THE RIGHT TO A FAIR TRIAL IN PAKISTAN: CHALLENGES & PROSPECTS

PhD. Law

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بسم الله الرحمن الرحيم

Dedication

To my wife Fatimah Qadir who stayed with me every word of this dissertation.

With Love and Affection

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FINAL APPROVAL CERTIFICATE

It is certify that we have evaluated the thesis ***"The Right to a Fair Trial in Pakistan: Challenges & Prospects"*** submitted by Mr. Muhammad Iqbal, Registration No.26-SF/PHDLAW/F12, in partial fulfillment of the requirements of the degree of Ph.D Law at the International Islamic University, Islamabad. The thesis fulfills the requirements in its core and quality for the award of the degree of Ph.D Law.

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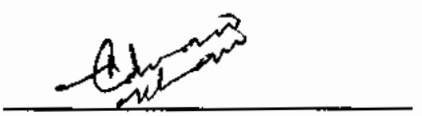

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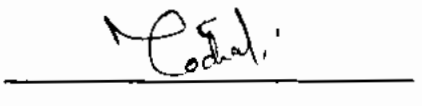

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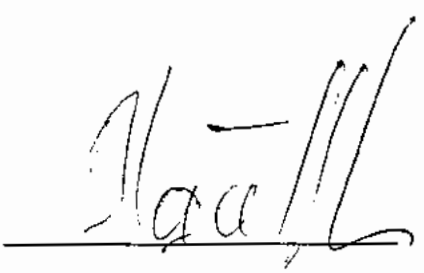

DECLARATION

I, **Muhammad Iqbal**, hereby declare that this dissertation is original and has never been presented in any other institution. I, moreover, declare that any secondary information used in this dissertation has been duly acknowledged.

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CHAPTER 1

INTRODUCTION TO RESEARCH

1. INTRODUCTION

Since the beginning of human life on earth, the concept of laws, oral or written, has travelled a long way in history of human existence from severe agonies and reprimands with no regard for human life, to the corridors of human rights with promise of a transparent Rule of Law through fair trial.[1]

The earliest known history of a legal system has been found in Bronze inscriptions during the period of Emperor Fuxi in China when law was written on Bamboo in 2853 BC. It was even before the Ten Commandments in 1300 BC that symbolized a "societal epiphany" as it was considered a socio-legal system directly from God.[2] Many different forms of 'codes' and theories kept on forming throughout different time periods as a way of keeping law and order in societies based essentially on the concept of prevalence of inherent good. The major breakthrough came in the form of some key changes in legal scenario of the societies firstly when ***Corpus Iuris Civilis***

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[1]Zhixi, Q. I. A. N. "A Study into the Incident of the Hongdumen Academy." *Frontiers of Literary Studies in China* 4, no. 4 (2010): 483-522.

[2]Coolidge, Brian T. "From Mount Sinai to the Courtroom: Why Courtroom Displays of the Ten Commandments and Other Religious Texts Violate the Establisment Clause." *S. Tex. L. Rev.* 39 (1997): 101.

popularly known as The Justinian Code was introduced in 533 AD.[3] This formed a basis of legal and criminal rules in law governing the society. In 622 Quran gave the world an absolute and detailed guideline for all matters of life, in which legal matters occupy a central place.[4] The Supreme Court in Washington D.C. has a freeze in which one of the founding fathers are carrying the Holy Quran, thus emphasizing the role in the constitutions and basic human rights. Also, Thomas Jefferson is said to have his personal copy of the holy book through which the objectives of the US constitution are cross referenced.[5] This Holy Book has been the guideline for Constitutions across the legal arenas of the world in matters of rule of law and fair trial.[6]

The institution of Magna Carta[7] in 1215 introduced by King John of England has been an integral part of English law with its Bill of Rights in 1688 is prevailing today.[8] Its clause 29 emphasizes the right to fair trial at individual as well as collective level in the society in following words:[9]

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[3]Radding, C. M., & Ciaralli, A. (2007). The Corpus luris Civilis in the Middle Ages.

[4]Markoff, John, and Daniel Regan. "Religion, the state and political legitimacy in the world's constitutions." *Church-State Relations: Tensions and Transitions* (1987): 161-182.

[5]http://www.usislam.org/debate/IslamandtheUSConstitution.htm (accessed on 16th May 2015 at 4:39 am.)

[6]Quraishi, Asifa. "Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and American Jurisprudence." *Cardozo L. Rev.* 28 (2006): 67.

[7]Holt, James Clarke, George Garnett, and John Hudson. *Magna carta*. Cambridge University Press, 2015.

[8]Thompson, Faith. *Magna Carta-Its Role in the Making of the English Constitution 1300-1629*. Read Books Ltd, 2012.

[9]http://www.bl.uk/magna-carta/articles/magna-carta-in-the-modern-age (accessed on 18th May 2015 at 11:37 am.)

The body of a free man is not to be arrested, or imprisoned, or disseized, or outlawed, or exiled, or in any way ruined, nor is the king to go against him or send forcibly against him, except by judgment of his peers or by the law of the land.[10]

Magna Carta is still referred in courts of England and Wales when Sir James Hoit referred to the protection of basic rights in ensuring justice by referring it in the following words, **"to no one will we sell; to no one will we deny or delay right or justice".**

Continuing the legacy of British Law prevalent in the subcontinent, it has been seen that all the Constitutions of Pakistan along with their preamble, with some differences carry the mark of British common law with the principles of liberty and rights of the citizens, rule of law and equality of arms.[11] In 1949, the adoption of 'Objective Resolution' by the Constituent Assembly of Pakistan was determination of future guideline for making laws in Pakistan. The declaration of this document by Liaqat Ali Khan to be the **"Magna Carta of Pakistan"** was based on its aim to protect basic human rights of all individuals of the society.[12] If we take a look at the present nature of constitution of Pakistan, it is an amalgam of Islamic law as well as common law of England. It is essentially in its spirit, a defender of human rights to the people of Pakistan. Article 10 A in the Constitution of Pakistan states,

"Right to fair trial. —for the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process".

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[10] http://magnacarta.cmp.uea.ac.uk/read/articles_of_barons/Article_29 (accessed on 24th December 2019 at 10:28 pm.)
[11] Linebaugh, Peter. *The Magna Carta manifesto: Liberties and commons for all*. Univ of California Press, 2008.
[12] http://www.dawn.com/news/1257897 (accessed on 17th April 2015 at 4:39 am.)

Conceivably the most significant facet of right to a fair trial is the very definition of fair trial. The 9th Edition of Black's Law Dictionary defines "Fair" to be **"impartial, just and disinterested'** while the word **"trial"** means **'an official judicial inspection of evidence and purpose of legal claims in an adversary proceedings".**[13] If these two words are combined together for descriptive purposes then Black's Law Dictionary defines fair trial to be, **"a trial by an impartial, unbiased (towards either parties) and independent tribunal in accordance with legal regulations, in which constitutional rights are well taken care of".**[14]

Moreover, one of the most recognized right which is also the least controversial is the right to a fair and impartial trial. This right has been considered as a fundamental right guaranteed by all the legal documents in the world. Article 10 of UDHR, for example gives this right as,

"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".[15]

Similarly, in Article 14 (1) of the International Covenant on Civil and Political Rights (ICCPR) also provides equality of rights to everyone in tribunals and courts. In case of determination of balance between rights and obligations between the parties, everyone is entitled to be heard by an impartial, competent and independent court. There are incidents when, for the purpose of national and public safety and order (*ordre public*) and protection of moral values, the trial may not be left open to the public or press. But judgments in criminal cases are to be made public in all cases other than where the interest of the justice or the persons involved in the case is

[13]Black, Henry Campbell, Bryan A. Garner, Becky R. McDaniel, David W. Schultz, and West Publishing Company. *Black's law dictionary*. Vol. 196. St. Paul, MN: West Group, 1999.
[14]Black, H. C., Garner, B. A., & McDaniel, B. R. (1999). *Black's law dictionary* (Vol. 196). St. Paul, MN: West Group.
[15]http://www.claiminghumanrights.org/udhr_article_10.html, (accessed on 17th April 2015 at 4:39 am.)

endangered to be compromised. These interests can involve juvenile persons or persons whose publicity could be a danger to national interest'.[16]

These definitions are descriptive and explanatory enough but as the set of circumstances in a time frame change, so does the meaning and pretext of fair trial. This is because every country and nation are a combination of its own historical, religious and socio-economic parameters as well as demands of justice, fair trial and equality.[17]

Since the criminal justice system is perhaps the most powerful tool that the state has to control its citizens, it is normally used for all kind of desired outcomes, sometimes overlooking the basic human rights in its wake. In Pakistan, especially during pre-trial stage i.e., arbitrary arrests and custodial torture is a routine practice of investigating agencies to seek information about crime and record confession thereof. Such practices are not only limited to the suspect but are sometimes extended to the relatives as well. Basic right to know the cause of one's arrest and legal assistance is usually a difficult task especially for the weaker segments of the society. There is a series of arguments that gives some idea of what criminal trial should serve and the significance they have and should have in the criminal aspect of justice system.[18]

In ensuring basic human rights, right to fair trial plays pivotal role and is considered the benchmark of a just system.[19] Fair trial is the issue that has always caused much concern at national as well as international forums as no other aspect of criminal justice system has stirred

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[16]https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf(accessed on 17th April 2015 at 4:39 am.)

[17]Geeta, Chowdhry, and Sheila Nair. *Power, postcolonialism and international relations: Reading race, gender and class*. Routledge, 2013.

[18]Skeem, Jennifer L., and David J. Cooke. "Is criminal behavior a central component of psychopathy? Conceptual directions for resolving the debate." *Psychological assessment* 22, no. 2 (2010): 433.

[19]Von Hirsch, Andreas, Julian V. Roberts, Anthony E. Bottoms, Kent Roach, and Mara Schiff, eds. *Restorative justice and criminal justice: Competing or reconcilable paradigms*. Bloomsbury Publishing, 2003.

as much concern for legal professionals and general public.[20] In the existing legal criminal system, the victim has completely been marginalized and simultaneously state power through the process of trial seems to be more interested in punishments rather than the reformation of the trial. No doubt there has been a range of controversies about the rules and principles of criminal trial that are supposed to govern them. It includes as to when the right to a fair trial should be available, should it start right when FIR is lodged or when the charge is formally framed against the accused, what should be the role of different stake holders during trial and whether the jail inmates (under trial and convicts) fall within the jurisdiction of fair trial? In spite of the intensity of debate about above mentioned important issues, no considerable efforts are seen at legal area to develop a legal criminal system that is adapted to socio-cultural aspects of Pakistan. No doubt our present legal criminal system has been envisaged more about fixing criminal responsibility and having its main emphasis on punishments rather than providing a fair and unbiased criminal trial itself.[21] It would be unfortunate on our part if we defend instead of improving the criticism of different legal jurists and scholars regarding rules and procedures and stages of criminal trial[22].

1.1 THESIS STATEMENT

Though the existing legal system of Pakistan contains some components about fair trial, yet the introduction of Article 10-A in the Constitution of Pakistan 1973, fair trial has been properly recognized as a justifiable basic human right. This dissertation aims at identifying and examining

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[20]https://www.humanrightsfirst.org/wp-content/uploads/pdf/fair_trial.pdf. (accessed on 19th June 2016 at 4:47 am.)

[21] Tanguay-Renaud, Francois. "Post-Colonial Pluralism, Human Rights & (and) the Administration of Criminal Justice in the Federally Administered Tribal Areas of Pakistan." *Sing. J. Int'l & Comp. L.* 6 (2002): 541.

[22]Langbein, John H. "Shaping the eighteenth-century criminal trial: A view from the Ryder sources." *U. Chi. L. Rev.* 50 (1983): 1.

legal and social challenges in the full realization of fair trial in human rights, observing the balance between prosecution and defense in light of principle of equality of arms between the two.

1.2 HYPOTHESIS

In the prevailing criminal justice system, the substantial tilt of providing basic rights especially trial rights are towards the accused, thereby ignoring the other balancing part i.e., the victim in a trial. Without striking balance between the two arms, the epistemic aim of right to a fair trial in courts through due process may not enhance the essence as well as spirit of equality and impartiality in the justice system of Pakistan.

1.3 THEORETICAL FRAMEWORK

Trial is so fundamental to a justice system that, as Patrick Grim argues, to deny it **"might seem tantamount to impugning our legal tradition as a whole"**.[23] Trial, particularly criminal trial, is the public face of a justice system. It has always been of great interest for ordinary people. These days, in many countries, including Pakistan, some ongoing high-profile trials and some recently concluded ones have hit the headlines in the media, generating public debate on the quality of criminal justice. They are the trials of former Pakistani President Pervez Musharraf (charge: high treason), Oscar Pistorius, a South African athlete (charge: murder), the trial of ex-Qaddafi officials (charges: murder, kidnapping and embezzlement of public funds), and in Egypt, a recently concluded trial in which 529 persons were condemned to death (charge: murder of *one* police official!). While ordinary citizens have a big valid stake in knowing about these and many

[23] Grim, Patrick. "The" Right" to a Fair Trial." *J. LIB. STUD.* 2 (1978): 115-116.

other trials, in a scientific research inquiry, it is imperative to have a proper and rigorous academic understanding of trial, as a tool of legal justice.

Pakistan has recently recognized right to have a fair and just trial as a fundamental right in its Constitution of 1973 through 18th amendment. This thesis argues that the mere inclusion of this right in the constitution may be of great significance, but mere inclusion may not be enough for full realization of this right. For this right of fair trial to have a meaningful realization, particularly in accordance with the internationally recognized standards, Pakistan must explore whether its existing legal system has the potential to help realize such a right. Given the fact that her existing legal system, being a colonial legacy, a researcher must appreciate and consider that the realization of right to a fair trial is in the perspective of the post-war developments, especially the development of human rights at international arenas. As the inclusion of the right to a fair trial in the constitution of Pakistan is a recent development, this work claims to be a pioneering contribution to humanly possible complete and meaningful realization of such an indispensable basic right. It seems useful to begin with a proper theoretical understanding of the right to a fair trial.

To begin with, different scholars of trial have attempted to define trial differently. Antony Duff et al, for example, argue that trial is a procedure through which an individual is accused of an unusual happening for which he/she is called to answer as a charge in lieu of criminal act, in case if it is proved, to answer for his/her conduct.[24] In this sense, Duff et al see trial as a communicative process in which participants communicate with each other. Robert Burns defines trial through the lens of normative understanding, arguing that trial is an indispensable

[24]Duff, Antony, Lindsay Farmer, Sandra Marshall, and Victor Tadros. "The Trial on Trial: Volume Three: Towards a Normative Theory of the Criminal Trial." (2007).

tool to realize the rule of law where a dispute of facts is involved.[25] In other words, trial is a careful factual analysis (means following the law) of what actually occurred.

Trial scholars rather lamentably argue that 'theorizing about criminal trial is still at a nascent stage.[26] Though relatively smaller, yet there has been some appreciable scholarly literature aimed at the theorization of trial. For the sake of simplicity, at least in the context of this research inquiry, theorization literature appears to be following two approaches. First, we do a study of the trial itself in order to develop a general theory of trial, which is aimed at taking consideration of the intrinsic factors of trial. The second, approach relates to understanding trial in the context of extrinsic considerations, such as the trial as a tool of enhancing the rule of law and liberal democracy. A brief explanation of the two approaches seems to be useful.

The intrinsic approach argues that the prime theoretical underpinning of trial is truth finding. As noted above, trial is a tool of careful analysis of facts. As Gary Goodpaster argues, to put it simply, a trial aims at exploring "what happened".[27] Truth-finding, it is argued, is reached at through material evidence that is logically relevant to a specific proposition required to be proved.[28] In this perspective, Duff et al argue that this amounts to theories of different aspects of trial, not a general theory of trial.[29] Duff et al further argue that while constructing a general theory of trial, questions arise firstly, 'what the trial's epistemic aim is or should be?', and secondly, what is 'the relationship between the epistemic aims of the trial and the process (due

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[25] Robert, Burns. "A Theory of the Trial." (1999): 165-166.
[26]Antony Duff, et al (Ed.), *The Trial on Trial*, volume three, Hart Publishing, 2007, 2.
[27]Gary Goodpaster, 'On the Theory of American Adversary Criminal Trial', 78(1) *Journal of Criminal Law and Criminology*, 1978, pp 118-154, at p121.
[28]R Burns, *A Theory of Trial*, Princeton: NJ Princeton University Press, 1999, 21.
[29]Antony Duff, et al (Ed.), *The Trial on Trial*, volume three, Hart Publishing, 2007, 5.

process rights of a defendant) through which those aims are pursued'? [30] It is further to be resolved whether 'truth is the ultimate aim sought, or truth is part of some more ambitious aim that the trial might have?'[31] Furthermore, an inherent problem in adversarial trial is that parties, being in control of proceedings, are not interested in conscious striving of truth finding.[32]

The extrinsic approach argues that trial has social and political ramifications. Arguing from the rule of law perspective, Burns pinpoints four foundations of trial.[33] First is 'the legitimacy of law to a version of popular sovereignty'. Second, the rule of laws helps in guarding against the abuse of power by state's individual actors. Third, the rule of law operates a limitation on the state's power to protect and safeguard the life and liberty of an individual in the society. Lastly, the rule of law seeks to ensure consistency by treating similar cases similarly on the principle of equal deference of all persons. Burns' rule of law perspective is closely linked to Hock Lai's liberal theory of criminal trial. Lai argues that a criminal court is at the same time an institution of a liberal state as well as the epitome of liberal institution of the government.[34] In a liberal democracy, state (notably the executive) is accountable (through courts) to those over whom it exercises power (individual liberty). In this perspective, Lai argues, a criminal trial is an aspect of this 'form of accountability polity.'[35]

Coming to challenges to trial, commentators argue that in the contemporary world, criminal trial is facing many challenges. Firstly, there is a growing call for balancing the defendant's due process rights with the interest of the victim of the crime. Second, case management techniques

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[30]Ibid. 6.
[31]Ibid.
[32]Good Paster, p 78.
[33]R Burns, *A Theory of Trial*, Princeton: NJ Princeton University Press, 1999, 21.
[34]Lai, Ho Hock. "Liberalism and the Criminal Trial." *Sydney L. Rev.* 32 (2010): 243.
[35]Ibid, p 244.

are posing challenge to the concept of more scientific inquiry at the trial. In England and Wales, this is true because of the restricting role of juries in trial. In Pakistan, the national judicial policy has been posing such a challenge. The policy's quick-fix approach to disposal of cases, in a given time frame leaves little scope for exhaustive trial procedures.[36] Second, the fight against terrorism has made serious inroads in the domain of fair trial by restricting the defendant's due process rights. Again, Pakistan is no exception[37]. The jurists and legislators of the country are trying hard to create a balance between due process and lacunas that allow the terrorists to escape punishments and re-enter the societal setup of the country.[38] Third, there is a growing trend of deciding criminal cases on basis of guilty plea. Procedural rules aimed at inducing defendants to enter guilty plea for reward of lesser sentence are serving expediency rather than creating a scope for well-defined contested trials. Lastly, a normative attack comes from resort to reconciliation and restoration in criminal justice system. Restorative justice seeks to bring both the offender and victim by exploring avenues to mend the harm resulted due to committing a crime[39].

As this thesis argues, and as per the international standards prevalent, Pakistan is facing the challenge of realizing and practically implementing fair trial rights. Within the remit of this theoretical framework, this work will carry out an assiduous study of scholarly works, contextualizing the Pakistan case study. The study may help in proper academic understanding of the right to a fair trial, with implications for law and policy in the Pakistani context.[40]

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[36]Guiora, Amos N. "Where Are Terrorists to Be Tried: A Comparative Analysis of Rights Granted to Suspected Terrorists." *Cath. UL Rev.* 56 (2006): 805.

[38] Jawad, S.,Terrorism and Human Rights. *Sociology and Anthropology*,*3*(2), (2015). 104-115.

[39] Ali, Sardar Hamza. "An Analytical Study of Criminal Justice System of Pakistan (with special reference to the Province of Punjab)." *Journal of Political Studies* 22, No. 1 (2015).

[40]Areas, T. Legal Challenges to Military Operations in Pakistan.*Pakistan's Counterterrorism Challenge*, (2014). 127.

Although a signatory of UDHR since 1948, it has been a recent phenomenon that Pakistan has incorporated this right in its Constitution. However, for full realization of its goals, it still lacks the availability of minimum international standards of fair trial and other fundamental rights for the accused.[41] The lack of trial rights is particularly conspicuous in the context of arbitrary arrests, non-disclosure of accusation to accused, double jeopardy, custodial torture to obtain confession and procedural violation in identification parade test for the meaningful realization of right to a fair trial in Pakistan.[42] Major concerns of accused, victim, and public at large regarding the procedures and steps of the trial require a fair balance without prejudice to any of the concerned participants in the due process of trial.[43] The inclusion of article 10-A has now rendered the right to fair trial as a basic, fundamental and constitutional right to all citizens of Pakistan negating all associations of cast creed and social status.[44] These rights include the right to be equal before law, protection against arbitrary arrest and detention, provision of legal counsel of the accused's choice and protection against torture amongst many other basic fundamental rights. The right of production before a magistrate to ensure the trial rights are met with is also a part of trial rights along with other actions detrimental to their life, liberty and reputation.[45]

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[41]Lunday, Kevin E., and Harvey Rishikof. "Due Process Is a Strategic Choice: Legitimacy and the Establishment of an Article III National Security Court." *Cal. W. Int'l LJ* 39 (2008): 87.

[42] Banerjee, Tapas Kumar. *Background to Indian Criminal Law*. R. Cambray, 1963.

[43]Parvez, Tariq, and Mehwish Rani. *An Appraisal of Pakistan's Anti-Terrorism Act*. US Institute of Peace, 2015.

[44] Pakistan, Shaukat Mahmood, and Nadeem Shaukat. *The Constitution of the Islamic Republic of Pakistan, 1973*. Legal Research Centre, 2006.

[45]Hussain, Mazna. "Take my riches, give me justice: A contextual analysis of Pakistan's honor crimes legislation." *Harv. JL & Gender* 29 (2006): 223.

For a meaningful realization of the right to a fair trial, particularly in accordance with the internationally recognized standards,[46] Pakistan has to explore whether its existing legal system has the potential to help realize a system that has the potential to meet the challenges that may come to the fore during the implementation of due process of law.

What is a trial? What is the theory of a trial? Do we need to have a theory of trial? What are challenges to trial in the contemporary legal, social and political milieu? These are some of the questions, which, at least, need to be properly interpreted and understood, if could not be concretely answered, in studying the role and significance of trial in the criminal justice system.

1.4 INTERNATIONAL STANDARDS OF FAIR TRIAL

Various international and regional covenants provide right to fair trial. The countries and states who are signatory of these statutes and covenants, have these rights binding on them due to their ratification. Different organizations that safeguard fair trial rights at international level are Universal Declaration of Human Rights of 1948 (UDHR), International Covenant on Civil and Political Rights of 1966 (ICCPR), Convention against Torture of 1975 (CAT) and Convention on the Rights of the Child of 1989 (CRC)[47] to name a few.

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[46]http://www.youthforhumanrights.org/what-are-human-rights/videos/right-to-trial.html (accessed on 17th May 2017 at 4:39 am.)

[47]https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf (accessed on 16th August 2017 at 4:39 am.)

Among the covenants mentioned above, International Covenant on Civil and Political Rights (ICCPR)has provided the right to fair trial in detail addressing the following rights for the trial procedure.[48]

- Right to be Equal before the Law and Courts.
- Right to a Fair Hearing
- Right to a public Hearing
- Competent and independent Tribunal Created by Law.
- Independence and Impartiality
- Presumption of Innocence
- Right to be informed of the Charge
- Right to Adequate Time to Prepare for Defense
- Right to be Tried without undue Delay
- Right to Defense
- Right to be Present at Trial
- Right to Call and Examine Witnesses.
- Right to Interpretation
- Right not to be compelled to Testify or Confess Guilty.

[48]Robinson, Patrick. "The right to a fair trial in international law, with specific reference to the work of the ICTY." *Publicist* 3 (2009): p.1.

- Protection against unlawful and arbitrary arrest.
- Right to Interpreter.
- Right to have counsel of choice.

1.5 RIGHT TO FAIR TRIAL IN PAKISTAN

1. The 1973 Constitution of Pakistan.

Although there were some provisions of law in the Constitution of Pakistan 1973 and the Code of Criminal Procedures 1898 covering basic human rights, yet fair trial right was encompassed as a fundamental right for the first time in the constitution when Article 10-A (18th Amendment) in 2010 was introduced. This article has made the basic right fundamentally more necessary by entitling accused to a fair trial and proper due process of law.[49]

If the trial is considered to be not fair, article 199 of the Constitution can enforce the provisions of rights pertaining to fair trial. If public importance or necessity is attached with it, then article 184(3) of the constitution furthers cements its implementation to be necessary. [50] A right in the procedure has been created for the accused which ensures right of fair trial under due process of law. Before the introduction of article 10-A of the Constitution, precedent was used to make efforts to ensure fairness in trial, as a moral obligation, not as a right.[51] Since it has been termed as fundamental right, the right to fair trial becomes binding not only to the courts but for the legislatures as well as executive as well. Fundamental rights once inserted in the Constitution cannot be withdrawn. Therefore, no law derogatory to this fundamental right may be passed and

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[49]https://pakistanconstitutionlaw.com/article-10-safeguards-as-to-arrest-and-detention/ (accessed on 17th May 2017 at 5:57 am.)
[50]http://www.pakistani.org/pakistan/constitution/part7.ch2.html (accessed on 17th May 2017 at 6: 18 am.)
[51]Cook, Joseph G. "Constitutional rights of the accused; pre-trial rights." (1972).

in case such an incident happens, it is considered 'void' under article 8 of the Constitution.[52] This right is available to all and sundry and no difference of class, color, creed, association, religion, individuals as well as collective groups. Natural or artificial, can have this right taken from them under any circumstances whatsoever.[53]

Although Islamic procedure of fair trial and international law is highly contested but by exhibiting how Islamic jurisprudence has established 'the right-based scheme',[54] similarities could be drawn in Islamic legal system (fiqh) and fair trial rights given in International Covenant on Civil and Political Rights (ICCPR) especially article 14 and 15. Such rights include crime and punishments, as well as other rights guaranteed under Islamic Procedural laws which have been explained in detail by Muslim Legal experts and Ulema. The major areas discussed by Muslim jurists are the issues of arbitrary arrest and detention, how to investigate and the provision of legal counsel as well as rights of both prosecution and defense creating a balance between the two.[55]

From the analysis of existing procedural laws in Pakistan it is evident that essence of fair trial remained the main consideration. Even constitution has guaranteed and protected fundamental rights as enshrined in Article 4, 9, 10, 10-A, 13, 14, 15, 25, 184 (3) and 199 of the Constitution.[56] The above-mentioned articles are relating to security of person, safeguard from arbitrary arrest and illegal detention and provision of right to a fair trial and due process of law. Double

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[52]Palo, Stephanie. "A charade of change: Qisas and Diyat ordinance allows honor killings to go unpunished in Pakistan." *UC Davis J. Int'l L. & Pol'y* 15 (2008): 93.
[53]Durrani, Naureen. "Pakistan: Curriculum and the Construction of National Citizens." *Education in West Central Asia* 30 (2013): 221.
[54]Kennedy, Charles H. "Repugnancy to Islam–Who Decides? Islam and Legal Reform in Pakistan." *International & Comparative Law Quarterly* 41, no. 4 (1992): 769-787.
[55]http://www.newcivilisation.com/home/ideas-philosophy/islamic-law-and-human-rights-an-analysis-of-the-right-to-fair-trial-and-due-process-pt-1/ (accessed on 18th June 2017 at 4:39 am.)
[56]Choudhury, G. W. "The constitution of Pakistan." *Pacific Affairs* 29, no. 3 (1956): 243-252.

jeopardy, freedom of movement, dignity and equality of citizens before law are also guaranteed in these articles. In case these basic and fundamental rights are not properly provided, the person can assail in original jurisdiction of the apex courts.[57]

2. **Procedural Laws of Pakistan**

Right to fair trial could be split into three categories:

1. Pre-trial,
2. during commencement of trial,
3. Post-trial.

Some pre-trial rights[58] were initially inserted in the criminal procedure code, 1898, Sec 54 CrPC provides safeguards as to arbitrary arrest and illegal detention. Sec 61 CrPC describes the procedure to produce the accused before a local Magistrate within 24 hours and Sec 63 CrPC, speaks as accused can be discharged in case of insufficient evidence. Sec 167 CrPC discuss those circumstances in which remand could be granted. In sec 164 CrPC, the due process rights of a person are stated while recording his confessional statement. On commencement of trial, accused is given the right of provision of all relevant documents seven days before formal framing of charge against him, so he/she may know the nature and type of allegation against him and has adequate time to prepare for his defense in consultation of his counsel. These allegations may be read over to him as well.[59] Accused has the right to be represented by a counsel that he chooses. The right of accused to be present at the time of evidence and to record his statement under sec

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[57]Wheatley, Jonathan, and Fernando Mendez. *Patterns of constitutional design: The role of citizens and elites in constitution-making*. Routledge, 2016.
[58]Cook, Joseph G. "Constitutional rights of the accused; pre-trial rights." (1972).
[59]sec 221, 241, 265-C & D, 371, CrPC.

342 CrPC and may opt to appear as his own witness.[60] The accused can be acquitted in case of no possibility of conviction or in case the charge is groundless and in section 361 CrPC, if accused does not understand the language of the Court, he has the right to make request for translator or interpreter in the language he understands and can get his case transferred in case of non-availability of such a facility.[61] Accused has the right to represent himself through pleader and in case pertaining to capital punishment the accused shall be given counsel on state expenses.[62] As section 528 CrPC, accused may get his case transferred. The right of bail has been given to the accused in sec 497, 496 & 497 CrPC. Death sentence cannot be executed unless confirmed by the High Court (sec 374 CrPC). Post-trial rights include, most particularly, the right to appeal.[63]In section 426 CrPC, sentences could be suspended and accused may be released on bail. Accused can be given the benefit of section 382-B CrPC. Execution of capital punishment of pregnant woman accused can be postponed and if the punishment is less than one year; can be postponed till the decision of appellate court. In bail able offences accused can claim the bail as a right. Under Juvenile Justice System Ordinance, special procedure for separate trial of juvenile is provided and if the accused is under-age or minor as well as the punishment is less than 10 years, the accused has right to be released on bail. In case of lunatic, special procedure is provided for lunatic accused. In Probation of Offender Ordinance, the accused can be released in certain offences.[64] But in general practice, appeals are concluded after a long delay. The courts are not exercising their discretion of suspending the punishment and subsequent release of accused on bail. No doubt, separate challan of the juvenile is submitted but

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[60]Sec 340(2) CrPC.

[61]http://www.lawsofpakistan.com/code-of-criminal-procedure-1898-pdf-download-cr-p-c/ (accessed on 17th June 2017 at 5:2 am.)

[62]https://en.wikipedia.org/wiki/Code_of_Criminal_Procedure,_1973 (accessed on 18th June 2017 at 4:11 am.)

[63]Cook, Joseph G. *Constitutional Rights of the Accused: Post-Trial Rights*. Vol. 3. Lawyers Co-operative Publishing Company, 1976.

[64]http://www.pakistani.org/pakistan/constitution/ (accessed on 27th June 2017 at 5:31am.)

the trial proceedings of the juvenile accused proceed simultaneously because the set of witnesses are same and for the convenience of the witnesses, separate trial of the juvenile is not conducted. Therefore, some amendments are required in codified laws to meet the basic standards of fair trial.

3. Key Challenges.

In the backdrop of existing debate of provision of fair trial, the present profile of criminal system working in Pakistan is faced with numerous challenges. Prevalent criminal laws seem to be lacking in fulfilling the spirit of international standards of fair trial as protected in international instruments.[65] In case where one is convicted U/S 336 PPC, right to a fair and impartial hearing as well as equality before law is compromised when there is no enabling provision under which a reference could be made to the High Court for confirmation. According to sec338-D PPC, only the High Court can confirm the punishment of *Qisas* or sentence of *Qisas* for causing hurt.[66] On the other hand, whenever an accused is awarded capital punishment (U/S 302 PPC), a reference is made (U/S 374 CrPC) to High Court because this punishment is also subject to confirmation by the High Court. Moreover, right to be informed of the charge and right to counsel is not available to accused at the pre-trial stage. As accused is neither allowed to be visited by his counsel for legal assistance nor he could obtain the copies of police proceedings (ziminies) during pre-trial investigation. As per police rules (11-63)[67] it is prohibited to supply the copy of

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[65]Ibid pg. 84

[66]Shah, Hassam Q. "Reflections on the Law of Qisas and Diyat." *Shaping Women's Lives, edited by Farida Shaheed, Sohail A Warraich, Cassandra Balchin and Aisha Gazdar* (1998): 253-267.

