether the act was intentional or accidental. In this sense, the author's view seems to be aligned with strict liability. In his view, judicial remedies in this regard may be damages (pecuniary compensation), grant of injunction, and specific restitution of property. Though the work focused on the tort law, yet the subject of state liability is not attended in this work.

Specifically on the right of accused to compensation against violations of rights, Muahmmad Rafat Saeed, in his pioneering work '*Al-Muttaham Wa-Haqūqūhu fī-al-Sharīah al-Islāmiyah: Ta'wiḍ al-Muttaham'* (1993)[48] that explains about rights of an accused, presumption of innocence, harms to rights of an accused, methods to compensate for the harms, determination of compensation and its liability under Islamic law. The book gives an account of method to determine compensation for the accused in case he is acquitted after the trial. It argues that, under Islamic law, every injury or harm must be compensated; even the action or omission causing harm

[46] Further arguments have been discussed in Chapter 4 of this study.
[47] Muhammad Muslehuddin, the *Concept of Civil Liability in Islam and the Law of Torts* (Lahore: Islamic Publications Limited, 1982).
[48] Muhammad Rafat Saeed, *Al-Muttaham Wa Haququhu Fi-al-Shariah al-Islamiyah: Ta'widh Al-Muttaham* (Jordan: Maktabah al-Manar Al-Zarqaa, 1983).

is done erroneously or wrongfully. It concludes that under Islamic law accused is entitled to both monetary and non-monetary compensation.

As for the quantum of compensation and details, the matter is entrusted to the discretion of the judge to determine it in accordance with principles of justice and equity. The author posits that the jurisprudence of some western countries also conforms to the Islamic perspective with regard to right of compensation to the accused against violations of his fundamental rights. The book, a pioneer work on the subject, only offers the details about the rights of accused in Islamic perspective and does not discuss the subject in the spectrum of modern human rights regime.

Taha Jaber al-'Alwani, in his article '*The Rights of the Accused in Islam (Part Two),* (1995)[49] although in some broader terms, expounds basic rights of the accused in Islam,[50] and maintains that Sharī'ah provides compensation to the accused who is placed under detention as a precaution but whose innocence is later established. He posits that the Sharī'ah principles encourage the "government's doing a good turn for those who suffer as a result of its mistakes while it takes undertakes to protect the rights of society and its subjects". This could take the form of an 'apology' or 'material or juristic recompense'. The author holds the position that the accused should be recompensed for whatever suffering he/she undergoes due to unproven accusation.

Similarly, Ashraf Md. Hashim, in his article *The Right of the Accused to Compensation* (2002),[51] addresses the question of compensation in its various forms to the innocent and acquitted accused, from the perspective of Islamic law. He also reaches on the conclusion that under Islamic law an accused is entitled to compensation for any *ḍarar*/harm caused by voluntary or mistaken

[49] Ṭāhā J. Al 'Alwānī, "The Rights of the Accused in Islam," (Part Two), *The American Journal of Islamic Social Sciences* 11, no. 4 (1994): 504-518.

[50] The rights he explains, include right to defence, right to counsel of his choice, right to remain silent on questioning, right of expression and to be heard, right of protection against forced confession, self-incrimination or torture, right to retract in *hudud* cases except *qadhf, and* the right to compensation.

[51] Muhammad Hashim Ashraf, "The right of the accused to compensation," *Hamdard Islamicus* 25, no. 02 (2002): 70.

action; thus, Islamic law has a comprehensive approach for the protection of rights of accused from any unwarranted harm.

Similar point was also maintained by Farhad Malekian, in his book '*Principles of Islamic International Criminal Law: A Comparative Search* (2011),[52] who posits that Islamic law aims, in all circumstances, at the protection of individual rights and no one shall, in the case of damages, be left out without adequate remedy. To him, as a matter of policy of Islam, all persons are granted an effective remedy in the case of the violations of their rights. He concludes that on this aspect, Islamic law is similar to the international human rights law. The author, however, seems to be general in his comment about the similarities of Islamic law and international law.

In the perspective of Islamic criminal principles, Muhammad Munir in his article *'Fundamental Guarantees of the Rights of the Accused in the Islamic Criminal Justice system* (2017)[53] offers an account of various legal safeguards relating to fundamental guarantees of the accused under Islamic criminal law and discusses the relevant basic principles of Islamic law. He maintains that under Islamic criminal procedure, depriving the accused from due process of law during the criminal justice procedure, amounts to gross violation of the fundamental guarantees.

Thus, the violation of the dignity of the accused, or subjecting him to torture or forced confession by the state's authorities is a criminal offence and incurs the criminal liability. The judiciary is bound to hold justice and correction of any injustice or error done through its judgment. The author argues that Islamic criminal justice system adheres to certain principles and does its utmost to avoid any possibility of miscarriage of justice. However, if in any case there occurs any miscarriage of justice or the unlawful criminal procedure, the Islamic criminal justice

[52] Farhad Malekian, *Principles of Islamic International Criminal Law: A Comparative Search* (Leiden: Brill, 2011).
[53] Muhammad Munir, "Fundamental Guarantees of the Rights of the Accused in the Islamic Criminal Justice system," *Hamdard Islamicus* 15, no. 4 (2017): 45-65.

system recognises the right to compensation for the innocent victims including those who are wrongfully or mistakenly accused or prosecuted. The article, however, has general theme and does not particularly deal with right of accused to redress in terms of reparation against violations of fundamental rights.

A collective position taken by these scholars is that the accused persons whose fundamental rights are violated in the criminal justice, deserve to be compensated under the law. By the compensation, they mean to include both pecuniary and non-pecuniary compensation. The position held by these scholars seems to be similar, but not identical to the modern international human rights law perspective.

d) International Human Rights Laws

As for the modern human rights perspective on this subject, the human rights instruments including International Covenant on Civil and Political Rights (ICCPR 1966), provide that the states are duty bound to provide 'effective remedy' to any person whose rights are violated, irrespective of the fact the violation is committed by the 'persons acting in official capacity'. However, as for the redress for violation of fundamental rights of accused, it provides that a person who becomes a victim of unlawful arrest and detention shall have "an enforceable right to compensation".[54] Thus, it only recognizes the right of compensation only against unlawful arrest and detention, not otherwise.

In the *Views of the Human Rights Committee under Article 5; paragraph two of the Optional Protocol to the International Covenant on Civil and Political Rights (2010)*[55] the Human

[54] Article 9(5) of the International Covenant on Civil and Political Rights (ICCPR), 1966.
[55] UN Human Rights Committee, Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Dumont v Canada, CCPR/C/98/D/ Communication No. 1467/2006, 21 May 2010 at paras. 24-25, http://www.worldcourts.com/hrc/eng/decisions/2010.03.16_Dumont_v_Canada.pdf. Accessed January 14, 2023.

Rights Committee noted a violation of article 2 (3) and article 14 (6) of ICCPR, "owing to lack of an effective remedy to enable the author to prove his innocence" and the facts presented. It concluded that the State party must be obliged to provide an effective remedy in the form of adequate compensation to the applicant.

However, the partially dissenting individual opinion of Fabian Omar Salvioli is remarkable as the learned member of the Committee interprets that the language and wording of Article 14, paragraph 6, of the Covenant is clear, and nowhere does it contain a requirement or standard of the proof of innocence, and even less of 'factual innocence'.

The right of appropriate remedy in terms of monetary compensation was also upheld by International Criminal Tribunal for Rwanda in *The Prosecutor vs. Andre´ Rwamakuba* (2007).[56] The International Tribunal for Rwanda (ICTR) Trial Chamber realized the need to grant compensation especially in cases where accused persons suffered and were subjected to lengthy detention in pre-trial stages, though the detention was not unlawful.

The report of International Commission of Jurists titled as *The Right to Remedy and Reparation for Gross Human Rights Violations* (2018)[57] expounds that every wrongful act of the State culminates into the duty to provide reparation as a legal consequence under international law and the Basic Principles and Guidelines on the Right to a Remedy and Reparation, 2005 are based on the notion of state responsibility. However, underscoring the victim-oriented perspective, the scope of these principles is extended to include the lability of non-state actors as well.[58] However,

[56] *The Prosecutor vs. Andre´ Rwamakuba*, Case No. ICTR-98-44C-T, Decision on Appropriate Remedy, (January, 2007). The same decision was upheld by appeal chamber on September 13, 2007.
[57] Livio Zilli, *The Right to Remedy and Reparation for Gross Human Rights Violations: Practitioners Guide No. 2,* (International Commission of Jurists, October 2019).
[58] The principle 3(c) states for provision of equal and effective access to justice irrespective to the fact that who is ultimately bearer of responsibility for the wrong committed. Besides, the principle 15 states that any person, legal person or even other entity shall be liable to pay reparation to the victim.

it is yet to see as how the states and non-state actors acknowledge these remedies and reparations for the accused turned to be victim of violations of fundamental rights or miscarriage of criminal justice.

e) Comparative Constitutional Practices

As for Pakistan, a significant work on tort law reform and state liability titled *Citizens versus State: Public Servant Immunity and Tort Law Reforms in Pakistan* (2005)[59] identifies and highlights the gaps in tort law in Pakistan, whereby the citizens do not have redress for their grievances caused by the negligent acts and omissions of public servants. The report concludes that tortious liability of public servants could not be established due to immunity clauses incorporated in the statutory framework. It suggests enacting appropriate law based on the principles of strict and vicarious liability. The work having broad-spectrum, however, does not have any particular focus on possible forms of redress or remedies, nor it specifically considers redress for violations of fundamental rights of accused in criminal justice.

Likewise, Ghulam Abbas in his doctoral thesis *Liability of the State in Tort: An Indo-Pak Perspective* (2019)[60] maintains that there is no specific legislation in India and Pakistan, which administers the state liability for the torts committed by its public servants. The work articulates that Pakistan, as compared to India, could not develop state liability jurisprudence in tort law. It suggests codification of tortious liability of the state in Pakistan by regulating the immunity clauses to overcome the problem.

[59] Aziz ur Rahman and The Network Publications, *Citizens versus State: Public Savants Immunity and Tort Law Reforms in Pakistan* (Islamabad: The Network Publications, May 2005).
[60] Ghulam Abbas, *Liability of the State in Tort: An Indo-Pak Perspective*, (PhD Law diss., International Islamic University Islamabad, 2019).

Though the work has significant relevance to this study, however, it too has general and broader theme and does not specifically address the violations of fundamental rights of various segments of society including the accused persons that are at risk of vulnerability or susceptibility. Besides, the distinct and broader theme of redressing victims of violations of fundamental rights and its particular forms is beyond the scope of this work.

Regarding the lack of compensation for the innocent individuals against their wrongful imprisonment or conviction in Pakistan, Sara Qayum in her paper '*Short Comings of Criminal Justice of Pakistan and its effects of rights of accused prisoners wrongly convicted or imprisoned* (2016)[61] stresses to have an adequate legal framework for compensation for innocent accused. She posits it a failure of justice system when a court decides a case after a lengthy trial and acquit an individual on merit without any compensation due to lack of adequate legal provisions. The article argues for the right of compensation for wrongfully or erroneously convicted individuals in the light of the provisions of international human rights law.

In fact, the right of compensation needs to be acknowledged in broader terms of reparation for violation of right of liberty and other fundamental rights. This article, however, does not take into account the issue of violation of all fundamental rights of the accused except the right to liberty, nor does it shed light on the right of compensation. The Islamic perspective on this aspect also needs consideration to support the argument for reparation in Pakistan.

Similarly, this author in his article *'Pre-Trial Detention and its Compensation in International and Pakistani Law (2018)'*[62] maintains that the human rights regime has yet to evolve the right of compensation for false or mistaken pre-trial detention. In this regard, some

[61] Sara Qayum, et al., "Short Comings of Criminal Justice of Pakistan and its effects of rights of accused prisoners wrongly convicted or imprisoned," *Journal of Legal Studies* 18, no. 32 (October 2016): 13-27.
[62] Tauqeer Hussain, "Pre-Trial Detention and Its Compensation in International and Pakistani Law," *Policy Perspectives* 15, no. 3 (2018): 47-66.

individual states[63] have taken position that is more appropriate by providing right to compensation to the individuals who are acquitted after undergoing erroneous or wrongful pre-trial detention. As for the Pakistani law, it has yet to make compliance with international human rights standards to evolve any such remedial or compensatory jurisprudence for wrongful detention of accused. The paper suggests reforms by providing redress or compensation to the innocent persons who become victims of pre-trial detention. The scope of this paper is limited, and does not go beyond right to compensation for pre-trial detainees. The broad subject of redress in terms of reparation for violations of fundamental rights of accused in criminal justice is not discussed at any length.

Muhammad Tariq Masood in his article *Fundamental Rights: Prospects of Compensatory Jurisprudence in Pakistan* (2020)[64] maintains that the remedy of compensation for violation of fundamental rights should be provided by the courts under public law in terms of constitutional discretionary jurisdiction.[65] He emphasises that, "the purpose of public law is not only to civilize public power but also to assure the citizens that they live under a legal system, which aims to protect their interests and preserve their rights".

The author views the courts in Pakistan enjoy broad and wide powers under the Constitution and can issue any appropriate order including the compensatory order for the enforcement of the fundamental rights. He appreciates for not having any express legal provision that makes it mandatory for the courts to provide compensation. Thus, everything is left at the discretion of the courts which have to determine the appropriateness of case' and appropriateness of relief' and the Court are self-governing in expanding or shrinking the scope or sphere of

[63] These states include United States of America, United Kingdom, Germany, Canada, Denmark and Sweden and perhaps India too is going to the same direction.
[64] Muhammad Tariq Masood, "Fundamental Rights: Prospects of Compensatory Jurisprudence in Pakistan," *PLD*, (July 2020): 66.
[65] In the opinion of the author, the remedy of compensation for violation of fundamental rights should be provided by the courts under Articles 199 (1(c), 175E(3) and 187 of the Constitution.

compensatory jurisprudence. He accentuates that the Pakistani courts, like Indian courts, should provide compensatory relief when infringement of the fundamental rights is gross and patent, that is, incontrovertible and ex-facie glaring.

However, the view of the author regarding discretionary constitutional remedy seems to be inconsistent or unfamiliar with current Indian jurisprudence where the Law Commission of India on the direction of Delhi High Court, proposed statutory provisions for consistent and determinate remedy of compensation.

f) Case Law

In fact, India has taken significant initiative and recently Law Commission of India has done a remarkable study to determine for right of compensation for wrongfully prosecuted accused persons. The Commission submitted a report titled '*Wrongful Prosecution (Miscarriage of Justice): Legal Remedies, (2018)*[66] to the Government of India in August 2018 in compliance of an order of the Delhi High Court in the case of *Babloo Chauhan vs. State Govt. of NCT of Delhi*.[67]

The Commission, after reviewing the existing laws and the case law, noted three categories of court-based remedies with respect to miscarriage of justice resulting in wrongful prosecution, incarceration or conviction etc. they are public law remedy, private law remedy, and criminal law remedy. As for this set of remedies, the Commission noted claim and grant of compensation for the said miscarriage of justice still remains complex and uncertain. Under public law, a violation of fundamental rights by the police and prosecutorial misconduct can invoke state liability but the amount and payment of compensation remain arbitrary and lacks transparency as

[66] Law Commission of India, *Wrongful Prosecution (Miscarriage of Justice): Legal Remedies*, Aug. 2018, http://lawcommissionofindia.nic.in/reports/Report277.pdf. Accessed January 08, 2023.
[67] *Babloo Chauhan @ Dabloo v. State Government of NCT of Delhi*, 247 (2018) DLT 31.

there is no set legislative principle regarding the basis for determining the award of compensation or its amount.

The Commission *inter alia* recommended the Government for enactment of specific legal provision for redress of cases of miscarriage of justice resulting in wrongful prosecution. In order to give clarity to the whole procedure, it also suggested amendments to the Code of Criminal Procedure, 1973 and prepared a Draft Bill titled "The Code of Criminal Procedure (Amendment) Bill, 2018.

Pakistan too needs to study and to take measures to ensure the redress for violations of fundamental rights of accused to have uniform process of accountability, rule of law, better performance of state functionaries and public confidence on the justice process. In fact, the Indian judiciary has much role to stimulate the debate and development of compensatory jurisprudence.

Delhi High Court in *Babloo Chauhan @ Babloo vs. State Govt. of NCT of Delhi* observed that the High Courts or the Supreme Court have been acquitting the accused after imprisonment of many years in numerous cases without compensation, as there is no statutory or legal scheme for compensating those who are wrongfully incarcerated in India. As for the possibility of invoking civil remedy, the court held that the remedy can be no way as efficacious, affordable or timely.

The Court noted that the Supreme Court of India has held in several cases that compensation can be awarded by constitutional courts for violation of fundamental rights, including for wrongful incarceration, under Article 21 of the Constitution of India as matter of public law remedy based on strict liability of state. However, these are occasional and are not easily available to all persons in similar situations. A violation of fundamental rights due to police and prosecutorial misconduct can invoke State liability but the amount and payment of compensation remain arbitrary and lacks transparency. In other words, despite decades of

jurisprudence on compensation under public law, there is no set of legislative principles regarding the basis for determining the award of compensation or its amount thereof.

The Court noted that under the remedies available under the existing system, the mechanism of compensation for miscarriage of justice resulting in wrongful prosecution remains complex and uncertain. The Court, therefore, felt an urgent need for a legal (preferably legislative) framework for providing relief and rehabilitation to victims of wrongful prosecution and incarceration and directed the Law Commission of India to undertake a comprehensive examination of the issue highlighted in the order and make its recommendations thereon to the Government of India.

As compared to India, the situation in Pakistan is not good. The High Courts in Pakistan have been rarely granting the remedy of compensation to the victims of violations of fundamental rights.[68] However, this practice of the High Courts is not uniform, consistent and determinate due to lack of adequate legislative framework about compensation even in cases where the court eventually acquits the accused on merit. The High Courts granted compensation to the accused for violation of fundamental rights in following cases.

In *Mazharuddin v. The State (1998)*,[69] the Sindh High Court while declaring the arrest of wife and sons of petitioner as unlawful and of no legal effect, addressed the question as whether the High Court could do more than merely passing an order of release of the detenu? It was held that the High Court is competent, in appropriate cases, to direct that monetary compensation be paid to the victims of violations of fundamental rights. Such compensation is payable by way of public law duty of the State and its officers which is independent of the private rights that a citizen

[68] *Khurshid Ahamad Naz Faridi v. Bashir Ahmad* 1993 SCMR 639; *Mazharuddin v. State* 1998 PCr.LJ 1035; *Ali Ahmad v. M. Yakoob Almain* PLD 1999 Karachi, 134; *Muhammad Zia v. Ch. Nazir Muhammad Advocate* 2002 CLC 59; *Syed Hasan Ali Shah v. Station House Officer, Police Station, Dadu* PLD 2006 Karachi, 425.
[69] *Mazharuddin v. The State 1998* PCR.LJ. 1035.

may have to claim damages through ordinary proceedings. The Court held that in cases of violations of fundamental rights, the victims are also be given compensation under public law.

The Court also dealt with the proposition of option of seeking alternate remedy of compensation for unlawful deprivation of liberty under ordinary law through normal proceedings. The Court repelled this for more than one reason. Firstly, the remedy of compensation in appropriate cases can be made payable under the constitutional jurisdiction for violations of fundamental rights is a liability in public law which is independent and altogether different from a private law remedy that a citizen may have in tort. The Court held that the duty to enforce these fundamental rights has been casted upon the superior courts. The Constitution left it to the judiciary to evolve tools for giving effect to these rights by empowering the Courts to make order or directions under Article 199(1)(c). However, this sort of remedy has it's owns limitations embedded in the same Article, which make this remedy as indeterminate and arbitrary.

In another case of *Mst. Afsana vs. District Police Officer, (Operation) Khairpur (2007)*,[70] a division bench of Sindh High Court, while disposing of a constitutional petition, took action against the delinquent police officers who were responsible for registration of false FIR and causing illegal arrest of the detenus. The Court noted that there are instances where the Courts found that the detenus were held in unlawful custody, orders were made for their release and the 'monetary compensation was ordered to be paid to the detenus' and cases were also ordered to be registered against the delinquent officers.[71]

[70] *Mst. Afsana v. District Police Officer, (Operation) Khairpur, 2007* YLR 1618 Karachi.
[71] For instance, Khurshid Ahamad Naz Faridi v. Bashir Ahmad and 3 others (1993 SCMR 639); Mazharuddin v. State, (1998 P.Cr.LJ 1035); Ali Ahmad v. M. Yakoob Almain (PLD 1999 Karachi, 134); Muhammad Zia v. Ch. Nazir Muhammad Advocate and 4 others (2002 CLC 59); Syed Hasan Ali Shah v. Station House Officer, Police Station, Dadu (PLD 2006 Karachi, 425).

The Court held that under the wide powers given in Article 199 of the Constitution, the High Court is empowered to grant damages to the victims of violations of fundamental rights. The Court determined, against the violations of detenus' rights of liberty and dignity as provided under Articles 9 and 14 of the Constitution of Pakistan 1973, the amount of compensation in its discretion keeping in view the principle applicable in awarding general damages in case of false imprisonment.

In *Mahera Sajid v. Station House Officer, Police Station Shalimar (2018)*[72], while disposing-off a constitutional petition of Habeas Corpus in case of 'enforced disappearance', the Islamabad High Court held that the State through its 'instrumentalities and functionaries' is absolutely and exclusively responsible for protecting and safeguarding fundamental rights. The Court held that the State and its functionaries in the instant case have failed in safeguarding the fundamental right of the petitioner guaranteed under Article 9 of the Constitution. It is therefore, an obligation of the State to put the petitioner financially in the same earlier position by way of compensation. The government, however, challenged this judgment before division bench of the Islamabad High Court[73] and the decision could not get finality.

g) Comparative Synthesis and Application to Pakistan

This study focuses on the national legal regimes that share a specific context with the legal regime of Pakistan. In this regard, it is pertinent to discuss the practices of countries which have direct bearing and relevance with the legal system of Pakistan. This includes the legal regimes of UK, USA and India. The Study highlights that the India's public law compensation model, especially in

[72] Mahera Sajid v. Station House Officer, Police Station Shalimar (2018 CLC 1858 Islamabad).
[73] Malik Asad, IHC verdict in enforced disappearance case challenged, *The Dawn*, July 29, 2018, https://www.dawn.com/news/1423571. Accessed on January 24, 2021.

the domain of fundamental rights violations, provides instructive lessons for adapting similar frameworks within Pakistan's constitutional and legal structure.[74]

v. Research Questions/Statement of Research Problem

The study attempts to address the followings research questions:

i. What are the fundamental rights of accused, guaranteed under the Constitution of Pakistan 1973? (Chapter 1)
ii. How does the legal regime of Pakistan protect the fundamental rights of accused in the criminal justice? (Chapter 2)
iii. How does the law provide redress to the accused for violations of fundamental rights? (Chapter 3)
iv. Why the State should be liable to redress the accused against wrongful or erroneous actions resulting into violations of fundamental rights? (Chapter 4)
v. How does the International human rights law address the violations of the rights of accused in criminal justice? Who is liable to redress in terms of reparation or compensation to the accused? (Chapter 5)
vi. What is the position in Islamic law regarding right of accused to redress in terms of reparation or compensation for violations of fundamental rights? (Chapter 6)
vii. What are the international best practices with regard to redress for accused against violations of fundamental rights? (Chapter 7)
viii. What should be the standard of liability and forms of redress against violations of fundamental rights of accused in the legal regime of Pakistan? (Conclusion)

[74] The detailed discussion on the comparative regimes has been incorporated in chapter 7 of this study.

vi. Need and Significance of the Study

As discussed in the literature review that there exists a research gap or lack of any in-depth study based on the theoretical basis and standard for redressing violations of fundamental rights of accused in Pakistan. To fill this gap, it is appropriate to study as how the Pakistani law, apart from protective measures, does or should redress for the violations of fundamental rights of the accused in criminal procedure or 'process'[75]? The study involves various important questions to address like, is there any need of right of redress under the law for the aggrieved persons (accused) or they should be left without any adequate redress? What kind of redress should be given to the accused against violations of fundamental rights? Why the State and the individuals should be liable to redress the innocent aggrieved accused persons?

The study reappraises and reviews the legal framework of Pakistan in the light of principles of Islamic law, international human rights law and international best practices to determine the redress for the accused persons whose fundamental rights are violated during criminal justice especially when they are wrongfully or mistakenly accused, detained, prosecuted, maltreated or subjected to torture and lengthy trial in criminal justice. The study also sets to weigh the argument of denying or curtailing the right of accused to redress on the pretext or claim of criminals escaping justice. Moreover, it intends to identify adequate standard for determination of redress keeping in view the socio-economic scenario of Pakistan.

The study concludes with recommendations to make improvement in overall legal and judicial structure of the country and to avoid 'miscarriage of justice'[76] especially with respect to

[75] The phrase 'process' in this study is used in the broader sense, as equivalent to, or synonymous with 'procedure', or 'proceeding.' See Garner, *Black's Law Dictionary* (11th ed.), 1058.

[76] The phrase 'miscarriage of justice' is defined as "a grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite a lack of evidence on an essential element of the crime. Also termed "*failure of*

fundamental right of accused. The study also indicates the outdated laws or practices prevalent in the country to bring them in conformity with the modern needs for proper dispensation of justice and enforcement of fundamental rights.

The findings of this study may help and provide relevant substance and aspiration for the academia, legislature, policy makers and courts to determine about the question of redress for violations of fundamental rights of accused in Pakistan and elsewhere. This study may also help the legislature and the relevant policy makers to understand and redress the grievances of the accused persons in Pakistan.

vii. Objectives of the Study

The study aims to discuss, examine and compare the 'redress' for violations of fundamental rights of the accused as presented in the legal regime of Pakistan and as assured and guaranteed by Islamic law, international human rights law, and international best practices. The study focuses the 'fundamental rights of accused' in the context of redressing the grievances or 'miscarriage of justice' in the criminal justice system' of Pakistan. Thus, it intends to explore the venues to address the problem of miscarriage of justice in Pakistan and suggests the corrective and remedial measures in light of Islamic law and international best practices.

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justice". Garner, *Black's Law Dictionary* (11th ed.), 1194; In fact, the term 'miscarriage of justice' does not carry precise meanings, nor is consistently invoked for certain circumstances. See Malcolm David Birdling, "Correction of Miscarriage of Justice in New Zealand and England," (PhD Law diss., 2012),7. The legal experts and scholars have defined the phrase of 'miscarriage of justice' variously. Thus, different standards can be assigned to the concept of 'miscarriage of justice'. See Attia Madni, Rao Imran Habib, and Naureen Akhtar, "Wrongful Prosecution a Miscarriage of Justice: Need for Procedural Reforms in Pakistan," *Pakistan Journal of Social* Sciences 39, no. 4 (2019): 1649. However, this study is concerned about the phenomenon of miscarriage of justice effecting or violating the fundamental rights of accused in criminal justice.

viii. Scheme of the Study

This study consists of introduction, seven chapters followed by the conclusion and recommendations. The introduction of this research study briefly explains about the utility and scope of this study to reform the legal regime of Pakistan especially in the context of fundamental rights of accused. It also takes into account the relevance of international Islamic law and international best practices with regard to the legal system of Pakistan.

The first chapter of this study sheds light on the fundamental rights of accused as guaranteed under the Constitution of Pakistan 1973. The second chapter discusses the criminal legal regime of Pakistan *vis a vis* enforcement of fundamental rights of accused in the criminal justice. Third chapter of the study provides an account of the existing legal regime of Pakistan in terms of its redress mechanism for the violations of fundamental rights of accused. Fourth chapter delineates the underlying grounds or reasons to justify the state responsibility to provide redress for violations of fundamental rights of accused.

Chapter five takes into account the remedial approach and mechanism as embodied in the international human rights law. Chapter six provides the viewpoint of Islamic law regarding fundamental rights of accused and right of redress for their violations by the state. Seventh chapter presents the position in UK, USA and India regarding vindication and redressing violations of fundamental rights of accused. The study concludes with the certain recommendations that suggest reform and overhaul of the legal regime of Pakistan in the light of guidance of Islamic law, human rights law and international best practices.

ix. Limitations and scope of the Study

As a matter of explanation, I would like to add this fact here that originally the research topic for this study was proposed as "Redressing Violations of Fundamental Rights of Accused: An Analytical Study of Pakistan's Legal Regime in the Light of Islamic Law and International Best Practices". However, it was modified by the Board of Advanced Studies and Research (BASR) as "Pakistan's Legal Regime in the Light of Islamic Law and International Best Practices: Redressing of Fundamental Rights of Accused" and the word "violations" was skipped from the title of the study. Thus, this fact caused some confusion about the scope and nature of this study.

As the phrase 'redressing of fundamental rights' might involve and suggest various dimensions of the rights of accused like enforcement, validity or need of overhauling of the current scheme of fundamental rights of accused. This might have broadened or stretched the focus of this study. To address this issue, the study observes the following limitations as for its scope:

- The study takes into consideration the subject of redress for violations of fundamental rights of accused that happen in the criminal justice of Pakistan.
- The study delineates upon the redress for violations of accused's fundamental rights in their totality and does not attend any particular fundamental right or its violation. Further, it does not specifically cover the violations of statutory and procedural rights of accused and their redress.
- The study primarily focuses on right to redress in terms of public law and thus the private law remedies like injunctions and tort law remedies are beyond the scope of this study.

- As the title of the study suggests, it lays emphasis on the redress in terms of civil liability in the light of the principles of Islamic law and international best practices.
- The strict liability theory has been employed as a conceptual framework for this study to analyze and justify the redress for violations of fundamental rights of accused.

x. Research Methodology

As for this study, qualitative and comparative research methodology is employed to appraise and examine the legal framework of Pakistan in the light of principles of Islamic law and international best practices, based on strict and vicarious liability. The relevant case laws and contemporary practices of states form an important part of this research and the arguments are based on the statutory provisions, precedents of courts, finding of the scholarly books and articles, and law reviews that have relevance to redress for violations of the fundamental rights of accused in the criminal justice.

The research study involves both primary and secondary sources. The primary sources which are consulted include provisions of statutory laws of Pakistan, texts of Islamic law, and legislation in other states. The secondary sources that are employed include the judgments of superior courts, judgments of foreign courts, law books and journals, online articles, newspapers and other literary works and publications related to legal studies.

The study employs descriptive, comparative and analytical methods. Occasionally, secondary empirical data like statistical evidences from official reports and judicial decisions, and case studies are incorporated in appropriate scenarios to enhance its methodological robustness and practical relevance of the study and to meet the doctoral evaluation requirement i.e. to contribute to ongoing debates, policy or practice. Nevertheless, the focus is laid on the

comparative approach to examine and compare the redress mechanism provided in Islamic law, international human rights instruments, and the state legislations that are regarded as best international best practices. In this regard, the practices of United Kingdom (UK), United States of America (USA) and India are selected as they share common law heritage with Pakistan and they have either evolved or in the process of evolving redressive jurisprudence. The doctrinal legal research method is taken up to determine the liability criteria and standards for redressing violations of fundamental rights of accused and suggest measures for reform in the legal framework.

CHAPTER 1: INTRODUCTION TO FUNDAMENTAL RIGHTS OF ACCUSED IN PAKISTAN

CHAPTER 1

INTRODUCTION TO FUNDAMENTAL RIGHTS OF ACCUSED

1.1 Introduction

Human beings possess human rights or natural rights that exist independently to their recognition by a legal system or despite their denial by a legal system.[1] Therefore, a state is to ensure all the measures for the security of life, dignity, freedom and property of its people. The validity of any political social structure depends on the assurance that all men are guaranteed security of life, freedom and the quest for joy, that are principal, intrinsic, inviolable, and unalienable. When such assurance is given by the constitution for the protection of these rights then they are named as "fundamental rights".[2]

In modern constitutions, the rights like right to life, personal freedom, equality before the law, right to dignity and privacy, the right of property, freedom of association, freedom of speech, freedom of conscience and worship, and freedom of contract and occupation are stated as fundamental rights.[3]

Undoubtedly, the human rights are regarded as legal rights as such a given legal system should enforce and give them their full effect. As the legal rights are correlated with their corresponding duties, the duty to protect human rights or prevent their violations is incumbent

[1] Garner, *Black's Law Dictionary* (11th ed.), 1583; Muhammad Tariq Mahmood, "Rights of Accused under International Human Right, Islam and Domestic Legislation of Pakistan*"* (PhD Law diss., Selinus University, 2021), 9.

[2] Naveed Ahmed, "A Critical Analysis of Fundamental Rights under the Constitution of Pakistan," 1973, *Journal of Political Studies* 28, no. 1 (Summer 2021): 11-12.

[3] O. Hood Philips, Paul Jackson and Patrica Leopold, *Constitutional and Administrative Law*, 8th ed. (Landon: Sweet & Maxwell Limited, 2001), 13-14.

primarily on state. Thus, a breach of such an obligation violates a human right induced by the state itself, thereby incur further secondary obligation of state to redress the injury.[4]

Amongst the legal interests or rights that are protected by the Constitution, they are termed as constitutional or fundamental rights. Similarly, the expression 'statutory rights' means those rights that are protected through some statute or legislation. Amongst the statutory rights, when some right is recognized and guaranteed under the constitution, they can be distinguished as fundamental rights.[5]

These rights are termed as fundamental rights because no organ of the state, whether it is legislature or executive, can act in violation of them, and they cannot be suspended, abridged or eliminated except in the manner provided by the Constitution itself.[6] The fundamental rights are the restraints against the arbitrary exercise of powers by the state and its functionaries.[7]

This study takes into account the fundamental rights of accused and their enforcement by the state in totality, and does not pertain to the protection or violation of any specific fundamental rights.

1.2 Fundamental Rights in Pakistan

As human rights are inviolable and universally acknowledged through various international and regional human rights instruments,[8] states are obliged to make compliance with these

[4] Sompong Sucharitkul, "Multi-Dimensional Concept of Human Rights in International Law," *Notre Dame Law Review* 62, no. 3, (2014): 312.
[5] O. Hood Philips, Paul Jackson and Patrica Leopold, *Constitutional and Administrative Law*, 13-14.
[6] A.K. Brohi, *Fundamental Law of Pakistan*, (Karachi: Din Muhammadi Press, 1958), 303.
[7] *Mian Muhammad Nawaz Sharif v. President of Pakistan*, PLD 1993 Supreme Court 473; *Watan Party and others v. The Federation of Pakistan*, PLD 2012 SC 292; See Muhammad Rafeeq Shinwari, "The Constitutional Rights of the People of the Federally Administered Tribal Area (FATA): Their Enforcement & Constitutional Remedies and the Role of FCR," *Islamabad Law Review* 1, no. 4, (2017): 64.
[8] The detail of these international human rights instruments is given in chapter 5 of this study.

instruments and ensure protection of individuals' rights including of accused.[9] Resultantly, states in their constitutions acknowledge and guarantee certain fundamental rights for the citizens and people living therein, including the accused persons. Pakistan as an Islamic Republic and signatory to numerous human rights treaties, has responsibility to ensure protection of fundamental rights of very citizens including the persons accused of an offence.[10]

The Constitution of Islamic Republic of Pakistan 1973 contains civil, political, social, economic and cultural rights. The Constitution has following provisions[11] regarding 'fundamental rights' of citizens:

1. Equality of status, equal opportunity and equality before law (Objectives Resolution),
2. Social, economic and political justice (Objectives Resolution),
3. Freedom of thought, expression, belief, faith, worship, and association (Objectives Resolution),
4. Protection of law/right to be treated in accordance with law (article 4),
5. Security of the person (Right to life and liberty) (article 4(2)(a) and 9),
6. Safeguards to arrest and detention (article 10),
    a. Right to information about grounds of arrest (article 10),

[9] Office of the United Nations High Commissioner for Human Rights, *Human Rights and Constitution Making* (New York: United Nations Publications, 2018), 21; See also Muhammad Hassan and Muhammad Abdullah Faizi, "Enforced Disappearances and Constitutional Guarantees in Pakistan: A Human Rights Perspective," *European Journal of Social Sciences* 59, no. 3 (May 2020): 289.
[10] Muhammad Tariq Mahmood, "Rights of Accused," 9.
[11] The Constitution of Pakistan 1973 incorporates these rights in Part II, chapter 1 comprising on articles 8 to 28 and Objectives Resolution as given in the Annex of the Constitution of Pakistan.

b. Right of defence (article 10),

c. Right to have counsel of his own choice (article 10),

d. Right to be presented before the court (article 10),

7. Right of fair trial and due process (article 10A),

8. Right to open, speedy and expeditious trial (article 10A),

9. Protection against slavery, forced labour and compulsory service (article 11),

10. Protection against retrospective and excessive punishment (article 12),

11. Protection against double jeopardy and self-incrimination (article 13),

12. The right of dignity (article 14),

13. The right of home privacy (article 14),

14. Protection against torture (article 14),

15. Freedom of movement, residence and settlement (article 15),

16. Freedom of Assembly (article 16),

17. Freedom of association (article 17),

18. Freedom of trade, business or profession (article 18),

19. Freedom of speech, expression and the press (article 19),

20. Right to information (article 19A),

21. Freedom to profess, practice and propagate religion and to manage religious institutions (article 20),

22. Safeguard against taxation for purposes of any particular religion (article 21),

23. Safeguards as to educational institutions in respect of religion (article 22),

24. Right to acquire, hold and dispose of property (article 23),

25. Protection of property rights (article 24),

26. Equality before law and equal protection of law (article 25),

27. Right to education (25A),

28. Non-discrimination in respect of access to public places (article 26),

29. Safeguards against discrimination in services (article 27),

30. Preservation and promotion of language, script and culture (article 28),

31. Right to move a High Court for the enforcement of any of the Fundamental Rights (article 199).

1.2.1 Rights guaranteed to the 'Citizen', and 'Person',

Above-mentioned fundamental rights are guaranteed to the citizens of Pakistan. Amongst these rights, there are certain rights that are guaranteed to every person for the time being living in Pakistan. For instance, right to be treated to be treated in accordance with law,[12] security of

[12] Article 4 of the Constitution of Pakistan.

person,[13] right to fair trial and dues process,[14] prohibition of slavery,[15] protection against torture and inhuman treatment, protection against double jeopardy, right of dignity and privacy of home. On the account of human being or citizen of the state of Pakistan he is entitled for all kinds of fundamental rights which are otherwise guaranteed to any individual or citizen by the Constitution.[16]

1.2.2 Significance and Inviolability of the Fundamental Rights

Fundamental rights lay at the very heart of the constitutional scheme of Pakistan and their pre-eminence can be observed from the fact that Article 8 expressly provides that any law, custom or usage having force of law may be declared as void to the extent of its inconsistency with fundamental rights or when it "takes away, abrogates or "abridges" any fundamental right.[17] This enjoins upon legislature and executive to ensure that laws, policies and their actions comply with fundamental rights to avoid being declared as invalid.

The Constitution pledges for the inviolability of fundamental rights directed against the 'State' as defined under Article 7 of the Constitution.[18] About the sanctity and inviolability of the fundamental rights, the Supreme Court of Pakistan in the case of *Pakistan Broadcasters Association* reiterated the oft-repeated constitutional principle. The Court held that "undoubtedly, no one can be deprived of his fundamental rights. Such rights are incapable of being divested or

[13] Ibid., Article 9.
[14] Ibid., Article 10A.
[15] Ibid., Article 11.
[16] *Khadim Hussain v. Secretary Ministry of Human Rights Islamabad*, PLD 2020 Islamabad 268; *Shabbaz Shabbeer v. Additional Session Judge*, PLJ 2022 Islamabad 200.
[17] In this regard, the doctrine of severability is relevant and applicable in such cases. The doctrine simply means that in case of repugnancy or inconsistency of any law with the fundamental rights guaranteed by the Constitution, the only relevant provision(s) of that particular law, not the whole law, will be declared as void by the Court. Thus, the court is empowered to sever the unconstitutional portion of any particular law in question from its constitutional portion for sake of declaring it to be void to the extent of its repugnancy to the Constitution. See *Baz Muhammad Kakar and others v. Federation of Pakistan and others* PLD 2012 SC 92.
[18] Justice (R) Fazal Karim, *The Law of Criminal Procedure* (Karachi: Pakistan Law House, 2010), 231.

abridged. The legislative powers conferred on the State functionaries can be exercised only to regulate these rights through reasonable restrictions and that too as may be mandated by law and not otherwise. The authority wielding statutory powers conferred on it must act reasonably and within the scope of the powers so conferred."[19]

The Constitution of Pakistan, unequivocally and expressly states about the binding nature and sanctity of the fundamental rights and leaves no room of ambiguity or uncertainty for derogation of the fundamental rights. The Constitution enjoins upon the State and its institutions to protect and safeguard these fundamental rights and ensure the compliance of the legislation to the preservation and protection of fundamental rights. Any law made in derogation of these rights would be invalid and void.[20]

Thus, the State organs and institutions should remain "particularly sensitive towards mandate of the Constitution and prescription of law, when it comes to fundamental rights".[21] In this context, the fundamental rights are to be protected and preserved 'at all cost' in order to uphold supremacy of the Constitution and to honor the people of Pakistan who have adopted and given to themselves this Constitution[22].

However, the constitutions expressly or impliedly restrict these rights by various notions or tools like 'public order', 'morality', or 'due process of law' and the states have varying nature of judicial review of legislation that limits such rights.[23]

[19] *Pakistan Broadcasters Association v. PEMRA*, PLD 2016 SC 692.
[20] Article 8 of the Constitution of Pakistan.
[21] *Khawaja Salman Rafique and another v. NAB through Chairman*, PLJ 2020 SC 299.
[22] *Justice Qazi Faez Isa v. the President of Pakistan* 2021 PLD SC 1.
[23] O. Hood Philips, Paul Jackson and Patrica Leopold, *Constitutional and Administrative Law*, 13-14.

1.2.3 Limitations of the Fundamental Rights

The fundamental rights are not absolute in their character; rather they have their own limitations and qualifications. In the Constitution of Pakistan, fundamental rights variously phrased in terms of their absoluteness and qualified nature. It is for the Courts to interpret them accordingly and determine about their absolute or qualified nature.[24] Besides, the Constitution of Pakistan provides for various limitations, restrictions, and exemptions with regard to application or enforcement of the fundamental rights. Articles 8 (3)[25], 199 (3)[26], 233[27] and First Schedule of the Constitution[28] exempt several laws from the application and enforcement of fundamental rights.

Further, the Constitution also employs various expressions and terms in order to define the scope, limitations and qualifications of the fundamental rights. These expressions include 'subject to law'[29], 'public order'[30], and 'morality'[31], 'except or save in accordance with law'[32],'subject to any reasonable restrictions imposed by law'[33], 'subject to such qualifications as may be prescribed by law'[34]'subject to regulation and reasonable restrictions imposed by law'[35],

[24] Fazal Karim and Adeel Shahid Karim, *Access to Justice in Pakistan*, 2nd ed. (Pakistan Law House, 2002), 157.
[25] The constitutional provision relates to non-application of fundamental rights to any law related to Armed Forces
[26] The provision relates to the non-enforcement of fundamental rights with regard to members or subjects of law of Armed Forces of Pakistan.
[27] Article 233 of the Constitution is about power of President to suspend Fundamental Rights during emergency period.
[28] The First Schedule of the Constitution relates to laws exempted from the operation of Article 8 (1) and (2) which state about invalidity of laws inconsistent or in derogation of fundamental rights.
[29] Objectives Resolution; Articles 14(1), 20, 22 (3) and 28 of the Constitution of Pakistan.
[30] Ibid., Articles 16, 17, 19 and 20.
[31] Ibid., Objectives Resolution; Articles 17 (1) and, 19, and 20.
[32] Ibid., Articles 4(2)(a), 9 and 24.
[33] Articles 15, 16, 17 (1), 19 and 23 of the Constitution state about restrictions imposed by law 'in the public interest' or 'in the interest of public order' or 'in the interest of sovereignty or integrity of Pakistan, public order or morality' or in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, commission of or incitement to an offence'
[34]Article 18 of the Constitution of Pakistan.
[35] Ibid., Article 19A.

'subject to the Constitution'[36], 'save for a public purpose, and save by the authority of law'[37], and 'subject to Article'[38].These expressions and terms define and restrict the exercise of the fundamental rights depending upon the situations and circumstances.

Besides these phrases and expressions given in the Constitution, the statutory law also restricts and qualifies the scope of the fundamental rights in various situations and circumstances. For instance, Sections 54 and 55 of the Code of Criminal Procedure 1898 empower the police to restrict the right of liberty of a suspect or accused. Under Section 54 of Cr.PC, a police officer is empowered to arrest a person who is involved in any cognizable offence or against whom a complaint is made or there exists credible information or reasonable doubt about the commission of cognizable offence. However, the law requires that a police officer who makes arrest of a person must be able to justify the exercise of that power in making the arrest apart from his having power to do so. He cannot make arrest of a person, only because he has the power to do so. Instead, he must also show sufficient grounds for making the arrest.[39]

Similarly, Article 4(1)(j) of the Police Order, 2002 expressly states that it is 'the duty of every police officer to apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient ground exist".

However, such restrictions and limitations of the fundamental rights have their own scope. For instance, about the limitations of fundamental right of liberty, the Supreme Court of Pakistan in *Sughran Bibi* case held that "ordinarily no person is to be arrested straightaway only because he has been nominated as an accused person in an FIR or in any other version of the incident

[36] Ibid., Articles 23 and 199.
[37] Ibid., Article 24(2).
[38] Ibid., Article 28.
[39] *Shahzada Qaisar Arafat @Qaisar v. The State etc*., PLD 2021 SC 708.

brought to the notice of the investigating officer by any person until the investigating officer feels satisfied that sufficient justification exists for his arrest."[40]

Besides, Sections 167 and 344 of Cr.PC provide for remand of an accused to custody explicitly. The former section deals with grant of remand to police custody and the latter deals with grant of remand to judicial custody.[41] Thus, the statutory limitations provide and endorse qualifications of fundamental rights as per nature, status of the rights and their subjects.

However, it is equally important to note that when the law has prescribed a method for doing a thing in a particular then such provision of law should be followed and doing a thing in a manner other than provided manner would not be permitted under the law.[42]

1.2.4 Enforcement of Fundamental Rights

It is Constitutional duty of the superior Courts to protect and enforce the fundamental rights of the citizen against any arbitrary and illegal action on the part of the public and administrative functionaries of the Government. The Supreme Court of Pakistan in its verdict held that High Court must protect Fundamental Rights when they are encroached by any person or authority of the Government.[43]

The constitutional provisions which confer Fundamental Rights on a citizen whenever violated and complaint is made to a High Court about their violation, the Court must step in to investigate such facts under the discretionary jurisdiction conferred on it under Article 199 and

[40] *Mst. Sughran Bibi v. The State*, PLD 2018 SC 595.
[41] *Nazir Ahmad v. Capital City Police Officer Lahore*, PLJ 2022 Cr.C. 263.
[42] *Metropolitan Corporation, Islamabad v. Chairman CDA* PLD 2021 Islamabad 144.
[43] *Government of Sindh v. Raeesa Farooq*, 1994 SCMR 1283; Muhammad Nawaz Dogar, "Enforcement and Suspension of Fundamnetal Rights in Pakistan: A Constitutional Perspective," *Pakistan Law Journal*, (2008) https://www.pljlawsite.com/2008art9.htm. Accessed July 24, 2023.

pass such order as may be found just, legal and equitable taking into consideration the facts and circumstances of each case.[44]

The Constitution provides the machinery for the enforcement of fundamental rights against the public authorities contravening it i.e. to be enforced only against person acting in exercise of the powers given to them by the law namely the public officers. When a private individual violates any fundamental right, the aggrieved party has remedy under ordinary law. [45]

With regards to enforcement of fundamental rights, the Constitution has expressly provided two forums under Articles 175E and 199 of the Constitution of Pakistan. Under Article 175E the Federal Constitutional Court[46] has jurisdiction and under the latter one the High Court has jurisdiction to decide the validity of any law unconstitutional based on its repugnancy. The Article 175E (3) allows the Federal Constitutional Court to interfere only if a question of public importance involving the enforcement of fundamental rights arises, whereas Article 199(1)(c) gives powers to High Courts to issue orders and directions, where the question of fundamental rights is involved and it may issue writs of prohibition, mandamus, certiorari, habeas corpus and quo warranto, without employing their technical names. This special Constitutional jurisdiction conferred upon High Court which in simple term may be stated as:

a) the jurisdiction is subject to Constitution;
b) there must be no other adequate remedy provided under the law;
c) it is discretionary to High Court i.e., to exercise or refuse to exercise this jurisdiction;

[44] See Dogar, "Enforcement and Suspension of Fundamental Rights in Pakistan".
[45] Ibid.
[46] Prior to the 27th Amendment in the Constitution of Pakistan 1973, this authority was vested to the Supreme Court of Pakistan under Article 184(3) of the Constitution of Pakistan.

d) the person must be aggrieved person;

e) he must show the illegality.

For enforcement of fundamental rights, the person moving the Court must be an aggrieved person and other adequate remedy must not be there i.e. he has to satisfy the Court that other adequate remedy is not provided by law, then the Court takes the step for enforcement of fundamental right under Article 199(1)(C).

The High Court may direct any public functioning to refrain from doing what he is not permitted by law to do. The direction so issued is in nature of writ of prohibition. But the person moving to Court cannot be permitted for such relief if any other adequate relief is available i.e. if any alternative remedies like suit, amendment of suit, an appeal or some other steps to be taken before specially constituted authority, i.e. election tribunal etc. are available then he is not entitled for any relief under this, because if there is any other remedy available under the terms of this article no order can be issued, hence the existence or availability of another adequate remedy is a constitutional bar or restriction to exercise this jurisdiction. [47]

Further, the person seeking relief for enforcement of fundamental right must satisfy the Court that he is an aggrieved person. The aggrieved person here is one, in prohibition whose right is threatened, in mandamus whose rights are denied and in certiorari whose rights are affected by a decision. Here it was further observed that a person alleging to be aggrieved has a personal interest in performance of legal duty which if not performed would result in loss of some personal advantages.[48]

[47] See Dogar, "Enforcement and Suspension of Fundamental Rights in Pakistan".
[48] Ibid.

In challenging an action, the validity of law under which it was taken may also be challenged. In each of these above cases the High Court may issue any one of the appropriate directions or orders e.g. injunction, prohibition mandamus etc. This jurisdiction of High Court to enforce fundamental rights being Constitutional cannot be taken away by the law, and where the law purports to take away, such legislation shall be to that extent be ineffective.[49]

A justice system is established to protect the rights of the people.[50] The criminal justice system means to ensure fundamental rights of both victims and accused defendants; it has not only to provide redress to the victims of crime, but also to protect the innocent people from wrongful conviction or detention. The protection of the accused remains invariably in the interest of all civilized systems of law. Hence, all legal systems provide certain principles and standards for the protection of the rights of the accused. Those rights guarantee that if criminal proceedings are held no harm will be done to the alleged offender and his right to a fair trial will be ensured.[51]

1.3 Fundamental Rights of Accused

The rights of accused, in law, mean the rights and privileges of a person accused of a crime, guaranteeing him a fair trial. These rights were initially (generally from the 18th century) confined primarily to the actual trial itself, but later on in 20th century many countries extended them to the pre-trial and post-trial periods.[52] In the modern times, almost all legal system guarantee to provide

[49] *Asima Jilani v. Government of Punjab* PLD 1972 S.C 139.
[50] Saqib Jawad, Barkat Ali and Muhammad Hassan, "Countering Terrorism: Constitutional and Legal Framework: A Critical Appraisal of Judicial Strategies of Pakistan," *Pakistan Social Sciences Review* 5, no. 1 (March 2021): 348, 351.
[51] Karolina Kremens, "The Protection of the Accused in International Criminal Law According to the Human Rights Law Standards," *Wroclaw Review of Law, Administration & Economics* 1, no. 2 (2011): 26.
[52] *Encyclopaedia Britannica*, "Rights of accused", (July 20, 1998), https://www.britannica.com/topic/rights-of-accused, Accessed 1 February 2022.

certain basic rights or protections to the accused persons considering the principle of presumption of innocence which is a cardinal principle of human rights jurisprudence.[53]

The Constitution of Pakistan, 1973 also guarantees the fundamental rights for the accused person and preserves his fundamental rights in criminal justice. There are various fundamental rights of the accused enshrined in the Constitution of Pakistan, which secure them from arbitrary and abuse of power by the State. It is the basic principle of the rule of law that seeks to do justice for everyone including accused persons, without any prejudice and bias, as the accused is to be presumed innocent until proven guilty. [54]

Further, the right of access to justice also lies within such Constitutional guarantees that provide that every individual is to be dealt and tried 'in accordance with law'[55] and has equal protection of law.[56] The right of the accused to avail justice includes the right to be tried fairly before an impartial and independent court or tribunal.[57]

The Constitution of Pakistan, however, does not bifurcate, categorize or distinguish fundamental rights of accused from the fundamental rights of any other citizen or individual. Instead the Constitution provides that all citizens are equal before law and are entitled for equal status and protection.[58] Thus, an accused as a citizen or individual is entitled to all fundamental rights provided in the Constitution except where the law expressly qualifies or limits these

[53] See Ashish Kumar Singhal, Eakramuddi, and Abroo Khan, "The Status of the Rights of Accused under Different Indian Laws," *Academia Arena* 5, no. 5 (2013): 37, http://www.sciencepub.net/academia; Mukete Tahle Itoe, "A Study on the Protection of the Rights of Pretrial Detainees under International Law: The Case of Fundong, Boyo Division, Northwest Of Cameroon" (PhD diss., Department of International Law program, Selinus University of Sciences and Literature, 2022), 2.
[54] Muhammad Hassan and Johan Shamsuddin Bin Sabaruddin, "Jurisdiction of Military Courts over Civilian Terrorists in Pakistan: A Miscarriage of Justice," *IIUM Law Journal* 27, no. 1 (2019): 77.
[55] Article 4 of the Constitution of Pakistan.
[56] Article 25 of the Constitution of Pakistan.
[57] *Sharaf Faridi v. Federation of Pakistan* PLD 1989 Kar. 404.
[58] Article 25 of the Constitution of Pakistan.

rights.[59] Thus, the fundamental rights of accused, in the context of criminal justice procedure, include right to life and liberty, protection against unlawful or arbitrary arrest, right to be informed about the reason of arrest and detention, right to be presented before the court within twenty-four hours, right of defence before the competent court and right of counsel.[60]

Other such fundamental rights include right to fair trial and due process, protection against retrospective and excess of punishment, protection against double punishment and self-incrimination, inviolability of dignity, privacy of home and protection against torture and equal protection of law.[61]

Besides, the Constitution provides right to move a High Court for the enforcement of any of the fundamental rights and requires inexpensive and expeditious justice.[62]Almost 16 Articles of the Constitution are relevant to fundamental rights of accused and criminal procedure and thus, it is called as a 'mini-code of criminal procedure'.[63]

It has been observed and declared by the apex court of Pakistan that while interpreting the Constitutional provisions regarding Constitutional guarantees, the approach of the court should be dynamic progressive and liberal by keeping in view the rights of the accused. It has further been observed in an another case that the Constitution is to be interpreted in a liberal and beneficial manner by keeping in view the spirit behind the fundamental rights guaranteed by the

[59] Even an accused that has been alleged to any heinous crime is entitled for fundamental rights ensuring fair trial. See Saqib Jawad, Barkat Ali and Muhammad Hassan, "Countering Terrorism: Constitutional and Legal Framework," 348, 351.
[60] Fazal Karim, *The Law of Criminal Procedure*, 143; See also M Cherif Bassiouni, "Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions," *Duke Journal of Comparative and International Law* 3 (1993): 235, 292.
[61] See Articles 4, 9, 10, 10A, 12, 13, 14, and 25 of the Constitution of Pakistan; *Mazharuddin v. The State* 1998 PCRLJ 1035.
[62]Articles 4, 199(2) and 37 (d) of the Constitution of Pakistan.
[63] Fazal Karim, *The Law of Criminal Procedure*, 143.

Constitution.[64] In this context, some basic principles and important provisions of the Constitution with regard to fundamental rights of accused are discussed in following:

1.3.1 Right to be dealt with in accordance with law (Article 04)

The Constitution of Pakistan 1973 provides and guarantees about the rule of law whereby every individual has inalienable right to be protected and treated in accordance with law. In this regard, no detrimental action can be taken by the State, against the life, body, liberty, reputation or property of the accused, save in accordance with law.[65] The rule of law is a complex, multifaceted ideal that legal systems either satisfy or fail to satisfy to varying degrees. There would be a severe threat to the rule of law if officials could violate rights with impunity and reduce the rights to practical nullities.[66]

Article 4 of the Constitution of Pakistan, 1973 in terms of the rule of law, is the 'bedrock of the Constitution of Pakistan'. Similarly, the courts have constitutional responsibility to ensure the rule of law in the true spirit. In this regard, the courts of the country in their various judgments have upheld the rule of law and equal treatment and protection of law.[67] This inalienable right of every citizen must be read with "right to fair trail and due process" as guaranteed in Article 10-A of the Constitution.[68]

Articles 4 and 25 of the Constitution provide and guarantee about the 'rule of law' and 'equal protection of law' to all citizens, respectively. Therefore, the accused persons like other citizens and innocent persons have equal protection and entitlement of fundamental rights unless

[64] *Benazir Bhutto v. President of Pakistan* PLD 1998 SC 388.
[65] See Article 4 of the Constitution of Pakistan.
[66] Richard H. Fallon, "Bidding Farewell to Constitutional Torts," *California Law Review* 107 (2019): 971.
[67] *Yasir v. The State and Others* 2018 YLR 379; Zia Ur Rehman v. The State 2018 YLR 1810.
[68] *Gulfaraz Khan v. Government of KPK*, PLD 2017 Peshawar 2; *Muhammad Asif v. Government of Sindh* 2017 PLC (C.S) 42; Muhammad Hassan and Johan Shamsuddin Bin Sabaruddin, "Jurisdiction of Military Courts," 78.

the law provides otherwise. Article 4 of the Constitution precisely provides for 'the protection of law' as 'inalienable right' of every citizen and every other person who is for the time-being living in Pakistan. The pre-eminence of this Article can be observed from the fact that the fundamental rights can be suspended as compared to the right given in Article 4 of the Constitution.[69]

Article 4 of the Constitution also pledges that the life, liberty, body, reputation or property of any person shall be safe and no detrimental action shall be taken "*except in accordance with law"*. Article 9 is another cherished fundamental right of a person, which, *inter alia,* guarantees right to liberty, which is not to be curtailed *"save in accordance with law*." However, there is a remarkable distinction between these two mentioned Articles of the Constitution as even in the case of the proclamation of Emergency, the operation of Article 9 may be suspended but Article 4 remains in full force even during Emergency.[70]

As for the interpretation of phrase *"save in accordance with law",* the Supreme Court of Pakistan in *Muhammad Iqbal Khan Noori v. National Accountability Bureau* delineates that "The phrase except or save in accordance with law implies that not only should the procedural requirements of the "law" be fully met but also its substantive content i.e., there must be sufficient material/evidence on the record that can justify the application of such a "law." Therefore, material/evidence must be sufficient enough to persuade the constitutional court to deprive an individual of his fundamental right."[71]

Moreover, the court have interpreted that right to treated 'in accordance with law' is an inalienable right and must be read with the "right to fair trial" enshrined in Article 10-A of the

[69] Fazal Karim, *The Law of Criminal Procedure*, 159.
[70] Muhammad Hassan and Johan Shamsuddin Bin Sabaruddin, "Jurisdiction of Military Courts," 81.
[71] *Muhammad Iqbal Khan Noori v. National Accountability Bureau* PLD 2021 SC 916.

Constitution of Pakistan. The right to be dealt in accordance with law is most basic right that survives and remain in force even during emergency time, while other fundamental rights are suspended.[72]

1.3.2 Security of Person: The Right to Life and Liberty (Article 09)

The Constitution of Pakistan 1973 provides and guarantees the right to life to every citizen under Article 9 which states that nobody shall be deprived from his life and liberty except in accordance with law and prohibits arbitrary deprivation of life and liberty.[73] Thus it is the constitutional right of the people that their life and properties are saved and protected by the State and such State functionaries include the police officials.[74]

The word "life" in Article 9 includes the right to live with dignity as guaranteed, a right to be treated by keeping in view the rule of law, a right to enjoy protection from any trespassing act by the executive on the right of privacy and liberty and right of access to justice, which are inherent in the right to life. Further, Articles 4 and 9 of the Constitution of Pakistan declare that the protection of life and liberty is not only meant for the citizen of Pakistan but also for those who are temporarily staying in Pakistan. The right to liberty is, however, not an absolute right, but its deprivation can only happen with due process of law.[75] In this regard, Article 10 of the Constitution stipulates the conditions that are to be observed in cases of arrest and detention.

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[72] *Muhammad Asif v. Government of Sindh* 2017 PLC (C.S) 42; *Gulfaraz Khan v. Government of KPK* PLD 2017. Peshawar 23; Muhammad Hassan and Johan Shamsuddin Bin Sabaruddin, "Jurisdiction of Military Courts," 78.
[73] Article 9 of the Constitution of Pakistan.
[74] *Saddam Hussain v. The State* PLD 2020 Supreme Court 310.
[75] Shaukat Mahmood and Nadeem Shaukat, *The Constitution of the Islamic Republic of Pakistan, 1973* (Legal Research Centre, 2006), 63-64; Muhmmad Hassan and Muhammad Abdullah Faizi, "Enforced Disappearances and Constitutional Guarantees in Pakistan," 290.

1.3.3 Protections against Unlawful Arrest or Detention (Article 10)

The Constitution provides certain protections that are available to the accused when he is arrested or detained. Under article 10 of the Constitution, an accused person who is arrested and detained, he has following protections:

1.3.4. Right to be informed about the grounds of Arrest (Article 10(1))

An accused person who is arrested by police or any other state agency authorized by the law, he must be informed about the reasons of arrest or detention at the time of arrest and detention. Thus, the 'existence of ground is a condition precedent to the arrest' and the accused is not to be arrested and detained without any valid ground.[76]

1.3.5 Right to Counsel of Choice: (Article 10(1))

An Accused person has a fundamental right under the Constitution that he must be given opportunity to consult his counsel of his own choice to present him before the court. It gives him the right to be defended by a pleader who can present him before the court in a reasonable way.

1.3.6 Right to be presented before the Magistrate: (Article 10(1))

An accused person when he is arrested, he must be presented before the magistrate after his arrest and detention.[77] Sections 60 and 61 of the Cr.PC, 1898 also protect the accused against unlawful and arbitrary detention.[78] Thus, failure to present the accused before the magistrate within the time would render the detention illegal.

[76] Fazal Karim and Shahid Karim, *Access to Justice in Pakistan*, 171.
[77] Article 10 (2) of the Constitution of Pakistan.
[78] Sections 60 and 61 of Cr.PC, 1898.

The second part of the Article 10 of the Constitution deals with preventive detention that is a detention by the executive without trial or inquiry by the Court. The preventive detention is authorized by the law as a precautionary measure for public safety and order and not as a matter of punishment. This detention is to be exercised within prescribed manner and subject to review by a Review Board. In absence of any single legal requirement, the detention would be unlawful.[79]

1.3.7 The Right to Fair Trial (Article 10-A)

Most of the constitutions provide "*right to fair trial*" to the accused person in varying degrees.[80] The right to fair trial is based on the presumption of innocence, and insists on a criminal process and justice system to avoid miscarriages of justice. [81]

There are various fundamental rights related to fair trial guaranteed under international law to ensure fairness in criminal proceedings against the accused. In fact, right of fair trial is not a single right rather a bulk of fundamental rights are associated and included with the term 'fair trial'.[82]

Fundamental fair trial rights involve the essential conditions of a trial that it should take place in public and before an independent and impartial tribunal, with the burden of proof on the prosecution and the presumption of innocence of the accused until proven guilty. These fundamental fair trail rights are respected in all countries, though there are differences about the definition of impartiality and the presumption of innocence. [83]

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[79] Article 10 of the Constitution of Pakistan; *Ministry of Interior, Islamabad v. Amtul Jalil Khawja* PLD 2003 SC 442.
[80] M Cherif Bassiouni, "Human Rights in the Context of Criminal Justice," 267.
[81] Farkhanda Zia Mansoor, "Reassessing Packer in the Light of International Human Rights Norms," 272, 274.
[82] See Celia Brown-Blake, "Fair Trial, Language and the Right to interpretation," *International journal on Minority and Group Rights* 13, (2006): 391.
[83] Brants and Franken, "The Protection of Fundamental Human Rights in Criminal Process," 52.

The right to fair trial was inserted in Article 10-A of the Constitution of Pakistan under the Constitution (Eighteenth Amendment) Act, 2010. It is very imminent right for the protection of other fundamental rights as it is not a mere single dimensional right rather its deprivation would affect others rights of accused as well. Thus, for the full realization of the right of trial, a balancing approach for the rights of accused, victim and society at large without prejudice to anyone.[84]

It is to be noted that Article 10A itself does not expressly clarify the right to fair trial and its scope. However, it has been elaborated by the courts that it is the right of the parties to be tried, uninfluenced or unbiased, by the court and it is also an established principle that the court should not prejudice any party. Such a right is available not only to criminal charges but also to civil rights and obligations.[85]

Furthermore, the apex court of Pakistan also ruled that the right to fair trial is a long-recognized right, which now has become a substantial clause of the Constitution. The court further observed that Article 10-A, had been 'raised to a higher pedestal' but the legislative body left the term "fair trial" unexplained. Nevertheless, a universally accepted definition was adopted by the courts that describes that the 'fair trial' includes, the "right to conduct fair hearing by an impartial competent forum by keeping in mind the principles of natural justice and justice should not only be done but be seen to be done, and it can only be assured by the independent judiciary.[86]

The Supreme Court of Pakistan outlined the necessary ingredients to ensure the fairness of trial. These include the information of the grounds of arrest, permission to consult with and defended by the counsel of choice; information of the offence charged for; opportunity to cross-

[84] Hina Hafeez Ullah Ishaq, "The Right to Fair Trial: Better Late Than Never," *LUMS Law Journal* 1, no. 1 (2014): 96.
[85] *Matloob Hussain v. The State* 2005 MLD 1101.
[86] *Malik Riaz Hussain v. Dr Arsalan Iftikhar* PLD 2012 SC 664.

examine witnesses; affording opportunity to explain the circumstances disclosed in evidence against him; and opportunity to produce evidence in his evidence.[87]

Indeed, Article 10-A is intrinsically linked to other fundamental rights guaranteed by the Constitution and violation of a fair trial would also be a violation of other connected fundamental rights.[88] The Supreme Court of Pakistan in *Sohail Ahmad v. Government of Pakistan* held that the Court has to analyse facts and circumstance of the case to ascertain that the indispensable right of fair trial is afforded or not.[89]

The Courts, in criminal cases, must ensure that the accused persons are awarded every opportunity to defend himself with surety, that his right to fair trial is not being violated as that right is "*aimed at ensuring proper administration of justice*".[90] It is the responsibility of adjudicating authority to ensure that the trial has been conducted fairly, in accordance with the prescribed criminal justice system.[91] A court that does not ensure a fair proceeding would defeat its character regarding impartiality, as it is an organ of which the sole purpose is to dispense justice fairly and judiciously.[92]

1.3.8 Due Process of Law: (Article 10-A)

Due process of law is a constitutional guarantee to prevent the government from abusing the rights of citizens. Due process of law includes both substantive due process and procedural due process. Article 10-A of the Constitution provides that every person is to be treated under due

[87] *Muhammad Bashir v. Rukhsar and others* PLD 2020 SC 334.
[88] Hina Hafeezullah Ishaq, "The Right to Fair Trial," 99.
[89] *Sohail Ahmad v. Government of Pakistan* PLJ 2022 SC 332.
[90] Human Rights Committee, General Assembly Official Records: Thirty-Ninth Session, Supplement No.40 (A/39/40), General Comment 13/21.
[91] Christoph Johannes Maria Safferling, *Towards an International Criminal Procedure* (Oxford University Press, 2001), 21-33.
[92] Bahma Sivasubramaniam, "The Right of an Accused to a Fair Trial: The Independence of the Impartiality of the International Criminal Courts," (PhD diss., Durham University, 2013), 19.

process of law in any condition. Thus, an accused person cannot be prosecuted arbitrarily without due process of law. Instead, he is to be triad and prosecuted under the substantive and procedural law for the alleged crime.[93]

1.3.9 Protection against Retrospective or ex-post facto law: (Article 12)

The Constitution of Pakistan prohibits retrospective effect of penal law and excessive punishment. Article 12 of the Constitution of Pakistan provides right to the accused person that he cannot be punished for an act or omission that was not declared punishable at the time when the accused committed it. It also prohibits any excessive or greater punishment for the act or omission that was not as such punishable at the time of commission. This rule is based on the legal maxim '*nulla poena sine lege'* which simply means that 'there can be no punishment without law'.

1.3.10 Protection against double jeopardy

The Constitution protects the accused against double punishment for the same cause.[94] This is based on the legal maxim '*nemo debet bis vexari pro una et causa* i.e. no person should be vexed or tried twice for the same matter. Thus, the accused cannot be prosecuted and punished twice of the same offence.

1.3.11 Protection against self-incrimination or forced confession

Article 13(b) of the Constitution protects the accused against self-incrimination, and forced confession. Thus, the accused cannot be compelled to be witness against himself in any case.

[93] Mariam Sherwani, "Rights of the Accused in the Legal System of Pakistan: A Legal Analysis," *Islamabad Law Review* 3, no. 3&4 (2019): 106.
[94] Article 13(a) of the Constitution of Pakistan.

1.3.12 Right of Dignity and Privacy of Home: (Article 14(1))

Article 14 (1) of the Constitution of Pakistan declares and guarantees for the inviolability of dignity of man and privacy of his home. The privacy of home is not to be violated in any circumstances except when it is necessary and that too in compliance of the due procedure of law. Reasonably, the right also entails the modern digital privacy and protection against unlawful surveillance.

1.3.13 Protection against Torture: (Article 14(2))

Torture is banned and prohibited at all times. It 'includes cruel, inhuman and degrading treatment'. Article 14(2) of the Constitution prohibits the use of torture for the purpose of extracting evidence. Under this provision, an accused cannot be subjected to custodial torture merely to extract the confession statement with regard to charges leveled against him.[95]

It is pertinent to note that the right to life is not as absolute as the right to protection against torture is for the reason that there are no qualifications to the prohibition against torture. Thus, most of the states strictly adhere to the prohibition of torture and cruel or inhuman treatment or punishment and have absolute prohibitions in either their Constitutions or legislation.[96]

1.3.14 Equality before Law and Equal Protection of Law: (Article 25(1))

Article 25 of the Constitution of Pakistan explicitly provides for 'equality of all citizens' and 'equal protection of law' without any discrimination. This protection is also available to the accused persons as it is available to all citizens in general. All citizens have equal access and

[95] *Khadim Hussain v. Secretary Ministry of Human Rights Islamabad* PLD 2020 Islamabad 268.
[96] Brants and Franken, "The Protection of Fundamental Human Rights in Criminal Process," 28-29, 41.

protection of law as no one is above the law.[97] The right of equality or equal treatment of law demands that all the people have same rights and self-respect as they are free-borne and entitled for equal protection as per the Constitution without any discrimination.[98]

However, this is pertinent to note that apart from equality principle, the rule of reasonable classification is also well acknowledged by the superior judiciary in Pakistan. Supreme Court in *I.A. Sherwani v. Government of Pakistan* held that "equal protection of law does not envisage that every citizen is to be treated alike in all circumstances, but it contemplates that persons similarly situated or similarly placed are to be treated alike."[99]

1.3.15 Right to be tried before Independent and Impartial Court

Article 175 of the Constitution is the hallmark for the separation of powers and independence of judiciary which is essential for fair trial and access to justice. Thus, the accused has fundamental right to be tried before an independent and impartial court to ensure fair trial and access to justice.[100] It is worth mentioning that the Supreme Court ruled that the legislature cannot enact such laws which may suspend the right to approach the courts of law, because the denial of this right is also an infringement of other fundamental rights.[101]

[97] Mariam Sherwani, "Rights of the Accused," 106.
[98] Naveed Ahmed, "A Critical Analysis of Fundamental Rights," 11.
[99] *I.A. Sherwani v. Government of Pakistan*, 1991 SCMR 1041.
[100] Ibid. Muhmmad Hassan and Muhammad Abdullah Faizi, "Enforced Disappearances and Constitutional Guarantees in Pakistan," 294.
[101] *Government of Baluchistan v. Azizullah Memon* PLD 1993 SC 341.

1.4 Principle of Presumption of Innocence

One of the fundamental principles of the criminal justice is that every person should be presumed innocent until proven guilty beyond reasonable doubt in criminal proceedings and it is considered one of the most recognizable rights of the accused in the civilized world.[102]

The principle that accused is to be presumed innocent until proven guilty by the prosecution before a competent court of law, is a universally accepted principle incorporated in the international human rights instruments.[103] It is expressed literally in both Universal Declaration of Human Rights (UDHR), 1948[104] and International Covenant on Civil and Political Rights (ICCPR), 1966[105] and in a number of other international treaties.[106]

The international rules of law do not provide an exact moment when the protection of the accused should commence.[107] The rules only set out the ending date which is the conviction of the accused. The Rome Statute, however, resolves the problem explicitly. Article 66 (1) of the Rome Statute of International Criminal Court (ICC), 1998 clarifies that it is not only the accused who needs to be presumed innocent. The quoted article states that 'everyone' shall be treated in such a way, establishing that this is a right which should be attributed to every person. Therefore, the

[102] Kremens, "The protection of the accused in international criminal law," 36.
[103] Details about the presumption of innocence under international human rights law are discussed in chapter 5 of this study.
[104] Article 11 (1) of the UDHR provides for the innocence of an accused until he is proved guilty under the law after fair trial proceedings.
[105] Article 14 (2) of the ICCPR also provides that every who is charged with a crime has a right to be presumed innocent until proven guilty.
[106] For instance, Article 66 of Rome Statute of the International Criminal Court, 1998, Article 6 (2) of the European Convention on Human Rights (ECHR), 1950, and Article 8 (2) of the American Convention of Human Rights (ACHR) 1969.
[107] See Article 11 (1) of the UDHR and Article 14 (2) of the ICCPR.

presumption of innocence is applicable to the accused and a suspect until the moment guilt is proven, and this accordingly persists during the pre-trial investigation and trial proceedings.[108]

Besides the provisions of international human rights law, the presumption of innocence is recognized by national laws of several countries. Both inquisitorial and adversarial models of judicial process recognize this principle. However, states accommodate and observe the notion of innocence of accused variably in their constitutions and laws. [109]

In Pakistan, there is no express constitutional or statutory provision about the principle of presumption of innocence. However, the higher courts in Pakistan have upheld and interpreted this principle in a number of cases. The Supreme Court of Pakistan in the case *Khawaja Salman Rafique v. National Accountability Bauru*[110]maintained that the judiciary should observe and adhere to the principle of criminal jurisprudence that a person is presumed innocent until proven guilty. This principle is based on the general rule the burden of proof in a criminal case lies on the prosecution to establish the guilt of an accused beyond reasonable doubt. The principle of presumption of innocence has justification on the basis that the outcome of a wrongful conviction is far worse than that of a wrongful acquittal.

Because the public interest in protecting an innocent person from being subjected to incarceration, humiliation, and conviction, greatly overwhelms the public interest in securing conviction of the guilty. The Court settled that "the concept of the presumption of innocence is

[108] Kremens, "The protection of the accused in international criminal law," 37.
[109] Zappala, 'The Rights of Accused' in *The Rome Statute of the International Criminal Court: A Commentary*, vol. II, ed. Antonio Cassese, Paola Gaeta and John RWD Jones (Oxford University Press, 2002), 1344.
[110] *Khawaja Salman Rafique and another v. NAB through Chairman and others* PLD 2020 SC 456.

imperative, not only to protect an accused on trial, but to secure and maintain public confidence in the fairness, impartiality, integrity and security of the criminal justice system."[111]

The Court emphasized that punishment comes only after conviction and the presumption of innocence of accused subsists and remains intact until his conviction after trial. Thus, the Courts, while dealing with the matter of grant of bail and justifiable exercise of power of arrest, have to maintain a delicate balance between two fundamental but conflicting demands of personal liberty of the accused on one and the right of investigation of the Police on the other hand or between individual rights versus social or public interests.[112]

The Court further held that any deprivation of liberty or curtailment of fundamental rights guaranteed by the Constitution needs adequate justification based on 'principle of proportionality, unreasonableness and necessity'. The curtailment or limitation of fundamental rights of accused is to be employed for "proper purpose rational and necessary and the prejudice caused to the constitutional rights must be proportional to the benefit achieved."[113]

Thus, this establishes the accused persons as being humans and citizens have as much fundamental rights as other humans or citizens except the situations where the law itself limits these fundamental rights. For instance, as discussed above in certain situations the law itself warrants that, due to severe nature of allegation or accusation, an accused is divested with the certain fundamental rights like right of liberty and right to movement.[114]

The courts in Pakistan adhere to and observe the principle *'presumption of innocence',* which requires that a person is to be presumed innocent until proven guilty by a court of law, and

[111] Ibid.
[112] Ibid.
[113] Ibid.
[114] For Instance, Section 54 and 55 of Cr.PC.

its can only be dislodged or rebutted if there exists 'sufficient incriminating material' against a person[115].

Thus, the state is responsible to actually enforce the fundamental right of accused and to ensure that he is not involved or trapped in false accusations to meet the ends of justice as denial of these fundamental rights would result into punishment for a crime that he might not have committed as he is actually innocent in the eyes of law and innocent persons should not be punished. Lahore High Court has even added and held this that:[116]

> It is also an established principle of law and equity that it is better that 100 guilty persons should let off but one innocent person should not suffer. As the preeminent English jurist William Blackstone wrote "Better that ten guilty persons escape, than that one innocent suffer". Benjamin Franklin, who was one of the leading figures of early American history, went further arguing "it is better a hundred guilty persons should escape than one innocent person should suffer". The accused to be afforded the right of the benefit of the doubt, it is not necessary that there should be many circumstances creating uncertainty and if there is only one doubt, the benefit of the same must go to the accused.

It is for this underlying reason, it has been held by the courts that the ultimate conviction and incarceration of a guilty person can repair the wrong caused by relief of bail granted to him but no satisfactory reparation can be offered to an innocent accused person for his unjustified incarceration at any stage of case if he/she is acquitted ultimately.[117]

[115] *Muhammad Iqbal Khan Noori v. NAB* PLD 2021 SC 916.
[116] *Muhammad Umair v. State* PLJ 2022 Cr.C. 158.
[117] *Naseem Bibi v. Gull Faraz* PLD 2021 Islamabad 120; *Manzoor and 4 others v. The State* PLD 1972 SC 81.

1.5 Fundamental Rights of Accused and the Criminal Justice System in Pakistan

The Constitution and the legal framework of Pakistan provide assurance and certain safeguards against violations of fundamental rights of its all citizens including accused persons. However, factually the accused persons often suffer violations of their fundamental rights during investigation, pre-trial, and post-trial stages in the criminal justice system.[118] Consequently, the constitutional guarantees for the protection of fundamental rights of accused are not practically implemented and realized. When the actual practice compromises the enforcement and vindication of fundamental rights of accused, this aspect raises question about the efficacy of whole justice system.[119]

Despite the legal system of Pakistan guarantees almost the basic rights of the accused; yet the flagrant violations of fundamental rights are often reported in numerous criminal cases. The study narrates the actual situation of rights of accused in Pakistan and outlines some recommendations for amendments of relevant laws to reduce the possibility of the abuse of the power of government authorities and redress the aggrieved innocent accused persons.

The discussion in following chapter follows on the protection of fundamental rights of accused from wrongful and arbitrary action or omission of government bodies or servants in the course of criminal justice.

1.6 Conclusion

This preliminary chapter highlights and sums up briefly the accused's fundamental rights as provided by the Constitution of Pakistan. The Constitution and the legal regime of Pakistan

[118] International Commission of Jurists, "On Trial: The Implementation of Pakistan's Blasphemy Law," November 2015, https://www.refworld.org/pdfid/565da4824.pdf. Accessed February 12, 2022.
[119] Mariam Sherwani, "Rights of the Accused," 111.

guarantee about the protection of fundamental rights of all citizens including accused persons. These rights *inter alia* include right to life, right to liberty, the right to security of person, protection against unlawful arrest and arbitrary detention, protection against retrospective and excessive punishment, right to dignity and safeguard against torture and forced confession, right of privacy of home, right of property and right to equal protection of law.

The Constitution and the legal framework of Pakistan recognise the rule of law and concept of equality and underpin the presumption of innocence for accused. In this regard, the judiciary especially the higher courts are vested with the responsibility and powers to ensure enforcement of these rights against any unlawful or arbitrary administrative action.

In addition to the embodying these rights into the constitution and other legal instruments, the question of redressing and vindicating the grievances of accused persons is of paramount significance as without adequate redress or remedy, the fundamental rights are futile and useless. The next chapter discuses and highlights this particular aspect in detail.

CHAPTER 2: PROTECTION OF FUNDAMENTAL RIGHTS OF ACCUSED AND CRIMINAL JUSTICE IN PAKISTAN

CHAPTER 2

PROTECTION OF FUNDAMENTAL RIGHTS OF ACCUSED AND CRIMINAL JUSTICE IN PAKISTAN

2.1 Introduction

In the modern state system, one of the key functions of the state is administration of justice and establishing peace and order in the society. In this regard, the state, on one hand, is responsible to maintain public peace and protection of collective rights of the society, and on the other, it has obligation to respect the rights of the individuals including persons accused for crime. Thus, the state has to keep a delicate balance of between collective rights of society and the individuals' rights.[1]

The purpose of enforcement of criminal law is to ensure peace and tranquilly in the society in which the fundamental rights of all citizens including accused persons are protected. It protects rights of life, dignity, liberty, and property of the citizens and ensure rule of law in a state. The main purpose of law is to determine the guilt and innocence of the accused and no punishment can be inflicted unless it is established after a fair trial to the accused before an independent and impartial court.[2] Undeniably, it is one of the core postulates of every legal system to protect the fundamental rights of accused because an accused is treated as innocent until proven guilty by a competent court after a fair trial.

[1] Farkhanda Zia Mansoor, "Reassessing Packer in the Light of International Human Rights Norms," 279-280.
[2] See Muhammad Munir, "Judicial Proceedings in Criminal Cases in Pakistan," *SSRN,* (December 2021) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3975427. Accessed March 16, 2023.

Admittedly, no legal system is perfect. A good legal system is one that keeps improving and adjusting with time and circumstances[3] while passing through the process of evolution which is essential ingredient of safe administration of criminal justice.[4] An effective criminal justice system is considered a main pillar and a key aspect of the rule of law in a country and comprises on the "conventional mechanism to redress grievances and to bring action against individuals for offences against society."[5]

An effective criminal justice system is a main pillar and a key aspect of the rule of law in a country.[6] The criminal justice system consists of governmental institutions of police, prosecution, judiciary, prisons and corrections with their respective roles of investigation, prosecution, adjudication, and execution or correction of the criminal offenders to uphold the principles of legal justice.[7] Legal justice is accomplished through balancing the individuals' fundamental rights with government obligation and commitment to protect public rights. Without the unwavering and continuous commitment of the professionals of criminal justice, the fundamental rights of the people cannot be preserved and enforced.[8] In this regard, the role and functioning of public bodies and state officials is very crucial in the criminal justice to protect the fundamental rights of the people including accused persons.[9]

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[3] Zeeshan Manzoor, *Practical Approach towards Criminal Justice in Pakistan* (Karachi: Mega Publishers, 2014), 352.
[4] *Sajid Hussain v. State*, PLD 2021 Supreme Court 898.
[5] World Justice Project, USA, Andersen, E.,& Ponce, A., "The World Justice Project Rule of Law Index" (2022), *https://worldjusticeproject.org/rule-of-law-index/factors/2022/Criminal%20Justice/*.
[6] Muhammad Arif Rajput, Farid Samir and Benavides Vanegas, "Reformation of Criminal Justice of Pakistan," *European Scientific Journal* 18, no. 5 (2022): 88.
[7] Muhammad Munir, "Police Powers and Investigation in Criminal Justice in Pakistan," *SSRN*, (November 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3974412. Accessed June 16, 2023.
[8] Tansif ur Rehman, Mehmood Ahmed Usmani and Sajida Perveen, "A Critical Analysis of the Criminal Justice System in Pakistan," *Pakistan Journal of International Affairs* 4, no. 4 (2021): 741.
[9] Tansif ur Rehman, Mehmood Ahmed Usmani and Sajida Perveen, "Police and Prosecution's Perspective on Low Conviction Rates in Pakistan," *Pakistan Journal of International Affairs* 5, no. 1 (2022): 133, 165.

In the administration of justice, errors are inevitable and it is impossible to eliminate errors from the criminal justice system. A variety of risks are involved in the criminal proceedings during which the fundamental rights of accused persons can be violated. Though the states make their efforts to improve their legal rules and codes but the practice shows that the violation, errors and mistakes are inevitable.[10]

It is a matter of fact that the in every country people are accused, arrested and detained on suspicion of crime. Sometimes, the accused persons are detained for weeks, months or years before their fate is decide by the courts. Often, the people are held in prisons in worse condition. Despite of the presumption of innocence, their legal status remains undetermined, they are suspected but they are proven guilty yet. In this troublesome time, the accused persons suffer and undergo physical abuse, enormous pressure of economic loss and mental distress and stigmatization.[11]

On the other hand, it is also a matter of fact that the conviction rate in Pakistan is very low.[12]According to a report, it is hardly 9 percent, that simply means that almost 91 percent accused persons are acquitted in criminal justice due to various reasons including defective investigation and prosecution.[13] Despite of this low conviction rate, it is well-established fact that

[10] Wojciech Jasin´ski, Karolina Kremens, ed., *Compensation for Wrongful Convictions: A Comparative Perspective*, (New York: Routledge, 2023), 1.
[11] Centre for Human Rights, Crime Prevention and Criminal Justice Branch, Professional Training Series No. 3, Human Rights and Pre-trial Detention: A Handbook of International Standards relating to Pre-trial Detention, United Nations Publications, Newyork and Geneva, 1994), 2.
[12] According to a study, "the overall conviction rate in Pakistan is around 50%... Pakistan's conviction rate reveals that in heinous offences the national average of conviction rate is 15% and that in ATA cases 19%, which further decreases after appeal." See Ali Asghar, "Criminal Justice of Pakistan", ISSRA Papers, Vol.- XIV, 2022. 4, 1-12.
[13] Muhammad Arif Rajput and Muhammad Riaz Rajput, "Impact of Defective Investigation and Prosecution on Trial," *Social Sciences* 9, no. 6 (2020): 265.

accused persons often face ill-treatment and violations of their fundamental rights in the criminal justice.[14]

In any legal system, criminal proceedings directly or indirectly have an effect on fundamental human rights. The right to security, physical integrity, dignity, and property of individuals are the most affected fundamental rights in any criminal proceedings. Thus, the right to life, the right to liberty and security, the prohibition of torture and the right to privacy are jeopardized in criminal proceedings. In most cases, accused or convict persons are deprived of their rights to liberty and/or property. In exceptional cases, a conviction may result in the deprivation of the right to life.[15]

Similarly, in the criminal procedure, mostly the right to life, liberty and property are at stake whenever someone faces a criminal charge.[16] The rights of accused are violated or at least there happens a risk of their violations when the officials apprehend the accused against some allegation of crime and this risk of violation continues through arrest, pre-trial detention, during the trial and appeals, and at the time of imposition of punishment.[17] When a state treats accused persons arbitrarily, there is likelihood of state terror to its own people.[18]

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[14] See Joseph Achile, "Miscarriage of Justice in Legal System," *International Journal of Law and Policy* 8, no. 1 (2023): 37-38; Reema Omer, *Authority without Accountability: The Search for Justice in Pakistan* (International Commission of Jurists, October 2013), https://www.refworld.org/pdfid/530f088d4.pdf. Accessed September 01, 2020; Zarfishan Qaisar, Khushbakht Qaisar and Usman Hameed, "Dysfunctional Law Against the Crime of Enforced Disappearances in Pakistan," *International Review of Social Sciences* 9, no. 2 (February 2021): 1-8; Tariq Hassan, "Supreme Court of Pakistan: The Case of Missing Persons," *Criterion* 4, no. 3 (2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1861044. Accessed June 15, 2023.

[15] Abdi Jibril Ali, "Remedies for Human Rights Violations: A Reform Proposal for Addressing Victims of Criminal Proceedings in Ethiopia," *Northwestern Journal of Human Rights* 19, no.1 (2020): 14.

[16] Fazal Karim, *The Law of Criminal Procedure*, 143.

[17] Farkhanda Zia Mansoor, "Reassessing Packer in the Light of International Human Rights Norms," 262.

[18] Muhammad Hassan and Muhammad Abdullah Faizi, "Enforced Disappearances and Constitutional Guarantees in Pakistan," 297.

After all, legally not all criminal proceedings *per se* contravene human rights. Yet human rights, including the rights which are most affected during criminal proceedings, are guaranteed in international human rights treaties ratified by Pakistan and recognized in the Constitution of the Islamic Republic of Pakistan. They require sincere attention and due regard in the administration of justice as well.

2.2 Criminal Justice System of Pakistan and Protection of Fundamental Rights of Accused

In Rule of Law Index 2024, Pakistan scores at 98 out of 142 countries of the world as for the performance of its criminal justice system keeping in view the performance of all relevant actors of the system including the police, lawyers, prosecutors, judges and prison officers. The assessment of the criminal justice includes the performance of criminal investigation, adjudication, corrections to reduce criminal behavior, impartiality, corruption, government influence, due process of the law and rights of accused persons. Unfortunately, as for the due process of the law and rights of accused, the score is further decreased in ranking at 121 out of 140 countries.[19]

The dismal status and grim condition of criminal justice of Pakistan with respect to fundamental rights, has also been highlighted by Islamabad High Court in a case where it observed that "current status of the criminal justice system does not appear to guarantee the fundamental right to a fair trial and justice to every citizen. The system has become a classic example of a grave violation of the constitutionally guaranteed rights of every citizen because it

[19] World Justice Project, USA, Andersen, E.,& Ponce, A, "The World Justice Project Rule of Law Index*"* (2022), https://worldjusticeproject.org/rule-of-law-index/country/2022/Pakistan/Criminal%20Justice/. Accessed June 15, 2023; See also Muhammad Arif Rajput, Farid Samir and Benavides-Vanegas, "Reformation of Criminal Justice System of Pakistan," *European Scientific Journal* 18, no. 5 (2022): 87-88.

fails to achieve its fundamental objective to protect the victims, punish the guilty and thus make society safe for every person."[20]

The High Court, while emphasizing the needs of urgent reformation, has observed that if urgent steps are not taken then posterity will never forgive those who are today in a position to remedy the wrongs that perpetuate miscarriages of justice.[21]

Thus, despite the constitutional safeguards, statutory provisions and judicial pronouncements, the actual practice of arrest and detention reveals violations of fundamental rights of accused in criminal justice.[22] Unfortunately, regardless of the universal principle of presumption of innocence, accused persons are often confused with offenders and both are viewed and treated alike or even the accused persons are treated in worse terms.[23] This unfortunate attitude becomes a reason that the accused persons are deprived of their fundamental rights even they have not committed any offence.[24]

2.3 Violations of Fundamental Rights of Accused in the Criminal Justice

Despite the constitutional safeguards, statutory provisions and judicial pronouncements, violations of fundamental rights is a pervasive problem in the criminal justice of Pakistan.[25] The actual practice of arbitrary arrest and unlawful detention, custodial torture and misuse of powers reveals violations of fundamental rights of accused in criminal justice on different pretexts and

[20] *Aftab Hussain v. State* 2021 P Cr. L J 761 Islamabad.
[21] Ibid.
[22] Hina Hafeez Ullah Ishaq, "The Right to Fair Trial," 100.
[23] Megan Stevenson, Sandra G. Mayson, "Pretrial Detention and the Value of Liberty," *Virginia Law Review* 108 (2022): 709.
[24] Mariam Sherwani, "Rights of the Accused," 101.
[25] Amina Aame, Khaliq Ayub and Rimsha Khan, "Legal Framework on Compensation for Wrongful Conviction in Pakistan: A Comparative Analysis with Washington and England Laws," *Journal of Social Sciences Review* 3, no.2 (2023)" 903.

forms.[26] There are numerous reports and studies that show that miscarriage of justice in terms of violations of fundamental rights of accused is a matter of common practice in the criminal justice of Pakistan.[27]

Violations of fundamental rights of accused in criminal justice may happen due to various factors like mistake, negligence, false accusation, malicious prosecution, defective or erroneous investigation, unlawful arrest and detention, misuse of power or trust, and erroneous or wrongful decision of the court. As it has been highlighted, the trend of the malicious prosecution and wrongful incarceration is prevalent in Pakistan. There are a plenty of painful instances that manifestly show occurrence of miscarriage of justice in various forms in the legal system of Pakistan.[28]

2.3.1 Intentional and Erroneous Violations of Fundamental Rights of Accused

There are certain factors contributing to violations of fundamental rights (miscarriages of justice) of persons accused, convicted and imprisoned for criminal offences. The intentional factors contributing to this miscarriage of justice in terms of violation of fundamental rights of accused include false identification parade, misconduct of police and prosecution, forced confession, and political and extraterrestrial pressure.[29]

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[26] Hina Hafeez Ullah Ishaq, "The Right to Fair Trial," 96.

[27] For instance, Joseph Achile, "Miscarriage of Justice in Legal System," 43; Reema Omer, *Authority without Accountability: The Search for Justice in Pakistan*, 2013; Zarfishan Qaisar, Khushbakht Qaisar and Usman Hameed, "Dysfunctional Law Against the Crime of Enforced Disappearances in Pakistan," 1-8.

[28] Attia Madni, Rao Imran Habib and Naureen Akhtar, "Wrongful Prosecution a Miscarriage of Justice: Need for Procedural Reforms in Pakistan," *Pakistan Journal of Social* Sciences 39, no. 4 (2019): 1649, 1653; Aziz-u-Rahman and The Network for Consumer protection, *Citizens versus State: Public Servants Liability and Tort Law Reforms in Pakistan* (Islamabad: The Network for Consumer Protection, 2005): 8-11, 13.

[29] Imtiaz Ahmad Khan, et al., "Wrongful Conviction and Miscarriage of Justice," *Competitive Social Science Research Journal* 3. no. 1 (2022): 217-220.

Amongst the unintentional or erroneous factors include misidentification, circumstantial evidence, frame-ups, overzealous police or prosecutors, prior convictions, guilty pleas and confession by innocent persons and community opinion demanding conviction.[30]

2.3.2 Violations of Fundamental Rights of Accused by State Officials

The violations of fundamental rights may result of certain action of a private individual or by some act of a state authority or functionary like police or any other investigation agency. People are often wrongly or maliciously accused, implicated, detained, tortured and subjected to enforced disappearance and forced confession by the state functionaries.[31] It has also been alleged that the civilian trial in the military courts can endanger the fundamental rights of accused.[32]

The violations of fundamental rights of accused by the state and its functionaries may be in number of forms including false accusation and frivolous litigation, wrongful investigation and prosecution, unlawful arrest and arbitrary detention, enforced disappearance, trespass, confiscation of property, forced confession, physical torture, and violation of dignity and privacy.[33] As for the custodial torture and inhuman treatment, National Commission for Human Rights has submitted its

[30] Jr. Joseph H. King, "Compensation of Persons Erroneously Confined by the State," *University of Pennsylvania Law Review* 118, no. 7 (June 1970):1094.
[31] See Reema Omer, *Authority without Accountability: The Search for Justice in Pakistan*, (International Commission of Jurists, October 2013).
[32] Muhammad Hassan and Johan Shamsuddin Bin Sabaruddin, "Jurisdiction of Military Courts over Civilian Terrorists in Pakistan," 77.
[33] Nicholas Lassi, "Legislating Anti-Torture Reform and Harm Reduction Services to Protect Incarcerated Opium Users in Pakistan," *Pakistan Journal of International Affairs* 5, no. 3 (2022): 115-116; X. Jalil, "Breaking Wills, Broken Souls", *Dawn*, December 10, 2017, https://www.dawn.com/news/1375606. Accessed May 27, 2023; Justice Project Pakistan, "Criminalizing Torture in Pakistan: The need for an effective legal framework," (2021), https://www.omct.org/site-resources/images/Pakistan-report.pdf. Accessed May 27, 2023; Human Rights Watch, "Pakistan: Make a Torture a Crime", August 23, 2022, https://www.hrw.org/news/2022/08/23/pakistan-make-torture-crime. Accessed May 27, 2023.

report in which it highlighted the trends of torturing and other violations of fundamental rights of accused prisoners in Adiala Jail.[34]

Other forms of violations include arrest and detention without informing reason(s), denial of access to one's counsel, non-presence of the accused before the judicial body cautious warning, custodial torture, secret proceedings, false identification parade, and non-disclosures of accusations and material evidence to the accused, wrongful imprisonment and conviction. [35]

2.4 Consequences of Violations of Fundamental Rights of Accused

Understandably, violations of fundamental rights of accused in the criminal justice, may result into a number of consequences and sufferings like deprivation of liberty, dignity and reputation, physical torture and mental agony and anguish, family trauma and anxiety, loss of resources, financial hardships like termination of employment, business loss, litigation cost and waste of time, health and energy. For instance, malicious prosecution inflicts hardship, litigation cost, mental anguish as well as loss of reputation of a person who is falsely implicated in a matter.[36] Further, prolonged investigation and lengthy trial proceedings and inordinate delay in conclusion of trial increase the volume and gravity of any miscarriage of justice.[37]

An error of justice is any departure from an optimal outcome of justice for a criminal case. Thus, an error of justice occurs either when an innocent person (i.e., innocent of the crime in question) is harassed, detained or sanctioned, or when a culpable offender receives a sanction that

[34] See National Commission for Human Rights, *Report on Torture in Adiala Jail* (September 2022), https://www.nchr.gov.pk/wp-content/uploads/2022/11/Report-on-Torture-at-Adiala-Jail.pdf. Accessed June 15, 2023.
[35] Hina Hafeez Ullah Ishaq, "The Right to Fair Trial," 96; Seemal Hameed, "Military Courts: An Affront to Human Rights," *RSIL Law Review* 1 (2019): 33.
[36] *Abdul Khameed v. Muhammad Shabbir and another* PLD 2021 Islamabad 405.
[37] Muhammad Nadeem and Naeem Ullah Khan, "Paradigm of Criminal Justice System: Problems and Social-Legal Reforms in Pakistan," *Journal of Law and Society* 48, no. 71 (July 2017): 82.

is either more or less than optimal – one that minimizes social cost – or escapes sanctioning altogether. This is also called as an *error of due process*.[38]

The social cost of the error is the sum of the costs imposed on the innocent person and his or her dependents and the costs imposed on society for failure to sanction the true offender. Due process errors include as well excessive intrusions against those who violate the law.[39]

As for the consequences of curtailment or violation of fundamental right of liberty of accused person in criminal justice, the Supreme Court of Pakistan expressed its remarks and observations in the case of *Zaigham Ashraf v. The State* as[40]:

> To curtail the liberty of a person is a serious step in law, therefore, the Judges shall apply judicial mind with deep thought for reaching at a fair and proper conclusion albeit tentatively however, this exercise shall not to be carried out in vacuum or in a flimsy and casual manner as that will defeat the ends of justice because if the accused charged, is ultimately acquitted at the trial then no reparation or compensation can be awarded to him for the long incarceration, as the provisions of Criminal Procedure Code and the scheme of law on the subject do not provide for such arrangements to repair the loss, caused to an accused person, detaining him in Jail without just cause and reasonable ground.

[38] Brian Forst, *Errors of Justice, Nature, Sources, and Remedies* (New York: Cambridge University Press, 2004), 3-4.
[39] Ibid.
[40] *Zaigham Ashraf v. The State* 2016 SCMR 18.

Understandably, on the conclusion of trial or appeal when a court decides a case, it is quite likely that a good number of accused persons either escape punishment on the pretext of benefit of doubt or otherwise acquit on the merit. However, when an accused turns to be a convict and he is sentenced with imprisonment, he can be compensated under the law against his pre-trial detention through deduction of the pre-trial detention period or its settlement in the total period of imprisonment awarded.[41] Such benefit is awarded even to those who are sentenced with life imprisonment for murder.[42]

On the other hand, if an accused is declared to be not guilty or innocent, he does not find any compensation for the loss of liberty, dignity, health, job and even other social and economic prospects. His social and family chapter will be badly affected. In some cases, even the family members are subjected to incarceration and detention to secure the detention and arrest of an accused person in a clear violation of law.[43] Thus, miscarriage of justice especially in terms of violations of fundamental rights of accused is a serious issue in the criminal justice system of Pakistan and this may results into detrimental effects and cause at risk of losing the public confidence on the criminal justice system and the government.[44]

For instance, unlawful or wrongful detention entails costs for both the detainees and the rest of society. The former arise from loss of liberty, income, reputation and self-esteem; demoralization effects of being placed in alien surroundings; risk of being abused or attacked by other inmates; cut off from friends and family; dislocation costs in adjusting back to life in the outside, etc. The latter include sever or negative emotional, stigmatizing and financial impacts

[41] Section 382-B of Cr.PC.
[42] *Ramazan v. State* PLD 1992 Supreme Court 11.
[43] Mahmood Ahmed Sheikh, "Detention of Relatives of Accused by Police: Lawlessness by the Law Officers," *Pakistan Journal of Criminology* 8, no. 3 (July 2016): 65.
[44] Joseph Achile, "Miscarriage of Justice in Legal System," 38.

on family members of detainees, and monetary costs incurred by the State in order to fund the detention system.[45] Besides, sense of insecurity and deprivation, injustice and discrimination also prevail in society when individuals become victims of unlawful detention or other human rights violations.[46]

2.5 Legal Framework to Prevent Violations of Fundamental Rights of Accused

Beside the constitutional framework for the protection of fundamental right of accused, sufficient protective and regulatory measures are embodied in the statutory framework. The superior judiciary in Pakistan interpreted the legal framework to ensure the protection of fundamental right of accused in the criminal justice.

2.5.1 First Investigation Report and Protection against Arbitrary Arrest of the Accused

The process of criminal justice starts with the lodging of First Information Report (FIR) before police or complaint before the magistrate. The concept of FIR is simply about the earliest intimation or communication about occurrence of a cognizable offence to the police.[47] Ordinarily, arrest is not to be made straightway merely on the reason that a person is nominated as an accused person in FIR until the investigating officer is satisfied that in fact there exists sufficient justification for the arrest of an accused and that justification is to be based and guided by the relevant provisions of the Cr.PC, 1998 and Police Rules, 1934.[48]

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[45] Doménech and Puchades, "Compensating Acquitted Pre-Trial Detainees," 171.
[46] Udai Yashvir Singh and Smita Singh, "Right to Compensation for Wrongful Prosecution, Incarceration, and Conviction: A Necessity of the Contemporary Indian Socio-Legal Framework," *International Journal of Law Management & Humanities* 4, no. 2 (2021): 451, 453.
[47] Rais Nouman Ahmad, et al., "Registration of Second FIR (First Information Report) in Sughran Bibi Case: A Landmark Judgment of the Supreme Court of Pakistan," *Review of Education, Administration and Law* 3, no. 1 (2020): 114.
[48] *Mst. Sughran Bibi v. The State* PLD 2018 SC 595; *Shahzada Qaiser Arafat v. The State*, PLD 2021 SC 708.

According to the relevant provisions of the Code and the Rules, an accused or suspect is not to be arrested as a matter of course unless there exists any reasonable reason warranting for the arrest. Thus, the arrest is to be deferred until sufficient and material evidence is available on the record of investigation that *prima facie* makes a reasonable case for the satisfaction of the investigating officer about the correctness of accusation or suspicion regarding his involvement in the alleged offence. Thus, the arrest of the accused should be based on some justifiable ground or probable cause indicating the involvement of the accused in the alleged offence.[49] Otherwise, if a police officer arrests an accused without requisite material and probable cause, merely relying on the mention of the name of the accused in FIR, such action would amount to abuse of power by the police.[50]

The report of investigation based upon the actual facts discovered during the investigation is to be submitted under section 173 of the Code, irrespective of the fact that the version of informant in FIR or of any other person. Thus, this judgment delinked the registration of FIR or criminal case from making an arrest by police.[51]

2.5.2 Protection against Powers of Police to Arrest the Accused

In the criminal justice of Pakistan, police is vested with vast discretionary powers ranging from power to register criminal case in cognizable offences, power to arrest, search, seizure of property, power to investigate offence, power to not to investigate in certain cases, power to

[49] *Mst. Sughran Bibi v. The State* PLD 2018 SC 595; See Muhammad Munir, "Police Powers and Investigation," November 2021.
[50] *Muhammad Bashir v. Station House Officer Okara Cantt. And others* PLD 2007 SC 539.
[51] *Mst. Sughran Bibi v. The State* PLD 2018 SC 595; Kamran Adil, "The Sugran Bibi Case and its Impact on the Criminal Justice of Pakistan," *LUMS Law Journal* 5 (2022): 92. https://sahsol.lums.edu.pk/node/12853. Accessed May 26, 2023.

discharge accused or power to grant bail to the accused, to the power to prepare to cancellation report in certain cases.[52]

As for the powers of police to arrest and detention, Rule 26.1 of the Police Rules, 1934 explains this by providing that the authority given under Section 54 of the Cr.PC to the police to arrest without a warrant is permissive and not obligatory. As per the said Rule whenever escape from justice or inconvenient delay in completion of the investigation or commencement of the trial is likely to result from the police failing to arrest, they are bound to do so, but in no other cases.

The investigating officers should not mechanically make the arrest of a person accused of having committed a cognizable offence, rather they must exercise their discretion in making the arrest of such person judiciously by applying their mind to the particular facts and circumstances of the case and consciously considering the question as what purpose will be served and what object will be achieved by arrest of the accused person. Thus, Islamabad High Court has held that "the power to arrest an accused cannot be exercised mechanically and deprivation of liberty or intrusions into fundamental rights guaranteed by the Constitution are required to be adequately and demonstrably justified. The power of arrest is to be exercised fairly, justly and without discrimination.[53]

The Supreme Court, after exhaustively examining the provisions of Cr.PC held that arrest of an accused by a police officer would not be justified on the sole ground that a FIR was registered and because he was nominated therein. There must be sufficient incriminating material

[52] See Muhammad Munir, "Police Powers and Investigation in Criminal Justice in Pakistan," November 2021.
[53] *Amjad Mustafa Malik v. Director NAB*, PLD 2021 Islamabad 266.

to justify deprivation of liberty.[54] The Supreme Court has explicitly declared arbitrary exercise of power of arrest as 'abuse of authority'.[55] This view has also been reaffirmed by a larger bench of the Supreme Court *Mst. Sughran Bibi case* wherein it the Court held that:

> Ordinarily no person is to be arrested straightaway only because he has been nominated as an accused person in an FIR or in any other version of the incident brought to the notice of the investigating officer by any person until the investigating officer feels satisfied that sufficient justification exists for his arrest and for such justification he is to be guided by the relevant provisions of the Code of Criminal Procedure, 1898 and the Police Rules, 1934. According to the relevant provisions of the said Code and the Rules a suspect is not to be arrested straightaway or as a matter of course and, unless the situation on the ground so warrants, the arrest is to be deferred till such time that sufficient material or evidence becomes available on the record of investigation prima facie satisfying the investigating officer regarding correctness of the allegations leveled against such suspect or regarding his involvement in the crime in issue.[56]

Thus, it has been well settled by the Courts that mere registration of FIR is not sufficient for the arrest of accused until and unless some sufficient incriminating material is available against him.[57]

Islamabad High Court in *Amjad Mustafa Malik case*[58] highlighted the rights of accused that could be affected or violated by arresting an accused:

i. right to be presumed innocent

[54] Kamran Adil, "The Sugran Bibi Case and its Impact," 91.
[55] *Muhammad Bashir v. Station House Officer Okara* PLD 2007 SC 539.
[56] *Mst. Sughran Bibi v. The State* PLD 2018 SC 595.
[57] *Nazir Ahmad v. Capital City Police Officer Lahore*, PLJ 2022 Cr.C. 263; *Khizar Hayat v. Inspector General of Police Punjab Lahore* PLD 2005 Lahore 470, *Muhammad Bashir v. SHO Okara Cantt and others* PLD 2007 SC 53; *Haider Ali and another v. DPO Chakwal and others* 2015 SCMR 1724; Shahzada *Qaiser Arafat alias Qaisar v. The State and another* PLD 2021 SC 708.
[58] *Amjad Mustafa Malik v. Director NAB*, PLD 2021 Islamabad 266.

ii. right to dignity

iii. right to liberty and freedom of movement

iv. right to equal treatment

The Court highlighted that the Courts have principles to review the administrative actions and discretion in order to protect the most crucial and fundamental rights such as the right to liberty and not to be exposed or subjected to degrading and humiliating treatment. These principles include principles of necessity, proportionality and reasonableness. Any deprivation of liberty or curtailment of rights guaranteed by the Constitution inevitably has to be justified on the touchstone of the principles of proportionality, reasonableness and necessity. Thus, on the grounds of these principles, the executive power to order the arrest of an accused is subject to judicial review under Article 199 of the Constitution.[59]

The aggrieved accused person can invoke writ of Habeas Corpus in High Court against unlawful or arbitrary detention. The writ of Habeas Corpus is a judicial order to bring the accused detainee before the Court to ascertain the legality or validity of arrest and detention. Similarly, under section 491 of Cr.PC, the High Court has extraordinary power to direct the liberty of a person in public or private custody. Yet this is a pure discretion of the High Court and not regarded as a matter of right of accused. [60]

2.5.3 Prohibition of Custodial Torture and Abuse of Authority

Apart from the discretionary powers of arrest and detention of accused persons, the more challenging and gruesome problem faced in the criminal justice of Pakistan is the custodial torture. To counter this problem, Article 156(d) of Police Order 2002 provides:" whoever, being

[59] Ibid.; *Asif Faseehuddin Khan Vardag v. Government of Pakistan* 2014 SCMR 676.
[60] Mariam Sherwani, "Rights of the Accused," 102.

a police officer inflicts torture or violence to any person in his custody; shall, for every such offence, on conviction, be punished with imprisonment for a term, which may extend to five years and with fine."

2.5.4 Administrative Discretion and Accountability Framework

One of the relevant debates about the enforcement of fundamental rights of accused is the assessing the role of administrative discretion *vis a via* state liability. In the modern era, the state and its functionaries are to perform numerous functions and, in this regard, they are vested with the authority to exercise discretion which is regarded as inevitable. However, alongside the discretionary authority, there exists a mechanism to control the exercise of state authority and ensure liability for its actions though administrative, legislative and judicial controls.[61]

Without these controls, there is likelihood of abuse of power by the administrative and executive authorities while performing their respective powers and functions. The legislature has authority to provide a framework within which the executive is supposed to exercise its discretionary powers. On the other hand, the administrative control or dispensation also confers and provides apparatus to control the behavior and wide-ranged discretionary powers of its officials to ensure transparency and accountability and provide relief to the aggrieved person through departmental remedy. Lastly, the judiciary is empowered to protect the rights of the aggrieved person through providing judicial remedy and to avoid abuse of power and authority by the public officials and functionaries.[62]

[61] Bakht Munir, Ali Nawaz Khan and Naveed Ahmad, "Control over Administrative Discretion: A Case Law Study in the Context of Pakistan," *ISSRA Papers* 8 (2021):1, 11.
[62] Ibid. See also E.C.S. Wade and Godfrey Phillips, *Constitutional Law*, 8th Ed., (Landon: Longman Group Ltd., 1971), 639-645.

The courts are empowered with the judicial review to annul the orders of the executive on number of the grounds including enforcement of fundamental rights, mala fide action, unreasonableness, lack of jurisdiction, improper purpose, arbitrary, colorable and *ultra vires* exercise of power, irrelevant considerations, breach of reasonable expectations and violation of natural justice principles.[63]

2.5.5 Protection against Malicious Prosecution

Malicious prosecution is another major factor for the violations of fundamental rights of accused. In case of Pakistan, false and frivolous litigation is major problem that requires sincere steps and measures. Although Section 250 of Cr.PC provides some deterrence against false accusation and frivolous litigation yet that seems insufficient. The Supreme Court of Pakistan in a case held that "in Muslim society prosecuting innocent persons maliciously is not permitted and, in consequences, the aggrieved person can have recourse to Courts in Pakistan who were not only the Courts of law but justice, equity, and good conscience as well".[64]

As for this discussion on this point, next chapter of this study sheds light in detail, yet it is quite obvious that the factual position is quite different from what is stated by the Supreme Court.

2.5.6 Other Measures and Remedies to Protect the Fundamental Rights of Accused

To minimize the violations of fundamental rights of accused in terms of false accusation, malicious prosecution or wrongful imprisonment in criminal justice, there are certain preventive and remedial measures that can prevent or minimize injustice. Preventive measures that may be employed to prevent the violations of fundamental tights of accused include crime definition;

[63] Ibid.
[64] *Muhammad Yousuf v. Syed Ghayyur Shah and 5* others 1993 SCMR 1185.

policing methods; exercise of police/prosecutorial discretion; bail reform; pre-trial process; speedy trial legislation; legal aid policy; forensic rules and institutions, and sentencing reform.[65]

Similarly, adequate remedial response to miscarriage of justice may help to minimize (because one cannot completely eliminate) the chances of injustice. It is quite understandable that 'notion of fundamental rights' is meaningless unless adequate remedy is provided under the law in case of their violations. As rights once violated cannot be undone, yet an adequate redress or remedy can be provided to the victim to compensate his losses. Thus, the state needs to compensate and provide remedy to the people who are wrongfully accused, prosecuted, detained or convicted have to face a lot of sufferings by the wrongful actions of the state that takes away the rights, dignity and personal liberty of individuals.[66]

In the legal regime of Pakistan, the remedies which are available to the aggrieved persons against violations of their rights by a statutory functionary, include constitutional petition under 199 of the Constitution of Pakistan, criminal proceedings, civil suit for declaration or injunction or claiming the damages, petition to the relevant department for the disciplinary action against the delinquent and complaint to ombudsman office. [67]

As the 'two-track approach' suggests, the courts should have a special role in providing effective remedies for litigants who have established rights violations. At the same time, it accepts that courts will generally need assistance from the executive, the legislature and society

[65] George Zdenkowski*, "*Remedies for Miscarriage of Justice: Wrongful Imprisonment," *Current Issues in Criminal Justice* 5, no. 1 (July 1993): 107.
[66] Udai Yashvir Singh and Smita Singh, "Right to Compensation for Wrongful Prosecution," 451.
[67] Muhammad Naeem Shah, "Deliberate Misapplication of Law/Misuse of Power: Remedies Available under the Law," Pakistan Tax Law Consultants, https://pakistantaxlaw.com/data/Article_deleberate_misapplication_of_law.pdf. Accessed February 29, 2024.

itself to formulate more complex systemic remedies to minimize future violations of fundamental rights of accused.[68]

Undoubtedly, in a just society, the fundamental rights of people including those available to the accused cannot be waived,[69] and it is important as how the society and its law treat those who are injured by the government functionaries.[70] Hence, the very aspect of redressing violations of fundamental rights of accused is discussed in detail in the subsequent chapters of this study.

2.6 Conclusion

The Constitution of Pakistan guarantees certain fundamental rights for the accused and these rights are to be respected by the State and its institutions. However, it is unfortunate that the fundamental rights are not respected and protected in the course of criminal justice. Despite the constitutional safeguards, statutory provisions and judicial pronouncements, the actual practice of arbitrary arrest and unlawful detention, custodial torture and misuse of powers reveals violations of fundamental rights of accused in criminal justice on different pretexts and forms.

As a matter of fact, there is a huge role and duty of the police or other investigating authority to have proper investigation and not to implicate innocent people to the crimes which they had never committed. Simultaneously, it must not allow the criminals and offenders to escape from justice.

In fact, the protection or enforcement of the fundamental rights of accused remain remains a big challenge due to impunity available to the actions of government authorities. Lack of

[68] Kent Roach, *Remedies for Human Rights Violation: A Two-Track Approach to Supra-national and National Law*, (New York: Cambridge University Press, 2021), 524.
[69] Fazal Karim and Shahid Karim, *Access to Justice in Pakistan*, 158.
[70] Jeffrey S. Gutman, "An Empirical Reexamination of State Statutory Compensation for the Wrongly Convicted," *Missouri Law Review* 82, no. 2 (2017): 369.

accountability for the misuse of administrative power and wanting redress to the victims are main hurdles to enforce these rights.

Normally, the risk of violations of fundamental rights of accused originates or aggravates from the time when he is arrested and detained by the police or any other administrative authority. Despite of the presumption of innocence, the accused persons are routinely arrested and treated as criminal or culprit before establishment of his guilt by the competent court after a fair trial.

Thus, there should be proper awareness for the public to make them realize the fact the accused persons are innocent until proven guilty and they should not be labelled as offenders or criminals and they are to be afforded their due fundamental rights. There should be no stigma for the innocent accused persons for the offences which they had never committed.

Thus, the enforcement system of fundamental rights should be improved and made effective to meets the ends of justice so that the innocent people are not trapped and no offender could escape the law.

CHAPTER 3: REDRESSING VIOLATIONS OF FUNDAMENTAL RIGHTS OF ACCUSED IN PAKISTAN

CHAPTER 3

REDRESSING OF VIOLATIONS OF FUNDAMENTAL RIGHTS OF ACCUSED

3.1 Introduction

> To deprive a man of liberty, put him to heavy expense in defending himself, and to cut off his power to earn a living perhaps also to exact a money fine- these are sacrifices which the state imposes on him for the public purpose of punishing crime. And when it is found that he incurred these sacrifices through no fault of his own, that he was innocent, then should not the state at least compensate him, so far as money can do so?[1]

As the legal regime of any state has to take precautionary measures to prevent violations of fundamental rights and provides effective remedy in case of violation of these rights, this study examines as to what extent the legal regime of Pakistan provides redress for violations of fundamental rights of accused.

Admittedly, the criminal justice system cannot be made 'error or 'miscarriage proof'.[2] Errors or mistakes are bound to occur in every criminal justice system. The factual guilty may escape conviction and the innocent may be judged falsely and convicted. The errors of justice may be, in one hand, in terms of failure of bringing culpable offenders to justice and, on the other hand,

[1] John H. Wigmore, "The Bill to Make Compensation to Persons Erroneously Convicted of Crime," Journal *of the American Institute of Criminal Law and Criminology* 3, no. 5 (1913): 665. http://www.jstor.org/stable/1132906. Accessed February 29, 2024.
[2] Steven Greer, "Miscarriage of Criminal Justice Reconsidered," *The Modern Law Review* 57, no. 1 (1994): 73.

the errors of harassing and sanctioning innocent people through letting them suffer and bear the costs. In general parlance, errors of justice are taken to mean errors in the interpretation, procedure, or execution of the law – typically, errors that violate due process, often resulting in the conviction of innocent people.[3] Thus, an error of justice occurs either when an innocent person is harassed, detained or sanctioned, or when a culpable offender receives a sanction that is either more or less than optimal – one that minimizes social cost – or escapes sanctioning altogether. This is also called as an *error of due process*.[4]

The criminal courts may make mistakes when adjudicating. They can convict innocent people, who did not commit the crime as charged or acquit guilty individuals, who actually committed the crime. In this regard, it is important to note as how the states respond such situations and provide corresponding redress to the aggrieved.[5]

States may not be directly responsible in all cases of 'miscarriage or failure of justice'. However, it is pertinent as how the legal framework provides redress or remedy[6] while responding to the wrong, suffering, loss or grievance of the people whose fundamental rights are violated. Consequently, an important proposition that follows is that why the right to redress is important or what is the affect if no right of redress is recognized in a justice system?

Wrongful detention of an accused is, for instance, only issue for which satisfactory remedy is arguably lacking. Others forms of injustice that are devoid of adequate redress include,

[3] Brian Forst, *Errors of Justice, Nature, Sources, and Remedies* (New York: Cambridge University Press, 2004), 3.
[4] Ibid.; 3-4.
[5] Doménech and Puchades, "Compensating Acquitted Pre-Trial Detainees," 167.
[6] Remedy means "the means of enforcing a right or preventing or redressing a wrong; legal or equitable relief", remedial action, also termed *law of remedy*". Garner, *Black's Law Dictionary* (11th ed.),1547.

malicious prosecution, wrongful investigation custodial torture, wrongful conviction, excessive punishment, improper exercise of prosecutorial discretion; and lack of fair trial opportunities.[7]

3.1.1 Meaning and Purpose of Redress

In this study the term 'redress' signifies the legal remedies provided or ought to be provided under the law for the violations of fundamental rights of accused. The International bodies, judges and the scholars select and use various terms to signify the meanings of 'remedies'. Various terms such as 'remedies', 'reparations' or 'redress' are employed for the same or similar purpose; hence there is lack of uniformity in the existing literature and official practice.[8] In any case, a remedy or redress presupposes a wrong suffered, an injury inflicted or a violation of right.[9]

Before dwelling into the details of the Pakistan's legal regime on the right of accused to redress, it is expedient to explain about the terms related to the subject.

The word 'remedies' is used to entails two separate meanings and senses. In the first sense, remedies mean access to justice and consist of procedural apparatus or processes through which the claims of human rights violations are addressed and adjudicated by the courts and other competent bodies.[10] In the second sense, it refers to the actual or substantive outcome of the proceedings or relief afforded. In this second sense, the remedies are meant to "make good the damages caused".[11]

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[7] Zdenkowski, "Remedies for Miscarriage of Justice: Wrongful imprisonment," 105.
[8] S. Haasduk, "The Lack of Uniformity in the Terminology of the International Law of Remedies," *Leiden Journal of International Law* 5 (1992): 245; Dinah Shelton, *Remedies in International Human Rights Law* (UK: Oxford University Press, 2015), 16-17.
[9] Antoine Buyse, "Lost or Regained, Restitution as a Remedy for Human Rights Violations in the Context of International Law," *Heidelberg Journal of International Law* 68 (2008): 130.
[10] Gabriela Echeverria, *Reparation: A Source Book for Victims of Torture and Other Violations of Human Rights and International Humanitarian Law* (The Redress Trust, 2003), 8.
[11] Buyse, "Lost or Regained, Restitution as a Remedy," 129.

Besides the term 'remedies', other terms like reparations or redress are also used in international and national law to signify the both aspects of the remedies.

Reparations mean either the act or process of providing a remedy or the remedy itself. There is a tendency to use 'reparation' as the generic term for 'the various methods available to a State for discharging or releasing itself' from international responsibility. In the context of the state responsibility in international law, the term 'reparation' is most frequently used to denote the remedies for the inter-state claims. Usually, reparation involves various means and methods through which the states under international law are to repair the consequences of a breach of its international obligation. Besides, the term 'reparation' may incorporate and include all of the acts and measures serving to redress individual harm arising from human rights violations such as compensation, restitution, satisfaction, and guarantees of non-repetition.[12]

The terms 'redress' is the most commonly term used in the literature and national law of the states to refer to the 'substantive remedies' for the victims of human rights violations. In this study, the terms 'redress' and 'remedies' refer to the range of measures available when human rights are actually violated or threatened; and include both the 'substance of relief' and the 'procedures to obtain the relief'. They may include injunctions, declaratory relief, award of damages, litigation fee and costs. Thus, the term 'redress' refers and signifies to the act of repairing a harm and it is obtained through remedies i.e. "measures through which redress is obtained".[13] Thus, now both aspects of redress i.e. right of access to justice[14] and the substantive redress are widely recognized.[15].

[12] Gabriela Echeverria, *Reparation*, 8; Dinah Shelton, *Remedies in International Human Rights Law*, 16-17.
[13] Maria Jose Recalde-Vela, "Access to Redress for Stateless Persons under International Law: Challenges and Opportunities," *Tilburg Law Review* 24, no. 2 (2019): 186; Gabriela Echeverria, *Reparation*, 8; Dinah Shelton, *Remedies in International Human Rights Law*, 17.

The fundamental purpose for redress is to make amends for any wrong or casualty. The specific end goal or purpose of the reparation is to demonstrate that you intend to indemnify or rectify the wrong. It is intended to establish equity, sense of justice and fair play and prevent infringement and or change the results of the wrongful demonstrations, and "provide the basis for ethical relationships among members of society".[16]

As for the redress against violations of fundamental rights of accused, possible remedies include statutory right to compensation not as ex gratia, pardons/quashing convictions, corrective publicity order, public apology, punitive response to wrongdoer, and institutional/judicial accountability for the wrongdoing. Thus, redress may be in form of penal action or in form of reparation or in both forms.[17]

For the purpose of this study, the term 'redress' is used to refer overall measures including procedural and substantive forms of civil remedies for the violations of fundamental rights of accused. Therefore, the terms 'remedies' 'redress' 'reparation' and 'compensation' are used interchangeably.

3.1.2 Significance of Redress

As compared to the rights, remedies are under-studied, though they are interconnected to each other.[18] Rights are useless and have no utility unless law provides redress through an independent forum against their violation or infringement. According to Professor Dinah Shelton, Aristotle

[14] Access to justice implies that the effective measures and procedures are employed to redress the harm inflicted to the aggrieved person. See Dinah Shelton, *Remedies in International Human Rights Law*, 17.
[15] Dinah Shelton, *Remedies in International Human Rights Law*, 17; Iredell Jenkins, *Social Order and the Limits of Law* (Princeton, 1980), 247.
[16] Dinah Shelton, *Remedies in International Human Rights Law*, 18.
[17] See Zdenkowski, "Remedies for Miscarriage of Justice," 109.
[18] Sandrine Ampleman-Tremblay, "Book Review on Kent Roach, Remedies for Human Rights Violations: A Two-Track Approach to Supra-National and National Law, (Cambridge, UK: Cambridge University Press, 2021), *Alberta Law Review* 60, no. 1 (2022): 325.

outlined the conceptual or theoretic framework of corrective or remedial justice on which modern law of remedies is based. The essential features of compensatory justice outlined by him are equal treatment of parties, damage inflicted by one party to another and the remedy to restore the victim to the position before the wrong committed. Thus, the remedies are aimed to restore or place the aggrieved person to the same position before the injury occurred.[19]

The concept of compensatory justice is laid in the legal maxim *ubi jus ibi remedium* (there is no wrong without a remedy), for "it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal".[20] It postulates that where law establishes a right there should be a corresponding remedy for its breach. The right to a remedy is a fundamental, inconvertible and universal rule historically recognized in all legal systems. Thus, "the principle that rights must have remedies is ancient and venerable".[21]

The Supreme Court of United States in *Marbury v. Madison* pronounced that every violation of a vested legal right, the laws must supply a remedy. The Chief Justice Martial expounded this principle stating that "it is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded. For it is a settled and invariable principle in the law of England, that every right, when withheld, must have a remedy, and every injury its proper redress." [22]

[19] Law scholars discuss various purposes of remedies including compensation, retribution, deterrence, and restoration or reconciliation. Dinah Shelton, *Remedies in International Human Rights Law*, 13.
[20] As pronounced by C.J. Holt in Ashby v. White, (1703) 92 ER 126 and quoted by Herbert Broom, *A Selection of Legal Maxims*, (Philadelphia: T. & J.W. Johnson & Co., 1874), 191; Fazal Karim, *The Law of Criminal Procedure*, 231.
[21] Donald H. Zeigler, "Rights, Rights of Action, and Remedies: An Integrated Approach." *Washington Law Review* 76, no. 1 (2001): 71; *Mst. Kalsoom Bibi v. Muhammad Amin Agha* PLJ 2022 SC 152.
[22] *Marbury v. Medison* 5 U.S. (1 Cranch) 137 (1803).