[67]Sec 172 CrPC read with police rule 11-63 of Police rules 1934.

police files to any individual for his personal use or a government employee for his private usage other than the order of court of law that is working in its legal jurisdiction.[68]

We also find discrimination in the right of equality before courts as in special courts, 90 days physical remand is allowed with the only embargo that it should not exceed 15 days in a single stretch. Whereas in ordinary courts, a magistrate can grant remand of an accused even for capital punishment of 15 days maximum. This is a violation of right to a fair trial in terms of equality of citizens before law. The very essence of fair trial also lacks in identification parade as accused is not kept muffled face, as through modern devices their photographs are obtained to make the witnesses familiar with the face of accused to be easily identified.[69]

Though Pakistan has recently recognized the right to a fair trial as a fundamental right in its 1973 constitution, yet the functionalities and mechanisms of fair trial are neither described in the Constitution nor interpreted by the superior courts. It is necessary to remove fog and cloud and let the stake holders know the true essence of fair trial.

1.6 FRAMING OF ISSUES

- What are different theories and approaches related to fair trial and which are more closely related to Pakistan's constitutional and legal environment?
- What importance and significance equality of arms have and its impact on fair trial?

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[68]http://prosecution.punjab.gov.pk/system/files/Police%2520Prosecution%2520Cooperation.pdf (accessed on 27th June 2017 at 11:43 am.)

[69]McDermott, Yvonne. "Double Speak and Double Standards: Does the Jurisprudence on Retrial following Acquittal under International Criminal Law Spell the End of the Double Jeopardy Rule?." *THE CHALLENGE OF HUMAN RIGHTS: PAST, PRESENT AND FUTURE, David Keane, Yvonne McDermott, eds., Cheltenham, Edward Elgar* (2012).

- Whether the existing legal system of Pakistan has the potential to help realize the right to a fair trial?
- What are the challenges to trial in contemporary legal, social and potential milieu?
- Is the judicial system in Pakistan compatible with internationally recognized standards of fair trial?
- How do we interpret Islamic concept of fair trial, especially with reference to Pakistan?
- Does there exist the probability that in certain cases, the standards and norms set for fair trial may be compromised in the name of national security, international peace and harmony and the cause of greater good?

1.7 SIGNIFICANCE OF RESEARCH

As the concept of rule of law prevails in the very fabric of judicial system, yet the subject of fair trial is relatively new to the legislation of our country.

Fair trial means the right to a public hearing, interpretation, and right to counsel and most importantly the right to be heard within a reasonable time, ensuring the observance of basic human rights. It also includes prohibition of arbitrary arrest, appearance before the magistrate, equality before law and prohibition of torture. The rule of law helps in guarding the innocent persons against the abuse of state powers.

This idea of fair trial is essential to protect the human rights of accused and to ensure public trust through administration of speedy justice. In the past, suspicion of guilt played an important role in the perception for execution of judicial orders. In the absence of the notion of fair trial, the concept of "innocent until proven otherwise" becomes degenerative in its essence. A few incidents of lynch handing out on spot "justice" to the suspects has rendered the need of fair trial

within specified time, imminent. Formulation of clear laws and their efficient applicability is what this research aims at, under the guidance of the international standards of right to a fair trial. The concept of fair trial requires the setting up of minimum standards to which courts as well as other stakeholders must observe. This research also aims at finding ways and means to ensure fair trial to every person, regardless of his creed or caste, race, color, political affiliation, or religion.

This thesis would also argue as to whether the existing criminal justice system in Pakistan, whose roots are still embedded in the colonial era has the potential to help realize the right to a fair trial particularly pursuant of security situation of the country. It would also be argued as to whether the criminal legal system of Pakistan is in consonance with the standards of a right to a fair trial enshrined in international human rights instruments as well as in article 10-A of the Constitution of Pakistan 1973. The introduction and history of criminal trial would illuminate and highlight the questions relating to trial that we would address later.

This thesis would debate the true essence of free and fair justice especially in the backdrop of responsibility of stake holders. The impartial and competent judges, efficient legal fraternity, proactive investigation agencies, legally equipped prosecution and law knowing jail authorities can contribute in the realization of concept of fair trial. The financial and administrative autonomy of judiciary and system of accountability of all the stakeholders that are involved in the administering criminal justice system for the meaningful realization of fair trial will also be discussed. Given heat and intensity of these different details about trial, the thesis would strike a balance between accused and victim during all the three stages of trial.

Case-flow management in courts will enhance assess to timely and affordable justice for all and sundry. Mechanism towards procedural reforms and improved case-flow management would help the stake holders for the smooth administration of justice. It would suggest significant legal and court reforms especially e-courts and paper free judicial functioning. The challenges of language barrier/ interpreter being faced by the present legal criminal system would also be addressed in this thesis. The other challenges to the present legal system such as arbitrary arrests custodial tortures, non-availability of legal assistance, absence of the knowledge of cause of arrest, illegal detentions, non-proactive attitude of the courts in the exercise of habeas proceedings, non-production of accused before the court of law/magistrate within the stipulated period i.e., within 24 hours of arrest. Absence of visitation rights would also be addressed.

This thesis would mainly focus on the main trial proceedings i.e., from framing of charge to the final adjudication of the trial including examination and cross examination, appreciation of evidence especially in the cases of common intention and common object and cases of circumstantial evidence. Element of wider net would also be discussed to involve many people as accused to increase the agony of family of accused. The value of trial has since long been called in question by the jurists particularly the proceedings and stages of trial as neither these were intended to address the needs of victim nor the agonies of the defendant/ accused to be the part of process.

We would argue in the light of such critiques that it should be radically reformed so as to have an idea of the aims that criminal trial should serve of what significance they have and should have as a part of criminal system. This thesis would develop a theory of truth finding in the essence that trial is fair and free, and nobody is guilty provided proven otherwise instead of everybody is guilty proven otherwise. The core of the theory will be little bit near/similar to normative theory.

It is a process through which accused are called to answer a charge of criminal wrong doings and if they are proved to be guilty, the offense charge and he would be convicted through guilty verdict and would be held responsible for the wrongdoing. This process of criminal trial would be a communicative process thus making trial a communicative forum. Through this thesis we would develop this account of trial in the light of history and we would also discuss the old account of trial along with the alternative account of trial. Moreover, various features of criminal trial would also be evaluated separately. Substantial debate would be focused on particular features of trial.

This thesis would not aspire to be an exhaustive and complete guide to article 10A, rather it would pursue an original doctoral approach to article 10A and aims at a different and in-depth approach as this thesis would establish that there are inconsistencies in the way the investigation agencies, prosecutions, courts and advocates approaches issues and how article 10 A of the Constitution of Pakistan can be implemented in its true spirit for the benefit of masses at large and devise a method to execute it in its true spirit of justice and equality. It would also pinpoint the language barrier in the way of fair trial and application of minimum standards of fair trial.

1.8 LITERATURE REVIEW

Selected literature has presently been reviewed and key literature would be examined during the composition of thesis.

"What is a fair trial? A basic guide to legal standards and practice".[70] A guide prepared by the ***human rights lawyers committee*** describe the essence of fair trial and how in order to ensure the proceedings of a trial as fair and humane, different steps are needed to be observed. This guide

[70]Lawyers Committee for Human Rights (US), Jelena Pejic, and Vanessa Lesnie. *What is a Fair Trial?: A Basic Guide to Legal Standards and Practice, March 2000*. Lawyers Committee for Human Rights, 2000.

tells us about the steps of fair trial from arrest to the final decision by the jurisdiction and all the procedures that are needed in order to fulfill the requirements of fair trial like the pre-trial rights of the accused, the hearing procedure and the post-trial rights. Also, the trial itself needs to be observed carefully in order to fulfill the essence of fair trial. For this purpose, individuals are needed that are experts and are acquainted with the complexities of domestic and international fair trial criterions.

"The right to a fair trial in times of terrorism. A method to identify the non-derogable aspects of article 14 of international covenant on civil and political rights"[71] by Evelyne Schmidt. This article suggests the methodology of how to identify and ensure fair trial rights that have been declared as a fundamental right for every individual irrespectively. It also discusses the application of law in the war against terrorism as it is yet to be decided collectively by the international community the minimum standards of fair trial that must be provided to the accused. This study will be helpful in understanding the minimum standards of fair trial and due process of law.

"R vs NS: what's fair in a Trial? The Supreme Court of Canada's divided opinion on the niqab in the courtroom"[72] by Faisal Bhabha. This article deals with the proposition in which court was presented with a novel question as to how to accommodate two conflicting basic rights provided by the constitution. The right of accused to face his accuser as well as the basic right of religious freedom that allows a Muslim. Matter at issue was a collision between religious freedom and trial fairness. The basic principles of evidence have ruled in favor of unveiling of

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[71]Schmid, Evelyne. "The Right to a Fair Trial in Times of Terrorism: A Method to Identity the Non-Derogable Aspects of Article 14 of the International Covenant on Civil and Political Rights." *Goettingen J. Int'l L.* 1 (2009): 29.

[72]Bhabha, Faisal. "R. v. NS: What Is Fair in a Trial: The Supreme Court of Canada's Divided Opinion on the NIQAB in the Courtroom." *Alta. L. Rev.* 50 (2012): 871.

face of a women complainant for prosecution to facilitate the cases of sexual assault. The study of this article will clarify the basic principles of the law of evidence.

"Fair trial rights of the accused"[73] by Ronald Banaszak. The main focus of the book is on public trial by jury, right to council and due process of law. This book has also narrated the 5th and 6th amendment in the US constitution. This book also contains list of citizen rights related to trial necessary to provide justice for the accused as well as for the country.

"The Administration of Justice in Medieval India"[74] by Muhammad Basheer Ahmed contains information regarding Mughal justice system. The study of this book will be helpful in understanding the historical background of the legal system of Pakistan for the proposed research.

In an article ***"Fair Trial and Due Process"***,[75] Yasser Latif Hamdani, has tried to give different applicable perspectives of fair trial in present times. He is of the view that through the newly incorporated article 10-A in the Constitution of 1973, the concept of basic and fundamental human rights is further cemented when this article was introduced through 18th amendment. The vast applicability and importance of article 10-A has created further constitutional challenges in almost every legal branch in the country

"Article 6 of European convention on human rights".[76]by Ryan Goss. According to him, right to a fair trial is the most litigated and complex body of legal cases. The writer has shared in this book an innovative and critical analysis of European court. Accordingly, fair trial rights include

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[73]Banaszak, Ronald A., ed. *Fair trial rights of the accused: a documentary history*. Greenwood Publishing Group, 2002.
[74]Ahmad, M. B. "The Administration of justice in Medieval India. Aligarh." *Historical Research Institute* (1941).
[75]http://www.inp.org.pk/sites/default/files/Article%20Due%20Process.pdf (accessed on 19th June 2017 at 3:47 am.)
[76]Goss, Ryan. *Criminal fair trial rights: Article 6 of the European Convention on Human Rights*. Bloomsbury Publishing, 2014.

many component rights and analyze the case laws simultaneously through several cross-cutting problems. This innovative approach has given a widely understandable view of the article 6 of the convention. The case law driven approach allows the writer to demonstrate that the working of the European court

"Fair trial and judicial independence"[77] by BEDO. This book has provided a sketch of correlation between jurisprudence and the way in which the sociological, cultural and political factors may affect litigation, fair trial and the jury. This book also provides comprehensive analysis of relationship between fair trial and judicature. A comparative analysis of issues at court rooms, administrative problems and analyzing judicial power has been discussed. The role of judicial officer service structure and the comparison between distribution of cases and problems that judiciary faces while deciding minuscule problems affecting individuals in a big way as well as matters of national security and its impact has been discussed in present democratic system. This book also discusses fair trial standards and the amount of fairness in the cases in the trial system in different eras of past and present. What are the future prospects and how the security of European nations with juggling between human rights and safety is also discussed in the book?

The book, ***"The Role of Islam in the Legal System of Pakistan"*** [78] by Martin Lau is the in-depth critical study of the Islamization of the legal system of Pakistan. This book discusses the influence of Islamization on the political and constitutional system of country. This book will clarify the implications of Islamization on our justice system.

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[77]Badó, Attila. "Fair Trial and Judicial Independence, 2013."
[78]Lau, Martin. *The role of Islam in the legal system of Pakistan*. Brill Nijhoff, 2005.

Liberalism and the Criminal Trial[79] by Ho Hock Lai. This article provides two different aspects of theorization in criminal trial. The liberal theory of trail is discussed in detail and due process with equality of arms is explained. Punishing a criminal is, according to this book, a fragment of the whole process whereas bringing justice to the whole society where neither the victim nor the accused loses his sense of belonging is the real feat. According to this article, criminal trial is always justified as an engine to search for truth. And then finalizing that truth discovered through the rigorous process of trial into plausible outcomes for the aggrieved individual as well as the society as a whole.

The book ***The Trial on Trial Volume 3, Towards a Normative Theory of the Criminal Trial*** [80] by Anthony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros develops a communicative theory through historical perspective of trials as the most important forum for public opinions and discussions. It also discusses principles and alternative regulatory models. This book also describes the important role of participants as well as relationship between investigation and trial. This book will be helpful in understanding the normative theory of criminal trial.

The articles and books that we have discussed above are a few amongst the wide range of work done by researchers on fair trial. In this literature, they have carved out the most common issues on the subject of procedures which are practiced today by legal criminal system to broadly outline the subject of right to a fair trial in its true perspective. Although the concept of fair trial

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[79]Lai, H. H. "Liberalism and the Criminal Trial". *Sing. J. Legal Stud.*, 87, 2010.

[80]Duff, Raymond Anthony, Lindsay Farmer, Sandra Marshall, and Victor Tadros. *The trial on trial: volume 3: towards a normative theory of the criminal trial*. Bloomsbury Publishing, 2007.

is not new culturally and historically in subcontinent[81] where the requirement for a fair and unbiased trial has always been stressed and subsequently appreciated, yet its inclusion as article 10 A of the constitution of Pakistan 1973 needs further in-depth investigation in the field of research and study. The contemporary issue in the management of matters relating to fair trial have often been deliberated by the researchers but most of these discussions and research studies don't include the present day challenges of the subject.[82] This literature review shows that most of the researchers and scholars have done an excellent job in discussing the general and known concerns of the fair trial and but have failed to discuss newfangled and unusual issues springing up owing to rapidly changing current scenarios especially in Pakistan. Due to their nature these issues need to be the subject of debate and require further investigation. No doubt, some scholars and researchers have penned down landmark articles on the subject and have discussed some important topics such as the right to know the cause of arrest, right to council, right of due process and right to silence etc., but they have not done in-depth research on fair trial and equality of arms according to the current issues that the world and especially Pakistan is facing today.

In a nutshell the previous literature has discussed the core issue of availability of minimum standards of right to a fair trial, its management, and equality between the arms in legal criminal system.[83] But it still needs more academic and practical studies as it is a vast term that covers all aspects of a trial and can prove immensely beneficial in dispensing clear and unambiguous justice to all members of the trial. This thesis will also include the study of the innovations and

[81]Kolsky, Elizabeth. "The colonial rule of law and the legal regime of exception: Frontier "fanaticism" and state violence in British India." *The American Historical Review* 120, no. 4 (2015): 1218-1246.
[82]Robinson, Patrick. "The right to a fair trial in international law, with specific reference to the work of the ICTY." *Publicist* 3 (2009): 1.
[83]Kwon, O. G. (2007). The challenge of an international criminal trial as seen from the bench. *Journal of International Criminal Justice*, *5*(2), 360-376.

newly defined issues in this area in the light of what is practiced in criminal law courts in Pakistan. Moreover, the current study has been conducted which includes theoretical discussions in the light of standards of fair trial rights as mentioned in nearly all of international human rights instruments.[84] Apart from the important issues mentioned above, the objections raised about the fair trial in the country would remain worthy of research and discussion particularly.

1.9 CHAPTERIZATION

For the purpose of understanding the challenging concept of fair trial rights, this dissertation is split into following chapters.

The ***first chapter*** of this dissertation is the introductory information not only regarding what is fair trial but also the thesis statement and hypothesis will be disclosed. The first chapter will serve the purpose of prelude of this dissertation. An overview of fair trial rights in international legal scenario and at the domestic front will be discussed. What major books are consulted in researching right to fair trial and what will be the significance of this research especially in the backdrop of introduction of 10-A in the constitution will be analyzed.

The ***second chapter*** can rightly be called as the backbone of this dissertation as theoretical framework will be developed in this chapter. Notable theorist with their ideas of theories applicable in adversarial system will be discussed. On the basis of these scholarly works, a deduction in the shape of theory will be presented, which according to this researcher will be the most optimum theory applicable on the issue of fair trial rights in Pakistan. Moreover, how trial has evolved over time from a mere idea based on equality of all human beings to the present shape of intricate and complex laws will be discussed. The researcher will try to explain how in

[84]Harris, D. (1967). The right to a fair trial in criminal proceedings as a human right. *International and Comparative Law Quarterly*, *16*(02), 352-378.

the dark and doomed criminal world, criminal trial is the beacon of light for all the low and downtrodden in the society.

The ***third chapter*** would discuss the development of trial rights in the international statutes and covenants. How the world wars and their destruction brought the world together and resulted in international organization of UN. Different covenants and statutes notably ICCPR, UDHR, American Convention on Human Rights, African Charter, African Convention and Human Rights Committee will be discussed with regards to the rights given by them to accused and convict. Moreover, Tribunal cases and ICC case laws will be discussed in this chapter to get a picture of trial rights in the world.

The ***chapter no. four*** would discuss fair trial rights in the Constitution of Pakistan. How the basic human rights were guaranteed in three Constitutions of the country but the right to fair trial was included in 2010 through an amendment. This chapter will also discuss under which article the trial rights are given other than article 10-A of the Constitution and how the equality between the arms is addressed in the legal scenario in Pakistan.

The ***fifth chapter*** would discuss the codified laws of Pakistan. As a country which carried the English legal system of common law with adversarial mode of trial, the codified laws would give a more detailed insight of how trial procedure is dealt with in Pakistan and how courts are trying to provide trial rights to both the parties during trial. Also, which areas need further improvements will also be discussed. Moreover the topics addressed in this chapter would be impact of implementation of right to a fair trial on society, human rights and pre trail detention, legal and human right implication of delay, and the role of punishment in the expounding of law. The court ruling and right to a fair trial and *suo-moto* and its implication on right to a fair trial.

In the ***sixth chapter*** one of the most volatile and sensitive topics for the masses in Pakistan would be discussed. With deepening polarization, the Islamization of legal system will be discussed. What is the historical background and association of Pakistan with Islamic Shariah? Moreover, parallels will be drawn amongst the rights provided by Islam and the prevalent legal systems in the world. Moreover, how Islam has been used to cement certain regimes in the political arenas will also be discussed with special reference to General Zia's Islamization policies.

The ***last chapter*** also the concluding chapter would discuss how fair trial rights have been developed in this dissertation. What are the major lacunas in trial system in Pakistan? What are the implications of 10-A on the future legislation of Pakistan? With backlog and people not completely trusting the system, how truth can be discovered without undue delay or complications in the legal system of Pakistan.

1.10 RESEARCH METHODOLOGY

As far as research in the field of law is seen, the major issue of debate is the fact that crime in a society and its control are inherently considered as researchable in social sciences, thereby qualifying essentially for qualitative research but human behavior and habits are inherently not criminally intended.[85] The major problem that the legal fraternity is facing while conducting research is that it has been torn between the effort to grasp the expanding reality of law and its context, and turning the complex situations manageable and understandable proportions of law.[86] It is probably not accurate to define the legal analysis process as a **"methodology"** at least in the

[85]http://www.qualitative-research.net/index.php/fqs/article/view/1119/2483 (accessed on 14th January 2017 at 3:51 am.)

[86]http://www.ius.bg.ac.rs/prof/Materijali/jovmio/DS_PrimeriMetodoloskihPristupa/ (accessed on 14th January 2017 at 4:32 am.)

sense in which that term is used in the sciences.[87] This is mainly because research methodology consists of descriptive, exploratory, explanatory and evaluation. Legal research on the other hand is usually done as descriptive, hermeneutical, or normative.[88] These methods interact together to gain a deeper understanding of the questions under investigation.[89]

During legal research, initially the method of black letter methodology[90] will be used. After gathering relevant facts, the research will be started with secondary sources for background information and to follow black letter methodology that includes statutory as well as case laws. In this research both primary as well as secondary data will be used. The main sources for secondary data have been the international covenants, legal encyclopedias[91], law journals and authorities. Primary data includes court orders and rules, statues and ordinances. In present era, internet and legal websites are one of the major sources used for consulting up-to-date and relevant research material. Legal research guides are a valuable guidance in doing research of fair trial. This will help in collecting the existing data available on fair trial by concentrating on letter of the law through mostly primary sources. The aim is to co-relate, explain and describe legal rules and regulations so as to give an explanation of how the system works and what are the identification markers of the underlying legal system.[92] The nature of research methodology would be descriptive, exploratory and analytical. The study of the research combines therein

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[87]Chynoweth, P. "Professional doctorate research methodologies: new possibilities from beyond the social sciences." In *Proceedings of the 4th International Conference on Professional Doctorates*. UK Council for Graduate Education, 2014.

[88]Smith, J. A. (Ed.). *Qualitative psychology: A practical guide to research methods*. Sage. (2007).

[89]http://www.encyclopedia.com/doc/1G2-3403000080.html

[90]https://www.lawteacher.net/law-help/dissertation/writing-law-dissertation-methodology.php (accessed on 18th September 2018 at 3:41 am.)

[91]Hagan, Frank E., and Frank E. Hagan. *Research methods in criminal justice and criminology*. Boston: Allyn and Bacon, 1997.

[92]https://cadmus.eui.eu/bitstream/handle/1814/22016/LAW_2012_13_VanGestelMicklitzMaduro.pdf?sequence=1 (accessed on 18th August 2017 at 5:37 am.)

insight from primary sources i.e. statutes and articles and secondary sources i.e. books, international human rights instruments such as UDHR, ICCPR. Most of the analysis is based on the views of jurists of theories of fair trail which can be found in various texts and literature as a primary source of research.[93]

Interpretation of the existing primary data as well as the 'law in action' i.e. the on-going trials will be thoroughly discussed to analyze the impact on fair trial. Due to technological advancements, and the advent of Skype, internet and other gadgets, finding data and analyzing it has become a more focused as well as result oriented research.[94]This research on fair trial will not only cover all three stages of trial i.e., pre-trial, during trial and post-trial but will discuss the role of participants in this process and the equality of arms.[95]During the course of this research, ethical issues will also be addressed as they are an integral part of basic human rights, of which fair trial is an important part.[96] Introduction of Right to a fair trial in the constitution of Pakistan has given a ray of hope to the observance of basic human rights in its true spirit. Particularly in accordance with international standards, Pakistan has to explore whether the existing legal system has the potential to help realize such a right. Under the guidance of previous articles in Pakistani law and jurisprudence, the main focus will be to devise methodologies and procedures so that these laws can adapt to the socio-cultural aspects of Pakistan and turns out to become the norm in society. This pioneering contribution is a useful instrument in the implementation and realization of right to a fair trial for all and sundry. The intended target of this research thesis is

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[93]Bursztajn, Harold J., Robert M. Hamm, and Thomsas G. Gutheil. "Beyond the black letter of the law: An empirical study of an individual judge's decision process for civil commitment hearings." *Journal of the American Academy of Psychiatry and the Law Online* 25, no. 1 (1997): 79-94.

[94]Patton, Michael Quinn. *Qualitative evaluation and research methods*. SAGE Publications, inc, 1990.

[95]Kraska, Peter B., and W. Lawrence Neuman. *Criminal justice and criminology research methods*. Pearson Higher Ed, 2011.

[96]Neuman, William Lawrence, and Bruce Wiegand. *Criminal justice research methods: Qualitative and quantitative approaches*. Boston: Allyn and Bacon, 2000.

to have a comprehensive and in-depth understanding of fair trial and its implementation in the legal and criminal system of Pakistan. Possibilities and their applications will be planned out to create a custom fit strategy of implementation and application of fair trial at the gross root level in Pakistan. It is after all the notion of justice and equality for all before the law that can guarantee the survival and prosperity of a nation in the world.

1.11 CONCLUSION

The introductory chapter is a brief overview of what fair trial means and how it will be dealt with in the subsequent chapters. Research methodology and significance of this research has been discussed in this chapter. Pakistan is currently facing some major issue regarding speedy justice satisfactory to all and sundry. The present socio-political and economic scenario has deemed the need for provision of trial rights to both victim and accused more than ever. In the upcoming chapters it will be discussed how thoroughly the trial rights have been guaranteed in international covenants and statutes. Moreover, the study of Islamic legal system gives ample examples of how trial rights were discussed and provided more than 1400 years ago.

CHAPTER 2

THEORIES OF FAIR TRIAL

2. Introduction

Since crime and criminology is the scientific study of ways and means to address and eliminate the rogue elements of the society, the application of criminal theory or a set of theories in addressing the problem have great significance. Literature pertaining to criminal justice is suggestive of the fact that all eminent researchers have laid great emphasis on the importance of theoretical framework in analyzing the criminal literature. Application of theories can 'logically interconnect prepositions' through which plausible explanations can be deduced. According to Merton, theory is a set of assumptions from which empirical conclusions can be drawn in order to find a logical explanation of a problem in a society.[97]

Criminal incidents in a society, despite being a regular occurrence, are always considered happenings against norms and behaviors expected of individuals in a society. Application of theory helps in understanding realistic occurring in a systematic manner. Since theories are formed after critically analyzing facts as well as manner of occurrence in an incident, these theories not only provide direction to the data but also provides newer discoveries of analyzing

[97]Merton, Robert K. *On theoretical sociology*.. Merton has been used in this dissertation because his work, though primarily is on social work, can explain adequately the link of theory to society and criminology as a linked bridge between cause and effect. New York: Free Press, 1967.

aspects of a crime during trial. Theory not only validates a set of suggestions but re-validate the old and the new outcomes of a research.

In this chapter, this dissertation will attempt to explain different theories of fair trial and which theory this dissertation will use prospectively in explaining the right to fair trial in Pakistan. The legal system in Pakistan, due to its roots originating from Magna Carta and English system is adversarial in its essence. In this chapter we will discuss the salient features of adversarial system and different theories explaining different features of legal system. As it will be discussed later in this chapter that many theories explain different aspects of law and legal system in Pakistan but are insufficient to explain the whole of adversarial system. This chapter will address the notion as to why and how adversarial theory has been the foremost ideology crisscrossing the fabric of Pakistani law. What are the constraints and benefits of adversarial system to socio-political and religious-economic scenario in Pakistan? This chapter will also discuss the extrinsic and intrinsic aspects of adversarial system by discussing and developing theoretical framework[98] and how the introduction of article 10-A of the constitution has helped legislatively pointing towards the right direction, the right to fair trial and due process of law for attaining better place in the pinnacle of realizing basic human rights in Pakistan. This chapter is concluded with salient features of right to fair trial in Pakistan and the measures that are deemed necessary by this researcher, for proper realization of right to fair trial as envisioned by article 10-A of the constitution of Pakistan.

[98]https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198763154.001.0001/acprof-9780198763154-chapter-17 (assessed on 4-9-2016 at 4:32 pm.)

2.1 Historical Development of Trial

Definition of Fair Trial

In order to get an understanding of trial itself, a look at the word 'trial' and how it has been explained can give a clearer understanding of trial procedure, reason and effect on individuals and society. In Ancient Greek, word for trial is ***Agon*** which means gathering or contest and conflict between characters in a play[99].

Trial can also be defined as:

> **the criminal trial is a process through which accused are called to answer a charge for criminal wrong doer if they are proved to have committed the offence charged, to answer for their conduct. If the accused is found to have committed the offence and have no defense, the accused is condemned through a guilty verdict.[100]**

Before discussing theories of trial in detail we will take a look at the historical development of how trial have proceeded since the advent of human history.

2.2 Historical Development of Trial

The right to a fair trial is a basic human right and essential for the prevention of the abuse of all other human rights. For several centuries, the idea of Fair Trial meant it to be conducted according to procedure prevalent during respective times. The very first crude form of trial that

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[99]Goodpaster, Gary. "On the theory of American adversary criminal trial." *J. Crim. L. & Criminology* 78 (1987): 147.*See also*Thatcher, Virginia Sarah. *The new Webster encyclopedic dictionary of the English language*. Edited by Alexander McQueen, and Margaret L. Smith. Avenel Books, 1980.

[100] Frankel, Marvin E. "The search for truth: An umpireal view." *University of Pennsylvania Law Review* 123, no. 5 (1975): 1031-1059. See also http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=5309&context=penn_law_review (accessed on 29th November 2019 at 1:07 pm.)

was prevalent in medieval Europe was "trial by ordeal" chiefly aimed at, as Hyamas argued, settling disputes amongst individuals or small communities.[101] The chief characteristic of this type of quasi-trial was that the accused was supposed to provide 'proof' of innocence or face the punishment. Macnair considers early trial to be more close to ordeal than its present shape.[102] Whereas trial in England, despite having *Anglo-Saxon* origin[103], was firstly introduced as means to attain peace in the absence of a police force or a machinery to maintain law and order by William the Conqueror around 1066.[104]The conception of trial in historical perspective has shown that little protection was offered to the accused in either law or practice by the late 18th century criminal trial.[105] The criminal law tend to protect interest of landed class, those accused were neither entitled to legal representatives nor were informed in advance of charge against them and little opportunity was given to prepare defense. Trials were mainly brief, and tendency was more towards conviction. Courts exercised desecrations and trial exhibits serious deficiencies. Requirement of a trial to be fair was firstly demanded to be documented in *Old Bailey's* (London's Central Criminal Court) [106]when interest in criminal procedure was considered rather fashionable, discussed at tea stalls and fashion houses alike. In early 1700s the

[101]Hyams, Paul R. *Trial by ordeal: the key to proof in the early common law*. 1981.
[102]Macnair, Mike. "Vicinage and the Antecedents of the Jury." *Law and History Review* 17, no. 3 (1999): 571-587.
[103]Von Moschzisker, Robert. "Historic Origin of Trial by Jury." *U. Pa. L. Rev.* 70 (1921): 73.
[104]"Legal History: Origins of the Public Trial," Indiana Law Journal: Vol. 35 : Iss. 2 , Article 8, 1960 through https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3047&context=ilj (accessed at 11-08-2018 at 2:23 am.)
[105]Hamburger, Philip A. "Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil Rights." *The Supreme Court Review* 1992 (1992): 295-392.
[106]Beattie, John Maurice. *Crime and the Courts in England, 1660-1800*. Vol. 404. Princeton, NJ: Princeton University Press, 1986.

reports giving information about trials in London described exact transcriptions of trials aiming to be a "true, fair and perfect narrative" of every trial.[107]

Present trial proceedings still carry some of the traditions of ordeal when, for example, 'oath' is still taken during court proceedings and death row convicts are still given the choice of how they wish to be tried. At the turn of 20th century right to fair trial meant the observance of rights namely right to a public hearing within a reasonable time, by an impartial tribunal and the knowledge of charges against the accused. This meaning of fair trial gradually, over time, turned from a rarely used term of right to fair trial to as a basic human right. Inclusion of right to fair trial in international statutes and covenants is a testament to universality of right to fair trial in the comity of human rights. Early researchers like Ronald Dworkin[108]considers fair trial as a basic intrinsic value of human life and puts forward the question **of "whether there is something inherent in human beings from which our rights spring is fundamental to any attempt at understanding human rights"**. Whereas Kohen[109] considered the idea of fair trial as a newly coined idea that is a jewel of modern civilized world. Similarly, William Schultz believes fair trial to be **"the best way we know of at the moment to counter cruelty and build a decent society... human rights might be a fad that could just as well not be in fashion tomorrow"[110].** According to Ian Langfold[111], the the present-day meaning and use of *fair trial* is no more than approximately 150 years old. According to him, right to fair trial is a cultural

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[107]Shoemaker, Robert B. "The Old Bailey proceedings and the representation of crime and criminal justice in eighteenth-century London." *Journal of British Studies* 47, no. 3 (2008): 559-580. See alsohttps://www.jstor.org/stable/25482829?seq=1#page_scan_tab_contents (accessed on 24-06-2017 at 3:34 am.)