Thus, the right to a remedy or redress is one of the ancient and venerable fundamental rights historically recognized in all legal systems and every legal system, whether domestic or international, provides for a remedial mechanism to implement rights and obligations created and established by that system.

The primary function of 'remedies' in any legal system is to redress the illegality and act as a credible threat against potential violators. The credibility of any legal system thus, depends on the efficacy of remedial mechanisms through which principles of natural justice relating to rights and obligations are upheld. Remedies, thus, are an institutional guarantee that an obligation[23] will be observed and enforced. As a result, the courts have an essential duty to remedy violations of individuals' constitutional rights.[24]

Thus, if the individuals are unable to seek adequate redress for their fundamental rights' violations or deprivations suffered due to government bodies and agents, then the constitutional guarantees and safeguards for the fundamental rights are 'nullities'[25] As pointed out by Lord Denning: "a right without a remedy is no right at all".[26]

Though the Aristotle's compensatory justice pertains to the acts committed between individuals, and was not meant for unjust acts committed by 'society' against a group or

[23] A legal obligation is regarded as a correlative to a legal right and some writers also include element of enforceability while defining a legal right because the concept or notion of legal right requires a correlative duty on the part of other people to act or refrain to act for the benefit of the right-holder. See Dinah Shelton, *Remedies in International Human Rights Law*, 17.

[24] William H.W. McKenna, "The Gideon Split: Pre-conviction Indigent Defense Reform Litigation in Hurrell-Harring and Duncan," *University of California Davis Law Review* 45, no. 1 (2011): 202.

[25] Bailey D. Barnes, "The Constitution's Waning Enforceability: Constitutional Torts after Egbert & Vega," *Hasting Constitutional Law Quarterly* 50, no. 1 (2023): 70.

[26] *Lord Denning in Gouriet v. Union of Post Office Workers*, AC, 1978, 435, cited in R. Higgins, "The Role Of Domestic Courts in the Enforcement of International Human Rights: The United Kingdom," in *Enforcing International Human Rights in Domestic Courts*, ed. B. Conforti and F. Franciani (The Hague: Martinus Nijhoff Publishers, 1997), 38; Liesbeth Zegveld, "Remedies for Victims of Violations of International Humanitarian Law," *International Review of Red Cross* 85, no. 851 (September 2003): 498.

government against an individual. However, this approach can provide basis for public law remedies as well.[27]

It is also significant due to the fact that often it is not possible to restore the victim to the situation prior to the violation, redress can help the victims in healing of their suffering sustained or harms caused due to said violations and they can move forward with their lives.[28] On the other hand, if the climate of impunity prevails, it can leave serious negative consequences and repercussions on the victims of human rights and ultimately on society as a whole.[29]

On the other hand, the remedies are of paramount significance. The remedies not only intend to compensate the aggrieved individuals for the damage or injury that occurred, but they also have a wider impact for building overall perception as how the state treats its individuals on the occasion of malfunctioning its justice apparatus. This in turn is important and reflected in terms of confidence building in state policies and actions.[30]

Regarding the application of maxim, *ubi jus ibi remedium* the Lahore High Court held as follows:

> The legal regime of Pakistan also incorporates the cardinal principle of law "*ubi jus ibi remedium"*. Under Articles 4 and 10-A of the Constitution of Pakistan, every person has a right to be dealt in accordance with the law and have a fair trial. A person, who is aggrieved by some unwarranted act, always has a remedy available under Article 199 of the Constitution, if there is no

[27] Dinah Shelton, *Remedies in International Human Rights Law,* 18-19.
[28] Maria Jose Recalde-Vela, "Access to Redress for Stateless Persons under International Law," 187.
[29] Dinah Shelton, *Remedies in International Human Rights Law,* 20.
[30] Wojciech Jasin´ski, Karolina Kremens, ed., *Compensation for Wrongful Convictions: A Comparative Perspective*, (New York: Routledge, 2023), 200.

other remedy provided in any other law, by the virtue of above stated maxim i.e. *ubi jus ibi remedium*.[31]

The principle *ubi jus ibi remedium* has always been considered as one of the fundamental principles of law and natural justice. In our country, the jurisprudence qua this maxim is well settled through plethora of judgments[32] rendered by Constitutional Courts and it needs no further authority that when there is no other remedy available to an aggrieved person, he can approach High Court under Article 199 of the Constitution.[33]

In fact, in the legal regime of Pakistan, the remedies that are available to the aggrieved persons against violations of their rights by a statutory functionary, include constitutional petition under 199 of the Constitution of Pakistan, criminal proceedings, civil suit for declaration or injunction or claiming the damages, petition to the relevant department for the disciplinary action against the delinquent and complaint to ombudsman office.[34]

3.1.3 Classification of Judicial Remedies

The Constitution of Pakistan has established the judicature and mandated it to act a guardian of fundamental rights. It is an obligation of the Courts to ensure that irrespective of a person's situation in the society and prevalent social and economic inequality, the principle of legal equality between citizens is upheld. Thus, the Courts are to ensure that lack of social or economic equality in the society does not culminate into legal inequality.[35]

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[31] *Umer Daraz v. Learned Additional Session Judge,* PLJ 2022 Lahore 44.
[32] For instance, see *Sarfraz Saleem* v. Federation of Pakistan PLD 2014 SC 232, *Federation of Pakistan v. Mian Muhammad Nawaz Sharif* PLD 2009 SC 644; *Mst. Zahida Sattar v. Federation of Pakistan* PLD 2002 SC 408.
[33] *Umer Daraz v. Learned Additional Session Judge*, PLJ 2022 Lahore 44.
[34] Muhammad Naeem Shah, "Deliberate Misapplication of Law/Misuse of Power," 1.
[35] *Abdul Khameed v. Muhammad Shabbir* PLD 2021 Islamabad 405.

The judicial relief as called remedies may be of different forms like awarding money damages,[36] injunctive relief,[37] restitution,[38] declaratory judgment,[39] and reformation.[40] However, they may be classified as in following:

a. *Legal and Equitable Remedies*

These judicial remedies may be of legal or equitable remedies. Legal or common law remedies are generally about court's determination of some legal right and the award of monetary damages. On the other hand, the equitable relief is about enforcing of an equitable right like injunctions, restitution, and declaratory judgment.[41]

b. *Private and public law remedies*

The remedies provided for redressing the wrong done to citizens by the administrative actions may also be divided into two further categories: private law remedies and public law remedies. Private law remedies include actions for damages, injunctions, and declarations. Public law remedies include prerogatives and constitutional writs of *mandamus*, *prohibition*, *certiorari*, *habeas corpus* and *quo-warranto*.[42]

[36] That may be liquidated or un-liquidated compensatory damages, punitive/exemplary damages, nominal damages etc. It is considered that the punitive damages can serve best to the effective enforcement of fundamental rights and providng redress for constitutional torts. See Michael L. Wells, "Punitive Damages for Constitutional Torts," *Louisiana Law Review* 56 (1996): 841, 872.
[37] That is requiring someone to do or refrain from doing something.
[38] That is restoring a person to a previous position to prevent unjust enrichment.
[39] That simply means a judicial determination of the rights of parties.
[40] That is judicially rewriting a written instrument to reflect the real agreement of the parties.
[41] Frank August Schubert, *Introduction to Law and the Legal system* (Boston: Wadsworth Cengage Learning, 2010), 229-234.
[42] Hamid Khan, *Principles of Administrative* Law (Karachi, Oxford University Press, 2012), 265; Yasir Rashid Khan, Aiman Bashir, "Unlocking Prerogative Writs: Concept and Scope of Writ Jurisdiction under Article 199 of the Constitution of Pakistan," *Law and Policy Review* 1, no. 1 (Spring 2022):83, 94.

3.1.4 Rectification of the Wrongs and the Modes of Remedies

Quite reasonably wrongs or mistakes may happen in the criminal justice and there exist avenues and opportunities to correct such errors. To address these mistakes or errors of justice, there are a number of possible responses that can be conveniently divided into two categories: firstly, a punitive response to the wrongdoer and secondly, making amends to the person wronged.[43]

3.1.4.1 Punishment to the Wrongdoer

Often it is argued that the punishment could serve a best cure for perpetrators of miscarriage of justice. The punitive option includes criminal proceedings, disciplinary proceedings, dismissal, demotion and transfer. Arguably the victim of the injustice may feel vindicated but the suffering may not be completely undone through mere punitive response to the wrongdoer.

There is a tendency of false accusation in Pakistan, which is indirectly a form of victimization through abuse of power. False allegations are reported to the police and it takes a long time for the falsely accused person to establish his or her innocence. Section 182 of Pakistan Penal Code deals with false information given to the police, and does not empower police to take direct action without the approval of the court.

Nevertheless, the punitive redress is beyond the scope of this study, as the study focuses on the civil remedies for redressing violations of fundamental rights of accused persons. This does not, by any mean, that the punitive option is useless or irrelevant.

[43] Zdenkowski, "Remedies for Miscarriasge of Justice," 107.

3.1.4.2 Making Amends to the Person Wronged/Civil Remedies

Besides the punitive redress such as bringing the criminal offenders to justice through their trial and punishment, there is option of civil remedies. The normal course of action for such remedy is through tort suit proceedings through which damages are claimed by the aggrieved against the culprit. In few cases, the courts provide compensation to the victim of offence under sections 545 and 546 of Cr.PC.[44]

Making amends to the accused person whose fundamental rights are violated is basically a civil course of action to undo or minimize his suffering. In certain circumstances the harm that is suffered may be complex and not to be calculated in a clinical way. The possible harm may take form of grief, financial loss, humiliation, damage to reputation, impact on family, friends, loss of employment etc. Thus, the various dimensions of harm may not be properly addressed by traditional legal remedy of monetary compensation. Though, the loss of a person's liberty and dignity cannot be measured in money terms, yet some forms of harm are obviously amenable to such a remedy and a detailed jurisprudence has been developed as to the modes of quantifying such losses.[45]

In addition to financial compensation for quantifiable loss there is likely to be a need for comfort, counseling, recognition of the wrong suffered, public apology, restoration and fair punishment of those responsible for the harm. The various dimensions of harm may be addressed

[44] For instance, see *Nadeem Masood v. State* 2015 PCr.LJ 1633 Lahore High Court; *Mst. Perveen v. Chief Secretary Khyber Pakhtunkhwa, Peshawar*, 2014 PLD 92 Peshawar High Court.
[45] *Abdul Khameed v. Muhammad Shabbir* PLD 2021 Islamabad 405.

in different ways in different cases but the important thing is not to bury or ignore them altogether.[46]

The following discussion in this chapter takes into account the existing civil remedies for the violations of fundamental rights of an accused especially when he establishes that he had suffered harm due to wrongful or erroneous actions of state authorities.

3.2 Redressing Violations of Fundamental Rights of Accused in Pakistan

Under the human rights framework and the Constitution of Pakistan, the State is duty-bound to not only respect and protect the fundamental rights of every person including of the accused but it also owes responsibility to provide adequate redress when the State fails to protect these rights, or when its officials and functionaries violate fundamental rights.[47] Following section delineates the outline and details of redress provided under the legal regime of Pakistan.

In Pakistan, the fundamental rights have both substantive and procedural contents.[48]The Constitution of Pakistan lays responsibility on the superior courts to protect the fundamental rights of the people. Article 175E(3) and Article 199 of the Constitution of Pakistan empowers the Federal Constitutional Court and the High Courts respectively to issue any appropriate order or direction for the enforcement of the fundamental rights.

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[46] Zdenkowski*, "*Remedies for Miscarriage of Justice," 108.

[47] See Articles 2(3) and 9(5) of International Covenant on Civil and Political Rights, 1966; Article 1 of the Responsibility of States for Internationally Wrongful Acts, 2001; *D. K. Basu v. State of West Bengal*, AIR 1997 SC 610; *Mahera Sajid v. Station House Officer, Police Station Shalimar*, 2018 CLC 1858 Islamabad. In *Mahera Sajid case,* the Court in this case held that in case of failure or breach of duty to protect the fundamental rights, the State and the concerned functionaries definitely would expose themselves to be accountable besides being liable to compensate the affected citizens based on strict liability.

[48] Fazal Karim, *The Law of Criminal Procedure*, 143.

The Constitution of Pakistan provides for enforcement and redress mechanism of fundamental rights against persons acting in exercise of the power given to them by the law, namely the public officers. In case a private individual violates any fundamental right, the aggrieved party has remedy under ordinary law, because fundamental rights are all, except one right, directed and enforceable against the State and not against private individuals.[49]

The only notable exception is the right to liberty, which is, by Article 199 (1)(b), enforceable against the State and its functionaries and as well as against private persons.[50] Thus, the principles of *corrective justice*[51] and *ubi jus ibi remedium* (where there is a legal right, there is a legal remedy) entrenched and given effect in the legal framework of Pakistan.[52]

3.2.1 Constitutional Redress for Violations of Fundamental Rights of accused

The legal regime of Pakistan especially the Constitution provides enforcement and redress mechanism against violations of fundamental rights of the citizens, and when fundamental rights of accused are violated in the criminal justice, the redress is also provided by the same way.

The constitutional remedies serve three important functions. First, they provide compensation to the victims of official misconduct. Second, they afford a mechanism for holding wrongdoers individually accountable to those whom they have injured. Nominal damages awards testify to the importance of this function. When people's constitutional rights are violated, they often, and understandably, have a sense of personal injury and grievance. The law should recognize that they also have an interest in calling offending officials to account—even if that

[49] *Syed Iqbal Hussain Shah Gillani v. Pakistan Bar Council*, 2021 SCMR 425.
[50] Fazal Karim, *The Law of Criminal Procedure*, 231.
[51] The term 'corrective justice' refers to "the Aristotelian notion that the exclusive function of law is to require those who have caused harm to remedy the consequences of their fault." Garner, *Black's Law Dictionary* (11th ed.), 1034.
[52] Fazal Karim, *The Law of Criminal Procedure*, 231; G.M. Chaudhry, *Essays on Law, Justice, Human Rights and Legal System* (Rawalpindi Federal Law House, 2009), 888-889.

interest does not necessarily hold a lexical priority over competing interests, such as those that sometimes support immunity doctrines. Third, through deterrent and related effects, constitutional remedies help maintain a rule-of-law regime in which officials do not stray systematically or routinely outside of constitutional bounds.[53]

The Constitution provides, along with the list of fundamental rights, procedural mechanism to enforce these rights through the Federal Constitutional Court of Pakistan and the High Court under Articles 175E(3) and 199 respectively. To protect the fundamental rights, the Constitution provides protective and redressive measures, as invalidity of law repugnant to the fundamental rights,[54] and judicial review of administrative actions in terms of writ jurisdiction of superior courts to provide adequate redress or remedy.[55]

In view of the importance of the fundamental rights, and in the interest of their speedy and effective enforcement of the fundamental rights, Article 175E(3) of the Constitution confers original jurisdiction to the Federal Constitutional Court of Pakistan.[56]This original jurisdiction is, however, somewhat limited jurisdiction as under this Article the Federal Constitutional Court can only entertain matters of fundamental rights having 'public importance'.[57]

Similarly, under Article 199 of the Constitution, the High Courts may provide remedy to the aggrieved person for violation of fundamental rights. The only limitation placed on the exercise of the power of High Court under Article 199 of the Constitution is the existence or

[53] Fallon, "Bidding Farewell to Constitutional Torts," 970.
[54] Article 8 of the Constitution of Pakistan.
[55] Article 199 of the Constitution provides for the remedies of the nature of writs of mandamus and prohibition, of habeas corpus, certiorari, and quo warranto. The use of the terminology of traditional "writs" abandoned in the 1962 Constitution and this discontinuance carried on in the Constitution. This made the exercise of constitutional jurisdiction untrammeled by the substantive limitations and procedural formalities of the old prerogative writs. See *Manzoor EIahi v. Federation* PLD 1975 SC 66.
[56] Albeit this original jurisdiction is somewhat limited jurisdiction as under Article 175E (3) the Federal Constitutional Court can only entertain matters of fundamental rights 'having public importance'.
[57] Article 175E (3) of the Constitution of Pakistan.

presence of another 'adequate remedy'.[58] In case, the law provides any 'adequate remedy' then that remedy cannot be bypassed or ignored. Therefore, if no remedy is provided by law or the remedy provided by the law is not 'adequate', no violation fundamental rights should be suffered to remain uncorrected, or to remain without being as fully redressed as is possible in the circumstances of the case.[59]

In the words of Justice Fazal Karim "the object of this rule, which has in Article 199 received constitutional recognition, that in the presence of another adequate remedy, the power of the Judicial Review under Article 199 will not be exercised, is to provide against short cuts in legal proceedings."[60]

As for adequacy of any remedy available under the law, he further states that "the distinction is between the absence of an adequate remedy being a condition to the court's jurisdiction under Article 199, and its power to be satisfied that a particular remedy is not an adequate remedy. The court must be satisfied that a remedy, if available, is not adequate remedy, before it can proceed further."[61]

The Constitution of Pakistan empowers the superior courts i.e. the Federal Constitutional Court and the High Courts, to restrain such person or persons who are performing functions in connection with "affairs of the Federation, province or a local authority", from acts that the law does not authorize them to do, and to declare any such actions to be without legal effect. Equally, the superior courts may direct a person or persons who are performing functions in connection

[58] Ibid., Article 199(1).
[59] *Mehboob Ali Malik v. Province of West Pakistan* PLD 1963 Lahore 575.
[60] Fazal Karim, *Judicial Review of Pubic Actions*, vol. III, (Pakistan Law House, 2018), 1453.
[61] Fazal Karim, *Judicial Review of Pubic Actions*, 1453.

with "affairs of the Federation, province or a local authority" to carry out such acts as the law required of them where the needful had not been done.

As for the nature of redress or remedy against violations of fundamental rights, the High Courts are empowered to pass orders of the kinds of writs of mandamus, prohibition, habeas corpus, certiorari and quo-warranto against persons performing functions with the affairs of the Federation, a Province or a local authority.[62]

Significantly, the clause (1)(c) of Article 199 read with Article 175E(3) of the Constitution authorizes the High Courts and the Federal Constitutional Court to give 'appropriate directions' to "any person or authority, including any Government" exercising any power or function within the jurisdiction of that Court "for the enforcement of any of the Fundamental Rights." Similarly, under Article 199 of the Constitution, the expression 'person' includes anybody or authority of the Federal Government or a Provincial Government, or any Court or tribunal, except for the Federal Constitutional Court or the Supreme Court, a High Court or a Court or tribunal that has been "established under a law relating to the Armed Forces of Pakistan".[63]

Thus, the provisions of Article 199(5) of the Constitution bar an order or writ against a High Court or other judicial authority if the issue relates to judicial order or judgment. Thus, a writ may lie against an administrative, consultative, executive order passed by the Chief Justice or judge of a High Court or the Administration Committee involving of the Rules framed under

[62] 199 (1) of the Constitution of Pakistan; *Muhammad Iqbal Khan Noori v. NAB* PLD 2021 SC 916.
[63] See Article 199(5) of the Constitution of Pakistan.

Article 208, causing infringement of fundamental rights of a citizen and the enforcement of the fundamental rights is not to be left without a remedy.[64]

The High Courts are empowered, besides passing orders of the kinds of writs of mandamus, prohibition, habeas corpus, certiorari and quo warranto, grant relief or remedy of any other nature like damages or compensation, restitution, public apology etc. for the enforcement of fundamental rights against administrative and executive functionaries of the State. Hence, it depends upon the issue of 'justifiability'[65] that is affected through case laws and the higher judiciary played an imperative role in the recognition, interpretation and 'enforcement' of the fundamental rights of people.[66]

As per provisions of Article 199, the High Court is empowered to direct any person or authority as may be appropriate and this authority cannot be abridged or curtailed by the law. It is believed that relying on the text of the Article 199, allowed the Supreme Court (now the Federal Constitutional Court) of Pakistan to expand the scope of its discretional remedial authority remarkably.[67]

Both Article 199 (1)(c) and Article 175E(3) use the word 'enforcement' and when the Federal Constitutional Court or a High Court decide about a law or an action whether being inconsistent with or is in contravention of a fundamental rights, it is in fact 'enforcement' of fundamental rights. Making of any order of the nature mentioned in Article 199 or giving of 'any appropriate direction' to any Government or any public authority is a way of enforcing

[64] *Gul Taiz Khan Marwat v. Registrar Peshawar High Court*, 2021 PLD SC 391.
[65] 'Justiciability' refers to the right of people to have a recourse to a judicial or other effective remedy when their rights are violated. Black's Law Dictionary defines it as "'the quality, state, or condition of being appropriate or suitable for adjudication by a court." Garner, *Black's Law Dictionary* (11th ed.), 1036.
[66] *Muhammad Ahmad Pansota v. Federation of Pakistan* 2020 PLD Lahore 229.
[67] Shayan Manzar, "A Concoction of Powers: The Jurisprudential Development of 184(3) & its Procedural Requirements," *LUMS Law Journal* 8, no. 1 (2021): 17.

fundamental rights. Similarly, awarding compensation for the violation of a fundamental right is another way of enforcing it.[68]

In practically terms, the High Courts occasionally granted, besides the usual remedy of writs, compensation to the accused for violations of fundamental rights. In *Mazharuddin v. The State (1998)*,[69] the Sindh High Court while declaring the arrest of wife and sons of petitioner as unlawful and of no legal effect, addressed the question as whether the High Court has any authority to pass an order other than an order of release or acquittal of the detenu? It was held that the High Court is competent, in appropriate cases, to direct that monetary compensation be paid to the victims of violations of fundamental rights. Such compensation is payable by way of public law duty of the State and its officers which is independent of the private rights that a citizen may have to claim damages through ordinary proceedings. The Court held that in cases of violations of fundamental rights, the victims are also be given compensation under public law.

The Court also dealt with the proposition of option of seeking alternate remedy of compensation for unlawful deprivation of liberty under ordinary law through normal proceedings. The Court repelled this option for more than one reason. Firstly, the remedy of compensation in appropriate cases can be made payable under the constitutional jurisdiction for violations of fundamental rights is a liability in public law which is independent of and altogether different from a private law remedy that a citizen may have in tort. Secondly, the Court held that the duty to enforce these fundamental rights has been casted upon the superior courts. So, the Constitution left it to the judiciary to evolve tools for giving effect to the

[68] Fazal Karim, *The Law of Criminal Procedure*, 233.
[69] *Mazharuddin v. The State* 1998 PCr.LJ 1035.

fundamental rights by empowering the Courts to make any appropriate order or directions under Article 199(1)(c).

Undeniably, the High Courts have invoked writ jurisdiction in several instances of unlawful arrest and wrongful detention by police, to provide redress or relief to the victims in terms of compensation. For instance, in *Mst. Afsana vs. District Police Officer, (Operation) Khairpur (2007)*,[70] a division bench of Sindh High Court, while disposing of a constitutional petition, took an exemplary action against the delinquent police officers who were responsible for registration of false FIR and causing illegal arrest of the detenus. [71]

Thus, the Court noted that there are instances where the Courts found that the detenus were held in unlawful custody, orders were made for their release and the 'monetary compensation was ordered to be paid to the detenus' and cases were also ordered to be registered against the delinquent officers.[72]

The Court maintained that under the wide powers given in Article 199 of the Constitution, the High Court is empowered to grant damages to the victims of violations of fundamental rights. The Court determined, against the violations of detenus' rights of liberty and dignity as provided under Articles 9 and 14 of the Constitution of Pakistan 1973, the amount of compensation in its discretion keeping in view the principle applicable in awarding general damages in case of false imprisonment.

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[70] *Mst. Afsana v. District Police Officer, (Operation) Khairpur*, 2007 YLR 1618 Karachi

[71] The Court having found that the action of police personals caused harassment, humiliation, mental torture and undue expense to the three accused detenus, held that the police officers are liable to redress in terms of monetary compensation which is determined as Rs. 5,000 for each person for each day they spent in illegal police custody. This remedy was given by the court apart from the order of disciplinary action for their professional misconduct.

[72] For instance, *Khurshid Ahamad Naz Faridi v. Bashir Ahmad* 1993 SCMR 639; *Mazharuddin v. State* 1998 PCr.LJ 1035; *Ali Ahmad v. M. Yakoob Almain* PLD 1999 Karachi, 134; *Muhammad Zia v. Ch. Nazir Muhammad Advocate* 2002 CLC 59; *Syed Hasan Ali Shah v. Station House Officer, Police Station, Dadu* PLD 2006 Karachi, 425.

Similarly, in *Mahera Sajid v. Station House Officer, Police Station Shalimar (2018)*[73], while disposing-off a constitutional petition of Habeas Corpus in case of 'enforced disappearance', the Islamabad High Court held that the State through its 'instrumentalities and functionaries' is absolutely and exclusively responsible for protecting and safeguarding fundamental rights.

The Court held that the State and its functionaries in the instant case have failed in safeguarding the fundamental right of the petitioner guaranteed under Article 9 of the Constitution. It is therefore, an obligation of the State to put the petitioner financially in the same earlier position by way of compensation.

Consequently, the Court awarded compensation of amount of Rs. 117, 500- as monthly maintenance along with the arrears from the State exchequer to the petitioner-aggrieved family. The said monthly payment was ordered to be paid to the petitioner until the State through its functionaries has traced the whereabouts or fate of the Detenu. The government, however, challenged this decision before division bench of the Islamabad High Court,[74]which suspended the decision[75] and thus it could not yet get finality.

The Courts occasionally tend to provide monetary compensation for violations of fundamental rights of the accused. However, the practice of the Courts is not uniform, consistent and determinate due to lack of adequate legislative framework about redress even in cases where the court eventually acquits the accused on merit.

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[73] *Mahera Sajid v. Station House Officer, Police Station Shalimar* 2018 CLC 1858 Islamabad.
[74] Malik Asad, IHC verdict in enforced disappearance case challenged, *The Dawn*, July 29, 2018, https://www.dawn.com/news/1423571. Accessed February 14, 2024.
[75] Malik Asad, "IHC bench suspends fines on govt official in missing person case", *The Dawn*, January 22, 2021, https://www.dawn.com/news/1602871. Accessed February 14, 2024.

Further, it has been observed that the Courts on their discretion do not employ any other form of remedy or reparation. On the other hand, the courts, in number of cases, expressly declared that there exists no adequate remedy in the legal framework for erroneous violations of fundamental right of liberty of accused.[76] If the courts leave the victims of fundamental rights violations to seek the civil tort remedy and face the burden of costly and complex litigations and lengthy court proceedings, then they are, in fact, unable to effectively their role as protectors and guardians of the constitution and the fundamental rights of the people.

Thus, in absence of an appropriate statutory framework, the practice of remedy remains as ambiguous, unregulated, arbitrary, indeterminate and uncertain. To avoid this uncertainty and ambiguity, a public law redress in terms of reparation that includes monetary and non-monetary compensation to the victims of violations of fundamental rights, may be regulated through proper statutory framework.

The state's legislature should make proper provisions in public law regarding adequate remedy to the victims of miscarriage of justice as "the purpose of public law is not only to civilize public power but also to assure the citizens that they live under a legal system, which aims to protect their interests and preserve their rights".[77]

3.2.2 Statutory Redress against Violations of Fundamental Rights of Accused

The statutory framework supplements the constitutional protection mechanism for the enforcement of fundamental rights of accused. While in the administration of justice for the determination of rights and duties, the courts are to ensure that process of law is not abused or

[76] For instance, *Muhammad Hussain v. State* 1995 PCr.LJ 488; *Tariq and Others v. State* PLD 1995 SC 34; *Muhammad Shabbir v. State* 2010 YLR 1379 Lahore.
[77] Muhammad Tariq Masood, "Fundamental Rights: Prospects of Compensatory Jurisprudence in Pakistan." *PLD* (July 2020): 66.

misused. Thus, to check tendency of false accusation and frivolous litigation whereby fundamental rights are violated, penal action against complainant in such cases may be taken by imposing fine for false accusation or frivolous litigation under Section 250 of Cr.PC, and by filing complaints against them under Sections 182, 191, 194, 211, 219 and 220 of Pakistan Penal Code (PPC), 1860. Usually, however, these provisions are rarely set to operation by the judiciary in Pakistan.

Besides, punishments are prescribed for the offences committed by the Police officers under Sections 155 to 157 of the Police Order, 2002 because they should be more accountable and if the offence is proved, then they should be dismissed from service in addition to their conviction.

Apart from statutory penal remedies mentioned above, another remedy available in the legal framework is that of injunction. Injunction is a judicial process by which one who has invaded or is threatening to invite the rights, legal or equitable of another, is restrained from continuing or commencing such wrongful act. In Pakistan, the Specific Relief Act, 1877, has regulated remedies of injunctions. The Act provides for perpetual injunction, mandatory injunction, and temporary injunction. Temporary injunctions can be granted at any stage of the suit and are regulated by Order XXXIX of the Code of Civil Procedure (CPC) 1908. The plaintiff in a suit for injunction, whether perpetual or mandatory, can claim damages either in addition to, or in substitution of such injunction. The court may, in its discretion, award damages.[78]

[78] Hamid Khan, *Principles of Administrative Law* (Karachi, Oxford University Press, 2012), 267-269.

Apart from the private remedy of injunction or tort, the legal system has adopted the scheme of 'instant compensation' for the victims of false and vexatious proceedings even without having their recourse to separate legal suit or proceedings. Sections 35-A and 95 of CPC provide for compensatory costs for false and frivolous proceedings and provide redress for any cost or injury happening to the victim of wrongful arrest or attachment on insufficient grounds. Thus, under section 35-A of CPC, the courts are empowered to award compensatory cost in respect of false or vexatious claims or defenses.

Similarly, under Section 250 of the Cr.PC a Magistrate can award compensation to the extent of Rs. 25, 000 to the defendant against false and frivolous or vexatious accusation of a complainant or informant. The remedy provided under this section is in addition to any civil or criminal liability of the accuser provided under other provision of law.[79] This *prima facie* remedy (maximum a compensation of twenty-five thousand rupees in the provinces and it was enhanced to one hundred thousand rupees to the extent of Islamabad Capital Territory)[80] may be provided under section 250 of Cr.PC, at the time of discharge or acquittal of an accused by the Magistrate.

Likewise, as for the scope of Section 491 of Cr.PC, Hamid Khan states that in numerous cases the courts have been awarding compensation to the victims of habeas corpus in cases of illegal detention or imprisonment under section 491 of Cr.PC.[81]

[79] Section 250 of Cr.PC; Fazal Karim and Shahid Karim, *Access to Justice in Pakistan*, 163.
[80] Section 250 of Cr.PC as amended through the Cost of Litigation Act 2017, May 27, 2017.
[81] Hamid Khan, *Principles of Administrative Law*, 269; See *Province of Sindh v. Roshan Deen* PLD 2008 Supreme Court 132; *Riaz Ahmad v. I.G of Police*, 2006 MLD 1093; *Syed Hassan Ali Shah v. SHO, Police Station Dadu* PLD 2006 Karachi 425; *Mazharuddin v. State* 1998 PCr.LJ 1035.

3.2.3 Remedy under Tort Law

The tort law remedy plays an important role to implement a system of corrective justice based on the principle of personal responsibility for damage caused by wrongdoing. The primary function of the tort law is to restore the plaintiff to his to his prior position by compensating him for the harm suffered. The underlying concept of tort damages is to restore the plaintiff to the position he or she was prior to the alleged tort. Of course, in terms of enforcing human rights norms, monetary compensation is not equivalent to the harm suffered by the victims of human rights violation. However, monetary compensation may begin to compensate the victims for their suffering, emotional distress, physical harm, medical expenses, and economic losses. In some common law jurisdictions, punitive or exemplary damages are also awarded for the purpose of deterrence.[82]

In tort law, there are three broad categories of liability thresholds for recovery of damages against fundamental rights, namely intentional torts, negligence and strict liability torts. These torts have their own rules to determine the liability attaching to wrongful acts. Intentional and negligence torts require proof of fault committed by the defendant against the rights of aggrieved party such as libel, slander, trespass, and malicious prosecution. Strict liability torts do not require any proof of fault like nuisance, liability for damage caused by dangerous animals, product liability and accidents arising from specific dangerous activity. Negligence torts require proof of damage suffered by the plaintiff, damage caused by the negligence of defendant, and breach of standard duty of care. [83] Thus, the law of negligence in tort entails a general obligation

[82] Beth Van Schaack, "The Civil Enforcement of Human Rights Norms in Domestic Courts," *ILSA Journal of International & Comparative Law* 6 (2000): 298.
[83] See McLellan and Myles Frederick, "Innocence Compensation: Vicarious Liability and Indemnification by the State for the Harms Caused by Wrongful Convictions," *SSRN*, (2017), https://ssrn.com/abstract=3086607. Accessed

to take reasonable care to prevent harm to others in circumstances where there involves a duty of care.[84]

In Pakistan, an injury to person or property can also be redressed under the civil law through personal civil suit in ordinary tort law proceedings of false imprisonment and malicious prosecution. Tort law remedy that is monetary compensation can be invoked in malicious prosecution, and defamation cases.[85] To establish a case of malicious prosecution, following is the test under the tort law[86]:

i. That the plaintiff was prosecuted by the defendant in criminal charge;
ii. That the prosecution concluded in plaintiff's favour;
iii. That the prosecution was malicious;
iv. That the defendant acted without reasonable and probable cause;
v. That the criminal proceedings had interfered with the plaintiff's liberty and affected or ruined the reputation;
vi. That the plaintiff had suffered the mental agony and financial damage.[87]

In both types of cases, the plaintiff has to fulfill the legal requirements to prove that the defendant's action was without any probable cause. Due to such lofty requirements, success is generally unlikely in tort cases.[88]

March 02, 2024; Myles Frederick Mclellan, "Innocent Compensation: Private Law Principles for Public Law Remedies," *ResearchGate*, https://www.researchgate.net/publication/318006316. Accessed March 2, 2024.

[84] Emmanuel K. Nartey, *Remedy for Human Rights Abuses under Tort and International Law* (Cambridge Scholars Publishing, 2023), 4.

[85] While there is no statutory rule that governs the action regarding malicious prosecution, the defamation cases are dealt under Defamation Ordinance 2001 (LVI of 2002) for tortuous liability.

[86] *Abdul Khameed v. Muhammad Shabbir* PLD 2021 Islamabad 405; Faisal Khan Daudpota, "Tort of Malicious Prosecution in Pakistan," (2010), *SSRN*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1530241. Accessed June 16, 2023.

[87] *Nazim-ud-Din and others v. Sheikh Zia-ul-Qamar and others* 2016 SCMR 24; *Abdul Majeed Khan v. Tawseen Abdul Haleem & others* PLD 2012 SC 80; *Ishtiaq Hussain Shah v. Mushtaq Hussain Shah & another* 2019 MLD 314; *Muhammad Iqbal v. Muhmmad Ashraf* PLJ 2022 Lahore 423.

Nevertheless, for the compensation for malicious prosecution and other consequential harm, the Supreme Court of Pakistan has long observed that:

> the illegal and wrongful prosecution in absence of specific proof of good faith, would definitely fall within the purview of malicious prosecution and mental torture was the natural consequences, therefore, the petitioner would also be entitled to reasonable compensation for loss of profit and mental torture.[89]

The Supreme Court in *Niaz and others v. Abdul Sattar and others* felt the need to employ the tort law to stop frivolous and malicious prosecution in Pakistan. It emphasized that:

> It is high time to put the nation on a right path to promote the law of tort…the only solution to stop this frivolous litigation for the purpose of taking revenge from the other side is to file suits for damages as and when the competent forum has declared the accused persons as innocent acquitted/discharged by the competent Court so that prosecution must lodge genuine cases.[90]

Similarly, the Supreme Court in *Abdul Majeed Khan v. Tawseen Andul Haleem* case held that:

> Where the claimant has been subjected to a criminal prosecution, as a consequence of which he losses or risks of losing his liberty and/or his reputation, a remedy in the tort of malicious prosecution will lie. The institution of a civil action should exceptionally result in liability under tort as when the claimant loses the suit, the defendant's reputation is restored and he recovers his cost spent on defending the action…. It is well known that a person who is maliciously prosecuted

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[88] Lauren C. Boucher, "Advancing the Argument in Favor of State Compensation for the Erroneously Convicted and Wrongly Incarcerated," *Catholic University Law Review* 56, no. 3 (Spring 2007): 1083; see also Mclellan, "Innocent Compensation," 1.
[89] *Azizullah v. Jawaid A. Bajwa* 2005 SCMR 1950.
[90] *Niaz and others v. Abdul Sattar and others* PLD 2006 SC 432.

on a criminal charge can sue in tort for damages if the prosecution ends in his acquittal and the prosecution was malicious in the sense that it was without any reasonable cause.[91]

A comprehensive judgment by the Islamabad High Court has summed up the law about the redress for malicious prosecution in Pakistan. It has laid down the rationale for conferring equitable jurisdiction upon Courts. According to its judgment, it is based and rooted in the maxim *"ubi jus, ibi remedium"* i.e. where there is a right, there is a remedy. Thus, damages are imposed on the person who causes to abuse the process of law and the subsequent consequences for another. It has elaborated that the subjecting a person to malicious prosecution can interfere with the right to be treated in accordance with law guaranteed under Article 4 of the Constitution, the right to liberty guaranteed under Article 9, and the right to dignity under Article 14 of the constitution.[92]

While admitting the fact that the plaintiff in a suit for malicious prosecution cannot recover compensation on the basis of humiliation suffered at the hands of police or prison authorities or inmates, the Court held that he has a right to be compensated by the person whose false accusation resulted is his incarceration and suffering. The court also observed and highlighted that fact that in case where no damages are specifically quantified by the plaintiff, still a Court has discretionary jurisdiction to grant damages for the loss of liberty, dignity, reputation and mental anguish that is reasonably proportionate to the suffering of the plaintiff and in view of the circumstances of the case. The reasonable baseline of this conclusion is that right to liberty and dignity are inalienable rights and must not be interfered except in accordance with law.

[91] *Abdul Majeed Khan v. Tawseen Andul Haleem and others* 2012 CLC 6.
[92] *Abdul Khameed v. Muhammad Shabbir* PLD 2021 Islamabad 405.

As for any objective standards for estimating such injuries, the Court noted that an inference can be drawn that someone who has been subjected to malicious prosecution, he has suffered loss of time, litigation expenses, mental suffering due to being subjected to legal challenge that could have produced penal consequences for him. In the case of arrest and detention, has is presumed to suffer the loss of his right to liberty and dignity and consequent reputational harm. Thus, the superior Courts have upheld imposition of damages on the basis of rule of thumb which aims to quantify damages that are reasonably proportionate to the loss suffered.[93]

Delineating upon the *raison detre* of the remedy of monetary compensation against malicious prosecution, the Court held that "granting of damages for malicious prosecution is a means to hold to account a person who abuses the process of law against another and to offer recompense to the person on the receiving end of such abuse. Even though restitution is not possible in a claim involving loss of liberty and dignity, the Court must aim to award damages that are reasonably proportionate to the harm inflicted." [94]

The Court besides adjudicating the matter of malicious prosecution, also ordered to pay a cost of Rs. 200,000/- under Section 35(1)(iii) of C.P.C. as has been amended and restated by the Costs of Litigation Act, 2017.[95]

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[93] *Abdul Khameed v. Muhammad Shabbir* PLD 2021 Islamabad 405.
[94] Ibid.
[95] The relevant Section of C.P.C. states as follows:

> 35. Costs. (1) Subject to such conditions and limitations as may be prescribed, and the provisions of any law for the time being in force,--
> (i) a party to any proceeding shall, before the announcement of final order, judgment or decree, file in the prescribed Form, details of actual costs of litigation, including but not limited to Court fee, stamp fee, fee paid to counsel and all other ancillary or incidental expenses thereto;
> (ii) the Court shall award the actual costs of litigation under clause (i) to the successful party with mark-up not exceeding the prescribed limit per annum, as notified by the State Bank of Pakistan, at the time of passing the order, judgment, or decree;

The legislature intent in promoting this provision is to deter malicious prosecution and frivolous litigation and to impose the cost of litigation in a just and reasonable manner on the party whose conduct inflicts such cost on another. In our justice system, adjudication of disputes takes place within an adversarial system. Every person has the freedom to decide how to pursue a perceived grievance against another. But when he does initiate litigation against another, such action has costs for the party on the receiving end. Likewise, each time a party chooses to appeal an order to the next tier in the adjudicatory hierarchy, it results in costs for another party. It is only fair that the losing party whose claim is adjudicated and found to be without merit bears the cost of litigation of another party. For such purpose, the Parliament has promulgated the revised Section of C.P.C. and it is the duty of this Court to give effect to its provisions in accordance with the legislative intent.[96]

The Court also highlighted another significant aspect/dimension related to cost litigation which should be considered by the courts at the time of awarding cost:[97]

> The cost incurred by the parties to litigation does not take into consideration the cost borne by the public exchequer. Due to frivolous litigation all components of criminal justice system are clogged and consumed i.e. investigation, prosecution, Courts, and prisons. This impede access to justice for everyone by delaying adjudication of genuine grievances as well as depleting public resources that would otherwise be available to all components of the justice system for processing and adjudication of genuine disputes. The cost incurred by the public exchequer due to frivolous

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(iii) the costs other than those mentioned in clause (i) shall be in the discretion of the Court; and
(iv) the Court shall have full power to determine out of what property such costs are to be paid and recovered and to give all necessary directions for the purpose aforesaid.
(2) The fact the Court has no jurisdiction in respect of the proceeding shall be no bar to the exercise of such powers under the section.

[96] *Abdul Khameed v. Muhammad Shabbir* PLD 2021 Islamabad 405.
[97] Ibid.

litigation cannot be objectively estimated by a Court, but such cost is certainly a consideration to be born in mind by the Court while awarding costs under Section 35 and 35B.

The courts in Pakistan, however, do not grant any compensatory relief mere on the claim that the accused is prosecuted and acquitted on the basis of benefit of doubt. Rather the acquitted accused has to establish the absence of reasonable and probable cause along with malice.[98] Moreover when a violation is committed by the state, then it becomes more difficult the seek redress due to the hurdle of "sovereign immunity'.[99] Further, this private law remedy is considered, to involve time consuming procedure to get an enforceable judicial pronouncement and to be an expensive, difficult to prove, and by no way it can be considered as efficacious and affordable remedy.[100]

Further, the intricacies of the adversarial systems also make it more difficult for the poor litigants especially the innocent accused persons to seek redress for their grievance of violation of fundamental rights against the state functionaries.[101]

3.2.4 Statistical Data and Case Studies

The statistical data and various case studies on wrongful prosecutions, acquittals, and compensation claims also highlight the severe systemic issues within the criminal justice system of Pakistan. The statistical landscape is characterized by a lack of a centralized "Miscarriage of Justice Registry." However, by piecing together data from various reports, surveys and landmark cases, there emerges a disturbing picture.

[98] *Subedar Retd. Fazale Rahim v. Rab Nawaz* 1999 SCMR 700, *Abdul Khaliq v. Gul Faraz* PLD 2011 Peshawar 112, *Ishtiaq Hussain Shah v. Mushtaq Hussain Shah & another* 2019 MLD 314, Noor *Ali v. The Province of Sindh* PLD 2020 Sindh 700, *Nawab Sher & another v. Ismaeel* 2020 MLD 14, *Mst. Afroz Qureshi & another v. Muhammad Ikram Siddiqui* 1995 CLC735; *Muhammad Iqbal v. Muhammad Ashraf,* PLJ 2022 Lahore 423.
[99] Muhammad Tariq Masood, "Fundamental Rights," 66.
[100] Madni, Habib and Akhtar, "Wrongful Prosecution a Miscarriage of Justice," 1649, 1655.
[101] Muhammad Sher Abbas, "The Dynamics of Public Interest Litigation (PIL) in the Perspective of Adversarial Legal System of Pakistan," *Punjab Judicial Academy Law Journal* (June 2020): 37.

3.2.4.1 Statistical Data

High acquittal rates indicate faulty prosecutions indicating the systemic failure. For instance, In PILDAT research report, it was stated that the conviction rate in Pakistan is 8.66%.[102] Similarly, a recent study of Law & Justice Commission of Pakistan (LJCP) reveals that the overall conviction rate in gender-based violence cases in Pakistan is as low as 5%.[103] This figure suggests a systematic failure at the investigation and prosecution stages, leading to thousands of individuals being wrongly prosecuted and detained for years.

Similarly, various reports have shown that the acquittal rate is exceptionally high between 70% to 80% in Anti-Terrorism Act (ATA) and blasphemy cases.[104] These figures are not just statistics; they represent a colossal waste of judicial resources and, more importantly, the immense suffering of tens of thousands of individuals who are put through the trauma of prosecution and detention, often for years, for crimes the state could not prove they committed.

Besides, the under-trial crisis in Pakistan reflects a very serious miscarriage in the justice system. The prison data consistently shows high rates of pre-trial detention. According to a report of National Counter Terrorism Authority (NACTA), the rate of pre-trial prisoners in Pakistan is about 66% which is significantly higher than the global median average rate of 27%.[105] Similarly, a recent report by the Justice Project Pakistan (JPP) found that under-trial

[102] PILDAT, Prosecution Services and Media in Pakistan, 6; Abdul Lateef, Low Conviction Rate in Pakistan, 5-24; Muhammad Arif Rajput, Farid Samir Benavides-Vanegas, Reformation of Criminal Justice System of Pakistan, 88.
[103] Law and Justice Commission of Pakistan, Gender-Based Violence in Pakistan, 2023; National Commission for Human Rights, Pakistan, Submission to the UN Human Rights Committee, (2024); Hafiz Muhammad Azeem, Muhammad Sohail Thaheem, Muhammad Ramzan Kasuri, Exploring Factors Contributing to the Low Conviction Ratio, 342.
[104] For instance, see International Commission of Jurists, *The Implementation of Pakistan's Blasphemy Laws*, November 2015, 7.; United States Institute of Peace, An Appraisal of Pakistan's Anti-Terrorism Act, 2.
[105] NACTA, Addressing Overcrowding in Prisons, (May 2018) 8, https://codepak.org/wp-content/uploads/2024/03/Addressing-overcrowding-in-prisons-by-reducing-pre-conviction-detention-in-Pakistan.pdf, Accessed on October 28, 2025; See also Tauqeer Hussain, "Pre-Trial Detention and Its Compensation," 51.

prisoners account for 73.41% of total prison population.[106] Many of these individuals have not been convicted of any crime. They are incarcerated, often in horrific conditions, for the duration of their trial. Occasionally, they spend more time in jail as under-trial prisoners than the maximum sentence for their alleged crime.

The excessive use of under-trial detention is the strong statistical evidence of a systemic miscarriage of justice. It reveals the failure of the investigation and bail system, the inefficiency or lack of care by the courts, and the trend of pre-trial detention over presumption of innocence. These individuals are presumed innocent but are subjected to harsh prison conditions. This represents a blatant violation of the fundamental right to a speedy trial and the presumption of innocence.[107]

As for compensation claims, there is legal void in practice. There is no official data on successful compensation claims for miscarriage of justice because there is no statutory framework for it. Compensation is granted rarely and at the discretion of superior courts under the Constitution. The fact that one cannot find any "Annual Report on State Compensation for Wrongful Imprisonment" is, in itself, a critical data point. It proves that the remedy is ad-hoc, exceptional, and not a recognized right.

3.2.4.2 Case Studies

Hans Sherrer, the Justice Denied's editor and publisher and the Forejustice organization has documented the data regarding miscarriage of justice happening in various countries of the world. As for Pakistan, around 50 cases of miscarriage of justice are documented in which the

[106] National Commission for Human Rights, National Academy for Prisons Administration, Justice Project Pakistan, *Prison Data Report_ Pakistan's Prison Landscape: Trends, Data, And Developments In 2024*, January 2025, 8. https://jppprisonreforms.com/wp-content/uploads/2025/01/JPP_Prison_Data_Report_2024.pdf, (Accessed on October 28, 2025).
[107] See Tauqeer Hussain, "Pre-Trial Detention and Its Compensation," 51.

fundamental rights of the accused persons were violated.[108] Some of them are discussed in following:

In 1997, Mazhar Hussain was wrongfully convicted of murder and sentenced to death in Sihala, Pakistan. He died of a cardiac arrest in prison in 2014. Unaware of his death, the Supreme Court of Pakistan continued to process his appeal and was only informed of the situation later. On October 6, 2016, the Court posthumously acquitted him, ruling that his conviction was based on false testimony and a flawed trial. In a poignant moment, one judge questioned who was accountable for the 17 years Hussain spent wrongly imprisoned.[109]

In a profound case of miscarriage of justice, Malik Taj Mohammad was wrongly sentenced to life in prison in 2003 for a murder that never occurred—the alleged victim, Malkani Bibi, was alive. Despite his persistent claims of her survival, he served three years before being released in July 2006. His release came only after Bibi was found alive in a different Pakistani jail, serving a sentence for theft, based on information Mohammad himself provided. The authorities, acknowledging the error, announced he would receive compensation. This case highlights severe incompetence within the police and prosecution.[110]

In another case, Mohammad Rasool and Mohammad Irfan were wrongly convicted in 2014 on explosives and drug charges after a 2012 police action. Both were sentenced to 14 years in prison. In 2015, the Peshawar High Court acquitted them, revealing critical flaws in the case; forensic analysis proved the seized material was not explosive, and the police testimony was

[108] Hans Sherrer, *Justice Denied*, http://www.justicedenied.org/ ; and the Forejustice organization, *Innocent Database*, https://forejustice.org/search_idb.htm. (Accessed on October 21, 2025). See also Zille Huma, Maira Mumtaz and Johar Imam, The struggle for prison reform in Pakistan, *Himal South Asian*, https://www.himalmag.com/politics/pakistan-prison-reform-human-rights, Accessed on November 7, 2025.
[109] Ibid; Imtiaz Ahmad Khan, et al., "Wrongful Conviction and Miscarriage of Justice," 216-217.
[110] Ibid.

unreliable. The officers' accounts of finding drugs were inconsistent, and their claim of discovering explosives in a hidden car compartment was disproved, as the vehicle had no such feature. The court found that the men were convicted based on a false police report and fabricated testimony.[111]

Similarly, in another case, Ghulam Mohammad was wrongly convicted in April 2018 for allegedly attempting to plant an explosive device in Peshawar in 2017. Although arrested at his home 30 miles away from the crime scene, he was sentenced to 10 years in prison. In September 2018, the Peshawar High Court overturned his conviction, ruling that the prosecution's evidence was insufficient and failed to connect him to the offense. The case highlights how police misconduct and prosecutorial incompetence can lead to wrongful convictions.[112]

A famous Rani Bibi case of 2020 is another a high-profile case of miscarriage of justice wherein a woman spent years in prison before acquittal. She was acquitted after a lengthy detention and widely cited as emblematic of systemic failings in investigations and trial fairness. This case also highlighted gaps in post-conviction relief and the absence of automatic compensation mechanisms for exonerees in Pakistan.[113]

There is remedial void as there is the lack of data on compensation. The absence of any formal compensation mechanism or data is the final insult to the victims. It shows the state's failure to acknowledge its wrongs and provide redress. There is a stark absence of a formal, statutory framework for compensating victims of wrongful prosecution and imprisonment in Pakistan. While Articles 4 (right to due process) and 9 (right to life and liberty) of the

[111] Ibid.
[112] Ibid.
[113] Ibid.

Constitution are sometimes invoked, compensation is granted rarely and only at the discretion of the Supreme Court or High Courts. It is not an automatic right.

The fact that there are no official statistics on state-compensated wrongful convictions is itself a critical data point. It proves that the remedy is ad-hoc, exceptional, and not institutionalized. In a few instances, the Courts have ordered compensation for illegal detention. However, these cases are the exception, not the rule, and typically address illegal detention rather than compensating for the ordeal of a full wrongful prosecution and acquittal.

This statistical grounding and case studies establish that it is essential to have a statutory right to compensation for wrongful prosecution and detention and the establishment of an independent body like a Criminal Cases Review Commission to investigate potential cases of miscarriage of justice in Pakistan.

3.3 Problems with Existing Redress Mechanism

The legal regime of Pakistan that addresses the violations of fundamental rights of accused is also amenable to certain problems, hence requires reform and improvement.

3.3.1 Problems with Constitutional Redress Mechanism

The Constitution provides redress mechanism for enforcement of fundamental rights, yet the nature and scope of redress provided under Article 199 of the Constitution has certain limitations embedded in the same Article, which make this remedy as indeterminate and arbitrary. For instance, the enforcement and remedy of these rights largely depends upon the discretion of the High Court. Therefore, there exists no uniform, consistent and determinate standard and practice

for awarding reparation or compensation and there are "a very few judicial precedents on the subject in the country".[114]

Besides, the relief or remedy provided therein is of either of injunctive or declaratory nature and the Courts very rarely exercise compensation writ or other form of directions to redress violations of fundamental rights of accused, under Article 199 (1)(C)[115].

Hence, there is no express constitutional provision that makes it mandatory for the courts to provide compensation or other form of redress. Thus, the redress is subject to the discretion of the courts that have to determine the 'appropriateness of case' and 'appropriateness of relief' and the Courts are self-governing in expanding or shrinking the scope or sphere of compensatory jurisprudence.[116]

Commenting on this discretionary remedy, a former judge of Supreme Court maintains that, "the judicial review jurisdiction is a discretionary jurisdiction and to require a person to invoke that jurisdiction is to throw him to a discretionary remedy, and to deprive him of his constitutional right to be dealt with in accordance with law."[117]

Contrary to the argument that the remedial discretion is in conflict with rule of law as the discretion allows the judges not to annul the unlawful actions of public authorizes, it is counter-

[114] Muhammad Tariq Masood, "Fundamental Rights," 66.
[115] This provision states that, on the application of any aggrieved person, the High Court can make an order giving such directions to any person or authority including any government, "as may be appropriate for the enforcement of any of the fundamental right".
[116] Muhammad Tariq Masood, "Fundamental Rights," 66.
[117] Fazal Karim, *Judicial Review of Pubic Actions*, 594.

argued that the remedial discretion upholds the rule of law as the remedial discretion in judicial review is unfettered; rather it is subject to certain rules, principles and guidelines.[118]

It is asserted that access to the court is the public law right in judicial review and its correlative duty is the supervision of the actions of public authorities by the Court. The court's supervision requires a remedy in a varying degree that vindicates and enforces individuals' rights. The courts are to not refuse the remedy to an aggrieved person who has been wronged but the Courts are vested with the power to do so under the principles of administrative law. Thus, the remedial discretion does not amount to arbitrary judicial decision making by the judiciary; rather it acknowledges the decision-making role of the executive authorities and preserves the role and ability of the courts to supervise the actions of public authorities.[119]

yet, this argument may not serve and help us for the protection and enforcement of fundamental rights of accused as when any right is acknowledged or guaranteed under the Constitution, then making its remedy as discretionary would defeat the purpose of making it pubic law right. To ensure the enforcement of fundamental rights of accused, the remedy should be specified and regulated by the statutory provision. This would also realize that the remedies for fundamental rights are granted as matter of right, and not as *ex-gratia*, depending upon the sweet will or whims of the judges.

3.3.2 Problems with the Statutory Framework

As stated above, the statutory framework supplements the constitutional protection mechanism for the enforcement of fundamental rights. However, this too has certain drawbacks and

[118] Sam Miles, "The Purpose of Remedial Discretion and the Nature of Public Law Rights," *Victoria University of Wellington*, (2018), https://researcharchive.vuw.ac.nz/handle/10063/8432?show=full, accessed June 14, 2023.
[119] Ibid.

shortcomings. Section 250 of Cr.PC provides some monetary compensation for false and frivolous accusation, but it is inadequate or insufficient in many respects and does not cover all cases of violations of fundamental rights of the accused against loss or injury.[120] Further it does not address the situations where a person is accused or suspected by the police or other state operates and a wrongful or mistaken action results into violation of right of liberty or dignity of an accused person.

Even this meager remedy provided under this section depends upon the discretion of the magistrate and is not available at the appellate court stage.[121] Further, the remedy is only limited against private individuals i.e. complainant or informant,[122] hence not stretched against state officials.

Similarly, the remedy under section 35-A of the CPC, civil court is empowered to award compensatory cost in respect of false or vexatious claims or defences, has very limited scope and largely depends upon the discretion of the civil court. Thus, the remedy provided under Section 250 of Cr.PC and 35-A of CPC against false, frivolous or vexatious accusation has certain limitations.

Apart from these legal provisions providing deficient redress, the usual remedy of monetary damages or compensation is to depend or rest on is the private remedy under tort law where the claimant has to prove the existence of malice and lack of reasonable and probable cause. The remedy under tort law that is, however, not properly enacted and involves prolonged

[120] Under this section, Magistrate court can award monetary compensation up to twenty-five thousand rupees. The Costs of Litigation Act, 2017 enhanced the maximum limit of the compensation provided in section 250 of CrPC, from twenty-five thousand rupees to one hundred thousand rupees. However, the Act is applicable only in Islamabad Capital Territory.
[121] Section 250 of CrPC expressly confers exclusive authority to magistrate to grant remedy of compensation.
[122] Madni, Habib and Akhtar, "Wrongful Prosecution a Miscarriage of Justice," 1656.

and futile litigation, loss of time and resources that makes this remedy arbitrary, complex, arbitrary and uncertain.[123] Thus, there is lack of statutory framework for the right of redress for miscarriage of justice happening to the accused in the criminal justice system of Pakistan.[124]

On the other hand, to redress the violations of fundamental rights of victims of offence, the statutory law provides the public remedy in form of compensation. Under the Qisas and Diyat provisions of PPC, the victims of offence are provided remedy of compensation under sections 331[125], 337[126], 337Y[127] and 338-G.[128]Further, the courts are empowered to order to pay expenses and compensation to the victims of offence by virtue of sections 544,[129] 544A,[130] 545,[131] and 546A[132] of the Cr.PC Thus, because of statutory remedy, the High Courts have been granting remedy of compensation as a matter of right to the victims of offence resulting through violations of fundamental rights.[133]

The preposition that reasonably follows is that whether the accused that turns to be a victim of violations of fundamental rights or miscarriage of justice, should not be entitled for the

[123] Ibid., 1655; Muhammad Tariq Masood, "Fundamental Rights," 66.
[124] Sara Qayum, et al., "Short Comings of Criminal Justice of Pakistan and its Effects of Rights of Accused Prisoners Wrongly Convicted or Imprisoned," *Journal of Legal Studies* 18, no. 32 (October 2016):13; See also Aziz-ur-Rahman, *Citizens versus State*, 8-13.
[125] This section provides about payment of *diyat* by the convict to the legal heirs of the victim.
[126] This section relates to payment of *arsh* payable to the victim by the convict.
[127] This section is about value and payment of *daman* payable to the victim by the convict.
[128] This section relates to framing of rules by the Government, protecting the rights of the victims for purpose of *diyat*, *arsh*, and *dhaman*.
[129] This section is about payment of expenses of complainants and witness from Government and depends upon the discretion of Criminal Court.
[130] This section provides about payment of compensation to the victims of an offence from the convicted person. It is a mandatory provision.
[131] This section relates to the power of Court to pay expenses of compensation out of fine imposed. This provision is, however, not mandatory.
[132] This section is about power of a court for order of payment of certain fees paid by complainant in non-cognizable cases. This provision is however not mandatory.
[133] *Khurshid Ahamad Naz Faridi v. Bashir Ahmad and 3 others* 1993 SCMR 639; *Mazharuddin v. State* 1998 PCr.LJ 1035; *Ali Ahmad v. M. Yakoob Almain* PLD 1999 Karachi, 134; *Muhammad Zia v. Ch. Nazir Muhammad Advocate and 4 others* 2002 CLC 59; *Syed Hasan Ali Shah v. Station House Officer, Police Station, Dadu* PLD 2006 Karachi, 425.

compensation or damages under these or likewise statutory provisions? The Supreme Court, however, admitted the grim and distasteful position in Pakistan stating, "if the accused is ultimately acquitted at the trial, then no reparation or compensation can be awarded to him for the long incarceration he had already suffered. Even none of the provisions of Cr.PC provide any remedy to be claimed by the petitioner for its compensation."[134]

Conversely, the Lahore High Court in one of its judgments about the payment of Diyat discussed three grounds for state liability to provide monetary assistance to convict for payment of *Diyat*, A*rash* and *Daman* to the victim(s) of offence. These grounds are, firstly beneficiary status of the state for establishing and preservation of peace through payment of *Diyat* and compensation, secondly constitutional obligation of the state to protect the fundamental rights of the people, and thirdly moral and religious obligation of the state to help and ensure welfare of poor and destitute persons including the poor convicts.[135]

The question arises as why the state should not be liable to pay compensation to the accused who is presumed innocent and whose violations of fundamental rights are established? Reasonably, the accused person being as innocent deserves more for state sympathy and support for redress for violations of fundamental rights.

Apart from monetary compensation, redress or reparation may be in non-monetary terms.[136] In this regard, it is noted that the law provides redress to the convicts who are sentenced to imprisonment under Section 382-B of Cr.PC for the time spent in the official custody or

[134] *Sajid Hussain Joji v. The State and another* PLD 2021 SC 898.
[135] *Abid Hussain v. The Chairman Baitul Maal* PLD 2002 Lahore 482.
[136] Non-monetary compensation may include public apology, counseling services; and expunging of the record of conviction, housing assistance, job training, assistance in terms of job search and placement services, referral to employers with job openings, and physical and mental health services. See Karlene Patsy Blackman, "Reentry Services for Individuals Wrongfully Convicted and Exonerated," *(*PhD diss., Walden University 2021), https://scholarworks.waldenu.edu/dissertations/11256/. Accessed June 15, 2023).

detention before the conclusion of the trial.[137] Thus, the convict is provided somehow adjustment and compensation for the pre-trial detention period to the convict, but the accused who ultimately acquits has no such relief or remedy.

In fact, however, the courts in Pakistan have been providing redress in terms of monetary compensation against arbitrary or unlawful arrest and detention in few or rare cases. The concern of violations of fundamental rights of accused person, however, still holds its ground as often his sufferings are resulted due to a mistaken or negligent action by the police or any other state authority on the pretext or defence of '*bona fide* action' or 'good faith'. In any case, accused persons are normally left to their fate on the conclusion of their trial just declaring them that they are not guilty and no compensation in any form is offered by the state for the wrongful or erroneous actions of its functionaries.

Consequently, the existing legal provisions, though inadequately and insufficiently, provide or deal only with monetary aspect of the redress, whereas non-monetary redress is altogether non-exiting. Thus, apart from a civil action to tort remedy to recover compensation for unlawful detention or malicious prosecution, there is deficiency in the legal framework of Pakistan with regard to adequate redress for violations of fundamental rights of accused.[138]

It seems that the right of redress in terms of reparation or compensation is less thought for the accused under the law. Violations of fundamental rights of the accused are most serious type of miscarriage of justice,[139] yet the accused suffering harm due to violations of their fundamental

[137] Section 382-B of Cr. P.C. provides that "the length of any imprisonment imposed upon an accused person in respect of any offence shall be treated as reduced by any period during which he was detained in custody for such offence".
[138] Madni, Habib and Akhtar, "Wrongful Prosecution a Miscarriage of Justice," 1651.
[139] C. Ronald Huff and Martin Killias, ed., *Wrongful Conviction: International Perspectives on Miscarriages of Justice* (Philadelphia: Temple University Press, 2008), 5-6.

rights are not given adequate redress in terms of reparation under the law, even in case of acquittal of the accused on merit with or without tendering any benefit of doubt.[140] Undoubtedly, the problem becomes aggravated when aggrieved persons have either no or deficient redress for violations of their fundamental rights in criminal justice due to lack of proper legislative framework for adequate redress to the victims of fundamental rights.[141]

In fact, it is a failure of justice system that a court decides a case and acquits an individual on merits after a lengthy trial and that too without any remedy or compensation to the victims or aggrieved persons due to lack of adequate legal provisions.[142]

Interestingly, an attempt was made to incorporate the provisions into the public law to redress or compensate, the victims (accused) for miscarriage of justice violations of fundamental rights in criminal justice, yet the idea could not be materialized. In 2017 a private bill titled "Miscarriage of Justice (Compensation) Act, 2017"[143] was introduced in the Senate of Pakistan but later it was withdrawn in March 2018.[144] Thus, unfortunately, there exists no express provision in the Constitution nor in any statute that provides adequate right of redress to the accused against violation of his fundamental rights.

Though Article 212 (1) (b) of the Constitution provides about the establishing of administrative courts to adjudicate the claims about tortious acts of the Government and its

[140] Sara Qayum, et al., "Short Comings of Criminal Justice of Pakistan," 13.
[141] Ibid., 23; Aziz-ur-Rahman, *Citizens versus State*, 8-13.
[142] Sara Qayum, et al., "Short Comings of Criminal Justice of Pakistan," 13, 23; Zeeshan Manzoor, *Practical Approach towards Criminal Justice System,* 384.
[143]Senate of Pakistan, Miscarriage of Justice (Compensation) Act, 2017 Bill, https://www.senate.gov.pk/uploads/documents/1503334797_194.pdf. Accessed April 29, 2024.
[144] Senate of Pakistan, Report of the Standing Committee on Interior on "The Miscarriage of Justice (Compensation) Bill, 2017, Report no. 41, https://senate.gov.pk/uploads/documents/1519370468_979.pdf. Accessed April 29, 2024.

functionaries,[145] but it is not yet operationalized.[146] The legislature in Pakistan has yet to give effect to this requirement of the Constitution by passing the relevant law to establish a competent forum vested with the authority to effectively deal with the tortious claims of the citizens against the State.[147]

Thus, there is no law available in Pakistan providing redress to a suspect person who has suffered violations of his fundamental rights and declared innocent by a court of law after spending so many years in prison. It is not certain in the law as what would be the remedy and who would provide it to that detainee. Thus, the parliament needs to make a law by providing relief and compensation to that accused in case violation of their fundamental rights in the course of criminal justice.[148]

The Constitution of Pakistan 1973 is the ground-work for the fundamental rights but state servants must be called upon to account when they fail to comply with their duties and obligations.[149] The Constitution of Pakistan, being a public law, provides and guarantees the fundamental rights; hence, it reasonably requires that the remedy should also be available under public law in case of violation of these rights.

The concept of redress is not alien to our own jurisprudence rather it is endorsed by the superior judiciary but even then it is exercised and practiced sparingly and selectively. Increased incidents of forced disappearances, custodial violence and killings, highhandedness of law

[145] See Article 212 of the Constitution of Pakistan.
[146] See Aziz-ur-Rahman, *Citizens versus State*, 8-13.
[147] Omer Imran Malik and Nubira Khan, "The Need to Develop Constitutional Torts in Pakistan," *Courting the Law,* Last modified February 20, 2018, https://courtingthelaw.com/2018/02/20/commentary/the-need-to-develop-constitutional-torts-in-pakistan/. Accessed April 28, 2024.
[148] Madni, Habib and Akhtar, "Wrongful Prosecution a Miscarriage of Justice," 1655.
[149] Yasir Rauf, "Impact of the Original Jurisdiction of the Supreme Court on Its Appellate Jurisdiction and Pendency of Cases in The Apex Court," *Islamabad Law Review* 3, no. 2 (2019): 43.

enforcement agencies and other human rights violation especially related to life, honor and dignity of men have also necessitated an equally quick and befitting response from the judiciary.[150]

3.4 Indemnity provisions and impunity of state functionaries

Another aspect relating to the redress is that the law, in many jurisdictions, provides immunity to the state servants from criminal and civil liability in the best interest of the community or public. Immunity is an exception to the general rule that every wrong has a remedy and there is no justifiability. Immunity implies that though the conduct is tortuous or injurious in character, yet the law denies the liability for the policy reasons. The courts make the right of the individual to redress a private wrong subservient to a larger interest of the public.[151]

Now, however, the courts in many jurisdictions have tendency to limit or abolish the immunity when it appears that there involves no actual public interest or benefit from the immunity. The rationale behind this approach is "the availability of liability insurance and the perceived inequity of denying relief to a deserving claimant".[152]

As for Pakistan, in a case of false imprisonment by government servants, the government was held liable for damages, where on the plea of 'sovereign act' it was sought to resist an action for damages for illegal detention and disposal of some movable property belonging to the plaintiff by the District Magistrate, the Supreme Court rejected the contention.[153]

[150] Muhammad Tariq Masood, "Fundamental Rights," 66.
[151] Frank August Schubert, *Introduction to Law and the Legal system*, 202-203.
[152] Ibid.
[153] *Pakistan v. Muhammad Yaqoob Butt*, PLD 1963 SC 627.

However, there exists no uniform practice and established compensatory jurisprudence in Pakistan.[154] The citizens have no or inadequate redress for their grievances caused by the negligent acts and omissions of public servants. The legal framework in Pakistan provides immunity to the actions done by the State representatives[155] and state servants in good faith in pursuance of their functions and duties. Tortious liability of public servants could not be established due to immunity clauses incorporated in the statutory framework.[156]

Thus, there is no specific legislation in Pakistan, which establishes the state liability for the torts committed by its public servants. Pakistan, as compared to India, could not even develop state liability jurisprudence in tort law. Therefore, there is need of codification of tortious liability of the state in Pakistan by regulating the immunity clauses and incorporating the principles of strict and vicarious liability.[157] In this regard, the legislature should also regulate states' liability for their officials' constitutional violations to cases involving breaches of clearly established law.[158] Hence, a right-based approach, informed by Islamic law and international best practices is essential for redressing the fundamental rights of the accused in Pakistan.

3.4.1 Consequences of State Immunity

There are a number of questions that relate to the effects and consequences of state immunity. For instance, what happens when courts no longer provide an avenue for relief against the

[154] Ghulam Abbas, "Liability of the State in Tort: An Indo-Pak Perspective," (PhD Law diss., International Islamic University Islamabad, 2019), 169, 171, 269.
[155] Article 248 of the Constitution states about immunity of the President, Governor, the Prime Minister, Federal Minister, Minister of State, Chief Minister and Provincial Minister for the exercise of powers and performance of functions of their respective officers or for any act done or purported to be done in the exercise of those powers and performance of those functions.
[156] International Commission of Jurists, Entrenching Impunity, Denying Redress: The Commission of Inquiry on Enforced Disappearances in Pakistan- A Briefing paper, (September 2020); Aziz-ur-Rahman, *Citizens versus State*, 8-13.
[157] Aziz-ur-Rahman, *Citizens versus State*, 8-13.
[158] Fallon, "Bidding Farewell to Constitutional Torts," 978, 982.

government? What happens to individuals who are wronged by the state? Must they simply accept their losses or do they resort to alternative means of redress? What happens to the states that rely on sovereign immunity? Are there any repercussions? What impact do these decisions have on the expansion or contraction of state authority? How did the decisions affect the individual or groups suing the state? And how did the doctrine of immunity influence the state and its scope of authority?[159]

Different studies shows that those who disproportionately bear the burden of sovereign immunity are the weakest and most vulnerable in society.[160] Limiting the reach of sovereign immunity is consistent with the idea of a government that is responsive to its citizens and rule of law. The ability to hold government accountable should not be restricted exclusively to those with resources and political support. In a limited government that prides itself on democratic accountability, the courts have an important role to play. There is an old legal maxim that there is no right without a remedy. By removing any legal remedy, sovereign immunity serves to deny the rights of those seeking redress. That is not something that should be done lightly and the costs of such actions must be weighed carefully. In the case of sovereign immunity, the costs are high while the benefits are marginal.[161]

Since the fundamental rights are sacrosanct and inviolable, they cannot be waived or neglected in the pretext of state immunity or sovereign act. Conversely, the idea of rule of law would be defeated and lawlessness will prevail on the cost of state or sovereign immunity.

[159] Christopher Shortell, *Rights, Remedies, and the Impact of State Immunity*, (Albany: State University of New York Press, 2008), 153.
[160] Ibid., 159
[161] Ibid.,161-162.

3.5 Conclusion

The factual position as for the redressing violations of fundamental rights of accused is as highlighted by Kent Roach that "we live in a world rich with rights. Alas, we live in a world poor in remedies".[162] Possibly there can be different underlying reasons for non-availability of remedies. One of the reasons is that the remedies are not guaranteed just like rights. Remedies are not always ordered and when they are ordered they do not fully repair the harm of violations or prevent the new ones. Secondly, the governments, even established democracies, do not always fully observe and comply with the remedies. Thirdly, remedies have been paid less attention as compared to rights. The legal scholars, legislators and judges have devoted less attention to remedies than the underlying the human rights. Though many human rights instruments contain remedial provisions yet they provide limited guidance in shaping remedies.[163]

There exists a significant gap between the guaranteeing of rights and their implementation. Mere defining the rights of victims does not imply that they can, in fact, seek or obtain these rights. There involve multiple factors and reasons due to which persons subjected to serious human rights violations may not believe in the legal systems of the state where the violations happen. These reasons include lack of money, self-confidence to initiate legal proceedings to enforce one's rights, non-availability of legal aid, and lengthy and complicated legal procedure. [164]

Fundamental rights of accused are sacred and inviolable and the Constitution sets guarantees for their protection and enforcement. However, violation of fundamental rights of accused is a

[162] Kent Roach, *Remedies for Human Rights Violation: A Two-Track Approach to Supra-national and National Law*, (New York: Cambridge University Press, 2021), 2.
[163] Ibid., 2-3.
[164] See Nora Sveaass, "Gross Human Rights Violations and Reparation Under International Law: Approaching Rehabilitation as a Form of Reparation," *European Journal of Psychotraumatology* 4, no. 1 (May 2013): 1.

serious issue and because of lack of proper legislative framework, these violations are not adequately redressed in Pakistan. The available remedies include expensive and time-consuming modes and routes of litigation and hence they are ineffective and indeterminate. Resultantly, aggrieved individuals find no or inadequate remedy under the law for their loss and harm.

Wrongful detention of an accused is, for instance, only issue for which satisfactory remedy is arguably lacking. Other forms of injustice that are devoid of adequate redress include, false accusation, malicious prosecution, wrongful investigation, custodial torture, wrongful conviction, excessive punishment, improper exercise of prosecutorial discretion; and lack of fair trial opportunities.

The remedies provided in the legal framework are deficient and subject to various limitations. The public law remedies as provided in the Constitution and other statutory framework largely depend on the discretion of the Courts and aggrieved person is not entitled to claim these remedies as a matter of right. Thus, the law should incorporate a statutory right to compensation for the accused whose fundamental rights are violated in the criminal justice. The remedy of compensation for violation of fundamental rights should be provided by the courts under public law as matter of right and not in terms of constitutional discretionary jurisdiction.

Thus, the justice system needs to evolve the right-remedy jurisprudence to provide a right of adequate remedy or compensation to the aggrieved persons. The Pakistani legal system should employ the strict liability standard[165] to redress the violation of fundamental rights of accused in

[165] As the strict liability standard in Pakistan is already employed in many areas including blasphemy, drugs, *Qatal Khata',* and unintended injuries, possession of weapons and driving and traffic offences, so it is desirable to extend this for the enforcement of fundamental rights and public interest. See Imran Ahsan Khan Nyazee, General Principles of Criminal Law (Islamic and Western), (Islamabad: Shari'ah Academy, 2019), 171-172.

the light of principles of Islamic law and international best practices that provide adequate remedy against violations of fundamental rights of accused in criminal justice.

Besides reform in statutory framework for right to redress, the judiciary should also play its due and active role in developing redressive jurisprudence for the protection of rights of the accused (as victim of miscarriage of justice). Pakistani courts, like Indian courts, should provide redress in case of violation of fundamental rights of accused in the course of criminal justice. Thus, in appropriate cases, the courts may award redress spontaneously at the conclusion of criminal trial or where it is established that the accused has no fault.

Also, in light of the unimplemented constitutional mandate under Article 212(1)(b), a critical legal void persists in Pakistan. Despite the Constitution's provision for establishing administrative courts to handle tortious claims against the state, the legislature has not enacted the necessary enabling law. This failure leaves citizens without a dedicated, effective forum to seek redress for harms caused by government actions, undermining both access to justice and the principle of state accountability.

It is therefore recommended that the legislature should urgently prioritize passing comprehensive legislation to operationalize this constitutional clause. The required law must explicitly create a system of administrative courts or tribunals, clearly define their jurisdiction and powers over state-related torts, and establish fair and efficient procedures. By doing so, the state would fulfill its constitutional duty, provide a vital mechanism for citizen grievance, and strengthen the rule of law and public trust in the justice system.

In this regard, the legal framework should provide for the timelines for disposal of the claim for compensation, the period of limitation for filing the application, and for filing an appeal

against the decision. Instead of providing for fixed amount of monetary compensation, the amount of compensation should be determined according to certain guiding principles or factors.[166]

Instead of adopting a depersonalized compensation regime, the aggrieved persons should be offered to a certain extent, to select a remedial course that better suited them for their personal needs and circumstances. For instance, some aggrieved persons may prefer the option of less adversarial and expedited option, as compared to litigation for the remedy of the harm they have suffered.[167]

A fairly drafted compensation scheme providing for the state liability for redressing violations of fundamental rights of accused in criminal justice ought to be adopted without any unjustified or strict eligibility criteria, arbitrary limitations and excessive formalities. The aggrieved persons should not be overburdened with formal requirements when submitting the claim to a relevant authority and the legal aid should be available for those claimants who need legal assistance.[168]

[166] Madni, Habib and Akhtar, "Wrongful Prosecution a Miscarriage of Justice," 1656.
[167] Gutman, "An Empirical Reexamination of State Statutory Compensation," 374, 438.
[168] Wojciech Jasin´ ski and Karolina Kremens, "In quest of the optimum model for compensating wrongful convictions," in *Compensation for Wrongful Convictions: A Comparative Perspective*, ed. Wojciech Jasin´ski, Karolina Kremens (New York: Routledge, 2023), 230-232.

CHAPTER 4: STATE LIABILITY FOR REDRESSING VIOLATIONS OF FUNDAMENTAL RIGHTS OF ACCUSED

CHAPTER 4

STATE LIABILITY FOR REDRESSING VIOLATIONS OF FUNDAMENTAL RIGHTS OF ACCUSED

4.1 Introduction

"Where the common interest is joined for a common end, each individual members being subject to same danger, the loss, when it occurs, should be borne by the community and not alone by the injured individual."[1]

In 1913, when Edwin M. Borchard wrote these words about Anglo-American public law, there was no legislative development to grant an indemnity or compensation to the victims of the errors of criminal justice. However, after that moment till now the American legal system has made significant legal development to redress such victims of errors of justice.

Undoubtedly, to ensure justice and peace in society, states may have to detain accused persons allegedly committing or suspects of having committed a serious crime. It may thus temporarily take their liberty in the public interest, i.e. in order to deter criminal behavior and protect society. In this process, it is very likely that fundamental rights of accused are violated by the state bodies and officials in some way or other.

However, it seems not just and reasonable to force innocent accused persons (usually detained) only to bear this public burden and suffering. Does the state fulfil its obligation by merely letting them free from prison or it has some additional duty to perform? Without any kind

[1] Edwin M. Borchard, "European System of State Indemnity for Errors of Criminal Justice," *Journal of Criminology and Criminal Law* 3, no. 5 (1913): 697.

of prejudice to the collective right of the society, should not the state compensate the victims of errors or miscarriage of justice for the exceptional harm suffered for the interest of the whole society? The idea of compensating the victims of miscarriage of justice is hardly new as aver a century ago; Professor Edwin Borchard pioneered the notion of compensating the wrongly convicted persons.[2]

In the context of Pakistan, this chapter engages with prepositions as why should the state liable to redress the violations of the fundamental rights of accused in criminal justice? How the state should to redress against the fundamental rights of individuals accused for certain crime? What is the possibly effect or implications if the state provides redress in such cases?

As the preceding chapter of this study discusses the legal regime of Pakistan *vis a vis* right of redress for the accused whose fundamental rights are violated in the criminal justice, this chapter discusses about the appropriate party to bear the burden of redress when the violation has been committed by state officials or authority in criminal justice; the individual as the victim of the criminal justice system, or the State, as the beneficiary of the enterprise of criminal justice and as the party who inflicted that harm.[3]

Similarly, this chapter also looks into the question as whether the state is liable for acts of its officials as agents or they are personally and solely liable for the violation of fundamental

[2] See Edwin Borchard, "State Indemnity for Errors of Criminal Justice," *The ANNALS of the American Academy of Political and Social Science* 52, no.1 (1914): 108-114.
[3] Myles Frederick McLellan, "The Loss of Innocence and the Pursuit of Compensation for the Wrongly Convicted," (PhD diss., Anglia Ruskin University, February 2017), 2. https://www.academia.edu/70954728/The_loss_of_innocence_and_the_pursuit_of_compensation_for_the_wrongly_convicted. (Accessed April 27, 2024).

rights of an individual? To ensure indemnification anyway, it is equally necessary to dispel confusion and uncertainty about where financial responsibility is to rest.[4]

The study-chapter explores the foundational aspects of state liability for redressing violations of fundamental rights of accused *vis a vis* immunity of state and its functionaries. It evaluates the degree of fault by state agents necessary to attribute responsibility in terms of vicarious liability and the issue of immunities of state affecting the entitlement of redress for violation of fundamental rights of accused.[5]

4.2 State Liability for the Acts of its Officials and Agents

Professor Edwin Borchard pioneered the notion of state liability for the acts of its officials and agents. He propounded that "the state or community assume the risk of official wrongdoing and errors instead of permitting the losses resulting from such fault or mistake to be borne by the injured individual alone."[6] Since the publication of his thought in the United States in 1913, there have been continuous debates and discussions about the errors of justice and the possible ways of rectification and reform in criminal justice. The topic of state liability for the wrongful or mistaken actions of its officials during criminal justice is only one dimension of this discourse. Regarding the state liability to redress the grievances and harms suffered due to its officials, various arguments have been advanced in order to justify or criticize it.

[4] Fallon, "Bidding Farewell to Constitutional Torts," 979.
[5] McLellan, "The Loss of Innocence," 50.
[6] Edwin M Borchard, *Convicting the Innocent: Sixty-Five Actual Errors of Criminal Justice* (New York: Garden City Publishing Company, Inc., 1932), v. https://ia802602.us.archive.org/30/items/convictinginnoce00borcrich/convictinginnoce00borcrich.pdf. (Accessed April 27, 2024).

4.3 Arguments for State Liability for Redress

Various arguments are put forward for state responsibility to provide redress to the accused as victims of violations of fundamental rights. These arguments include 'affirming the sanctity of plaintiff's right, deterrence of constitutional violations, breach of social contract, corrective justice, responsibility as principal and employer, consistency with regard to liability for common law torts and constitutional violations, enhancing the credibility and legitimacy of the criminal system, moral satisfaction to the acquitted accused persons, shift of the risk to the party better suited to bear it, encouraging state agents to prevent wrongful detention and lowering the volume of detentions.[7] Some important arguments are discussed in following:

4.3.1 Takings Analogy or Eminent Domain Theory

One of the major arguments put forward in favor of state liability to redress the violations of fundamental rights is *Takings Analogy*. *Taking* argument proposes that the criminal justice system should compensate innocent victims for wrongs or errors suffered due its wrongful or erroneous operation and thus the argument is meant to restricting the government from leaving or forcing some aggrieved persons alone to bear this public burdens. The taking analogy requires that in all fairness, the burden should be borne or shared by the 'public as a whole'. [8]

The constitutions of several countries and the provisions of various international treaties warrant the Government to take property for public purposes. In such case, however, the affected

[7] Doménech and Puchades, "Compensating Acquitted Pre-Trial Detainees," 168.; Sushila Rao, "Constitutional Rights Violations and Compensatory Jurisprudence in India and U.S.A.: Justifications and Critique," *Student Bar Review* 18, no. 1 (2006): 108-110.

[8] Kelly Shea Delvac, "Liberty and Just Compensation for All: Wrongful Conviction as a Fifth Amendment Taking," *Connecticut Law Review* 53, no. 4 (February 2022): 1018; Jeffrey Manns, "Liberty Takings: A Framework for Compensating Pre-trial detainees," *Cardozo Law Review* 26, (2005): 1951; *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

owners have right to receive a reasonable compensation for the loss and the state has liability to pay it.[9] Thus, when a private property is taken for a public interest, like road or building, the state owes duty to pay compensation to the owner.[10]

Similarly, the State may detain suspects and accused persons allegedly have committed a serious crime. The government in such cases may temporarily take their liberty in the public interest, i.e. in order to protect society and deter criminal behavior. But it seems unfair and unjust to force innocent detainees alone to bear this public burden or loss. Instead, the acquitted persons "should consequently have a right to be compensated for this exceptional harm suffered for the benefit of the whole society".[11]

Based on the analogy that can be possibly drawn between the taking of the property and taking of people by the state, some scholars maintain and appreciate closed interaction of liberty and property to the effect that and consider the "idea of compensating individuals for infringement of liberty could be extended to other spheres."[12]

Similarly, the Constitution of Pakistan 1973 also contains provisions relating to provide compensation to the property owners when their property is acquired by the state for public purpose. The Constitution of Pakistan states that "no property shall be compulsorily acquired or taken possession of save for a public purpose, and save by the authority of law which provides

[9] Doménech and Puchades, "Compensating Acquitted Pre-Trial Detainees," 167; See for example: Article 33.3 of Spanish Constitution; Article 17.1 of Charter of Fundamental Rights of the European Union; Fifth Amendment of U.S.A. Constitution. The U.S. Supreme Court has stated, the takings clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" Armstrong v. United States, 364 U.S. 40, 49 (1960).
[10] Borchard, "State Indemnity," 207.
[11] Doménech and Puchades, "Compensating Acquitted Pre-Trial Detainees," 167.
[12] Manns, "Liberty Takings," 2021.

for compensation therefore and either fixes the amount of compensation or specifies the principles on and the manner in which compensation is to be determined and given."[13]

Thus, the argument of takings is considered relevant and can play a significant role in establishing right of redress for those aggrieved persons whose fundamental rights are violated in the criminal justice. Just like the compensation for the loss of property owners, the owners of fundamental rights should also be provided the right to redress or compensation by the state as the preservation of public peace through criminal justice is a public purpose and in both cases public is the equally beneficiary.[14]

4.3.2 Making the Aggrieved Party Whole on the basis of Corrective Justice

Admittedly, wrong once committed to the injured party cannot be undone and it becomes part of history. Providing redress or compensation means to restore the victims in a place, to the extent possible, as if no wrong has been committed. The corrective justice theory[15] focusing the perspective of victim losses implies a responsibility to repair or correct an injury, regardless the blame is on the state or any other entity for the violations of fundamental rights.[16]

Redress in terms of compensatory damages based on 'corrective justice theory' aims to correct the wrong and make the aggrieved party whole following the injury to the person,

[13] Article 24(2) of the Constitution of Pakistan. However, Clause 4 of the same Article qualifies this right of compensation stating as "the adequacy or otherwise of any compensation provided for by any such law as is referred to in this Article, or determined in pursuance thereof, shall not be called in question in any court."
[14] Edwin Borchard, "State Indemnity for Errors of Criminal Justice," *Boston University Law Review* 11, no. 2 (1941): 208- 209.
[15] "Corrective justice is the idea that liability rectifies the injustice inflicted by one person on another. This idea received its classic formulation in Aristotle's treatment of justice in *Nicomachean Ethics*, Book V". See Ernest J. Weinrib, "Corrective Justice in a Nutshell," *The University of Toronto Law Journal* 52, no. 4 (2002): 349.
[16] Alanna Trivelli, "Compensating the wrongfully convicted: A Proposal to Make Victims of Wrongful Incarceration Whole Again," *Richmond Journal of Law and the Public Interest* 19, no. 3 (2016): 270.

his property and economic interest or the rights which he would have been enjoying otherwise. Thus, when an accused person has lost his right due to state action in criminal justice, there is a duty on the state to fully restore his rights. The burden is laid on the state simply for the reason it is the state legal system that caused the harm to the accused person and corrective justice applies when element of causation is proved.[17]

The right-remedy principle is an expression of corrective justice theory whereby the wrongdoer is required to correct a loss though compensating the victim.[18] Thus, the Corrective justice theory is considered to provide a sound theoretical and procedural foundation for moral obligation of the state to indemnify the individuals for the violations of their constitutional rights in criminal justice and the "vehicle for achieving corrective justice is strict liability".[19]

4.3.3 Strict Liability Theory

It has also been argued that the *strict liability theory* is "the most philosophically and procedurally sound theory for imposing liability on the state".[20] The theory is regarded as 'conceptually superior' than other theories supporting state compensation in the field of public law while redressing violation of fundamental rights of accused.[21]

Eminent writers like Professor Edwin Borchard, Joseph H King, Keith S. Rosenn and Lauren C. Boucher recommended monetary compensation on the basis of strict liability theory

[17] Ibid., 270.
[18] Seth Davis and Christopher A. Whytock, "State Remedies for Human Rights," *Boston University Law Review* 98, no. 2 (March 2018): 447-448.
[19] Deborah Mostaghel, "Wrongly Incarcerated, Randomly Compensated- How to Fund Wrongful Conviction Compensation Statues", *Indiana Law Review* 44 (2011): 527.
[20] Boucher, "Advancing the Argument in Favor of State Compensation," 1073.
[21] Myles Frederick McLellan, "The Loss of Innocence and the Pursuit of Compensation," 2, 40; Joseph H. King, Jr., "Compensation of Persons Erroneously Confined by the State," *University of Pennsylvania Law Review* 118, no. 7 (June 1970): 1091, 1109-1111.

regardless of any culpable role of the government agent.[22] The argument is made that the most principled approach to addressing the harms caused by state actors is to frame relief as a constitutional tort engaging the theory of strict enterprise liability.[23]

The principal ground of this theory is that in the process of any great undertaking or enterprise like management of a large-scale industry or the administration of criminal justice, the accidents are bound to happen. Thus, like workmen' compensation in cases of accident, the victims of miscarriage of justice are entitled for the compensation by the state as it is unfair to presume that individuals injured alone should bear the burden of errors of criminal justice system whereas the losses are suffered for the common purpose of public peace by the prosecution of crime. When everyone reaps the benefits of the criminal justice system, then the society as a whole should bear the loss and not the individuals injured alone.[24]

Similar to the strict liability theory, there is argument of enterprise liability without fault as a method for imposing losses on superior risk bearers. It envisages that "one who should know that his activity, even though carefully prosecuted, may harm others, should treat this harm as a cost of his activity. If the activity is a business enterprise, this cost item will influence pricing and will be passed on to consumers, spread so thin that no one will be seriously affected. If the activity is not a business enterprise, the actor should not prosecute it for his own purpose unless he is willing to pay the price."[25]

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[22] Joseph H. King, Jr., "Compensation of Persons Erroneously Confined by the State," 1092; Edwin Borchard, "State Indemnity for Errors of Criminal Justice," 110; Keith S. Rosenn, "Compensating the Innocent Accused," *OHIO State Law Journal* 37 (1976): 716, 726.
[23] Myles Frederick McLellan, "The Loss of Innocence and the Pursuit of Compensation," 2, 37, 49.
[24] Edwin Borchard, "State Indemnity for Errors of Criminal Justice," 108-114; Boucher, "Advancing the Argument in Favor of State Compensation," 1072, 1101; Michal, "Compensating Acquitted," 407.
[25] Clarence Morris, "Hazardous Enterprises and Bearing Capacity," *The Yale Law Review* 61 (1952): 1176.

Workmen's compensation laws are good example of this argument where the person claiming the compensation is a poor risk bearer whereas industry enterprise may shift the cost of workmen's compensation based on liability without fault to the consumers. This argument, however, has been rebutted by Clarence Morris that those engaged in dangerous activities sometimes are and sometimes are not better risk bearer than those injured by prosecution of the dangerous activities.[26]

Nonetheless, it is unjust and inequitable to hold officers personally liable for constitutional violations without proof of fault. If it were thought wise to move to a regime that compensates *all* violations of constitutional rights regardless of individual fault or the lack thereof, then responsibility to redress should rest directly on government, not on the individual state officials or government servants.[27]

To ensure compensation for injury, injury should be of controlling effect, not the degree of fault or culpable role of state agent. Accordingly, the government, not the agent, justifying the mistaken exertion of power over the individual should redress the injury as a matter of social adjustment. In cases of miscarriage of justice exclusively resulting of the acts of private persons, then the government's obligation would appear gratuitous and might be linked to its obligation to compensate the victim. But in cases of miscarriage of justice in terms of violation of fundamental rights from the view point of the government is more accurately characterized as a *quid pro quo*.[28]

[26] Ibid., 1179.
[27] John C. Jeffries, Jr., "The liability rule for constitutional torts," *Virginia Law Review* 99, no. 2 (2013): 240.
[28] Jr. Joseph H. King, "Compensation of Persons Erroneously Confined by the State," 1096.

Professor Jason Varuhas posits that the parties should receive damages solely because their fundamental right has been breached or violated regardless of whether they suffered consequential loss on the basis of vindicatory approach providing for torts actionable per se (TAPS) to ensure the principle of law *Ubi jus*, *ibi remedium* and the principle of equality.[29] Accordingly vindicatory damages "are not only available to redress factual losses consequential upon the wrong, i.e. negative psychological, physical or economic effects suffered by the claimant, but also for the wrongful interference with the underlying protected interest in itself."[30]

4.3.4 Doctrine of Constitutional Torts

Tort is a civil wrong which result in un-liquidated damages (Damages that are not predetermined) if one person violates the legal right of the other. If a government servant violates the fundamental rights of an individual then the torts arising will be categorized as a constitutional tort. Constitutional tort law is generally a concept of vicarious liability of the state. The constitutional tort arises from the conduct that violates a duty both to the specific individual and the society at large.[31] Employer, in such cases it is the state, is liable for the wrongful acts of its servants during the course of employment, on the basis of the principle

[29] Thus, even if the claimant suffers no consequential factual losses, damages ought to be awarded for interference with the right in and of itself, as in TAPS . See Jason Ne Varuhas, *Damages and Human Rights* (Oxford: Hart Publishing, 2016) 47, 474.

[30] "Thus, even if the claimant suffers no consequential factual losses, damages ought to be awarded for interference with the right in and of itself, as in TAPS. Ibid., 475.

[31] See Nathan S. Chapman, "Fair Notice, the Rule of Law, and Reforming Qualified Immunity," *Florida Law Review* 75 (2023): 38.

'*respondeat superior*'.[32] Constitutional tort based on the principle of strict liability eliminates the limitations in terms of state immunities and remove thresholds of fault for state liability.[33]

In South Asian countries, the Supreme Court of India since 1980s and 1990s introduced and employed the practice of constitutional torts under the public law proceedings, for the enforcement of fundamental rights in liberal terms. Following the pattern of Indian jurisprudence, the superior courts of Pakistan, Bangladesh and Sri Lanka adopted their own variant standards of public interest litigation. The Courts of the respective countries recognized, relaxing the requirements of tort law, wide range of rights to be enforced through public law proceedings.[34]

4.3.5 Rule of law and Government Accountability

In the modern world, every state ensures rule of law for administration of justice. The role of the judiciary's independence and the supremacy of the constitution ensure that laws are applied equally. The notion of the rule of law requires that everyone including the government is to be held responsible in the 'ordinary' courts according to 'ordinary law'.[35] Thus, the rule of law requires judicial remedies for official wrongdoing to ensure accountability and redressing the wrong suffered in the administration of justice.[36]

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[32] The constitutional torts are based on the concept of *vicarious liability* of the state for which the maxim stands as "*quifacit per alium facit per se",* i.e. he who acts through another does the act himself. The concept of vicarious liability postulates that if an employee commits a tort in the course of employment, then his master or employer will be vicariously liable despite the fact that he himself did not commit the tort.

[33] Myles Frederick Mclellan, "Innocent Compensation: Private Law Principles for Public Law Remedies," 4, 33, *ResearchGate*, https://www.researchgate.net/publication/318006316, Accessed March 2, 2024.

[34] Rehan Abeyrante, "Ordinary Wrongs as Constitutional Rights: The Public Law Model of Torts in South Asia," *Texas International Law Journal* 54 (2018): 4; *SSRN*, https://ssrn.com/abstract=3134217.

[35] A V Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed., 1959), 193.

[36] Kathryn M Campbell, "Exoneration and Compensation for the Wrongly Convicted: Enhancing Procedural Justice," *Manitoba Law Journal* 42, no. 3 (2019): 267; Fallon, "Bidding Farewell to Constitutional Torts," 935, 940.

Thus, is due to the reason that the state is also a subject of law and no authority in the State is outside the domain of law, even the authority is vested with the wide discretionary powers to make decisions in any state. To the individual, the state acts and performs its functions only through organs, or agents, whose powers are determined by law.[37]

Providing redress for the wrongs suffered acknowledges accountability. Thus, the rationale and reasonable expectation of redress require that the state should assume responsibility for the miscarriage of justice.[38] Further, redress in cases of miscarriage of justice has its legitimacy and foundation on the principles of equity, justice and fairness.[39]

Supreme Court of Pakistan held that the fundamental rights in a living Constitution were to be liberally interpreted so that they continued to embolden freedom, equality, tolerance and social justice.[40] Thus, for an efficacious way to provide relief through state machinery, the courts can redress grievances against state officials while making accountability of the exercise of administrative discretion by the state authorities.[41]

4.3.6 *Respondeat Superior* & the Least Cost Avoider Theory

State responsibility to redress for the actions of its officials and servants is also justified on the ground and requirement of a fundamental principle of the employer's responsibility for the torts of the servants performed within the scope of their duties or authority. Though the concerned officers or servants are not relieved from their respective liability to the community for their

[37] Edwin M. Borchard, "Governmental Responsibility in Tort, VI," *Yale Law Review* 36, no. 8 (June 1927): 1099.
[38] Campbell, "Exoneration and Compensation for the Wrongly Convicted," 267.
[39] Edwin Borchard, "State Indemnity for Errors of Criminal Justice," 110.
[40] *Jurists Foundation v. Federal government* PLD 2020 Supreme Court 1.
[41] Bakht Munir, Ali Nawaz Khan and Naveed Ahmad, "Control Over Administrative Discretion: A Case Law Study in the Context of Pakistan," *ISSRA Papers* 13 (2021): 6.

willful wrongs, yet the individual aggrieved is not to be redressed solely by the subordinate officers or servants.[42]

Similarly, on the basis of the *Least Cost Avoider Theory*,[43] it has been argued that states should be strictly liable to compensate the victims of miscarriage of justice. States, as compared to the individuals, are in the best position to prevent miscarriage of justice therefore the responsibility to compensate lies on the states. The least cost avoider theory is an economics-based theory which is applied in value-neutral cases where neither party is at fault. Simply stating, whichever party to a dispute is in the best position to avoid violation or accident is the party who should bear the burden.[44]

The rationale behind this theory is that the liability will cause and encourage the least cost avoider to prevent the accident and loss in future. While making the states liable for redress or compensate the victims of miscarriage of justice, this step will reduce the likelihood of most common causes of miscarriage of justice in terms of violation of fundamental rights of accused persons.[45]

4.3.7 Credibility and Legitimacy of the Criminal Justice System

State may not possibly prevent all the errors of the criminal justice system, yet it can and should compensate the aggrieved persons whose rights are violated in the criminal justice. When a state fails in its duty of administering criminal justice, then it should accept its responsibility for the

[42] Edwin M. Borchard, "Government Liability in Tort," *The Yale Law Journal* 34, no. 3 (January 1925): 258.
[43] The *least cost avoider* theory maintains that in cases where the harm is accidental, the liability should rest on the shoulder of the party that was in better position to 'avoid the harm by taking preventive measures'. Ibid., 1102.
[44] Boucher, "Advancing the Argument in Favor of State Compensation," 1088.
[45] Ibid., 1087, 1103.

mistake and compensate those who suffered due to its erroneous actions.[46] More so, when the state itself acknowledges and freely admits that it owes obligation to compensate the aggrieved individuals for the infringement of private rights for the public interest.[47]

It has also been argued that compensation may enhance the credibility and legitimacy of the criminal system by showing a willingness to admit mistakes and take the consequences of the application of forceful measures seriously. Similarly, it has been supposed that it would be odd to compensate (in terms of deducting sentence the time spent in detention) the convicted accused but not the acquitted.[48]

If the power to administer criminal justice is acknowledged and respected by the individuals, then is equally important that a mechanism should also exist for compensating damage resulting from the defective functioning of criminal justice. A legal mechanism that allows for the elimination and redressing of errors and harms is a necessary condition to legitimize the criminal justice.[49]

It is well-settled enunciation and articulation of law expressing that no man should suffer because of the fault of the court or delay in the procedure. The maxim '*actus curiae neminem gravabit'* means an act of the court shall prejudice no one. Nobody should become victim of injustice as a consequence of mistake of the court, and in the event of any injustice or harm suffered by mistake of the court; it should be remedied by making necessary correction

[46] Trivelli, "Compensating the wrongfully convicted," 273, 281; Delvac, "Liberty and Just Compensation for All," 986, 1018.
[47] Edwin Borchard, "State Indemnity for Errors of Criminal Justice," 109.
[48] Doménech and Puchades, "Compensating Acquitted Pre-Trial Detainees," 168.
[49] Wojciech Jasin´ski and Karolina Kremens, ed., *Compensation for Wrongful Convictions: A Comparative Perspective* (New York: Routledge, 2023), 2.

forthwith. Thus, if the court is satisfied that it has committed a mistake, then such person should be restored to the position before happening mistake.[50]

Although, aggrieved accused persons whose fundamental rights are violated in the criminal justice become victims of irreparable loss and can never be compensated by merely providing monetary compensation, yet the state's failure to compensate the aggrieved party would simply mean abandoning its obligation to bear the burden of the failure in criminal justice system.[51]

4.3.8 Incentive effects of compensation on state agents

It is argued that the redress involves and internalizes, at least partially, the social costs of wrongfully detentions, thus encouraging State agents to prevent detention of accused, by increasing the level of care taken when detaining people and by lowering the volume of violations. It does not necessarily mean that every acquitted detainee should receive compensation.[52]

The Government liability addresses the apprehension that officials may get lazy or reluctant in the performance of their duties by threats of personal liability. Under a regime of entity liability, governments could easily establish separate penalties for mischievous officials or subject them to personal liability for malicious misconduct and wrongdoing.[53]

However, this argument is challenged in the terms that the threat of civil liability factor would hardly make any difference or deterrent effect to the behavior of the state functionaries,

[50] *Homoeo Dr. Asma Noreen Syed v. Government of the Punjab* PLJ 2022 SC 317.
[51] Chelsea N. Evans, "A Dime for Your Time: A Case for Compensating the Wrongfully Convicted in South Carolina," *South Carolina Law Review* 68, no. 4 (2017): 569.
[52] Doménech and Puchades, "Compensating Acquitted Pre-Trial Detainees," 168.
[53] Fallon, "Bidding Farewell to Constitutional Torts," 980.

and it is extremely doubtful that the incidents of errors would not happen in criminal justice system.[54]

4.3.9 Indemnification as Reasonable Expectation

Compensation or redress for violation of fundamental right of accused due to errors or mistakes on the part of state officials is considered as a reasonable expectation.[55] As it can be reasonably expected that once it is shown to the court the fundamental rights have been violated, the court will not be at loss to find what 'directions', 'orders', or 'writs' they must issue in order to ensure that the fundamental rights of the subjects are respected by the State. In fact, the courts are vested enormous powers with regard to enforcement of fundamental rights.[56]

It is expected that the state should provide compensation to the aggrieved persons wrongly incarcerated in the criminal justice, for that is the least thing that the community can do.[57] Hence, the public tends to support any such move of providing indemnity and assistance to those who, though no fault of their own, have been accused and suffered harm by the criminal justice system.[58]

The public policy reasons and fairness argument support the compensation to the accused who are wrongly convicted. It has been evaluated that substantial compensation tends to reduce

[54] Lawrence Rosenthal, "Second Thoughts on Damages for Wrongful Convictions," *Chicago-Kent Law Review* 85, no. 1 (2010): 161.
[55] Campbell, "Exoneration and Compensation for the Wrongly Convicted," 266.
[56] A.K. Brohi, *Fundamental Law of Pakistan* (Din Muhammadi Press, Karachi, May 1958), 442.
[57] Boucher, "Advancing the Argument in Favor of State Compensation," 1072.
[58] See Elizabeth Jeanne Lopez, "Public Perceptions of Exonerees' Deservingness of Compensation and Expungement," (Minnesota State University, Mankato, May 2023), 37, https://cornerstone.lib.mnsu.edu/etds/1293/. Accessed April 29, 2024; Adele Bernhard, "Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who have Been Unjustly Convicted and Later Exonerated," *Drake Law Review* 52 (2004): 711, 713.

post-release offending. As the compensation help them to overcome the problem of re-integration and make them feel of being valued by society.[59]

4.3.10 Moral Satisfaction for the Acquitted Accused

There is another argument that advocates for enacting a statutory compensation on the principle that the state, though may not has a legal duty, is under moral obligation to indemnify and compensate the victims of errors of criminal justice. This is for the reason that justice requires restitution of the victims and rectification of the losses suffered either due to mistake or malice.[60]

Redress provides a sense of moral satisfaction to the acquitted defendants**.** It shifts the risk of wrongful detention to the party better suited to bear it (which is not the wrongfully detained person, but the community.[61] As for the compensation of victims, the governmental bodies are better situated than individual officers to bear this burden.[62] On the other hands, states are not the kinds of entities that can suffer embarrassment in any psychologically recognizable sense.[63]

4.4 Arguments against State Liability for Redress

On the other hand, there is an opponent view that contests the legitimacy of the compensation or redress by the state to the acquitted persons. There are arguments propounded against the obligation of the state to redress against miscarriage of justice or violation of fundamental rights of accused in criminal justice by the state officials and bodies. Instead, the individuals

[59] Evan J. Mandery, et al., "Compensation Statutes and Post-exoneration Offending," *Journal of Criminal Law and Criminology* 103, no. 2 (2013): 583.
[60] Jessica R. Lonergan, "Protecting the innocent: A Model for Comprehensive, Individualized Compensation of the Exonerated," *Legislation and Public Policy* 11 (2008): 452.
[61] Doménech and Puchades, "Compensating Acquitted Pre-Trial Detainees," 168.
[62] Fallon, "Bidding Farewell to Constitutional Torts," 979.
[63] Ibid., 982.

themselves should bear the burden of liability for violations of rights of accused. Some of these arguments are discussed in following:

4.4.1 Fiscal Burden on the State

There are concerns about the fiscal sustainability. It is argued that implementing any statutory compensation may not be practically feasible for the government as any action of legislation would lead to surge of numbers of claims against state for paying out more than its affordability.[64] Eventually, the state may not be able to afford and realize any such liability in practical terms.

However, looking at the practical trends, it seems that this apprehension is unfounded as Bernhard pointed out that the cost of compensating deserving individuals has been minimal in those states where exonerations were in greatest number.[65] The issue can, however, be settled through the structured or tiered compensation schemes like those in Washington State or England, which define clear schedules and caps on compensation amounts. Further, the State can also set an adequate eligibility criteria limiting compensation claims, and this could reduce frivolous claims and aligns with international human rights standards.

4.4.2 Possibility of Error in Acquittal and Compensation to Guilty

Acquittal does not necessarily amount to innocence of accused. Sometimes, in criminal justice, innocent people become victims of violations of fundamental rights and are convicted thereof, and the factual guilty are set free.[66]

[64] Boucher, "Advancing the Argument in Favor of State Compensation," 1098.
[65] Bernhard, "Justice Still Fails," 715.
[66] See Achile, "Miscarriage of Justice in Legal System," 37.

Thus, it is stated that in presence of possibility of this factor, it may not be appropriate to provide redress or compensation to the accused persons who are acquitted and set free due to lack of evidence or benefit of doubt. Legislators are often concerned with the cost and manner of enforcing such obligation as there is possibility of recovering compensation by the undeserving guilty individuals who might have escaped justice.[67]

Admittedly criminal courts commit mistakes while adjudicating and sometime individuals who actually committed the crime are acquitted. In such case, compensating them would cause to foster crime as we cannot neglect the possibility of factually guilty detainees being acquitted, in which case compensation increases the expected private benefits from crime. Besides, arguably compensating every acquitted detainee can endanger the application of the principle of *in dubio pro reo*[68], as the courts could thus convict some accused, even though there are reasonable doubts as to their guilt, in order to avoid them being "undeservedly" compensated. Nevertheless, it is not clear either why judges will tend to behave in this way, especially bearing in mind that compensation is not paid out of their pockets. [69]

The issues of risk of compensating guilty individuals could, however, be addressed with policy safeguards or eligibility criteria. Eligibility should require a determination on the basis of probability, not merely procedural acquittal. This burden could rest on the claimant, or be shifted to the state with stringent procedural safeguards to prevent abuse. The Courts or independent review panels could assess claims, weighing evidence and innocence, preventing automatic compensation based solely on acquittal. The Institutional review by specialized tribunals or

[67] Boucher, "Advancing the Argument in Favor of State Compensation," 1073.
[68] That principle means that an accused is not to be convicted if there exists any doubt about his guilt.
[69] Doménech and Puchades, "Compensating Acquitted Pre-Trial Detainees," 176.

commissions can ensure that the system is neither too restrictive nor too permissive, balancing fairness and deterrence.

4.4.3 Legality of the Act: State Acting Lawfully Can Legally Injure No One

This argument is based on the principle that he who legally uses his own legal authority incurs no legal liability. Yet this argument has also been subjected to restriction in its application. The rule, however, has been modified and transition happened as now the general rule of both public law and private law is that a private action is lawful only to the extent that it does not infringe others' legal rights.[70]

Thus, the exercise of the legal authority of the state, to limit the rights of accused in certain circumstances is justified and procedurally safeguarded. For instance, the pre-trial detention is substantially justified by the existence of a reasonable suspicion and grounds of public interest, such as the risks of flight or interference with justice. Furthermore, this detention is also procedurally safeguarded. Consequently, the subsequent acquittal of accused does not affect the legitimacy of pre-trial detention, not it violates the acquitted accused's rights, and hence there arises no state liability to provide redress under human rights law.[71]

However, this argument can be engaged in terms of the fact that when a state violates a fundamental right, it steps out of its sovereign role and becomes a legal wrongdoer, liable to provide redress. Pakistan's Constitution guarantees protection of fundamental rights, including liberty and equality before law,[72] underpinning state liability for violations such as wrongful imprisonment. Further, Pakistan's accession to the International Covenant on Civil and Political

[70] Borchard, "European System of State Indemnity for Errors of Criminal Justice," 696.
[71] Michal, "Compensating Acquitted Defendants for Detention," 407, 409.
[72] Articles 4, 9, and 25 of the Constitution.

Rights (ICCPR) includes obligations to provide redress for wrongful convictions[73] reinforcing both monetary and non-monetary remedy frameworks.

4.4.4 Fault not attributed to the State

It is also considered that where fault is not attributed to the state, then the state is not subject to any obligation to provide redress to the aggrieved persons. This argument is based on the principle "no liability without fault". This implies that when a state actor performed any act without any malicious intent and the injury was unforeseeable, there is no fault on the part of the state and it is unfair to hold the state liable for accidental and inevitable harm. Thus, the state should not be financially liable in cases where in a normal legal course, fundamental rights of an innocent individual are violated. This argument, however, has been rebutted on the basis of eminent domain or taking argument and strict liability theory.[74]

Besides, this doctrine went through significant change so that "for large classes of cases liability is predicted on the mere causal relation between the act and injury, whether inflicted with or without fault. The workmen's compensation acts are perhaps the clearest illustration of this change in legal principle."[75]

4.4.5 Not Every Violations Justify Redress

It has been stated that not every violation of a right yields a remedy, even when the right is constitutional. For instance, application of the doctrine of sovereign immunity defeats remedy is one commons example, where the government officials including police and judicial officers

[73] See Article 9(5) of the ICCPR
[74] Boucher, "Advancing the Argument in Favor of State Compensation," 1073.
[75] Borchard, "European System of State Indemnity for Errors of Criminal Justice," 696.

may not be sued without prior consent of the government.[76] However, this argument can be addressed on the ground that the legal rights especially those guaranteed under the Constitution should be not be tread as useless, keeping in view the principle "where there is a right, there is a remedy" as discussed earlier. The argument of sovereign immunity has been engaged ahead. Further, the state's liability arises from its own misconduct, not from a definitive declaration of the accused's factual innocence.

4.4.6 Doctrine of Sovereign Act (Act of the State)

This argument states that when a state in the administering of justice exercises it sovereign authority, it is not under any obligation to bear the burden of the loss which a particular individual has to suffer due to its action. For the reason it is not illegal to err and in case an innocent person is convicted by mistake, it is burden which he has to bear as a citizen of state. However, if there happens any intentional wrong or illegality, either on the part of private individual or by some state official, the aggrieved would be entitled for redress under the law.[77]

This argument, however, was challenged on the ground that under modern public law, only general burdens are to be borne by the citizens of the state as a whole, not special sacrifices made in the interest of the whole community. Where a citizen makes special sacrifices for the general welfare of society, he is compensated for his special sacrifices like in eminent domain cases.[78]

[76] Bernhard, "Justice Still Fails," 723; Joseph H. King, Jr. "Compensation of Persons Erroneously Confined by the State," 1099.
[77] Borchard, "European System of State Indemnity for Errors of Criminal Justice," 694.
[78] Ibid., 695.

4.4.7 Doctrine of Qualified Immunity to the Public Officials

The doctrine of qualified immunity is a defensive doctrine in response to various theories of redress and recovery against the government officers. It is a defence for the government officials when they are sued against the violation of civil rights of the people.[79] The doctrine is applicable only in cases when an officer factually acted in good faith and with probable clause. The doctrine negates and defies the public perception that official misconduct and abuse of process is rampant. It exonerates the honest government servants from instances of the miscarriage of justice in the form of fictitious and unmeritorious suits against public officials and minimizes it occurrence.[80]

The argument of qualified immunity has served in the cases where constitutional liability is highly unpredictable. Thus, the immunity is not granted when an officer while performing without due care or acting in bad faith, violated a criminal law or constitutional rule affecting the fundamental rights of individuals.[81] Still, some commentators challenge the doctrine of qualified immunity on the grounds of its legality that it is "unlawful and inconsistent with conventional principles of statutory interpretation."[82]

The primary respondent in a compensation claim should be the State. This protects individual officers from personal financial ruin for bona fide mistakes made in the course of their duties. The focus is on systemic failure, not individual scapegoating. However, the statute should mandate that if the state is required to pay compensation due to proven malice or gross

[79] Andrea Vieira, Addie C. Rolnick and Anona Su, "Tackling the Qualified Immunity Problem with State Law," *Nevada law Journal* 22, no. 3 (2022): 1030-31.
[80] David Crump, "Qualified Immunity: Where Do We Go From Here?," *Albany Law Review* 84, no.3 (September 2021): 577; *Pierson v. Ray*, 386 U.S. 547, 555-557 (1967).
[81] Chapman, "Fair Notice, the Rule of Law, and Reforming Qualified Immunity," 1-2.
[82] William Baude, "Is Qualified Immunity Unlawful?," *California Law Review* 106 (2018): 45.

negligence by a specific official, the state has the right to seek indemnity from that official through internal disciplinary proceedings or civil service rules. This creates accountability without creating a immediate "chilling effect" on legitimate police work. The law can explicitly protect officials who act in good faith and with reasonable cause, even if their actions ultimately lead to an acquittal.

44.8 The Concern of Judicial Overreach

Critics from a strict separation of powers perspective argue that mandating the state to pay compensation from the public treasury is a quintessentially executive/legislative function. For judges to order such payments constitutes judicial overreach into the fiscal and policy domain of the other state organs. They caution that expansive state liability regimes empower courts excessively, intruding into legislative or executive prerogatives.[83]

However, the counterargument highlights that clearly legislated frameworks with defined roles for courts, administrative agencies, and legislatures balance judicial oversight with institutional competence, preserving separation of powers while offering effective remedies. For, example, legislative compensation statutes often specify procedural and substantive limits on judicial discretion, ensuring accountability and predictability.

The argument can also be rebutted on the ground that the judiciary is under duty to enforce fundamental rights. When the executive violates fundamental rights and the legislature

[83] See Nasir Iqbal, Supreme Court warns against unbridled judicial overreach*, Dawn*, March 7, 2021, https://www.dawn.com/news/1611139, Accessed on November 7, 2025; Bakht Munir, Akhtar Ali Ansari, and Tahir Mahmood, "Judicial Activism in Pakistan and its Impacts on Tripartite Governance: Lessons from the US Constitutional Construct" *Global Political Review* IX, no. III (2024): 44-45, https://doi.org/10.31703/gpr.2024(IX-III).05.

fails to provide a remedy, it is not only the right but the duty of the judiciary to enforce the Constitution.

4.4.9 Impact on Judicial Finality and Legal Certainty

One other argument is that expanding state liability may undermine finality of judgments and legal certainty, prompting continuous challenges and claims. However, well-drafted statutes may include time limits for claims, and finality provisions to uphold legal certainty while safeguarding rights. The legal frameworks may integrate filing deadlines and finality clauses to maintain balance.

There might be other possible arguments in favor or against the state liability in the context of redressing violations of fundamental rights of accused yet it seems that the arguments favoring the state liability are amenable and better suited to ensure protection of fundamental rights of the individuals from the miscarriage of justice. The issues like fiscal burden on the state or the risk of compensating guilty individuals could be addressed with policy safeguards or eligibility criteria. Their support to the rule of law, human rights and state accountability is quite obvious and understandable. Thus, this study prefers the argument or conceptual framework of strict liability for its viable application to the legal regime of Pakistan with respect to protection and enforcement of fundamental rights of accused.

Informed by the philosophy and ethos of strict liability to ensure fairness, peace and justice, the legal framework of Pakistan should make the state liable for its wrongs or mistakes committed in the course of criminal justice.

4.5 Redress Mechanism: Standards and Procedure

In case a state acknowledges and owes its obligation to provide to the innocent aggrieved persons whose fundamental rights have been violated in the criminal justice, the next preposition which involves in this regard is the *modus operandi* or mechanism of redress. There can be various thresholds and standards depending upon the legal systems of the states.

With respect to the issue of wrong or fault committed by state officials, there are various fault thresholds as prerequisites to compensation or redress for the victims of violation of fundamental rights. These are found in causes of action that can be framed within the laws of intentional torts, negligence, and strict liability. Intentional torts and negligence require proof of fault by way of showing that the defendant has intentionally committed a wrong. The foundation of a fault regime is corrective justice. Torts of strict liability do not require proof of fault and the State is subject to strict enterprise liability which removes the various burdens to the pursuit of compensation for those conspicuously and clearly harmed by the criminal justice system. [84]

Besides, various rules and standards could be and have been developed about the redressing of violations of fundamental rights of accused. These rules and standards include unlawfulness, negligence, not proven guilty, proof of innocence.[85]

4.5.1 Indemnification Scheme: Public Law Remedy or Private Law Remedy?

Currently there are three avenues or modes employed of seeking indemnifications against violations of fundamental rights of accused, namely; tort suit against the state, private legislative

[84] Myles Frederick McLellan, "The Loss of Innocence and the Pursuit of Compensation," 14, 37.
[85] Doménech and Puchades, "Compensating Acquitted Pre-Trial Detainees," 168-169.

(moral obligation) bills for compensating specific individuals in ex-gratia, and compensation statutes.[86]

Amongst these options, a more popular perception is that the compensation statutes as public law actions are good model and best option for compensating the aggrieved persons[87] and pursued as a breach of constitutional right.[88] A number of jurists and scholars concur that a statutory compensation award is practical, effective, conventional, popular, and offers uniform approach to the problem.[89]

According to Professor Adele Bernhard, the uniform statutory compensation scheme is simple, clear, inexpensive, expeditious, effective, and possesses logical and emotional appeal. She posits that "most importantly, a legislative remedy is the only reliable and fair response to the inevitable mistakes that occur as a by-product of the operation of a criminal justice system as large as ours."[90] Thus, now it is widely accepted that the statutory compensation is the most efficacious remedy for the victims of miscarriage of justice.[91]

Further, as for the reservation expressed due to its cost factor, the remedy under compensation statutes is adjustable and likely to be smaller than compensatory damages in a tort law suit as the State is vested with the opportunity to determine its liability and method of

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[86] Delvac, "Liberty and Just Compensation for All," 1000-1003; Evans, "A Dime for Your Time," 557-559.
[87] Bernhard, "Justice Still Fails," 708, 711, 738; Gutman, "An Empirical Reexamination of State Statutory Compensation," 372; Mackenzie Philbrick, "Budgeting for Exoneree Compensation: Indemnifying Exonerees Not Officials to Deter Future Wrongful Convictions," *Fordham Urban Law Journa*l 50, no. 4 (2023): 823.
[88] Myles Frederick Mclellan, "Innocent Compensation: An International Comparative Analysis on Compensation for Wrongful Convictions and Miscarriage of Justice," *SSRN*, (January 2019): 31, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3423024, Accessed June 16, 2023.
[89] Lilia Valdez, "Wrongfully Convicted Does Not Need to Mean Wrongfully Compensated: Using State Legislation to Assure Accurate Compensation," *Public Interest Law Reporter* 25, no. 1 (2019): 55; Mostaghel, "Wrongly Incarcerated, Randomly Compensated," 517, 535; Lonergan, "Protecting the innocent," 410.
[90] Bernhard, "Justice Still Fails," 708; Adele Bernhard, "When Justice Fails: Indemnification for Unjust Conviction," *University of Chicago Roundtable* 73, no. 6 (1999): 74.
[91] Mclellan, "Innocent Compensation," 55-56.

compensation for violation of fundamental rights of accused.[92] Despite of the risk of under-compensation compensation statutes are viewed as clear, easy, effective and inexpensive option.[93]

It is argued that the state should provide redress under the public law remedy, not as private law remedy. This is for the reason that the nature of the right determines the nature of the remedy to be awarded. Thus, if the right infringed is a public right, the remedy would be a public law remedy; and if the right violated is a private right, the remedy would be provided under the private law proceeding i.e. civil law.[94] Further, disputes between the state (or its public bodies) and a citizen or a group of citizens fundamentally fall in the domain of public law which is distinct from private law in various terms.[95] Thus, civil actions are meant to compensate the aggrieved party for losses, and constitutional claims intend and uphold vindication of human rights standards.

If the court defies the right to remedy or redress to the aggrieved accused person against violations of his fundamental rights under public law and leaves him/her to seek private law remedy, that would be tantamount to the acknowledgement that the court is unable to effectively perform it role as protector and guarantor of the fundamental and indefeasible rights of the people.[96]

The other view is that the principles of tort law are can more helpful to claim the compensation damages based on the grounds of fairness and justice as compared to the

[92] Evans, "A Dime for Your Time," 569.
[93] Boucher, "Advancing the Argument in Favor of State Compensation," 1096.
[94] Ernest J. Weinrib, "Restitutionary damages as corrective justice," *Theoretical Inquiries in Law* 1, no.1 (2000): 4.
[95] Omar Imran Malik, Nubira Khan, "The Need to Develop Constitutional Torts in Pakistan," last modified February 2018, courtingthelaw.com/2018/02/20/commentary/the-need-to-develop-constitutional-torts-in-pakistan/. Accessed January 25, 2024.
[96] Rao, "Constitutional Rights Violations and Compensatory Jurisprudence," 106.

compensation statutes that put certain limitations and bars,[97] like variation of size of monetary award, eligibility criterion as determination of innocence, filing requirement.[98] Thus, damages, under the tort law, may be assessed objectively depending their quantum on the basis of the 'seriousness of the violation' and nature of the right violated and considering the previous awards in similar cases to ensure consistency, equity and fairness.[99] According to Professor Jason Ne Varuhas concludes that "we need look no further than the common law for all of the resources which we need to fashion an approach to human rights damages which is principled, coherent and rational, and gives effect to the policy of protection and vindication of fundamental interests that underpins human rights law."[100]

However, many reservations are also expressed about the efficacy of tort law remedy in seeking redress. For instance, this mode of remedy is considered deficient as the courts invoke policy reasons and doctrine of sovereign immunity, when deciding the cases of liability of public officials. Therefore, due to strict legal requirements,[101] and other factual reasons such as uncertainty of tort law doctrine to the litigants, high filing fee, long delays and difficulty of obtaining an adequate damages award,[102] the possibilities to succeed litigation against the government are regarded very limited.[103]

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[97] Trivelli, "Compensating the wrongfully convicted," 258, 263, 266.
[98] Evans, "A Dime for Your Time," 560.
[99] Jason Ne Varuhas, *Damages and Human Rights,* 475.
[100] Ibid., 476.
[101] Due to legal requirements like evidence of fault or negligence on the part of state officials, action without probable cause, tort suit remedy is considered ineffective and inadequate. See Boucher, "Advancing the Argument in Favor of State Compensation," 1083, 1095.
[102] Rehan Abeyrante, "Ordinary Wrongs as Constitutional Rights," 37.
[103] Sara Qayum, et al., "Short Comings of Criminal Justice of Pakistan," 20; Joseph H. King, Jr., "Compensation of Persons Erroneously Confined by the State," 1103.

As Professor Bernhard delineated, only in the absence of any practical, generous and popular statutory compensation, aggrieved persons are left to turn to the courts through private suits for vindication and indemnification of their rights lost in the criminal justice.[104]

Similarly, moral obligation bills are also regarded inadequate because of its discretionary nature, political lobbying and inconsistent practice. Further it also involves lengthy and uncertain process.[105]

Besides, another proposal forwarded by Jeffrey S. Gutman that wrongly convicted persons should be permitted with option to pursue both state compensation and other remedies. In such a case, the state may "impose an offset, whereby the state compensation is repaid in whole or in part by a subsequent civil rights or tort award. The latter sort of offset could significantly reduce state payouts in these kinds of cases".[106] Nevertheless, he prefers a reformed statutory compensation regime capable of being lass adversarial, less-time consuming, and more even-handed.[107]

As for the judicial discretion, Kent Roach suggests that "public law principles allow the exercise of remedial discretion to be disciplined and made more transparent through the use of well-established proportionality principles."[108]

[104] Bernhard, "Justice Still Fails," 703.
[105] Boucher, "Advancing the Argument in Favor of State Compensation," 1096.
[106] Gutman, "An Empirical Reexamination of State Statutory Compensation," 434.
[107] Ibid., 421.
[108] Kent Roach, *Remedies for Human Rights Violation: A Two-Track Approach to Supra-national and National Law* (New York: Cambridge University Press, 2021), 275.

4.5.2 Monetary and Non-Monetary Redress

The monetary compensation is the most common form of redress offered (but not always granted), yet the governments always stress that they have no obligation under the law for compensation and that the payment is made ex-gratia. Though there is no legal right to compensation for imprisonment following wrongful conviction *per se*, it is possible to pursue civil remedies for damages in appropriate cases if it can be established that there was a malicious prosecution or that a statutory duty to exercise official duties with due care had been breached. In practice, it is very difficult to succeed in either situation. Thus, the principles related to compensation for normal tortious liability are irrelevant or ineffective.[109]

Other possible remedies include statutory right to compensation. The law should establish an enforceable right to compensation and define entitlement criteria including the nature of the wrongful conduct, consequent harm and the parties entitled to claim this right. Besides, corrective publicity order is another possible remedy. On the direction or order of the court, the state should acknowledge and correct the error perpetrated by its official (make payment) in a public statement. Such acknowledgment should be through an appropriate level of prominence in the media. Public officials rarely acknowledge that they have inflicted harm on citizens. Compensation is paid after embarrassing political campaigns and public pressure. However, there should at least a public apology when fundamental rights of accused are violated. In relatively minor cases, the aggrieved accused may be content with such a public apology.[110]

[109] George Zdenkowski, "Remedies for miscarriage of justice: Wrongful imprisonment," *Current Issues in Criminal Justice* 5, no.1 (July 1993): 108.
[110] Ibid., 109.