[108]Dworkin, Ronald. *Law's empire*. Harvard University Press, 1986.

[109]Kohen, Marcelo G., and Marcelo G. Kohen, eds. *Secession: international law perspectives*. Cambridge University Press, 2006. 244.

[110]Schulz, William F. *In our own best interest: How defending human rights benefits us all*. Beacon Press, 2001. 26-28.

[111]Langford, Ian. "Fair trial: The history of an idea." *Journal of Human rights* 8, no. 1 (2009): 37-52.

export by **"English Heritage that spread round the world as English became a world language and English law became one of the two major systems of jurisprudence of the world".** Despite the fact that trial has emerged from centuries of historical changes and needs of the societies all across the globe, critics like Blackstone consider trial, its components and procedures to always be **"looked upon as the glory of English Law.... most transcendent privilege one can enjoy".**[112] Such **'pious perjuries'** claims were dismissed by Langbein and Hay et al, who deciphered the trial to show how little protection and dignity was offered to the accused. Trials were brief and tilted towards conviction than acquittal.[113] Duff et al, on the other hand, consider attachment to jury trial as expressed by Blackstone to be the acceptance of importance of other values (fairness, liberty, lay participation, and so on) and a belief in the capability of trial to represent and protect these values, thus revealing an association to a set of deeper normative beliefs about the trial as a legal and political institution.[114]

It can be argued that trial has always been concerned with **"truth finding.... with discovering who did what at a particular place and time"**, irrespective of what system and shape trial has attained. Fundamental normative values, according to Darbyshire[115], associated with trial will always remain true to its essence, in almost all historical periods of trial.[116] During 17th till 19th century, prosecution, despite a private entity, increasingly became a part of Justice of Peace (JP), a force aimed at suppressing disorder. Therefore, John Langbein considered trial as a

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[112]Blackstone, William. *Commentaries on the Laws of England, Volume 3: A Facsimile of the First Edition of 1765-1769*. University of Chicago Press, 1979.

[113]Hay, Douglay. "Property, authority and the criminal law." (1975).See also,
Langbein, John H., and AW Brian Simpson. *The origins of adversary criminal trial*. Oxford University Press on Demand, 2003.

[114]Duff, Robin Anthony. "Who is responsible, for what, to whom." *Ohio St. J. Crim. L.* 2 (2004): 441.

[115]Darbyshire, Penny. "The Lamp That Shows That Freedom Lives—Is It Worth the Candle?." *Criminal Law Review* 740 (1991).

[116]Smith, Carole. "The sovereign state v Foucault: law and disciplinary power." *The Sociological Review* 48, no. 2 (2000): 283-306.

combination of adaptability in procedures and practices with no underlying traces of normative conception. Indeed, he sees the change of the criminal trial as the **"story of how we came to live under a procedure for which we have no adequate theory"**.[117] Just as Fischer questions, why, for example, consent was so important? The answer being that trial proceeding's legitimacy and acceptance amongst masses has always, as discussed later in this dissertation, played a pivotal role in deciding the approach trial takes[118]. The historical development of trial can also be seen as changes in structures and procedures by changed values and conceptions of trial over time, how, for example, proof and evidence have evolved in trial. Such understanding can play a major role in our attempt to develop a plausible theory of trial, in this case truth finding theory. The international law of human rights is so designed that they protect individuals, who apparently possess little or no power, from unlawful curtailments of basic human rights from powerful states and government. These covenants are a source of finding truth which otherwise may be curtailed through the misuse of power and resources that are at the expense of states. The right that guarantees trial to be fair and just starts not **"only upon the formal charge but rather on the date on which State activates substantially affect the situation of person concerned".** In order to have a proper realization of fair trial rights, guarantees provided by the international covenants and statutes should be observed right from the start of investigation until the trial proceedings end including the decision on the appeal has been taken. Thus, the changing paradigms and socio-political needs of the institutions contribute little to the development of an overall theory that this dissertation aims to discuss in the backdrop of Pakistani legal scenario.

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[117]Langbein, John H., and AW Brian Simpson. *The origins of adversary criminal trial*. Oxford University Press on Demand, 2003.

[118]Fisher, George. "The jury's rise as lie detector." *Yale LJ* 107 (1997): 585-602.

2.3 Foundations of Adversarial System

Modern adversarial system came into being with the passing of Treason Trials Act in 1696. This Act, for the first time, sanctioned full access to counsel to those charged with treason to prepare and conduct of their defense. Although termed as a **'charter of defensive safeguard'**, this right was not granted to ordinary law breakers. Prisoner's Counsel Act of 1836 was the milestone of formal access to legal defense while most of the 18th century saw gradual changes like introduction of lawyers etc., to form the present-day form of adversarial system.

Despite having deep roots in the legal system of the world, adversarial system has been the foundation stone of legal system in Pakistan. How the law is practiced and perceived has been majorly influenced by the English legal system (common law) which is adversarial in its essence and nature. Although roots of adversarial system can be traced back to as far as Greeks and Romans where trial of Socrates[119] was the first example of public trial having adversarial features, yet this primitive form has changed many faces and the major adversarial systems in the world i.e., English and American systems have attained great deal of distinctive differences.[120] Perhaps the legal system of Pakistan which is essentially based on English legal system has attained its own distinctive features[121]. Geo-political and socio-religious elements have given the legal system in Pakistan its distinctive personality.

On taking a look at the components of adversarial system, the quest to truth finding takes the shape of two contesting parties arguing similar facts of a common incident in front of an essentially passive yet attentive 'decision maker' (judge in case of Pakistan) who in the light of

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[119]https://www.famous-trials.com/socrates/833-home (accessed on 4-9-2016 at 6:42 pm.)
[120]Nijboer, Johannes F. "The American adversarial system in criminal cases: Between ideology and reality." *Cardozo J. Int'l & Comp. L.* 5 (1997): 79-92.
[121]Wasti, Tahir. *The application of Islamic criminal law in Pakistan: Sharia in practice*. Brill, 2008.

evidence presented and the prevalent law of the land gives a verdict of acquittal or conviction of the accused. In British as well as American system of law which is essentially adversarial in nature, the role of jurists who are assessors of the situation plays an important role in truth finding of a given incident and leaves little to chance in discovering the truth. Jury Trial, which was advocated strongly for subcontinent by both Congress and Pakistan, and which ironically, became a flashpoint for many legislations like Rowlett Act to be rejected through the sieve of communal differences. Trial by Jury was considered by legal experts like Muhammad Ali Jinnah and Gandhi as an integral part in quest of truth finding and justice during trial. This right, which was strongly appreciated during Lucknow Pact 1916,[122] has gradually been 'phased out' in both Pakistan and India. In Pakistan,[123] twelve assessors of non-legal background were to be present during trial proceedings as these assessors were mostly elders from the same area where the crime was committed and had considerable influence and say in the affairs of that area.[124] The role of jury was abolished in law reforms of 1972[125] which shifted the role of judge towards more centralized decision making.[126]

Since Pakistani law drives its roots from Common law (judicial precedent)[127] of England and Wales,[128] the quest for the goal of truth finding puts great emphasis on deciding cases according

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[122]https://www.britannica.com/event/Lucknow-Pact (accessed on 03-09-2019 at 2:12 am). The provision of right of trial by jury for local Indians by the British raj was one of the very few rallying points for otherwise volatile and hostile opposing political parties of Congress and Muslim League. One of the major reason for the realization of importance of jury trial was because both Mr. Jinnah (Quaid-e-Azam) as well as Mr. Gandhi were from legal fraternity.

[123]https://dailytimes.com.pk/304779/trial-by-jury/ (accessed on 03-09-2019 at 2:39 am).

[124]https://en.wikipedia.org/wiki/Law_of_Pakistan (accessed on 12-06-2017 at 12:59 am).

[125]Layish, Aharon. "THE TRANSFORMATION OF THE SHARĪ'A FROM JURISTS'LAW TO STATUTORY LAW IN THE CONTEMPORARY MUSLIM WORLD." *Die Welt des Islams*44, no. 1 (2004): 85-113.

[126]Suddle, Mohammad S. "Reforming Pakistan Police: An Overview." *United Nations Asia and* (2003).

[127]https://en.wikipedia.org/wiki/Precedent(accessed on 12-06-2017 at 13:24 am)

[128]https://en.wikipedia.org/wiki/Common_law (accessed on 12-06-2017 at 13:29 am)

to consistent principled rules where a judge is bound to precedents i.e., ***stare decisis***[129]***(Let the decision stand).***

2.4 Adversarial System in Pakistan

The purpose of a criminal trial is finding truth of what happened in the light of its historical background of events. With no generic name of adversarial system in place, this system is essentially used under different names in different societies. In Pakistan it is CrPC, PPC and other codified laws[130]. In Pakistan there are two legal systems working side by side i.e., civil and criminal. This dissertation aims at discussing the criminal aspect of adversarial system in Pakistan which is more stringent and restrictive within its workability.[131]

Like any other adversarial system practiced around the globe[132], adversarial system in Pakistan has some salient features in pursuit of truth finding[133]. Facts are proven through dialogue between two contesting parties by presenting evidence to an essentially passive decision maker, who after 'judging' the evidence and the facts presented from both sides, assigns criminal liability and either convict or acquit the accused. In adversarial system, both the parties inadvertently are inclined to win the decision in their favor rather than the morally upright goal of truth finding or righteousness for the opposing party[134]. Prosecution is to present its case firsthand to prove it through evidence, providing defense with the opportunity to assess the facts and respond accordingly. Defending party cannot be forced to testify and the most important and

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[129]Waldron, Jeremy. "Stare decisis and the rule of law: a layered approach." *Mich. L. Rev.* 111 (2012): 1.
[130]Pakistan, Shaukat Mahmood, and Nadeem Shaukat. *The Constitution of the Islamic Republic of Pakistan, 1973*. Legal Research Centre, 2006.
[131]Goodpaster, Gary S. "The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts." *Iowa L. Rev.* 56 (1970).
[132]Amsterdam, Anthony G. "Speedy Criminal Trial: Rights and Remedies." *Stan L. Rev.* 27 (1974): 525.
[133]Hussain, Faqir. *The judicial system of Pakistan*. Supreme Court of Pakistan, 2011.
[134]Goodpaster, Gary. "On the theory of American adversary criminal trial." *J. Crim. L. & Criminology* 78 (1987): 120.

perhaps difficult as well is the 'burden of proof' for prosecution to prove beyond a reasonable shadow of doubt. '***ipse-dixit***' (unproven findings that rests solely on the authority of one who makes it; in this case police officials) of police findings are not binding on the court[135]. Rules to present evidence in the court of law are complex and complicated in all the adversarial systems. Similarly, Pakistan is no exception where different sorts of evidence is to be presented. This includes:

1. Direct Evidence
2. Circumstantial Evidence
    a. Last seen evidence
    b. Way taken evidence
    c. Extra-judicial confession
3. Hearsay evidence

If we take a look at the adversarial system in Pakistan, we see such hurdles in search for truth as well. For example, the disclosure of case to the accused in 59 A CrPC[136] provides the same privilege to the accused as elsewhere in the world, which provides the similar advantages for the defense to know the details of the case beforehand, as discussed in this dissertation. This shows the delicate balance of rights, privileges as well as responsibilities that prosecution and defense have to seek and observe not to infringe the rights while at the same time, avoid any damage to truth finding during trial. How do we explain these features of legal system of Pakistan? Many

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[135] In Fiaz Fareed vs. the State etc., Court in Criminal Revision No. 7 of 2016, Mr. Justice Khalid Mahmood Malik in his judgment has decided the issue that ipse dixit of police is not binding upon the Court. This judgement relied upon the case of "Haji Mehboob Khan and another vs. The State" (2002 P. Cr.L.J 340). See aslo file:///C:/Users/hp/Downloads/Criminal%20Revision%20No.%207%20of%202016.pdf (accessed on 04-09-2019 at 3:43 am).

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

theories have been formulated in the past to explain the legal systems having afore-mentioned features and such theories are similarly applicable on the criminal judicial system in Pakistan.

2.5 Theorization of Trial

If we look at the philosophical aspect of criminal law theories, theories can broadly be classified into either analytical or normative.[137] Analytical theorist seek to explain a multitude of concepts in criminal law. For example, crime and its metaphysical nature.[138] Analytical theorist do not need a strict and historical definition of criminal law. Yet analytical theories of criminal law may explain feature of criminal law and the structural explanations as well. On the other hand, normative theorists not just explain the meaning of criminal law but other aspects as well. For example, a normative theorist tries to perceive what is criminal law? Why and what it ought to? Whether it ought to be at all or not. The normative account of a criminal law theory will also study the scope, values as well as structure of a trial. Then plausible answers will be sought to satisfy these questions through proposal of different theories and their application to criminal law and trial. Normative theorist will also argue the basic purpose of criminal trial and will consider that the metaphysical aspect of criminal law can be discovered through in-depth analysis of its concept and will reveal the moral reasons for conducting a trial.[139]

Many substantial scholarly attempts in the recent past has been made to explain the theories of trial.[140] Scholars like Barry Turner are against sticking law to a single theory. According to him:

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[137]Husak, Douglas N. *The philosophy of criminal law: Selected essays*. Oxford University Press, USA, 2010. 5:357

[138]Duff, Antony. "Theories of criminal law." *Stanford Encyclopedia of Philosophy* ,D Husak referred by Duff, (2011).

[139]https://stanford.library.sydney.edu.au/archives/spr2013/entries/criminal-law/ (accessed on 03-06-2017 at 3:37 am).

[140]Hagan, Frank E., and Leah E. Daigle. *Introduction to criminology: Theories, methods, and criminal behavior*. Sage Publications, 2018.

Law is not an exact science so there is no need to prefer one legal theory over another. All theories have positive contributions to make and one or the other is more appropriate at different times. Trying to tie down the law definitely is like attempting to tether the wind.[141]

Yet theorization is a necessary paradigm of explaining law logically. Theories give the rational explanation of the practices prevalent in a legal system. Theories fabricate facts, and they construct facts from data. How theories build the process of trial will be discussed below by comparing different theories of trial in the legal world. Also, the theories most prevalent and relevant to Pakistan will also be discussed. The intrinsic desire of legal system whose ultimate aim is truth finding is adversarial in nature. Does this quest of finding truth leads to fairness in decisions and the aim of protection for people from oppression is guaranteed?

Different scholars have tried explaining trial according to their own way. Antony Duff et al, consider trial to be a procedure which is placed by the society to keep a check on the conduct of its members, especially in case of a criminal act.[142] This way Duff et al, consider trial as a way of communicative process between contesting parties or individuals. On the other hand Robert Burns defines trial as an indispensable tool of normative process if the need to settle dispute arises and rule of law needs to be realized.[143]Thus trial can simply be summarized as determination of guilt or innocence[144] through a set of pre-set rules about what actually happened in an incident. The value of trial is more paramount for the society as it serves bigger and deeper issues than merely punishing the culprit. Although this itself is vital in retaining balance in the

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[141]https://www.researchgate.net/post/What_do_you_think_is_the_best_theory_or_conception_of_law (accessed on 22-07-2016 at 05:12 am.)
[142]Antony Duff, et al (Ed.), *The Trial on Trial*, volume three, Hart Publishing, 2007, 3.
[143]R Burns, *A Theory of Trial*, Princeton: NJ Princeton University Press, 1999, 11.
[144]https://www.nolo.com/legal-encyclopedia/criminal-trials (accessed on 1-08-2018 at 2:54 am.)

society but pertains to one aspect of the ultimate focus of finding truth. Accused has numerous rights which should be protected partially in order to make sure that verdicts are truthful and correct but also to ensure that these accurate verdict are obtained without jeopardizing the dignity and respect of the citizens that they enjoy as human beings as well as the citizens of the state. Another object to our focus on criminal trial might come from those interested in restorative justice. Since it fails to meet the concerns that we should have about both offenders and victim of crime, trials and punishments tend to lead to the social exclusion of offenders rather than to their reintegration into society. Although Nils Christies believes that the perfect victim is only **'the old lady'** yet the need of victim who in Nils Christies' memorable phrase has their conflicts **'Stolen by the state.'**[145]

Langbein consider the development of modern adversary trial as defective, owing to the fact that the 'wealth effect' can give undue advantages to the wealthy and powerful defendants and the 'combat effect' can hinder the discovery of truth due to insufficient means.[146] According to Langbein, the ultimate aim of trial is truth finding. The development of modern trial has been so shaped that a continuous process of amendments and improvements have emphasized on creating balance between prosecution and defense. He argues that, there is an inherent normative concept of 'balance' at the core of the historical development of the trial to '**even up**' between the two arms, even if this was rarely articulated by contemporaries. The prime objective behind these successive '**improvements**' in trial has the epistemic aim of equality with justice and fairness and avoid either parties from evolving a '**permanent advantage'.** Such understanding can create

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[145]http://criticallegalthinking.com/2015/08/05/nils-christies-ideal-victim-applied-from-lions-to-swarms/ (accessed on 19-02-2017 at 3:17 am.)

[146]Langbein, John H., and AW Brian Simpson. *The origins of adversary criminal trial*. Oxford University Press on Demand, 2003.

a better understanding of normative concept in developing theory than emphasis on truth finding in a fair and just trial. This places, according to Langbein, the development of the trial in its specific legal, political and social context as theorization about trial, is considered by many scholars as 'still at a nascent stage',[147] only truth and fairness and the idea of balance between the two arms cannot carry the development of normative theory very far. Many questions need answering when developing a theory of trial. Especially in case of Pakistan, the length of trial against the agony that litigants face. Also is the aim of all the players in a courtroom the truth finding or winning is the aim of lawyers setting aside the moral values against monetary gains? Such and many more questions have remained unanswered as the proceedings in a criminal court seek different ethos than what they have taken shape over time.[148] The value of trial is increasingly called into question by the followers of different kinds of theories that are intended to address more profound, the needs of victim and participation of accused to be part of process.

Although there are many theories regarding fair trial in the adversarial system prevalent in common law countries, yet they are considered by many theorists as in an 'embryonic stage'. Moreover, Goodpastor believes that these theories may explain different aspects of fair trial but fail to give a complete and comprehensive account of right to fair trial and its components.[149] There are many theories in legal arenas that explain aspects and reasoning for legal practices and norms of a trial that this dissertation will explain, but the biggest hurdle is that although these theories explain different features, they do not give comprehensive and complete picture of the

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[147]Antony Duff, et al (Ed.), *The Trial on Trial*, volume three, Hart Publishing, 2007, 2.

[148]Firestone, Gregory, and Janet Weinstein. "In the best interests of children: A proposal to transform the adversarial system." *Family Court Review* 42, no. 2 (2004): 203-215.

[149]Goodpaster, Gary. "On the theory of American adversary criminal trial." *J. Crim. L. & Criminology* 78 (1987): 118.

legal system prevalent in Pakistan.[150] Since the foremost intention of conducting a trial is the search for truth, it is yet to be seen whether these theories produce publicly acceptable conclusions pertaining to legal norms and how much of it is part of true facts of an incident[151].

This dissertation will approach theorization of trial through two aspects i.e., intrinsic and extrinsic. The study of trial itself is intrinsic in nature where the quest to find truth is the ultimate goal of conducting trial. Since this dissertation will be developed normatively instead of analytically, the most over-arching theory that fits the legal scenario in Pakistan will be developed and analyzed by this dissertation. In order to see how application of the most relevant theory, according to this researcher under the existing adversarial system develops, prevalent theories will be discussed below. As right to fair trial is a basic human right recognized by almost all international and regional bodies, this concept can have a multitude of theories applicable to it. Sociological, biological, psychological, natural and classical aspects of human nature individually and social aspect collectively can be discussed under right to fair trial. Due to shortage of space and time, this researcher is aiming to discuss some of the prominent theories of fair trial under adversarial system. Out of many theories, following are a few which are most relevant to the development of theoretical framework of this dissertation:

1. The Rights theory
2. Bargaining Incentive theory
3. The Norm theory
4. Truth-Finding theory

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[150]Yilmaz, Ihsan. *Muslim laws, politics and society in modern nation states: Dynamic legal pluralisms in England, Turkey and Pakistan*. Routledge, 2016.
[151]Goodpaster, Gary. "On the theory of American adversary criminal trial." *J. Crim. L. & Criminology* 78 (1987): 123.

5. Fair Decision theory

1. The Rights Theory

First proposed by David Luban in 1983 in his book **"The Good lawyer: lawyers' roles and lawyers' ethics"** the Rights theory discusses the defendants' rights. This theory proposes the trial rights of defendants are so constructed as to make the prosecution difficult to win any trial. This is because the tilt towards protection of defendants is more observable in adversary trial procedure. The huge machinery of government with its vast resources, acting as prosecution must not use its advantage over accused to use the power of prosecution to persecute the defendants. This theory inherently considers ulterior motives of the government as either politically motivated or power-drenched under the guise of truth finding and fairness in decision. Although both of these concepts have been central to the Rights theory, yet, according to this theory, the accused/defendants' rights in current trial procedures are a means to protect all citizens from possible abuse of the power and resources of government.[152]

Since Government is possibly the biggest and the most powerful institute in any country having tremendous resources, judges are also essentially government officials too. Thus, the inherent tendency of judges either towards governmental or bureaucratic justice of calculable rules and regulations render the trial proceedings prone to misdemeanours of impartial justice during trial. According to the Rights theorists, inherent trend of judging seems to be tilted towards **"dehumanized administration of calculable rules"**.[153] Whereas trial rights are a check to government's role in influencing favourable outcomes of trial that may serve the purpose of the government agenda. Since adversary trial are considered neither accurate nor reliable

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[152]Luban, David. "The Good Lawyer: Lawyers' Roles and Lawyers' Ethics." (1984).
[153]Weber, Max. *Max Weber on law in economy and society (20th century legal philosophy series)*. Berkeley: University of California Press, 1978. Pg. 976.

determination of factual analysis, both defendants as well as prosecution run the risk of flawed convictions or acquittals. The rights theory displays a concern for both of these sides where error of judgement is concerned. More so, if there is a chance of such error in trial, the rights theorist would like to have a case of erroneous acquittal than conviction. The motive behind this move is the protection of human life and dignity with human rights. Thus, the set of rights should be structurally inclined towards acquittals.[154]

How rights theory proposes to achieve this lofty, yet noble aim is through different approaches. According to Gary Goodpastor, one way is to make the job of prosecution more complicated in order to reduce the error of judgement during trial. Yet another possible way would be to equalize the resources of prosecution and defense to reduce the wrongful convictions during trial. According to rights theorist, **"a system of trial rights is the only available means to check governmental power"** in an adversary system.[155] The right theory has essentially risen from the weakness of adversary trial system as an accurate and fool-proof method of discovering truth because trial, in the view of rights theory, is so politically designed as to expand government power to harass or punish people through criminal proceedings.

According to Freedman, the rights theory can essentially be considered as a testing theory as they explain the characteristics of criminal trials with respect to the unilateral burden placed on the shoulders of prosecutor. The rights theory which according to some researchers is based on the 'dignity'[156] of human person. Siding with weak and oppressed has always had a poetic charm it it against the mighty and powerful institutions of the government. As this is a noble notion which

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[154]Schwartz, Murray L. "The zeal of the civil advocate." *American Bar Foundation Research Journal* 8, no. 3 (1983): 543-563.
[155]Beattie, John Maurice. *Crime and the Courts in England, 1660-1800*. Vol. 404. Princeton, NJ: Princeton University Press, 1986.
[156]Freedman, Monroe H. "Lawyers' ethics in an adversary system." (1975). 3-4

gives inherent rights to human beings and their subsequent treatment by the law enforcing agencies in case of an error in their dealings of the society, yet according to this researcher, rights theory is not adequate enough to elucidate and fully explain the fair trial rights. According to this researcher in present adversarial system, enforcing a regime in which the rights of prosecution and defense are equal may not be possible, owing to the huge amount of resources at the disposal of government machinery which is not possible for an individual. Moreover, what the rights theorist demands, can only be met with strong political and legislative decisions which can not only handicap government in during trial proceedings, but also calls for exclusion of probative evidence. Such set of rules, although considered as **'essentials conventional rules for due process,'** according to Freedman may cause serious distortions in factual hearing and the protection of basic human rights. But most importantly, like many other theories discussed below, the chief aim that defendants follow is the aim to 'win' rather than finding truth. The defense cannot be the 'knights-in-shining-armour' as the **'win ethoses'** of defense lawyers often pursue to enforce rights merely to obstruct discovery of truth rather than ensuring the preservation of constitutional rights of individuals. Thus, it can safely be said that rights theory provides protection of fundamental rights to individual theoretically but, according to Goodpastor, gives a credible account of truth dis-functionality of criminal trials.

2. Bargaining Incentive Theory

Compared to the rights theory, bargaining incentive theory altogether considers criminal trials as an exceptional and often unnecessary way of disposing off trials. Although considered an offshoot of rights theory, settlement of a criminal incident between prosecution and defense through bargaining is the way of settling an accord. According to this theory, both prosecution and defense, during trial are in a state of equilibrium. This is because of degree of risk lawyers,

(in some countries) juries etc., and the set circumstances that are created in a trial. The advantages that both the parties have over each other make the outcome of trial unpredictable as well as risky. Although defense has the advantage of prior knowledge of the parameters of the case, as is customary in adversarial trial, according to bargain incentive theorist, the vast resources and expertise of prosecution balances the centre of gains as well as losses equally to both sides.

Since the outcomes of adversarial trial is usually unpredictable to some degree, the bargains incentive theorist considers it wastage of precious resources for both prosecution as well as defense and a great risk as far as outcome is concerned. Gary Goodpastor[157] considers it in the following words, **"The uncertainty of result is so high, and the risk of loss is so great, that the parties are strongly influenced to compromise their positions and reach a negotiated settlement".**

Bargaining incentive theory represents the functional system of adversarial system in a way that it explains the practical implications of adversarial system. Compared to the Rights theorist, the bargaining incentive theorist admits the purpose of trial is not so structured as to be the chief instrument of creating balance of power amongst prosecution and defense. According to these researchers, adversarial system is the product of a series of adaptive mechanisms aimed at serving the purpose of, as already discussed earlier in this chapter, creating peace with a sense of justice being served to the masses. The present shape of adversarial system, although evolved to a set of very different ethos, should still keep in sight the original purpose for which trials were conducted.

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[157]Goodpaster, Gary. "On the theory of American adversary criminal trial." *J. Crim. L. & Criminology* 78 (1987): 139.

Bargaining incentive theory, according to Gary Goodpastor, can be resembled to the axiom of **"brushing the problem under carpet"**. This is because in bargaining theory, problem seems to disappear with the simple denial to see and acknowledge it. One of the major reasons for this is the backlog of millions of cases in our present adversarial system. Since the outcome of a trial is never certain, several million cases annually rely on the bargaining incentive system.[158] According to bargaining theorist, prosecution also seeks to try only those cases where the margin of wining the trial is more obvious. The defendants on the other hand, according toLisa Kern Griffin, because of their reliance on governmental support for the provision of counsel, cannot sustain the pressure of delays in decision of their cases. This is partially due to the **"staggering caseloads and minimal standards have produced an acute crisis in that system".**

Critics of bargaining incentive theory present their case. According to prof. Ribstein, **"prosecutors can avoid the need to test their theories at trial by using significant leverage to virtually force even innocent, or at least questionably guilty, defendants to plead guilty".**[159] According to US Sentencing Commission 2010, 95% of defendants **"succumb"** to the power of bargained justice.[160] Such a glimpse of statistics show how deep running bargaining incentive theory is in our current justice system. This notion of speedy resolve can end the need for trial for a criminal happening as well as the allied problems for both defendants as well as defense, but the quest for searching truth gets lost on the way.

As the chief aim of developing and adopting a theoretical framework in this dissertation is the quest to truth finding, this researcher observes that a bargaining incentive theorist is mainly

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[158]Griffin, Lisa Kern. "State incentives, plea bargaining regulation, and the failed market for indigent defense." *Law & Contemp. Probs.* 80 (2017): 83.
[159]Ribstein, Larry E. "Agents Prosecuting Agents." *JL Econ. & Pol'y* 7 (2010): 617.
[160]Sessions III, William K. "At the Crossroads of the Three Branches: The US Sentencing Commission's Attempt to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles." *JL & Pol.* 26 (2010): 305.

concerned with finding a solution to an existing problem through the incentive of bargaining instead of truth finding. He has, no concern with the **"issues of truth finding, fairness in trial and its side constraints".** Although a lot of cases in the world are still resolved through guilty pleas, yet cases tried through trial is gaining momentum. This shows that the trust of masses on fairness on trial and due process has somehow retained its trust, despite reservations as well as traditionally running systems. One such system in Pakistan which is very different but relatable to bargaining incentive theory is the system of Jirga and Panchayat[161] in different areas of Pakistan.

3. The Norm Theory.

Another theory that we can bring in our discussion of theorization is the norm theory. The most relevant explanation of norms theory can be traced to Nesson who believes that the primary purpose of trial is to introduce behavioural norms and moral ethics in the society.[162] Punishing the wrong doer is a decision that affect an individual, yet produces far greater impact of correcting the societal behaviours and norms by reinforcing moral values. According to Nesson,[163] the objective of adversarial trial is to create **"acceptable conclusions and thus to project substantive legal rules".** According to norm theorists, decisions announced by judge in a trial are projection of norms through verdicts. We can relate the norm theory again to truth finding that the verdict announced can only be termed as a norm if it is accepted by the concerned parties as well as general masses. Such acceptance can only be generated if people

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[161]Shah, Ali Shan, and Shahnaz Tariq. "Implications of Parallel Justice System (Panchyat and Jirga) on Society." *People* 2 (2013): 200-209.
[162]Nesson, Charles R. "Reasonable doubt and permissive inferences: The value of complexity." *Harv. L. Rev.* 92 (1978): 1187.
[163]Nesson, Charles. "The evidence or the event? On judicial proof and the acceptability of verdicts." *Harvard Law Review* (1985): 1357-1392.

believe in the verdict and subsequently people believe in a verdict only if it correctly portrays what happened. This gives rise to the notion that norm is accepted if they fulfil the quest for truth-finding.

Although the roots of norm theory can be traced back to the sociological paradigms presented by the great French sociologist Emily Durkheim,[164] yet Thurman Arnold was the first scholar in 1962 to apply norm theory to trials.[165] Arnold believes in the symbolic characterization of conduction of trials as an emphasis of morals in a society. Trials, according to him are 'a series of object lesson and examples' which is the biggest parameter of how morally correct the government is. The dignity of state, as an effective enforcer of law and order through due process collectively as well as at the individual level, can be gauged by taking a look at criminal trials.[166] Trials play much deeper and multi-faced role in the society when shaping the present norms or dictating the future trends.

Norm theorist believes that trial is litmus test of the credibility for prosecution's case. In an adversarial system, prosecution has to pass through the rigorous standards of proving the burden of proof, lack of prior knowledge of events and exclusion of relatable evidence.[167] Winning a case by prosecution in spite of all these hurdles, is a case of convincing guilty of accused and

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[164]Lukes, Steven, ed. *Emile Durkheim: The Rules of Sociological Method: and Selected Texts on Sociology and Its Method.* Palgrave Macmillan, 2013.

[165]Catlin, G. "Emile Durkheim: The rules of sociological method." (1938).
As there is no definitive statement of "norm theory" in the literature. The basic claim of the theory, for the purpose of social rituals is to constitute community, can be traced back to the great French sociologist, Emile Durkheim. The judicial trial thus becomes a series of object lessons and examples. It is a way in which society is trained in right ways of thought and action, not by compulsion, but by parables which it interprets and follows voluntarily. . . . For most persons, the criminal trial overshadows all other ceremonies as a dramatization of the values of our spiritual government, representing the dignity of the State as an enforcer of law, and at the same time the dignity of the individual when he is an avowed opponent of the State, a dissenter, a radical, or even a criminal.

[166]Catlin, G. "Emile Durkheim: The rules of sociological method." (1938).

[167]Wells, Gary L., Amina Memon, and Steven D. Penrod. "Eyewitness evidence: Improving its probative value." *Psychological science in the public interest* 7, no. 2 (2006): 45-75.

creates norms as a precedent in the society. Since position of trial in norms theory, is much greater than giving punishment to the accused, the defense retrospectively present the most plausible evidence as defense, even if it is false. Like many other theories discussed, the main purpose of both defense as well as prosecution is to win. As winning is taken as truth, whether it actually is or not. Moreover, a system that grants more convictions than acquittals is naturally taken as more reliable. Thus, norm theory supports adversarial system with more convictions than acquittals, thereby risking conviction of innocent accused as well. In an adversarial system under norm theory, trial is structures around public acceptance. In Pakistan, the present judicial system is unnoticeably inching towards the phenomenon of public acceptance. The pressure on government is increasing with regard tothe enforcement of fundamental rights namely fair trial rights, whenever a question of '**public** importance' arises.[168] As far as norm theory is concerned, a long term reliance on structure of trial based on public opinion is bound to lose public confidence. If, for example, probative evidence is withheld during a trial, it can cause serious damage to the trust that public places in the institute of courts and trial.