The victims of miscarriage of justice deserve both compensatory and non-compensatory compensation from the state which is responsible for administration of criminal justice in which fundamental rights of accused persons are sacrificed and violated.[111] These compensatory damages include, but are not limited to, physical pain, mental suffering, lost reputation, medical expenses, property damage, lost wages, and profits loss. The standard calculation for compensatory damages is based on pecuniary and non-pecuniary losses, both tangible and non-tangible.[112]

As for the non-compensatory relief, it includes access to social services, education assistance, job training, expungement of conviction record, medical and counseling services, and housing assistance.[113]

4.5.3 A Typology of Non-Monetary Remedies for Miscarriage of Justice Victims

This is a profound and critical area of justice, addressing the restoration of the rights of individuals who have been failed by the very system meant to protect them. A systematic typology of non-monetary remedies for victims of miscarriage of justice moves beyond financial compensation to focus on holistic rehabilitation and systemic reform. A miscarriage of justice inflicts a unique and multifaceted injury including loss of liberty, psychological trauma, reputational destruction, and a fundamental breach of trust in the state. So, monetary compensation, while important, cannot alone "make whole" the victim.

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[111] Jennifer L. Chunias and Yael D. Aufgang, "Beyond Monetary Compensation: The Need for Comprehensive Services for the Wrongfully Convicted," *Boston College Third World Law Journal* 28, (2008): 105, 128.
[112] Ibid., 112, 116, 119-120; Trivelli, "Compensating the wrongfully convicted," 267.
[113] Lonergan, "Protecting the innocent," 436; Meggan Smith, "Have We Abandoned the Innocent: Society's Debt to the Wrongly Convicted," *American University Criminal Law Brief* 2, no. 2 (2003): 3, 12.

The non-monetary redress mechanisms play a crucial role alongside financial compensation. These address dignity, rehabilitation, social reintegration, and systemic reform, vital for holistic justice. A systematic approach categorizes remedies based on their primary objectives into restoring status, facilitating reintegration, providing moral satisfaction, and ensuring non-repetition. UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, 2005 entails following types of the non-monetary redress.[114]

a. Status-Restoring Remedies (Official Vindication)

The primary goal is to officially and publicly erase the legal and social stains of the wrongful prosecution or conviction. This includes judicial exoneration and expungement of criminal records. In United Kingdom, the Criminal Justice Act 1988 allows for the payment of compensation and, upon a successful appeal, the conviction is quashed. While not automatic expungement, the quashing is the legal equivalent of a not-guilty verdict. In United States, many states have exoneration statutes. For example, California's Penal Code allows a person who has been pardoned or whose conviction has been overturned to file a petition for a "finding of factual innocence." If granted, the records must be sealed and deemed never to have occurred.[115]

Another form of status restoring remedy is the official pardon. An executive act of clemency that forgives the crime and removes its legal consequences. In Canada, the case of Steven Truscott is a landmark example. Convicted and sentenced to death in 1959 as a

[114] United Nations General Assembly, A/RES/60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005, https://www.ohchr.org/sites/default/files/2021-08/N0549642.pdf, Accessed on November 7, 2025.
[115] Kelly Shae Delvac, California Wrongful Incarceration Compensation Law: A History That is Still Being Written, *Manitoba Law Journal*, 44: 6, 2021, 212.

teenager, he was paroled in 1969. After decades of advocacy, the Ontario Court of Appeal reviewed the case in 2007, declared his conviction a miscarriage of justice, and acquitted him.[116]

b. Reintegrative & Rehabilitation Remedies (Facilitating a Return to Life)

These remedies address the practical and psychological barriers a wrongfully convicted person faces upon release. This includes reintegration support services whereby a comprehensive package of state-funded support to help the individual rebuild their life. This includes psychological counseling, housing assistance, job training, educational grants, and healthcare (including mental health care for PTSD, anxiety, etc.). for instance, in United Kingdom, the government provides a dedicated caseworker and a support package that can include help with housing, education, healthcare, and benefits. This is administered by the Miscarriage of Justice Support Service, often contracted to a non-profit organization.[117]

Another form of such remedies is the public apology and official acknowledgment whereby a formal, public, and unequivocal apology from the state (e.g., from the head of state, the Minister of Justice, or the prosecuting authority). This is a powerful psychological remedy that acknowledges the harm and validates the victim's suffering. For example, in Canada, in the case of David Milgaard, who spent 23 years in prison for a murder he did not commit, the Saskatchewan government issued a formal apology and the Prime Minister personally met with him to apologize on behalf of the Canadian people. This public acknowledgment was a crucial step in his healing process.[118]

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[116] See the Canadian Registry of Wrongful Convictions, *Steven Truscott Case Summary*, https://www.wrongfulconvictions.ca/cases/steven-truscott, Accessed on November 7, 2025.
[117] RCJ Advice- Citizens Advice & Law Centre, "Miscarriage of Justice Support Service," https://www.rcjadvice.org.uk/our-services/miscarriage-of-justice/, Accessed on November 7, 2025.
[118] See the Canadian Registry of Wrongful Convictions, *Case Summary David Milgaard*.

c. Moral & Reputational Remedies (Restoring Dignity and Standing)

These remedies aim to repair the social and personal dignity that was destroyed by the wrongful conviction. They include the public declarations and certificates of innocence. Beyond a legal exoneration, a formal certificate issued by the state that can be shown to employers, landlords, and others to officially confirm the individual's innocence and resolve any doubts. For Example, in United States, several states, including Illinois, issue a "Certificate of Innocence" upon exoneration. This document legally establishes that the individual was innocent of the crime for which they were convicted and is not simply released on a technicality.[119]

Commemoration and memorialization are another form of such remedies. For cases that reveal profound systemic failures, establishing public inquiries, memorials, or naming reforms after the victim can serve as a lasting tribute and a public affirmation of their innocence. For Example, in United Kingdom, in the Birmingham Six and Guildford Four cases led to a massive public inquiry (the Runciman Commission) and ultimately to the establishment of the Criminal Cases Review Commission (CCRC) in 1997. The creation of the CCRC itself is a form of systemic memorialization of those earlier failures.[120]

d. Systemic & Guarantor Remedies (Ensuring Non-Repetition)

The most forward-looking remedies aim to fix the system that caused the miscarriage of justice, providing a sense of meaning to the victim's suffering by ensuring it helps others. This includes mandatory systemic inquiries. A statutory requirement to conduct an independent, public inquiry into the causes of every confirmed miscarriage of justice. The inquiry should examine police

[119] See Editors, The University of Chicago Law Review (1948) "Recent Cases: Eligibility for Certificate of Innocence under Federal Erroneous Convictions Act," *University of Chicago Law Review*: 15:3, 1947, 778.
[120] See Terry McGuinness, Briefing Paper: Criminal Cases Review Commission, *House of Commons Library*, no. 7448, January 7, 2016, 3, https://researchbriefings.files.parliament.uk/documents/CBP-7448/CBP-7448.pdf, Accessed on November 7, 2025.

conduct, forensic errors, prosecutorial overreach, and inadequate defense. For example, in United Kingdom, the CCRC is a prime example. It is an independent public body that reviews suspected miscarriages of justice and can refer cases back to an appeal court. Its very existence is a systemic remedy. For specific cases, like the Murder of Stephen Lawrence, a public inquiry was held which uncovered institutional racism in the police, leading to major reforms.[121]

This type of remedy includes legal and procedural reforms implementing changes to the law or criminal procedure directly as a result of a specific miscarriage of justice. This gives the victim a legacy of reform. For instance, in USA, the case of Barry Scheck and Peter Neufeld's Innocence Project has not only exonerated hundreds but has directly led to reforms such as the mandatory recording of police interrogations, changes in eyewitness identification procedures, and the expanded use of DNA evidence. Similarly, in Canada, the wrongful conviction of Guy Paul Morin led to the Kaufman Commission, whose recommendations resulted in major reforms to forensic science services and disclosure practices between the prosecution and defense.[122]

For a jurisdiction like Pakistan, where a formal legal framework for miscarriage of justice is underdeveloped, this typology provides a comprehensive roadmap. The first step must be a statutory right to status-restoring remedies—a clear legal process for judicial exoneration and expungement of records. Following release, the state has a moral duty to provide reintegrative support. Given Pakistan's limited resources, this could begin with a partnership with NGOs and a dedicated caseworker model, providing essential psychological and housing support.

Even a formal, public apology from the state is a powerful, low-cost remedy that can be implemented immediately through executive policy. It acknowledges the harm and begins the

[121] Jaswant Narwal, Remembering Stephen Lawrence 30 years on, *Crown Prosecution Service*, https://www.cps.gov.uk/stories/remembering-stephen-lawrence, Accessed on November 7, 2025.
[122] See the Canadian Registry of Wrongful Convictions, *Case Summary Guy Paul Morin*.

process of restoring dignity. Finally, the most meaningful remedy for many victims is to ensure their suffering was not in vain. Establishing an independent statutory body, like to the UK's CCRC, to investigate potential miscarriages and recommend systemic reforms would be the ultimate guarantor of non-repetition.

Thus, along with monetary redress, the non- monetary redress mechanisms including public apologies and acknowledgment, rehabilitation and restorative services, record expungement and sealing, structural reforms and institutional accountability, satisfaction measures and memorialization, guarantees of non-repetition and monitoring could provide the victims of miscarriage of justice a hope to come back to their normal lives. These categories reflect a deepening understanding internationally that justice for wrongful convictions requires more than financial reward—addressing social stigma, psychological harm, and systemic failings is equally essential. Pakistan, with its evolving legal framework, could adapt and integrate these non-monetary remedies to offer holistic redress.

4.5.4 Burden of Proof for Redress: Balance of Probability Standard

The imposition of a burden of proof of innocence to a "beyond reasonable doubt" standard places far too heavy a burden on the applicant. In many cases this standard will only be reached if the applicant is able to implicate another person. The discretion of an independent assessor to accept or dismiss a claim based on the evidence suggests that a balance of probabilities standard would be sufficient. The "beyond reasonable doubt" standard ensures that the costs of legal error will continue to be borne by individuals and not the State – concealing or neglecting the financial and

policy implications and problems of the malfunctioning criminal justice system.[123] Thus, for any enactment meant to redress the victims of miscarriage of justice, it is necessary that the standard of proof should not be complicated, inaccessible or unattainable.

4.5.5 Redress in National and International Perspectives

Thus, remedies engage both domestic and international law. Redress at the international level includes international and regional tribunals as well as treaty bodies, which allow individuals to bring complaints against States for violations of IHRL and in certain cases for IHL. At the domestic level, individuals may bring claims for the violation of IHRL or IHL before the domestic courts of a State, usually the State allegedly responsible for the violation. To comply with the relevant rules of international law, domestic mechanisms are supposed to provide an effective remedy for affected individuals, including appropriate reparation if the violation is proven. [124]

On the other hand, access to international procedures also needs to comply with certain requirements, such as the exhaustion of local remedies,[125] to avoid the misuse of international mechanisms and respect the principle of subsidiarity. In fact, international and domestic mechanisms complement each other.[126]

It is remarkable job of some western states such as Sweden, Austria, Norway, Germany, Netherlands etc. that provide compensation to acquitted pre-trial detainees, adopting their own

[123] Christine E Sheehy, "Compensation for Wrongful Conviction in New Zealand," *Auckland University Law Review* 8, no.4 *(*1999): 999.
[124] Roach, *Remedies for Human Rights Violation*, 5.
[125] The rule of 'exhaustion of local remedies' requires that human rights violations should be considered and addressed by the domestic legal apparatus of the State first before invoking international responsibility of the state for a wrongful action at the regional or international level. See Silvia D'ascoli And Kathrin Maria Scherr, "The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection," European University Institute, Department of Law Working Paper LAW No. 2007/02, (February 2007):1. *SSRN*: https://ssrn.com/abstract=964195.
[126] Kent Roach, *Remedies for Human Rights Violation*, 4-6.

different compensating standards and measures.[127] This practice of these states shows their sense of responsibility regarding social security which surely protects human rights and lessens and mitigates grief and suffering of innocent pre-trial detainees.

4.6 State Liability in the Legal Regime of Pakistan

The state of Islamic Republic of Pakistan has made commitment for rule of law and to fulfill its obligation of protecting fundamental rights.[128] Yet, as discussed in the previous chapter, the situation on ground is not satisfactory and the fundamental rights of the accused are flagrantly violated in the criminal justice of Pakistan. Hence, this chapter provides the insight for providing remedy to the victims of miscarriage of justice.

As for the remedies available for miscarriage of justice in terms of violation of fundamental rights of accused, tort law remedy in terms malicious prosecution is regarded as perfect solution for redressing the negligence committed by public authorities in Pakistan.[129] However, it is considered deficient as the courts invoke policy reasons, proving lack of reasonable and probable cause, and doctrine of sovereign immunity, when deciding the cases of liability of public officials.[130]

Nevertheless, the tort law remedy covers important aspect of monetary redress and is regarded as of having capability and significant increasing role in forging and fashioning

[127] Doménech and Puchades, "Compensating Acquitted Pre-Trial Detainees," 169.
[128] For instance, see Objectives Resolution and Articles 4,8, 25 and 175E(3) and 199 of the Constitution of Pakistan expressly enjoin upon the state to ensure rule of law, protection and enforcement of fundamental rights.
[129] Farrukh Usman, Raana Khan, and Saima Yousuf, "Torts can be the Perfect Solution for Redressing the Negligence Committed by Public Authorities in Pakistan," *Pakistan Journal of International Affairs* 5, no. 4 (2022): 682, 693.
[130] Sara Qayum, et al., "Short Comings of Criminal Justice of Pakistan," 20.

principle of vicarious liability in constitutional and fundamental rights regime for advancing fairness and adjusting losses.[131]

Apart from the tort law remedy, as discussed in the preceding chapter, the legal system of Pakistan has no adequate scheme of redress or compensation to the innocent accused persons who suffer violations of their fundamental rights in the criminal justice.[132] The Supreme Court has admitted this fact that in case the accused is ultimately acquitted at the trail then no reparation or compensation can be awarded to him for the long incarceration he had already suffered. Even none of the provisions of Cr.PC provide any remedy to be claimed by the acquitted accused for its compensation.[133]

As for the court practice, the Supreme Court has persistently reiterated the well-established principle that the Courts cannot and should not create any right, liability or obligation that is not founded in law.[134] Thus, due to lack of any proper statutory framework, the option of tort law remedy involves myriad and multiplicity of problems as it is not easy to get it or even claim it due to the lack of practice or financial incapacity and thus ultimately resulting into a complete fiasco.[135]

4.6.1 Impunity to the State Functionaries in the Legal Regime of Pakistan

The fundamental principles of legal regime of Pakistan dealing with criminal justice are by and large in consonance and parity with international standards and principles of criminal justice

[131] Nwudego Nkemakonam Chinwuba, "Recent Developments in the Application of the Doctrine of Vicarious Liability by United Kingdom Courts," *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 11, no.1 (2020): 148.
[132] Madni, Habib and Akhtar, "Wrongful Prosecution a Miscarriage of Justice," 1649, 1651.
[133] *Sajid Hussain v. State* PLD 2021 Supreme Court 898.
[134] *Justice Qazi Faez Isa v. The President of Pakistan* PLD 2021 Supreme Court 2021.
[135] Ibid; Imtiaz Ahmad Khan, et al., "Wrongful Conviction and Miscarriage of Justice," *Competitive Social Science Research Journal* 3, no. 1 (2022): 221.

with few exceptions.[136] Yet, the governmental accountability is not practiced in Pakistan and the government and its functionaries enjoy high impunity.[137] Converse to the notion of state liability, immunity is served to the state officials from civil and criminal liability.

The Constitution of Pakistan extends immunity and protection to the President of Pakistan as head of the State and Prime Minister as head of government under Article 248 for anything done in exercise their respective official powers and functions. Similarly, no criminal proceeding can be initiated or continued during their tenure of office.[138] Likewise, the state and its servants enjoy impunity from any civil liability under the cover or pretext of 'mistake of fact' or 'good faith' plea.[139]

As for the application of doctrine of sovereign immunity in such cases, it has been admitted that "while certain indemnity clauses bar lawsuits against public officials for acts done in an official capacity, in good faith or under instructions or directions made under the law, their ambit does not extend to those acts falling outside the scope of official capacity such as acts that amount to torture."[140] Therefore, the possibilities to succeed litigation against the government are regarded very limited and unlikely.[141]

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[136] Mazhar Ali Khan, "Pakistan's Commitment to Human Rights: A Probe into the Question of Ratification of the Rome Statute of International Law," *Review of Human Rights* 5, no. 1 (2019): 60-61, 66.

[137] See generally National Commission for Human Rights, *Report on Torture in Adiala Jail*, (September 2022), https://www.nchr.gov.pk/wp-content/uploads/2022/11/Report-on-Torture-at-Adiala-Jail.pdf, Accessed June 15, 2023; International Commission of Jurists, *Entrenching Impunity, Denying Redress: The Commission of Inquiry on Enforced Disappearances in Pakistan- A Briefing paper* (September 2020).

[138] Article 248 of the Constitution of Pakistan.

[139] For instance, section 2(27) of the General Clauses Act 1956 states that "a thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not'.

[140] Government of Pakistan, Pakistan's Initial Report on United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 27, January 2016, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=CAT%2FC%2FPAK%2F1&Lang=en. Accessed June 06, 2023.

[141] Sara Qayum, et al., "Short Comings of Criminal Justice of Pakistan," 20; See also Joseph H. King, Jr., "Compensation of Persons Erroneously Confined by the State," 1103.

Instead of affording immunities to the government and its functionaries who, sometimes, act with malice, caprice, wrongful and arbitrary manner, it is bounden duty of the legislature and superior courts to come to the assistance of aggrieved individuals facing the injuries and harm from the government servants armed with the coercive authority of the state. Thus, providing redress to the innocent accused whose fundamental rights are violated by the officials would ensure rule of law, due process of law, fundamental rights and equality among citizens in the country.[142]

4.6.2 Need of a Statutory Redress Scheme in the Legal System of Pakistan

The position of legal regime of Pakistan with respect to redressing of violations of fundamental rights of accused in criminal justice is as Edwin Borchard has portrayed in 1914 about Anglo-American Law legal system "the law could only give him his liberty".[143]

The same factual position exists in the legal regime of Pakistan which has no proper redress framework for the violations of fundamental rights, and impunity is granted to the perpetrators who are predominantly police officers or administrative authorities.[144] As a result, allegedly in the legal system of Pakistan, measures of accountability do not virtually exist for unsatisfactory performance and malpractices of police and other state officials.[145]

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[142] Hamid Khan, "Developing Liberal Jurisprudence in Pakistan: Role of Justice A. R. Cornelius," *Policy Perspectives* 17, no. 1 (2020): 139.
[143] Edwin Borchard, "State Indemnity for Errors of Criminal Justice," 108.
[144] Maseehullah, Sania Islam, and Humaira Meer, "Legal Analysis on Act of Torture based on International Law and its Incorporation into Pakistani Law, *Traditional Journal of Law and Social Justice* 1, no. 1 (2022): 47.
[145] Tansif ur Rehman, Mehmood Ahmed Usmani and Sajida Perveen, "Police and Prosecution's Perspective on Low Conviction Rates in Pakistan," *Pakistan Journal of International Affairs* 5, no. 1 (2022): 167.

Thus, to bring our legal system at par the fundamental principles of criminal law and international standards, Pakistan needs a comprehensive legislative reform package that may oust or eliminate immunity provisions and clauses for state officials.[146]

After taking in view arguments discussed above both in the favor and against the state liability to redress for the wrongs and errors in criminal justice, it seems just and reasonable that the states can and should take measures to prevent miscarriage of justice in terms of violations of fundamental rights of accused in criminal justice. This is for the reason that in a just and egalitarian society, losses and sufferings resulting from violation of fundamental rights of individuals, are not to lie where it falls and a person who is immediate cause of inflicting such loss and hardship on a fellow citizen ought to be held accountable for his actions.[147]

As for the actions of state and its functionaries in criminal justice performed in public interest, the losses and suffering are not to lie only on innocent accused persons, rather the state should bear the liability to indemnify and redress.

In modern civilized world, states are proposed to enact statutes as the most effective way to ensure efficient and fair compensation to the aggrieved individuals,[148] or amendments[149] are proposed to reform and improvement of current statutory schemes.[150] As it is the State that controls the enterprise of criminal justice by investigating and prosecuting crime for the benefit of the society, therefore the State should bear the burden of damage and harm caused by errors and

[146] Khan, "Pakistan's Commitment to Human Rights," 61, 66.
[147] *Abdul Khameed v. Muhammad Shabbir and another* PLD 2021 Islamabad 405.
[148] Boucher, "Advancing the Argument in Favor of State Compensation," 1073.
[149] The proposed amendments include adoption of less adversarial compensation scheme by relaxing the requirement of proof of factual innocence, option to the aggrieved party to select for remedies packages available, an increase of compensation and presumption of coercion in false confession. See Philbrick, "Budgeting for Exoneree Compensation," 797, 843, 845; Bernhard, "Justice Still Fails," 720.
[150] Jeffrey S. Gutman, "Are Federal Exonerees Paid?: Lessons for the Drafting and Interpretation of Wrongful Conviction Compensation Statutes," *Cleveland State Law Review* 69, no. 2 (2021): 229, 234, 282, 287, ; Philbrick, "Budgeting for Exoneree Compensation," 823,866.

wrongs of this enterprise. Thus, the state should be directly liable in cases of wrongs caused by criminal justice system based upon the principles of strict liability.[151]

> To sum up, it is worthwhile to mention here the well settled principle stated by Justice Kaikaus in *Imtiaz Ahmed v. Ghulam Ali* case. He expresses that "I think 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…. Any system which by giving effect to the form and not the substance, defeats substantive rights… is defective to that extent."[152]

4.6.3 Operationalisation of Strict Liability in the Pakistani Context

This is a complex and critically important area of legal reform as the current fault-based system (requiring proof of *mens rea* or negligence) places an impossible burden on victims and has failed as a deterrent. The operationalisation of strict liability to redress violations of fundamental rights of the accused in Pakistan requires a careful, nuanced approach that balances the need for accountability with the principles of justice.

Strict liability, in this context, means that a state agent (e.g., police officer, jail official, prosecutor, judge) would be held legally and financially responsible for a violation of an accused person's fundamental rights, regardless of their intention or negligence. The mere fact that the violation occurred is sufficient to trigger liability. This is a proposed remedy for the systemic and rampant violations of rights in Pakistan, such as illegal detention beyond 24 hours without

[151] Myles Frederick Mclellan, Innocent Compensation: Private Law Principles for Public Law Remedies, 1; See also Delvac, "Liberty and Just Compensation for All," 1006;
[152] *Imtiaz Ahmed v. Ghulam Ali* PLD 1963 SC 382.

judicial remand (Art. 10 Constitution), custodial torture and death, fake encounters (extra-judicial killings), denial of the right to counsel (Art. 10A), fabrication of evidence etc.

Operationalising strict liability in the Pakistani context to redress violations of fundamental rights of accused would require statutory amendments, judicial assessment, and safeguards against abuse. To operationalize strict liability, there could be two possible strategies. First of them is a new, and dedicated statute. Amending existing laws like the Pakistan Penal Code (PPC) or the Code of Criminal Procedure (CrPC) in a piecemeal fashion may be insufficient. A comprehensive "Redress for Fundamental Rights Violations Act" should be enacted. Its key amendments and provisions should include the core strict liability clauses, and specific operational clauses. In the said statute, the core strict liability clauses maybe phrased as:

Vicarious Liability of the State: Notwithstanding anything contained in any other law for the time being in force, the State, through the Federal Government or Provincial Government as the case may be, shall be strictly and vicariously liable to pay compensation to an accused person for any violation of their fundamental rights as guaranteed under Articles 4, 9, 10, 10A, 13, and 14 of the Constitution of Pakistan, committed by any public servant or any person acting under the authority of the state. The State shall have a right of indemnity against the public servant found personally responsible for such violation.

As for the specific operational clauses, the statute should explicitly define "deemed violations" that automatically trigger strict liability. For example, it should include:

Custodial Death or Injury: Any death, rape, or grievous bodily injury occurring while a person is in the custody of law enforcement shall be presumed to be a violation by the custodians.

Illegal Detention: Failure to produce an arrested person before a magistrate within 24 hours of arrest as mandated by Article 10 of the Constitution.

Denial of Counsel: Unreasonable denial of access to a legal practitioner of choice.

The Act should make provisions to establish dedicated special tribunals like Fundamental Rights Redress Tribunals in each district, with summary proceedings to ensure speedy justice (disposal within 90 days). Further the Act should make amendments to Qanun-e-Shahadat Order, 1984 for introducing a clause that shifts the burden of proof onto the state agency in cases of deemed violations. Once the accused establishes a prima facie case that they were in custody or were injured, the burden shifts to the state to prove that the violation did not occur or was not caused by its agents.

The other important issue is how the courts should assess liability without fault. Under a strict liability regime, the court's inquiry changes fundamentally. This may involve two phases including establishing the fact of violation, and the court assessment.

In the phase of establishing the fact of violation, the claimant (the accused or their legal heirs) must prove, on a balance of probabilities, the facts of identity (he/she was in the custody or under the control of a state agency), injury (suffered a recognized harm (e.g., physical injury, illegal detention, death) and the causal link (the harm occurred during the period of custody/control). For example, an accused person presents a medical report from after their release showing signs of torture and a receipt from a lawyer showing they were denied access. This establishes the fact of the violation.

In the phases of the court's assessment, once the fact of the violation is established, the court does not inquire into whether the police officer intended to torture the accused; whether the

jailer was negligent in preventing the accused's injury or the "reasons" or "good faith" of the officer. The liability would be automatic. The only relevant questions for the court will be quantum of compensation as what is the appropriate amount of compensation for this specific violation? The court will consider the severity of the violation (e.g., duration of illegal detention, severity of torture), the physical and psychological impact on the victim, loss of earnings and reputation, and the need for deterrence and constitutional vindication.

While the state pays the victim, the court will separately determine the degree of personal responsibility of individual officers for the purpose of the state's subsequent recovery action (indemnity). This is where evidence of malice, negligence, or recklessness would be relevant, but it is separate from the victim's claim (apportionment of liability for indemnity).

A strict liability regime is powerful and could be vulnerable to abuse through false claims. Thus, some procedural and substantive are essential. The proposed statute can incorporate procedural safeguards like mandatory preliminary scrutiny, costs for frivolous litigation, corroborative evidence requirement; and the substantive safeguards may include the defenses like force majeure or the act of third-party defense, the self -harm defense and capping for compensation.

The second possibility could be introducing the required amendments in the Code of Criminal Procedure to provide compensation to the innocent victims of miscarriage of justice. As for its modus operandi or mechanism of redress, the state may assess and look into the nature of each case to provide compensation to such victims, ensuring the inviolability of their fundamental rights. However, this option could be least effective keeping in view the implementation of other provisions of the Code relating to the redress for the victims' rights.

The operationalisation of strict liability in Pakistan could be a revolutionary step towards enforcing constitutionalism and protecting the most vulnerable in the criminal justice system. It moves the inquiry from the nearly impossible task of proving an officer's malicious intent to the more objective fact of a right being violated. The courts' role would shift from fault-finding to fact-finding and compensation assessment. Besides, a robust framework of procedural, substantive, and technological safeguards is not just an add-on but a necessity to ensure that this powerful tool for justice is not itself abused.

4.7 State Liability to Redress in the Islamic Law and Human Rights Law Perspectives

It is also pertinent to understand this subject in view of Islamic law as the sources of the legal regime of Pakistan include Constitution of Pakistan 1973, statutes, precedents,[153] and Islamic law. Under the Constitution[154] and the Enforcement of Shariah Act, 1991,[155] Quran and Sunnah are the Supreme law of the land. Other sources of the legal system of Pakistan include bye-laws such as rules, regulations, SROs, equity and customs.[156]

Similarly, the Courts in Pakistan have been seeking guidance, while interpreting the law, from the principles laid down in the Quran and Sunnah. For instance, the Lahore High Court in one of its decisions held that "where the law is silent or no statute is available then public functionaries including the judiciary has to exercise their powers of dispensation of justice in accordance with principle of Islam".[157]

[153] See 189, 201, 203 GG of the Constitution of Pakistan.
[154] Ibid., Articles 203D and 227.
[155] Section 3(1) of the Enforcement of Shariah Act, 1991.
[156] Muhammad Munir, "Evolution and Sources of Pakistani Legal System," (December 2021), *SSRN*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3975421.
[157] *Muhammad Iqbal v. A.D.B.P., Kabirwala Branch District Khenewal* 1999 YLR 2708.

The Supreme Court of Pakistan in *Muhmmad Yousuf v. Ghayyur Hussain Shah*,[158] held that "in a Muslim society prosecuting innocent persons maliciously is not permitted and, in consequence, the aggrieved person can have recourse to Courts in Pakistan which were not only Courts of law but justice, equity and good conscience as well".

Hence, with regard to right to redress in the criminal justice in Pakistan, it would be appropriate and pertinent to understand the same in Islamic perspective and particularly in view of its philosophy of personal liberty, human rights and justice. This is also significant in the context of Pakistan because Islamic injunctions enjoy preference on other sources of law in the Islamic Republic.[159]

Similarly, it is important to mention that all legal systems, whether domestic or international, provide for a redress mechanism to implement rights and obligations.[160] As Kent Roach highlighted that the human rights lawyers can learn much about remedies from international law.[161] The international law is supposed to be helpful to advance national legislation and practice on right to right for the victims of human rights violations.[162]

The right of redress can be enforced either in national level or international level. Individuals can claim the redress in courts of the country where their rights have been violated, or

[158] *Muhammad yousuf v. Syed Ghayyur Hussain Shah* 1993 SCMR 1185, see also *Abdul Khameed v. Muhammad Shabbir* PLD 2021 Islamabad 405.
[159] For instance, Article 227(1) of the Constitution of Pakistan states about conformity of all laws with the injunctions of Islam as laid down in Quran and Sunnah. Further it was held by the Supreme Court of Pakistan in *Zaheeruddin v. State* 1993 SMCR 1718 that "every man-made law must now conform to the Injunctions of Islam as contained in Quran and Sunnah of the Holy Prophet. Therefore, even the fundamental Rights as given in the Constitution must not violate the norms of Islam".
[160] Valentina Spiga, "The Right to Justice for Victims of Human Rights Crimes," PhD diss., (Florence: European University Institute, Department of Law, July 2013), 27. Cadmus, EUI Research Repository, https://cadmus.eui.eu/handle/1814/29597. Accessed April 29, 2024.
[161] Kent Roach, *Remedies for Human Rights Violation*, 2.
[162] International Commission of jurists, *The Right to a Remedy and Reparation for Gross Human Rights Violations: A Practitioners' Guide* (Geneva: October 2018), 18.

they can seek remedy from international bodies competent to entertain and adjudicate such cases like International Criminal Court, and Human Rights Committee and Committee Against Torture.

The following chapters of this study discuss and delineate upon the right to redress to accused in the light of Islamic legal principles, international human rights law and international best practices.

4.8 Conclusion

This chapter has divulged into the arguments which may put forwarded in favor or against of state liability for redressing of violations of fundamental rights of accused. Keeping in view the value of these arguments, in can safely concluded that the state is liable, legally and morally, to redress the violations of fundamental rights of accused as it is the right of an individual to be restored when state's wrongful action caused or lead to the injury.

Thus, the state should have a comprehensive and robust legislative framework to ensure protection of the fundamental rights of accused in criminal justice and provide redress to those whose fundamental rights are violated in the criminal justice. The proposed legal framework should be based on the principle of strict liability theory whereby the redress is to be awarded as a matter of right and not as ex-gratia.

The compensatory redress scheme should be inclusive to cover both monetary and non-monetary aspects based on the principles of fairness, equity and proportional to the losses of the aggrieved individuals. As for best practical model and comprehensive scheme of redress, it would be appropriate to seek help from the practices and experiences of the states that have introduced and implemented such redress schemes for their subjects.

The state should be liable to provide redress regardless the violations of fundamental rights have been made intentionally or wrongfully by its functionaries in criminal justice. The redress mechanism would ensure accountability, rule of law and public confidence on the justice system of which everyone in society would reap the benefits.

CHAPTER 5: INTERNATIONAL HUMAN RIGHTS LAW ON REDRESSING VIOLATIONS OF RIGHTS OF ACCUSED

CHAPTER 5

INTERNATIONAL HUMAN RIGHTS LAW ON REDRESSING VIOLATIONS OF RIGHTS OF ACCUSED

5.1 Introduction

The phenomenon of modern International human rights law has gradual development since after Second World War to address the necessity of non-repetition of the tragedies and sufferings of the War period and to ensure respect for the 'group of standard rules referred to as human rights'. International human rights law includes a group of treaties, conventions and declarations that provide the international community with guidelines and obligations regarding rights that are indispensable and need to be protected on both the national and international levels.[1]

The human rights norms are considerably important to define and interpret the material and substantial "scope of states' obligations".[2] They define and deal with the obligations that the states owe to its citizens and the persons living in their respective territories, to protect them from abuses by the public authorities and officials of the states.[3] Thus, the international human rights law aims to protect the victims and to provide the redress for injuries resulting from the acts of states.[4]

[1] Kremens, "The protection of the accused in international criminal law," 26.
[2] Michał Balcerzak, "Polish Domestic Remedies Against Human Rights Violations and Their Interaction with 'Just Satisfaction' Awarded by the European Court of Human Rights," in *Damages for Violations of Human Rights*, ed. E. Bagińska, Ius Comparatum - Global Studies in Comparative Law 9, (Switzerland: Springer International Publishing, 2016), 290.
[3] E. Bagińska, ed., *Damages for Violations of Human Rights*, Ius Comparatum - Global Studies in Comparative Law 9 (Switzerland: Springer International Publishing, 2016), 4.
[4] Mattia Pinto, "Awakening the Leviathan through Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law," *Utrecht Journal of International and European Law* 34, no. 2 (2018): 161.

One of the fundamental ideals or notions of the modern international human rights law is the one that the 'victims'[5] of human rights violations are entitled for right to justice which, in turn, entails and requires a right to an effective remedy or redress.[6] In fact, the protection and enjoyment of all other rights depends on the right of an effective remedy.[7] For an effective remedy it is necessary that it should be accessible, prompt and available before an independent forum or body and culminate into tangible input. Further, the effectiveness of a remedy suggests and implies that it must not be hindered by excessive delay; hence its existence should be visible both in law and practice.[8]

The subject of 'redress' or 'remedies'[9] for violations of fundamental human rights of accused is primarily linked to public international law (international human rights law). The international human rights law governs the entitlements or redress delivered by international tribunals and courts.[10] Thus, public law and states obligations are the main and traditional focus of the protection of human rights.[11]

The protection of human rights starts "at home" and redress[12] for human rights violation should be available in the domestic system. However, this protection or enforcement does not stop

[5] The term 'victim' is used in this study to refer to the persons whose rights have been violated. See the related terms in Dinah Shelton, *Remedies in International Human Rights Law* (UK: Oxford University Press, 2015), 8.
[6] ICTR, Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, T. Ch. III, 31 January 2007; ICTR, Decision on Appeal Against Decision on Appropriate Remedy, *Rwamakuba v. Prosecutor*, Case No. ICTR-98-44C-A, A. Ch., 13 September 2007; International Commission of jurists, *The Right to a Remedy and Reparation for Gross Human Rights Violations: A Practitioners' Guide* (Geneva: October 2018), 27.
[7] Human Rights Committee, "General Comment No. 29 on Derogations During a State of Emergency," UN Doc CCPR/C/21/Rev.1/Add.11 (2001), para 14.
[8] International Commission of jurists, *The Right to a Remedy and Reparation,* 53, 65-68.
[9] As discussed in Chapter 3, the terms like redress, reparation and remedies are used interchangeably in this study. They signify "the range of measures that may be taken in response to actual or threatened violations of human rights." Shelton, *Remedies in International Human Rights Law*, 7, 33. However, in international law perspective, the terms 'reparations' or 'remedies' are more often used.
[10] Bagińska, *Damages for Violations of Human Rights*, 2.
[11] Ibid., 4.
[12] The term 'redress' entails the notions of ''effective remedy'' and ''reparation''. For instance, the measures required to redress violations under the Convention Against Torture and Other Cruel, Inhuman or Degrading

or limit "at home"; rather it extends to international remedies based on human rights instruments. Thus, the full picture of redressing violations of human rights includes both areas of domestic law and as well as international law.[13] Afterall, it is necessary that the right to an effective remedy should exist and must be embedded in local or domestic mechanism, being *effective* in law and practice, to deal with entitlement claims of appropriate reparation.[14]

The right to an effective remedy under International human rights law covers and includes both substantive redress and procedural redress.[15] Substantive redress is the outcome of the proceedings or redress or relief afforded to the successful claimant, whereas the procedural redress is the process through which victim accesses to judicial, administrative, or other appropriate authorities to ensure fair, effective and prompt access to remedies.[16]

At the procedural level, access to justice means that it must be through a competent and independent judicial authority vested with the power to investigate, adjudicate about occurrence of human rights violation, and to enforce redress in case of violation. Thus, access to justice implies

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Treatment or Punishment (CAT), 1984 entail "restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition." See Sveaass, "Gross Human Rights Violations and Reparation Under International Law," 1. The term 'reparations' encompass "various methods available to a state to discharge or release itself from state responsibility for a breach of international law." Shelton, *Remedies in international human rights law*, 15.

[13] Shelton, *Remedies in international human rights law,* 22-29; Balcerzak, "Polish Domestic Remedies Against Human Rights Violations," 289-290; for detailed analysis of domestic remedies for violations of international human rights law, see Beth Stephens, "Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations," *Yale Journal of International Law* 27, no. 1 (2002): 1-57.

[14] Theo Van Boven, "Victims' Rights to a Remedy or Reparation: The New United Nations Principles and Guidelines," in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, ed. Ferstman et al. (Leiden: Brill, 2009): 19.

[15] International Commission of jurists, *The Right to a Remedy and Reparation*, 52; Piet Hein Van Kempen, "Appropriate Remedy of Redress for Human Rights Violations against Acquitted Persons. Commentary," in *Annotated Leading Cases of International Tribunals. The International Tribunal for Rwanda 2006-2007*, ed. André Klip & Göran Sluiter, vol. 25, (Oxford: Intersentia, 2010): 941.

[16] Shelton, *Remedies in international human rights law*, 2; Tom Antkowiak, "Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond," *Columbia Journal of Transnational Law* 46 (2008): 356.

that procures adopted for the legal proceedings should be effective and capable of redressing the harm or injury.

Further, the 'substantive redress" should be adequate and relative and proportional to the and sensitivity and gravity of the violation and the given circumstances of each case. Generally, full and effective redress includes[17] restitution,[18] compensation,[19] rehabilitation,[20] satisfaction[21] and guarantees of non-repetition[22]. Further, it is also supposed that there exists a hierarchy of modes of reparation whereby the restitution is regarded as primary means of reparation.[23]

Thus, the states' obligation to provide effective remedies to the victims of human rights violations is well acknowledged and 'an essential component of international human rights law' and the right to a remedy under international law serves as an independent basis for the states' interest in remedying human rights.[24]

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[17] Basic Principles on The Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Law and Serious Violations Of Humanitarian Law, adopted By General Assembly Resolution 60/147, UN Doc A/RES/60/147 (2005) (cited as UN Principles on Remedy and Reparation); Theo van Boven and Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report submitted by Mr. Theo van Boven*, Special Rapporteur, E/CN.4/Sub.2/1993/8, July 1993.

[18] Restitution aims "to restore victim to his or her original situation before he or she suffered violations of human rights. This includes restoration of liberty, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property." See UN Principles on Remedy and Reparation; International Commission of jurists, *The Right to a Remedy and Reparation,* 13-14, 27.

[19] Compensation refers to a "monetary damage, whether pecuniary or non-pecuniary, as appropriate and proportional to the gravity of the violation and the circumstances of each case, such as lost opportunities, loss of earnings and moral damage." Ibid., 27-28.

[20] Rehabilitation refers to "medical and psychological treatment as well as legal and social services." Ibid., 27-28.

[21] Satisfaction refers to "a broad category of measures, ranging from those aiming at a cessation of violations, to truth seeking, the search for the disappeared, the recovery and reburial of remains, public apologies, judicial and administrative sanctions, commemoration and memorialization, and human rights training." Ibid.

[22] Guarantees of non-repetition is "a broad category which includes, for example, institutional reforms establishing civilian control of military and security forces; strengthening judicial independence; the protection of human rights defenders; human rights training; the promotion of international human rights standards in public service, law enforcement, the media, and psychological and social services." Ibid.

[23] James Crawford, *State Responsibility: The General Part*, (New York: Cambridge University Press, 2013), 507-510; Buyse, *"*Lost or Regained, Restitution as a Remedy," 132.

[24] Seth davis and Christopher A. Whytock, "State Remedies for Human Rights," *Boston University Law Review* 98 (2018): 419, 444.

Before dwelling into the details of right of redress, it seems pertinent to discuss in brief the protection of fundamental rights of accused under international human rights.

5.2 International Human Rights Law on Protection of Fundamental Rights of Accused

International human rights law is a mechanism in which 'every individual has certain inalienable and legally enforceable rights protecting accused persons against state unnecessary interference and the abuse of power by government'.[25] Thus, the protection of human rights in criminal justice is the subject of both international law and domestic law.[26] For instance, the International Covenant on Civil and Political Rights (ICCPR), 1966 provides the minimum standards for protection of the accused in criminal proceedings on both the national and international levels.[27]

International human rights law provides for a number of fundamental human rights and humanitarian values associated with the criminal process, while setting limits and boundaries for the states for criminal prosecution of the suspected offenders to ensure security of society at large.[28]

Criminal proceedings are meant for protecting human rights but at the same time, they are locus of human rights violations. States are obliged to provide remedies and reparation to the victims of human rights violations. These remedies and reparations include restitution, compensation, satisfaction, and guarantees of non-repetition. These forms of remedies also apply

[25] Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge, 1997), 209.
[26] Chrisje Brants and Stijn Franken, "The Protection of Fundamental Human Rights in Criminal Process: General Report," *Utrecht Law Review* 5, no. 2 (October 2009): 14.
[27] Kremens, "The protection of the accused in international criminal law," 47.
[28] Articles 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR), 1966.

to the victims of criminal proceedings who are accused, arrested, prosecuted, or convicted for a crime in proceedings that are in defiance of applicable human rights.[29]

As the states are bound by the principle of rule of law, any state activity in the administration of criminal justice that infringes the fundamental rights of the individuals is subject to the scrutiny of an impartial and independent tribunal. International human rights instruments contain a number of provisions related to presumption of innocence,[30] fairness of proceedings[31] and due process,[32] and the fundamental rights independent of fair trial such as right to life,[33] prohibition against torture, cruel and inhuman treatment[34] which are fundamental and primary rights of every human being including accused persons.[35]

Other significant rights of the accused in criminal proceedings include relaxation of burden of proof,[36] right to be informed about the charges against him,[37] Right to an expeditious trial and to have time for the preparation of a defence, [38] protection against trial in absentia,[39] right

[29] Ali, "Remedies for Human Rights Violations," 13.
[30] See Article 11 (1) of the Universal Declaration of Human Rights (UDHR), 1948; Article 14 (2) of the ICCPR; Article 66 of Rome Statute of the International Criminal Court, 1998, Article 6 (2) of the European Convention on Human Rights (ECHR), 1950; Article 8 (2) of the American Convention of Human Rights (ACHR) 1969.
[31] See Article 14 of ICCPR; Though there is no agreement on the concepts incorporated in the broad notion of fair trial, fair trial rights include of all the rights of the accused provided in Article 14 ICCPR. Thus, the 'fair trial rights' under ICCPR include equality of arms, publicity of proceedings (public hearing), impartiality and independence of the judges; Kremens, "The protection of the accused in international criminal law," 34.
[32] Article 14 of International Covenants on Civil and Political Rights (ICCPR) states that due process of law includes hearing in open court, both in criminal and civil cases, before an impartial and independent judicial body, without any delay and judgment shall be announced in an open court of law. Further, it also includes that over the entire trial, the accused shall be presumed innocent until proven guilty beyond any reasonable doubt.
[33] Article 6(1) of ICCPR. states that "every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."
[34] Article 2 of the CAT; Article 7 of ICCPR.
[35] Brants and Franken, "The Protection of Fundamental Human Rights in Criminal Process," 27.
[36] See Article 66 of the Rome Statute of International Criminal Court (ICC), 1998.
[37] See Article 14 (3) (a) of the ICCPR; Human Rights Committee, General Comment No. 35: Article 9 (Liberty and security of person), December 16, 2014.
[38] Article 14 (3) of ICCPR.
[39] See Article 14 (3) (d) of ICCPR.

to counsel,[40] right to examine or have examined witnesses,[41] right to have an interpreter,[42] and protection against self-incrimination and forced confession.[43]

5.3 International Human Rights Law on Redressing Violations of Human Rights

All legal systems have this cardinal principle that whoever wrongfully causes injury to another, he is under duty to redress the injury. The notion of redressing the harm caused due to wrongful act committed by a state has a strong basis under international law and reflected through both international legal instruments and national jurisprudence.[44] International law while establishing certain rights and imposes a correlative duty on the states to respect those rights, it is not necessary to specify the obligation to afford remedy for the breach of obligation, as the duty to repair the injury arises automatically by operation of law.[45]

International human rights law requires as a matter of right, an effective remedy for all violations of human rights.[46] The substantive nature of the right to redress or effective remedy ensures realization of the right to equality and equal protection of law.[47] The purpose of redress or reparations is not only to help the injured party, but it also defies impunity and protects the principles of legality. Thus, the reparations for human rights violations serve both purposes i.e., to

[40] Ibid.; See also Article 6 (3) (c) of the ECHR.
[41] Article 14 (3) (e) of ICCPR.
[42] 14 (3) (f) of ICCPR.
[43] Article 14 (3) (g) of ICCPR.
[44] Maria Jose Recalde-Vela, "Access to Redress for Stateless Persons Under International Law," 182.
[45] Dinah Shelton, "The Right to Reparations for Acts of Torture: What Right, What Remedies?," *Torture* 17, no. 2 (2007): 97.
[46] See the provisions of international human rights treaties like Article 8 of the UDHR; Article 2 of the ICCPR; Article 6 of Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, (ICERD) 1965; Article 14 of CAT, Article 39 of the Convention of the Rights of the Child (CRC), 1989; Article 7 of the The *African Charter* on Human and Peoples' Rights (AfrCHPR), 1981; Article 25 of The American Convention on Human Rights (ACHR), 1978; and Article 13 of ECHR.
[47] Avitus A Agbor "Pursuing the Right to an Effective Remedy for Human Rights Violation in Cameroon: The Need for Legislative Reform," *Potchefstroom Electronic Law Journal* 20 (2017): 1.

provide remedy for past abuse of power and to reduce the incidence of violations by seeking compliance of those in power to respect the human rights norms in future.[48]

It is important to note that the principle that an international delict (illegal act) invokes the obligation of reparation and the principle that reparation must, to the extent possible, eliminate the consequences of that delict, are underlying principles for remedies in international law.[49]

Modern international law recognizes protection of human rights as its fundamental aim and responds to human rights violations by providing opportunities of redress for individuals whose rights are violated without remedy in domestic law. By the development of international human rights law, state sovereignty was reduced to the extent that now treatment of the individuals within a state territorial jurisdiction is no more its exclusive internal matter. Now, alongside the statement of guaranteeing and enforcing the human rights for all human beings including accused persons, the human rights law also provides for redressing of these rights when they are violated. The specific provisions of human rights law provide for the obligation of states to provide effective remedies for human rights violations,[50] for example to victims of unlawful arrest and detention.[51]

5.4 Development of Redressive Justice or Remedial Jurisprudence

Since the early 1900s, there evolved international and domestic forums to address violations of individual rights in various forms.[52] As early in 1928, the Permanent Court of International

[48] Shelton, "The Right to Reparations for Acts of Torture," 98.
[49] Ibid., 97.
[50] Shelton, *Remedies in International Human Rights Law*, 16; Zegveld, "Remedies for Victims of Violations of International Humanitarian Law," 497.
[51] See for example Art. 5(9) of the ICCPR.
[52] For instance, the Central American Court of Justice created in 1907 with the jurisdiction to entertain individuals' claims against States; the International Prize Court created in 1907 with the mandate to adjudicate claims against foreign States; The Treaty of Versailles of 1919 that provided the remedy to nationals of the Allied and Associated Powers to bring claims against Germany; and the decision of PCIJ in the case concerning *Jurisdiction of the Courts of Danzig*, which declared the individuals' right to bring international claims before national courts.

Justice (PCIJ) in *Factory at Chorzow case* established that international law has cardinal obligation to redress the harm resulting from a wrongful act in an adequate form.[53] The general rule articulated by the *Chorzow Factory Case* has been widely cited and reaffirmed in several judgments of the International Court of Justice (ICJ), including the case concerning Armed Activities on the Territory of the Congo,[54] and *Ahmadott Sadio Diallo case*.[55]

The International Court of Justice in its advisory opinion concerning case '*legal consequences of the construction of a wall in the Occupied Palestinian Territory,* held and underscored for the entitlement of reparation for the all legal and natural persons that are affected by the violations or breaches of international human rights and humanitarian law.[56] Besides being a core principle of international law, it has also been regarded "a general conception of law".[57]

Thus, now the right to a remedy or redress (usually known or referred as reparation in international law) for the breach of human rights is a fundamental principle of international law recognised in numerous treaties and international courts and tribunals have acknowledged this right. The purpose of corrective or remedial is to render justice by removing, correcting or

[53] PCIJ*, Case Concerning the Factory at Chorzow, (Germany v Poland)* (Jurisdiction) [1927], Series A, No. 9, 26 July 1921, at 21, and Factory at Chorzow (Claim for Indemnity) case, *(Germany v. Poland)* 'Merits' [1928] PCIJ Ser. A No. 17 at 29; Recalde-Vela, "Access to Redress for Stateless Persons," 182.

[54] See International Court of Justice, *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Rep. 2005 (Dec. 19), 257, para. 259.

[55] International Court of Justice, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, Rep. June 19, 2012, para. 57. The case involved violations of ICCPR and AfrCHPR by the Democratic Republic of the Congo.

[56] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, ICJ Judgment, July 9, 2004, paras 152-153.

[57] See Permanent Court of Arbitration, *Chorzow Factory Case (Germany. v. Poland.)*, (1928) P.C.I.J., Series A, No.17, at 47 (September 13); International Court of Justice: Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. U.S.*), Merits 1986 ICJ Report, 14, 114 (June 27); *Corfu Channel Case;* (*UK v. Albania*); Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, 184; Article 1 of the draft Articles on State Responsibility adopted by the International Law Commission in 2001 states that a State owes responsibility for every internationally wrongful act.

redressing the injustice or consequences of a wrongful act for the victim and to prevent and deter further violations.[58]

The remedies or reparations are aimed to restore and reinstate the victim to the original position before the harm and/or redress him for damage suffered. As for the specific forms and quantum of reparations, this would vary according to the nature of violation committed and the harm caused.[59] Yet in all cases, reparations should be effective, adequate, and inclusive as they must be according to the seriousness or gravity of the violations and the injury sustained or harm suffered; and hence the harm or the sufferings of the victims must be redressed fully.[60]

Much attention has been devoted in last few decades for ensuring effective remedies for violation of human rights.[61] In last few decades, there has been a tremendous breakthrough and developments in the domain of redressive justice or remedial jurisprudence. The United Nations adopted principles and guidelines on reparation for gross and systematic violations of human rights and humanitarian law. Further, the International Criminal Court[62] and International Court of Justice developed principles on victim reparations and issued judgment awarding compensation for human rights violations, respectively. International Law Commission after codifying articles on the

[58] African Court on Human and Peoples' Rights, *Comparative Study on the Law and Practice of Reparations for Human Rights Violations*, September 2019, 8; Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study Concerning the Right to Restitution, Compensation and Rehabilitation*, para. 137.

[59] International Court of Justice, A*hmadou Sadio Diallo v Democratic Republic of the Congo (Merits)*, ICJ Judgment of 30 November 2010, para 163; *Ahmadou Sadio Diallo v Democratic Republic of the Congo (Compensation)*, ICJ Judgment of 19 June 2012, para 17. Article 39 of Articles on State Responsibility for Internationally Wrongful Acts, 2001 provides: "In the determination of reparation, account shall be taken to the contribution to the injury by… any person or entity in relation to whom reparation is sought." International Commission of jurists, *The Right to a Remedy and Reparation,* 155.

[60] African Court on Human and Peoples' Rights, *Comparative Study on the Law and Practice of Reparations for Human Rights Violations*, 3.

[61] Gerald L. Neuman, "Bi-Level Remedies for Human Rights Violations," *Harvard International Law Journal* 55, no. 2 (Summer 2014): 323; Bagińska, *Damages for Violations of Human Rights*, 2; See also Lisa Tortell, *Monetary Remedies for Breach of Human Rights: A Comparative Study* (Oxford: Hart Publishing, 2006). 13-14.

[62] It is, however, unfortunate that the practice of redress could not seek its due recognition from International Criminal Court. See, for instance, Joanna Nicholson, "'Too High', 'Too Low', or 'Just Fair Enough'? Finding Legitimacy Through the Accused's Right to a Fair Trial'" *Journal of International Criminal Justice,* 17, no. 2 (May 2019): 365.

law of state responsibility has developed Articles on responsibility of international organizations. In addition, new petition procedures were entered into force to enforce the remedies before United Nations human rights treaty bodies.[63]

The human rights tribunals have gradually developed a law of remedies based upon the traditional law of state responsibility, domestic legal regimes and views of the judges or committee members regarding capacity and role of the international bodies to redress the victims of state abuse. The remedies developed include declaratory judgments awarding compensatory damages in varying degree, and orders to perform a specific action by the state. Likewise, national courts and tribunals have been increasingly providing redress to the victims of human rights violations and also passed judgments in favor of those who suffered unrepaired historical injustices and wrongs.[64]

5.5 Nature of Right of remedy Under International Law

The right to an effective remedy of violations of human rights and its correlative duty of redressing governmental misconduct are integral and substantial part of customary international law.[65] Thus, the right to a remedy has been recognized as a non-derogable right.[66] Consequently, it is an independent and continuing obligation on the states to provide effective domestic remedies for victims of human rights violations at all times even in emergency times.[67] In this regard,

[63] See Shelton, *Remedies in International Human Rights Law*, vii.
[64]Ibid., 2.
[65] Boven, "Victims' Rights to a Remedy or Reparation," 19.
[66] See, for example, UN Human Rights Committee, "General Comment 29 on States of Emergency (Art. 4)," CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 14.
[67] The Redress Trust, *Reparation: A Source Book*, 13.

human rights treaties require that the states must enact domestic legislation to provide reparations to the victims of human rights violations.[68]

The current practice reveals that redress is available for the violations of human rights of individuals at inter-state, international level and domestic levels. At the inter-state level, it is the right of states to seek reparation for individuals through the traditional process of diplomatic protection.[69]

5.6 International Human Rights Law on Redressing Violations of Rights of Accused

Under the international law, the right to redress for violations of fundamental human rights is established and guaranteed under various international[70] and regional human rights instruments[71] that expressly provide for the right to an effective remedy and oblige states parties to ensure an effective remedy when human rights are violated.[72] These international human rights instruments guarantee both kinds of redress i.e. the procedural right to an access justice and the substantive right to reparations.

5.6.1 The Universal Declaration of Human Rights, 1948

The Universal Declaration of Human Rights (UDHR), 1948 obliges all states to constitute competent national tribunals to provide an effective remedy against violations of

[68] See Article 8 of the UDHR, Article 2 of ICCPR, Article of 6 of ICERD, Article 13 of the CAT, Article 13 of ECHR, Articles 24 and 25 of the Inter-American Convention on Human Rights, Article 3 and 7 of AfrCHPR and Article 9 of Arab Charter on Human Rights (ACHR), 2004.
[69] Claudio Grossman Guiloff, *Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law*, A/74/10, 359.
[70] For instance, International human rights instruments such as Article 8 of UDHR, Articles 2(3), 9(5) and 14(6) of ICCPR, Article 6 of ICERD, Article 14 of the CAT, Article 39 of CRC, and Articles 68 and 75 of the Rome Statute of the International Criminal Court, 1998.
[71] For instance, Article 21 of AfrCHPR, Articles 25, 63(1) and 68 of ACHR and Articles 5(5), 13 and 41 of ECHR.
[72] Shelton, "The Right to Reparations for Acts of Torture," 99; Kent Roach, *Remedies for Human Rights Violation: A Two-Track Approach to Supra-national and National Law*, (New York: Cambridge University Press, 2021), 2.

fundamental rights.[73]This protection has been reiterated and guaranteed in many subsequent human rights treaties including ICCPR, 1966.[74] However, the form of that remedy is a matter of controversy particularly in terms of criminal proceedings against the states and state actors for human rights violations.[75]

5.6.2 International Treaties

Apart from Universal Declaration of International Human Rights, the right of redress is established under many international human rights treaties. ICCPR requires the states to promote the rights of all people within their territorial jurisdiction and ensure an effective remedy to an individual whose rights are allegedly violated.[76] ICCPR provides that member states are responsible to provide an effective remedy for those whose freedom or rights are infringed or violated even by the state authorities or officials. The Covenant expressly provides for right to compensation to a person unlawfully arrested, detained, or convicted.[77] Articles 2(3), 9(5) and 14(6) of ICCPR provide for the right to an effective and enforceable remedy against violations of human rights.

Thus, Article 2(3) of the ICCPR obliges every state to ensure the effective judicial system which provides such remedy to the victim party and his remedy is effectively enforced by the competent authorities.[78] Article 2(3)(b) of the ICCPR provides that each state party should ensure provision of reparation to the victims of human rights violations and develop the venues or "possibilities of judicial remedy."

[73] Article 8 of the Declaration provides for the duty of the state to provide an effective remedy for the violations of fundamental rights granted him by the constitution or by law.
[74] For instance, Article 2(3) of ICCPR expressly provides for states responsibility towards protection of the right of remedy to the victims of human rights violations.
[75]M. Cherif Bassiouni, "International Recognition of Victims' Rights," *Human Rights Law Review* 6, 2006: 207, 215.
[76] Article 2 of the ICCPR; Brants and Franken, "The Protection of Fundamental Human Rights," 11.
[77] Shelton, "The Right to Reparations for Acts of Torture," 100.
[78] Article 2(3) of the ICCPR.

Besides, Article 9(5) of the ICCPR also states about the specific enforceable right of compensation in cases of 'unlawful arrest and detention'. Thus, the international law not only provides right to substantive (monetary) compensation, but it also enjoins upon the states to provide in their domestic law the enabling procedure to seek and obtain the substantive remedy.[79]

However, in case the detention of an accused pre-trial detainee, who is subsequently acquitted, is "based on a reasonable suspicion of having committed a crime," then Article 9(5) ICCPR does not provide him the right to compensation.[80]

Another important provision is the Article 14(6) of ICCPR that states about state liability for providing compensation against miscarriage of justice in terms of wrongful conviction affecting the rights of accused in criminal justice.

Besides the ICCPR, other human right treaties also contain similar provisions for redressing of violations of human rights.[81] Some specialized international treaties provide for right to remedy, often explicitly including compensation. Article 6 of International Convention on the Elimination of All Forms of Racial Discrimination, (ICERD) 1965 not only asks for provision of domestic effective protection and remedies against racial discrimination violating his human rights and freedom but it also requires to make enabled mechanism to provide the remedy.

Similarly, Article 14(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) requires the states to ensure in their legal systems

[79] International Commission of jurists, *The Right to a Remedy and Reparation,* 81.
[80] M. Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary*, (NP Engel, Kehl, Germany, 2005), 239. According to the Human Rights Committee, the fact that a person has spent time in pre-trial detention and is later acquitted 'does not in and of itself render the pre-trial detention unlawful', See, for instance, *WBE v. The Netherlands*, Communication No. 432/1990, U.N. Doc. CCPR/C/46/D/432/1990 (1992).
[81] European and Inter-American Conventions include similar provisions. For instance, Article 8 (right to fair trial), and Article 25 (right to judicial protection) of ACHR, 1969, and Article 6 (right to fair and public hearing), and Article 13 (right to effective remedy) of ECHR.

provision of redress and "enforceable right to fair and adequate compensation." Possibly, the most victims of torture may not be in a position to submit formal claims for reparation; rather they may be in immediate need of care and rehabilitation.[82] Thus, the states are required to have legislation to provide for an enforceable right to redress including "means of rehabilitation".

The Rome Statute International Criminal Court, 1998 also recognizes an obligation for state and non-state entities to make reparation. The Statute is remarkable to provide victims the right to receive redress and make the individual perpetrators liable for the sufferings and losses of the victims. It also emphasizes the requirement and provision of non-monetary redress such as rehabilitation.[83] It is pertinent to mention that Rome Statute was the first international legal mechanism that enabled victims to make claims for reparation against the person directly responsible for a violation.[84]

Remarkably, Article 75 (1) of the Statute enables the International Criminal Court to establish principles relating to reparations which may include restitution, compensation and rehabilitation.[85] Further, the Court is sanctioned to award the reparations, considering the "scope and extent of any damage, loss or injury."[86]

Besides, Article 85 of Rome Statute provides for the enforceable right of compensation for the accused as victim of unlawful or arbitrary detention. The Statute, however, provides

[82] Sveaass, "Gross Human Rights Violations and Reparation," 5.
[83] Antkowiak, "Remedial Approaches to Human Rights Violations" 364.
[84] Eric Mongelard, "Corporate civil liability for violations of international humanitarian law," International *Review of the Red Cross* 88, no. 863 (2006): 673.
[85] Article 75 (1) of the Rome Statute.
[86] Art. 75(2) of Rome Statute.

compensation where it seems beyond reasonable doubt to afford compensation to persons erroneously detained due to a 'grave and manifest miscarriage of justice'[87]

In the same way, Article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance, 2010 enjoins upon the States to provide reparations and fair prompt, and adequate compensation to the victims of enforced disappearance. The reparation may include 'material and moral damages and other forms of reparation like "restitution, rehabilitation, satisfaction, including restoration of dignity and reputation; and guarantees of non-repetition."

5.6.3 Regional Human Rights Treaties

Apart from international human rights instruments, regional human rights instruments also provide for redressing of violations of fundamental rights. For instance, Article 16 of Arab Charter on Human Rights, 2004 states about entitlement of compensation to the victim of unlawful arrest or detention.[88] Similarly, Article 13 of European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 provides effective remedy to the victim of human rights before a national authority even the violation is made by a person acting in official capacity.[89] Likewise, Article 10 of the American Convention on Human Rights 1969 provides for right to compensation for the victims of miscarriage of justice.