While discussing norm theory, many questions arises as to what norms theory is? How public perceives it? How a judgement incorporates norm and what meaning is perceived in it? How is it transmitted to the general public? And, how and to what extent public accepts that norm? A judgment of a trial is the sum total of the events that happened, and the result deduced of it. In this way a judgment or verdict is a norm but is deficient of the specifications that we expect from the norms and values that are expected of something that falls within the category of norm. whatever comes in the fold of norm is something that is evolved over a certain period, passing

[168]Hussain, Faqir. *The judicial system of Pakistan*. Supreme Court of Pakistan, 2011.

through many trials and errors and thus attaining its acceptable form. Verdicts may be such general condemnations or exonerations that they are vacuous and may either coincide or be contradictory to a norm. The notion of public acceptance may have bombastic appeal, but it lacks substance. Like other questions, this question also arises for norm theorist. What if public stops accepting trial results? The norm theorist is silent over this otherwise observation regarding this theory.

According to Goodpastor, Nesson is the theorist who gave the most accurate link between norm theory and conduction of trial and advanced norm theory as a general description of adversarial trial. According to this theory, the real happening of a trial is not imperative, rather what general masses believe is important. Therefore, the components and structure of trial should be so developed that public accepts it as truth. The fine difference between actual truth and truth apparent renders norm theory incomplete in its essence of providing explanation to fairness in trial and due process. As according to this researcher as well as numerous stalwarts of law research, the basic aim of a trial is and should be the finding of truth, norm theory cannot be used in this dissertation. No doubt, norm theory looks at the bigger picture of betterment of a society, yet without the actual truth of a series of events, for which atrial is conducted, may go useless. No societal setup can truly have justice for individuals at apparent fault as well as collective groups without finding the truth. This lacuna leads us to the truth-finding theory of trial.

4. Truth-Finding Theory.

The notion of who purposed truth finding theory takes us in history a long time back. The first vague mention of truth finding in trial was given in the Metaphysics by the great philosophers

Plato and Aristotle.[169] The theory proposes that any fact or statement can be regarded as true if a corresponding fact is there to prove it.[170] The major question arises as to what is truth? How to find it and what are its dimensions in criminal trial? This philosophical dilemma of truth has been with us for a long time. In the first century AD, Pontius Pilate asked "What is truth?" but no explanation came forward. Mankind has been in search of what can really termed as truth and the recent times have seen an increase in the quest to find the meaning of truth. In the last century or so, significant progress has been seen in studying the notion of truth and how to find means and ways to discover it.[171] During centuries of changes, nearly all legal systems have been developed on the notion of truth finding. In adversarial system, the track to factual truth leads through evidence which is processed in a rational manner to find out the actual series of events as it happened.[172]

The proclamation that **"truth is best discovered by powerful statements on both sides of a question"**[173] is at the heart of adversarial system. Despite this ideological claim, many critics do not consider adversary system to be the best tool to discover what actually happened. Questions posed by the critics are, does the process that is meant to serve justice to the aggrieved puts more emphasis on finding truth or resolve differences and controversaries? Can people from different sociological and economic background enjoy equal access to legal services?[174]

The trial of O.J. Simpson in 1995 when broadcasted to millions of people in America, cast a shadow of doubt on the truth finding capacity of adversarial system. It seemed that the search for

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[169]https://plato.stanford.edu/entries/truth-pragmatic/ (accessed on 27-02-2016 at 03:27 am.)
[170]https://www.iep.utm.edu/truth/ (accessed on 27-0202016 at 04:02 am.)
[171]https://www.iep.utm.edu/truth/ (accessed on 03-07-2017 at 4: 12 am).
[172]Risinger, D. Michael. "Searching for Truth in the American Law of Evidence and Proof." *Ga. L. Rev.* 47 (2012): 801.
[173]United States v. Cronic, 466 U.S. 648, 655 .This view is also shared by adversary system critics. Cf., e.g., M. FRANKEL, supra note 1, at 6, 87;J. FRANK, supra note 1, at 80-102, 108-25(1984).
[174]https://legal-dictionary.thefreedictionary.com/Adversary+System (accessed on 3-08-2108 at 3:41 am.)

truth seemed to be lost in lengthy and many times unnecessary arguments by the lawyers. Also, a close look at the proceedings during a trial, show parties inevitably shaping evidence in commitment to win rather than discovering the truth. This has been true in many jurisdictions, including in Pakistan, the rule of unilateral discovery of facts by the prosecution inevitably tilts the trial towards defense which gets the time and facts to modify and manipulate facts to its advantage whereas no such obligation can be put to the defense.[175] Also, the privilege against self-incrimination to the defendant throws the balance between the two arms way out of proportion.

In an adversarial system, trial can be considered as essentially a communicative process where defendant and accused both get the chance to express their innocence in the light circumstantial evidence. The role of judge is of a passive listener who has to use law and judgment of his own to decide between right and wrong.[176] Thus the quest to discover truth lies in the convincing power of arguments. The occurrence and then presentation of the evidence is the main criterion for truth-finding during trial.

The question about the relationship between epistemic aim of trial and process through which those aims are pursued, are required in to prove certain facts about the accused to justify conviction. It is generally accepted that accused have certain rights and if those rights are violated in pursuit of their conviction they might have been wrongly convicted and it would to consider interference with accused rights. We need a proper way to address the needs of offenders and of victims. The reason to develop normative model of criminal trial as an essentially public process. The truth finding theory can be built by building a conception of

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[175]Langbein, John H., and AW Brian Simpson. *The origins of adversary criminal trial*. Oxford University Press on Demand, 2003.
[176]Luhmann, Niklas. *A sociological theory of law*. Routledge, 2013.

adversarial trials.[177] The criminal procedure is based different factors to reach the truth. This would allow us to ground our theory effectively in its historical context as our theory of trial is developed through historical scrutiny. There are two points to make in response to this view Langbein action of development of modern adversarial trial. Firstly he is explicitly seeking to discover the origins of what he sees the defect of modern American trial describes the wealth effect (the wealthy accused with access to lawyers are able to gain advantages and thus distort trial outcome) and secondly, the combat effect that adversarial procedure provides in the legal system. It is clear that for Langbein, adversarial system is an inefficient means of discovering the truth whose process is continually being measured. Langbein is seeking to reconstruct the normative understanding of a particular historical development or bringing his own contemporary view to bear on a historical debate.

The modern trial has been shaped historically by successive attempts to restore a balance between prosecution and defense. This idea of fairness or balance will not take us very far, since we must additionally look at the question of which actors were considered to be part of this balancing process and why, and this will require some principles and rules. The development of fair trial as an institution responds to and in turn shapes broader social changes in understandings of the legal subject, of the role of the law and legal institutions, of the definition and protection of liberties, and of the capacity of the trial to determine or reconstruct the "truth" of particular events during main stages in the development of criminal trial. The idea that "truth" is best discovered by confronting the accused with the charges and evidence at the trial, rather than allowing them to see the charge and witnesses in advance and to prepare a defense.

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[177]Glos, George E. "The Normative Theory of Law." *Wm. & Mary L. Rev.* 11 (1969): 151. See also Whittington, Keith E. "Presidential challenges to judicial supremacy and the politics of constitutional meaning." *Polity*33, no. 3 (2001): 365-395.

Since there is a very delicate balance between the rights of accused as well as the over-burdening of prosecution resulting in protection of basic rights of an accused, the duty of prosecution to ascertain a crime beyond reasonable shadow of doubt creates many difficulties in framing and shaping of evidence, thus burdening the quest of truth-finding, sometimes to the extent of its complete loss during trial.[178] The structural truth dysfunction of adversarial theory has given rise to 'fair decision theory' of trial which will be discussed and compared in this dissertation. Although the truth-finding theory and fair decision theory can be summed up under the umbrella of adversarial theory as essentially two sides of the same coin. They can be considered as twin purpose of adversary trials.[179]

5. Fair Decision Theory.

The idea of fair decision theory can be derived from the work of Fuller.[180] Considered as one of top four legal theorists of the last century[181] Fuller argues that all systems of law contain an **"internal morality"** that enforces on individuals a probable responsibility of submission. According to Fuller, adversary trial system has the means to flourish the morality of a person to that extent that his/her decision becomes impartial, empathetic and free from prejudice. Fair decision theory emphasizes on a procedure for resolving problem which is accepted to both prosecution and defense. Since trial is considered to be a contest between two rivals, who through evidence and argument try to prove their point, fair decision theory considers that trial itself is not the appropriate way of finding truth as truth is probably unknowable. Since the

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[178]Goodpaster, Gary. "On the theory of American adversary criminal trial." *J. Crim. L. & Criminology* 78 (1987): 118.

[179]https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/justice-and-fairness/ (accessed on 5-08-2018 at 10:32 am.)

[180]Allison, J. W. F. "Fuller's analysis of polycentric disputes and the limits of adjudication." *The Cambridge Law Journal* 53, no. 2 (1994): 367-383.

[181]Summers, Robert S. "Fuller on Legal Education." *J. Legal Education* 34 (1984): 8.

dispute in an adversarial system is usually considered to be between state and individual/s, the best way to do justice is to provide a resolution mechanism that is fair to both the parties.[182] Since the decision maker is considered to be unbiased and impartial, the desire to win, as long as it do not affect the power of government machinery to influence the outcome of that decision, remains a fair one. This 'broader fairness in trial' demand is to equalize the advantages and disadvantages in a trial to both the contesting parties.[183] As in reality, the scope of resources of government machinery is way gigantic than an individual, no matter how resourceful, an accused unilateral right to fair trial and due process stand in serious jeopardy.[184]

As fair decision theory believes in fairness in decision which is acceptable to both prosecution as well as defense. Yet the determinants of adversarial system do not display such balance between the two arms. The obligations of prosecution to provide unilateral discovery of evidence and to prove the case beyond reasonable shadow of doubt are not reciprocated by defense. Right against self-incrimination and right to jury trial to defense and other such provisions provide an imbalanced set of rights between prosecution and defense both qualitatively as well as quantitatively. Fairness according to Goodpastor is a **"matter of equalizing advantages and disadvantages"** between the two arms. Since application of fair decision theory is not possible in the existing adversarial system with the benefit of rights tilted towards the defense and burden of obligations towards prosecution, fair decision theory alone cannot satisfy the right to fair trial in the existing adversarial system. It may be possible to apply fair decision theory in system

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[182]Bone, Robert G. "Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation." *BUL rev.* 75 (1995): 1273.
This appears to be the thrust of Fuller's argument. Fuller.

In the end, the justification for the adversary system lies in the fact that it is a means by which the capacities of the individual may be lifted to the point where he gains the power to view reality through eyes other than his own, where he is able to become as impartial, and as free from prejudice, as "the lot of humanity will admit." Id. at 47.
[183]Davidson, Donald. "A coherence theory of truth and knowledge." *Epistemology: an anthology* (2000): 154-163.
[184]https://plato.stanford.edu/entries/libertarianism/ (accessed on 5-08-2018 at 10:17 am.)

other than adversarial system like the European inquisitorial or investigative criminal trial system.[185] Since Pakistan has adversarial system in place, thus fair decision theory is not capable to handle components of trial rights especially fair trial rights in our country.

2.6 Extrinsic and Intrinsic Approach in Adversarial System

Out of the two approaches that adversarial system follows, at least, ideologically is the quest for truth. This can also be interpreted as intrinsic approach of a trial. Trial can be considered a tool of careful scrutiny of facts. Theories, on the other hand fabricate facts, and they construct facts from data.[186] As Gary Goodpaster argues, to put it simply, a trial aims at discovering "what happened".[187] Truth-finding, for which facts, figures and materials provide 'proof' or evidence to prove a certain proposition.[188] In this perspective, Duff et al argue it to be to theories of different aspects of trial, not a general theory of trial.[189] Duff et al further argue that while constructing a general theory of trial, questions arise firstly, 'what the trial's epistemic aim is or should be?', and secondly, what is 'the relationship between the epistemic aims of the trial and the process (due process rights of a defendant) through which those aims are pursued'? [190] It is further to be resolved whether 'truth is the ultimate aim sought, or truth is part of some more ambitious aim

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[185]Langbein, John H. "The criminal trial before the lawyers." *The University of Chicago Law Review* 45, no. 2 (1978): 263-316.
[186]Hanson, Norwood Russell. *Patterns of discovery: An inquiry into the conceptual foundations of science*. Vol. 251. CUP Archive, 1958.
[187]Gary Goodpaster, 'On the Theory of American Adversary Criminal Trial', 78(1) *Journal of Criminal Law and Criminology*, 1978, pp 118-154, at p121.
[188]R Burns, *A Theory of Trial*, Princeton: NJ Princeton University Press, 1999, 21.
[189]Antony Duff, et al (Ed.), *The Trial on Trial*, volume three, Hart Publishing, 2007, 5.
[190]Ibid. 6.

that the trial might have?'[191] Furthermore, an inherent problem in adversarial trial is that parties, being in control of proceedings, are not interested in conscious striving of truth finding.[192]

The other aspect of fair trial theorization is through extrinsic approach that argues trial to have social and political ramifications. Arguing from the rule of law perspective, Burns pinpoints four foundations of trial.[193] First is 'the legitimacy of law to a version of popular sovereignty'. Second, the rule of laws helps in guarding against the abuse of power by state's individual actors. Third, the rule of law operates a limitation on the state's power in order to protect liberty. Lastly, the rule of law seeks to ensure consistency by treating similar cases similarly on the principle of equal respect for persons. Burns' rule of law perspective is closely linked to Hock Lai's liberal theory of criminal trial. Lai argues that a criminal court is an institution of a liberal state and liberal institution of the state.[194] In a liberal democracy, state (notably the executive) is accountable (through courts) to those over whom it exercises power (individual liberty). In this perspective, Lai argues, a criminal trial is an aspect of this 'form of accountability polity.'[195]

2.7 Truth Finding and Critics of Adversarial System

There are always critics of any system prevailing and functioning in the society. Trial itself which occupies central position, at least qualitatively, under adversarial system is no different as criticism comes from all walks of life, even the system itself. Trial, once mighty emblem of justice, was considered a just and open way of finding truth. The trial has always, for instances, been concerned with truth. There was some historical interest in discovering the different

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[191]Ibid.
[192]Goodpaster, p 78.
[193]R Burns, *A Theory of Trial*, Princeton: NJ Princeton University Press, 1999, 21.
[194]Ho Hock Lai, 'Liberalism and the Criminal Trial', 32 *Sydney Law Review*, 2010, pp 243-256.
[195]Ibid, p 244.

processes. Perhaps modern law critics like the late Chief Justice Warren e. Burger[196] was candid in his criticizing of the system and of lawyers, asserting that, **"They are too numerous and too zealous, that they file too many frivolous lawsuits and motions, and that there is general failure within the system to encourage out-of-court settlements".**

Burger pointed out that Alternative Dispute Resolution (ADR)[197] could be a feasible substitute as non-litigious resolution. Arbitration or mediation was also considered an important tool by him to reduce court congestion. Adversary system, although one of the most widely used trial system, is considered to be lengthy and cumbersome. One of the reasons is that trial is based on evidence which is provided from both the parties of trial in favor of their arguments. The judge is a neutral person who has little control over the proceedings of the trial. In order to try to find the truth, it may take years for a case to be finally decided. The appellate review and right to appeal further lengthens the time period of a trial. This problem has been taken seriously in the legal circles and recent efforts have been made to divert the discords towards settlements instead of going for a trial. The practicality of time and lessening of financial and social burden has put great appeal to alternate dispute resolution mechanisms. Yet the dispute resolution also has a considerable amount of time allocation to itself and the changing verdicts create a certain level of uncertainty to it. On the other hand adversary system though lengthy and cumbersome, is systematic and the most appropriate mechanism for upholding the basic human rights of individuals.[198] Other critics like Marvin Frankel believes that although the chief aim of adversarial trial is truth finding, yet:

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[196]Burger, Warren E., and Earl Warren. "Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal." *American Bar Association Journal* (1973): 721-730.
[197]Gordon, Robert, Maurine Skeeters, Leon Peek, and Daniel Brookshier. "Alternative dispute resolution preparation method and systems." U.S. Patent Application 09/895,675, filed March 21, 2002.
[198]https://legal-dictionary.thefreedictionary.com/Adversary+System (accessed on 22-07-2019 at 4:34 am.)

as against the yielding up of everything, we are accustomed to strenuous debates about giving a supposedly laggard or less energetic party a share in his adversary's litigation property safeguarded as 'work product'. A lawyer must now surmount partisan loyalty and disclose 'information clearly establishing' frauds by his client or others. But that is a far remove from any duty to turn over all the fruits of factual investigation.[199]

Similarly, Damaska[200] believes that in order to have a just and fair decision, truth in adjudication is achievable and discoverable in principal but, **"Influential currents of contemporary thought are skeptical of truth as a philosophical principle, and they doubt that the acquisition of objective knowledge is possible".**[201]

Another great seeker of truth, J. Frank has been very candid in his opinion regarding the court proceedings and in his light humor kind of 'urge' the judges to remove themselves:

from the business of 'court-house government' as he calls it, all the flimflam and the flummery about the 'majesty,' the 'certainty,' the 'predictability,' the 'scientific' and 'logical' nature of the law, and leaves it stark naked as a chancy and fallible process which manages to achieve justice-if and when it achieves it-mostly by-guess-and-by-God and by the goodwill and good sense of human beings.[202]

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[199]Frankel, Marvin E. "The search for truth: An umpireal view." *University of Pennsylvania Law Review* 123, no. 5 (1975): 1031-1059.
[200]Damaska, Mirjan. "Evidentiary barriers to conviction and two models of criminal procedure: A comparative study." *U. Pa. L. Rev.* 121 (1972): 506.
[201]Damaska, Mirjan. "Truth in adjudication." *Hastings LJ* 49 (1997): 289.
[202]Frank, Jerome. *Courts on trial: Myth and reality in American justice*. Princeton University Press, 1973.

Since Frank is still a supporter of adversarial system, thus he believes that the search for 'pure truth' and the resultant betterment of the trial can be shaped from existing adversarial procedures.

In common law countries, it has been seen that emphasis lies more on winning the case by either party than finding the truth. The moral aspect of this attitude towards a case greatly regresses its morality and damages the real purpose of finding truth. Lawyers are seen to be engaging in arguments which have little regard for truth. Proponents of adversarial system on the other hand, believes that the opposing arguments eventually bring the truth out. The fight has the natural tendency to bring the truth out amongst the fighting opponents. This argumentative nature of adversarial system is its crowning glory that reveals the truth about the events of a trial.

2.8 Application of Truth-Finding theory in Adversarial System in Pakistan

As discussed earlier, many legal scholars believe that fair decision theory is an off-shoot of truth finding theory and they complement the pursuit for truth finding, this researcher believes that truth finding theory can be considered as foundation in developing theory in our quest of truth finding and the depth and validity of process of fair trial in our current legal system. The foremost benefit of adversarial trial system which is prevalent in Pakistan is that despite its lacunas, it is still considered as the best truth-finding system that has been devised. This is because the basic principle on which adversary system is based is the discovery of 'truth' according to socio-legal environment of Pakistan. This thesis would use truth finding theory of criminal trial. The core of that theory is the idea of calling to account: the criminal trial, as a process through which accused are called to answer a charge of criminal wrongdoing. The basic aim of trial in adversarial system is the aim of **"establishing the truth"**. They aim to establish

whether accused committed the offence charge with and whether they are entitled to any defense and whether they can be punished.

Coming to challenges to trial, commentators argue that in the contemporary world, criminal trial is facing many challenges. Firstly, there is a growing call for balancing the defendant's due process rights with the interest of the victim of the crime. Second, case management techniques are posing challenge to the concept of more scientific inquiry at the trial. In England and Wales, this is true because of the restricting role of juries in trial.[203] In Pakistan, the National Judicial Policy[204] has been posing such a challenge. The policy's quick-fix approach to disposal of cases, in a given time frame, leaves little scope for exhaustive trial procedures. For example, the recent claim by the apex court of Pakistan that **"12,584 murder, narcotics cases disposed of by model courts in 5 months"**[205] leaves little to imagination regarding the truth finding prerequisite in an attempt to provide fair trial rights and due process of law. Second, the fight against terrorism has made serious inroads in the domain of fair trial by restricting the defendant's due process rights.[206] Again, Pakistan is no exception. Third, there is a growing trend of deciding criminal cases on basis of guilty plea. Procedural rules aimed at inducing defendants to enter guilty plea for reward of lesser sentence are serving expediency rather than creating a scope for well-defined contested trials. Lastly, the pressure to apply alternative methods of resort to reconciliation and restoration in criminal justice system have placed serious dents in quest for truth-finding and right to fair trial. Restorative justice seeks to bring both the offender and victim by exploring avenues to repair the harm caused due to the commission of a crime.

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[203]Lloyd-Bostock, Sally, and Cheryl Thomas. "Decline of the Little Parliament: Juries and Jury Reform in England and Wales." *Law and Contemp. Probs.* 62 (1999): 7.
[204]http://www.ljcp.gov.pk/NJPMC.html (accessed on 16-02-2018 at 4:47 am.)
[205]https://tribune.com.pk/model-courts/ (accessed on 18-09-2019 at 3:21 am.)
[206]http://www.supremecourt.gov.pk/web/user_files/File/NJP2009.pdf (accessed on 23-03-2018 at 5: 35 am.)

There is little doubt that the present dimensions of prevalent adversarial system in Pakistan lacks some serious inroads to the fair trial rights. Fair trial guarantees in Pakistan's constitution was introduced clearly in article 10-A. the realization of fair trial rights in court proceedings are burdened due to the pressure on the courts to decide cases in an impossibly short time of mere days. It is true that at present such speedy trials are lauded but there is a serious breach of trial rights. On the other hand, the extra-long trial proceedings had emotional, financial and social ramifications for both prosecution as well as defense. The optimum way to find a balance of time management during trial as well as observation of fair trial rights can only be achieved if truth-finding is the ultimate goal of trial. One way, according to J. Frank[207] is the factual accuracy of evidence within a specific time period. Even if truth-finding is sensitive to procedural environment within a court. The continued trust in adversarial system that fair trial guarantees can be ensured as a result of our search for truth can be summarized in the words of the great positivist critic of adversary trial Marvin Frankel:

> **If we must choose between truth and liberty, the decision is not in doubt. If the choice seemed to me that clear and that stark, this essay would never have reached even the tentative form of its present submission. But I think the picture is quite unclear. I lean to the view that we can hope to preserve the benefits of a free, skeptical, contentious bar while paying a lesser price in trickery and obfuscation.**

2.9 Conclusion

[207]Ramsey, Robert J., and James Frank. "Wrongful conviction: Perceptions of criminal justice professionals regarding the frequency of wrongful conviction and the extent of system errors." *Crime & Delinquency* 53, no. 3 (2007): 436-470.

In order to have a deeper understanding of right to fair trial, this chapter has examined the current theories prevalent in criminal justice system and the generalization of these theories. This chapter have discussed the existing theories that are generalized in effect but not specific to the needs of right to fair trial in Pakistan and the challenges this basic human right faces in its implementation in the volatile and often unprecedented circumstances in Pakistan. Truth-finding theory has been discussed in the current legal system of Pakistan which is seen to be inherently adversarial in nature. In its first part, we have examined fair trial rights intrinsically as to what due process in trial means and what theoretical ideas and theories can explain the intricacies of fairness in trial itself and what this right means and in second part the extrinsic aspect of process of fair trial and the effect of due process of law on criminal justice system of Pakistan has been deliberated, in an effort by this dissertation to find truth theoretically. This is especially important as the current trial procedure in Pakistan is adversarial in nature and since finding ways and means to ensure fair trial rights is the main focus of this dissertation, theoretical explanation of the norms of fair trial under truth-finding theoretical framework has been discussed. As we have already discussed that most of the prominent legal systems in the world are currently following adversarial model based on common law. Thus, basic structure of law, protection of basic human rights and the search for truth in an incident have evolved as a common goal in every law arena. How fair trial rights and due process has been developed in the international statutes and covenants will be discussed in the next chapter.

CHAPTER 3

FAIR TRIAL GUARENTEES IN INTERNATIONAL LAW

'Maybe we're all born knowing we have rights - we just need to be reminded'

--- Romanian HRE trainer

3. Introduction

The concept of fair trial as an integral part of law has long been recognized by the law knowing bodies. It is probably this notion that led the statue of lady justice to be blindfolded with a balance in one hand and a sword in the other. If justice and revelation of truth is taken out of trial, its purpose becomes void. The journey of fair trial from theory of natural law to that of truth finding quest has passed through many hiccups and has resulted in its present form.[208] Fair trial in its infancy was amongst those portions of rule of law that was considered divine in its essence but to have an effective implementation there is seen a gradual but essential involvement of states which eventually recognized it as a basic fundamental right with no regard for any discrimination.[209] The treatment of fair trial from a domestic issue, intervention in which was considered a breach of sovereignty of a country, to an internationally recognized right has

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[208] Jack Donnelly, 'Human rights as Natural Rights' (1982) 4 Human Rights Quarterly 2. See more about the argument of the foundation of human rights in J Donnelly, Universal Human Rights in Theory and Practice (2nd edn, Cornell University Press 2003) 18-20.

[209] Rhona KK Smith, International Human Rights (5th edn, OUP 2012) 264.

become more efficient and effective.[210] Not only the states are recognizing and implementing this right as a moral obligation but the international bodies and human rights covenants like UDHR and ICCPR are also gearing towards effective recognition and implementation of basic human rights, of which right to a fair trial and due process is a pivotal part. Right to fair trial has been recognized as the indispensable prerequisite of accused by all international statutes and tribunals. Fairness in procedures of fair trial involves equality of arms and rights to adversarial proceedings whereas equality of arms and fairness are usually taken as a single stride towards realization of basic human rights.[211] The protection of this basic right was ensured as treaties signed at international as well as regional covenants while legislative changes at national level ensured the protection of civil liberties of the citizens in a country. It is true that the concept of fair trial as a legal right was being exercised at different intensities at national and regional levels but as mass destruction at global level for the first time in history in WW1 and WW2 came to the fore, so did the volume of crimes and discrepancies in right to fair trial.[212]

This researcher wants to take into account the geo-political environment of 1948. The first half of the century had seen some magnificent as well as devastating effects of the world wars. The world had woken up to the mass existence of world population and had witnessed a rapid boom of industrialization as well as the destruction of two great wars that apparently involved all individuals. The world especially Europe saw the evolution of individual rights into international law accordingly.[213] The mentality behind the provision of these two rights of fair trial can give rise to this presumption that, with the introduction of democracy and the faith of public on the

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[210] Javaid Rehman, International Human Rights Law (2nd edn, Pearson Education Limited 2010), 4.
[211] Widder, Elmar Richard. "A Fair Trial at the International Criminal Court?: Human Rights Standards and Legitimacy." PhD diss., University of Hull, 2015.
[212] Steiner, Alston and Goodman (n 6) 115; See also John HE Fried, 'The Great Nuremberg Trial' (1976).
[213]Brand, Ronald A. "External sovereignty and international law." *Fordham Int'l LJ* 18 (1994): 1685.

intelligence and fairness of decision of general public was relatively firm. Thus a trial which was publicly heard, had a balance between the rights of victim and accused both and where the basic human rights were kept not below the humane requirements of the consciousness of man were presumed to be fulfilled.

The establishment of UN in 1945 was the first global effort to introduce morally induced rights for the benefit of both sides of the argumentative bodies as it is not possible to look upon a subject with complete concurrence. Yet the desire to uphold basic principles of humanity and command them when needed, was the starting point of these international bodies. Article 18 of American Declaration of the Rights and Duties of Man, adopted in May 1948,[214] was the pre-cursor of Article 10 of the Universal Declaration of Human Rights (UDHR), presented in UN General Assembly in Dec. 1948[215] and can rightly be crowned as the first universally accepted document in the journey of recognition of basic human rights.[216] The horrors of world wars had created a lofty sense of righteousness in all fields especially in the provision of fair trial rights to the condemned accused. The UDHR declaration was the first step in the search for truth and called a **"Magna Carta for all mankind".** The then President of UN General Assembly stated this as **"a remarkable achievement for the declaration to be adopted without any direct opposition".**[217] The process of trial was relatively simple and the intricacies of trial procedures and the challenges it posed while finding truth were relatively unknown to the contesting parties as well as general public. The integrity of human mind and the pureness of their noble intentions

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[214] AmericanDeclarationoftheRightsandDutiesofMan, Mar.30-May2,1948,*reprinted in* HandbookofExistingRulesPertainingtoHumanRights,OEA/Ser.L/V/II.23Doc.21Rev.6,at 5(1979)

[215] TheUniversalDeclarationofHumanRights,Dec.10,1948,G.A.Res.217A(III),U.N. Doc.A/810.

[216] Henry J Steiner, Philip Alston and Ryan Goodman, International Human Rights in Context: Law, Politics, Morals (3rd edn, OUP 2007) 59.

[217] http://www2.gwu.edu/~erpapers/maps/Europe1948final.html (accessed on 17th August 2018 at 3:47 am.)

were taken for granted by all and sundry.[218] Although the notion and desire for a just and fair trial where the rights of both parties are in balance and tilt of trial in favour of neither the parties, the first formal acknowledgement of fair trial rights became documented in 1948 in Universal Declaration of Human Rights (UDHR) when article 10 and 11 along with 30 other articles were adopted and proclaimed by General Assembly of the United Nations.[219] The adoption of UDHR proved to be a prologue of ICCPR that was adopted in 1966 as a **"Declaration on the Essential Rights of Man"**, increasing endorsement of which by most nations of the world is a standing testament to the fact that fair trial through due process has been recognized as a universal fundamental right for all and sundry.[220] The fact that ICCPR was binding on the participating nations by law has further ratified its position. Many fair trial rights have been granted in different regional and international covenants to ensure right to fair trial and due process. The resultant tools were created to resurrect human dignity as an individual and were collectively called as bill of rights.[221] These organizations helped in the achievement of freedom of self, of thoughts and expressions with certain limitations, fairness and truth finding in trials especially criminal trials to ensure that an individual is free and justly treated to ensure smooth human working in the society. Since 1948, fair trial rights have been provided by many international covenants and statutes. Among them are the International Covenant on Civil and Political Rights (ICCPR; 16 December 1966), Convention for Protection of Human Rights and Fundamental Freedoms,[222] African Charter on Human and Peoples' Rights (June, 1981)[223], American

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[218]Summers, Robert S. "Formal Legal Truth and Substantive Truth in Judicial Fact-Finding--Their Justified Divergence in some Particular Cases." *Law and philosophy* 18, no. 5 (1999): 497-511.

[219]http://www.claiminghumanrights.org/udhr_article_26.html (accessed on 27-06-2016 at 3:39 am.)

[220]https://en.wikipedia.org/wiki/International_Covenant_on_Civil_and_Political_Rights(accessed on 17th May 2018 at 4:39 am.)

[221]Fried, John HE. "The Great Nuremberg Trial." *American Political Science Review* 70.01 (1976): 134-137.

[222]No, Protocol. "to the Convention for the Protection of Human Rights and Fundamental Freedoms." *Explanatory Report* 22 (12).

Convention on Human Rights (November 22, 1969)[224], EU Charter of Fundamental Rights (December, 2000), IMT Charter (Nuremberg; 1945) and Geneva Conventions (1949) to name a few. Additional protocols are also documented to provide fair trial rights in the process of trial to the accused.[225]

The question remains as to what rights have been provided in international statutes and to what extent these rights are ensured not only during court procedures that ensure finding truth in court findings and investigation? Also, what is the level of fairness during trial and how the obligation of a prosecutor of doing investigation and finding inculpatory and exculpatory evidence is affected by it?[226]What these rights imply and how they have evolved will be discussed as well as what are the implications of these rights on the process of law and legislation.