Thus, the texts of human rights instruments are clear on the duty of states parties to provide redress for violations of rights guaranteed by national and international law. The provisions of treaty law require the states to explain and document the compliance of the

[87] S. Zappalà, "Compensation to an Arrested or Convicted Person," in *The Rome Statute of the International Criminal Court: A Commentary,* ed. A. Cassese, P. Gaeta and J.R.W.D. Jones, vol. II, (Oxford: Oxford University Press, 2002), 1583.
[88] Arab Charter on Human Rights, 2004, https://www.refworld.org/docid/3ae6b38540.html, Accessed 23 September 2023.
[89] European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

provisions of relevant treaties, on a regular basis. As for the compliance of relevant treaty, states are duty to report to the concerned treaty body about redress mechanism including means for reparation or rehabilitation to the victims of human rights violations.[90]

5.6.4 Other Non-Binding Instruments

Besides international and regional treaty law, non-binding "soft law" instruments also specify the need to provide redress to the victims of human rights violations.[91] For instance, the General Assembly unanimously adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 calling on the state to provide redress to the victims of crime and official abuse in term of restitution, compensation, necessary material, medical, psychological and social assistance when public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws.[92] Similarly, the U.N. Declaration on Enforced and Involuntary Disappearances also requires individual civil liability as well as proclaiming the obligation of the state to investigate the crimes and compensate victims and their families.[93]

The UN Body of the Principles for the Protection of all Persons under Any Form of Detention or Imprisonment (1988) provides about the compensation for the damage suffered by the accused person. It states "damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules or liability provided by domestic law".[94]

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[90] Sveaass, "Gross Human Rights Violations and Reparation," 8.
[91] For instance, Articles 12 and 13 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985; Article 19 of Declaration on the Protection of all Persons from Enforced Disappearance, 1992, UN Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, 2005.
[92] General Assembly Resolution 40/34, U.N. Doc. A/40/53 (1985).
[93] General Assembly Resolution 47/133, U.N. Doc. A/47/49 (1992).
[94] Principle 35.1 of the UN Body of the Principles for the Protection of all Persons under Any Form of Detention or Imprisonment (1988).

In this regard, one significant development was the Draft articles on Responsibility of States for Internationally Wrongful Acts, 2001.[95] These Draft Articles made in the context of inter-State relations and did not attend the relationship between States and individuals still they are relevant to draw and invoke state liability for the violations of human rights of individuals.[96]

Another most significant attempt in shape of "soft law" to codify the right to reparation was made in December 2005 when UN General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation, 2005 which are also considered to be major legal authority on this subject. This UN resolution was an important milestone in strengthening international focus on the right to remedy and forms of reparation.[97] It provides for the 'compensation' in cases of 'gross violations of international human rights law and serious violation of international humanitarian law'.[98]

The adoption of the *Basic Principles and Guidelines* signifies the first inclusive and comprehensive document that codifies the rights of victims of international crimes to remedies, reparation and access to justice. The *Basic Principles and Guidelines* were developed out of the 1985 Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders. [99] These *Principles and Guidelines* do not embody or entail new legal obligations but they identify the

[95]International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, as contained in *Report of the International Law Commission on the Work of its 53rd Session*, UN Doc A/55/10 (2000).
[96] See Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study Concerning the Right to Restitution, Compensation and Rehabilitation*, 1993.
[97] Sveaass, "Gross Human Rights Violations and Reparation," 6.
[98] Article 20 of Basic Principles and Guidelines on the Right to a Remedy and Reparation, 2005.
[99] Kelly McCracken, "Commentary on the basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law," *Dans Revue internationale de droit penal* 76, no. 1-2 (2005): 78, https://www.cairn.info/revue-internationale-de-droit-penal-2005-1-page-77.htm.

"mechanisms, modalities, procedures and methods for the implementation of existing legal obligations". [100]

The Basic Principles and Guidelines provide for expansive rights to victim for remedy and illustrate the wide range of remedies potentially available in international human rights law including compensation for physical or mental harm, lost opportunities, moral damage, and consequential costs, cessation of continuing wrong or violation, restitution to the extent possible, rehabilitation through medical, psychological, legal, or social services, measures of satisfaction like public disclosure of truth, public apology, judicial and administrative sanctions against perpetrators, and guarantees of non-repetition.[101]

Basic Principles and Guidelines aim to define the mechanisms that allow victims of gross violations of international human rights law and serious violations of international humanitarian law to obtain reparation. Consequently, non-state entities are also bound to make reparation for damage resulting from a breach of international law. According to these basic principles, states are obliged to provide victims with "effective access to justice", irrespective of who may ultimately be responsible for the violation and to enforce ''judgments for reparation against individuals or entities liable for the harm suffered".[102]

The resolutions and reports, though, do not have the same binding force as do the conventions, which are legally binding to the states that have ratified them. However, they are important as soft-law codification of the right of remedy to the victims of human rights violations

[100] Preamble of Basic Principles and Guidelines on the Right to a Remedy and Reparation, 2005.
[101] See paras. 15 to 21 of Basic Principles and Guidelines, 2005. See also Human Rights Committee, "General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant," UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 16.
[102] See para. 15 of Basic Principles and Guidelines, 2005.

under international law.[103] Thus, the *Basic Principles and Guidelines* blend a variety of techniques and modes of remedies from the Common Law, Civilist, and Islamic legal systems, and represent an interesting and pleasant development in comparative criminal law and procedure.[104]

5.7 Individual Claims to International Human Rights Bodies

At international level, United Nations treaty bodies monitor compliance of the states with regard to specific human rights conventions.[105] Besides, Special Rapporteur and the UN Commission on Human Rights (UNCHR) have their various monitoring mechanisms to deal with human rights violations outside the context of specific human rights treaties.[106]

The human rights treaties bodies as part of their compliance monitoring functions express their views and comments to the states while reviewing state reports on treaty implementation.[107] Thus, these treaties bodies may issue reports on States' compliance with their obligations.

Similarly, the decisions of these treaty bodies, such as the Human Rights Committee and the Committee against Torture, also provide useful guidance to assess the parameters and appropriate scope of redress to be granted, based on the relevant instrument. However, the treaty monitoring mechanisms can only entertain claims from the states that are party to the conventions through ratification and accede to the specific jurisdiction of these complaint mechanisms. [108]

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[103] Sveaass, "Gross Human Rights Violations and Reparation," 6.
[104] McCracken, "Commentary on the Basic Principles and Guidelines," 79.
[105] United Nations treaty bodies comprising on special committees monitor implementation of core UN human rights treaties. These special committees are established by the treaties themselves. These committees comprise on the experts elected by the states on the basis of their expertise and services in the field of human rights. These committees include the Human Rights Committee, the Committee Against Torture, the Committee on the Elimination of All Forms of Racial Discrimination, the Committee on Economic, Social and Cultural Rights which monitor the implementation of ICCPR, CAT, and International Convention on the Elimination of All Forms of Racial Discrimination, and International Covenant on Economic, Social and Cultural Rights.
[106] The Redress Trust, *Reparation: A Source Book*, 28.
[107] Antkowiak, "Remedial Approaches to Human Rights Violations" 359.
[108] The Redress Trust, *Reparation: A Source Book*, 22.

5.7.1 Human Rights Committee on Redressing Violations of Rights of Accused

The Human Rights Committee is a monitoring body of ICCPR. It has a significant role to ensure the rights set out by the Covenant. Besides considering reports of the member states, the Committee may also receive and consider claims of individuals against violation of their rights guaranteed in the Covenant. This right of complaint is provided by the Optional Protocol to the Covenant, and thus can be invoked only if the state party ratifies the Protocol.

The Committee has held that the state party must also provide effective remedies for victims of arbitrary or unlawful arrest or detention. Article 9 (4) of the ICCPR requires that there be a judicial remedy for any detention that is unlawful on one of those grounds. Article 9(5) further clarifies that victims of unlawful arrest or detention are also entitled to financial compensation. It obliges States parties to establish the legal framework within which compensation can be afforded to victims, as a matter of enforceable right and not as a matter of grace or discretion. The remedy must not exist merely in theory, but must operate effectively and payment must be made within a reasonable period of time.[109]

The Article 9(5) does not specify the precise form of procedure, which may include remedies against the State itself or against individual State officials responsible for the violation, so long as they are effective. It does not require that a single procedure be established providing compensation for all forms of unlawful arrest, but only that an effective system of procedures exist that provides compensation in all the cases covered by Article 9(5). Article 9 (5) does not oblige States parties to compensate victims *sua sponte*, but rather permits them to leave commencement

[109] Human Rights Committee, "General Comment No. 35: Article 9 (Liberty and security of person)," (December 16, 2014), 15.

of proceedings for compensation to the initiative of the victim.[110] As for the procedure of the remedy, the Committee has stated in paragraph 52 of its general comment No. 32 that the States parties are under obligation to enact legislation to ensure the remedy of compensation is in fact provided within reasonable period of time.[111]

Regarding the nature of the reparation under the Covenant, UN Human Rights Committee interpreted that reparation to victims not only involves compensation, but it also "include restitution, rehabilitation and measures of satisfaction," which may take form of public apologies, public monuments, guarantees of non-repetition and amendment or changing the relevant laws and legal practices, apart from giving punishment to the perpetrators of human rights violations.[112]

The Committee considers under Article 14(6) to provide an 'effective remedy in the form of adequate compensation' against miscarriages of justice affecting the rights of the accused.[113] It has more generally held that effective remedies under international human rights law are owed to victims of abuses regardless of their guilt or innocence.[114] The Committee has elaborated that in this regard, amnesties are unacceptable as they the cause to deprive the individuals from their right to an effective remedy which may be in form of compensation and rehabilitation to the extent

[110] Ibid.
[111] Human Rights Committee, "General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial," U.N. Doc. CCPR/C/GC/32, 2007, (27 July 2007).
[112] UN Human Rights Committee, "General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant," CCPR/C/21/Rev.1/Add.13, (26 May 2004) https://www.refworld.org/docid/478b26ae2.html. Accessed 5 October 2023.
[113] UN Human Rights Committee, "Views of the Human Rights Committee under Article 5, para. 4, of the Optional Protocol to ICCPR concerning *Dumont v. Canada*," CCPR/C/98/D/ Communication No. 1467/2006, (21 May 2010), paras 24-25.
[114] UN Human Rights Committee, "Views of the Human Rights Committee under Article 5, paras 4-5; Hannah Quirk and MarnyRequa, "The Supreme Court on Compensation for Miscarriages of Justice: Is it better that ten innocents are denied compensation than one guilty person receives it?" *The Modern Law Review* 75, no. 3, 398.

possible.[115] In fact, state impunity issue and the redress for the human rights violations are interrelated. The victims of human rights violations are deprived or debarred from the seeking an effective remedy when the law sanctions the impunity or where '*de facto* impunity' itself becomes a norms.[116]

The Human Rights Committee, in the *Dumont v. Canada* case, found a violation of article 2, paragraph 3, read in conjunction with article 14, paragraph 6, of the ICCPR when Michel Dumont, a Canadian national claiming to be victim of a violation by Canada as the state refused to provide compensation after reversal of his conviction because of absence of proof of innocence on the part of acquitted.[117]

If the state has ratified the First Optional Protocol to ICCPR, the persons aggrieved by a miscarriage of justice may apply by individual petition to the Human Rights Committee of the United Nations, in Geneva. Although the ratification is a significant human rights breakthrough in terms of individual access by aggrieved citizens to international agencies, there are substantial drawbacks to the procedure. A petitioner must first exhaust his/her domestic remedies; there happens some delay in the hearing of such petitions; there is currently no legal aid available; and the decisions of the Human Rights Committee are not enforceable.[118]

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[115] "General Comment No. 20 (on Article 7)," in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRIIGEN/JIRev. 1 at 30 (1994).
[116] Boven, "Victims' Rights to a Remedy or Reparation," 19.
[117] United Nations Human Rights Committee, "Views under Article 5 para. 4 of the Optional Protocol in respect of communication No. 1467/2006, *Michal Dumont v. Canada*," *Ninety*-eighth session, (May 2010).
[118] See Zdenkowski, "Remedies for miscarriage of justice: Wrongful imprisonment," *Current Issues in Criminal Justice* 5, no. 1 (July 1993):109.

5.7.2 Committee against Torture (CAT) on Redressing of Human Rights of Accused

The Committee against Torture was established under Article 17 of Convention Against Torture (CAT). The Committee adopted several comments to define and highlight the scope and application of CAT. In its general comment no. 3, the Committee outlined and explained both substantive and procedural dimensions of redress. In substantive redress, it referred to the five forms of reparations including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, whereas for procedural redress, it referred to the types of remedies that effectively ensure access to means of reparation as legislation, complaint mechanisms, investigative bodies, and independent judicial and quasi-judicial bodies.[119]

To give effect to Article 14 of the CAT, the Committee against Torture held that the states parties are bound to enact legislation to specifically provide an effective remedy to the victims of torture and ill-treatment and ensure their access to a right to obtain 'adequate and appropriate redress.' The committee also added that such state legislation must ensure their access to a judicial remedy to exercise their right of redress.[120]

5.8 Redressing Violations of Fundamental Rights of Accused and State Responsibility

A remedy or redress presupposes a wrong suffered, an injury inflicted or a violation of right. Therefore, the norms governing the consequences and outcomes of wrongful act under the international law are significant for the purpose of redressing violations of rights.[121] Under the international law, the States have the obligation for victims of all human rights violations, to

[119] Committee Against Torture, "General Comment No. 3: Implementation of Article 14 by Parties" 13 CAT/C/GC/3 (GC 3), (December 2012).
[120] Committee against Torture, "General Comment No. 3 on the Implementation of Article 14 by States Parties," UN Doc CAT/C/GC/3 (2012), para 20.
[121] Buyse, "Lost or Regained, Restitution as a Remedy," 130.

provide them remedies, including compensation, restitution, satisfaction, and guarantees of non-repetition.[122] These forms of remedies apply to the victims of criminal proceedings including those individuals who are arrested, accused, prosecuted, or/and convicted for the allegation of committing a crime in a proceeding that contravene their human rights.[123]

As the International human rights norms become a source of international obligations, the violations of such obligations by the State may cause or lead to state responsibility and hence the international bodies can be approached for the redress. According to Professor Van Boven, the matter of state responsibility emerges or emanates due to the state's violation of internationally recognized human rights which are embodied in the in international treaties and customs.[124]

According to the Principles of Responsibility of States for International Wrongful Act, 2001 as adopted by International Law Commission, a state owes international responsibility for its every internationally wrongful act,[125] which consists of 'an action or omission attributable to the State' breaching an international obligation of the State.[126] The doctrine of 'international responsibility' is applicable to the states and individuals who are subject of international law. Thus, individuals as a subject of international law can be held responsible for an act or omission that violates international law. Similarly, individuals can also claim remedy in case of breach of international obligation resulting into the violation of their rights.[127]

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[122] International Commission of jurists, *The Right to a Remedy and Reparation,* 16.
[123] Ali, "Remedies for Human Rights Violations," 13.
[124] Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study Concerning the Right to Restitution, Compensation and Rehabilitation*, para. 41.
[125]Article 1 of Responsibility of States for Internationally Wrongful Act, 2001.
[126]Article 2 of Responsibility of States for Internationally Wrongful Act, 2001; The Redress Trust, *Reparation: A Source Book*, 13.
[127] The Redress Trust, *Reparation: A Source Book*, 9; International Commission of jurists, *The Right to a Remedy and Reparation,* 28.

Under international law, the essential requisites to remedies are breach of international obligation, and the resulting harm to the party injured.

5.8.1 Breach of International Obligation

Like national legal systems[128] in the international law of state responsibility, if an act or omission of a state breaches its international obligation, it would invoke a new obligation of that state to make reparations for any injury caused due to breach of its international obligation. Besides, the state would be under its continuing obligation to stop the breach and make compliance to the norm or obligation violated.

The state actors are subjects of international human rights obligations, regardless of their level or branch of government and they are under effective duty to guarantee fully and freely exercise and enjoyment of human rights. Accordingly, where infringement or impairment of the guaranteed human rights is attributable under the rules of international law to the actions or omission of a public authority, the state would be responsible for any such imputable conduct. Thus, in case a state organ, public authority, or government official acts or involves in violation of a guaranteed right, this would constitute failure of state's obligation; even though the organ or official contravenes the provisions of its national law or exceeds its scope of authority. The state in such a scenario would under its international obligation to cure the violation by providing timely and effective remedies and redress.[129]

[128] In a national legal system, usually if a person breaches his legal obligation owed to the right of other, he is liable to repair the harm caused due to breach of his duty.
[129] Shelton, *Remedies in International Human Rights Law*, 14; International Commission of jurists, *The Right to a Remedy and Reparation,* 29.

5.8.2 Resulting Harm

Under the rules of international law, to ascertain about the state responsibility with regard to a wrongful action, it is necessary that there exists a direct causal link between the victims and the harm suffered. Once this link is proved, the right to remedy would arise thereof. Remedies or reparations presuppose the suffering of harm. The term 'harm' connotes to mean the negative outcome assessed and evaluated by making analysis and comparison of the circumstances existing before and after causative event to the aggrieved party.[130]

Under the international law, the state responsible for the wrongful act is supposed and obliged to provide full reparation for any material or moral injury or damage.[131] As explained in 1928 in *Factory at Chorzów* case, the Permanent Court of International Justice (PCIJ) held that reparation must cover and wipe out all the effects or consequences of the illegal act to the extent possible and restore the earlier position which can be assessed in terms of probability.[132] The *Chorzów standard* of reparation as "source of wisdom" and "principle of reasoning" gained additional support when International Law Commission adopted the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), 2001.[133]

[130] Shelton, *Remedies in International Human Rights Law*, 42.
[131] See Article 31 of Articles on Responsibility of States for Internationally Wrongful Acts, 2001; Accordingly, reparations are classified as material and moral reparations. Material reparations include restitution of property, job, freedom, a pension or good name, and rehabilitation in terms of medical or occupational therapy, monetary compensation or services for the victims. Moral reparations refer to include 'satisfaction' like disclosure of facts, official apologies and acknowledgment and 'guarantee of non-repetition'. See Naomi Roht-Arriaza, "Reparation decisions and dilemmas," *Hastings international and Comparative Law Review* 27, no. 2 (2004): 159.
[132] PCIJ, Chorzów Factory (Merits) (*Germany v. Poland*), 13 September 1928, Series A, No. 17, 47; Buyse, "Lost or Regained, Restitution as a Remedy," 131.
[133] Felix E. Torres, "Revisiting the Chorzów Factory Standard of Reparation- Its Relevance in Contemporary International Law and Practice," *Nordic Journal of International Law* 90 (2021): 191.

The question of harm is critical for the entitlement of remedy or reparation since proportionality is the key factor for redressing any harm suffered.[134] In fact, there are multiple factors that are to be kept in regard while making assessment of the harm suffered. These factors include the nature of violated right, gravity of its violation, and observing the pattern or practice of violation of right.[135] Besides, the individual characteristics of the aggrieved persons are also pertinent such as gender, age, family, wealth, culture, social position and community reaction (stigma).[136]

Violations of human rights are regarded as of dual character of crimes and torts because they involve injury or harm to both individual victims and as well as human society generally. As a matter of torts, they give rise to civil action by the victims against the tortfeasor and the principal remedy in this regard is the monetary damages or compensation for the victims of torts. This is contrast to the criminal proceedings in which the victims have a secondary role as witness, as it happens in common law countries, in criminal prosecution against the perpetrator.[137]

Thus, under the international law, states are obliged to establish independent, impartial and competent judicial bodies to ensure effective remedy to the victims of human rights violations. In this regard, it is equally necessary that the executive authorities must also be competent enough to enforce the law and the remedies awarded by the judicial bodies.[138]

[134] Harm is supposed in cases of gross human rights violations. See International Commission of jurists, *The Right to a Remedy and Reparation,* 42.
[135] International Commission of jurists, *The Right to a Remedy and Reparation,* 80.
[136] Shelton, *Remedies in International Human Rights Law*, 14.
[137] Schaack, "The Civil Enforcement of Human Rights Norms in Domestic Courts," 297.
[138] International Commission of jurists, *The Right to a Remedy and Reparation,* 55.

5.9 Rule of Exhaustion of Domestic Remedies

As for the redress at the international level, that includes international and regional judicial forums as well as treaty bodies. To seek the redress at international level, it is necessary to comply with certain requirements like exhaustion of local or domestic remedies to avoid the misuse of international mechanism and respect the principle of subsidiarity[139] so that international and national mechanisms may complement each other.[140]

Under the international human rights law, the claimant seeking redress for violation of human rights has to exhaust the domestic remedies. In this regard, a reference is made to the Article 41(1) of ICCPR which describes procedure for Human Rights Committee and provides that the Committee shall undertake the matter only after its determination that all the domestic remedies of the given state have already been invoked and exhausted. Thus, the rule is well established in international law and makes the international judicial remedies as complementary and subsequent of national remedies. In legal theory, the rule is regarded as corollary of the principle of state sovereignty and in practice the rule establishes the 'actual primacy' of domestic or national remedies.[141]

This requirement of exhaustion of domestic remedies is based on the principle that international bodies should respect and supplement the domestic institutions for enforcement of human rights. Therefore, before submitting a complaint to international mechanism like

[139] The principle of subsidiarity is considered to be one of the core elements of the international human rights system. It simply holds that international human rights standards are best implemented at domestic level government. The principle also aims to respect national sovereignty of the states and thus meets both pragmatic and normative concerns. See William M. Carter Jr, "Rethinking Subsidiarity in International Human Rights Adjudication," *Hamline Journal of Public Law & Policy* 30 (2008): 320.

[140] Guiloff, *Reparation to individuals for gross violations*, 360.

[141] Cesare P. R. Romano, "The Rule of Prior Exhaustion of Domestic Remedies: Theory and Practice in International Human Rights Procedures," in *International Courts and the Development of International Law*, ed. N. Boschiero et al., (The Hague: T.M.C. Asser Press, 2013): 563.

international human rights bodies or regional human rights bodies, the applicant should attempt to access the domestic institutions usually in terms of initiating the proceedings before the highest judicial forum of the state concerned.[142] Thus, every human body requires the petitioners to prove the exhaustion of domestic remedies or inapplicability of the rule in their initial application.[143]

Thus, claims that originate in human rights law are primarily to be addressed in the domestic legal system. The international human rights law depends primarily on domestic order to provide personal remedies to the victims of human rights violations.[144] However, the requirement of exhaustion of domestic remedies can be exempted in case the application is subjected to undue delay.[145] Similarly, the individual may be excused from the duty to exhaust the domestic remedies requirement in case the domestic remedies are not "available", "effective" and "sufficient" while taking into consideration the specific circumstances of the applicants.[146]

5.10 Challenges in Redressing Violations of Human Rights under International Law

Generally, International law includes substantial body of rules and principles that govern the subject of 'remedies' or 'redress' for any breach of international obligations. However, due to 'decentralized nature of the international legal system'[147] there have been 'apprehensions' about the nature, scope and effectiveness of remedies available in practice; as the subject of remedies is still evolving.[148]

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[142] Article 5(2) of the Protocol; International Justice Resource Centre, *Exhaustion of Domestic Remedies in the United Nations System*, 3.
[143] Romano, "The Rule of Prior Exhaustion of Domestic Remedies," 568.
[144] Seth Davis & Christopher A. Whytock, "State Remedies for Human Rights," 399.
[145] Brants and Franken, "The Protection of Fundamental Human Rights in Criminal Process," 11.
[146] Romano, "The Rule of Prior Exhaustion of Domestic Remedies," 565.
[147] Arianna Whelan, "International Law as a Decentralised System in a World of Shared Challenges," in *The International Legal Order in the XXIst Century*, ed. Jorge E. Viñuales, Andrew Clapham, Laurence Boisson de Chazournes, and Mamadou Hébié, (Brill, October 2023), 307-308.
[148] Luke Moffett and Clara Sandoval, "Tilting at windmills: Reparations and the International Criminal Court," *Leiden Journal of International Law* 34 (2021): 750-751, 769.

Despite radical advancements of human rights law, there is a challenge of development of coherent theory for redress and lack of consistent practice in providing redress to the individuals whose human rights are violated. Moreover, the decisions of the international human rights bodies limit themselves to finding facts and issuing declaratory judgments whereby they recommend compensation of an unspecified amount for the claimant. Besides the compensatory damages for both pecuniary and non-pecuniary injury, non-monetary remedies like apology, restitution or rehabilitation are normally overlooked. There are rare reasoned decisions articulating the principles determining non-monetary remedies or specific amount of compensation. [149]

It has been postulated that existing redress mechanisms in international law cannot afford adequate or effective remedies and reparation.[150] United Nations human rights institutions that examine individual petitions do not possess competence to issue a mandatory order for compensation or other remedies. For instance, Human Rights Committee has no authority to issue mandatory directives, and the ICC has yet to establish an integrated practice of redress. Similarly, the Basic Principles inclusively provide for remedies but they also lack any binding effect and even they do not precisely define the terms "gross violations" or "serious violations."[151]

Though, there is no unanimous definition of "gross violations" of human rights under international law, yet the terms "gross", "grave", "flagrant", "massive", or "serious" are used interchangeably by international legal instruments and quasi-judicial bodies and thus they are regarded to have same meanings in terms of qualifying the gravity of certain human rights violations. These violations consist of the violations of civil rights, political rights, and socio-

[149] Shelton, *Remedies in International Human Rights Law*, 2.
[150] Carla Ferstman, "Reparation for Violations of Human Rights and Humanitarian Law: The Responsibility of International Organizations," (DPhil Law diss., (Oxford: Mansfield College, 2015), 16.
[151] Antkowiak, "Remedial Approaches to Human Rights Violations" 364.

economic rights. The seriousness of violations is measured on several bases including the type of violated rights, and the nature of the violation, the quantity of victims, the repeated occurrence of the violations and its planning, and the government failure to take appropriate preventive and corrective measures.[152]

The role of these international bodies such as Human Rights Committee and Committee Against Torture is subsidiary and only becomes relevant and necessary when the State do not provide the required relief. Further, these bodies have not been vested with the powers of binding decision-making. Thus, the Human Rights Committee like other international and regional human rights bodies has limited capacity to provide redress and its role is confined to formulating 'views' when ruling on individual communications.[153]

Although the ratification is a significant human rights breakthrough in terms of individual access by aggrieved citizens to international agencies, there are substantial drawbacks to the procedure. A petitioner must first exhaust his/her domestic remedies; there happens some delay in the hearing of such petitions; there is currently no legal aid available; and the decisions of the Human Rights Committee are not enforceable. [154] In fact, the victims of human rights violations need a comprehensive package of redress including monetary compensation and other non-monetary services and a court can significantly contribute to provide a fuller remediation.[155]

In this perspective, it is suggested that the redress should be dependent on victim's initiative of litigation as right to redress through other means should not be prevented due to lack

[152] Roger-Claude Liwanga, "The Meaning of Gross Violation of Human Rights: A Focus on International Tribunals' Decisions over the DRC Conflicts," *Denver Journal of International Law & Policy* 44, no.1 (January 2015): 68, 81.
[153] The Redress Trust, *Reparation: A Source Book*, 23; Seth Davis & Christopher A. Whytock, "State Remedies for Human Rights," 399; Kempen, "Appropriate Remedy of Redress for Human Rights Violations," 941.
[154] Zdenkowski, "Remedies for miscarriage of justice," 109.
[155] Antkowiak, "Remedial Approaches to Human Rights Violations" 419.

of availability of effective legal mechanism or person's own choice of not pursuing complex legal procedures. The possibility of actual redress or reparation depends only on the implementation of practical, accessible and confidential mechanisms. Mere defining the rights does not serve justice or reparation to the victims[156] as recognition of rights is one thing, the right to claim those rights is another.[157]

5.11 Relevance of International Human Rights Law and the Legal Framework of Pakistan

Pakistan is a signatory to the ICCPR and other human rights treaties that oblige member states to ensure to provide the rights of its individuals within the territory. In this regard, UN Bodies like United Nations Committee against Torture have been expressing their concerns and reservation that many victims of torture and abuse of powers are unable to seek redress and urged the state of Pakistan to ensure effective redress and reparation including adequate compensation and rehabilitation for the victims of torture, ill-treatment and abuse of power, regardless of whether the perpetrators of the violations are identified or apprehended and dealt under the law or not.[158]

Pakistan being signatory to the several international treaties, is bound to honour its commitment and make compliance to the international human rights law. However, it is unfortunate that the fundamental rights of accused are ruthlessly violated by the state authorities in the course of criminal justice. This scenario becomes more gruesome when there happens to be no required apparatus to redress such violations, as discussed in detail in chapter 3 of this study.

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[156] Sveaass, "Gross Human Rights Violations and Reparation," 5.
[157] Zegveld, "Remedies for victims of violations of international humanitarian law," 497.
[158] United Nation, Committee against Torture, "Concluding Observations on the initial report of Pakistan," June 2017,https://www.ohchr.org/en/documents/concluding-observations/catcpakco1-committee-against-torture-concluding-observations, Accessed on June 6, 2023.

5.12 Conclusion

International law provides for a substantial body of rules and principles governing 'remedies' for any breach of international obligations. These principles of international law oblige the states to provide remedies for all human rights abuses and violations. Undoubtedly, the right to redress or compensation is an established individual right under international law. However, there exists certain difficulty to find international law and jurisprudence about the amount of compensation, as different human bodies have interpreted and awarded it considerably various terms.[159]

Although the enforcement of such principles remains difficult and uncertain yet the standards of reparation may be adopted keeping in view the nature of the breach and the resulting harms, regardless of who is responsible for the breach. In this regard, it is important that the redress afforded in cases of human rights violations, should be adequate and sufficient. This same is applicable even in cases where non-pecuniary redress is to be provided.

Under international human rights law, the right to redress is available only in cases where rights of accused are violated by the state through some wrongful or unlawful actions. However, this right does not extend to the cases of erroneous violations of rights of accused that may happen in course of performance of some legal duty in the criminal justice.

Besides, International law acknowledges a great role of domestic or local remedies for sake of enforcement of human rights of individuals including accused persons. Thus, the domestic programs in terms of domestic laws and national judicial decisions are also relevant to the extent they may also regulate the issue of redress owed to accused persons.

[159] International Commission of jurists, *The Right to a Remedy and Reparation,* 203.

CHAPTER 6: ISLAMIC LAW ON REDRESSING VIOLATIONS OF FUNDAMENTAL RIGHTS OF ACCUSED

CHAPTER 6

ISLAMIC LAW ON REDRESSING VIOLATIONS OF FUNDAMENTAL RIGHTS OF ACCUSED

O ye who believe! Stand out firmly for justice, as witnesses to God, even as against yourselves, or your parents, or your kin, and whether it is (against) rich or poor. For God can best protect both. Follow not the lusts (of your hearts); lest ye distort (justice) or decline to do justice, verily God is well-acquainted with all that ye do.

Al-Quran (04:135)

6.1 Introduction

The precept of justice is one of the fundamental values of Islam which is much emphasized upon. It is stated as the very objective of the prophets and revealed book: "We sent aforetime our messengers with clear signs and sent down with them the Book and the Balance (of Right and Wrong), that men may stand forth in justice".[1]

Islamic concept of justice has its distinct values and principles. In Islam, there is no one who is immune from the operation of law, whether it is a ruler or Caliph. Even an ordinary person can bring complaint against highest executive authority in an Islamic state.[2] The principle of personal responsibility is a benchmark of Islamic Justice system. The principle means everyone is responsible for his action and not for other's action unless one's role is shared or involved in that act. Similarly, no one can escape his responsibility irrespective of his ties and

[1] Al-Qurān (57:25).
[2] Abul A'la Maududi, *Human Rights in Islām* (Landon: The Islamic Foundation, 1976), 35.

relations to the victims, judge or ruler.[3] This principle is embodied in the verse of Holy Qurān as "and whatever [wrong] any human being commits rests upon himself alone; and no bearer of burdens shall be made to bear another's burden."[4]

Islamic Law provides for a great adherence and sanctity to human rights. Preamble of the Cairo Declaration on Human Rights in Islam, 1993 states that the Principles of Islamic law strongly adheres to fundamental rights and freedoms which cannot be waived or abolished as they are Divine commands and binding in their nature. The sanctity and sacrosanct authority of these rights is established by the words of Almighty Allah and safeguarding them is an act of worship. Any Neglect or violation of these freedoms and rights is "abominable sin" and the responsibility to protect and safeguard these rights and freedom lies on very person individually and on entire Ummah collectively.[5]

The criminal justice system of Islam protects not only the rights of the aggrieved but also provides safeguard to the rights of accused person. It ensures justice for both the victim of crime and the accused person. Even the state or ultimate executive authority is responsible for its acts that are detrimental to the rights of the innocent individuals; even those acts have been done or committed on the pretext of necessity or public interest.[6] Thus, the rights of the accused under Islamic law are considered to be protected under the theory of 'protected interests'[7].

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[3] Osman Abd-el-Malek Al-Saleh, "The rights of the individual to personal security in Islām," in *The Islamic Criminal Justice System*, ed. M. Cherif Bassiouni, (New York: Oceana Publications, Inc., 1982), 57.
[4] Al-Qurān (6: 164).
[5] Cairo Declaration on Human Rights in Islām, 1993.
[6] Al-Saleh, "The rights of the individual to personal security in Islam," 66.
[7]These interests include right to be informed promptly about his charge and its reasons, right of protection from arbitrary arrest, detention, torture' or physical annihilation, right to be presumed innocent until proven guilty by fair trial, the right to speedy trial, right to present his defence, right to choose and access to the counsel of his own choice, right to appear before an appropriate court or tribunal established under the law, the right to a public trial, the right of protection against self-incrimination and forced confession, the right to examine and rebut the evidence or witness presented against him, the right to have decision on merits in accordance with the law, the right to appeal,

The present study primarily attempts to focus on right of accused in terms of redress against violations of his fundamental rights in the light of Islamic law. This subject or other related issues are discussed and deliberated ahead in this chapter in detail. The discussion in this chapter discusses the important principles of Islamic law that govern the redress mechanism in case of violation of fundamental rights of accused in criminal justice.

6.2 Inviolability of Human Dignity and Rights in Islam

In Islamic law, the rights of an individual to the protection of life, liberty, honor, dignity and property, are sacred and inviolable. The Holy Prophet Muhammad (peace be upon him) had said in his famous 'Farewell Sermon': "O people, verily your blood, your property, and your honour are sacred and inviolable until you appear before your Lord, as the sacred inviolability of this day of yours, this month of yours and this very town (of yours). Verily, you will soon meet your Lord and you will be held answerable for your actions."[8]

Under Islamic law, the rights are gifted and conferred by Almighty Allah to the individuals are inalienable and cannot be snatched or violated by anyone including the ruler has no authority to encroach on the inalienable rights of the individuals.[9]

To secure the sanctity and respect for the fundamental rights of the people, Abul A'la Maudūdī suggested that 'the Constitution of an Islamic State must guarantee fundamental rights to all citizens' and should guarantee that: "no citizen of the state shall be deprived of the fundamental

and right of his security and privacy. See FarhadMalekian, *Principles of Islamic International Criminal Law: A Comparative Search*, (Leiden: Brill, 2011), 375-384; M. Cherif Bassiouni, *The Islamic Criminal Justice System* (New York: Oceana Publications, Inc., 1982), 249-250; see also M. Cherif Bassiouni, "Crimes and Criminal Justice," *Arab law Quarterly* 12, no.3 (1997): 269.

[8] Muhammad Bin Ismail Abu Abdullah Al-Bukhari, *Sahih Al-Bukhari,* Hadīth No. 1739, (Dār Al-Touq Al-Najaat, 1422 H).

[9] Muhammad Mushtaq Ahmad, "Revisiting the Discourse on Islam and Human Rights," *Kardan Jounal of Social Sciences and Humanities* 1, no. 1 (June 2018): 92, 99; See also Abu Bakr Muhammad b. Abi Sahl al-Sarakhsi, *Al-Mabsūt*, vol. 10 (Beirut: Dar-al-Kutub al-'Ilmiyyah, 1997), 139.

rights without his guilt being judicially established in an open court of law according to the common law of the land."[10]

According to his view, unless such a guarantee is not incorporated in the Constitution, nobody can feel secure against the misuse of the executive authority. He further adds that " if our Constitution-makers try to take away or abridge or limit these rights, they will be guilty of causing discontent and disruption in the country, and it will be an unpardonable act of perfidy, on their part, towards the people and the State of Pakistan."[11]

Islamic law upholds the fundamental principle that justice not only means to punish the offender for his guilt but it also intends to protect the innocent people from undue loss of liberty, and wrong punishment.[12] Thus, the personal liberty and dignity of an individual is sacred, which cannot be taken away by the government on mere allegation or suspicion without any proof.[13]

6.3 Principles of Islamic Law Protecting Fundamental Rights of Accused

Islamic law entails certain principles of justice that ensure fundamental rights of accused and the redress mechanism once these rights are violated in the criminal justice. Through these principles of justice, the Islamic criminal procedure guarantees to protect the personal security of an individual and establishes a balance between the rights of an accused and state's authority to enforce the criminal law by apprehending the culprits and collecting the evidence against them to prove their guilt in the court. Thus, the proper balance between the interests of the state and an

[10] Abul A'la Maududi, *Islamic Law and Constitution* (Lahore: Islamic Publications Ltd., 1960), 338-339.
[11] Ibid., 339.
[12] Al-Saleh, "The right of the individual to personal security in Islam," 66-67.
[13] Ala Uddin Abu Bakr Bin Masud Al-Kasani, *Baḍā'i Al-Ṣanā'i fī Tartīb Al-Sharā'i,* vol. 7, (Dārul Kutub Al-Ilmiyyah, Beirut, 1991), 53.

accused person, brings forth 'a secure and stable society with a minimum infringement on individual freedom 'or liberty.[14] Some of these precepts and principles are discussed in following:

6.3.1 Principle of Legality

One of the core principles of Islamic law is the principle of legality which simply means that no one can be punished without the existence of a criminal law in force at the time when the act was committed.[15] The law must establish the exact description of the act that is prohibited and declare it as an offence involving punishment. This principle provides protection to the accused against the abuse of power by the judges and guarantees the security of person.[16]

6.3.2 Principle of Presumption of Innocence

Under Islamic law, all human beings are equal before law with equal protection, and they are presumed innocent until proven guilty.[17] Thus, an accused is presumed innocent until his guilt is proven beyond reasonable doubt in a fair trial by a competent court. Islamic law takes utmost care and precaution in avoiding breach of a person's liberty by setting a presumption of innocence in favor of the person who is accused until this presumption is rebutted by proving his guilt before the competent court. 'The presumption of innocence as a right inherent to all people' has been well-

[14] Al-Saleh, "The right of the individual to personal security in Islam," 56, 66.
[15] For instance, Article 15 of Arab Charter on Human Rights, 2004 states that there would be no crime and punishment with the prior enactment or provision of the law and the defendant would be treated favorably under the law.
[16] Silvia Tellenbach, "Fair Trial Guarantees in Criminal Proceedings under Islamic, Afghan Constitutional and International Law," *Heidelberg Journal of International Law* 64 (2004): 930.
[17] Art. 19 of Cairo Declaration provides for equality of all individual before the law without any distinction, innocence of the defendant until proven guilty and the right of defence.

recognised under Islamic law. This right is based on the Islamic legal maxim that "the norm of Islamic law (Sharī'ah) is that of non-liability".[18]

The presumption of innocence stems from one of the most fundamental principles of Islamic law "certainty is not done away through doubt.[19] The presumption of innocence implies the normative state or the 'state of certainty' will persist as the people are not liable or condemned unless it is proven that they are in fact guilty. The provenance for this principle is based on the sayings of the Holy Prophet (Peace be upon Him): "Had men been believed only according to their allegations, some person would have claimed the blood and properties belonging to others, but an oath is required of one who denies it."[20]

The Holy Prophet said that "the accuser (plaintiff) is bound to present positive proof and an oath is required of one who has been accused (defendant)".[21]

Besides, the Islamic legal maxims based on the traditions of the Holy Prophet (Peace be Upon Him) also support the principle of presumption of innocence. One of such maxims is *Al-Yaqin la Yuzal bi'l-Shakk* (Certainty is not superseded by doubt). Another maxim of Islamic law is *Al-Asl Bara'at al-Dhimmah* (The norm is non-liability).[22] Similarly another maxim states that it is

[18] Mohammad Hashim Kamali, *The Legal Maxims of Islamic Law*, The Association of Muslim Lawyers, 1. https://ia600205.us.archive.org/13/items/KamaliQawaidAlFiqh/Kamali_Qawaid_al-Fiqh.pdf. Accessed May 1, 2024.
[19] See Imran Ahsen Khan Nyazee, *Islamic Legal Maxims*, (Islamabad: Advanced Legal Studies Institute, 2016), 122-29; Shihab al-Din al-Sayyid Ahmad b. Muhammad al- Hamwi, *Ghamz `Uyun al-Basa'ir Sharh al-Ashbah wa al-Naza'ir*, vol. 1, (Beirut: Dar al-Kutub al-`Ilmiyyah, 1985), 193-245.
[20] Muslim bin al-Hajjaj, *Sahih Muslim*, the Book of Judicial Decisions, Vol. 4, Hadith No. 1713, Darussalam, (Riyadh: August 2007), 489.
[21] Muhammad bin 'Esā Al-Tarmidhī, *Sunan Al-Tarmidhī*, Ḥadīth No. 1341, Shirḳah Maḳtabah, Mustafā Al-Bābi Al-Hilbī, Cairo, 1395.
[22] Khaleel Mohammad, "The Islamic Law Maxims: Occasional Paper No. 62, *Islamic Studies*, (2005): 21.

better that a guilty person should escape than that an innocent man should be subjected to ill-treatment.[23]

Accordingly, every person including accused is presumed to act righteously and honestly until contrary is proved. The presumption of innocence has a number of different aspects. Firstly, it is the logical consequence of the presumption of innocence that in Islamic law the burden of proof of the charge is laid on the prosecution; it is not the accused that has to prove his innocence. Secondly, it is the accused that is entitled for the benefit of the doubt. This doctrine is designed to ensure justice and guarantee to safeguard the interest of the accused.[24]

6.3.3 Benefit of Doubt to Accused

Among the consequences or implications of the principle of presumption of innocence, is that any doubt is to be resolved against the accuser and in favor of the accused. As in Islamic law a conviction must be based on assurance and certainty of guilt of the accused, not on mere probability.[25] Islamic law affords protection to accused from punishment in cases of doubt against his guilt.[26] This principle is based on the saying of the Holy Prophet: "If the people were given according to their claims, they would claim the lives of persons and their properties, but the oath must be taken by the defendant"[27].

[23] Abdur Rahim, *The Principles of Muhammadan Jurisprudence* (KLR Publications: Lahore, 2021), 135.
[24] Tellenbach, "Fair trial guarantees in criminal proceedings under Islamic, Afghan constitutional and International law," 934.
[25] Al-Saleh, "The rights of the individual to personal security in Islam," 66.
[26] Article 19 of Cairo Declaration states about the innocence of defendant until his guilty is proved after a speedy and fair trial.
[27]Muslim Bin Al-Hajjāj Al-Qashīrī, *Al-Ṣaḥīḥ Al-Muslim*, Ḥadīth No. 1711, (Dar Iḥyā' Al-Turāth Al-'Arbī, Beirut).

Thus, for the precautionary measure, the Holy Prophet (PBUH) said: "Prevent punishment in case of doubt. Release the accused, if possible, for it is better that the ruler be wrong in forgiving than wrong in punishing."[28]

According to Imran Ahsan Khan Nyazee, the term '*Shubhah'* in Islamic law has generally is regarded synonymous to the English law concept of "benefit of the doubt". However, as per his understanding, it has more in common with "mistake of law or of fact" than with the "benefit of the doubt".[29]

The rule of giving benefit of doubt to accused person is essentially a rule of caution and prudence and is deep rooted in Islamic jurisprudence for safe administration of criminal justice. Consequently, this principle provides a great protection to the rights of an accused and a fair chance to defend himself before a court.

A person accused of a crime, cannot be punished by a lawful sentence unless he is proven guilty beyond a reasonable doubt that he committed that crime. For instance, in a case of allegation of rape against accused, there are many possibilities, apart from the truth of the accusation. For instance, the said allegation might have been made with an ulterior motive or as plot against the accused. The court is duty bound to consider and assess all possibilities and will not prompt to punish the accused unless all other possibilities, except his guilt, are eliminated. For instance, in rape case, if it is established that the woman was really an innocent victim, even then it would not suffice for the proof of guilt of the accused; rather positive evidence is required to prove the guilt

[28] Abu Abdullah, Al-Ḥakim Muḥammad, *Al-Mustadraḳ 'alā Al-Ṣaḥīḥayn*, Ḥadīth No. 8163 (Dār Al-Ḳutub Al-'Ilmiyyah, Beirut, 1990); *Sunan Al-Tarmidhi*, Hadith no.1424, 3: 85 (Dar-ul-Gharbal-Islami, Beirut, 1998).
[29] Nyazee, *General Principles of Criminal Law* (Islamabad: Advanced Legal Studies Institute, 1998), 142-43.

of accused. Therefore, the position of the complainant must be taken into account separately and independently from that of the accused.[30]

6.3.4 Security and Personal Freedom of the Accused

Islamic law guarantees for the security of personal freedom of every individual and protects from arbitrary detention. Innocent persons for being suspect cannot be punished and their dignity and liberty cannot be violated on mere whims and accusation without providing him an opportunity to produce his defence.[31]

The right to personal security and freedom is sacred right in Islam as the Holy Prophet (peace be upon him) held in his last sermon: "O people, verily your blood, your property, and your honour are sacred and inviolable until you appear before your Lord, as the sacred inviolability of this day of yours, this month of yours and this very town (of yours)."[32]

Islamic law acknowledges that everyone has the right to security and personal freedom. Therefore, a person even an accused cannot be detained on mere suspicion or allegation unless there is a strong reason to believe for his involvement in the suspected or alleged offence or for obstruction of justice. Caliph Umar had said, "In Islam no one can be imprisoned except in pursuance of justice".[33] The Muslim Jurists condemn the violation of this principle by prohibiting arrest and detention of an accused person except in cases of necessity.[34]

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[30] Muhammad Mushtaq Ahmad, "The Crime of Rape and the Hanafi Doctrine of Siyasah", *Pakistan Journal of Criminology* 6, no.1 (2014): 186.
[31] Maududi, *Human Rights in Islām*, 28.
[32] Da'wah Academy, *The farewell Sermon of the Holy Prophet Muhammad* (SallallahoAlaihiWasallam), (Islamabad: IRI Press, International Islamic University, 1996), 4.
[33] Maududi, *Human Rights in Islām*, 28.
[34] Awad M. Awad, "The Rights of the Accused under Islamic Criminal Procedure" in *The Islamic Criminal Justice System*, ed. M. Cherif Bassiouni (New York: Oceana Publications, Inc., 1982), 102.

Islam law prohibits the malpractice of unlawful and arbitrary detention. On the basis of mere doubt, it is not permissible to apprehend accused and put him behind the bar without complying judicial process. Further, it provides everyone to defend himself in an independent and open court.

It is narrated that once a man asked this question to the Holy Prophet (Peace be Upon Him) while he was delivering a sermon: "O Prophet of Allah, under what crime my neighbor has been arrested?" The Prophet heard the question, and did not response and he continued his question thrice. However, for the third time the Prophet passed the order to release the detainee. It has been interpreted that the Holy Prophet waited for a police officer to give a valid reason of the detention he must stand and respond his statement from the very beginning. So, he gave no reason and remained silent that's why the prophet ordered to release the arrestees.[35]

Thus, the individual right to personal security refers to mean as a legal security for an individual especially in relation to state authorities. It serves as a protective shield and a basic safeguard for all forms of personal freedoms and liberties against unlawful and arbitrary interferences.[36] It is responsibility of an Islamic state to ensure the rights granted by Islam to every innocent accused person against undue suffering and harm.[37]

6.4. Rights of Accused and the State Authority under Islamic Law

Islamic law acknowledges and protects basic human rights of each individual without any discrimination on the basis of religion, gender, caste, creed, color etc. These minimum human

[35] Maududi, *Human Rights in Islām*, 14.
[36] Al-Saleh, "The right of the individual to personal security in Islam," 55.
[37] Khalid Bin Abdullah Bin Fahad Al-Shafi, *Ḥuqūq Al-Muttaham Fī Al-Tashrī' Al-Islāmī*, (Riyadh: King Saud University), http://faculty.ksu.edu.sa/30520/ar/Documents/bu/4.pdf. Accessed on July 16, 2023.

rights are inherently granted to all persons 'by virtue of being human beings'.[38] This imperative is reflected in the words of Quran: "verily we have honored the children of Adam."[39]

Among numerous acknowledged and protected rights in Islam, the most important rights includes right to life, liberty, honour and dignity, individual freedom, privacy and property. Safeguard and protection to these rights is thus fundamental to the *Sharī'ah*, and state is under duty to protect them 'through the implementation of the *Sharī'ah*. The ruler or a state is duty bound to protect the rights of people from the actions of criminals and offenders, and on the reasonable suspicion or incriminating evidence, it can arrest and detain those who make mischief or known for their criminal behavior.[40]

Under the doctrine of *Siyasah al- Shariah*,[41] it is the duty of the state to protect the rights of its individual subjects as well as of the public.[42]This, sometimes, necessitates regulating behaviors through putting some restrictions and limitations to preserve a balance between the individual and public rights.[43]

Thus, the state is authority to employ certain conditions, restrictions and safeguards to set a necessary balance between the individual rights to freedom and security on the one hand and the interest of society in effective law enforcement on the other. The authority is given under the principle of necessity that provides that 'all rights can be limited or even violated when necessary. As Islamic jurisprudence has a fundamental precept that "necessity knows no law" or necessity

[38] Awad, "The rights of the accused under Islamic Criminal Procedure," 99.
[39] Al-Qurān, (17:70).
[40] Kamal Ul-Din Muhamad Ibn Al-Hammam, *Fatḥul Qadīr*, Vol. 5 (Dārul- Fikr, Beirut), 350.
[41]The term 'Siyāsah Shar'iyah' means extended and broad authority of the ruler to act in accordance with 'Maṣlaha' or public good which is not against the principles of Sharī'ah, though there exist no specific provision to a that particular matter. See Abdul Wahhāb Khallāf, *Al-Siyāsah al- Shar'iyah fī Sh'ūn al-Dastūriyah wa'l Khārjiyyah wa'l Māliyyah*, (Dārul-Qalam, 1988), 24.
[42] Awad, "The Rights of the Accused under Islamic Criminal Procedure," 100.
[43] Halali Abdullah Ahmad, *Zamanaat Al-Muttaham fi Muwajahat –il- Qabz-e bain Al- Shariat- il- Islamiyah wa-Qanoon al-Wazai* (Cairo, Darul al-Lahdhat- il- al-Arabiya, 1995), 143.

renders prohibited things permissible. So, these rights can only be limited or abridged for the sake of 'some higher interest that transcends these protections.'[44]

As a consequence, along with the limitations on the rights of the accused, certain restrictions and limitations are also imposed and enforced on the powers of the state authorities at the same time to establish justice. Such limitations on the powers of state authorities are considered as safeguards and guarantees for the accused person.[45]

Muslim jurists have elaborated the grounds and situations which warrant the state to limit an individual's rights by arresting and detaining him.[46] However, as highlighted by Mahmood Ahmad Ghazi, in order to detain an accused person during his trial in prison, the *prima facie* case must be of such nature that the court sees the guilt of the accused very likely.[47] In any case, such detention should not be excessive, undue and arbitrary violating the fundamental rights of accused.[48]

As a general rule, the scheme of *Shariah* does not precludes the authority of the state to detain accused persons, rather it delegates authority to the state and assigns the duty of criminal justice administration to be performed in accordance with 'of public interest'[49] conforming to the general principles and commands of Shariah.[50] So, the doctrine of *Siyasah al- Shariah* equips the

[44] Awad, "The Rights of the Accused under Islamic Criminal Procedure," 99-100.
[45] Ibid., 100.
[46] Mohammad Ibn e Farhoon, *Tabsiratul-Hukkam fi Usool al- Aqdhiyat-e wa- manahijil-Ahkam*, Vol. II, (Beirut: DarulKutab-il- Ilmiyyah, 1301 H.), 215.
[47] Mahmood Ahmad Ghazi, *Adab ul-Qazi*, (Islamabad: Islamic Research Institute, international Islamic university, 1993), 133.
[48] Mahmood Ahmad Ghazi, *Adabul-Qazi*, 280.
[49] Awad, "The Rights of the Accused under Islamic Criminal Procedure," 103-104.
[50] Imran Ahsan Nyazee, *General Principles of Criminal Law: Islamic and Western*, (Islamabad, Shariah Academy, International Islamic University, 2007), 176.

head of state with discretionary powers to take all steps which are deemed necessary to secure benefit (*Maslahah*) for the people and establish good government.[51]

Consequently, the state is under duty to perform its functions in a manner consistent with the rights of an accused person so that he is able to defend his innocence against the prosecution's case before the court.[52]

6.4.1 Detention of Accused

Under Islamic criminal procedure, detention of an accused is employed to protect the investigation and trial proceedings especially when a reasonable apprehension exists that accused may attempt to influence the witness, or alter or destroy incriminating evidence or flee, if he is set free. It is for this reason pre-trial detention is recognized and employed as "an exception to the general principle that one shall not be deprived of his liberty except for the enforcement of a lawful sentence".[53]

In fact, the pre-trial detention casts a direct bearing and serious impact on the fundamental rights of accused person. As to ascertain the state authority to limit the rights of accused persons in terms of detention, the jurists have discussed and explained the categories of the people who can be arrested and detained during or before trial.

[51] Muhammad Hashim Kamali, "Appellate Review and Judicial Independence in Islamic Law," *Islamic Studies*, Occasional Paper 4, (Islamabad: Islamic Research Institute, 1993), 15; See also Muhammad Hashim Kamali, "Siyasah Shariyyah or the policies of Islamic Government," *The American Journal of Islamic Social Sciences* 6 (1989): 59.
[52] Al-Saleh, "The rights of the individual to personal security in Islam," 56.
[53]Muhammad bin Abi Bakr Ibn al-Qayyim, Al-Joziyyah, *Al-Turuq ul-Hukmiyyah fi-Siyasat-al-Shariah* (Beirut: DarulKutub al-Ilmiyyah, 1995), 78.

6.4.2 Categorization of accused persons

Ibn al-Qayyim, while explaining *Siyasah al- Shariah* about arrest and detention of an accused, mentions the views of Muslim jurists regarding three types of accused persons for their detention. According to him[54]:

1. Muslim jurists are of opinion that the accused that is known as pious and upright shall not be arrested and detained by the state until proved guilty.
2. About the person whose character or general conduct is not known, most Muslim jurists prefer detention.
3. For the accused that is notorious for bad character and wickedness, the majority of Muslim jurists advise detention and even chastisement by the State, if warranted.[55]

This categorization is based on the Islamic concept of *Istishab* which refers to a presumption of law of evidence that a state of affairs known to exist in the past continues to exist until contrary is proved. This implies that presumption of innocence of an accused should not be conflated to mean non-interference with the rights of an accused.[56] Thus, the state has authority to adopt an approach with regard to matters of their detention or limiting other rights, in accordance with the variation of times and place, for the sake of 'public interest'.[57]

The detention of an accused is to be employed only as a last resort, not as a matter of practice or rule. And even in any such case, it is not necessary to confine the accused in any

[54] Ibid., 78-79.
[55] Ibid., 77-80.
[56] Awad, "The Rights of the Accused under Islamic Criminal Procedure," 101.
[57] Ibid., 103-104.

narrow place; rather his freedom of movement and free activities can be restrained or prevented through restricting him in a house or Masjid or entrusting to a person to guard him.[58]

Thus, the state can make laws and limit the rights of accused persons through pre-trial detention in appropriate cases of necessity i.e. to uncover the truth or reality of accusation, to prevent the accused from distorting the incriminating evidence and from fleeing away from jurisdiction of the court, and to secure the ends of justice at large. Such detention can be justified only for limited period of time, in case reasonable suspicion or evidence exists against the accused or his previous records suggests that he might have committed the crime.

Thus, Islamic law, on one hand, allows the state to place certain restrictions on the rights of accused to protect the public right, and on the other, it places restrictions on the power of the state. Further, the authority enjoyed by the state in relation to some of the rights of the accused, certainly does not extend to any of his other basic rights.

6.5 The Possibility of Errors and Wrongs in the Administration of Justice

It is, however, possible that any action of government authorities may result into errors or even violations of fundamental rights of accused. For instance, in case of pre-trial detention of accused person, the right to liberty is curtailed due to wrong or mistaken action of government authorities. Even in certain cases, accused persons suffers violations of right to dignity, right to privacy of home, protection against torture and self-incrimination and right to movement. Hence, it is important to understand as how Islamic law responds in case the rights of accused are violated by the state agencies in criminal justice.

[58] Ibn al-Qayyim Al-Joziyyah, *Al-Turuq ul-Hukmiyyah*, 101-102.

The Quran and Sunnah admit, in principle, the possibility if error in judicial decisions, even when they are made by the recipients of divine revelation.[59] The Quran, for example, refers to an incident in which the Prophet David adjudicated a dispute over the ownership of some sheep. The relevant Quranic passage indicates that David rushed to pass a judgment on the basis of a mere claim without giving the defendant an adequate opportunity to present his case. This manner of adjudication, as the text runs, was erroneous and, therefore, invoked God's admonition which was communicated to David, as the Quran tells us, in the following terms: "O David, we have made you a vice-gerent in the earth, so judge among people with truth and follow not the (vagaries) of desire"[60].

The Quran likewise speaks of differential understanding and judgment of the same dispute by two prophets-cum-judges, namely David and Solomon. We are thus informed that each rendered a decision concerning a dispute over the destruction of agricultural crops belonging to one of the disputants by the straying sheep of the other. The Quranic text then continues to praise both of their wisdom and knowledge but adds the phrase that: "we gave Solomon the right understanding of the issue."[61]

The Prophet Muhammad (Peace be upon him) is widely known to have made the following statement in which he clearly admitted the possibility of error occurring in his own adjudication. The Prophet (Peace Be upon Him) said: "You refer your disputes to me, but one of you may be more eloquent in arguing than the other, and I judge in his favor because of what I

[59] Kamali, "Appellate Review and Judicial Independence in Islamic Law," 17.
[60] Al-Quran (38:26).
[61] Al-Quran (21: 79).

hear from him. If I allocate to a person something that is his brother's right, let him not take it, for I have allocated him a piece of fire."[62]

No one is, therefore, immune from error which is ever-present possibility in judicial decisions. A gross error of judgment which leads to miscarriage of justice must therefore be rectified under Shariah.[63]

One of the widely quoted authorities in support of necessity of correcting an erroneous decision in Islamic law is a letter that the second caliph, 'Umar Ibn al-Khattab, wrote to one of his judges, Abu Musa al-Ashari. In this letter the caliph refers to justice as a firm obligation (*Faridah Muhkamah*) under the Shariah and asks the judge, al-Ashari, to:

> "Let not a judgment you rendered yesterday, and that you have (later) reflected upon receiving guidance towards the correct view, prevent you from restoring a right. Rights are ancient and cannot to be annulled. Resorting to right is by far better than persisting in a manifest error."[64]

This letter, according to the Hanfi jurists, al-Sarkhasi, indicates that when an error becomes manifest and apparent to the Qadi, it is for him to reverse his own decision and he should not allow loss of face to deter him from doing so.[65] Thus the judges have the authority

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[62] Imam Abul Hussain Muslim bin al-Hajjaj, *Sahih Muslim*, the Book of Judicial Decisions, Hadith No. 1713, vol. 4, (Riyadh: Darussalam, August 2007), 490.
[63] Muhammad Hashim Kamali, "Appellate Review and Judicial Independence in Islamic Law," *Islamic Studies* 29, no. 3 (1990): 215.
[64] The author relied on the translation made by Imran Ahsan Nyazee, *Introduction to Law (for Pakistan)*, (Rawalpindi: Federal Law House, 2016) 85- 86; M. Cherif Bassiouni, "Crimes and the Criminal Process", *Arab Law Quarterly* 12, no. 3 (1997): 269-286; Abu'l Hasan Ali b. Muhammad al-Mawardi, *Kitab al-Ahkam al-Sultania* (Cairo: Darul Hadith, 2010), 122.
[65] Muhammad Hashim Kamali, Appellate Review, *Islamic Studies*, 20; Shams al-Din al-Sarkhasi, *Al-Mabsūt*, Vol. XVI (Beirut: Dar al-Marifah), 62.

under Islamic law to review their own decisions, whether such decisions are flawed by personal but erroneous reasoning, or a departure from clear injunctions of the Shariah.[66]

The jurists are in agreement that a judicial decision which is manifestly oppressive, whether deliberate or otherwise, is basically null and void and therefore liable to reversal, initially by the issuing judge himself, who must alert the parties to seek a review, failing which the Imam or his representatives are duty bound to reverse it. The Muslim scholars hold the view that the substantive error which causes miscarriage of justice is sufficient to warrant reversal of a judicial decision and a gross error of judgment which leads to miscarriage of justice must also be rectified.[67]

6.6. The Redress for Errors and Violations of Rights

As discussed above, Islamic law acknowledges the fact that no one is immune from error, which is an ever-present possibility in judicial decisions. To avoid such possibility, Islamic criminal justice system adheres to certain principles and does its utmost to avoid any chance miscarriage of justice. However, in any case of occurring miscarriage of justice or the unlawful criminal procedure, the Islamic criminal justice system recognises the right to compensation for the innocent victims,[68] even in cases of mistake and negligence.[69]

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[66] Kamali, "Appellate Review and Judicial Independence in Islamic Law," 215.
[67] Ibid.
[68] Muhammad Munir, "Fundamental Guarantees of the Rights of the Accused in the Islamic Criminal Justice system," *Hamdard Islamicus* 40, no. 4 (2017): 45.
[69] Imran Ahsan Khan Nyazee, *General Principles of Criminal Law (Islamic and western)*, (Rawalpindi: Federal Law House, 2010), 123, 130; Anwarullah, *The Criminal Law of Islam*, (Islamabad: Shariah Academy, International Islamic University, 2005), 117.

As sated above, the human rights of an individual are sacred and inviolable under Islamic law.[70] To protect these rights, Islamic commandments and teachings acknowledge the right to remedy or compensation for the victim of human rights violations. Thus, every harm or injury reaching the five high objectives of Shariah_ deen, life, intellect, linage/honor, and property, must be redressed either through civil or penal remedy. The right to remedy is thus established by the numerous verses of holy Quran and the traditions of the holy prophet (peace be upon him).[71]

Among the verses that generally provide for the legality of redress against any aggression or grievance is the verse "whoever then acts aggressively against you, inflict injury on him according to the injury he has inflicted on you"[72].

The other verse which corroborates this subject is "if you have to retaliate, let your retaliation be commensurate with the wrong which was done to you; but if you endure with patience, the best reward indeed is for those who endure with patience."[73.]

Similarly, the right to redress or compensation is also established by the verse "the recompense for an injury is an injury equal thereto (in degree), but if a person forgives and makes reconciliation, his reward is due from Allah."[74]

The Holy Quran narrates the incident of the prophets "Dawood and Suleiman when they gave judgment in the matter of field into which the sheep of certain people had strayed at

[70] Da'wah Academy, *The farewell Sermon of the Holy Prophet Muhammad* (SallallahoAlaihiWasallam), 4.
[71] Hassan Abdul Ghani Abu Ghadah, "Compensation for the Accused Detainee Upon Proving His Innocence" *(in Arabic)*, https://midad.com/. Accessed May 1, 2024.
[72] Al-Quran (02:194).
[73] Al-Quran (16:126).
[74] Al-Quran (42:40).

night"[75]. Interpreting this verse, the Muslim scholars explained that the prophet Dawood had acknowledged the decision of his son Suleiman who decided for the owners of the field to have benefited from the milk of the sheep till the damaged crops are grown and restored to their earlier position. The incident reflects about the legitimacy of the compensation to be paid to the aggrieved owners of the field. Thus, the above-mentioned verses provide about the right to redress against the harm or injury inflicted upon the victim, in general terms.