How fair trial has travelled in the history from a mere concept and idea that was being frowned upon in the past, through regional treaties to international covenants in its quest to truth finding, that are binding to all its signatories in its true spirit and essence.[227] The provision of trial rights to both the victim and accused and strike a balance between the two has been one of the most important accomplishments of international organizations like UN. ICCPR has been at the forefront t in giving equal opportunities to both the parties at defending their version of the case

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[223]Kiwanuka, Richard N. "The meaning of "people" in the African Charter on Human and Peoples' Rights." *American Journal of International Law* 82, no. 1 (1988): 80-101.

[224]Buergenthal, Thomas. "The American Convention on Human Rights: Illusions and Hopes." *Buff. L. Rev.* 21 (1971): 121.

[225]https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha_chapter32_rule100 (accessed on 6th December 19, 2016 at 4:37 am.)

[226]Khatir, Marjan, and Seyed Mahmood Hejazi. "How to find exculpatory and inculpatory evidence using a circular digital forensics process model." In *International Conference on Global e-Security*, pp. 10-17. Springer, Berlin, Heidelberg, 2008.

[227] Abdulhamid Al-Hargan, 'The Saudi Pre-Trial Criminal Procedure and Human Rights' (PhD thesis, University of Kent 2006), 40.

in courts.[228]Since provision of fair trial rights have been a vast subject this researcher will not be able to do justice to all the covenants and statutes providing fair trial rights due to the limitation of time and resources. Perhaps the most comprehensive covenant that entails fair trial right as a fundamental right and explains it in detail is the ICCPR. In this chapter, we will be discussing how these parameters of fair trial and due process have been treated in the prevalent international and regional treaties.

3.1 Prohibiting Arbitrary Arrest and Detention

The very first right that has been considered as mandatory in trial proceedings to ensure fairness is the prohibition of arbitrary arrest and detention. Since long arbitrary arrest and detention has been used more of a weapon than a tool for restraint in unusual and unlawful situations, thus it is generally considered unlawful sans particular situations when such an action is unavoidable.[229]In order to ensure that basic rights as provided by international statutes are not compromised, making arrest has some procedural requirements. Article 5 and article 6(3) of ECHR will be satisfied if the arrested person is brought before a competent authority like a judge or a magistrate with reasonable evidence of either committing or trying to commit a crime.[230] Although a written warrant is not an unconditional requirement but a highly favourable one as its absence can amount the arrest to be arbitrary if not illegal. It has become mandatory to announce

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[228]Jixi, Zhang. "Balance between the Prosecution and Defense in the Perspective of Substantive Law." *Journal of National Prosecutors College* 2 (2009).

[229]See also European Convention, supra note 8, Article 5(1); African Charter, supra note 8, Article 6; American Convention, supra note 8, Article 7(1)-(3); and Statute of the International Criminal Court [hereinafter ICC Statute], Article 55(1)(d). The ICC Statute establishes a permanent institution for the purposes of trying persons for the most serious international crimes (including genocide, crimes against humanity and war crimes) where a national legal system has failed to do so. The Statute was approved on July 17, 1998 but will not come into force until 60 nations have ratified. As of February 16, 2000, 94 countries had signed the Statute but only seven countries had ratified it.

[230]*Fox, Campbell and Hartley v. UK*, 1990 E.H.R.R.13 157 (1990).

the reasons for arrest, and the explanation of any other rights to the person arrested. The term "Miranda Warning"[231] has become a preventive procedural rule to avoid any breach of rights of the accused, in which the reason for arrest is also mentioned clearly.[232]

Different provisions give the right to arrested person to be told promptly the reasons for arrest at the time of arrest. Sufficient information must be provided to the accused in a language that he understands containing "legal sense".[233] Article 9(2) of the ICCPR provides that **"Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him".** Similarly, according to article 14(3)(a) of the ICCPR, it gives protection to the arrested person to have knowledge of any kind of criminal charges against him. It states that **"everyone is entitled to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him".** Also, Body of Principles provided the right of an interpreter for all kinds of legal assistance after the arrest.[234] This right extends to all pre-trial proceedings.[235] Moreover, article 8(2) of American Convention on Human Rights entitles the accused **"to prior notification in detail ... of the charges against him".** Although African Charter on Human and Peoples' Rights has no provision regarding prompt informing of charges, African Commission on Human and Peoples' Rights provides that the arrested person **"shall be informed promptly of any charges against them".**[236] Another statute namely the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides in its Principle 10 that the accused **"shall be**

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[231]https://en.wikipedia.org/wiki/Miranda_warning (accessed on)
[232]Miranda v. Arizona, 384 (US) 436 (1966).
[233]Human Rights Committee, Georgia, UN Doc. CCPR/C/79 Add.75, April 1, 1997 para 27.
[234]*Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).
[235]https://www.ohchr.org/Documents/ProfessionalInterest/bodyprinciples.pdf (accessed on 17th May 2018 at 4:38 am.)
[236]Udombana, Nsongurua J. "The African Commission on Human and People's Rights and the Development of Fair Trial Norms in Africa." *Afr. Hum. Rts. LJ* 6 (2006): 299.

promptly informed of any charges against him". Also in Principal 14 of the same statute, it is provided that:

> **A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in .... to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.**[237]

According to the Human Rights Committee, the right to be informed in article 14(3)(a) **"applies to all cases of criminal charges, including those of persons not in detention".** This responsibility starts as soon as **"the charge is first made by a competent authority".**[238] The article 42 (A) of the Rules of Procedure and Evidence of the Rwanda and Yugoslavia Criminal Tribunals,[239] also secures the right of arrested person **"to have the free legal assistance of an interpreter"** provided he **"cannot understand or speak the language to be used for questioning".** This responsibility lies with the local authorities or the domestic government to ensure the provision of such interpreter.[240] According to Human Rights Committee, whether the charge is made orally or in written form, it become mandatory that the facts as well as law must be explained clearly.[241] But the specification of immediately on arrest may not be applied here,

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[237]https://www.ohchr.org/EN/ProfessionalInterest/Pages/DetentionOrImprisonment.aspx (accessed on 17th May 2018 at 3:46 am.)

[238]Rabinowitz, Dorothy. *No crueler tyrannies: Accusation, false witness, and other terrors of our times*. Simon and Schuster, 2003.

[239]https://unictr.irmct.org/en/documents/rules-procedure-and-evidence. See also https://www.icty.org/en/documents/rules-procedure-evidence (both accessed on 27 May 2017 at 3:55 am.)

[240]Communication No.702/1996, C. McLawrence v. Jamaica (Views adopted on 18 July 1997), UN doc. GAOR, A/52/40 (vol. II), p. 232, para. 5.9.

[241]General Comment No. 13 (Article 14), in United Nations Compilation of General Comments, p. 124, para. 8.

rather the start of investigation or some other hearing date may also be considered appropriate for the disclosure of reasons for arrest.[242] Article 9 (2) of ICCPR entails the provision of details to the accused only when an individual has been formally charged, but not those who have been remanded while in police custody during investigation.[243] How such laws have been interpreted can be seen in Williams vs. Jamaica where the plea of accused was dismissed on the ground that since he was promptly informed of his reason for arrest, the delay of six weeks for formal charging do not amount to violation of his rights.[244] However, in Antonaccio vs. Uruguay, this right stood violated when the accused was neither informed of the nature of allegations, nor was able to contact his lawyer before being tried on camera in a military court.[245]

Another problem in informing the reasons for arrest are the trials conducted in absentia. In certain cases, despite being informed in advance, certain individuals refuse the right to be present at trial proceedings. Although special precautions may be exercised during such cases, certain limits must be put forward **"to the efforts which can duly be expected of the responsible authorities of establishing contact with the accused".**[246] A case of special interest is of Mbenge where the accused took the stance of knowledge of his trial only through press reports and that also when the trial has already taken place. Summons were issued by the clerk of the court but no effort was made to actually ensure the delivery of those summons to Mbenge, who

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[242]Communication No. 561/1993, D. Williams v. Jamaica (Views adopted on 8 April 1997), UN doc. GAOR, A/52/40 (vol. II), p. 151, para. 9.2;
[243]Communication No. 253/1987, P. Kelly v. Jamaica (Views adopted on 8 April 1991), UN doc. GAOR, A/46/40, p. 247, para. 5.8; emphasis added.
[244]Communication No. 561/1993, D. Williams v. Jamaica (Views adopted on 8 April 1997), UN doc. GAOR, A/52/40 (vol. II), p. 151, para. 9.2.
[245]Communication No. R.14/63, R. S. Antonaccio v. Uruguay (Views adopted on 28 October 1981), UN doc. GAOR, A/37/40, p. 120, para. 20 as compared with p. 119, para. 16.2.
[246]Communication No. 16/1977, D. Monguya Mbenge v. Zaire (Views adopted on 25 March 1983), UN doc. GAOR, A/38/40, p. 138, paras. 14.1-14.2

was at the time of trial residing in Belgium at an address in knowledge of the court.[247] This is a classic case of the violation of clauses of article 14(3)(a), (b), (d) and (e) of the covenant.[248]

In case of Castillo Petruzzi et al, this right was not taken care of when the accused did not have sufficient information about the accusations levied against him. The defense was allowed to view his files at a very late stage and also for a short time when the decision was announced next day, grossly undermining the right of fair trial.[249] In another case these rights were fulfilled when the accused was given charge sheet containing all the information within a reasonable time of ten hours while it stood violated when an individual of foreign origin in Italy received no assistance in understanding court notification despite requesting information in his mother language or the official language of UN. ECHR maintained that the Italian judicial authorities **"should have taken steps.... to understand from the notification the purport of the letter notifying him of the charges brought against him".**[250]

Although in 1948, signing of UDHR by 48 countries gave an internationally recognized right of prohibition of arbitrary arrest and detention, yet the most specific and profound change in legal system regarding arbitrary detention was the decision of House of Lords in Belmarsh case.[251] The decision was a landmark decision of indefinite and illegal detention of a person as Lord

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[247]Daniel Monguya Mbenge v. Zaire, Communication No. 16/1977; U.N. Doc. CCPR/C/18/D/16/1977 (25 March 1983).

[248]http://www.worldcourts.com/hrc/eng/decisions/1983.03.25_Mbenge_v_Zaire.html (accesson 16th June 2017 at 3:16 am.)

[249]*Castillo Petruzzi et al. Case*, Inter-American Court of Human Rights (IACrtHR), 30 May 1999. See also https://www.refworld.org/cases,IACRTHR,44e494cb4.html (accessed on 16th June 2017 at 3:37 am.)

[250]Brozicek v. Italy, judgment of 19 December 1989, Series A no. 167, p. 20, § 48. and Somogyi v. Italy, judgement of 10 November 2004, 67972/01. See also 9Eur. Court. HR, Case of Steel and Others v. the United Kingdom, judgment of 23 September 1998, Reports 1998-VII, p. 2741, para. 85https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-61762%22]} (accessed on 14the April 2018 at 4:23 am.)

[251]http://www.rcpbml.org.uk/wdie-05/lord_ste.pdf (accessed on 07th March 2017 at 7:36 am.)

Hoffman stated **"The real threat to the life of the nation... comes not from terrorism but from laws such as these".**[252]

These and many other cases are a testament to the accuracy and detail of the application of fair trial rights and how international covenants provide protection against keeping the accused uninformed about the nature of his accusation. If in any case an arrest is made it must be in accordance with law, as provided by the respective state and proportional in view of the set of conditions of the case. Moreover, such an arrest must not induce fear of any kind in the detainee or become a hurdle in search for truth, which is the ultimate goal in conduction of trial.[253]Although scholars like Marcoux considers these clauses of international statutes as vague and imprecise.[254] According to him, **"the more a law allows, or provides for, the deprivation of the right to personal liberty, the more arbitrary that law becomes",** this considering the term arbitrary a vague impression, the explanation of whose burden according to him lies with the state.

Sufficient time and help must be provided in scenarios where needed including the right to interpreter if the local language is not understandable by the accused.[255] In countries like US and EU states, it is mandatory for the arresting personnel to inform the arrestee through a statement containing that information, failure of which can trigger an investigation against the arresting

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[252]https://www.theguardian.com/law/2013/dec/04/law-cases-essential-student (accessed on 07 March 2017 at 12:27 pm.)

[253]Norton, Jack. "Truth and individual rights: A comparison of United States and French pre-trial procedures." *Am. Crim. LQ* 2 (1963): 159.

[254]http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1565&context=iclr (accessed on 14th May 2017 at 4:37 am.) see also ////

[255]Principle 14 of the Body of Principles sets out the right to an interpreter in all legal proceedings subsequent to arrest. Article 67(1)(f) of the ICC Statute guarantees the right to a "competent" interpreter.

personnel. No such practice is prevalent in Pakistan where any person arrested only gains the knowledge about the reason for his arrest after FIR is lodged with the police.[256]

3.2 The Right to Know the Reasons for Arrest

In order to ensure that basic rights as provided by international statutes are not compromised, making arrest has some procedural requirements. Article 5 and article 6(3) of ECHR will be satisfied if the arrested person is brought before a competent authority like a judge or a magistrate with reasonable evidence of either committing or trying to commit a crime.[257] Although a written warrant is not an unconditional requirement but a highly favourable one as its absence can amount the arrest to be arbitrary if not illegal. It has become mandatory to announce the reasons for arrest, and the explanation of any other rights to the person arrested. The term Miranda Warning[258] has become a preventive procedural rule to avoid any breach of rights of the accused, in which the reason for arrest is also mentioned clearly.[259]

Different provisions give the right to arrested person to be told promptly the reasons for arrest at the time of arrest. Sufficient information must be provided to the accused in a language that he understands containing "legal sense".[260] Article 9(2) of the ICCPR provides that **"Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him".** Similarly, according to article 14(3)(a) of the ICCPR, it gives protection to the arrested person to have knowledge of any kind of criminal

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[256]Sahito, I. H. The Criminal Investigation in Pakistan: Trends and Reality. *Journal of Pakistan Vision, 10*(2), 175-196.
[257]*Fox, Campbell and Hartley v. UK*, 1990 E.H.R.R.13 157 (1990).
[258]https://en.wikipedia.org/wiki/Miranda_warning (accessed on)
[259]Miranda v. Arizona, 384 (US) 436 (1966).
[260]Human Rights Committee, Georgia, UN Doc. CCPR/C/79 Add.75, April 1, 1997 para 27.

charges against him. It states that **"everyone is entitled to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him".** Also, Body of Principles provided the right of an interpreter for all kinds of legal assistance after the arrest.[261] This right extends to all pre-trial proceedings.[262] Moreover, article 8(2) of American Convention on Human Rights entitles the accused **"to prior notification in detail ... of the charges against him".** Although African Charter on Human and Peoples' Rights has no provision regarding prompt informing of charges, African Commission on Human and Peoples' Rights provides that the arrested person **"shall be informed promptly of any charges against them".**[263] Another statute namely the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides in its Principle 10 that the accused **"shall be promptly informed of any charges against him".** Also, in Principal 14 of the same statute, it is provided that

> **A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in ..... to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.[264]**

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[261] *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

[262] https://www.ohchr.org/Documents/ProfessionalInterest/bodyprinciples.pdf (accessed on 17th May 2018 at 4:38 am.)

[263] Udombana, Nsongurua J. "The African Commission on Human and People's Rights and the Development of Fair Trial Norms in Africa." *Afr. Hum. Rts. LJ* 6 (2006): 299.

[264] https://www.ohchr.org/EN/ProfessionalInterest/Pages/DetentionOrImprisonment.aspx (accessed on 17th May 2018 at 3:46 am.)

According to the Human Rights Committee, the right to be informed in article 14(3)(a) **"applies to all cases of criminal charges, including those of persons not in detention".** This responsibility starts as soon as the charge is first made by a competent authority".[265] The article 42 (A) of the Rules of Procedure and Evidence of the Rwanda and Yugoslavia Criminal Tribunals,[266] also secures the right of arrested person **"to have the free legal assistance of an interpreter"** provided he **"cannot understand or speak the language to be used for questioning".** This responsibility lies with the local authorities or the domestic government to ensure the provision of such interpreter.[267] According to Human Rights Committee, whether the charge is made orally or in written form, it become mandatory that the facts as well as law must be explained clearly.[268] But the specification of immediately on arrest may not be applied here, rather the start of investigation or some other hearing date may also be considered appropriate for the disclosure of reasons for arrest.[269] Article 9 (2) of ICCPR entails the provision of details to the accused only when an individual has been formally charged, but not those who have been remanded while in police custody during investigation.[270] How such laws have been interpreted can be seen in Williams vs. Jamaica where the plea of accused was dismissed on the ground that since he was promptly informed of his reason for arrest, the delay of six weeks for formal charging do not amount to violation of his rights.[271] However, in Antonaccio vs. Uruguay, this

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[265]Rabinowitz, Dorothy. *No crueler tyrannies: Accusation, false witness, and other terrors of our times*. Simon and Schuster, 2003.

[266]https://unictr.irmct.org/en/documents/rules-procedure-and-evidence. See also https://www.icty.org/en/documents/rules-procedure-evidence (both accessed on 27 May 2017 at 3:55 am.)

[267]Communication No.702/1996, C. McLawrence v. Jamaica (Views adopted on 18 July 1997), UN doc. GAOR, A/52/40 (vol. II), p. 232, para. 5.9.

[268]General Comment No. 13 (Article 14), in United Nations Compilation of General Comments, p. 124, para. 8.

[269]Communication No. 561/1993, D. Williams v. Jamaica (Views adopted on 8 April 1997), UN doc. GAOR, A/52/40 (vol. II), p. 151, para. 9.2;

[270]Communication No. 253/1987, P. Kelly v. Jamaica (Views adopted on 8 April 1991), UN doc. GAOR, A/46/40, p. 247, para. 5.8; emphasis added.

[271]Communication No. 561/1993, D. Williams v. Jamaica (Views adopted on 8 April 1997), UN doc. GAOR, A/52/40 (vol. II), p. 151, para. 9.2.

right stood violated when the accused was neither informed of the nature of allegations, nor was able to contact his lawyer before being tried on camera in a military court.[272]

Another problem in informing the reasons for arrest are the trials conducted in absentia. In certain cases, despite being informed in advance, certain individuals refuse the right to be present at trial proceedings. Although special precautions may be exercised during such cases, certain limits must be put forward **"to the efforts which can duly be expected of the responsible authorities of establishing contact with the accused".**[273] A case of special interest is of Mbenge where the accused took the stance of knowledge of his trial only through press reports and that also when the trial has already taken place. Summons were issued by the clerk of the court but no effort was made to actually ensure the delivery of those summons to Mbenge, who was at the time of trial residing in Belgium at an address in knowledge of the court.[274] This is a classic case of the violation of clauses of article 14(3)(a), (b), (d) and (e) of the covenant.[275]

In case of Castillo Petruzzi et al, this right was not taken care of when the accused did not have sufficient information about the charges levied against him and his lawyers were allowed to view the file for a very short time with the judgement being announce the following day.[276] In another case these rights were fulfilled when the accused was given charge sheet containing all the information within a reasonable time of ten hours while it stood violated when an individual of foreign origin in Italy received no assistance in understanding court notification despite

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[272]Communication No. R.14/63, R. S. Antonaccio v. Uruguay (Views adopted on 28 October 1981), UN doc. GAOR, A/37/40, p. 120, para. 20 as compared with p. 119, para. 16.2.

[273]Communication No. 16/1977, D. Monguya Mbenge v. Zaire (Views adopted on 25 March 1983). UN doc. GAOR, A/38/40, p. 138, paras. 14.1-14.2

[274]Daniel Monguya Mbenge v. Zaire, Communication No. 16/1977; U.N. Doc. CCPR/C/18/D/16/1977 (25 March 1983).

[275]http://www.worldcourts.com/hrc/eng/decisions/1983.03.25_Mbenge_v_Zaire.html (accesson 16th June 2017 at 3:16 am.)

[276]*Castillo Petruzzi et al. Case*, Inter-American Court of Human Rights (IACrtHR), 30 May 1999. See also https://www.refworld.org/cases,IACRTHR,44e494cb4.html (accessed on 16th June 2017 at 3:37 am.)

requesting information in his mother language or the official language of UN. ECHR maintained that the Italian judicial authorities **"should have taken steps.... to understand from the notification the purport of the letter notifying him of the charges brought against him".**[277]

These and many other cases are a testament to the accuracy and detail of the application of fair trial rights and how international covenants provide protection against keeping the accused uninformed about the nature of his accusation.

3.3 Right to Legal Assistance

Once an individual is arrested or placed under detention, there is a deprivation of liberty which gives the right to have access to legal help. This is important not only to safeguard mental and physical capabilities of the accused but to give a fair chance of defence to the arrested person. An early provision of legal counsel not only ensures the safeguard of basic human rights but also help in truth-finding during investigation.[278] The right to legal counsel entails an individual to have access to his or her lawyer within a specified time of arrest which may not exceed 48 hours or so as it is advisable so that "**representation must be provided early**".[279] It is also considered to be a part of this right that the counsel is to meet with the accused in complete privacy with the presence of legal official 'within sight but not within hearing shot'.[280]

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[277]Brozicek v. Italy, judgment of 19 December 1989, Series A no. 167, p. 20, § 48. and Somogyi v. Italy, judgement of 10 November 2004, 67972/01. See also 9Eur. Court. HR, Case of Steel and Others v. the United Kingdom, judgment of 23 September 1998, Reports 1998-VII, p. 2741, para. 85https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-61762%22]} (accessed on 14the April 2018 at 4:23 am.)

[278]Jackson, John D. "Theories of truth finding in criminal procedure: An evolutionary approach." *Cardozo L. Rev.* 10 (1988): 475.

[279]Beaney, William M. "Right to Counsel before Arraignment." *Minn. L. Rev.* 45 (1960): 771.

[280]Gardner, Martin R. "The Sixth Amendment Right to Counsel and Its Underlying Values: Defining the Scope of Privacy Protection." *J. Crim. L. & Criminology* 90 (1999): 397.

Out of 194 countries in the world, only 153 have made right to legal counsel a part of their constitutions.[281] How it is viewed in international constitutions of the world. A few examples are given below. For example, the sixth amendment in US constitution states that **"in all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense".**[282] This granting of right to counsel clause includes the right to counsel of choice and the right to appointed counsel, the right to conflict-free counsel and the effective assistance of counsel, as well as the right to represent oneself. But the right to legal counsel is more specified to criminal law compared to civil law where only a few instances concurrent to the 14th amendment of due process of law, require the provision of such legal assistance to the defendant.[283]

One of the first countries to adopt the right to legal assistance in 1778, was the English Crown when all successful prosecutions were funded through the Crown, employing professional lawyers[284] while it was in 1808, when in France it became compulsory in Napoleonic Code of Criminal Instruction when every defendant was given the assistance of a lawyer in case of trial of more serious crimes.[285] In a ruling of Supreme Court of Canada, right to counsel is not a fundamental right during interrogation, although a strong minority showed reservations about such decision. According to Canadian constitution, right to counsel is only guaranteed during arrest and detention but not during the proceedings of criminal trial, except under certain

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[281]Elkins, Zachary, Tom Ginsburg, and James Melton. 2013. Constitute: The World's Constitutions to Read, Search, and Compare. https://www.constituteproject.org/

[282]Holtzoff, A. (1944). Right of Counsel under the Sixth Amendment, The. *NYULQ Rev.*, *20*, 1.

[283]Cheh, M. M. (1990). Constitutional limits on using civil remedies to achieve criminal law objectives: Understanding and transcending the criminal-civil law distinction. *Hastings LJ*, *42*, 1325.

[284]Beattie, J. M. (1991). Scales of justice: Defense counsel and the English criminal trial in the eighteenth and nineteenth centuries. *Law and History Review*, *9*(2), 221-267.

[285]Kamisar, Y. (1962). Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values. *Michigan Law Review*, *61*(2), 219-282.

circumstances.[286]Many international covenants and international statutes have provided this right to the detainee.

The foremost amongst them is the ICCPR whose article 14(3)(d) provides that the accused must be given the choice of defence **"through legal assistance of his own choosing;.....to have legal assistance assigned to him".**[287] Similarly, article 6(3)(c) of ECHR and article 7(1)(c) of the African Charter[288] also provided this right in almost similar words as the imprisoned person is entitled to legal counsel with which he/she is comfortable with and is of their choice. In case of Niran Malaolu, the journalist was pardoned and subsequently released on the account that he was neither provided with legal counsel nor allowed to be represented by one.[289]The famous case of Campbell vs. Jamaica is a classic example where a violation of Article 9 (4) of the ICCPR was observed by the Human Rights Committee when the defendant did not have access to legal counsel from December 1984 to March 1985.[290] According to the observation of the committee, **"since he was not in due time afforded the opportunity to obtain, on his own initiative, a decision by a court on the lawfulness of his detention"**[291] thus a violation of the said rule was observed. Similarly in another case of D. Wolf, violation of Article 9 (3) was seen when neither assess to legal counsel was provided nor the accused was produced promptly before the judge or

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[286]Claydon, J. (1986). Use of International Human Rights Law to Interpret Canada's Charter of Rights and Freedoms, The. *Conn. J. Int'l L.*, *2*, 349.

[287]https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (accessed on 27th May 2017 at 4:39 am.)

[288]https://www.achpr.org/legalinstruments/detail?id=49. See also https://echr.coe.int/Pages/home.aspx?p=home (both accessed on 28th MAY 2017 at 3:17 am.)

[289]https://ifex.org/niran-malaolu-pardoned/ see also http://hrlibrary.umn.edu/africa/comcases/224-98.html (accessed on 28th May 2017 at 3:47 am.)

[290]Communication No. 330/1988, A. Berry v. Jamaica (Views adopted on 7 April 1994), in UN doc. GAOR, A/49/40 (vol. II), p. 26, para. 11.1.

[291]Communication No. 248/1987, G. Campbell v. Jamaica (Views adopted on 30 March 1992), in UN doc. GAOR, A/47/40, p. 246, para. 6.4.

the magistrate.[292]This case also points out the fact that the accused has to request for the legal assistance, failure of which reduces or in some cases nullifies the responsibility of the government for such a provision to the defendant. Such a ground can be based for the rejection of claim by the defendant.[293]

American Convention on Human Rights, in its article 8(2)(d) gives the exclusive right to the accused person to "**to communicate freely and privately with his counsel",** whereas other international covenants have not mentioned the confidentiality and privacy of the client-counsel relationship.[294] Also, United Nations Standard Minimum Rules for the Treatment of Prisoners in its rule 93 of 1955 gives this right as follows:

> **For the purposes of his defence, an untried prisoner.....free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions.... supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official.** [295]

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment in its Principle 15 provides the right to counsel as early as possible[296] while in Principle 18[297] also gives full and unrestricted access to the imprisoned person without delay.

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[292]Communication No. 289/1988, D. Wolf v. Panama (Views adopted on 26 March 1992), in UN doc. GAOR, A/47/40, p. 289, para. 6.2.
[293]Communication No. 732/1997, B. Whyte v. Jamaica (Views adopted on 27th July 1998), in UN doc. GAOR, A/53/40 (vol. II), p. 200, para. 7.4.
[294]Davis, Martha F. "In the interests of justice: human rights and the right to counsel in civil cases." *Touro L. Rev.* 25 (2009): 147.
[295]McCall-Smith, Kasey. "United nations standard minimum rules for the treatment of prisoners (Nelson mandela rules)." *International Legal Materials* 55, no. 6 (2016): 1180-1205.
[296]Ibid.
[297]Ibid.

On article 7, Human Rights Committee has provided in its general comment no. 20 that right to legal assistance **"should ... be made against incommunicado detention"**.[298] Similarly, Rule 67(A) and 67(D) of the Rules of Detention of the Yugoslavia Tribunal also gave the provision of unrestricted communication with defense counsel which may be conducted in sight but not within hearing range of detention staff to protect the privacy of the detainee.[299] In case the detainee lacks sufficient financial resources, it becomes mandatory to provide legal assistance free of cost.[300]

On the other hand, European Court of Human rights provided its observation about European Convention that it does not expressly guarantee the accused with the provision of defense counsel. Moreover, in case of S. v. Switzerland, it was maintained by the court that violation of provision of legal counsel to the accused in complete confidentiality has been breached. It was observed that communication of accused and his lawyer was put under surveillance and the lawyer was not given full access to the case file. Also the communication between the lawyer and imprisoned person, in the shape of letters were also opened and read.[301] Similarly, the case of article 14(3) stood violated when legal assistance was not provided to the imprisoned person within the first 48 hours of his imprisonment in case of Murray vs. Ireland[302] and Section 15 of the Northern Ireland (Emergency Provisions) Act 1987 was made the reason for non-provision of legal counsel on account of avoiding acts of terrorism. The European Court observed that article 6 of the convention stood violated when the accused was not provided with legal assistance in early stages of the investigation.

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[298]United Nations Compilation of General Comments, p. 140, para. 11.
[299]Ibid.
[300]Rule 42(A)(i) of the Rules of Procedure and Evidence of the Rwanda and Yugoslavia Tribunals.
[301]https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57709%22]} (accessed on 19th July 2018 at 4:59 am.)
[302]https://app.justis.com/case/murray-v-ireland/overview/c5ydmYyZnYWca (accessed on 19th July 2018 at 6:56 am.)

A basic and integral part of right to a fair trial is the right to counsel that refers to the assistance of a lawyer or a group of lawyers. In case the defendant is unable to afford one, the government either appoint a lawyer or pay for the legal counsel.[303] This right of an accused to legal counsel starts as soon as a person is arrested. If a person is unable to either provide for or monetarily afford a lawyer, it is the duty of the state to provide this help to the accused free of charge.[304] According to principle 1 of the Basic Principles on Lawyers states that **"all persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings".** This is particularly important in pre-trial detention because provision of legal assistance is of crucial importance in determining the correct sequence of events in an incident as it is usually the most misused and violated right during trial proceedings.[305] Similarly in Principle 5 and 7 of Basic Principles on Lawyers and Principle 17 of Body of Principles the right to be promptly inform the defendant of his right to have legal assistance of one's choice and it is the duty of the government to provide such assistance within 48 hours of the arrest and detention.[306] Principle 8 of Basic Principles of Lawyers also facilitates adequate time for both defendant as well as the counsel to discuss the

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[303]https://en.wikipedia.org/wiki/Right_to_counsel. (accessed on 13 November 2016 8: 42 am).

[304]For further the discussion on the right to counsel during the hearing see infra notes 83-89 and accompanying text.

[305]The Human Rights Committee has stated that "all persons who are arrested must immediately have access to counsel." (Concluding Observations of the Human Rights Committee, Georgia, UN Doc. CCPR/C/79 Add.75, April 1, 1997 para 27) [Hereinafter Concluding Observations of the HRC]. See also the Report of the Special Rapporteur on the Independence of Judges and Lawyers regarding the Mission of the Special Rapporteur to the United Kingdom, UN Doc E/CN.4/1998/39/Add.4, March 5, 1998, para 47.

[306]Compare Principle 15 of the Body of Principles, which states that a detainee must be able to communicate with counsel within "a matter of days," with the Human Rights Committee's statement that "all persons who are arrested must immediately have access to counsel." Concluding Observations of the HRC, supra note 19. 23 Principles on the Role of Lawyers, supra note 6, Principle 6; Body of Principles, supra note 6, Principle 17(2); ICC Statute, supra note 10, Article 55(2)(c)

details of trial and formulate the defense accordingly with complete discretion.[307] Presence of law enforcement can be voluntary but not within hearing range.[308]

The right to legal counsel holds paramount importance in provision and safeguard of human rights and the search for truth finding during the course of trial. In order to ensure fairness in the process, early access to legal counsel can set the course of the case in the right direction. It is a dilemma that is faced by the imprisoned person that if he remains silent adverse and sometimes non relating inferences may be concluded against him. But on the other hand, if the accused says anything during investigation, the defense may be prejudiced in favour of the interpretations previously assumed against him.

3.4 Equality before Courts and Tribunals

The major right to protect equality before the courts and tribunals and to give a fair trial in serving as a procedural means to safeguard the rule of law is to be equal without any bias before the judging body. Article 14 of ICCPR provides to ensure this right through a series of specific guarantees.

Article 14 of ICCPR guarantees the right of access to courts to all individuals. This right is not limited to any specific countries but to all persons even if they are stateless, immigrants, asylum seekers, refugees or victims of domestic or regional conflicts.[309] Any gender or age group can approach courts and tribunals and must be heard in detail. If any person, based on cast, race, religion or association is barred from bringing a case against an individual, the right given in

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[307]See Principles on the Role of Lawyers, supra note 6, Principle 22 ("Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationships are confidential;" and Body of Principles, supra note 6, Principles 15 and 18.

[308]Fried, C. (1981). Artificial Reason of the Law or: What Lawyers Know. *Tex. L. Rev.*, *60*, 35.

[309]Communication No. 202/1986, Ato del Avellanal v. Peru, para. 10.2 (limitation of the right to represent matrimonial property before courts to the husband, thus excluding married women from suing in court). See also general comment No. 18 (1989) on non-discrimination, para. 7.

article 14 para 1 is violated.[310] Legal assistance is required if a person or state wants to access these courts and tribunals. One of the reasons is the complexity of procedures and the access to these courts at international level. This right also encompasses all the domestic courts in their respective countries as well. All the signatories of ICCPR have the provision of this right binding on them. The provision of free legal counsel and interpreter as well as facilitation are encouraged for the states to be provided to individuals. In case the fees are imposed on a person, article 14, paragraph 1provides[311] in particular, a rigid duty under law to award costs to a winning party without consideration of the implications thereof or without providing legal aid may have a deterrent effect on the ability of persons to pursue the vindication of their rights under the Covenant in proceedings available to them.[312] The notion of equality before courts also implies the law of equality between the arms. This means that neither the accused nor the victim should be treated with discrimination.

All those rights which are provided under the umbrella of fair trial rights should be available to both sides of the case. Rights of appeal, for example, is as much available to the prosecution as much to defense. It can be safely deduced that this right encompasses all other rights as being equal gives dignity, protection and respect to all citizens of the state. The principle of equality between parties applies also to civil proceedings, and demands, inter alia, that each side be given the opportunity to contest all the arguments and evidence adduced by the other party[313] n exceptional cases, it also might require that the free assistance of an interpreter be provided

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[310]Communication No. 468/1991, Oló Bahamonde v. Equatorial Guinea, para. 9.4.
[311]Communication No. 646/1995, Lindon v. Australia , para. 6.4
[312]Communication No. 779/1997, Äärelä and Näkkäläjärvi v. Finland, para. 7.2.
[313]Communication No. 846/1999, Jansen-Gielen v. The Netherlands , para. 8.2 and No. 779/1997, Äärelä and Näkkäläjärvi v. Finland, para. 7.4.

where otherwise an indigent party could not participate in the proceedings[314] on equal terms or witnesses produced by it or the investigating person or agency to be examined. Equality before courts and tribunals also requires that similar cases are dealt with in similar proceedings. If, for example, exceptional criminal procedures or specially constituted courts or tribunals apply in the determination of certain categories of cases.

3.5 The Right to Adequate Time and Facilities to Prepare Defense

Time is of prime importance in preparation of a case. There is always a fine balance between the quest for speedy trial and adequate time given to prepare for the upcoming trial. This time is not only for the defendant but the counsel as well. International statutes and covenants provide this right to all the defendants and their counsel to avoid the slaughter of due process and fairness in trial. Article 14(3)(b) of the ICCPR provides that in the determination of any criminal charge against him or her everyone is entitled **"To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing".**[315] Similarly, article 8(2)(c) of the American Convention on Human Rights guarantees the accused to have **"adequate time and means for the preparation of his defence"**,[316] whereas European Convention on Human Rights in its article 6(3)(b) speaks of **"adequate time and facilities for the preparation of his defence"**. Article 7(1) of the African Charter on Human and Peoples' Rights universally warranties **"the right to defence, including the right to be defended by counsel of his choice".**[317] Both articles 20(4)(b) and 21(4)(b) respectively of the Statutes of the

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[314] E.g. if jury trials are excluded for certain categories of offenders (see concluding observations, United Kingdom of Great Britain and Northern Ireland, CCPR/CO/73/UK (2001), para. 18) or offences

[315] https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf (accessed on 17th June 2017 at 4:37 am.)

[316] https://www.cartercenter.org/resources/pdfs/peace/democracy/des/amer_conv_human_rights.pdf (accessed on 17th June 2017 at 4:57 am.)

[317] https://www.achpr.org/legalinstruments/detail?id=49 (accessed on 17th June 2017 at 6:04 am.)

International Criminal Tribunals for Rwanda and the former Yugoslavia states that the accused shall **"have adequate time and facilities for the preparation of his [or her] defence and to communicate with counsel of his or her own choosing".**[318]

The right to be provided enough time to prepare for one's defense is available not only to the accused but his counsel too. The provision of this right is juggling between different factors including what evidence is available to the court, how lengthy and complex the case is and is there any time limit to case. Also, how much time can be given in the name of preparation of defense.[319] Although this right is available to all accused and their counsel at all times[320] yet a certain time needs to be allocated to a certain group of similar cases to set a precedent so that litigation against non-provision of this right may be discouraged.[321] Appropriate information, documents as well as all files must be provided to the accused and his defense in complete confidence and privacy as well as while there is ample time to prepare for the defense.

An individual's right, whether an accused or a victim, to communicate with counsel of his or her own choosing, is the most important element of the right to adequate facilities for the preparation of a defense. The provision of adequate time for the preparation of trial proceedings are vital for truth finding in a trial. Lack of time may let many important pieces of evidence to be left out thus creating a kind of half cooked trial defense by the counsel. Thus, the chances of fair trial may be affected if this right is not provided to the accused and his counsel.

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[318]Schabas, William A. *The UN international criminal tribunals: the former Yugoslavia, Rwanda and Sierra Leone*. Cambridge University Press, 2006.
[319]Misner, Robert L. "The 1979 amendments to the Speedy Trial Act: Death of the planning process." *Hastings LJ* 32 (1980): 635.
[320]Harris, David. "The right to a fair trial in criminal proceedings as a human right." *International & Comparative Law Quarterly* 16, no. 2 (1967): 352-378.
[321]Craig, James R. "The Right to Adequate Representation in the Criminal Process: Some Observations." *Sw. LJ* 22 (1968): 260.

3.6 The Prohibition of Torture and the Right to Humane Conditions

Torture is one of those unpleasant yet integral part of human history which can be seen since the earliest records of human life on earth. Before the advent of modern society, the accused was not treated as a human with the assumption that this torture **"will purge him of his misdeeds"**.[322]

Romans have been practicing torture to extract "the highest form of truth".[323] Each generation of humans had their own barbaric ways which were justified in an attempt to satisfy the moral conscious of the societies. In order to create a sense of righteousness in their societies, Romans had crucifixion, Jews had stoning and Egyptians had desert sun death.[324] Deemed as a legitimate practice, Greek legal orator Demosthenes believed that **"no statements made as a result of torture have ever been proved untrue"**.[325] Depending upon the social status as well as the nature of the crime, torture in the Medieval Inquisition began in 1252 as a legitimate means to find out the true facts and ended in 1816 when a Papal bull (formal statement by the Pope) forbade its use. In 1644, Dutch lawyer Atonius Matthaeus opposed torture by identifying it as **"the affront to natural justice by torturing an innocent"** and **"the possibility that the accused person's perception of truth would be skewed under torture"**.[326] The prohibition of torture came as a law in 1948 when the UN Convention on Torture against Torture was adopted

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[322]Doležalová, Lucie. "Passion and Passion: Intertextual Narratives from Late Medieval Bohemia between Typology, History and Parody." In *La Typologie biblique comme forme de pensée dans l'historiographie médiévale*, pp. 245-265. 2014.

[323]James Ross, 'A History of Torture', *Torture: A Human Rights Perspective* (Human Rights Watch, 2005), p. 4; See Roman Digests, *De Quaestionibus* 'On Torture' Book 48, Chapter 18.

[324]http://phrtoolkits.org/toolkits/istanbul-protocol-model-medical-curriculum/module-1-international-legal-standards-overview/torture/history-of-torture/

[325]Demosthenes 30.37, quoted in Page duBois, Torture and Truth (New York: Routledge, 1991), pp. 49-50, quoted in James Ross, 'A History of Torture'.

[326]Antonius Matthaeus II, Commentarius de Criminibus, cited in Rudolph, Security, Terrorism and Tortue, p. 163, quoted in Ross, 'A History on Torture'.

by the UN General Assembly.[327] Violations of human rights is declared unacceptable (but not illegal) by Article 5 of the UN Universal Declaration of Human Rights (UDHR) that states **"no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."**[328]159 Signatory countries of the Geneva Conventions in 1949 and the **"Additional Protocols 1 and 2 (8 June 1977)"** has principally agreed not torture persons that are arrested during wars and conflicts. This clause has perhaps been one of the most famous and cited sections of Geneva Conventions that has given a moral publicity to the whole convention. Although in recent years incidents have been seen that are violative of this clause of Geneva Conventions, yet this clause has been instrumental in turning torture as a norm of extracting confession and truth, to a practice condemned by every segment of the society in the world.[329] Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms also prohibits torture in all circumstances.[330] According to The United Nations Convention against Torture, (CAT) it can be termed in the following manner:

> **for the purposes of [the] Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed,.....pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.**

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[327]International Covenant on Civil and Political Rights United Nations, 16 December 1966.
[328]Nowak, M., McArthur, E., & Buchinger, K. (2008). *The United Nations Convention against torture: a commentary* (pp. 557-567). Oxford: Oxford University Press.
[329]United Nations Treaty Collection". United Nations. Retrieved 7 October 2010.
[330]https://www.hrw.org/news/2003/03/11/legal-prohibition-against-torture, (last accessed on 25,Oct,2018,3:30pm)

The intended obtainable results of torture are many fold.[331] They include extraction of true confession, obtaining information from the accused, advancements in punishments and indiscrimination and coercion as well as atmosphere of fear and dread.[332]Torture other than physical torture can include psychological hindrances like lack of communication with family and friends[333] and lack of medical and dental facilities as rights of prisoners.[334] The historical background of subcontinent is laced with practice of torture as a means to the end. Blinding of eyes, putting liquid in ears and prolonged solitary imprisonment often without the knowledge of the close relatives had consequences reaching far beyond immediate pain as accused once freed are rendered useless for the society.[335]

Compared to CAT, definition of torture is slightly more comprehensive in the ICC Statute where any act committed by an individual with self-motivated purposes also comes under the fold of torture.[336] Different clauses of CAT explains definitions as well as the set of circumstances surrounding the act that may pertain to torture. Article 2 (1) obligates all the signatory parties to prevent occurrence of torture through all kinds of legislative, judicial and administrative means within their jurisdiction. The states cannot give the justification of lack of monetary or human

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[331]http://humanrights.ucdavis.edu/in_the_news/the-lingering-effects-of-torture. accessed on 25,Oct,2018,3:30pm)

[332]Gaer, Felice. "International Human Rights Scrutiny of China's Treatment of Human Rights Lawyers and Defenders: The Committee Against Torture." *Fordham Int'l LJ* 41 (2017): 1165.

[333]See further infra notes 73-76 and accompanying text.

[334]All of these documents can be found on the web site of the UN High Commissioner for Human Rights at http://www.unhchr.ch/html/intlinst.htm. See further the Appendix to this report, "Note on Sources."

[335]Burnett, A., & Peel, M. (2001). The health of survivors of torture and organised violence. *British Medical Journal*, *322*(7286), 606.

[336]Article 7(2)(e) of the ICC Statute defines torture as "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions."

resources in order to be able to stop the practice of torture in their territory,[337] nor can deny the detainees of their basic rights to food, shelter, essential items.[338] Similarly, in Article 2(2) of torture convention, no set of circumstances, however extraordinary, can provide justification for inflicting torture even if there is **"a state of war or a threat of war, internal political instability or any other public emergency".**[339] Orders passed by the superiors to inflict torture on the detainees lose their justification according to Article 2(3).[340] Articles 7 and 10 also highlights the parameters of prohibition of torture. It is true that the demarcation of difference between the two is a bit blurred with regard to the intensity of disregard to human dignity but as Article 7 of the ICCPR prohibits the infliction of torture or other inhuman treatments as well as forbidding the use of a person **"without his free consent to medical or scientific experimentation".**[341] On the other hand Article 10 outlines it to be that the **"all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".**[342] Thus, according to Nauhawk, the difference between the

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[337] See Human Rights Committee, General Comment No. 9/16, July 27, 1982.

[338]Standard Minimum Rules for the Treatment of Prisoners, supra note 6, Rules 17, 18, 20, 87 and 88.

[339]See also Body of Principles, supra note 6, Principle 6: "No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment." See further Code of Conduct for Law Enforcement Officials, supra note 6, Article 5: "No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment."

[340]http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx article 2 of Convention against Torture (CAT). (accessed at 9:50 am 4th January 2017).

[341]http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx article 7 ICCPR. (accessed at 9:50 am 4th January 2017).

[342]See also American Convention, supra note 8, Article 5; African Charter, supra note 8, Articles 4-5; Basic Principles for the Treatment of Prisoners, supra note 6, Principle 1; and Body of Principles, supra note 6, Principle 1.

articles is the 'lower intensity of disregard for human dignity than that within the meaning of Article 7.'[343]

Internationally torture is considered degradation of human life, liberty and dignity and is not only frowned upon, but every means is used to stop it. Despite international treaties and declaration as mentioned above, this practice has not been completely wiped out. Pakistan, being a third world country and having the scares of British Raj in which people lived the lives of modern slaves, torture is quite frequently been used as a method of extracting truth during investigation. The debate is still hot as arguments in favor as well against the use of torture are regularly coming forth in the world. How this derogatory technique is used in Pakistan and what are the methods and implications in the legislation and constitution of Pakistan will be discussed in detail in the coming chapters.

3.7 The Right to a Public Hearing by a Competent, Independent and Impartial Court

The right to public hearing has been universally granted in all statutes and covenants without any difference between caste, creed, gender and nationality. Article 14 (1) of ICCPR (International Covenant on Civil and Political Rights) gives the right that **"in the determination of any criminal charge against him or of his rights and obligations in a suit at law,** everyone shall be entitled to a fair and public hearing **by a competent, independent and impartial tribunal**

[343]This would include, for example, acts that cause mental suffering. It would also include prolonged solitary confinement. See Human Rights Committee General Comment 20, (Forty-fourth session, 1992), [hereinafter General Comment 20], paras 5 and 6 respectively.

established by law".[344] Similarly article 7 of African Charter on Human and People's Rights[345]gives the explanation of court duties as competent or impartial,[346] as well as article 26 makes the **"guarantee the independence of the courts"** as binding and necessary. Likewise, article 8 (1) of American Convention Human Rights as well as article 6 (1) of European Convention on Human rights considers tribunal established by law as **"competent, independent and impartial".**[347] In the International Criminal Court convention, article 40 provides that **"judges shall be independent in the performance of their functions and that they shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence".**[348]

For the provision of fair trial rights competence means a suitable law knowing person which has sufficient knowledge about the background chronology of events as well as applicable law and legislation, and independent and impartial means a court which is free from bias of all kinds, free from internal and external pressure from executive and legislative divisions and has law provisions that are accessible for all the concerned parties. In other words, this provision of law aims at establishing ways and means to make the process of trial more conducive towards the ultimate aim of truth-finding and what actually happened. This can be achieved if the court is independent and not specified for any particular offense. Although this notion has changed from

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[344]Zhang, Jixi. "Fair trial rights in ICCPR." *J. Pol. & L.* 2 (2009): 39. This dissertation will provide almost all the articles on a particular right in trial. These articles will be overlapping and repetitive in nature, but as they are part of international law, this repetition adds emphasis. See also https://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf (accessed on 14th July 2017 at 04:41 am.)

[345]http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf (accessed on 16th August 2017 at 03:37 am.). See also Umozurike, U. Oji. *The African Charter on Human and Peoples' Rights*. Brill Nijhoff, 1997.

[346]Udombana, Nsongurua J. "The African Commission on Human and People's Rights and the Development of Fair Trial Norms in Africa." *Afr. Hum. Rts. LJ* 6 (2006): 299.

[347]Okere, B. Obinna. "The protection of human rights in Africa and the African Charter on Human and Peoples' Rights: a comparative analysis with the European and American systems." *Hum. Rts. Q.* 6 (1984): 141.

[348]Werle, Gerhard. "Individual criminal responsibility in Article 25 ICC Statute." *Journal of International Criminal Justice* 5, no. 4 (2007): 953-975.

its original attributes like, for example, the establishment of military courts that are specifically meant for a particular type of cases and is to decide matters in a given time, under presumably, a pre-determined mind set about the outcome. The HRCP (Human Rights Commission of Pakistan) is one faction of the society (this researcher may or may not agree to this preposition) which considers the establishment of specific courts as contradictory to the competency, independence and impartiality of a court and considers it **as "an anomaly in any democratic order that claims to uphold the fundamental rights and freedoms of its citizens".**[349] Basic Principles on the Judiciary set out in some detail the need for and mechanisms necessary to achieve that independence. Some of the practical precautions of impartiality include the requirement of qualifications necessary for recommendation of judicial staff and judges, the terms of nomination,[350] the necessity for guaranteed tenure,[351] efficient, fair and independent disciplinary proceedings regarding judges,[352] and the obligation of state to provide resources such as training)[353]. The provision of allied perks like the security of their tenure, unnecessary transfer or suspension[354] and avoiding any undue disciplinary sanctions taken against them can keep the court room free from not only financial and educational problems but keep the courts free from political, governmental and media influence.[355] The impartiality of court to either of the parties is perhaps the most important criterion of finding truth in a case. Although a judge is central to the decision making in a case, the actual involvement of a judge, in an adversarial system is essentially of a passive one. Yet if the judge is either related to any party or has the involvement of personal stakes, the impartiality is seriously breached and the decision of the

[349] http://hrcp-web.org/hrcpweb/military-courts-are-anti-democratic/ (accessed on 13th March 2019 at 4:28 am.)
[350] Basic Principles on the Independence of the Judiciary, supra note 6, Principle 10.
[351] Id., Principle 12
[352] Id., Principles 17-20.
[353] Id., Principle 10.
[354] Id., Principle 11.
[355] Id., Principle 7.

court, therefore, may be far from actual and true. Also, objective and subjective test of impartiality must be observed. If the judge is non-participative, he is considered as impartial and competent. The adversarial system puts emphasis on the judge to be 'passive' and detached due to the high level of attachments of the parties to court proceedings. Only as a non-affected and impartial judge can give decision based solely on the basis of evidence.

In order to ensure transparency and clarity of the criminal trial proceedings, the hearings and judgements should, in principle, be conducted orally and publicly. The safeguard of individual rights and society at large can be ensured through the right to a public hearing. Facts presented to the public can ensure truth finding be achieved which is the ultimate aim of a trial.[356] All international statutes require the availability of information regarding court proceedings to the public. This information includes the time, place and date of hearing, concerned information of trial proceedings, and the information of concerned counsel, prosecutors as well as the judge. But provision of such information is not binding as according to article 14 of ICCPR, courts can withhold such information proceedings from media and the public may be excluded from the hearing only in the cases in the presence of plausible reason of privacy, security, public order and sometimes in the interest of justice.[357] Yet the basic information regarding essential findings, evidence and legal reasoning should be publicly available. The publicity of judgement can be either oral or documentary.[358]

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[356]Hench, Virginia E. "What Kind of Hearing--Some Thoughts on Due Process for the Non-English-Speaking Criminal Defendant." *T. Marshall L. Rev.* 24 (1998): 251.
[357]Leigh, Monroe. "Witness anonymity is inconsistent with due process." *American Journal of International Law* 91, no. 1 (1997): 80-83.
[358]Smail, Daniel Lord. *The consumption of justice: Emotions, publicity, and legal culture in Marseille, 1264–1423.* Cornell University Press, 2013.

3.8 The Prohibition of Double Jeopardy

Perhaps the most debated right amongst all court rights is the protection against double jeopardy. Prohibition of double jeopardy is that no person can be punished twice for the same offense. The ancient Romans and Greeks were not unaware of this law but the final legal expression came in the written form in Digest of Justinian where it was stated that **"the governor should not permit the same person to be again accused of a crime of which he had been acquitted".**[359]The prohibition of double jeopardy was also expressed in ancient Roman law stating ***"nemo debt bis puniri pro uno delicto"*** (no person should be punished twice for the same cause). The common law principle ***autre fois acquit*** (formally acquitted) and ***autre fois convict*** (formally convicted) also means that **"no one shall be punished or put in peril twice for the same matter".**[360] The basic principle of double jeopardy is based on the maxim of ***"ne bis in idem"*** (not twice about the same).[361]

Prohibition of double jeopardy can only be applicable once the following conditions have been met. Firstly the accused has already been tried for the offense and the trial was conducted by a competent and proficient court. Secondly the case is already decided in favor of acquittal or conviction and lastly the order or judgment is still in force.[362]

Nearly all international covenants and statutes provide protection to the accused against double jeopardy. This right is not bound by domestic law but an internationally recognized right to all

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[359]https://archive.org/stream/digestofjustinia01monruoft/digestofjustinia01monruoft_djvu.txt (accessed on 19th May 2017 at 3:47 am.)

[360]Sigler, Jay A. "A History of Double Jeopardy." *The American Journal of Legal History* 7, no. 4 (1963): 283-309. doi:10.2307/844041.

[361]https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e66 (accessed on 19th May 2017 at 4:07 am.)

[362]Westen, Peter. "The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences." *Michigan Law Review* 78, no. 7 (1980): 1001-1065.

trial proceedings disregarding the category of trial and the nature of its outcome. The most comprehensive protection can be observed in ICCPR. Article 14(7) of ICCPR states **"no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country".**[363] Article 8(4) of the American Convention similarly guarantees protection against double jeopardy, **"An accused person acquitted by a no appealable judgement shall not be subjected to a new trial for the same cause"**. European Convention also provides in its article 4(1) **"no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State".**[364] Similarly, 5th Amendment of US Constitution gives the protection against double jeopardy as **"nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb".**[365]

The case of double jeopardy can stand void in case fresh evidence surfaces or new facts are discovered pertaining to the case. An interesting question put forward by the International Criminal Tribunals for the Former Yugoslavia and Rwanda, and by the Statute of the future International Criminal Court is what if the accused person is already tried by their respective courts, be put through trial again by these international tribunals? The dominant opinion is that such a set of circumstances come under double jeopardy and thus they cannot be handed out

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[363]Morosin, Michele N. "Double Jeopardy and International Law: Obstacles to Formulating a General Principle." *Nordic J. Int'l L.* 64 (1995): 261.

[364]Bartsch, Hans-Jürgen. "Council of europe ne bis in idem: the european perspective." *Revue internationale de droit pénal* 73, no. 3 (2002): 1163-1171. This article was originally in French as this researcher based it on English translation of the said article.

[365]https://en.wikipedia.org/wiki/Double_Jeopardy_Clause (accessed on 6th June 2017 at 4:29 am.)

punishment again.[366] If we take double jeopardy as a relevant jurisdiction, Human Rights Committee considers that double jeopardy prohibits the subsequent trial within one state but is effectively not binding at national level when two or more states are involved.[367]

The right of double jeopardy is perhaps the most volatile rights of trial. The famous case of Bluefold vs. Arkensas also relates to the finer points in double jeopardy. The first trial saw the judge dishing out some 'hard transition' instructions to the jurors in deciding the multiple accusations in descending order from capital murder and first degree murder to negligent homicide.[368] Since the jurors were instructed to first decide the greater offenses before giving verdict on lesser crimes, the judge was reported a 'mistrial' as defendant's motion was denied to distribute verdict forms to the jurors. The court subsequently opened a second trial and rejected the plea double jeopardy of defendant on the basis that first jury's verdict was never formally reduced to writing and entered of record.[369]

The basic aim of providing protection against double jeopardy is to prevent the government from harassing people through repeated prosecutions for the same crime. The first sacrifice in case of harassment to the accused is of truth. And if the truth cannot be found during the process of trial, the very basic aim stands void. Also, double jeopardy aims at making the acquittals more meaningful and create a sense of fairness and justice in trial.

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[366]Finlay, Lorraine. "Does the International Criminal Court Protect Against Double Jeopardy: An Analysis of Article 20 of the Rome Statute." *UC Davis J. Int'l L. & Pol'y* 15 (2008): 221.

[367]https://hrc.act.gov.au/wp-content/uploads/2015/03/Section-24-Right-not-to-be-tried-or-punished-more-than-once-.pdf (accessed on 3rd June 2017 at 3:35 am.)

[368]Sheppard, Robert. "Double Jeopardy Blues: Why in Light of Blueford v. Arkansas States Should Mandate Partial Verdicts in Acquit-First Transition Instruction Cases." *Miss. LJ* 83 (2014): 373.

[369]https://verdict.justia.com/2011/11/02/what-purpose-does-the-double-jeopardy-clause-serve (accessed on 25th June 2017 at 4:37 am.)

3.9 The Right to Appeal

One of the most important right in ensuring fairness in trial is the right to appeal.[370] Individual decisions by the court can be made accountable through this right when parties can make the appeal for review petition to higher courts.[371] Appeal in its essence, is not to challenge the decision of the trial judge, rather an effort to not only correct the lacunas left in the judgement, but also ensure the truth finding in trial procedure. This quest for finding the real order of the events through appeal is an instrument which further reduces margin of error in the court decisions. In nearly all the countries following adversarial trial system, a small number of cases are subjected to successful appeal.[372]Justinian's Corpus Juris Civilis was the first document to recognise the right to appeal as an explanatory accountability of the court. The right to appeal serves the purpose of satisfying the aggrieved individual as well as restore the confidence of general public on courts as well as fairness and truth of trial.[373]

The right to appeal is an incognito trial recognised by the international covenants and statutes. Article 14(5) of ICCPR guarantees this right and states that **"everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law"**. Similarly Article 7(1)(a) of the African Charter on Human and Peoples' Rights states that **"every individual shall have the right to have his cause heard"**, which also

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[370]https://www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/right-2-appeal/ (accessed on 17th July 2017 at 4:21 am.)

[371]Stern, Robert L. "When to Cross-Appeal or Cross-Petition. Certainty or Confusion?." *Harvard Law Review* (1974): 763-780.

[372] In UK in 2011, 1,553,983 civil cases were filed and only 1,269 appeals were made in Court of Appeal Civil Division.

See also Eisenberg, Theodore. "Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes." *Journal of Empirical Legal Studies* 1, no. 3 (2004): 659-688.

[373]John W. Head. "Justinian's Corpus Juris Civilis in Comparative Perspective: Illuminating Key Differences between the Civil, Common, and Chinese Legal Traditions." *Mediterranean Studies* 21, no. 2 (2013): 91-121. doi:10.5325/mediterraneanstu.21.2.0091.

contains **"the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force".**[374] Also American Convention on Human Rights in its article 8(2)(h) states with regard to criminal proceedings that **"every person is entitled, with full equality.... the right to appeal the judgment to a higher court".** Although article 6 of the European Convention has not clearly demarcated this right, but article 2 provides this right in following words, **"may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in first instance by the highest tribunal or was convicted following an appeal against acquittal".**[375]

As far as the right to appeal is concerned, appeal must be heard at least at two different levels of judicial inquiry of the case. One of these two must be of a higher court or tribunal than the one which initially decided the case. In order for truth to prevail in the decision making this provision may prove critical in its essence.[376] Since the court has to stay its original order once the right to appeal is exercised by a party, the time factor of this right is of paramount importance and must be taken into account. Although this right is available to all persons regardless of the nature and severity of their crime, the overall ratio of cases that exercise this right is low. Many factors which involve time, finances and emotional burden of case proceedings effect the will and power of respective parties to go for appeal.[377] Still it is moral duty of the appellate courts and superior

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[374]https://www.achpr.org/legalinstruments/detail?id=49 (accessed 17th May 2017 at 6:43 am.)
[375]Weil, Gordon L. "The Evolution of the European Convention on Human Rights." *American Journal of International Law* 57, no. 4 (1963): 804-827.
[376]Dalton, Harlon Leigh. "Taking the right to appeal (more or less) seriously." *The Yale Law Journal* 95, no. 1 (1985): 62-107.
[377]Dent, John A. "No Right of Appeal: Bill C-11, Criminality, and the Human Rights of Permanent Residents Facing Deportation." *Queen's LJ* 27 (2001): 749.

tribunals to ensure that truth is laid bare to all and all the requirements of the fair trial are ensured during the proceedings of the court.

3.10 Conclusion

Since the first documentation of trial rights in 1948, there has been an overlapping of similar trial rights in different conventions. The most important articles with regard to provision of fair trial rights have been the ICCPR as discussed above. One of the reasons for these coinciding standards is, that different international statutes cover different regional spheres. This overlapping of fundamental fair trial rights is a testament to the fact that rights are similar and have a universality in its cause. In ensuring fair trial rights, the principle of 'equality of arms' entails equal opportunities for both prosecution as well as defense to defend their case. This principle strengthens the procedural guarantees that lie at the heart of provision of trial rights while striking a balance between the two.[378] Most democratic legal systems, especially those following common law, put great emphasis on this balance.

The law in Pakistan especially criminal law, as discussed before has an amalgamation of common law provisions that formulate adversarial system adapted to the socio-geographical and religious-economic parameters of Pakistan. Also, these rights are in consistence with Islam, the very basic and fundamental guidance for law in our country. The international statutes and covenants have made a detailed progress in provision of fair trial rights. Nearly all the aspects of present trial systems have been covered by these treaties. The impact and the fact that most of the countries of the world are signatories of these treaties worldwide add to their impact and importance.

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[378]Yu-yan, G. U. O. "Reflections on the Balance between the Prosecution and Defense in Investigation Stage." *Journal of Changchun University of Science and Technology (Social Sciences Edition)* 6 (2010).

Since according to Widder,[379] an adequate account of fairness must find a middle ground between particular concerns about procedural trial rights at one side and accuracy and truth finding in conclusions of trial at the other. Similarly, sociological impacts of fairness and what impact it has on finding truth as well as its perception by the parties plays a vital role in the legitimacy and trust of international covenants.[380] It is apparent that the international statutes discussed above have been quite successful in presenting in detail such clauses that safeguard basic human rights especially regarding trial. These articles have covered sufficient grounds in terms of fairness of trial and finding truth. And have the capability to guide regional laws country wise and area wise to be formulated in achieving enhancement of fairness, procedural impartiality and expeditious trials.

Fair trial rights have been formulated under basic human rights in the Constitution of Pakistan, but specification of fair trial rights have been a relatively new phenomenon in Pakistani Law. The introduction of article 10-A of the constitution of Pakistan is the first concrete step towards provision of fair trial rights while keeping in view the balance between the two arms. Since the search for truth in the process of trial is the ultimate yardstick that can ensure provision of fair trial rights, this researcher will discuss in forthcoming chapter as to how and to what extent fair trial rights have been developed in the constitution of Pakistan in the light of famous case laws in Pakistan. How Pakistan's constitution and codified laws have taken leaf out of these international statutes and formed laws adapted to its regional and sociological requirements will be discussed in forthcoming chapters. What has so far been developed and what more can be done to ensure the provision of fair trial rights in legal system of Pakistan

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[379] Ibid, Widder, 2015

[380] Machura, Stefan. "German sociology of law." *The American Sociologist* 32, no. 2 (2001): 41.

CHAPTER 4

FAIR TRIAL GUARANTEES IN PAKISTAN'S CONSTITUTIONAL LAW

4. Introduction

The first international declaration of protection of human rights was the 'Universal Declaration of Human Rights' adopted by UN in 1948. Hailed as the **"common standard of achievement for all peoples and all nations",**[381] UDHR was the first step towards the development of comprehensive **"International Bill of Human Rights",**[382] later followed by ICCPR and many other statutes and covenants. Article 10 of UDHR and articles 14 and 15 of ICCPR provides detailed information regarding right to fair trial. Despite being a signatory of this declaration, Constituent Assembly of Pakistan left out 'Right to Fair Trial' formulating the Constitution of Pakistan 1973, although many provisions of international statutes and covenants were amalgamated in its articles.[383] In 2010, Article 10-A was introduced in the Constitution of Pakistan by the 18th Amendment and states that, **"for the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process".**[384]

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[381]https://www.britannica.com/topic/Universal-Declaration-of-Human-Rights (accessed on 14th October 2018 at 3:56 am.)

[382]Humphrey, John P. "The international bill of rights: scope and implementation." *Wm. & Mary L. Rev.* 17 (1975): 527.

[383]https://sahsol.lums.edu.pk/law-journal/right-fair-trial-better-late-never (accessed on 24th November 2018 at 4:36 am.)

[384]http://www.na.gov.pk/uploads/documents/1549886415_632.pdf (accessed on 24th November 2018 at 11:23 am.)

Since the introduction of article 10-A in Constitution of Pakistan, it has become a constitutional right covering all legal branches. Since this dissertation aims at discussing criminal aspect of fair trial in Pakistan, we would be discussing fair trial in this regard.

This chapter would make analysis of fair trial guarantees in the constitution of Pakistan 1973 to determine the extent of compatibility of these guarantees with fair trial standards recognized by international human rights instruments. This analysis would reveal the fair trial gaps and would recommend how to make the right to fair trial attuned with that of human rights standards prevalent in the present judicial system in Pakistan.