Besides the Quranic verses the right to compensation is established by the tradition of the Holy Prophet (Peace be upon Him), in which he said: "There must be no incipient or retaliatory injury/harm)."[76]

Another tradition that corroborates the right to compensation is one in which it is narrated that one of the wives of the Holy Prophet (peace be upon him) gave him some food in a bowl. Then Aishah (one of wives of the Prophet) broke the bowl with her hand, and discarded what was in it. So the Prophet said "food for food and vessel for vessel."[77]

The right to redress is emphasized in the direction of Hazrat Umar in his famous letter to Abu Musa al-Ash'ari wherein he wrote that "the right without execution (or remedy) is futile".[78]

Besides, the right to redress or compensation to the victim can be envisaged in the light of Islamic legal maxims like "*Al-Dararu Yuzál"* (Harm/injury must be removed or compensated), and "*al-Izterar la Yabtulu Haq al Ghair*" (Necessity or compulsion does not

[75] Al-Quran (21:78).
[76] Ibn Maja Abu Abdullah Muhamad bin Yazeed Al-Qazweeni, *Sunan Abn Maja*, Ḥadīth no. 2340 (Dar Ihyaa Al-Kutub Al-Arabiyyah, 2341.
[77]Muhammad Bin 'Isā Al-Tirmidhī, *Al-Jamiul-Kabeer Sunan Al-Tarmidhī,* Ḥadīth no. 1359, (Dār Al- Gharb Al-Islāmī, Beirut, 1998).
[78] Bassiouni, "Crimes and the Criminal Process," 269.

abolish others' rights).[79] Other similar Islamic legal maxims include *Tasarruf-ul Imam e 'Ala al-Ra'iyyati Manutun bi-Maslahat*" (the exercise of authority by Imam/ruler is subject to the public interest), and "*al-Kharaju bil Dhaman*" or its similar maxim "*al-Ghurmu bil-Ghunm"* (the enjoyment of benefits incurs correspondent liability of loss) also corroborate and substantiate the liability of the state to pay compensation for the act done in the circumstances of necessity.

6.6.1 Concept of Civil Liability in Islam

Before entering into the discussion on subject of state liability for redress under Islamic law, it seems necessary and valuable to explain and elaborate the 'concept of civil liability'[80] in Islam. The subject of tort (ضمان) under Islamic law deals with civil liability of a person who causes harm to other and that harm primarily do not fall under the purview of criminal liability.[81] Some Muslim scholars term such liability as 'damage liability' that means that "the conception of civil liability in Islam is based upon the principle of indemnity against actual damage." As the damage is the essential requirement for such liability, Islamic law acknowledges no liability in the absence of damage. This concept of civil liability is based on a very famous tradition of Holy Prophet (Peace be Upon Him) providing a sanctity and sacredness to the life, property, and honour of the human being.[82]

The Prophet (Peace be Upon Him) said: "your blood (life), your property, and your honour (reputation) are as sacred as is the sacredness of this day in this city of yours and in this

[79] Mohammad Fozi Faiz Ullah, *Nazriyyatul- Zaman fil- Fiqh al-Islami al-Aam* (Farwaniya, Kuwait: Maktabatu al-Turathu al-Islami, 1983), 198-201; Luqman Zakariyah, *Legal Maxims in Islamic Criminal Law: Theory and Applications* (Leiden: Brill, 2015), 139.
[80]Civil liability means the liability of redressing or compensating to the victim for the harm/injury in terms of damages or monetary form. The converse term is criminal liability which results from crimes and offences. The Muslim Jurists use the term *Al-Mas'uliyyah Al-Madaniyyah* in Islamic jurisprudence to elaborate this concept.
[81] Liaquat Ali Khan Niazi, *Islamic Law of Torts* (Lahore: Research Cell Dayal Singh Trust Library, 1988), 25.
[82] Muhammad Muslehuddin, the *Concept of Civil Liability in Islam and the Law of Torts* (Lahore: Islamic Publications Limited, 1982), 52.

month of yours."[83] In view of the tradition of the Holy Prophet (Peace be Upon Him), the sacredness of the life, liberty, property and honour of each individual imposes the duty imposed upon society in this respect seems to be of an absolute character, so the breach of such duty naturally results in absolute liability as the nature of civil liability in Islam, is absolute.[84]

The jurists maintain that the concept of civil liability is based on the saying of the Prophet (Peace be Upon Him), "The hand is liable for what it takes until it returns it". Further, if the subject matter is the actual wealth of the defendant' it is based on the saying "whoever finds his actual wealth has a right to it."[85]

Based upon general principle of "indemnity against actual damage", the damage is essential element of concept of civil liability in Islam. The civil liability will be invoked in case of harm/damage, and the aggrieved will be redressed for the loss of property, reputation, liberty, etc. Thus, defendant is held liable in case the damage is direct result of his action irrespective of his intention. Intention in cases of civil liability is of little account for it is difficult to know about the intention of man. Law presumes it from conduct of the defendant. Consequently, regardless of intention, damage suffered by the aggrieved is taken into account and redress or compensation is awarded in proportionate to the actual damage suffered by the victim.[86]

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[83] Muhammad Bin Ismail Abu Abdullah Al-Bukhari, *Sahih Al-Bukhari*, Hadīth no. 1739 (Dār Al-Touq Al-Najaat, 1422 H).
[84] Muslehuddin, the *Concept of Civil Liability in* Islam, 53-54.
[85] 'Ala' al-Din Abu Bakr ibn Mas'ud Al-Kasani, *Bada'i al-Sana'i fi-Tartib al-Shara'i: (The Unprecedented Analytical Arrangement of Islamic Laws), Book LIII: Adab al-Qadi (Duties of the Qadi and Judicial Procedure*, trans. Imran Ahsan Khan Nyazee, (Rawalpindi: Federal Law House, 2007), 101-102.
[86] Niazi, *Islamic Law of Torts,* 25; Muslehuddin, *Concept of Civil Liability in Islam and the Law of Torts*, 53-54.

6.6.2 Civil Liability in Cases of Mistake or Necessity

The principle of strict liability is applied in "proceedings which, though criminal in form, are really only a means of enforcing a civil right". Thus cases of *Khatā* (mistake) may be treated as those of strict liability". Compensation (*damān*) is due in *Khatā cases* to the victim or heirs of the victims. The rule of 'strict liability applies in cases of destruction of property and even minors and lunatics do incur their civil liability, even though they lack capacity and the element of *mens rea*.[87]

Mistake is no defence in strict liability crimes. As strictly liability crimes entail no state of mind, so "mistake or ignorance of the fact is, therefore is no defence to them". Similarly, negligence is treated as a part of *Khatā* which is generic term that covers 'cases of unintended consequences where there was intention to cause harm, negligence, as well as strict liability'. The logic or reason behind this is that in all these cases, the penalty provided is *Diyyah* (blood money) or some other form of compensation.[88]

Abdul Qader 'Oudah states it as: "Nullification of accountability by the absence of any component of a willful offence does not stand in the way of civil accountability of the offender. For according to principle of the Sharī'ah, the life and property of a person is not blameworthy and as such they cannot be deprived of security of grounds of anything contained otherwise in the Sharī'ah."[89]

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[87] Nyazee, *General Principles of Criminal Law: Islamic and Western* (Islamabad: Sharī'ah Academy, 2019), 171-172.
[88] Nyazee, *General Principles of Criminal Law*, 108, 145.
[89] Abdul Qader 'Oudah, *Criminal law of Islam*, vol. 2, trans. S.Zakir Aijaz (Delhi: International Islamic Publishers; 1991), 139.

Thus, in Islamic law, the matter of compensation is not dependent on the intention or purpose, rather compensation or indemnity is must in cases of any harm without his permission.

6.6.3 Civil Liability for Acts Done in Necessity

In cases of necessity, permissibility of prohibited things is not unrestricted, unconditional or unqualified; rather permissibility of prohibited things is subject to certain conditions in Islam. Among these conditions, is that 'necessity does not extinguish right of other person'. This condition has application in all conditions/cases of necessity. So according to this condition of principle of necessity, any person who causes harm to another in case of necessity, he is responsible for the loss or damage suffered by the aggrieved person and thus is under duty to compensate it.[90] Hence, necessity is no excuse to avoid civil liability as compared to criminal liability.[91]

6.6.4 Civil Liability of the State and its Servants

Under Islamic law, the government authorities are subject to civil liability against their tortious acts as they violate the rights of the individuals and thus they can be sued. Even Hākim/Imam (Ruler), in case an undue inconvenience or loss is caused to a citizen due to his negligent act, he shall be accountable and he cannot claim a privilege of his office. A liability to pay damages as compensation to the aggrieved can be imposed on him.[92]

Thus, the harm/damage suffered, whether caused unlawfully or lawfully is essential benchmark for civil liability or compensation.[93] Compensation in case of intentional

[90] Abdul Malik Irfani, *Islāmī Naẓriyya e Żarūrat* (Islamabad: Sharī'ah Academy; 2001), 23-24.
[91] Abdul Qadir 'Awdah, *Al-Ṭashrī' A'l-Jinā'ī Al-Islāmī*, vol. 1 (Beirut: Dāru'l Kātib), 485, 581.
[92] Niazi, *Islamic Law of Torts*, 300.
[93] Muslehuddin, *Concept of Civil Liability in Islam and the Law of Torts*, 53-54.

unlawful action violating the right of accused is sole responsibility of the person who caused the same, whether being a public servant or ordinary individual. However, against mistaken or erroneous action of ruler who represents the authority of state, the compensation should be paid from the public treasury *Bayt ul Māl* (public treasury)[94] as the ruler or a judge being a public servant, does not work for himself.[95]

The civil liability applies when an accused is wrongfully arrested and detained due to certain action of police, judicial authority or private individual. This also includes actions done in mistake or necessity. However, it might be the case that a police officer arrests and detains an accused person mistakenly; he shall not be liable of the act, as he is performing this action as a state servant under the command of ruler or state.[96]

The civil liability of ruler or state, however, cannot be absolved or overlooked against the loss of an innocent person. The general principles of Shariah also uphold the right to redress for violations of fundamental rights of accused. As for the mistaken or wrongful detention of an innocent accused person, the civil liability cannot be waived (along with criminal liability of offender) as the life, property or honor of a person are not blameworthy on any ground,[97] and the mistake is no excuse in the matter of rights of people as opposed to the right of Almighty Allah.[98]

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[94] Niazi, *Islamic Law of* Torts, 300-301.
[95] Ahmad Abd al Aziz Al-Alfi, "Punishment in Islamic Criminal Law," in *The Islamic Criminal Justice System*," ed. M. Cherif Bassiouni, (New York: Oceana Publications, Inc., 1982), 233.
[96] Faiz Ullah, *Nazriyyatul- Zaman fil- Fiqh al-Islami al-Aam*, 198; Ahmad Bin Muhammad Hasni Al-Jafri, *Táwīd ul-Muthaham Al-Mutadharrar Ba'ad Subūt-e- Bara'tihī Fil-Fiqh il-Islami*, (Mecca: Zawiyah, 2006), 67.
[97]Abdul Qader Oudah Shaheed, *Criminal law of Islam,* vol. II (Karachi: International Islamic Publishers, 1987), 139.
[98] Niazi, *Islamic Law of Torts*, 354-355.

This account of the argument envisages that Islamic law pledges and adheres to the doctrine strict liability for the vindication of fundamental rights of the people. It takes utmost care and regard to enforce the rights of people in terms of civil liability.

6.7. Redressing Violations of Rights of Accused

Redress or compensation for violation of rights of accused means payment of money by the person inflicted or caused harm to the accused person.[99] Under Islamic law, the harm suffered whether caused unlawfully or lawfully is essential benchmark for compensation.[100]

On the issue of compensation, the majority of Muslim jurists are of the opinion that Islamic law provides for compensation to the accused whose guilt is not established and his innocence is affected in that case. The principles of the Shariah do not oppose or averse the reparation and compensation to those who suffer due to mistake of the government servants while undertaking to protect the rights of public, rather the principles of Sharī'ah "encourage such acts". [101]

In this regard, it is pertinent to note that the Holy Prophet (Peace be Upon Him) himself apologized to the person from Ghafari tribe, whom he detained for an accusation and then released that tribesman telling him to pray and ask Allah's forgiveness for him. When he prayed, the Prophet also prayed for him and asked Allāh to grant him martyrdom. This prayer of Holy prophet was certainly more than a simple apology on the part of Prophet, and was much more valuable for him than any compensatory amount. It indicates the correctness of

[99] Nasir bin Muhammad Al-Jofān, *Al-Ta'wīḍ 'An Al-Sijn*, (Manshūrāt Mujallah Al-Bahūth Al-Fiqhiyyah Al-Mu'āṣirah, 2004), 224.
[100] Muslehuddin, *Concept of Civil Liability in Islam and the Law of Torts*, 53-54.
[101] Zakariyah, *Legal Maxims in Islamic Criminal Law*, 164, 213; Taha Jaber Al-Alwani, "The Rights of the Accused in Islam," (Part Two), *The American Journal of Islamic Social Sciences* 11, no. 4 (1994): 517.

the opinion that the accused should be recompensed for whatever suffering he undergoes due to unproven accusation".[102]

The Islamic legal maxim (harm must be removed or compensated) also provides for paying compensation for the undue loss of liberty of innocent accused.[103] Further the objectives of the Shariah also provide for paying compensation for the undue loss of liberty of innocent accused. According to Islamic law of tort, one is liable to compensate for his act of táddi (aggression) causing harm to someone else without any legal authority or sanction.[104]

In the light of Quranic guidance as discussed above, traditions of the Holy Prophet (peace be upon him), and Islamic legal principles, it is established that if a police officers or any other authorized public servant violates the right of personal liberty of an individual and detains him without lawful authority, he is liable to pay compensation for the loss of his right of liberty and personal freedom, beside his criminal liability.[105] Thus, the state is also liable to provide adequate remedy in terms of compensation or otherwise to the victims of the miscarriage of justice.[106]

6.7.1 Redressing Intentional and Mistaken Violations of Rights of Accused

It is quite evident that in case of *mala fide* or unlawful action that causes violation of right of an innocent individual, the delinquent will have to compensate the victim.[107]

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[102] Al-Alwani, "The Rights of the Accused in Islam," 518.
[103]Wahbah al-Zuhaili, *Nazriyyat ul-Dhaman* (Damascus: Darul Fikr, 1982), 204-205.
[104]Al-Zuhaili, *Nazriyyatul-Dhaman*, 18.
[105] Hassan Abdul Ghani Abu Ghadah, "Compensation for the Accused Detainee Upon Proving His Innocence" *(in Arabic)*, https://midad.com/. Accessed May 1, 2024.
[106] Hasni Al-Jafri, *Taweed ul-Muthaham Al-Mutadharrar,* 86.
[107] Ibn e Farhoon, Ibrahim bin Ali bin Muhammad, *Tabṣiratu Al Ḥukkām fī Uṣūl Al-Aqḍiyyah wa Manāhij Al-Aḥḳām*, vol. 2 (Maktabah Al-Kulliyīt Al-Azhariyyah, 1986), 167.

Similarly, for the acts done in mistake or necessity as discussed above, civil liability is also applicable. If rights of an accused are violated due to some wrong or mistaken information of the informant or testimony of the witnesses, they are liable to redress or compensate the victim wrongly or mistakenly accused for any offence.[108] It is for the reasons that the mistake is no excuse in cases of rights of people; rather compensation is strictly applicable.[109]

As for the accused's human rights violation caused or affected due to some mistaken action of police or any other state authority or an individual, the liability of paying compensation to the victim, cannot be escaped or ignored under Islamic law.[110]

Taha Jaber al-Alwani upholds the opinion that Islamic law provides for the compensation for the detention of an accused whose guilt is not established. Supporting this view, he states that principles of Islamic law urge the state to compensate the defendants/accused persons and relieve the loss of those who suffers due to its mistakes or erroneous actions while it undertakes to protect public rights and safety if its subjects.[111]

On question of mistakes or erroneous action of ruler who represents the authority of state, Alwani notes the difference of Muslim jurists on payment of compensation whether it should be paid from his personal funds or from the public treasury.[112] Some jurists maintain that the compensation would be paid by him personally with the help his Áqilah (clan/family). Other

[108] Niazi, *Islamic Law of* Torts, 25.
[109] Muhammad Fouzi Faiz Allah, *Naẓriyyah Al-Ḍamān Fī Al-Fiqh Al-Islāmī Al'ām* (Kuwait: Maktabah Al-Turath Al-islami, 1982), 208.
[110] Muhammad Hashim Ashraf, "The right of the accused to compensation," *Hamdard Islamicus* 25, no. 02 (2002): 70.
[111] Al-Alwani, "The Rights of the Accused in Islam," 517-518.
[112] Ibid.

jurists suggest that the compensation should be paid out of *Bait ul Mal* (public treasury)[113] as the ruler or a judge being a public servant, does not work for himself.[114]

The latter view seems to be more reasonable and reliable in the modern scenario, for it is stated with the reference of famous Muslim jurist Abu Yousuf that he maintained that apart from providing for basic needs of prisoner, the ruler or state is responsible to financially support his dependents.[115]Hence, detention of an accused person whether caused or affected unlawfully or due to some mistaken action of police or some other state authority or an individual, the liability to redress to the victim, cannot be escaped or ignored under Islamic law.[116]

The state is liable to pay compensation to the victim from the public treasury in the light of Islamic legal maxims "*Al-Dararu Yuzál"* (harm/injury must be removed or compensated), and "*al-Izterar la Yabtulu Haq al Ghair*" (Necessity or compulsion does not abolish others' rights).[117]

The principles *La Darar wa la Dirar, and Al-Darar Yuzal* upholds that there must be no incipient or retaliatory injury, or harm must be eliminated. Causing initial harm to another in any way, shape or form is forbidden in Islam, and retaliatory harm is also forbidden. Therefore, **"**to remove error that leads to evil and injustice is one of the fundamental teachings of Islam and a foremost function of its administration of justice."[118]

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[113] Niazi, *Islamic Law of Torts*, 300.
[114] Hasni Al-Jafri, *Taweed ul-Muthaham Al-Mutadharrar* 65; Al-Alfi, "Punishment in Islamic Criminal Law," 233.
[115] See Bassiouni, '*The Islamic Criminal Justice System*, 235.
[116] Hashim Ashraf, "The right of the accused to compensation," 70.
[117] Faiz Ullah, *Nazriyyatul- Zaman fil- Fiqh al-Islami al-Aam*, 198-201; Zakariyah, *Legal Maxims in Islamic Criminal Law*, 164.
[118] Ghulam Murtaza Azad, *Judicial system of Islam* (Islamabad: Islamic Research Institute, 1987), 100; Kamali, "Appellate Review and Judicial Independence in Islamic Law," 7.

Other similar Islamic legal maxims e.g. *Tasarruf-ul Imam e 'Ala al-Ra'iyyati Manutun bi-Maslahat*" (the exercise of authority by Imam/ruler is subject to the public interest), and "*al-Kharaju bil Dhaman*" or its similar maxim "*al-Ghurmu bil-Ghunm"* (the enjoyment of benefits incurs correspondent liability of loss) also corroborate and substantiate the liability of the state to pay compensation for the act done in the circumstances of necessity. Thus, in view of above principles, it is evident that if the allegation proves false, the rights of the accused must be protected, possibly in terms of compensating the accused by the government.[119]

6.7.2 Nature of Redress for Violation of Rights of Accused

The specific subject of redressing violations of fundamental rights of accused in criminal justice is a bit modern and hence not specifically discussed by the early classical Muslim scholars.[120] The modern scholars, however, hold that any harm resulting into violation of rights of accused, must be compensated in both monetary and non-monetary terms; though the actions or omissions causing harm have been done erroneously or wrongfully. [121]

A Muslim state is vested with authority to consider and devise, keeping in view the relevant circumstances and conditions, other forms of redress that are adequate and suitable for the victims of human rights violations.

6.7.3 The Right to Redress against State and the Administration of Justice

Under Islamic law, the principle of administration justice requires that the rights of those, who have been wronged, be restored and their grievances redressed. Therefore, the judiciary must set

[119] Zakariyah, *Legal Maxims in Islamic Criminal Law*, 164.
[120] Hassan Abdul Ghani Abu Ghadah, "Compensation for the Accused Detainee Upon Proving His Innocence" *(in Arabic)*, https://midad.com/. Accessed May 1, 2024.
[121] Muhammad Rafat Saeed, *Al-Muttaham Wa Haququhu Fi-al-Shariah al-Islamiyah: Ta'widh Al-Muttaham* (Jordan: Maktabah al-Manar Al-Zarqaa, 1983), 56.

limits to check the abuse of power, and provide redress to the innocent aggrieved persons even against state officials.[122]

The text of the Holy Quran envisages the possibility of disputes arising between the ruler of the state and the ruled. It enjoins upon the believers: "Obey Allah and obey the Messenger and those who are in-charge of affairs among you. If you have dispute over something, then refer it to Allah and to the Messenger".[123] This text is clear on the point that both the ruler and the ruled are duty bound to the commands of Shariah. It is implied in this text that the people are entitled to disagree with their leaders.[124]

In the event of a disagreement, the final arbiter between them is, as the text provides, the law of Allah and the ruling of His Messenger. To facilitate the proper implementation of this text, there must be an independent judiciary with full powers to adjudicate between the citizens and state. This may take the form of the historical *Mazalim* courts with powers to adjudicate cases involving the state officials or it may take some different form.[125]

Historically, Mazalim courts had, unlike the other courts, a general jurisdiction to look into complaints against all departments of government and adjudicated all disputes, except that it was restricted to a certain area, and the judge had powers to adjudicate all disputes. The basic purpose of the creation of the Mazalim jurisdiction was to ensure government under the rule of law, irrespective of influence and government authority. Thus, the Mazalim court was first and

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[122] Zafir al-Qasmi, *Nizam al-Hukm fi'l- Shariah wa'l-Tarikh*, (Bairut; Dar al-Nafa'is, 1977), 131; Kamali, "Appellate Review and Judicial Independence in Islamic Law," 11.
[123] Al-Quran (4:58).
[124] Kamali, "Appellate Review and Judicial Independence in Islamic Law,"12; Fathi 'Usman, *al-Fard fil-Mujtama al-Islami* (Cairo: Shirkah Mutabi al-l'lanat al-Sharqiyyah, 1382/1962), 30.
[125] Muhammad Asad, *The Principles of State and Government in Islam*, (Los Angels: California University Press, 1961), 66; Mahmud Abd al-Majid al-Khalidi, *Qawaid Nizam al-Hukm fi'l-Islam* (Kuwait: Dar al-Buhuth, 1400/1980), 211.

foremost administrative tribunal which looked into disputes between the citizens and the state. But, an integral part of the judiciary, it was also a high court of appeal which entertained appeal against the decisions of judges.[126]

6.7.4 Determination of Redress in case of Miscarriage of justice

Under Islamic law, an innocent accused person is entitled to compensation for most kinds of Ḍarar (damage). He is entitled to compensation for loss of life and physical injury. And in cases of non-physical injury, compensation is payable for the cost of medical treatment, financial loss, whether it is in term of property loss, loss of use, or future loss.[127]

Regarding compensation to the accused for *al-Darar al-Ma'nanwī* (non-physical injury), Islamic law postulates that the judge should apply his mind to evaluate and asses any type of loss and implement compensation on the basis of *Al-Ḥuḳūmah*. As in *Ḥuḳūmah or Ta'zīr* cases, rules can be made for regulating the right and just use of discretion of judge and to provide guidance for imposing a particular amount of compensation in such cases.[128]

As for the payment of compensatory amount, there is a difference of opinion among Muslim jurists. According to some jurists, ruler is personally liable for the payment of compensation amount. However, he can be assisted by his '*Āqilah*.[129] Other jurists hold that this

[126] Kamali, "Appellate Review and Judicial Independence in Islamic Law," 16.
[127] Ashraf Md. Hashim, "The rights of the Accused to Compensation," *Hamdard Islamicus* 15, no. 2, (2002): 69.
[128] Hashim., *The rights of the Accused to* Compensation, 67.
[129] According to majority of Muslim jurists including Shāfīs, Hanbalīs, and Mālikīs, the term 'Ā*qilah*, means clan/family of the accused which relates to him from his father. The 'Āqilah comprises on male, sane, and adult members of his family. See Hassan Ali Shazli, *Al-Jināyāt fi'l- Fiqh Al-Islāmī,* 2nd ed. (Dāru'l-Kitāb Al-Jām'ī), 406.

amount can be paid from the government treasury (*Bayt-ul-Māl*) for the fact the human is to err and he too is no exception.[130]

Some Muslim scholars say that the compensation is to be paid by the personal funds of the person by whom harm/injury has been done. However, if he committed the same while performing his official duty, then it will be paid from public funds.[131]

The Hanafi jurist Al-Kasani has stated that in criminal offences which fall under pure right of God (*haqq Allah al-khalisah*) such as the prescribed (*hadd*) penalties of theft and adultery, if the judicial order has already been enforced, the state is liable for compensating the injured, not the Qadi. Similarly, in matters in which the right of God (*haqq Allah*) and the right of man (*haqq al-adami*) combine, such as retaliation in homicide and bodily injuries, only the state, not the Qadi, is liable to the payment of blood-money (*Diyyah*). For the Qadi acts not for himself, but in the capacity as representative (*Naib* or *Wakil*) of the Imam, acts for the public interest, and only the matter, that is principal party, is responsible for the errors of his representatives. Thus, liability to redressing the victims for errors lies on the state treasury. Similarly, the executioner is also not liable as he is acting under order from the Qadi. [132]

As for the rulings that pertain to rights of individuals, the ruling stands annulled in cases where original right can be restored. However, in matters that do not admit of reversal, the rights are returned through their compensation.[133]

However, the jurist Al-Kasani did not discuss about the redress in *t'azir* cases, yet on the basis of his argument, it yields that *t'azir* offences also involve public interest as these offences

[130] Niazi, *Islamic Law of Torts*, 300; Al-Alwani, "The Rights of the Accused in Islam," 517-518.
[131] Ra'fat Saeed, *Al-Muttaham wa Ḥuqūquhū Fī Al-Sharī'ah Al-islāmiyyah*: *Ta'wīḍ Al-Muttaham,* 57-59.
[132] Al-Kasani, *Bada'i al-Sana'i fi-Tartib al-Shara'i,* 101-102.
[133] Ibid.

are deemed against public or state. The state acts as party in these cases. Therefore, in case of any error resulting into miscarriage of justice, the liability for redressing the victims should also lie on the state treasury, not on the state representative.[134] However, in cases of intentional miscarriage of justice, the judge and administrative authority cannot escape the personal liability.[135]

As for the quantum of compensation and its other details, the matter is entrusted to the judge to determine it in accordance with harm suffered keeping in view the damage suffered and the principles of administration of justice. The purpose of the compensation is to restore the aggrieved person to the position before he suffered the harm. In this regard, no limitation law can restrict the enforcement of this right of redress.[136]

In Pakistan, for instance, under Section 337-Y of Pakistan Penal Code, 1860 the value of Daman[137] can be determined by the court, keeping in view the circumstances of each case. The compensation may include medical expenses, physical loss or disability and mental torture or trauma.[138]

While the system of *diyya* (blood money) for bodily injury is well-developed, comprehensive compensation for wrongful imprisonment, psychological trauma, or reputational damage is not as systematically elaborated in classical fiqh as in modern tort law. This creates a "redress gap" for the accused who has suffered a violation but no physical harm. Thus, the types

[134] Zakariyah, *Legal Maxims in Islamic Criminal Law*, 200.
[135] Kamali, "Appellate Review and Judicial Independence in Islamic Law," 215.
[136] Hasni Al-Jafri, *Taweed ul-Muthaham Al-Mutadharrar,* 72, 86; Rafat Saeed, *Al-Muttaham WaHaququhu Fi-al-Shariah al-Islamiyah: Ta'widh Al-Muttaham*, 59.
[137] *Daman"* means the compensation determined by the court to be paid by the offender to the victim for causing hurt not liable to *arsh.*
[138] Section 337-Y of Pakistan Penal Code, 1860.

of redress available in classical *fiqh* need to reinterpreted to map neatly onto modern human rights expectations.

It is important to note that some non-Muslim scholars are the proponent of this jurisprudence being in conformity with Islamic perspective with regard to right of redress or compensation to the accused against violation of his fundamental rights.[139]

6.8. Application of Islamic Tort Law and the Methodological Challenges

As noted above, it is well acknowledged principle under the Islamic law that the sanctity of human rights of an individual is inviolable.[140] Therefore, under Islamic law of torts, one who intentionally or carelessly causes harm to others including the accused without any legal authority or sanction is liable to compensate for his act of táddi (aggression) causing harm or damage to other.[141]

Muslim jurists hold that the damage (harm) is the 'essential mark' of civil liability in Islam and one is liable to pay compensation or damages in case the damage (harm) is resulted due to his direct action, whether damage is caused intentionally or accidentally. Intention is considered of little account, for it is impossible to know the intention of man. All that law can do is to infer it from human conduct. In all cases of tort, damage or injury means infringement of a legal right (right recognized by law of tort) and there is no question of damages if such right is not infringed. [142]

[139] Rafat Saeed, *Al-Muttaham WaHaququhu Fi-al-Shariah al-Islamiyah: Ta'widh Al-Muttaham*, 61.
[140] Da'wah Academy, *The farewell Sermon of the Holy Prophet Muhammad* (SallallahoAlaihiWasallam), 4.
[141] Al-Zuhaili, *Nazriyyat ul-Dhaman*, 18.
[142] Hasni Al-Jafri, *Taweed ul-Muthaham Al*-Mutadharrar, 51.

Islamic jurisprudence has since its earliest time established detailed rules regarding torts, which can very well fit contemporary needs. In this regard, nothing precludes the codification of these rules thereby transforming into positive codified law. Islamic law of torts is not a static and immutable body of rules, but is capable to meet the needs of changing society.[143]

In this regard the option of Mazalim (torts) courts may be considered and employed to provide speedy justice and remedy against violations of the rights of the people. Further, as it is suggested, the methodology of *talīq* and various laws as practiced in the Muslim world may also be helpful in formation of law of torts in Pakistan.[144]

In this arrangement, the principle of strict and vicarious liability may also provide support for the right of redress for violation of fundamental rights of accused. It has been held and established by the superior courts in Pakistan that the principles of justice enunciated by the Muslim Jurists/Imams/Qazis are more illuminating and full of wisdom than principles enunciated by the Western Jurists and scholars. For the true and safe administration of justice in civil and criminal cases, the Courts in Pakistan must seek guidance from decisions given and the principles of dispensation of justice enunciated by our Holy Prophet Hazrat Muhammad (PBUH), the four guided caliphs, Imams and eminent Qazis. These decisions and principles should be given overriding effect over the Western principles of justice.[145]

While Islamic law outlines robust fundamental rights for the accused, yet the methodological challenges lie in accommodating interpretive diversity, modern procedural demands, effective practical enforcement, and harmonization with international legal standards

[143] Muslehuddin, *Concept of Civil Liability in Islam and the Law of Torts*, 53-54.
[144] Niazi, *Islamic Law of Tort,* 198.
[145] *Naseem Bibi v. Gull Faraz*, PLD 2021 Islamabad 120; *Mst. Nusrat v. State* 1996 SCMR 973.

to redress violations effectively. The methodological challenges in applying Islamic law to redress violations of the fundamental rights of the accused involve reconciling classical Islamic criminal justice principles with modern human rights frameworks and addressing practical enforcement issues.

6.9 Relevance of Islamic law to the Legal Regime of Pakistan

Pakistan is an Islamic state and its constitution states that Islam shall be its State religion. It acknowledges the sovereignty of Almighty Allah and guarantees about the fully observance of Islamic principles.[146] Article 227(1) of the Constitution of Pakistan provides for the conformity of all laws of Pakistan to the injunctions of Islam. Further it was held by the Supreme Court of Pakistan in *Zaheeruddin v. State 1993 SMCR 1718* that "every man-made law must now conform to the Injunctions of Islam as contained in Quran and Sunnah of the Holy Prophet. Therefore, even the fundamental Rights as given in the Constitution must not violate the norms of Islam".

Thus, the principles Islamic law, are substantive part of the legal system of Pakistan and therefore, have binding effect. Thus, the Supreme Court of Pakistan has held that "the fundamental rights as given in the Constitution, therefore, must not violate the norms of Islam.[147]

Moreover, in view of majority Muslim jurists, signing a treaty by *Imam* (head of Islamic state) is permissible under Islamic law subject to that the treaty is beneficial for Muslim community and is not in contrast with the injunctions of Islam.[148] The following chapter

[146] See The Preamble of Constitution of Pakistan.
[147] *Zaheeruddin v. State* 1993 SMCR 1718.
[148] Muhammad Munir, "Fiqah-i-Islami mei Jang wa Sulh ke Mu'ahida ka Tasawur", (The Concept of Treaty in Relation to War and Peace in Islam), *Fikro Nazar Urdu* Journal, 47, no. 1 (2009): 43; Khan, "Pakistan's Commitment to Human Rights," 59.

discusses and highlights about the principles of international law that acknowledge the right to redress for accused for violation of fundamental rights.

6.10 Conclusion

The Islamic law has unique approach towards the inviolability of fundamental rights of the people including of the accused. These rights are of very sacred nature and thus, the state or its functionaries cannot take away the individuals' fundamental rights conferred by Almighty Allah without any justification or legal ground. Instead, it is the responsibility of the state to protect the fundamental rights of the individuals by securing justice and peace in the society.

Along with the protection of the rights of the victims, the principles of Islamic law guarantee about the protection of fundamental rights of accused in the criminal justice including presumption of innocence until proved guilty, right of equal treatment and equal protection of law, right of self defence, and right to fair trial proceedings, protection against torture, abuse and ill-treatment, privacy of home, right of dignity, and protection against excessive and retrospective punishment. In this regard, the provisions of the Constitution of Pakistan seem to be in conformity with the teaching and requirements of Islam.

As for the vindication and enforcement of these fundamental rights of accused, Islamic law acknowledges the possibility of errors and wrongs in the criminal justice and provides for redress for the harm or injury suffered by the accused who turn to be victims of human rights violations or miscarriage of justice. The Islamic law acknowledges the doctrines of 'strict liability' and 'vicarious liability' regarding enforcement of the right of accused to redress and civil liability of the perpetrators, whether they are individuals or the state functionaries.

The state is liable to redress the accused for the damage or harm suffered by the accused due to some action or omission of its officials or servants when they perform it in the course of their official duty. However, when they any action in their private capacity or *ultra vires* of their official authority, they would also be held personally. Hence, the rules of 'vicarious liability' and '*Respondeat superior*' apply to the extent of civil liability under Islamic law.

The value or quantum of redress is entrusted to the judge to decide it according to the nature of violation of right and proportionality of the loss suffered. In this regard, the principles of Islamic law of torts (*ḍamān*) intend to redress and restore the aggrieved (accused) to the position before violation of his rights.

While Islamic law provides a strong foundation for the rights of the accused, its application faces significant challenges. These include reconciling diverse legal interpretations, adapting classical principles to modern human rights standards, and overcoming practical enforcement gaps to ensure effective redress.

CHAPTER 7: INTERNATIONAL BEST PRACTICES ON REDRESSING VIOLATIONS OF FUNDAMENTAL RIGHTS OF ACCUSED

CHAPTER 7

INTERNATIONAL BEST PRACTICES ON REDRESSING VIOLATIONS OF FUNDAMENTAL RIGHTS OF ACCUSED

7.1 Introduction

As discussed in previous chapter, the international human rights law depends primarily on the domestic law of the state to provide remedies and obliges the states to provide effective remedies to the victims of human rights violations.[1] Besides, the right to an effective remedy is a fundamental principle of human rights protection and viewed as an essential element of an effective human rights policy.[2] Thus, it is considered important to study and discuss the international and domestic remedies side by side as they frequently interact and domestic remedies are to be exhausted before seeking international remedies.[3]

The chapter of the study focuses on the remedies provided in certain national practices, legislation and jurisprudence. It is important to note that the most comprehensive, extensive, and creative forms of redress have been developed in the realm of domestic law.[4] For instance, in many European countries, courts are vested with the authority to provide redress on an equitable

[1] See Article 2(3) of International Covenant on Civil and Political Rights, 1966; Davis and Whytock, "State Remedies for Human Rights," 399; Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press, New York: 2005), 380; Christopher C. Joyner, "Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability," *Denver Journal of International Law & Policy* 26, no. 4 (1998): 609, 614.
[2] Zeynep Oya Usal Kanzler, "Special Compensation Regimes for Violations of Human Rights in Turkish Law: A Fast Track Remedy or No Remedy at All?" in *Damages for Violations of Human Rights*, ed. E. Bagińska, (Switzerland: Springer International Publishing, 2016), 355.
[3] Kent Roach, *Remedies for Human Rights Violation: A Two-Track Approach to Supra-national and National Law* (New York: Cambridge University Press, 2021), 518.
[4] International Commission of jurists, *The Right to a Remedy and Reparation for Gross Human Rights Violations: A Practitioners' Guide* (Geneva: October 2018), 18.

basis for accused detainees who are acquitted after the trail.[5] Thus, the States practices play a fundamental role in fulfilling the aspiration that rights entail remedies.[6]

This chapter follows the comparative method which allows presentation of distinct perspectives and different resolutions to the problem. Based on the established comparative methods of research on law, it provides a separate section for each of the selected jurisdictions.[7]

7.2 Entrenchment of Right to Redress in the National Legal Regimes

The challenge of setting a fair balance that respects both individual rights and the collective rights of the society is faced by the all countries.[8] Yet, it is a general rule grounded in both civil law and common law traditions that every violation or breach of private legal right envisages a legal injury and the law provides remedy for every legal injury.[9]

In national legal systems, the protection of human rights are either guaranteed through constitutional provisions or/and secured through statutory mechanism and reflected in substantive law and procedural regulations. Therefore, the available remedies for the infringement of human rights are reflected either in constitutional, administrative, criminal, human rights or tort law.[10]

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[5] See, for example, in Norway (Articles 444-446 of the Code de Procedure Penale), France (Articles 149-150 of the Code de Procedure Penale), Germany (section 2 Act on Compensation for Measures of Criminal Prosecution, Italy (Article 314 of the Code de Procedure Penale, and The Netherlands (Articles 89-93 of the Code de Procedure Penale.

[6] Davis and Whytock, "State Remedies for Human Rights," 398.

[7] Wojciech Jasin´ski and Karolina Kremens, ed., *Compensation for Wrongful Convictions: A Comparative Perspective* (New York: Routledge, 2023): 3-4; K. Zweigert and H. Kötz, *Introduction to Comparative Law* (Clarendon Press, 2011), 43.

[8] Brants and Franken, "The Protection of Fundamental Human Rights in Criminal Process," 44.

[9] Mixed Claims Commission, United States and Germany, *Reports of International Arbitral Awards, Recueil de sentences arbitrales, Opinion in the Lusitania Cases,* November 1923, (United Nations: 2006) , vol. 7, 32-35, https://legal.un.org/riaa/cases/vol_VII/1-391.pdf. Accessed November 08, 2023.

[10] Bagińska, ed., *Damages for Violations of Human Rights*, 2.

The fundamental rights enshrined in the modern constitutions are directly enforced or affected in a various way. In many European countries, as a first step a constitutional guarantee for the right to redress is introduced to enforce the human rights. Thus, many jurisdictions have incorporated such a guarantee in their respective constitutions and it has been increasingly strengthened over time.[11] In most of the countries the constitutional provisions are general and leave the legislator quite substantial leeway in implementing these principles.[12]

The right to redress for violation of human rights of accused is an evolving right through the world and various rules for standard of proof could be or are, in fact, laid down to determine entitlement for redress against violations of rights in criminal justice. These rules include proof of unlawfulness, negligence, innocence and not being guilty.[13]

7.3 Selected National Legal Regimes: Analytical Framework for Comparative Evaluation

For the purpose of this study, this chapter focuses on the national legal regimes that share certain context with the legal regime of Pakistan. Pakistan has a hybrid legal system that predominantly consists of salient features of common legal system and Islamic legal system. In this regard, it is pertinent to discuss the practices of countries which have some relevance with the legal system of Pakistan.

Pakistan has been subjected to British colonial rule for a significant period that affected the current legal regime of Pakistan. Many existing laws were formulated during colonial time

[11] Ibid., 444.
[12] Wojciech Jasin´ ski and Karolina Kremens, "In quest of the optimum model for compensating wrongful convictions," in *Compensation for Wrongful Convictions: A Comparative Perspective*, ed. Wojciech Jasin´ski, Karolina Kremens, (New York: Routledge, 2023), 232.
[13] Doménech and Puchades, "Compensating acquitted pre-trial detainees," 168.

and the current adversary system is inherited from the British legal system. In this regard, the legal practice of United Kingdom and India is very pertinent to the legal system of Pakistan.

As far the scheme of entrenchment of fundamental rights and the practice of judicial review, the legal regime of Pakistan is akin to the legal regime of United States of America. Therefore, it is also important to discuss about legal regime of United States regarding redressing of violations of fundamental rights of accused. United Kingdom and United States of America both have provided indemnification legislation for miscarriage of justice. Thus, the selection of the UK, USA, and India as jurisdictions is justified by their legal relevance, shared colonial heritage, and significant jurisprudential influence on each other.

In the following section, the analytical framework for comparative evaluation is incorporated primarily based on the historical development, eligibility criteria, procedural safeguards and type of redress.

7.4 Redressing of Violations of Fundamental Rights of accused in the United Kingdom

In United Kingdom, the right of access courts to seek a remedy for an injury is considered to be originated from the Magna Carta, 1215.[14] The right to a remedy dictated that common law courts could exercise general jurisdiction, to adjudicate all cases involving injury to individual rights. According to Blackstone, it is a well acknowledged and settled law of the law of the England that every right when it is infringed or withheld must have a legal remedy and every injury has its

[14] In England, the Petition of Right in 1628 and the Habeas Corpus Act of 1679 have their traces to the famous clauses 39 and 40 of the Magna Carta 1215 that state: "No freeman shall be taken or imprisoned or disseised of any freehold, or liberties, or free customs, or outlawed, or banished, or in any other way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land. To no one will we sell, to no one will we deny, or delay right or justice." See Doris Mary Stenton, *Magna Carta England 2015*, https://www.britannica.com/topic/Magna-Carta. Accessed February 28, 2024.

proper remedy.[15]And Albert Venn Dicey argued that the principle that underlined the whole English Constitution is that "the courts give a remedy for the infringement of a right whether the injury be great or small".[16]

In case of *Ashby v. Wright*, the House of Lords established affirmed award against a constable who had denied an eligible voter the right to vote. Lord Holt CJ stated that "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it and a remedy if he is injured in the exercise or enjoyment of it, and, indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal."[17]

Similarly in another famous case *Entick v. Carrington*[18], the jury recognized rights against illegal searches and seizures, and awarded damages. For "it is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy and every injury its proper redress."[19] Similarly, the Crown Proceedings Act 1947 provided citizens the right to pursue remedies against the Crown.[20] The Act established the principle that the Crown is

7.4.1 Development of Compensatory Jurisprudence for Miscarriage of Justice

In United Kingdom, the phenomenon of redressing of violations of fundamental rights has been predominantly discussed in the perspective of miscarriage of justice happening in form of wrongful convictions. As for the development of compensation for wrongful convictions in Eng-

[15] William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765), Book III, 100–101; Thomas R. Phillips, "The Constitutional Right to a Remedy," *New York University Law Review* 78, no. 4 (2003):1311, 1322.
[16] Roach, *Remedies for Human Rights Violation*, 80; See also A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: MacMillan, 1959), 211-212.
[17] *Ashby v. White* (1703) 92 ER 126.
[18] *Entick v. Carrington* (1765) 95 ER 896.
[19] William Blackstone, *Commentaries on the Laws of England*, 100-101; for further discussion on the origins of the right to a remedy, see Thomas R Phillips, "The Constitutional Right to a Remedy," 1322.
[20] The preamble of the Crown Proceedings Act, 1947 introduces the Act as to amend the "law relating to the civil liabilities and rights of the Crown and to civil proceedings by and against the Crown."

land and Wales, there are three phases: the *ex-gratia* scheme (until 2006); the first statutory scheme (1988); and the 2018 revised scheme. [21]

In the first phase,[22] the power to grant to grant compensation was vested to the Home Secretary who could make *ex gratia* payment out of public funds to the victims of wrongful conviction and he was not bound to give reasons for his decisions. The decisions were not subject to review unless his decisions were not in accordance with his own guidelines and fairness of his decision-making. This scheme was reversed,[23] but only a few cases succeeded as the outcomes were perceived as unpredictable and inconsistent.[24]

As for second phase, UK adopted its statutory scheme over a decade after its ratification to the International Covenant on Civil and Political Rights (ICCPR) 1966[25] on 20 May 1976. Section 133 of the Criminal Justice Act, (CJA) 1988 provides similar to Article 14(6) ICCPR and Article 3 of Protocol 7 to the European Convention on Human Rights (ECHR), 1984. It provides that in cases of miscarriage of justice happening in terms of wrongful conviction where it is subsequently reversed or pardoned because of 'new or newly discovered fact' the compensation will be paid to the victim by the Secretary of the State.

This approach of paying compensation was pursued through the office of Home Secretary until abolition of the ex-gratia scheme in 2006. Until that, the Government had experienced two compensation schemes for victims of miscarriage of justice: a discretionary scheme and a

[21] Hannah Quirk, "Compensation for wrongful convictions in England and Wales," in *Compensation for Wrongful Convictions: A Comparative Perspective*, ed. Wojciech Jasin´ski, Karolina Kremens, (New York: Routledge, 2023): 8.
[22] As quoted by Hannah Quirk, it is "for as long as anyone can remember". Ibid., 10.
[23] *R. v Secretary of State for the Home Department* [1988] 3 All E.R. 86.
[24] Quirk, "Compensation for wrongful convictions in England and Wales," 10.
[25] The International Covenant on Civil and Political Rights (ICCPR) 1966 states for compensation for miscarriages of justice as an obligation under international law.

statutory scheme. UK government had been contenting that the ex-gratia scheme not only fulfilled its international commitments but it also did go beyond those obligations in many aspects. However, the ICCPR required a legal right to compensation, rather than the mere possibility of a discretionary payment in goodwill or ex gratia (as a matter of grace or favor). The United Nations Human Rights Committee continued to stress on UK to give statutory effect to the Treaty.[26]

The UK government resisted to the amendments for removing the 'beyond reasonable doubt' requirement and including the more generous provisions of the ex-gratia scheme. The CJA 1988 did not define a miscarriage of justice and the eligibility criteria for the statutory compensation were narrowly drawn as compared to the ex-gratia scheme[27] and were further narrowed again in 2008 by an amendment providing reversal of a conviction only when the prosecution decided not to proceed with a retrial.[28]

In the third phase, the government, being unhappy with the continuing litigation, introduced legislation that further restricted eligibility for compensation to cases in which, "if and only if the new or newly discovered fact shows beyond reasonable doubt that the person was innocent of the offence".[29] This was consequent to the fact that the Supreme Court in *Adams v. Secretary of the State* while widening the definition of a "miscarriage of justice" held

[26] Quirk, "Compensation for wrongful convictions in England and Wales," 11.
[27] Section 133(5) of the Criminal Justice Act 1988, as amended by para. 16(4) of schedule 2 to the Criminal Appeal Act 1995.
[28] Subsection (5A) was inserted by the S. 61 (5) of Criminal Justice and Immigration Act 2008.
[29] Section 175 of Anti-Social Behaviour, Crime and Policing Act, 2014 reversed the effect the judgment of SC in *R (Adams) v. Secretary of State for Justice* [2011] UKSC 18. Though this legislation, a new subsection 1ZA was inserted into section 133 of the 1988 Act stating that "if and only if the new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence".

unanimously that right to compensation was not conditional on proof of innocence by a claimant.[30]

As the statutory scheme did not originally contain definition of "miscarriage of justice", the Government legislated in March 2014 to define it and reversed the effect of the judgment of the Supreme Court. Later, the judiciary also narrowed the entitlement for compensation, especially in *R (on the application of Ali and others) v Secretary of State for Justice*.[31]

The applicants who meet the narrow criteria are to make a claim to the Ministry of Justice for compensation for their wrongful conviction. The decision as to the eligibility is determined by the Secretary of State[32] and the decision-making process is purely administrative yet any such determination is subject to judicial review.[33] As for the assessment of the amount of compensation, it is to be determined by an independent assessor taking into account of pecuniary and non-pecuniary losses and such determination is also subject to judicial review.[34]

In UK, Criminal Cases Review Commission (CCRC), a statutory independent body is constituted under Section 8 of the Criminal Appeal Act of 1995 to determine about the miscarriage of justice to an individual accused of an offence. The commission is mandated and empowered under the law to investigate the alleged miscarriage of justice and may refer appropriate cases to the Court of Appeal.

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[30] *R (on the application of Adams) v Secretary of State for Justice* [2011] UKSC 18, as refined in *R (on the application of Ali) v Secretary of State for Justice* [2013] EWHC 72 (Admin); [2013] 1 W.L.R. 3536.
[31] *R (on the application of Ali and others) v Secretary of State for Justice,* [2015] UKSC 68.
[32] See Section 133(3) of Criminal Justice Act, 1988.
[33] Quirk, "Compensation for wrongful convictions in England and Wales," 15.
[34] See Section 133(A) of Criminal Justice Act 1988.

7.4.2 The Legal Framework Related to Right to Redress in the United Kingdom

A range of claims could be brought under English law against public bodies, corporations and/or individuals if their action results into human rights violations. Such claims could involve common law[35] and/or statutory provisions which are applied in respect of any human rights violation.

7.4.2.1 Statutory Law Remedies

Amongst the statutory laws that provide remedy for violations of human rights, the Human Rights Act (HRA), 1998 incorporates and gives domestic effect to the rights and freedoms that are provided under the European Convention on Human Rights (ECHR).[36] Section 6 of the HRA requires that the public authority must act in the conformity with the rights provided under the ECHR; and in case of any compatibility such act of the authority would be unlawful. The meaning of public authority is defined by section 6(3) of the HRA to include "any person of whose functions are functions of a public nature". Claims under section 7 of HRA may be brought against public authorities.[37]

Accordingly, Section 8 of HRA directs UK courts to consider the jurisprudence of the European Court of Human Rights (ECtHR) while awarding compensation. This reflects the intent of the Human Rights Act, 1998 to provide for domestic enforcement of rights given in the European Convention.[38] Article 5(5) of the Convention confers an enforceable right of compensation to the victims of unlawful arrest or detention. Similarly, Article 13 requires that an

[35] The common law is the product of judicial decisions over centuries.
[36] The preamble of Human Rights Act, 1998 provides and defines this Act as "An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights."
[37] Section 7 of Human Rights Act, 1998; Russell Hopkins, *Civil Liability for Human Rights Violations | A Handbook for Practitioners | England & Wale,* (Oak Foundation & Bonavero Institute of human Rights, October 2022), 9.
[38] Preamble of Human Rights Act, 1998.

effective remedy should be provided before a national authority for the violations of human rights.

Thus, in United Kingdom, there is clear statutory possibility for a claim in damages against the Crown for the breach of human rights by the judges under the Human Rights Act 1998; however, no general common law remedy exists unless the breach is of a very specific nature.[39]

7.4.2.2 Remedy in Common Law of Torts

Besides the claim against public authorities under the statutory scheme, civil claims that rely on tort law can identify well-established causes of action that cover the harm and losses caused by the relevant violation. The tort law, however, does not provide specific named torts for 'human rights violations' per se.[40] Civil remedies, however, can be sought on grounds such as trespass, false imprisonment, assault and/or battery, malicious prosecution, negligence and misfeasance in public office.[41]

Remedies under the private law include compensatory damages, declaration, and injunctions. Sometimes in parallel with the common law, specific statutory duties provide a gateway to damages claim. Thus, the Courts in England grant compensation for injury caused by the violation of rights that are protected by the European Convention or private law of tort.[42]

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[39] Chris Oxtoby et., *The Liability of States in Damages for Rights-Violating Conduct by the Judiciary in the Performance of Judicial Function: Comparative Research for the Judge-President of Namibia*, (University of Oxford, 2014), 1-2.
[40] Hopkins*, Civil Liability for Human Rights Violations*, 7.
[41] Quirk, "Compensation for wrongful convictions in England and Wales,"18.
[42] See, for instance, *Iraqi Civilian Litigation v. MOD*, [2017] EWHC 3289 (QB).

7.4.3. Standard of Proof for Compensation: Demonstration of Innocence

The requirement to demonstrate and establish factual innocence for seeking compensation poses almost an insurmountable hurdle for most appellants and it ignores the presumption of innocence in the criminal justice system. Refusing compensation to most of the victims of wrongful convictions reflects that the state is not willing to accept its liability for the errors of justice, and offers no sympathy to the aggrieved individuals.[43]

To award compensation to the aggrieved individuals, there is emphasis on establishing factual innocence. The requirement of demonstrating innocence or 'factual innocence model' is a nearly insurmountable barrier for most of the aggrieved persons seeking compensation for violations of fundamental rights. Thus, under the current rules, even the most deserving persons may not be entitled to compensation. Thus, it is supposed that the effect of sub-section 1ZA is to undermine the presumption of innocence and to create a two-tier system of acquittals – those deserving and those undeserving of compensation. In practice, there is only one tier; the number eligible for compensation is statistically insignificant.[44]

7.5 Redressing of Violations of Fundamental Rights of accused in the United States

In the modern history human rights especially since the inception of the United Nations, the United States has been playing a prominent role as world leader in the development of human rights norms and "its influence in this field has been unparalleled by any other country".[45] Amongst these human rights norms, the right of access to the courts to obtain a remedy for

[43] Quirk, "Compensation for wrongful convictions in England and Wales," 21.
[44] Ibid. 21-22.
[45] Bassiouni, "Human Rights in the Context of Criminal Justice," 251.

injury, originated in Magna Carta is one of the oldest of Anglo-American rights,[46] and considered 'a fundamental equality norm' within US legal system.[47]

The legal maxim *ubi jus ibi remedium* articulates a great inspirational ideal of Anglo-American legal culture. Following common law tradition, the United States Supreme Court held in *Marbury v. Madison* that it would provide redress for violations of individuals' rights.[48] Thus, an enforceable remedial right entails a correlative duty upon courts to provide redress.[49]

The Bill of Rights Amendments in US Constitution is considered to protect the fundamental rights of accused.[50] The concept of a constitutional right implies that there exists a judicial remedy to enforce that right; otherwise, it is a meaningless.[51] First Amendment of the US Constitution, 1791 guarantees a right to a remedy. The right "to petition the Government for a redress of grievances" guarantees not only the right to ask for redress from any of the three branches of government, but, in the special case of meritorious legal petitions, a right to obtain an adequate remedy. There is, however, significant disagreement on the source, scope, and very existence of remedial provisions as State constitutional provisions in forty states explicitly or implicitly codify a right to a remedy, but interpretation of these provisions by state courts has varied widely across the jurisdictions.[52]

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[46] The foundational expression of the concept of due process in Anglo-American jurisprudence and the fundamental rights enshrined in the American Constitution and the Bill of Rights (1791) and the Fourteenth Amendment (1868) have their traces to the Magna Carta, See Doris Mary Stenton, *Magna Carta England 2015*.

[47] Benjamin C. Zipursky, "Ziglar v. Abbasi and the Decline of the Right to Redress," *Fordham Law Review* 86, no. 5 (2018): 2179.

[48] Roach, *Remedies for Human Rights Violation*, 44; Chief Justice Marshall cited William Blackstone for the proposition that "it is a settled and invariable principle in the laws of England that every right, when withheld, must have a remedy, and every injury its proper redress". See *Marbury v. Madison* 5 US 137 (1803).

[49] Zipursky, "Ziglar v. Abbasi and the Decline of the Right to Redress," 2175, 2179; Tracy A. Thomas, "Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy under Due Process," *San Diego Law Review* 41 (2004): 1640.

[50] Especially Fourth, Fifth, Sixth and Eighth Amendments in the USA Constitution relate to the rights of accused.

[51] Richard H. Fallon, Jr., "Constitutional Remedies: In One Era and Out the Other," *Harward Law Review* 136, no. 5 (March 2023):1365.

[52] Benjamin Plener Cover, "The First Amendment Right to a Remedy," *Davis Law Review* 50 (2017): 1741.

7.5.1 Redress for Miscarriage of Justice/Wrongful Conviction

Like UK, the debate in USA regarding redress for violations of fundamental rights is generally focused on the phenomenon of wrongful conviction and miscarriage of justice. In USA the remedies for wrongful convictions are either provided by Federal law or state law. To indemnify the victims of wrongful conviction, the right to redress is expressly or implicitly articulated in statutory schemes of majority US states yet some states have not yet established their compensation statutes. The remedial schemes vary greatly from state to state.[53]

Generally, the redressing of violations of human rights is the primary function of the states and they are the source of remedies for most legal wrongs as they provide remedies for common law torts, statutory violations, and constitutional rights, and state courts are also available to parties seeking remedies for the victims of international human rights violations.[54] Besides, as per the declared policy of USA, it owes respect to the human rights and remedies for violations of human rights.[55]

7.5.2 US Legal Framework for Violation of Fundamental Rights

The US legal system provides a variety of remedies ranging from statutory remedies to common law remedies available at the national (federal) and state levels. Generally, the aggrieved

[53] Addison K. Watson, "Wrongful Convictions: Life, Liberty, and the Pursuit of Compensation," *Mississippi Law Journal* 87, no. 5 (2018): 915; Abigail St. John, "A Comparative Analysis of Statutory Remedies for Wrongful Convictions in the Fifty States" *Honors College Theses*, No. 865, *The University of Southern Mississippi* (2022), 20, https://aquila.usm.edu/honors_theses/865. Accessed February 27, 2024.
[54] Davis and Whytock, "State Remedies for Human Rights," 398.
[55] Restatement (Third) of The Foreign Relations Law of The United States § 701-703 (1986); See also Daniel T. Murphy, "The Restatement (Third)'s Human Rights Provisions: Nothing New, But Very Welcome," *International Lawyer* 24, no. 4 (1990): 917.

individuals may claim compensation for wrongful conviction through three pathways: tort and civil rights litigation, bills of moral obligation, and compensation statutes.[56]

7.5.2.1 Torts Claims

Under US tort law, civil remedies are available to individuals whose fundamental rights are violated by public servants or private individuals. However, civil litigation varies from state to state. Relevant States tort laws govern such claims, along with the State's defences and immunities. Besides there exist statutory tort remedies based on the actions of federal officials in the Federal Tort Claims Act (FTCA), 1946[57] subject to certain limitations and exceptions. It provides US citizens the right of perusing tortious remedies against the US federal government. Claims relating the acts of federal employees are dealt under the FTCA that borrows the substantive law of the state in which the injury occurred. The FTCA is applicable subject to various limitations and immunities.[58]

Civil liability claims are also possible under the Alien Tort Statute (ATS),[59] the Torture Victim Protection Act (TVPA),[60] New York State Human Rights Law[61] and conventional tort litigation. These remedial schemes implement international human rights and obligations.[62]

Usually, domestic law provides for the basis for civil claims, yet rarely, violating international law may be an element of a civil cause of action. In the US, the Alien Tort Statute

[56] Meghan J. Ryan, "Compensation for wrongful convictions in the United States," in *Compensation for Wrongful Convictions: A Comparative Perspective*, ed. Wojciech Jasin´ski, Karolina Kremens (New York: Routledge, 2023), 162.
[57] 28 U.S.C Chapter 171.
[58] Paul Hoffman and Andrew Van Ligten, *Civil Liability for Human Rights Violations | A Handbook for Practitioners | United States of America* (Oak Foundation & Bonavero Institute of human Rights, October 2022), 10.
[59] Alien Tort Statute, 28 U.S. Code § 1350.
[60] Torture Victim Protection Act of 1991.
[61] New York City Human Rights Law, NYC Admin Code (2017).
[62] Hoffman and Van Ligten, *Civil Liability for Human Rights Violations,* 4-6.

(ATS) has sometime been a prominent vehicle for bringing civil lawsuits against state and non-state actors for actions committed in violation of the law of nations or a treaty to which the US is a party. Thus, aliens who are subjected to assault or unlawful arrest and detention within the United States may bring ATS claims before the US courts. The ATS grants US district courts an original jurisdiction with respect to any civil suit by an alien for a tort committed in the violation of international law or a treaty of the United States.[63] However, recent US Supreme Court judgments, however, have significantly limited the scope of the ATS.[64]

All of the compensation statutes in USA are based on the corrective justice theory of tort liability.[65] As exposited by Ernest Weinrib, redressing the party injured, by either restoring to him his right, if possible, or by giving him its equivalent is "a paradigmatic expression of corrective justice".[66]

Under Common law tort system, the aggrieved individuals may claim compensation against those who caused them harm. Such claims may include the instance of malicious prosecution, false imprisonment and legal malpractice. However, it is difficult for individuals to prove such claims due to inability, in most of such cases, to prove sufficient intent or causation and also because of certain privilege defences.[67]

In case of wrongful conviction, for instance, the aggrieved persons can make claim of malicious prosecution. To establish such a claim, generally one has to prove 'by a preponderance of the evidence' about his exoneration, malice and without probable cause on the part of person

[63] Alien Tort Claims Act (ATCA), 28 U.S.Code §1350.
[64] *Kiobel* v. *Royal Dutch Petroleum Co.* 569 U.S. 108 (2013)*;* Hoffman and Van Ligten, *Civil Liability for Human Rights Violations*, 10; Davis and Whytock, "State Remedies for Human Rights," 399, 410.
[65] Mostaghel, "Wrongly Incarcerated, Randomly Compensated," 527.
[66] Ernest Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012), 91.
[67] Ryan, "Compensation for wrongful convictions in the United States," 163.

or authority who initiated the proceeding. The proof of malice, however, is extremely difficult to establish in most of the cases. Generally, it would be implausible that the victims of wrongful conviction can prevail in malicious prosecution claims. Similarly in false imprisonment cases, the imprisonment would be privileged if there involves probable cause or for arrest. Besides, the common law tort claims are restricted due to immunity provisions.[68]

Eventually, an exoneree whose fundamental rights are violated, may pursue a suit against the state for malicious prosecution, false imprisonment at the state level, or a violation of federal civil rights under 42 U.S.C. § 1983.[69]

7.5.2.2 Civil Rights Claims

Most claimants seeking compensation through courts file federal civil rights suits—instead of, or in addition to common-law tort claims.[70] The American pursuit of redress for violations of constitutional rights is based on Civil Rights Act of 1871.[71] In 1871, Congress created and codified a cause of action, in terms of 42 U.S. Code § 1983 (Section 1983) to redress the violation of constitutional rights by persons acting under color of state law.

Section 1983 is considered as primary law for the vindication of constitutional rights in both federal and state courts. Section 1983 provides a statutory cause of action against state actors who violate federal constitutional or statutory rights while acting under the color of law. It

[68] Ibid., 162-164.
[69] Elizabeth O'Roark, "Complicated Mercy: Compensating the Wrongfully Convicted in Georgia," *Georgia Law Review* 56, no. 3 (2022): 1340.
[70] Ryan, "Compensation for wrongful convictions in the United States," 162-165.
[71] 42 USCA § 1983 (2000).

affords the basis for victims of assault or unlawful arrest and detention to pursue a claim against police and their agents under Section 1983.[72]

Section 1983 began to emerge, as early in 1961, as a tool to check the abuses of state officials in *Monroe v Pape* [73] where it was established that a federal remedy was available under Section 1983 even if a remedy was theoretically available under state law. Further, *Monroe* held that even state officials acting illegally were acting 'under the color of law' under Section 1983. Section 1983 litigation has expanded to permit liability against not just state agents, but also municipalities and local government entities**.**[74]

The US Supreme Court in *Bivens* case[75] held that federal officials are subject to civil liability claims based on violations of the Constitution. A *Bivens* claim may be made against federal government officials who subject victims to assault or unlawful arrest and detention. *Bivens* itself provided a cause of action in response to a violation of the Constitution.[76]

Bivens is a case that recognized the individuals' implied rights of action for seeking accountability of wrongdoers and redress against the wrong that infringe their rights. It stands for the practicality of the maxim *ubi jus, ibi remedium*, a principle of access to justice recognized in *Marbury v. Madison*, alongside the principle of judicial review.[77] Thus, the constitutional tort claims against government officials for violating individuals' fundamental rights as guaranteed in the federal Constitution have been recognized in US legal system.