The constitution of Pakistan has guaranteed many rights to citizens of Pakistan. They include independence of judiciary,[385] right to be treated in accordance with law,[386] no action detrimental to life and liberty,[387] laws inconstant with fundamental rights,[388] security to life and liberty,[389] safeguard as to arbitrary arrest, ground of such an arrest and right to counsel,[390] to be produced before magistrate within 24 hours,[391] right to fair trial,[392] to be protected against retrospectively punished,[393] prevention of double punishment and self-incrimination,[394] dignity of man,[395] protection against torture,[396] equality before law and right to appeal.[397] How article 10-A of the Constitution can be interpreted is still in its progressive stage. As fair trial right is non-negotiable

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[385] Article 2-A, Constitution of Pakistan 1973.
[386] Article 4(1), Constitution of Pakistan 1973.
[387] Article 4 (2) (A), Constitution of Pakistan 1973.
[388] Article 8 (1), Constitution of Pakistan 1973.
[389] Article 9, Constitution of Pakistan 1973.
[390] Article 10 (1), Constitution of Pakistan 1973.
[391] Article 10 (2), Constitution of Pakistan 1973.
[392] Article 10-A, Constitution of Pakistan 1973.
[393] Article 12, Constitution of Pakistan 1973.
[394] Article 13, Constitution of Pakistan 1973.
[395] Article 14, Constitution of Pakistan 1973.
[396] Article 14 (2), Constitution of Pakistan 1973.
[397] Article 25, Constitution of Pakistan 1973.

in the quest to discover truth, the exact definition of fair trial rights in Constitution is deliberately left out to provide universality to this right.[398]For example, the seven member bench of Supreme Court of Pakistan interpreted Fair Trial as long recognized and constitutionally guaranteed right which is now well embedded in our jurisprudence. The court interpreted article 10-A as a right:

> **raised to a higher platform; subsequently a law, or tradition or the usage having the force of law, making it a non-negotiable entity, which if is inconsistent or contradictory with the right to a "fair trial", would be void by virtue of Article 8 of the Constitution.**[399]

Since the inception of Pakistan, the constitutional and legislative history has been unlike any other nation. Going through many hiccups, the independence of judiciary was first marginalized and fundamental rights were infringed with the imposition of Martial Law in 1958. In 1962 onwards, courts became active to judge the constitutionality of Martial Law but another Martial law was imposed with courts being marginalized once again under the jurisdiction of courts (removal of doubts, order 1969)[400] which remained enforced till the end of 1970. The pro-activeness of courts was once again axed in July 1977 when constitution was, though not abrogated but was kept in abeyance. It is pertinent to mention here that constitution of 1973 witnessed certain amendments, which, no doubt curtailed powers of the Court. The constitutional development in our country could be observed especially in Doso case, Asma Jillani case and

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[398]Criminal Original Petition No. 6 of 2012 in Suo Motu Case No. 4 of 2010 (Contempt proceedings against Syed Yousaf Raza Gillani, the Prime Minister of Pakistan, regarding noncompliance of this Court's order dated 16.01.2012), decided on 26th April 2012 PLD 2012 SC 553, para 27.

[399]ibid para 25.

[400] Chaudhry M.I. (1969). The Jurisdiction of courts (removal of doubts) order, 1969, with martial law regulations & orders;: Containing I. Jurisdiction of courts (removal of doubts) order, 1969. See also https://www.amazon.com/Jurisdiction-courts-removal-martial-regulations/dp/B0006E1BDU

Nusrat Bhutto case wherein terms such as **"Kelson theory"** and **"Law of Necessity"** were used. The efforts made by courts in Pakistan in trying to strike balance between the prosecution and defense is also observed throughout the case laws in Pakistan. In --- case, the judgment declaring that:

> **Any system of law which does not keep in view the state of discipline, peace and. tranquility as well as the basic purpose of the law and establishment of Government i.e. protection of life, liberty and property of the citizen is bad to that extent because it militates against the basic human and fundamental rights of, the citizen. The balance is always to be struck in the liberty of one person and the fundamental and human rights of the society collectively**

is an effort in the right direction.[401] Through article 58 (2) (B) in constitution, presidential authorities remained in force and many elected governments were dissolved. In this chapter we would be discussing the different articles of the constitution that are relevant to the right to fair trial and due process of law as well as identify the gaps of all those rights of which we as a state are signatory but have failed to implement them in their spirit and essence. Following are the main article dealing the right to fair trial in the constitution of Pakistan.

4.1 Article 2-A

Although in the preamble of constitution of Pakistan, judiciary as an institute has not only been guaranteed independence but this right is recognized as a universal human right and according to

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[401]Nazeer Ahmed and 2 others vs.the State. Criminal Bail Application No.606 of 2001, 2003 MLD 1591. (30th January, 2002).

the constitution, **"the independence of judiciary should be fully secured".**[402] Judicial independence suffered many setbacks during constitutional crisis when martial laws were imposed and journey of judicial justice was interrupted. In Sharaf Faridi case, the Supreme Court of Pakistan declared that 'judiciary enjoys a unique and supreme position within the framework of constitution.'[403] The independence of judiciary denotes the independence of judges including their recruitment process from any sort of interference from executive. This also includes the separation of powers[404] as is evident in Mehram case, Supreme Court again observed that' a legislation was struck down on the ground that it violated the general principle of separation of power.[405] In Zafar Ali Shah case the Supreme Court also held that judicial independence means the application of conscience in the decision making of all spheres and magnitudes while deciding a case.[406] In all the societies of the world including Pakistan, if the judiciary is not independent in its working and decisions, this amounts to a denial of justice to public and an imminent danger of collapse of smooth operation of a society.[407] The independence of judiciary acts as a check on the power of the state and other mighty elements in the society where individuals are not afraid of speaking truth and a healthy balance of conflict thrives in it.[408] Judiciary as an important pillar of state and the importance of its independence has long been acknowledged by the decisions announced by courts in different cases from time to time. The judiciary is not only independent but has been assigned the jurisdiction to enforce

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[402] Article 2-A Constitution of Pakistan 1973.
[403] PLD 1989 kar 404, Sharaf Faridi v. federation of Islamic Republic of Pakistan.
[404] Article 175 (3) Constitution of Pakistan 1973.
[405] PLD 1998 SC 1445. Mehram Ali v. federation of Pakistan.
[406] PLD 2000 SC869 = SCMR 1137. Zafar Ali Shah v. Pervez Musharraf, Chief Executive of Pakistan.
[407] PLD 2013 SC 501 at [30. See also aljahad v. federation of Pakistan], PLD 1996 SC 324. Sh Riaz-ul-haq v. federation of Pakistan.

[408] PLD 1994 SC 105 [At 1. See also upgradation of judicial officers, suo moto case no. 16 of 2009, 2010 GBLR 160 At 18.

the fundamental rights. In Waseem Sajjad case, the judiciary is entrusted with the responsibility of enforcement of fundamental rights.[409] The independence of judiciary has not only been inserted in the constitution but is considered a sacred pillar necessary for the edifice of legal system as is declared in Ghulam Nabi case. One of the examples of judicial independence is the establishment of simultaneous and concurrent judicial systems in the country. In older regimes, it was very common to have many judicial systems working side by side but with the advancement in legal comities, single judicial systems worked in each country with guidelines from international covenants and treaties.[410] Whenever any such system is formed in a country where an extensive judicial system is already established, it is a mistrust on the existing legal system and at the same time, the indication of serious lacunas that need immediate attention. In case of Pakistan, we can take the recent example of the establishment of military courts. It is a well-recognized fact that when the ordinary courts are functioning in accordance with law, there is no room for military courts. In Liaqat case the Supreme Court observed that military courts ought not to be in existence where when civil and criminal courts are independently functioning without any coercive pressure and they are properly exercising their jurisdiction and promoting moral and legal values and truth finding in the court process.[411] Also, it is the sacred and difficult duty of the court to ensure that institutions work within their prescribed roles as enshrined in the Constitution and do not transgress their authorities so that the balance of the society is not disturbed.

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[409] Waseem Sajjad and others vs. Federation of Pakistan. PLD 2001 SC 233.
[410] Sharaf Faridi and three others vs. federation of Pakistan. PLD 1989 Karachi 404.
[411] http://pja.gov.pk/system/files/PLD%201999%20SC%20504.pdf Liaqat vs. Federation of Pakistan 1999.

In Nasreen case, it was said that constitution being a document of social contract and to seek justice is the right of the weakest.[412] The independent of judiciary is a jewel in the crown of the constitution. The fruits of independence of judiciary could only be seen if the judges are competent, honest, and fair and blessed with judicial approach. The judiciary is bound to be independent for the administration of justice and fair play.[413]The judiciary is essentially a creature of the constitution. It was marginalized when Pakistan had no constitution but when country was blessed with Constitution, the judiciary as an institution was prompt to uphold the supremacy of the constitution and the rule of law.[414] The independence of judiciary refers to becoming independent of deducts of the Government. One of major withholds in the working of judiciary is the financial dependence. Financial autonomy is the rode that gives speedy and open access to justice. Unless judiciary is given a certain level of strength and removed from under the governmental restrictions, complete autonomy of justice may remain a far-fetched dream for the society.[415] The rule of law in due process and concept of fair trial is meaningless without an independent judiciary. [416] In Al Jihad Trust (Judges Case) the Supreme Court has observed that right of **"access to justice to all"** is an invaluable right and shrived in the constitution of Pakistan. The importance of independence of judiciary in a country can't be over emphasized enough. A system where trials are independent and fair and free from bias and prejudice, where the government institutions especially law enforcing agencies are working seamlessly and diligently, that society can be termed as much close to perfection as possible. It may be a

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[412]1998 CLC 1099.
[413]http://www.pakistantoday.com.pk/2012/11/14/independence-of-judiciary/ (accessed on 23rd November 2015) See also Sardar Muhammad Raza Khan 17 November, 2012.
[414]Newberg, P. R. (2002). *Judging the state: courts and constitutional politics in Pakistan* (Vol. 59). Cambridge University Press.
[415] PLD 1993 SE 341.
[416]PLD 1989 Kar 404.

difficult task but not impossible one where individuals not only remain within the conformities of moral and legal obligations but feel safe and free at the same time.[417] All those courts which are conducting trials of accused involving capital punishment including military courts, courts of notices substances and anti-terrorism courts do not seem independent. This would be discussed in detail at the end of this chapter. However there have been a question mark upon the independence of these courts as to the transfer and posting, ministerial staff, salaries, leaves, transport, budget and their annual confidential reports (Performance Evaluation Reports) upon which their promotion depends are in the hands of executive authorities. Moreover, the formal permission needed to conduct jail trial is granted by Home Department of the concerned province instead of the concerned High Court. Also, High Court has no administrative powers to declare a civil division as 'sessions division' as this authority still lies with the government curtailing the essence of independence of judiciary as the accused is entitled to impartial judge who is neither prejudice nor pre-determined to convict the accused without proper evidence. The judge must show patience during hearing of the case. Moreover, judge during the course of trial, must avoid of any kind with parties and is not to be influenced from media coverage. As Justice Holmes has observed:

> **the theory of our system is that the conclusion to be reached in a case will be induced only by evidence and arguments in open Court and not by any outside influence whether of private talk or public print.[418]**

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[417] PLD 1986 SE 324.

[418] Tufts, James H. "THE LEGAL AND SOCIAL PHILOSOPHY OF MR. JUSTICE HOLMES." *American Bar Association Journal* 7, no. 7 (1921): 359-63. www.jstor.org/stable/25700893.(accessed on 25,Oct,2017,3:30pm)

4.2 Article 4 of the Constitution (Right to be dealt with in accordance with law)

The most important factor of article 4 of the Constitution is to be dealt with "in accordance with law". All the protection and treatment that a citizen of the state is dealt with, must be in accordance with law. This gives the notion of a little strict law-abiding demand, but this article gives a freedom within the prescribed regulations set out in the Constitution. No action which can be detrimental to the life, dignity or liberty of an individual may be taken. This article gives protection not only to the individual but also to all the clauses of the Constitution giving them legal protection. Any action which is in accordance with law is legal and binding and has little or no chance of being challenged about its authenticity. Article 4 of the constitution protects the right to be treated in accordance with law which envisages that determination of facts must be made first and then to apply law. In British law the principles of 'rule of law', in American Constitution, the principle of 'due process of law' and in Pakistan the principle 'according to law' are applicable. However, in the year 2010 when 18th amendment was introduced in the constitution of Pakistan, the doctrine of fair trail and due process were made part of fundamental rights. Due process of law refers to the rights that are due and ensure all the beneficial rights of the citizens. The term in accordance with law denotes that exercise of every authority must have the sanction of some legal backing as well as the auctions are subject to legal scrutiny. When the constitution of 1962 was framed, it was without any fundamental right. Moreover, court used to provide safeguard to the citizens under the basic principle of 'in accordance of law' but at some later stage upon public pressure, fundamental rights were introduced in the constitution in 1964. This was how the fundamental rights entered into the constitution of 1973. It is settled, now, that no legislation could be made against fundamental right and executive authority is to explain its

each and every action under the law as article 5 of the constitution puts an obligation on state authority to obey the constitution and law. It is now a vested constitutional right of every citizen that law must be applied properly, and citizens must be treated in accordance with the law. If the law is misinterpreted it would be gross violation of article 5 of the constitution. Similarly, the balance not only between prosecution and defense but also between ensuring justice within reasonable time is of utmost importance. It has been stated that:

> **Quick or hurried conclusion of cases is good, and delay in dispensation of justice is really denying it. However, balance has to be stuck between delayed justice and hasty justice. If delay ensures justice, nothing bad in it. Though not in good taste. But if haste distorts justice it is the worse than the delay.[419]**

Every organ of the state including the investigating agencies (police) are duty bound to act strictly in accordance with law and during trail accused must not be deprived of due process. It has been said that it is the inherent right of the accused person to be treated in accordance with law.[420] Moreover the public functionaries are also under legal obligation to work within the framework of constitution as enshrined in article 4 of the constitution.[421] Since, constitution is a scared document in every country which is actually a commitment to the nation to function within its mandate. Article 4 of the constitution lays an obligation upon every citizen to act in accordance with law and article 5 (2) requires loyalties to the constitution and law. Here law

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[419]Hakam Deen vs. the State through Advocate-General and 15 others. Criminal Appeal No.29 of 2004, PLD 2006 Supreme Court (AJ&K) 43. (21st April, 2006). (On appeal from the judgment of the Shariat Court dated 3-12-2004 in Criminal Appeals Nos.36 and 42 of 2004).

[420] 1999 P.Cr.L.J. 547

[421] NLR 1999 Criminal Lah. 140

denotes general 'law of the land', rule and regulations *vis-à-vis* citizens.[422] In article 4 the word 'law' includes not only statutory law but also the judge-made law as well as the judicial precedents which may be original, binding or persuasive. Any order in violation of article 4, in accordance with law, is bound to be strutted down.[423] The rule of law envisages the supremacy of law and nobody is above the law irrespective of his position in society. It can be understood as a legal prohibited regime and law restricts the government functionaries by creating order and liabilities as to how the country would function. Since the rule of law is fundamental to every democratic polity and Aristotle has said about 2000 years ago that **"that the rule of law is better than that is any individual"**. Moreover, Lord Chief Justice Cock quoting Brocton said in the case of proclamation **"the king ought not to be subject to man but subject to God and the law because the law makes him king"**.[424]

The phrase "rule of law" has been found in the oldest scriptures of the world. The very first societies formulated used this word of rule of law. In 4th BC, from the time of Aristotle, rule of law was used to denote the supremacy of rules in the society. Aristotle's concept of the rule of law is encapsulated in his saying; **"the rule of law is to be preferred to that of any individual".** According to Aristotle, rule of law, means **"Government by law is superior to government by men".**[425] According to Lord Hewitt, **"the Rule of law means the supremacy or dominance of law, as distinguished from mere arbitrariness or some alternative mode**

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[422] NLR 1998 Cr. Lah. 10
[423] NLR 1982 P.Cr.L.J. 10.
[424]Costigan, G. P. (1931). The Full Remarks on Advocacy of Lord Brougham and Lord Chief Justice Cockburn at the Dinner to M. Berryer on November 8, 1864. *California Law Review*, 521-523.
[425]Fallon Jr, R. H. (1997). " The Rule of Law" as a Concept in Constitutional Discourse. *Columbia Law Review*, 1-56.

which is not law of determining of disposing of the rights of the individuals".[426] According to Wade, **"A rule of law requires that government should be subject to the law rather than law subject to government".**[427]

According to Prof. Dicey, Rule of law means supremacy of law and excludes arbitrariness and discretionary authority of the executive. In Islamic jurisprudence, rule of law means that none can claim to be above the law, not even the caliph. In England King John placed the future kings and magistrates including himself within the rule of law when signed Magna Carta in 1215 AD,

The right to fair trial is directly connected with the rule of law as in Mohabbat Khan the superior has held that every citizen has the right to enjoy the protection of law and to be treated in accordance with law. Every citizen regardless of his status in society is also entitled to be dealt with and treated in accordance with law to which he is a subject.[428] In Dawood case it was also held that provision of article 4 of the Constitution provide every individual with the right to be treated according to law and be protected according to law ensuring life and liberty.[429] It is settled that every person is protected by law and no government functionaries can violate the rule of law and every act must be in accordance with law. If the functions of the courts are not in accordance with law, the fair trial right of due process cannot be enjoyed by the accused. The constitution of Pakistan is unambiguous as to the protection of life, liberty and body of every individual at any stage of fair trial proceedings. In Farhat case, it was said by the superior court that constitution is in ambiguous term has provided protection to life, liberty, and other fundamental rights of citizen. No action detrimental to such right could be initiated except in

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[426]Woolf, L. (2004). The Rule of Law and a Change in the Constitution. *The Cambridge Law Journal*, *63*(02), 317-330.
[427]Scalia, A. (1989). The rule of law as a law of rules. *The University of Chicago Law Review*, *56*(4), 1175-1188.
[428] 1985 PCRLJ 360.
[429]PLD 1986 Quetta 148.

accordance with law.[430] Article 4 of the constitution also recognizes the fundamental right directly connected with the standards of fair trial as one of its major constituent element. In Ghayyur case, the superior court said that every citizen has an inalienable right to enjoy the protection of law and to be treated in accordance with the law.[431] The concept of "rule of law". "According to law" and "due process" however needs elaboration as Article 4 of the constitution focuses on that aspect of right to a fair trial in the administration of legal system in Pakistan. In Hazir case the superior court has observed that every citizen in a state governed by the constitution and law has a right to enjoy the protection of law.[432] In Al-Jahad case Supreme Court has ordained that the right to assess to justice to all is an inalienable right which guarantees an individual to be tried fairly and justly by an impartial court. In federation of Pakistan the Supreme Court said that every person has the right to be protected by the law and no action deter mental life and liberty except in accordance with law.

4.3 Article 8 (Laws inconsistent with or in derogation of fundamental rights to be void)

The article 8 of the constitution of Pakistan has restricted the legislation to pass any law which is against the fundamental right. Article 8 of the constitution says, **"the state shall not make any law which takes away or abridges the rights so conferred",** and any law made in infringement of this clause shall **"to the extent of such contravention be wide".** In the constitution of Pakistan, the term fundamental rights are basically Human Rights which are inherited in the society and recognized by the individuals. It has been seen that level of trust of the parties of a

[430]1988 CLC 545.
[431]PLD 1990 Lahore 432.
[432]1993 MLD 1308.

trial is paramount as the trial in court should be free from all prejudices. The quest to find truth must prevail above all biases. It has been stated that:

> **process of administration of justice which at all costs be free from all taints;.... bracing the gallows as the process is adversarial in nature with an onus on the prosecution to drive home charge on its own beyond a shadow of doubt before forfeiture of freedom or life is inflicted upon the accused in the dock.**[433]

A proper and fair trial have been guaranteed in the constitution and has been made as a part of fundamental right. Legally speaking Article 8 has put an embargo on legislative to pass any law against fundamental rights. In Sharaf Faridi case, the Supreme Court said that limitations have been placed on legislation not to curtail fundamental right or abridge them by any law. Moreover restrictions has been placed on executives as by Executive Act, the fundamental rights are infringed, violated or curtailed but there is no mention of the judiciary in the definition of the state.[434] If such restriction is not imposed on executive and legislature, there is a strong possibility that fundamental rights can be infringed and innocent persons may not be able to get proper and fair trial. In Musa Khan Case, the superior court has said that legislature is presumed not to transgress its jurisdiction and invade fundamental right given by the constitution. Such rule must be kept in view in enforcing law.[435]The right to a fair trial is possible only if the other fundamental rights are not overstepped by the legislature or by any act of executive. In Arshad case the superior court said that fundamental rights are enriched in the constitution for every

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[433]Niaz AhmedVs.Hasrat Mahmood and 3 others. Criminal Appeal No. 307 of 2009, 2017 P Cr. L J Note 160 (13th July, 2015).
[434]PLD 1989 Kar 404.
[435]PLD 1996 Kar 402.

citizen and in some cases every citizen residing in Pakistan and they are guaranteed against the exercise of all branches of Government including the legislature. To test a piece of legislation as the touchstone of fundamental right does not necessarily involved the mandate of the legislature.[436] The fundamental right, once granted cannot be withdrawn. All the rights which have been guaranteed by the constitution for the proper and fair hearing of trial cannot be taken away by any law or any subsequent legislation. In Mubashir case, Supreme Court stated in accordance with Article 8 (2) of the Constitution that state is barred from formulating any legislation that is contradictory to the fundamental human rights. In case any such law is made, it may be considered as "void". The term "void" renders any law non debatable, amendable or capable of confirmation or authorization and having no legal significance whatsoever. This is the confirmation of fundamentality of law which becomes inherent in existence.[437]

4.4 Article 9 (Security of life and liberty of a person)

The constitution of Pakistan also guarantees the life and liberty of all the persons. Article 9 reads as **"no person shall be deprived of life and liberty saved in accordance with law".** It is a constitutional guarantee and declaration that no person can take the life and liberty of any other person. Article 9 is similar to Article 4 of the constitution but the scope of article 4 is wider than that of article 9. It may be mentioned here that right to life is not restricted to physical life but it included living with dignity to enjoy the necessities of life and facilities. In Sakjhi case it was observed that life is something more than physical day to day workings.[438] In Shehla case, Supreme Court of Pakistan has observed that health was right to life.[439] This article fortifies the protection of life and liberty of individual by freeing it from physical restraints as in Goplin case

[436]PLD 1990 Peshawar 51
[437]PLD 2010. SE 265.
[438]PLD 1957 Lahore 813.
[439] PLD 1994 SC 693.

it was held that liberty means all kinds of freedom.[440] In Shamim Afridi case, it was said that solitary confinement is against the fundamental rights[441] and as such has been abolished in the country since then. Likewise the similarities between Article 4 and 9 also embodies many aspects of right to a fair trial as according to Supreme Court of Pakistan, right to assess to justice is a well-recognized right and is very much available in the principle of 'due process of law'. This also embodies the right to be treated according to law, the right to be treated by an impartial court and right to have proper and fair trial.

Due process of law reveals that the accused must be provided with sufficient time to prepare his defense and of due notice of the proceedings that may affect valuable fundamental rights. In Sarfraz case, the Supreme Court called the fair trial as an inalienable right.[442] A person may be deprived of his life and liberty in due process of law provided the said law must be a valid law at that time and said law must have been passed by a legislature. In Abdul Hafeez Pirzada case, the Superior court has held that life and liberty guaranteed in article 9 of the constitution can be restricted by law and such law is open to challenge.[443] To ensure proper and fair trial the protection of life and liberty to individual specifically from physically restraints seems to be necessary. However, if an individual becomes nuisance for the society than a limitation could be imposed on his liberty. Even in such situation opportunity of hearing and due process in trial must be provided and fair trial must be conducted. While evidence needs to be recorded within reasonable time, the discovery of truth is not to be neglected. It was observed in Sarfraz Ahmed vs. Naheed it was observed that **"the trial Court apparently has acted in haste while passing**

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[440]A-K Goplin verses State Madras 1950.
[441]PLD 1973 Lahore 120
[442]PLD 2014 SE 232. Sarfraz Aslam verses federation of Pakistan. See also Wattan Party case.
[443]1989 CLC 79.

the order of acquittal in the instant matter, whereas, the proper course would have been to record the evidence subject to cross-examination of both the parties and then to ascertain the truth or falseness of the charge".[444] Life and liberty of an individual can be taken away under the law subject to the condition that said law is valid. Even during pretrial preceding an accused under Section 167 CRPC must be provided with due process of law and his liberty could not be curtailed arbitrarily. It has been held by Superior Court that if any person contrary to constitutional guarantee or statutory safeguard is held unlawful custody regardless if right cannot be denied.[445] In Thanwar case the superior court has said that the right to free movement and right not to be deprived of life and liberty is guaranteed. Man is born free, have a right to remain free and such freedom cannot be fitted with.[446] Every person has the right to assess the court and neither the Government can pass any law restraining the individual to access to the court nor can stop them. In Government of Baluchistan case, the Supreme Court emphasized that in order for the judiciary to have independence, it is imperative that it must be separated from judiciary so that complicated and lengthy routes to the road to justice can be simplified. No laws by the executive that bars the door to justice should be formulated. This is to ensure that justice is served with equality and promptness.[447] In Shehla Zia case Supreme Court has said that no person should be deprived of life and liberty. Life includes all features as every person is entitled to enjoy with dignity, legally and constitutionality.[448] In Liaquat Hussain case the right to access to justice to all is a fundamental right guaranteed under Article 9 of the constitution. The life and

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[444]Sarfaraz Ahmedvs.Mst. Naheed Criminal Acquittal Appeal No.316 of 2013, 2014 P Cr. L J 1659 (21st March, 2014).
[445] PLG 1897 Karachi 515.
[446]1991 MLD 447. See also http://www.suhakam.org.my/annual_report/pdf/isa.pdf (accessed on 18th March 2015 at 4:39 am.)
[447]PLD 1993 SE 34.
[448]PLD 1994 SE 693.

liberty are necessary for living a quality life be fitting human dignity and as such life cannot be limited to mere vegetable or animal life.[449]

4.5 Article 10

a. Safeguard as to arrest and detention

b. Information about the grounds of such arrest and

c. Right to legal counsel

The most important amongst all the fundamental right to a fair trial right to the accused person at a pretrial stage are, no doubt, that the probation of arbitrary arrest, reasons to know the grounds of arrest and right to consult and be defended by a legal counsel (Article 10). The legislation has protected this suspect from any sort of arbitrary arrest and has bound down all the government functionaries not to invade and work within the framework of constitution. If suspect is arrested he must be informed of the reasons of his arrest immediately and he shall not be detained more than 24 hours. The accused shall not be denied the right to counsel. The fair trial guarantee has been as a part of fundamental rights. The article 10 of the constitution pertains to the protection of suspect and to provide safeguard against arrest and detention. Against this fact it is hot reality that at the same time the articles recognize the authority of the government to arrest any suspect but that arrest should be lawful and person arrested must be produced before a magistrate to legalize the custody. Right of the suspect begins to run when the law is put into motion against a person and his liberty is curtailed in any manner. The first and foremost right of an individual when arrested is the information regarding reason and grounds of his arrest by the authorities.

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[449]PLD 2007 Kar 116.

The legislation guarantees the right of individual to search for the solution against his arrest and legal assistance. Although in the constitution of Pakistan and legislation, the right to legal assistance has been provided but neither legislation nor constitution has explained as to whether legal assistance is available during pre-trial stage. If a suspect is arrested and he is not disclosed the grounds of his arrest the said arrest would be deemed unlawful. In M/s Roshan it was said by the superior court that the failure to inform the grounds of arrest would render the arrest illegal.[450]The right to a fair trial requires that all the proceedings must be conducted in the presence of accused and particularly at remand stage. In case of Ghulam Qasim, the superior court has said that law requires the presence of the accused while reminding him to the judicial custody wherein an authority seeks to curtail the liberty of subject, it must strictly observe the forms and rules of law. The fair trial right also requires the presence of accused during trial but in some peculiar circumstances court may dispense with the personal appearance of accused under sec 205 CrPC. In Liaquat case it was said that article 10 of the constitution says that it is the fundamental right of an accused to be informed as soon as may be after his arrest and grounds for such arrest and to consult and to be defended by a legal counsel of his own choice.[451] Because every accused has the right to fair trial. The other right guaranteed in this article is regarding the right to legal assistance to the accused and to be represented by a lawyer of his own choice. In Usman case the court said that any law which denies the person the right to be defended by a lawyer is void.[452] In Moselumuddin case it was observed that it would a violation of basic rights of an arrested person if he is allowed to know the reason for his arrest but is not

[450]PLD 1965 Dacca 241.
[451]PLJ 1997 CRC 1434.
[452]PLD 1965 Lahore 293.

allowed to defend himself or seek legal professional help to be defended.[453] Through this article the legislature provides another safeguard that the arrested persons must be brought before the magistrate within 24 hours of his arrest which must not include to time of commute from or to the place where magistrate is present. However, the investigating officer is at liberty to investigate and if investigation is not complete than make a request to the magistrate for physical remand and if magistrate is not satisfied, he must refuse the same. In 1956 constitution the person arrested was to be provided before near magistrate which was binding on the police to produce him before the nearest magistrate from the place of arrest.

But since in the Constitution of 1973, a time period of 24 hours was allotted instead of immediate production of accused in front of the magistrate, the compulsion of nearest and quickest in availability has been relaxed and police can produce the accused in front of any magistrate within the allotted time. If the police officer fails to produce the arrested person before the magistrate within the prescribed period he may face the misconduct proceedings in his department or the superior court may initiate proceeding under article 5 of the constriction that every person is obedient to the law. These proceedings cannot be initiated by a magistrate because he is not a constitutional court. In Shaki case it was said that liberties of citizens are of most importance and no person is deprived of the liberties and when a person is not produced before magistrate within 24 hours the detention is absolutely against the law.[454] This initial period of 24 hours is of utmost importance as most of the incidents of torture and inhuman treatments are met with by the detainees and can have devastating effects on the future course of trial proceedings. The first two clauses of article 10 deal with punitive detention by police

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[453]PLD 1957 Dacca 101.
[454]PLD 1957 Lahore 813

whereas the next two clauses deal with the preventive detention by the state in anticipation of any threat. It is not worthy that law can be made for protection and security and state has got no authority to detain a person for more than 24 hours.

If constitutional provision must be read as a part of relevant statutes and non-production of an accused before magistrate within 24 hours of his arrest would be the violation of Article 10 of the constitution.[455] The court is under constitutional duty to provide a reasonable opportunity to an accused to engage a counsel to defend himself. Court is not supposed to appoint a counsel of accused on his behalf. Unnecessary delay and undue haste without providing full opportunity of defense is deplored.[456] Even in India, where the legal system is also adversarial, Supreme Court of India stated that **"in our adversary system of criminal justice, any person facing trial can be assured a fair trial only when the counsel is provided to him".**[457] In Hakim case the Supreme Court said that under the constitution an accused person has the right to be defended by a counsel of his own choice but not necessarily at state expense. He can engage any counsel he likes, but he is not able to engage any counsel then the choice is no longer available to him. He has to be satisfied with the counsel assigned by the court. In such case the counsel so engaged is not required to file wakalat Nama. However if an accused is not satisfied with the counsel he may of course object him but such objection must be on strong footing. It must be kept in mind that accused should not be given such liberty that he may make an effort to frustrate the process of law.

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[455] NLR 1992 Cr. Lahore. 384
[456] PLJ 1999 Cr.C. Lahore.367.
[457]Muhammad Hussain Alias Julfikar Ali vs. State (Govt. Of Nct), S C M R 1610 (Delhi .2012).

4.6 Article 10-A (Right to Fair Trial)

In spite of the fact that Pakistan voted for Universal Declaration of Human Rights (UDHR) and acceded to international convenient on Civil and Political Right (ICCPR) and the apex court of Pakistan ruled in favor of fair trial, this paramount right was not guaranteed as a fundamental right till the year 2010. Article 10-A was added to in the constitution through 18th amendment for the first time which waits for liberal interpretation by the court. The word "Fair Trial" and "Due Process" have been adopted from American legal system as in English system it is called as "Rule of Law". The deep study of all phrases indicates only one point i.e. it is the law which rules the subject. In American legal system, issue is decided in due process of law. After the insertion of Article 10-A, now courts have been provided opportunity, not to relay on principles of natural justice on the principles of fair trial. It was observed in Allah Jurio vs. the State:

> **it is the primary responsibility of the trial Court to ensure that truth is discovered in a case dealt by it. Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973, provides guarantee for fair trial in order to determine civil as well as criminal rights of any person under the obligation or in any criminal charge. It is settled principle of law that if any piece of evidence brought by the prosecution on record is not put to an accused person at the time of recording statement under Section 342, CrPC., then it could not be considered against him.**[458]

[458]ALLAH JURIO Alias JURIO and 2 Others Vs.The STATE, Cr. Appeal No.D-256 and Confirmation Reference No.13 Of 2010, 2018 M L D 1661 19th April, 2018.