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[72] *Manuel v. City of Joliet*, *Ill*, 137 S.Ct. 911 (2017) (SC); *Savino v. City of New York*, 331 F.3d 63 (2d Cir. 2003) (US Court of Appeals).
[73] *Monroe v. Pape* 365 U.S. 167 (1961).
[74] Paul Hoffman, Andrew Van Ligten, *Civil Liability for Human Rights Violations,* 9.
[75] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* 403 US 388, SC (1971). The Supreme Court enunciated the principle that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."
[76] Fallon, Jr., "Constitutional Remedies," 1320; Paul Hoffman, Andrew Van Ligten, *Civil Liability for Human Rights Violations,* 10.
[77] Zipursky, "Ziglar v. Abbasi and the Decline of the Right to Redress," 2168.

Later developments, however, clarify that *Bivens* likely furnishes a right of action only for a narrow range of constitutional tort and the scope of the remedy was narrowed by the Supreme Court to the limited circumstances.[78] In response to an increase in Section 1983 and other civil rights claims against state actors, US judiciary, particularly the Supreme Court has been inclined to limit the remedy drastically through its doctrines like qualified and absolute immunity.[79]

The US Supreme Court held that state governments have sovereign immunity from civil liability under the Eleventh Amendment of the Constitution.[80] Thus, the Supreme Court expanded the doctrine of qualified immunity to restrict the availability of Section 1983 remedies unless a defendant has violated 'clearly established' law.[81]

It is considered that section 1983 provides a method to protect the constitutional rights yet its remedial scope and application is restricted due to certain limitations and hurdles due to Supreme Court's immunity jurisprudence.[82] Consequently, Section 1983 claims are subject to defenses, immunities and other limitations or barriers which may restrict the circumstances in

[78] Hoffman and Ligten, *Civil Liability for Human Rights Violations,* 5.
[79] The current standard for qualified immunity is traced back to a 1982 decision in *Harlow v. Fitzgerald* 457 U.S. 800 (1982); See also *Carey v. Piphus* 435 U.S. 247 (1978).
[80] *Monell v. New York City Dept of Social Services*, 436 U.S. 658, 690 (1978) (SC); U.S. Constitution Amendment XI states that. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."; See also Fallon, Jr., "Constitutional Remedies," 1312; Roach, *Remedies for Human Rights* Violation, 263; Gary S. Gildin, "Redressing Deprivations of Rights Secured by State Constitutions Outside the Shadow of the Supreme Court's Constitutional Remedies Jurisprudence," *Penn State Law Review* 115, no. 4 (2011): 895.
[81] Roach, *Remedies for Human Rights* Violation, 263-264; See generally *Ashcroft v al-Kidd*, 563 US 731 (2011) (SC); Joanna C Schwartz, "How Qualified Immunity Fails," *Yale Law Journal* 127, no.1 (2017), 1, 16.
[82] Alexander A. Reinert, "Qualified Immunity's Flawed Foundation," *California Law Review* 111 (2023): 246.

which remedies are available and often it is not easy to establish prima facie claims under § 1983.[83]

7.5.2.3 Legislative Bills Mode of Compensation

One other mode or option of seeking remedies is through moral obligation bills or private legislative bills which are "specifically drafted (acts) generally used to pay otherwise unenforceable claims on behalf of individuals harmed by the state".[84] While private bills offer redress to the victims of unlawful incarceration or wrongful conviction, yet they are considered as problematic and unpopular for not being realistic path for providing a consistent and reliable indemnification to the aggrieved from the state.[85]

7.5.2.4 Compensation Statutes

Since 1913, there have been scholarly and legislative efforts to introduce compensation statutes for wrongful prosecution and erroneous conviction in the United States,[86] and today almost thirty-nine states (including the federal government and the District of Columbia) have enacted their statutes to compensate wrongfully convicted and incarcerated persons. As compared to other methods of redress, the victims of wrongful convictions often have greater chance in seeking compensation through statutes specifically directed at compensating individuals for wrongful conviction and incarceration. These statutes, however, vary in terms of procedure,

[83] Ryan, "Compensation for wrongful convictions in the United States," 165; Pamela R. Metzger and Janet C. Hoeffel, "Criminal (Dis)Appearance," *The George Washington Law* Review 88, no. 2 (2020): 412-413, 417; Ryan E. Johnson, "Supervisors Without Supervision: Colon, McKenna, and the Confusing State of Supervisory Liability in the Second Circuit," *Washington and Lee Law Review* 77, no. 1, 2020: 507-508.
[84] Bernhard, "Justice Still Fails," 708; Bernhard, "When Justice Fails," 93.
[85] Watson, "Wrongful Convictions," 890; Ryan, "Compensation for wrongful convictions in the United States," 166; O'Roark, "Complicated Mercy," 1361; Christine L. Zaremski, The Compensation of Erroneously Convicted Individuals in Pennsylvania, *Duquesne Law Review* 43, no. 3 (2005): 436.
[86] See, for instance, Edwin M. Borchard, "European System of State Indemnity for Errors of Criminal Justice," *Journal of Criminology and Criminal Law* 3, no. 5 (1913): 684; Zaremski, "The Compensation of Erroneously Convicted Individuals," 430.

eligibility requirements, the standard of proof as preponderance of the evidence or establishing actual innocence, calculating compensation standard, the mode of compensation etc. Though the details and scope of these states' statutes vary by jurisdiction, but, generally, experts agree that they are the best possibility and avenue for securing compensation for wrongful conviction and incarceration to the victims.[87]

Jeffrey S. Gutman, while responding the question "is where the burden of error should fall – on the state paying a small number of those regarded as undeserving, or on the deserving but uncompensated exoneree?" preferred the preponderance of the evidence standard over the standard of proving factual innocence for granting compensation through statutory scheme.[88]

7.5.3 Current Approach in the United States

Currently, it is considered that "the United States legal system, in theory, favors defendants, but in reality shows bias in favor of the government."[89] The United States Supreme Court has been obsessed to the point that in the absence of specific Congressional authorization, the courts should not award damages against the federal officials.[90] The Supreme Court has recently inclined to show hostility to suits seeking redress from state and federal officials for alleged constitutional violations.[91] Thus, an account of US courts practice shows 'remedial exceptionalism' restricting and not granting remedies.[92]

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[87] Ryan, "Compensation for wrongful convictions in the United States,"168; Gutman, "An Empirical Reexamination of State Statutory Compensation," 372, 376.
[88] Gutman, "Are Federal Exonerees Paid?" 219, 284, 287.
[89]Alanna Trivelli, "Compensating the Wrongfully Convicted: A Proposal to Make Victims of Wrongful Incarceration Whole Again," *Richmond Journal of Law and The Public Interest* 19, no. 3 (2016): 258.
[90] *Ziglar v. Abbasi*, 138 S.Ct. 1843 (2017); Roach, *Remedies for Human Rights Violation*, 55.
[91] Richard H. Fallon, "Bidding Farewell to Constitutional Torts," 951, 957.
[92] Roach, *Remedies for Human Rights* Violation, 519; Barnes, "The Constitution's Waning Enforceability," 69.

In this regard, in 2017 the case *Ziglar v. Abasi*[93] is of particular mention. It is a constitutional tort case in which innocent accused persons who were detained by the state authorities claimed for compensation. The Supreme Court, contrary to its approach in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* refused to apply the *Bivens* cause of action to claim for damages and denied the individuals' claim to redress for violations of their fundamental rights.[94]

The practice of the Supreme Court in cases like in *Ziglar v. Abbasi* and *Hernandez v. Mesa*[95] has been criticized on the account that the Supreme Court ignored the common law remedial baseline in defining the scope of constitutionally inflected forms of redress, [96] and thus has lead to allow the very loss of individual rights.[97] The core of *Ziglar* and *Hernandez* is the Supreme Court's disregard of the normative basis of the principle that "where there is a right there is remedy. [98]

It has been contended that constitutional remedies are a matter of judicial interpretation and it is essential element of the judiciary's role to interpret and shape the remedies. The full control of constitutional remedies belongs to judiciary since the decision in *Marbury v. Madison*.[99] Accordingly, American tradition requires courts to play an active part in crafting remedies that implement the Constitution on terms that reflect its rule-of-law ideals. Therefore,

[93] *Ziglar v. Abbasi*, 137 S C 1843 (2017).
[94] Zipursky, "Ziglar v. Abbasi and the Decline of the Right to Redress," 2167-68; Roach, *Remedies for Human Rights* Violation, 265.
[95] *Hernandez v. Mesa*, 140 S. Ct. 735 (2020).
[96] Madeline Prince, "Bivens and Ward---Constitutional Remedies in the United States and Canada," *Emory International Law Review* 36, no. 2 (2022): 359, 361, 388.
[97] James E. Pfander, "Dicey's Nightmare: An Essay on the Rule of Law," *California Law* Review 107, no. 3 (2019): 788.
[98] Zipursky, "Ziglar v. Abbasi and the Decline of the Right to Redress," 2175.
[99] *Marbury v. Madison* 5 US 137 (1803); Martin H. Redish, Constitutional Remedies as Constitutional Law, *Boston College Law Review* 62 (2021): 1866, 1923.

the Supreme Court should partially reverse its sharp retreat from the *Bivens* doctrine, as characterized in *Ziglar v. Abbasi*.[100]

In the words of Kent Roach, "the sovereign immunity of the state (except municipalities) that Edwin Borchard criticized almost a hundred years ago remains in place. The remaining promise of constitutional torts against state officials has died with increasingly robust qualified immunities."[101] Thus, initial wide application and enforcement of fundamental rights of the aggrieved has been receded with the hostile trend of Supreme Court towards individual rights claims. Nevertheless, the legal system of United States still embodies and employs causes of action for breach of constitutional rights as its central and core part.[102]

Alternatively, it is contended that the state courts and legislatures "must step outside the shadow of the Supreme Court's Section 1983 decisions to develop an independent scheme of redressing deprivations of state constitutional rights".[103]

7.6 Redressing Violations of Fundamental Rights of Accused in India

India is a common law jurisdiction with an adversarial dispute resolution system and the criminal justice system as it exists today in India was mostly evolved during British colonial period.[104] India's primary human rights protections and obligations arise from the Constitution of India, 1950 which embodies and guarantees about the protection of fundamental rights.

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[100] Fallon, "Bidding Farewell to Constitutional Torts," *California,* 987.
[101] Roach, *Remedies for Human Rights Violation*, 519.
[102] Lisa Tortel, *Monetary Remedies for Breach of Human Rights: A Comparative Study*, (Hart Publishing, 2006), 38.
[103] Gildin, "Redressing Deprivations of Rights," 921.
[104] Dalbir Bharti, "India: A Historical Perspective of the Criminal Justice System," in *Routledge Handbook of South Asian Criminology*, ed. Jaishankar Karuppannan (Routledge: New York: 2020), 45, 51; See also Dalbir Bharti, *The constitution and criminal justice administration* (New Delhi: APH Publishing Corporation, 2002).

Article 32 of the Constitution of India provides for a fundamental right of remedy that guarantees the protection of all other fundamental rights guaranteed under the Constitution. Therefore, a special feature of Indian Constitution is that the right to approach or move the Supreme Court under Article 32 is itself a fundamental right provided by the Constitution.[105] Bhimrao Ramji Ambedkar in the Constituent Assembly termed this article as 'very heart and soul of the Indian constitution' and remarked that Constitution without this article would be 'nullity'.[106]

The Supreme Court of India and respective High Courts are empowered to take action to enforce these rights. Under the provisions of the Constitution, an aggrieved person can directly approach the Supreme Court or High Court of the concerned state for the protection of his fundamental rights and redress of grievances. In such cases, the Courts are empowered to issue appropriate order, directions and writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari.[107] Thus, it is constitutional mandate of judiciary to protect human rights of the people.[108]

7.6.1 Development of Redress for Violation of Fundamental Rights of Accused

Though, at present, there is no specific and express provision in the Indian Constitution or other legislative framework for granting compensation, restitution or other forms of redress for fundamental rights violations happened or caused to the victims of miscarriage of justice in terms

[105] Article 32(1) of the Constitution of India 1949 provides as "The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed."
[106] R.C.S. Sarkar, *The Constitution of India,* (New Delhi: National Publishing House, 1991), 151; Constituent Assembly Debates, Vol. VII, (9th December, 1948), 953. https://main.sci.gov.in/AMB/pdf/cad%2009.12.1948.pdf. Accessed May 1, 2024.
[107] Article 32 (2) of the Constitution of India provides that "The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari,* whichever may be appropriate, for the enforcement of any of the rights conferred by this Part."
[108] Amartish Kaur, "Protection of human rights in India: A Review," *Jamia Law Journal* 2 (2017): 24.

of wrongful prosecution or unjust detention or other kinds of violations of fundamental rights f accused. However, the Supreme Court of India has judicially evolved a right to compensation through employing a dynamic approach to right to life and personal liberty guaranteed under Article 21 of the Constitution of India.[109] The said article provides generally for protection of life and liberty.

Over the years, the Indian higher courts have developed the practice of providing redress in terms of compensation for violations of fundamental rights. The Supreme Court of India as 'the custodian of the Constitutional rights' has employed the doctrine of vicarious liability of the state for fundamental rights violations especially those resulting into wrongful prosecution, undue detention and bodily harm.[110] Therefore, victims of fundamental rights violations can claim constitutional remedies from the Supreme Court and High Court under Article 32[111] and 226[112] of the Constitution.[113]

Rights-based litigation under Indian constitutional law comprises the mainstay of human rights litigation in India. Since the 1980s, the Supreme Court has consistently expanded the extent of the Constitution's protections for various fundamental rights. Traditionally, as a general

[109] Jyoti Dogra Sood, "Rights of the Accused and Constitutional Protection in Case of Arrest in India," *Asia Law Review* 5, no. 1 (2008): 49.
[110] See *DK Basu v. State of West Bengal* AIR. 1997 S.C. 610; In *Bhim Singh v. State of J & K* AIR 1986 SC 494 an accused person was not produced before the Magistrate within 24 hours of his arrest. The Supreme Court awarded Rs. 50,000 as compensation to be paid by the State for wrongful detention.
[111] Article 32 of the Constitution of India states about the remedies including writs for enforcement of fundamental rights.
[112] Article 226 of the Constitution of India states about the power of High Courts to issue directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari for the enforcement of the rights.
[113] *Nilabati Behra v. State of Orissa* AIR 1993 SC 1960; Megha Ojha and Mayuri Pandya, "Compensation to the Wrongfully Prosecuted Person: Hitherto and Challenges for India," *Think India Journal* 22, No. 14 (December 2019): 3567, 3574.

rule, constitutional rights have regulated the relationship between an individual and the State and are enforceable vertically against the State.[114]

The Supreme Court also expanded the nature of remedies that could be awarded in fundamental rights litigation. In addition to the writ remedies that were already available under article 32, the Supreme Court expanded its ambit to also award monetary compensation for violations of fundamental rights. One of the earliest cases where monetary compensation was awarded was in *Rudul Sah v. State of Bihar*. In this case concerning the unlawful detention of the victim for fourteen years in prison after he had been acquitted in court, the Supreme Court held that there was a necessity to award remedies that could offer a 'palliative' for victims in certain instances of fundamental rights violations in a way that other remedies could not.[115]

Following *Rudul Sah* case which expanded the remedies available under article 32, constitutional tort cases involving custodial violence and unlawful arrest and detention saw monetary compensation commonly awarded to the victim. In *Kaushal Kishor versus State of Uttar Pradesh & Ors*, the Supreme Court of India reiterated and held that "any act of omission or commission is done by the officers resulting in harm or loss to a person/citizen, the same may be actionable as a constitutional tort". [116]

Thus, constitutional tort actions have become a key route to civil remedies for human rights violations in India.[117]It is important to note that although the nature of the remedy that is awarded is compensatory and monetary, it does not preclude the claimant from also approaching

[114] Titiksha Mohanty, Krishnendu Mukherjee and Sonal Tiwary, Civil *Liability for Human Rights Violations | A Handbook for Practitioners | India* (Oak Foundation & Bonavero Institute of human Rights, October 2022), 9.
[115] *Rudul Sah v State of Bihar* (1983) 4 SCC 141.
[116] *Kaushal Kishor v. State of Uttar Pradesh & Ors*, Writ Petition (Criminal) No. 113 of 2016, The Supreme Court order dated January 03, 2023.
[117] Mohanty, Mukherjee, and Tiwary, *Civil Liability for Human Rights* Violations, 12.

the civil courts under tort law as a parallel, alternative, or complementary forum for civil remedies for human rights violations.[118]

Thus, the judicial trend in terms of public interest litigation in India has developed the sense of realization and vindication of fundamental rights of the aggrieved accused persons in terms of monetary compensation.[119] It is, however, a remedy determined on the basis of facts of each case and the disposition of the court hearing the case "which in turn, makes this remedy arbitrary, episodic and indeterminate".[120] Further, the non-pecuniary remedies too need to be considered to accommodate such victims of human rights violations.

7.6.2 Civil Liability of the State for the Violation of Constitutional Rights

The concept of state liability was recognized in the legal system of India[121] even in British rule.[122] After the independence Justice Krishna Ayyar in *Rattan Singh v. State of Punjab* highlighted the issue of lack of adequate redress for the victims of crimes and misconduct in the criminal justice system of India.[123] According to him, "it is a weakness of our jurisprudence that the victims of the crime, and the distress of the dependents of the prisoner, do not attract the attention of the law. Indeed, victim reparation is still the vanishing point of our criminal law. This is a deficiency in the system which must be rectified by the Legislature."

[118] *Kirloskar Brother Ltd v Employees' State Insurance Corporation* (1996) 2 SCC 682.
[119] Tortel, *Monetary Remedies for Breach of Human* Rights, 55.
[120] Yashvir Singh and Smita Singh, "Right to Compensation for Wrongful Prosecution, Incarceration, and Conviction," 459.
[121] Article 300 of the Constitution of India, 1950, states about the liability of the Union or State in tortuous act of the Government.
[122] Section 176 of the Government of India Act, 1935 provided about the government tortious liability. Similarly, Section 65 of the Government of India Act, 1858 provided that "all persons and bodies politic shall and may have and take the same suits, for India as they could have done against the said Company."
[123] *Rattan Singh v. State of Punjab* AIR 1980 Supreme Court 84.

Since then, the concept of constitutional tort[124] and state liability was discussed in numerous cases. In 1981, Justice Bhagwati, a judge of Supreme Court while deliberating upon the question regarding monetary compensation in *Khatri v. State of Bihar* remarked: "Why should the court not be prepared to forge new tools and devise new remedies for the purpose of vindicating the most precious fundamental right to life and personal liberty?"[125]

The Supreme Court settled the theoretical foundation for awarding compensation in cases involving police atrocities and other administrative misconduct.[126] The question of civil liability of the state in consequence of the violation of constitutional right was firstly discussed by the Supreme Court of India in the case *Rudul Shah v. State of Bihar*. In this case, the petitioner Rudul Shah suffered unlawful detention in jail for more than fourteen years after the Court of Sessions acquitted him.

The court held that it would be merely a 'lip-service' as to protection of fundamental rights if the optimal compensation is not awarded to the petitioner for the gross violation of his right to life and liberty. Thus, the court opted to grant compensation against the unlawful actions of state authorities which 'act in name of public interest and which present for their protection the powers of the state as shield'.[127]

[124] A tort is generally described as a civil wrong that results or incurs unliquidated damages in case one person violates the legal right of the other. If the legal right incorporated in the Constitution is violated by a government servant, then the torts arising will be categorized as a 'constitutional tort'.
[125] *Khatri v. State of Bihar* A.I.R. 1981 S.C. 928.
[126] Sood, "Rights of the Accused and Constitutional Protection," 51.
[127] *Rudul Shah v. State of Bihar and others* AIR 1983 SC 1086.

In *Bhim Singh v. State of Jammu and Kashmir*, the court asserted the jurisdiction of the court to provide the aggrieved the redress in terms of monetary compensation against the state for illegal arrest and detention of the petitioner with malicious intent.[128]

In 1993, in case *Nilabati behera v. State of Orissa* the Court distinguished the sovereign immunity in private law and state liability in public law. It held that the sovereign immunity for tortious acts of state officials is different from state's liability for violation or contravention of the fundamental rights. Hence, the defense of sovereign immunity finds no place for violations of constitutional rights and their remedies under Articles 32 and 226 of the Constitution of India.

The court further expounded that the public law remedy in terms of monetary compensation as exemplary damages in proceedings under Articles 32 and 226 for violations of fundamental rights is based on strict liability and it is distinct and in addition to the private law remedy in terms of damages for the tort resulting from the fundamental right violation.[129]

This is for the reason that the public law proceedings and remedies have different purpose than the private law proceedings and remedies. The purpose of public law is to civilize public power and assure the citizen for the protection of their rights under the legal system. The court further held that the remedy in public law i.e. under article 32 has to be more readily available when invoked by the poor people who do not have the resources for enforcement of their rights in private law. [130]

[128] *Bhim Singh v. State of Jammu and Kashmir* AIR 1986 SC 494.
[129] The Supreme Court of India in this case recognized damages as "a remedy available in public law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort".
[130] *Nilabati Behra v. State of Orissa* AIR 1993 SC 1960.

Claims can be brought under the law of civil remedies against public authorities in India. There are three distinct ways for civil remedies: under constitutional law, statutory law, and under tort law. Under the constitutional law route, the Supreme Court or any of the High Courts can exercise their writ jurisdiction under article 32 and article 226 of the Constitution to enforce the fundamental rights enshrined under Part III of the Constitution.[131]

7.6.3 Application of Doctrine of Sovereign Immunity in Fundamental Rights Cases

The Supreme Court, while expressing similar views, in *Union Carbide Corporation* v. *Union of India* further clarified that the application of sovereign immunity for tortuous acts of its servants[132] is confined only to the sphere of liability in tort. As for the state's liability for the violations of fundamental rights, the doctrine of sovereign immunity has no application in the constitutional scheme, hence it is no defence for the constitutional remedy provided under Articles 32 and 226 of the Constitution that empower the Court to award redress i.e. compensation for fundamental rights violations. Thus, the Court can award monetary compensation for the contravention of fundamental rights when the only practicable mode of enforcement of the rights can be the award of compensation. [133]

In *State of A.P.* v. *Challa Ramakrishna Reddy* the Supreme Court reviewed the doctrine of sovereign immunity and discarded this dilapidated doctrine stating that "the maxim that the king can do no wrong' or that the ' is not answerable in tort has no place in Indian jurisprudence where the power vests not in the crown but in the people who elect their representatives to run

[131] Rao, "Constitutional Rights Violations and Compensatory Jurisprudence," 110; See also M.S.V. Srinivas, "Compensation under Articles 32 and 226 for Violation of Human Rights and Fundamental Freedoms," *A.I.R.* 1997, 167.
[132] For sovereign immunity for tortuous acts of its servants, see *Kasturi Lal Ralia Ram Jain v. The State of U.P.* AIR 1965 SC 1039.
[133] *Union Carbide Corporation v. Union of India* (1991) 4 SCC 584.

the government which has to act in accordance with the provisions of the constitution and would be answerable to the people for any violation thereof." [134]

The court while explaining its previous rulings under the public law maintained that "so far as fundamental rights and human rights or human dignity are concerned the law has marched ahead like a Pegasus but the government attitude continues to be conservative and it tries to defend its action or the tortuous action of its officers by raising the plea of immunity for sovereign acts or acts of the state, which must fail."

In *Rabindra Nath Ghosal* v. *University of Calcutta*[135] the Supreme Court laid down the guidelines regarding award of compensation in public law. The court held that the aggrieved person must show the violation of certain fundamental right by an arbitrary or capricious action on the part of the public functionaries. However, minor infraction or breach of public duty by a public officer would not justify or establish the right to remedy in terms of compensation under articles 32 or 226 by applying the principles of public law proceedings.[136]

In *Babloo Chauhan @ Dabloo v. State Government of NCT of Delhi*, the High Court of Delhi considered the issue of miscarriage of justice in India[137] and observed lack of legal or statutory framework to provide redress to the persons who are acquitted by the courts after suffering wrongful prosecution and lengthy incarceration in numerous cases in India. The Court expressed its concern that these people are left without any opportunity for reintegration into

[134] *State of A.P. v. Challa Ramakrishna Reddy* (2000) 5 SCC 712.
[135] *Rabindra Nath Ghosal v. University of Calcutta* (2002)7 SCC 478.
[136] Sood, "Rights of the Accused and Constitutional Protection," 52.
[137] In India, over the years, the expression 'miscarriage of justice' has been looked into a plethora of judicial pronouncements, including within its purview a multitude of violations and desecrations. Miscarriage of justice is what arises from misconception of law, irregularity of procedure, neglect of proper precaution leading to apparent harshness of treatment or some underserved hardship to individuals. Thus, the expression failure of justice is an extremely pliable or facile expression, which can be made to fit into any situation of a case. See *Rattiram v. State of Madhya Pradesh* AIR 2012 SC 1485; *Bhimanna v. State of Karnataka* AIR 2012 SC 3026; *Darhara Singh v. State of Punjab*, AIR 2013 SC 840.

society or rehabilitation. As for the possibility of invoking civil remedy, the court termed it as not being affordable, timely and efficacious.[138]

The Court noted that Article 21 of the Constitution of India provides for the protection of life and personal liberty of the citizens and the State is liable against the infringement of a fundamental right for its officials including police and prosecutorial misconduct. However, the Constitution that guarantees for the fundamental rights has no explicit provision about grant of compensation by the state for infringement of these fundamental rights.[139] In this way, the remedies in the legal framework only create an ex-gratia obligation, and not the statutory obligation on the state for compensation.

The Court further observed that the courts in India have been awarding compensation for violation of fundamental rights, including for wrongful incarceration, under Article 21 of the Constitution of India as a matter of public law remedy based on strict liability of state. However, these instances are occasional and remedy is not easily available to all persons in similar situations. Consequently, the Court felt an urgent need for a legal framework for providing relief and rehabilitation to victims of wrongful prosecution and incarceration. The Court asked the Law Commission of India to undertake a comprehensive examination about the remedies for wrongful prosecution and make its recommendations to the Government of India.[140]

Accordingly, on 30th August 2018, the Law Commission of India submitted its report to the Government of India. The Commission looked into the interpretations and meanings of

[138] *Babloo Chauhan @ Dabloo v. State Government of NCT of Delhi*, 247 (2018) DLT 31.
[139] *Babloo Chauhan @ Dabloo v. State Government of NCT of Delhi*, 247 (2018) DLT 31.
[140] Ibid.

'miscarriage of justice' and acknowledged that it is of wide amplitude and has been defined in broader terms as 'error of justice' or 'failure of justice'.[141]

However, for the purpose of this particular study, the commission meant to confine the expression 'miscarriage of justice' to the "wrongful or malicious prosecution, whether or not it leads to a conviction by any court of law, and whether or not it leads to any incarceration".[142]

Thus, wrongful prosecution includes cases in which the police or the prosecution is involved in committing misconduct while performing investigation or prosecution of an accused. In this sense, the wrongful prosecution includes cases of false accusation, capricious detention and wrongful prosecution where the accused is ultimately found to be not guilty by the court. The Commission' report concurred with the findings of Court about lack of legislative framework to provide adequate redress to the victims of wrongful prosecution. The report discussed the inadequacies of the remedies available in the existing legal framework as were highlighted by the High Court Delhi in its order. The Commission, therefore, recommended statutory provisions for redressing the victims of wrongful prosecution.[143]

7.6.4 Pathway to Statutory Redress for Violation of Fundamental Rights of Accused

The Law Commission of India recommended amendments to the Cr.PC, to provide compensation in cases of miscarriage of justice in terms of wrongful prosecution. A draft Bill was annexed with the report as the Code of Criminal Procedure (Amendment) Bill, 2018. The Commission observed that it may not be possible at present to lay down a fixed amount of monetary compensation to be

[141] Error of justice means "errors in the interpretation, procedure, or execution of the law, typically errors that violate due process, often resulting in the conviction of innocent people". See, Brian Frost, *Errors of Justice, nature, Sources, and Remedies* (Cambridge: Cambridge University Press, 2004), 3.
[142] Law Commission of India, *Wrongful Prosecution (Miscarriage of Justice): Legal Remedies*, 2018, 5.
[143] Ibid., 84.

paid. It recommended certain guiding principles to be followed by the court while deciding the amount of compensation. These include seriousness of the offence, severity of punishment, length of detention, damage to health, harm to reputation, and loss of opportunities.[144]

The Commission recommended redress in terms of monetary and non-monetary compensation. The non-monetary compensation may include public apology, counseling, physical and mental health services, vocational trainings, employment, skills development, removal of disqualifications etc. within a statutory framework. The Commission also recommended for provision of interim compensation where the claimant may require immediate relief.[145]

The Commission suggested that a claim for redress in terms of compensation may be sought for harm caused to body, mind, reputation, or property because of the wrongful prosecution. For securing speedy trial in deciding compensation claims, the commission recommended setting up special courts in each district employing summary procedures for speedy disposal of cases. According to the proposed law, the claimant was required to prove the misconduct that led to his wrongful prosecution and the claim was to be decided by weighing the "balance of probabilities".[146]

Currently there exists no express provision in the Constitution for the grant of compensation for fundamental rights violations; nonetheless the Supreme Court has judicially evolved a right to redress in terms of compensation in cases of violations of fundamental rights.[147] Apart from the general constitutional provisions, currently there is no single, unified legislation in India that provides for civil liability of the State, individuals, or corporations for human rights

[144] Ibid., 85, 92.
[145] Ibid., 89-90.
[146] That means that claim will be decided in favour of the party whose claims appear more likely to be true.
[147] Sood, "Rights of the Accused and Constitutional Protection," 49.

violations. In the specific context of the defined harms, the claimant can approach civil courts or special tribunals as set up under different statutes, to seek limited civil remedies.[148]

Under the statutory law, a complaint can be filed with a statutory body such as the National Human Rights Commission (NHRC)[149]. To strengthen this process, an independent Commission like Criminal Cases Review Commission may be established for a complete and investigation about possible cases of miscarriage of justice or human rights violations.

7.6.5 Option of Tort Law Civil Remedy

In ordinary course, a claimant has to seek civil remedy through tort law in India. Based on principles developed by common law and statutory instruments, the law of torts administered in India today is the English law, as is found suitable to Indian conditions. While decisions of the English courts are not binding upon Indian courts, they continue to have persuasive authority. Tort law principles are supplemented with codified, specialized liability regimes for civil redress mechanisms for the specific context of activities that commonly produce accidental harm to life and property.[150]

Thus, in case the state servants or government bodies commit torts resulting in fundamental rights violations, this would constitute an actionable wrong for which a remedy exists in civil courts for damages.

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[148] Ibid., 14; Surya Deva, "India: Constitutional Torts "Ruling the Roost"?" in *Civil Remedies and Human Rights in Flux: Key Legal Developments in Selected Jurisdictions*, ed. Ekaterina Aristova and Uglješa Grušić (Hart Publishing, 2022), 210.

[149] In terms of remedial intervention, the NHRC has the power to recommend compensation or damages to the victims of human rights violations, See Section 12(a) of the Protection of Human Rights Act, 1993.

[150] Shyamkrishna Balganesh, "The Constitutionalization of Indian Private Law" in *The Oxford Handbook of the Indian Constitution,* ed. Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (Oxford University Press, 2016), 686.

The following table illustrate the above picture in a more precise way:

Dimension	**Pakistan**	**India**	**USA**	**UK (England & Wales)**
Eligibility Criterion	No formal statutory scheme, ad hoc basis	Proof of fundamental rights violation; PIL-enabled compensation	Eligibility criteria vary in the states, mostly on proof of factual innocence; statute-based	Broad statutory protections; proof standard varies
Procedural Safeguards	Limited specialized bodies; judicial discretion at high courts	Independent commissions; courts empowered to provide compensation	Compensation review board with procedural rules	Criminal Cases Review Commission and courts involved
Types of Redress	Mostly monetary damages in tort; rare non-monetary redress	Monetary, public apology, institutional reform	Monetary with capped awards	Monetary plus non-monetary

7.7 Comparative Synthesis and Application to Pakistan: Learning from Global Models

Along with the practice of other countries, it is necessary to know and extract core principles and design a tailored, context-aware model for Pakistan. The study bridges the gap between foreign models and local application. Thus, it is important to discuss the core, and convenient principles from these jurisdictions, and the wat they can be woven into the fabric of Pakistani constitutional law and institutional reality. A comparative synthesis and application, integrating other jurisdictions, using India as a primary example is given in following:

7.7.1 The United Kingdom Model and Its Application to Pakistan's Institutional Context

As discussed earlier, the UK legal regime is based on statutory certainty, independent review body, and fiscal control and eligibility criteria. The statute sets out specific criteria for compensation.[151] Besides, the Criminal Cases Review Commission (CCRC) is an independent administrative body that investigates potential miscarriages and refers them back to the Court of Appeal.

As for Pakistan, a pure statutory model is the ideal long-term goal. Yet for the time being, it can adopt a hybrid model as a starting point, based upon judicially-led, and legislatively-ratified" approach. Employing its original jurisdiction, the Federal Constitutional Court may not only award compensation in a specific case but to also lay down binding guidelines for lower courts and direct the federal government to ensure their compliance. The Court's guidelines can direct the government to establish an administrative compensation tribunal to handle claims efficiently, following the principles set by the Court.

[151] The Criminal Justice Act 1988

As for adapting the CCRC Concept, Pakistan can establish an “Independent Directorate of Miscarriage of Justice Review” with the mandate to investigate claims of miscarriage of justice, filtering out frivolous claims before they reach the courts.

7.7.2 The United States Model of Federalism and Civil Litigation and Its Application to Pakistan

The core principles from the US legal regime include sovereign immunity waivers, civil rights litigation, and exoneree statutes. The US model is based on specific waivers of sovereign immunity at both federal and state levels. The Federal Tort Claims Act of 1946 (42 U.S.C. § 1983) allows individuals to sue state officials for violations of their constitutional rights. Many states have specific statutes that provide automatic compensation to the exonerated, often with services like job training and counseling.

The U.S. model is adversarial and costly. It may not be the primary model to emulate. However, its Exoneree Statutes provide an excellent template for a rights-based rather than discretion-based compensation scheme. Pakistan could draft a law that automatically triggers a compensation claim upon a judicial finding of "miscarriage of justice" or "malicious prosecution." Pending legislation, the Federal Constitutional Court of Pakistan can use its power to craft a Pakistani version of a "§ 1983" action by interpreting fundamental rights and enforcement mechanisms (Articles 175E(3), and 199) as creating a direct cause of action against the state.

7.7.3 The Indian Model of Constitutional Tort and its Application to Pakistan's Constitutional Framework

The core principles from Indian regime include the consitutionsation of tort, bypassing sovereign immunity, and judicial pragmatism and dynamism. As discussed above, the Indian Supreme Court ingeniously read the right to compensation for violated fundamental rights into Article 21 (Right to life and personal liberty). They established that the right to life includes the right to live with dignity, and a violation of this right by the state necessitates a remedy. The remedy is a public law remedy under Article 32/226 (the equivalent of Pakistan's Article 175E(3)/199), making it a direct, swift constitutional claim rather than a protracted civil suit.

In the various landmark Cases, as discussed earlier, the Supreme Court of India established the legal doctrines favoring compensation to the victims of miscarriage of justice. The *Rudul Sah v. State of Bihar* (1983), was the pioneering case where the SC first awarded compensation for illegal detention beyond the sentence period. In *Nilabati Behera v. State of Orissa* (1993), the Supreme Court explicitly held that sovereign immunity is not a defense in a constitutional petition for enforcing fundamental rights. The award is for the wrongful conduct of the state. In *D.K. Basu v. State of West Bengal* (1997),[152] the Court Issued detailed guidelines to prevent custodial violence and recognized compensation as a necessary remedy.

Adopting the Indian "constitutional tort" doctrine, the Federal Constitutional Court of Pakistan may issue a landmark judgment, explicitly declaring that a violation of Articles 9, 10, 10A, 13, or 14 by the state agencies in the administration of justice gives rise to an enforceable right to compensation under the Court's original jurisdiction.

[152] *DK Basu v. State of West Bengal* AIR. 1997 S.C. 610.

7.7.4 Synthesized Proposal for Pakistan: A Multi-Pronged Approach

Pakistan may adopt a synthesized model based upon a multi-pronged approach that draws from all three regimes. As for immediate action (doctrinal), the Federal Constitutional Court of Pakistan to explicitly adopt the Indian "constitutional tort" doctrine under Articles 9, 10A, and 14 of the Constitution. This creates an immediate, judge-made remedy. And as for the medium-term goal (institutional), a Pakistani Miscarriage of Justice Review Directorate, inspired by the UK's CCRC, be established to investigate claims and make recommendations to the judiciary or a dedicated tribunal. This can be established through a Federal Constitutional Court directive or executive order.

As for long-term vision (legislative), a Pakistani Redress of Fundamental Rights Violations Act, which would statutorily entrench the right to compensation, define eligibility criteria (inspired by UK/US statutes), and provide for a package of monetary and non-monetary remedies inspired by international best practices.

The following table outlines the proposed multi-pronged strategy, categorized by timeframe, type of action, and key features:

Timeframe	**Action Type**	**Key Proposal**	**Inspiration/Source**	**Legal Basis / Mechanism**
Immediate	Doctrinal	The Federal Constitutional Court adopts	India's public law compensation model.	The Federal Constitutional Court jurisprudence

		the "constitutional tort" doctrine.		under Articles 9, 10, 13, 10A, and 14 of the Constitution.
Medium-Term	Institutional	Establish a Miscarriage of Justice Review Directorate.	UK's Criminal Cases Review Commission (CCRC).	Federal Constitutional Court directive or an executive order.
Long-Term	Legislative	Enact a Redress of Fundamental Rights Violations Act.	UK & US statutes; international best practices.	A comprehensive act of Parliament to statutorily entrench the right to compensation

Overall, the India's public law compensation model, especially in the domain of fundamental rights violations, provides instructive lessons for adapting similar frameworks within Pakistan's constitutional and legal structure. India's public law compensation jurisprudence highlights the transformative role of courts in redressing rights violations through compensation and reform mandates. However, contextual adaptation, as discussed earlier, is critical to address administrative capacity, fiscal constraints, and local legal culture of Pakistan.

7.8 Conclusion

The chapter intends to find about the best practices that could be employed as a pattern for the reforms in the criminal justice system of Pakistan. An effort has made to consult primary and secondary sources and to have a content analysis while applying a qualitative research method.

All national legal systems including Pakistan, India, UK and USA protect fundamental rights of accused and maintain the fundamental and general principle that a wrongdoer is under obligation to make good the injury caused and therefore require redressing the material and non-material harm resulting from physical, emotional or economic injury. They provide redress variously to the aggrieved individuals including accused persons through enforceable remedies in the courts.

The survey of the practices in United Kingdom United States and India remedies for human rights violations suggests that there are different approaches that could be taken to determine a remedy.[153]Amongst the various mechanisms for redressing individuals for wrongful conviction and incarceration, most scholars and commentators agree that compensation statutes is the best approach and avenue.[154]

In UK and USA, the statutes provide and set forth the definite elements of redress or compensatory justice. The US states which adopted the compensation statutes and procedures differ significantly in various terms.[155] However, so far there is no as such statutory remedy available in Pakistan and India for violations of fundamental rights of accused.

[153] Tortel, *Monetary Remedies for Breach of Human* Rights, 202.
[154] Ryan, "Compensation for wrongful convictions in the United States," 175.
[155] Jasin´ ski and Kremens, "In quest of the optimum model for compensating wrongful convictions," 212. They differ in many respects especially with respect to the eligibility requirements, questions of factual innocence,

Unfortunately, there is a perceptible trend in UK and USA to curtail the right to compensation by adopting a narrow understanding of what constitutes a 'wrongful conviction' and by adding unjustified eligibility criteria.[156] Taking into account the role of the presumption of innocence as a fundamental principle governing the position of the individual vis-à-vis the state, these limitations seem to be unjustified. Further, there exit obvious gaps between the provisions of the existing laws of these national legal regimes and the actual practice.

Generally, the main tension attached to this phenomenon is the eligibility criteria allowing compensation to be granted only to those who are actually innocent, or to a broader category of persons whose guilt has not been proved according to the law. In the USA the general rule is that the person has to prove actual innocence, although the evidentiary threshold varies among US jurisdictions.[157] A similar approach is currently adopted in England and Wales.[158] The other significant concern is the determination of the award for remedying the harm done to the victims of violations of fundamental rights in criminal justice as most of the statutes lack the 'restorative approach'.[159]

The account of practices of selected regime shows that a public law remedy against the state has the potential to avoid and overcome the absolute and qualified immunities that require plaintiff to establish some form of fault by the state and its officials in addition to the violation of rights, and render the state immune from damages. Further, the remedy of the rights should not

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burdens of proof, role and conduct of the claimant contributing to the conviction, prior criminal history of the claimant, limitations on awards, and statutes of limitations.

[156] Ibid., 230.

[157] Gutman, "An Empirical Reexamination of State Statutory Compensation," 371.

[158] Jasin´ ski and Kremens, "In quest of the optimum model for compensating wrongful convictions," 204.

[159] Gutman, "An Empirical Reexamination of State Statutory Compensation," 372; Tortel, *Monetary Remedies for Breach of Human* Rights, 202.

be left to the unfettered discretion of judges to ensure the vindication of fundamental rights of the aggrieved persons.[160]

As for the Pakistan, the practices of these states especially of India at the initial stage, may be helpful and provide insight and stimulation to pursue its efforts to enact an appropriate law on the subject keeping in view its own indigenous problems and possible opportunities. In this regard, the role of the judiciary and the legislature is of paramount significance as they can take necessary steps and measures to formulate an adequate and effective legislation to provide redress against miscarriage of justice or violations of fundamental rights of accused.

[160] Roach, *Remedies for Human Rights* Violation, 270, 523.

CONCLUSION

CONCLUSION AND RECOMMENDATIONS

This study attempted to examine the legal regime of Pakistan while making its comparison with principles of Islamic law and international best practices. It focused on as how the fundamental rights of accused are vindicated and redressed when they are violated in the course of criminal justice. Having had a detailed discussion on the view point of Islamic law, international practices, this research study concludes with the following observations:

Protection of Rights of the Accused and the State Responsibility under Islamic Law and International Best Practices

The rights of accused persons are recognized under Islamic law; international human rights law and as well as guaranteed under the national legal regimes. These rights are inviolable and the state is bound to respect and protect these rights.

Though the fundamental rights of accused persons are well-recognized yet the content and form of these rights vary from jurisdiction to jurisdiction. Nevertheless, the state is obliged to ensure rule of law, non-discrimination, fair trial, and other guarantees provided under the law while prosecuting the accused though criminal justice.

Alongside the protection of individual rights of accused, a state is under obligation to maintain law-and-order situation in the society. Therefore, it has to admonish the delinquents and punish the criminals who jeopardize the peace of society. The responsibility of bringing the culprits to justice and to protecting the public rights necessitates and requires the state to limit or restrict the rights of the persons accused for crimes. Both protection of rights of the accused and

punishing the offenders, are considered as a primary duty of state under Islamic law and national legal regimes.

In this regard, it is duty of the police or other investigating authority to have a proper investigation and not to implicate innocent people to the crimes which they had never committed. Simultaneously, it must not allow the criminals and offenders to escape from justice. For instance, the law warrants the arrest or detention of an accused in situation where some material incriminating evidence exists in terms of credible information or reasonable suspicion that *prima facie* indicates his role or involvement in the alleged offence.

In any case, the presumption of innocence should be reflected in the status and treatment of an accused person and the benefit of doubt should favorably be granted to the accused under the law and practice. The presumption of innocence until proof of guilty is one of the fundamental and universal principle recognized by Islamic criminal law, international law and national legal regimes. This fundamental principle requires that no one should be deprived of his fundamental rights except in accordance with law.

Discretionary Powers of Government Authorities and Doctrine of Strict Liability

The administrative authorities are often vested with the discretionary powers to make flexible decisions according to the given circumstances, yet they are to be exercised with due care and caution. To avoid the futility of such powers, it is pertinent to note that the courts usually do not strictly adhere to the doctrine of strict liability, and in most of the cases, an ample opportunity is given to the defendants to defend their actions and the courts are to award redress only after satisfying themselves that the government functionaries have transgressed their limits and boundaries in exercising their powers.

When the court reaches on the conclusion that the fundamental rights of accused have been violated in cases of arbitrary and unlawful detention, Islamic law and as well as international law provide that the compensation should be made against his loss of liberty and sufferings. Even in cases of erroneous or mistaken detention of accused by the state servants, the Islamic law obliges and appreciates the state to provide compensation to the innocent acquitted accused persons whose fundamental rights are violated in the criminal justice.

Undoubtedly, the public is the ultimate beneficiary of the enterprise of administration of justice by the state and its functionaries. Therefore, the harm suffered by the innocent accused persons due to state functionaries' erroneous actions performed in the course of their duties, should be equitably spread over public as they enjoy governmental services and hence should bear the responsibility for government-induced harm too. This reasoning makes it appropriate to impose liability on the state, except in the cases when the wrongful actions of the state servants are *ultra vires* or performed in the individual capacity.

In cases of willful or intentional violation fundamental rights of accused, individuals including government or public servants are personally liable for the reason that the state does not delegate or confer power to its servants for unlawful acts; hence it is not responsible for unlawful acts of its servants and functionaries. Nevertheless, the state is vicariously liable for wrongful judicial decisions causing miscarriage of justice, and under obligation to provide adequate remedy in appropriate cases.

The Constitution of Pakistan and the Protection of Fundamental Rights of Accused

The fundamental rights are inviolable and the Constitution of Pakistan guarantees about the protection and enforcement of fundamental rights of all citizens including accused persons. These

rights *inter alia* include right to life, right to liberty, the right to security of person, protection against unlawful arrest and arbitrary detention, protection against retrospective and excessive punishment, right to dignity and safeguard against torture and forced confession, right of privacy of home, right of property and right to equal protection of law.

The Constitution and the legal framework of Pakistan recognize the rule of law and notion of equality and underpin the presumption of innocence for accused. In this regard, the judiciary especially the higher courts are vested with the responsibility to ensure enforcement of these rights against any unlawful or arbitrary administrative action.

Though the Constitution of Pakistan guarantees certain fundamental rights for the accused and they are to be respected by the state institutions yet it is unfortunate that often they are not protected in the course of criminal justice. Despite the constitutional safeguards, statutory provisions and judicial pronouncements, the actual practice of arbitrary arrest and unlawful detention, custodial torture and misuse of powers, reveals violations of fundamental rights of accused in criminal justice of Pakistan on different pretexts and forms.

Normally, the risk of violations of fundamental rights of an accused originates or aggravates from the time when he is arrested and detained by the police or any other administrative authority. Despite of the presumption of innocence, the accused persons are routinely arrested and treated as criminals before their guilt is established.

Undeniably, there are significant gaps in the provisions of the existing laws and the actual practice. The fundamental rights of accused are frequently violated by the government officials in the course of criminal justice enterprise. The guarantees provided in the Constitution of Pakistan are not practically served to the accused persons as they are often subjected to humiliation and

sufferings through arbitrary arrest, physical abuse, torture, malicious prosecution and wrongful conviction. The problem gets more acute and heightening when the legal system is devoid of an adequate and effective mechanism for compensation for the violations of fundamental rights of accused by the state authorities.

Besides, the protection or enforcement of the fundamental rights of accused becomes a quagmire due to impunity favored to the actions of government authorities. Lack of accountability for the misuse of administrative power and inadequate redress to the victims are main hurdles to enforce these rights.

Redressing Violations of Fundamental Rights of Accused in the Legal Regime of Pakistan

Violation of fundamental rights of accused in the criminal justice is a very serious issue but it becomes more painful when due of lack of proper legislative framework, these violations are not adequately redressed. The available remedies in the legal framework of Pakistan involve expensive and time-consuming modes and routes of litigation which make them as ineffective and indeterminate. Resultantly, aggrieved individuals find no or inadequate remedy under the law for their loss and harm.

Wrongful detention of an accused is, for instance, is one of the issues for which satisfactory remedy is arguably lacking. Others form of injustice that are devoid of adequate redress include, false accusation, malicious prosecution, wrongful investigation, custodial torture, wrongful conviction, excessive punishment, improper exercise of prosecutorial discretion; and lack of fair trial opportunities.

In this regard, the venue of constitutional and human rights law that admit the doctrine of strict enterprise liability may be a good option as compared to the private law of torts where it is difficult to prove the fault on behalf of the defendant. For instance, in case of wrongful prosecution, the claimant has to show that the police acted without probable cause while interfering in the impugned right of plaintiff.

The Courts occasionally tend to provide monetary compensation for violations of fundamental rights of the accused but this practice is not uniform, consistent and determinate. Besides, the courts on their discretion do not employ any other form or tool of reparation. Conversely, in number of cases, it has been expressly declared that there exists no adequate remedy in the legal framework for erroneous violations of fundamental right of liberty of accused.

The remedies provided in the legal regime of Pakistan are deficient and subject to various limitations. The public law remedies as provided in the Constitution and other statutory framework largely depend on the discretion of the Courts and aggrieved person is not entitled to claim these remedies as a matter of right. This necessitates that the law should incorporate a statutory right to compensation for the accused whose fundamental rights are violated in the criminal justice. The remedy of compensation for violation of fundamental rights should be provided by the courts under public law as matter of right and not in terms of constitutional discretionary jurisdiction.

The study engaged with the arguments which may put forwarded in favor or against of state liability for redressing violations of fundamental rights of accused. Keeping in view the nature of these arguments, it can be reasonably concluded that the state is liable, legally and morally, to redress the violations of fundamental rights of accused as it is the right of an

individual to be restored to his earlier position when the state's wrongful or erroneous action caused or lead to the injury to his fundamental rights. The excuse of sovereign act or good faith reasons should not undermine or subvert the fundamental rights of the innocent individuals.

Specifically, it is important to mention that the continuing failure to enact legislation for the establishment of administrative courts required by Article 212(1)(b) of the Constitution has created a significant legal vacuum in Pakistan. As a result, there is a lack of a specialized and effective judicial forum to seek compensation for tortious harms inflicted by state authorities. This legislative inaction directly undermines access to justice and erodes the foundational principle of state accountability.

This situation imperatively requires that the legislature should realize its responsibility to the passage of enabling legislation as an urgent priority. Such a law must formally establish a system of administrative courts or tribunals, precisely delineating their jurisdiction over claims against the state, and instituting fair and efficient procedural rules. Operationalizing this constitutional mandate would not only fulfill a core state obligation but also establish a vital grievance mechanism, thereby reinforcing the rule of law and restoring public confidence in the justice system.

In absence of an appropriate statutory framework, the remedy and practice are to remain as ambiguous, unregulated, arbitrary, indeterminate and uncertain. To avoid this uncertainty and ambiguity, a public law redress that includes monetary and non-monetary compensation to the victim of violations of fundamental rights should be adopted and regulated through proper statutory framework.

International Human Rights Law on Redressing Violations of Rights of Accused

The study also looked into the perspective of international human rights law and furnishes that the right to redress or compensation is an established individual right under international law. However, there exists some difficulty to find international law and jurisprudence about the amount of compensation, as different human bodies have interpreted and awarded it considerably various terms.

Although the enforcement of principles relating to the reparation remains difficult and uncertain yet the standards of reparation may be adopted keeping in view the nature of the breach and the resulting harms, regardless of who is responsible for the breach. In this regard, it is important that the redress afforded in cases of human rights violations, should be adequate and sufficient. This same is applicable even in cases where non-pecuniary redress is to be provided.

The right of redress can be enforced either in national level or international level. Individuals can claim the redress in courts of the country where their rights have been violated, or they can seek remedy from international bodies competent to entertain and adjudicate such cases like International Criminal Court, and Human Rights Committee and Committee Against Torture. However, seeking redress from international bodies involves various hurdles and limitations.

Under international human rights law, the right to redress is available only in cases where rights of accused are violated by the state through some wrongful or unlawful actions. This right, however, does not extend to the cases of erroneous violations of rights of accused that may happen in course of performance of some legal duty in the criminal justice.

Nevertheless, the international law acknowledges a great role of domestic or local remedies for sake of enforcement of human rights of individuals including accused persons. Thus, the domestic laws and national judicial decisions are relevant to the extent they may regulate the right of redress owed to the innocent accused persons under international law.

Islamic Law on Redressing Violations of Rights of Accused

Islamic law acknowledges the possibility of errors and mistakes in the criminal justice and provides for redressing the harm suffered by the victims of human rights violations. Under Islamic law, the state is liable to provide redress for the errors, wrongs or mistakes causing any injury or harm to the accused by virtue of any action or omission of its officials or authorities in the criminal justice.

The value or quantum of redress is entrusted to the state or judge to decide it according to the nature of violation of right and proportionality of the loss suffered. The quantum of the redress may be regulated according to the domestic scales reflecting the domestic economic conditions. In any case, the aggrieved accused persons should not be unfairly undercompensated for identical heads of loss. In this regard, attempt should be made to redress and restore the aggrieved accused person to his earlier position. Both pecuniary and non-pecuniary losses of accused person should be redressed to the extent possible.

It is important to note that the position in Islamic law seems to be more aligned with the theory of strict liability as the civil liability to redress the injury or losses of an accused will not be relinquished or waved off for the excuses of ‘good faith’ and ‘performance of state duties’.

As the public is the ultimate beneficiary of the enterprise of administration of justice by the state and its functionaries, the harm suffered by the innocent accused persons due to state functionaries' actions performed in the course of their duties, should be equitably spread over public as they enjoy governmental services and hence should bear responsibility for government-induced harm too. This reasoning makes it appropriate to impose liability on the State. However, in cases where the wrongful actions of state servants are blatantly in violation of law or not performed as course of their duties, the state servants should also have their personal liability along with the vicarious liability of the State. Nevertheless, the state is liable for wrongful judicial decisions, and under obligation of provide adequate redress in appropriate cases.

International Best Practices on Redressing Violations of Fundamental Rights of Accused

The study finally tried to find out about the best practices that could be employed as a pattern for the reforms in the criminal justice system of Pakistan. It finds that all the selected national legal regimes including Pakistan, India, UK and USA protect fundamental rights of accused and maintain the fundamental and general principle that a wrongdoer is under obligation to make good the injury caused and therefore require redressing the material and non-material harm resulting from physical, emotional or economic injury. They provide redress variously to the aggrieved individuals including accused persons through enforceable remedies in the courts.

A survey of the practices in United Kingdom, United States and India, suggests that there are different approaches that could be taken to determine a remedy for human rights violations. Amongst the various mechanisms for redressing individuals for wrongful conviction and

incarceration, most scholars and commentators agree that compensation statutes are the best mode to provide redress.

In UK and USA, the statutes provide and set forth the definite elements of redress or compensatory justice. The procedures and standards of the US states that adopted the compensation statutes, differ significantly in various terms. However, there is no as such statutory remedy available in Pakistan and India for violations of fundamental rights of accused.

However, there is a perceptible trend in UK and USA to curtail the right to compensation by adopting a narrow understanding of what constitutes a 'wrongful conviction' or 'miscarriage of justice' and by adding strict eligibility criteria. Taking into account the role of the presumption of innocence as a fundamental principle governing the position of the individual vis-à-vis the state, these limitations seem not justified. Besides, there are obvious gaps between the provisions of the existing laws of these national legal regimes and the actual practice.

The main tension lies about eligibility criteria allowing compensation to be granted only to those who are actually innocent, or to a broader category of persons whose guilt has not been proved according to the law. In the USA the general rule is that the person has to prove actual innocence, although the evidentiary threshold varies among US states. A similar approach is currently adopted in England and Wales. The other significant concern is the determination of the award for remedying the harm done to the victims of violations of fundamental rights in criminal justice as most of the statutes lack the 'restorative approach' and non-monetary redress.

The account of practices of selected regime shows that a public law remedy has the potential to overcome the absolute and qualified immunities that require plaintiff to establish the fault on the part of the state and its officials in addition to the violation of rights, and render the

state immune from the liability of redress. Further, the remedy for the rights should not be left to the unfettered discretion of judges to ensure the vindication of fundamental rights of the aggrieved persons.

Thus, amongst the avenues of recourse for seeking redress, it is evident that a statutory framework employing principle of strict enterprise liability can be the best option for pursuing a breach of a constitutional right of the accused. On the other hand, adopting the doctrine of state immunity and leaving the innocent victims of criminal justice to seek redress by various thresholds amounts to their re-victimization.

Recommendations

The recommendations in following suggest a reform agenda to provide remedies for the victims of criminal proceedings in Pakistan. The proposed reform package should include legislative, financial, institutional, and awareness measures for redressing violations of fundamental rights of accused persons who become victims in the criminal justice proceedings.

Firstly, there should be proper awareness amongst the masses to make them realize the fact that the accused persons are innocent until proven guilty and they should not be labeled as offenders or criminals and they are to be afforded their fundamental rights. There should be no stigma for the innocent persons for the offences which they had never committed.

Secondly, an effective enforcement of fundamental rights of accused should be ensured in the criminal proceedings to meets the ends of justice so that the innocent people are not trapped and no offender could escape the law. In this regard, the existing laws pertaining to the fundamental rights of the accused persons should be fully implemented especially in the criminal

proceedings. The state authorities should not make interference to the fundamental rights of accused persons unless some reasonable grounds exist that justify the state intervention.

In addition to the embodying these rights into the Constitution and other legal instruments, the question of redressing and vindicating the grievances of accused persons is of paramount significance as without the adequate redress, the fundamental rights are futile and useless.

As for the cases in which the fundamental rights of accused are violated, the state should provide an adequate statutory redress rectifying their harm and sufferings. The proposed framework for providing substantial relief should enable the victims of wrongful prosecution and false imprisonment to reintegrate into the society. For this purpose, it is suggested that independent courts should be established with the administrative powers to provide redress to the victims of miscarriage of justice and to prosecute the delinquent public servants.

However, if it seems a burdensome in terms of financial and human resources, existing institutions may be alternatively assigned with the additional responsibility. Besides, national and provincial human rights commissions, or ombudsman offices may be vested with the powers to investigate and determine redress to the aggrieved persons. Nonetheless, no reform can be materialized without the arrangement of necessary financial resources.

Need of Statutory Redress

Having regard to all the avenues for redressing violations of fundamental rights of accused, the State of Pakistan should provide redress through a statutory framework. A breach of constitutional rights of accused especially that are guaranteed under Article 9, 10, 10A, 12, 13 and 14 of the

Constitution must be redressed through the statutory framework. The statutory redress should include for false and frivolous accusation, malicious prosecution, wrongful investigation, arbitrary detention, wrongful conviction or other forms of miscarriage of justice.

Thus, the state should have a comprehensive and robust legislative framework to ensure protection of the fundamental rights of accused in criminal justice and provide redress to the innocent accused persons. The proposed legal framework should be based on the principles of strict and vicarious liability whereby the redress is to be awarded as a matter of right and not as ex-gratia. The state should be liable to provide redress regardless the intentional or unintentional violations by its functionaries in criminal justice.

A fairly drafted compensation scheme providing for the state liability for redressing violations of fundamental rights of accused in criminal justice ought to be adopted without any unjustified or too strict eligibility criteria, arbitrary limitations and excessive formalities. The aggrieved persons should not be overburdened with formal requirements when submitting the claim to a relevant authority and the legal aid should be available for those claimants who need legal assistance.

The compensatory redress scheme should be inclusive to cover both monetary and non-monetary aspects based on the principles of fairness, equity and proportional to the losses of the aggrieved individuals. As for best practical model and comprehensive scheme of redress, it would be appropriate to seek help from the practices and experiences of the states that have introduced and implemented such redress schemes for their subjects.

As for the standard for quantum of redress, this largely depends on the nature of right, injury and the given situation of each case. This aspect links with the financial circumstances and

conditions of any country to ensure the practicality and pragmatism of the redress. Nevertheless, in any case, the redress should be adequate, reasonable and proportional to the injury. As for Pakistan, the law should be enacted to define minimum limit or quantum for such redress and the requirements which ought to be met for obtaining such redress. The redress mechanism would ensure accountability, rule of law and public confidence on the justice system of which everyone in society would reap the benefits.

Besides, the legal framework should clearly provide for the timelines for disposal of the claim for redress or compensation, the period of limitation for filing the application, and for filing an appeal against the decision. Instead of providing for fixed amount of monetary compensation, the amount of compensation should be determined according to certain guiding principles or thresholds. Pakistan may adopt a synthesized model based upon a multi-pronged approach that draws from three selected regimes.

Selection of Remedial Course of Action

Instead of adopting a depersonalized compensation regime, the aggrieved persons may also be offered the option to select a remedial course that better suited them for their personal needs and circumstances. For instance, some aggrieved persons may prefer the option of less adversarial and expedited option, as compared to litigation for the remedy of the harm they have suffered.

Role of Judiciary for Redressing Violations of Fundamental Rights

Besides making reform in statutory framework for right to redress, the judiciary should also play its due and active role in developing redressive jurisprudence for the protection of rights of the accused as victim of miscarriage of justice. Pakistani courts, like Indian courts, should

provide redress in case of violation of fundamental rights of accused in the course of criminal justice. Thus, in appropriate cases, the courts may award redress spontaneously at the conclusion of criminal trial or where it is established that the accused has no fault.

> The courts should not decide such cases considering the technicalities; rather consideration should be given to the suffering of the person maliciously prosecuted, and the aim should be to provide rehabilitation to the innocent exonerated accused persons whose innocence is established on the balance of probabilities (preponderance of evidence). Thus, both monetary and non-monetary losses of the victims should be given due consideration while awarding the redress.

Accountability of Public Servants and Institutional Mechanism

Alongside of providing redress to the victims of human rights violation, the legal framework must hold the state officials and authorities accountable for any delinquency. The proposed legislation should ensure the accountability of public servants including police, and prosecution whose *malafide* or wrongful actions resulting into the violations of fundamental rights of accused. Similarly, with the consultation of legal fraternity and policy makers, a proper mechanism should be developed for the accountability of judges for their wrongful decisions.

In this connection, the culture of impunity of public servants needs serious attention as it contributes to the violation of human rights in criminal proceedings in the country and the victims are left without any redress. Instrumental steps like enacting the enabling legislation should be taken to eradicate the culture of impunity, and to ensure accountability of delinquent public servants.

A robust system of accountability must be employed to address cases of investigation, malicious prosecution and colorful exercise of state authority. The law should bring the delinquent officials to justice for any false or dishonest investigation by the police or any other law enforcement agency. In this regard, the false accusation and malicious prosecution may be declared as strict liability crimes. It is not sufficient to leave the aggrieved party to file a suit for damages for malicious prosecution as it is time-taking remedy and cannot serve deterrence against wrongful and malicious prosecution.

In this regard, the punishment provided under sections 182 and 211 PPC should be enhanced and implemented in order to discourage the phenomena of false accusation and malicious prosecution. The quantum of fine and punishment should be according to the severity of the offence for which the accused person was charged and according to his sufferings and losses. In this context, guidance may be sought from the principles of Islamic law and international best practices that provide adequate remedy against violations of fundamental rights of accused in criminal justice.

Finally, there are other certain connected issues like the balance between immunity vs. accountability of public servants, overburden of cases on investigation and judicial departments, corruption, incompetent and ill-equipped investigation, duality of standards and governance crises. They too require attention to the fact that the fundamental rights of accused cannot be vindicated without rule of law and fair play.

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