These principles of fair trial and due process must be based on the notion of 'innocent until proven guilty. It has also been observed in a case that **"Our system of dispensation of criminal justice is adversarial in nature"** and the common system regarding proof of evidence is **"dislodge this presumption of innocence on the strength of evidence to be adduced in accordance with the rules of procedure as these constitute an integral part of Due Process of law which is inexorably annexed with procedural fairness".**[459] Previously accused has no right in 'procedure'. Since the rights to fair trial have been included as one of the fundamental right, it has now become binding not only on the court but also on the executive and the legislature to implement the same. No law in violation of fundamental right could be passed by the legislature, and if any such legislation is made that would be deemed null and void. It is a settled principle that fundamental rights once granted cannot be taken away.

4.7 Article 12 (protection against retrospective punishment)

It has been guaranteed in article 12 of the Constitution of Pakistan that protection against retrospective punishment must be provided and denotes that accused has a right against punishment with retrospective effect. It also provides a protective shield to a person from conviction for an act, when the act was not an offense and accused cannot be convicted for greater punishment than provided by the law. The deep analysis of relevant provision of law and cases from jurisdiction reflect consensus on the absolute nature that a protection has been granted against retrospective punishment as this article has put a bar on legislature not to pass any act for prescription of punishment for those offenses which were not an offense when committed. For the right to fair trial, the constitution furnishes guarantees that an act which was not punishable by law at relevant time, cannot be made punishable subsequently and no offense can be created

[459]Ejaz vs.The STATE and 10 others. Crl. Revision No.146 of 2015, 2017 Y L R Note 342 (15th October, 2015).

retrospectively. Any act which was innocent at the time of its commission, couldn't be made punishable by subsequent litigation.[460] The wisdom behind legislation of this principle of legality seems that criminal offenses must be defined before with no ambiguity therein. No doubt, legislation can pass law with retrospective as well as prospective effects but the law with retrospective effects would be deemed as a bad law because the said law might have infringed the rights of the people. The aim of law is to prevent individuals from the ordeals of punishment. However beneficial law could be passed by legislature with good intention but the prejudicial laws are always considered to be a depraved law if generates retrospective effect. Both in scholarly writings and in Court precedents, the view has consistently been held that article 12 guaranteed protection against ex-post facto effect that no person can be convicted for an offense subsequently and provides immunity to the accused from punishment greater than what he was to be inflicted at the time of commission of offense. Article 12 of the constitution of Pakistan says:

> **no law shall authorize the punishment of a person, A for an act, or omission, that was not punishable by law at the time of the act or omission, or B for an offense by a penalty greater than, or of a kind different from the penalty prescribed by law for that offense at the time the offense was committed.**[461]

Enhancement of punishment of an offense committed at some earlier time than that of framing of said laws has not been encouraged by courts. However, legislation has been practiced in violation of article 12 of the constitution of Pakistan as NAO (National Accountability

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[460] PLD 1997 LAH 285.
[461] Article 12 of the Constitution of Islamic Republic of Pakistan, 1973.

Ordinance)[462] was promulgated with the retrospective effect from the first day of January 1985. The government functionaries had also been in practice against the constitutional provision by giving retrospective effect to the statutes and lodged FIRs and submitted challan. However, the higher courts discouraged this practice of executive and quashed the FIRs and transferred the cases from special courts to ordinary courts.[463]

Currently many legislations are considered to be subject to its retrospective effects but Court orders are unanimous in the opinion that any legislation or amendment cannot have retrospective effects. In the course of legal history, many such incidents have been seen where amendments were used to create the retrospective outcome and the resultant challenging of such cases in courts have nullified such retrospective orders. A few examples from different cases can be observed scattered in the legal accounts.

For example, in case of Zulfiqar Ali, the Court ruled against NAB that amendment in sec 32 (C) in the NAB ordinance 1999 has no retrospective effect.[464] Similarly in another case of Aftab Ahmed Sherpao vs. NAB, Supreme Court said that since accused left Pakistan for London on 31-1-2000, while offense under sec 31-A was not available on statute book till then and was later on added on 3-2-2000, thus it could not be applied with retrospective effect.[465] In case of issuance of cheques in bank, any laws passed thereon cannot possess retrospective effects as well. Like in case of Muhammad Zulfiqar, Court held that the cheque was issued on 30-06-2002 whereas

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[462] National Accountability Bureau Ordinance, 1999. Ordinance no. XVIII of 1999.
[463] PLD 2006 Lah 64.
[464] Subs. by the National Accountability Bureau (Amdt.) Ordinance, 2002 (133 of 2002), s. 37, for "sub-section (c)" which was previously amended by various enactments.
[465] PLD 2005 SC 399. See also https://www.thenews.com.pk/archive/print/616996-sc-dismisses-nab-appeal-against-sherpao (accessed on 29-10-2016 8:30 am)

section 489-F[466] was added in PPC on 25 -10-2002, thus had no retrospective effect on the said case.[467] Under such circumstances, Supreme Court's ruling provides no benefit in law under sec 345 (2) CrPC retrospectively.[468]

Such retrospective outcomes in ransom and abduction cases has also been observed. In case of Abdul Ghaffar vs. Abdul Shakoor, High Court[469] ruled against the transferring of pending case of abduction for ransom from sessions Court to special Court- anti terrorism on the ground that since this case is under proceeding before the introduction of new amendment in PPC of transfer of such cases, such a law cannot be applied in retrospective timeframe. In Capt. S M Aslam case, Court said that contention that the Illegal Dispossession Act 2005 was retrospective, was not only fallacious against the settled principles of law but also against the provisions of the article 12 of the constitution.[470] In Maqbool Ahmed case, Supreme Court said that sec 10(4) Zina Ordinance 1979 was introduced through amendment in Dec 1997 whereas offense had taken place on 5-06-1997 and thus had no retrospective effect.[471] The Supreme Court has further elaborated the retrospective effect pertaining to amendment in sec 310 PPC prohibiting giving of a female in marriage as *badl-e-sulah* and consequent addition of sec 310 A in penal code, making it an offense with effect from 11-01-2005. Such *badl-e-sulah* could not be allowed to act retrospectively to cover the occurrence which had taken place much earlier.[472] Also in Raza-ur-Rehman case, the Court ruled, pertaining to the retrospective operation of section 10 (D) and 15

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[466]Criminal Law (Amendment) Ordinance (LXXXV of 2002).
[467] 2005 MLD 1063 Muhammad Zulfiqar vs. the state (lahore).
[468] PLD 2003 SC 547. Muhammad Arshad @ pappu vs. add. Sessions Judge (DB).
[469] PLD 2006 Lah 64. Rana Abdul Ghaffar vs. Abdul Shakoor and three others (DB)
[470] PLD 2006 Karachi 221. Capt S M Aslam vs. the state and two others.
[471] 2007 SCMR 116. Maqbool Ahmed and another vs. the state.
[472] PLD 2007 SC 48. The state vs. Sultan Ahmed and others.

of NAB Ordinance, hold that no retrospective effect could be given to the statute so as to impair an existing right or obligation.[473]

4.8 Article 13

a. Protection against double punishment

b. Protection against self-incrimination.

In the realm of sentencing jurisprudence, protection against double punishment and self-incrimination occupy an important place to meet the standards of fair trial rights. According to article 13 no person shall be persecuted or punished for same offense than once and no person shall be completed to be a witness against himself. This is an English court ***'autre fois acquit and aiutre fois concict'***. A person who have been equated cannot be convicted again and a person who has been convicted cannot be convicted again. Here we have to explain in the back draw of principles of equality and natural justice as fair trail requires that there must be an element of certainty as to the proceeding of trial and there must be an end of litigation. The superior court said that article 13 provides safeguards both against second punishment as well as second precut ion for the same offence.[474] The rule of law has also been made part of codified law in section 403, code of criminal procedure and section 26 of general clauses act but being a constitutional provision it cannot be taken away as superior courts are under constitutional responsibility to protect the right of fair trial as a part of fundamental right. However, first trial must be conclusive in all respect and must be ended either inequitable or conviction by a court of capable jurisdiction. The Supreme Court said that first trail should have been before a competent court to hear and determine the case and to record verdict. Fresh precut ion is barred only where

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[473] PLD 2007 Karachi 186 (DB). Raza ur Rehman vs. Govt. of Sindh.
[474]NLR 1998 CR Lhr 184

precaution is finally concluded and ended in equitable or conviction.[475] If a person has been convicted on the basis of his confessional statement cannot be tried for the same offence. Also, possibility cannot be ruled as to that the same facts may lead to different offence under different law. According to superior court no one ought to be punished twice if it is proved in court that it be the same offence.[476] However the phrase the "Prosecutions" in article 13 is different from investigation. Article 13 does not debar reinvestigation of offense as successive investigations are not hit by Article 13.[477] The second trial by Special Military Court would not be derogative to principle of autrefois acquit, nor it is violated of article 13.[478] The conviction in subsequent prosecution in case where earlier prosecution did not end in conviction or acquittal, would not also be violated of article 13.[479] Person once convicted or acquitted is not to be tried for same offense again. Adjudication of a criminal charge by an independent and competent court once finalized cannot be repeated, irrespective whether the outcome was in favor of conviction or acquittal.[480] Rule of double jeopardy is also found in S. 403(1) CrPC in which the procedural defense prevents the punishment to a person after a successful conviction or acquittal on same or similar charges. In some countries like UK, there is a difference in trial if new and compelling evidence surfaces out based on which new trial proceedings can start. On the other hand, countries like United States, Canada and Pakistan, protection against double jeopardy is a constitutional right. Plea of ***"autrefois convict"*** by the defendant can render re-trial of the same offense as 'void'. This protection is also clearly provided in the Constitution of Pakistan 1973 in its article 13 (A) which provides, "**Protection against double punishment and self-**

[475]PLD 1978 SE 121.
[476]NLR 1998 CR Lahore 194.
[477]1999 P.Cr.L.J 442.
[478]NLR 1992 P.Cr.L.J. 484.
[479]NLR 1992 P.Cr.L.J 476.
[480]1997 P.Cr.L.J 1771.

incrimination. No person shall be prosecuted or punished for the same offence more than once".[481] However in Hakim case the Supreme Court has said that two distinct offences under two different acts cannot be held to be double jeopardy.[482] If the suspect is found innocent and has been discharged does not amount to have been acquitted and fresh proceedings are not barred. In Akram case, the superior court has said that discharge of an accused did not debar fresh proceedings which can be initiated with respect to same offence on same facts on fresh complaint.[483] The bar on second trail or fresh proceeding is only in the event of an accused having already been acquitted or convicted for the same offence. In Anwar Khan Case it was said that on the principle of double jeopardy, the accused acquitted of an offence cannot be trailed again for the same offence.[484] The same principle was also upheld in Essa Noori case.[485] The Principe of double precaution and double punishment are prohibited when article 13 of the constitution and section 403 CrPC are read together and put in juxtaposition.

In Ashraf case it was said that under article 13 read with section 403 CrPC double precut ion and double punishment for the same case is prohibited. Where plea of section 403 CrPC was not technically available, the principle would be available to the persons persecuted when the interests of justice requires its extension in his favor.[486] In case of Mansoob, it was held that article 13 of constitution comes into play only if once proceedings have been considered.[487]

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[481] 1995 SCMR 626.
[482] PLD 1979 SE 121.
[483] PLD 1979 Lahore 462.
[484] PLD 1979 Lahore 349.
[485] PLD 1979 Quetta 188.
[486] 1989 PCRLJ 821.
[487] 1991 MLD 1706.

4.9 Self-Incrimination (part-B)

Article 13 says that no person shall be compelled to a witness against himself, when he is an accused of an offence. The principle behind this motion was the element of torture upon the person of suspect for the purpose of expert acting evidence or have confessional statement. The other motive was to stop the state and police from using third degree cursive methods by giving physical torture to take the accuse to task. No doubt any such confession before the police has no evidentially value unless it leads to some new facts in the case such as recovery of dead body or weapon of offence etc. However, if such confessional statement is made before magistrate voluntarily and without any coercion and undue influence and after adopting the procedure described in CRPC, only than the same may be admissible in the eye of law. As in case of Muhammad Naseem vs. State, it has been observed that:

> **administration of criminal justice is based upon adversarial trial with accused under a statutory presumption of being innocent..... protection against self-incrimination, thus, an accused cannot be burdened with confessional statement in derogation of the strict procedure provided under the law.**[488]

Confession itself is no more in negative aspect because moral values might have compelled him to speak the truth or to avoid the lengthy and expensive process. But confession for ulterior motive and make the innocent person's scope got is highly deprivable. No doubt a person cannot be compelled to be witness against himself, but he can give a statement under section 340 (2CrPC). If any law compels a person to be a witness against himself that law must be declared

[488]Muhammad Naseem vs. the STATE and another Criminal Revision No. 142 of 2017, 2018 P.Cr.L.J. 887, (20th June, 2017).

as void. If any accused is compelled to make statement upon oath under section 340 CrPC coupled with threats being sent to prison or adverse inference can be taken in the case of his failure to make statement on oath is illegal in the eye of law.[489] In Yousuf Zai case it was observed that amendment in Section 342 (2) CrPC by enjoining the accused to give evidence on oath was inconsistence with article 13 (2) of the constitution as provided that no person shall be compelled to be witness against himself.[490] Section 340(2) requires if an accused person make a statement on oath. He is to be cross examined and in cross examine he is bound to be asked questions which may incriminate him. This amendment to compelling him to be witness against himself is prohibited; therefore, the statement is of no consequence.[491] The amendment in codified law compelling the accused to become witness against himself is not warranted by law. In Rizwan case it was said that provision of section 340(2) CrPC as it did not compel the accused to be witness against himself rather it only makes accused to make statement in disproof of the charge against him.[492] In Saeedullah case the supreme court said that this section is introverts only in case it is read as directory and not mandatory but in Muhammad Yousaf vs. state it was held that the language of section 340 CrPC is mandatory and is various as an accused is compelled to give answers to questions which incriminate him and that evidence can be used in the trail. Thus conflicting opinion are there. However finally in the case of Amir Khatoon vs Faiz Ahmad it was resolved by the Supreme court of Pakistan that statement under section 340 CrPC is optional and not mandatory, hence it approved the view taken by Peshawar High Court. It was further held that even if the accused does not make his statement on oath in disproof of

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[489]NLR 1992.
[490]Khalid Hussain vs. Naveed alias Qalb Ali and 2 others. Criminal Appeals Nos.S-19, S-20 of 2006, PLD 2007 Karachi 442 (18th April, 2007).
[491]PLD 1988 Karachi 539.
[492]PLD 1986 Lahore 222.

allegations, he is not under obligation to give evidence and it is for the precaution to prove the charge. If the precaution successfully proves the charge, only than the accused could be examined under section 340 (CrPC). No doubt that constitution provides that an accused shall not be compelled to make a statement on oath and this is guarantee to him by way of fundamental rights, consistency with the fundamental rights demands that section 340 (2) CrPC only confers a duty on the court to inform the accused that he is right to make a statement on oath and it is his option with no risk attaching to it either to make or not make statement.

4.10 Article 14

a. Dignity of man and privacy of home shall be inviolable

b. Protection against torture for extracting evidence

Article 14 of the constitution of state dignity of man, subject to law, the privacy of homes shall be inviolable, and no person will be subjected to torture or extracting evidence. The dignity of man of a relative term and has been used in a wider sense. It depends upon the circumstances as to whether the dignity of man has been violated or not. However, the privacy of home is subject to law as if some who is "wanted" has taken refuge in the said premises/home. For such purpose said home could be searched in accordance with law and would not be considered a violation. As per as torture is concerned, the state of Pakistan has voted for UDHR and acceded to ICCPR where the torture especially for the purpose of extracting evidence has been prohibited. The constitution of Pakistan has specifically been pro habited torture for extracting evidence.[493] Since Pakistan has signed a ratified UN International Covenant on Torture on June 23, 2010 but no

[493] http://www.dawn.com/news/1190646 (accessed on 13th July 2015 11:37 am).

legislation has yet been made. A bill against torture was approved by the National Assembly but is still pending in Senate and its future seems to be uncertain and present laws are unable to envelop all situation. Former Chairman of Parliamentary Commission for Human Rights has suggested that the 'use of fear tactics and intimidate buy police has become tradition in our country'. According to a study by the Asian Human Rights Commission, about 80% of people in police custody were tortured. However about 27% did not report because of fear of police despondence. Over 60% firmly believed police torture to extract bribe information and 67% favored the need for laws against the torture. The constitution of Pakistan specifically prohibits torture for extracting any type of evidence including the confessional statement. But there is no mechanism either in constriction or in codified law to implement this provision of condition on the law enforcement agencies especially the police. Even upon the direction of the courts FIR were lodged against the police involved in torture upon the accused in custardy but later on these FIR was cancelled by the investigating officers. If a judicial inquiry has been conducted the accused/victims of police torture, due to fear of some future involvement in criminal case, either withdraw from those set of allegations on police or reach on some compromise. Moreover, there is no separate forum in Pakistan to deal with such cases. It has been said by High Court that the right under article 14 should be preserved and jealously guarded.[494] This fundamental law of dignity of man and prohibition of torture is found only in few constitutions of the worlds. The constitution of Pakistan has this provision. In Shela Zia case, it was held that very few Constitutions in the world can boast to provide the dignity and self-respect of a person as article 14 of the Constitution has prescribed.[495] Dignity of citizens is guaranteed by the Constitution and

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[494]1997 P.Cr.L.J 467.
[495] PLD 1994 SE 693.

no citizen can be subjected to torture buy the law enforcement agencies charged with the duty to protect citizens.

Modern development of criminology has revolutionaries the system of treatment of accused and the old brutal treatment has been treated as a third-degree measure. In Afzal case, it was said that torture of all kinds is prohibited by law and persons allegedly involved in crimes have to be treated like human beings and the police who is duty bound to protect citizens cannot be allowed to themselves to prefecture acts of human torture upon persons in their custody. Primary duty of police is to detect crimes and bring the criminal before court of law and not to punish themselves.[496] Mandate of article 4 is that only the citizens but aliens who were in Pakistan for the time being were entitled to such protection. Article 214 guarantees to all citizens of Pakistan that their dignity was inviolable.[497]

As far as the role of magistrate is concerned, magistrate can play important role in prevention of custodial torture. If magistrate, without ensuring the production of accused in court or applying judicial mind gives physical remand of the arrested person, the chances of custodial chances becomes pertinent. This problem can get worse if the physical remand is extended, even if there are allegations of torture especially physical torture, on the investigating team. The search for truth is severely damaged when a person is terrorized and subjected to torture and torment. It has been clearly provided by High Courts in its rules and orders that a magistrate must ensure the necessity of giving remand to the police. One of the most important aspect in this regard is the production of accused before the magistrate to ensure there is no extra judicial treatment being

[496]PLD 1996 Lahore 325.
[497]PLD 1998 Karachi 187.

met out to the accused.[498] Case diaries and previous orders are also required to be examined. The concerns of the accused are also taken into account by the magistrate before giving physical remand to the police. If the concerns of the accused are not listened to and there is no proper representation of the arrested person to resist his remand, then the right to fair trial and other fundamental rights are severely undermined and compromised.

4.11 Article 25 (Equality Of Citizens Before Court)

According to article 25 of consultation that all citizens are equal before law and are entitled to equal protection of law. This article provides that for all citizens of the state, regardless of their status and association justice is equal and similar. They enjoy the same legal status in the eyes of law. The legitimate protection of equality and non-discrimination of citizens cannot be snatched even by get state through subsequent legislation. There would be any discrimination among the citizens based on [499]race, religion, cast, creed, sex or birth or place. Pakistan has ratified all international declarations and covenants regarding discrimination. No person or class of person shall be denied this right under Article 25 which is enjoyed by the other persons in like circumstances regarding their life and liberty. However reasonable classification can be made by law. In Kishore case the Supreme Court of Pakistan said that all persons shall be treated alike in similar circumstances and conditions, classification is presumable if it is natural. Classification on the basis of race, color is not permissible. There is no doubt that article 25 of the constitution is barricade against unauthorized and unconstrained discretion in Pakistani law. Equal protection of law disregards discrimination amongst the individuals of the state but do not provide

[498]https://www.lhc.gov.pk/system/files/volume5.pdf (ACCESSED ON 26th August 2018 at 4:36 am.)
[499]PLD 1957 SE Page 9.

protection against the condition of the persons. Every individual life lives under a certain level of privacy and liberty which is not the concern of the law, rather equal protection denotes the protection of liberty and privacy and choice equally under the law. Equal protection of law only means that there should be no discrimination between a particular class of person's viz-a-viz enjoyment of rights in respect of their life, liberty, property etc. It can be shown that classification is reasonable, and diction drawn by authority taking action can be justified under circumstances, action cannot be struck down as discriminatory merely because some persons are excluded from it mischief whereas other have been included. Fundamental rights of equality before law guarantees equality and not identity of rights.[500] Different treatment to senior civil servants as against their junior colleagues in matters of allegations of corruption constitutes reasonable classification because senior civil servants are more responsible than their subordinates.[501]

4.12 Conclusion

Right to fair trial is an indispensable prerequisite in dispensation of justice both and international as well as national level. Though this right was recognized and ratified by many counties in 1948, Pakistan joined the bandwagon in 2010. Right to fair trial in an adversarial system is more balanced in civil cases but is tilted more towards the accused. Does this means that the complainant who is the original aggrieved and who has been wronged in the first place is left at the mercy of ill prepared and half-hearted prosecution? The court system in Pakistan has held the view that **"a criminal act is injurious not just to an individual but to the society as a**

[500]NLR 1992 Criminal Karachi 562.
[501] PLD 1997 Lahore 285.

whole".[502] Does the search for truth not get compromised in the face of present face of adversarial system? Emotional, physical and economical drainers leave the victim and accused both at the mercy of old methods of investigation, less than elaborate laws and a system which has complicated time consuming and lengthy procedural laws to get justice. Through right to fair trial, balance between the right of victims and the accused disregarding the tilt towards anyone faction can be instrumental in providing true justice to all and sundry. The route to ensuring right to fair trial in Pakistan has been relatively new but as discussed in the backdrop of Constitution of Pakistan, steady progress has been seen. More and more court cases are taking into account the right to fair trial. Many improvements have been seen in the constitution as well as procedural laws of Pakistan. How right to fair trial is dealt with in the constitution of Pakistan has been discussed in this chapter. But how right to fair trial fares in codified laws of Pakistan will be discussed in next chapter.

[502] https://sahsol.lums.edu.pk/law-journal/right-fair-trial-better-late-never (accessed on 16th Jnauary 2019 at 5:39 am.)

CHAPTER 5

FAIR TRIAL GUARENTEES IN PAKISTAN'S NATIONAL LEGISLATION

5.Introduction

Long before the books were written and humans enrobed themselves in knowledge and understanding of their whereabouts, the concept of right and wrong and punishment and reward was always there in their dealings with each other.[503] How the timelines of trial travelled from simple punishments to elaborate trials have its early periods a little less known to man. Yet the first recorded trial was found as early as 1850 BC when five out of nine accused were publicly tried and executed.[504] The '**Draco's Laws**' in 621 BC was the first attempt at institutionalizing the trial proceedings by making it the business of the Greek government instead of private law to punish the offenders.[505] Since then, for quite a long time, trial remained a cloaked and complex phenomenon of proceedings from commission of offense till the final execution of guilty verdict. During the whole process trial was carried out by a single state machinery on the sole principle of '**no wakeel (counsel) and no appeal**'.[506] The edifice of fair trial would be constructed on four pillars i.e., impartial investigation, fairness of trial proceedings, accuracy of the verdict and acceptability of the Court decisions by public. With the advancement in human civilization and cultures, trial became separated into different stages namely pre-trial, main trial and post-trial thus conducted by the different organs of state machinery. In conduction of judicial proceedings,

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[503]https://www.thebalance.com/the-history-of-criminology-part-1-974579, accessed on 25,Oct,2017,3:40pm)
[504]http://www.duhaime.org/LawMuseum/LawArticle-44/Duhaimes-Timetable-of-World-Legal-History.aspx, accessed on 25,Oct,2017,3:50pm)
[505]Grace, E. (1973). Status distinctions in the Draconian law. *Eirene, 11*(5).
[506]Langbein, J. H. (1983). Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources. *The University of Chicago Law Review,50*(1), 1-136.

we will discuss the fair trial guarantees in Pakistan's national legislation during the course of this chapter. The very first step to investigate a crime is the formal lodging of FIR. Initially these guarantees were part of law reforms by the East India Company in subcontinent. It is true that a concurrent system of justice was running in this part of the world and was quite successful as well as swift but there was no system with its present characteristics of lodging any FIR, conduct and manner of investigation, submission of chalan, legal assistance and trial by independent and impartial tribunal. The first ever FIR was lodged on October 18, 1861 by Mohaiuddin s/o Muhammad Yar Khan under Indian Police Act 1861 at sabzi mandi (vegetable market) police station Delhi in Urdu language for burglary of **'hookah'** priced at 45 **'anas'**.[507] Similarly many stages have to be dealt with by the investigators and prosecutors during pre-trial stage so that a challan is submitted to the court to take cognizance of the case. During the course of such assessments of the events that occurred, upholding the rights of the accused (defendants) as well as victims[508] has been the main concern for which statutes and regulatory bodies like Pre-trial Chamber of the ICC[509] have devised certain rules and regulations as upholding these beacons of righteousness are vital for the spirit of justice in a trial and due process of law.[510] In this part of thesis, fair trial guarantees in Pakistan's national legislation would be discussed in the backdrop of fair trial rights in the constitution of Pakistan and human rights instruments.

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[507]http://www.thehindu.com/todays-paper/tp-national/tp-newdelhi/delhis-first-fir-filed-153-years-ago-for-stolen-hookah-vessels/article6515859.ece(accessed at 6:43 am 23rd august 2015).

[508]Fletcher, G. P. (1995). *With Justice for Some: Victims' Rights in Criminal Trials* (p. 178). Wokingham, UK: Addison-Wesley Publishing Company.

[509]https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf, accessed on 25,Oct,2015,3:30pm)

[510]http://www.icj-cij.org/documents/index.php?p1=4&p2=1& (accessed at 10:11 am 23rd August 2015).

No doubt, safeguards have been provided in codified laws such as production of accused before magistrate within 24 hours of his arrest,[511] appearance of accused in person during remand,[512] right to document and adequate time for preparation,[513] assistance of an interpreter,[514] right to counsel,[515] right to open Court trial,[516] right to be present during trial, right to copy of the judgment,[517] prohibition of double jeopardy,[518] to examine witness,[519] right to bail,[520] attested copies[521] and right to appeal.[522] Sec 61 CrPC guarantees to produce the person arrested before a magistrate within 24 hours. However, the codified law speaks only of those persons who have been formally arrested and their names are shown in relevant records kept in police stations but law is silent and seems helpless where the accused is actually apprehended by the police but his arrest is kept in abeyance. In such situations sec 61 is not applicable under extra-judicial arrest and detention. Application under sec 491 CrPC. is put forward for the recovery of detenue.[523] Under the prevalent circumstances, undeclared arrest of a person does not render him entitled to a fair trial such as to know the reason of arrest, or to be assisted by a counsel.

Despite the presence of ***prima facie*** evidence, it is imperative for the police, magistrate, the IO as well as the court to observe the rule of caution. Remand is that part where the suspect is completely at the mercy of the police with the chance of torture looming large above him. Law is

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[511] Sec 61 CrPC 1898.
[512] Sec 167 CrPC 1898.
[513] Sec 265-C CrPC 1898.
[514] Sec 361 CrPC 1898.
[515] Sec 340 (1) CrPC 1898.
[516] Sec 352 CrPC 1898.
[517] Sec 371 CrPC 1898.
[518] Sec 403 CrPC 1898.
[519] Under chapter XXII-A CrPC 1898.
[520] Sec 496 CrPC 1898.
[521] Sec 548 CrPC 1898.
[522] Under chapter XXXI of CrPC 1898.
[523]Mughal, J. R. D., & Ahamd, M. (2013). Law as to Directions of theNature of a Habeas Corpus [Ch: XXXVII, S. [of the Code of Criminal Procedure, 1898 491 *.Munir Ahamd, Law as to Directions of theNature of a Habeas Corpus*, (S 491).

equal and just for suspect as well as victim and favors justice and fairness at every stage of the case.[524] In constitution of Pakistan 1973, a suspect was to be presented before the magistrate within prescribed time period i.e., within 24 hours. But in constitution of Pakistan 1956, the suspect was to be produced in front of the nearest magistrate immediately after arrest.[525] This provision was made to safeguard and protect the suspect from mistreatments of police and investigation agencies. Although the provision of 24 hours as an initial period to complete investigation has been concurrent to the idea of fair trial yet it can be detrimental as during this time period the suspect is subjected to torture by the investigating agencies. What manner they adopt to extract the truth and to what extent they are ready to go as well as how the suspect perceives that initial time period of 24 hours can greatly affect the decision of a case as well as the provision of fair trial and due process of law. One of the reservations that the law makers have is the infliction of torture and derogatory treatments during custody for the purpose of investigation.

It is the duty of the police officer to ensure to the best of his ability that the suspect is as close to the actual culprit as possible[526] and in case of non-compliance, is punishable by law.[527] In order to protect and safeguard the rights of the accused from any type of violation, magistrate is not bound by the recommendations of discharge or cancellation put forward by the police.[528]If an accused is discharged by the magistrate, this cannot be termed as acquittal or termination of the trial. Such a suspect can be summoned by the court or the magistrate for investigation and

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[524]2009 P.Cr.L.J. [Karachi] (c) 964.
[525]Munir, M. (1996). *Constitution of the Islamic Republic of Pakistan: Being a Commentary on the Constitution of Pakistan, 1973*. B. Aḥmad (Ed.). PLD Publishers.
[526] Chapter 25 Police Rules 1934 2000 &P.Cr.L.J. 1576.
[527] P.P.C. 1993 P.Cr.L.J. 91.
[528]PLD 1967 S.C. 425.

trial.[529] In case a second remand is required by the police,[530] they have to take the permission from the respective trial court[531] but if a suspect has been sent to judicial custody, subsequent and successive remand is not granted.[532] As police has to submit reasonable grounds before the magistrate.

The court under normal circumstances can extend the detention from 24 hours to 14 days on the production of substantive evidence that the detention is necessary for investigation. While special accountability courts under National Accountability Ordinance (NAO)[533] can hold suspects for 15 days in a single stretch, renewable with judicial order, up to a total of 90 days.[534] This authority is also concurrent to article 184(3) of the Pakistan Constitution.[535]There is no direct legislation as to control the police power to restrict the liberty of a person by way of arbitrary arrest but it is the responsibility of state to protect the right of liberty of citizen being guardian of their fundamental rights of equality before law. It has been held by Peshawar High Court[536] that to enjoy the protection of law, and to be treated in accordance with law was the inalienable right of every citizen under article 4 of the constitution[537]. No action detrimental to life, liberty, body and reputation except in accordance with law should be practiced. Article 10 of the Constitution is meant to provide safeguard to every person against arbitrary arrest or detention. Moreover, every person who is arrested and detained in custody would be produced in

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[529]Sec. 169, Cr.P.C& Sec. 182, PPC. 2004 P.Cr.L.J. 117
[530]1991 P.Cr.L.J. Note 88 (P. 63).
[531]1993 P.Cr.L.J. 221.
[532] 1997 P.Cr.L.J. 1204.
[533] Sec 24(6) NAO 1999.
[534]http://www.ncbuy.com/reference/country/humanrights.html?code=pk&sec=1d, accessed on 25,Oct,2016,3:20pm)
[535] Article 184(3) of the Pakistan Constitution, in relevant part, provides: "...the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved, have the power to make an order of the nature mentioned in the said Article."
[536]Singha, R. (2015). Punished by Surveillance: Policing 'dangerousness' in colonial India, 1872–1918. *Modern Asian Studies*, *49*(02), 241-269.
[537]Choudhury, G. W. (1974). " New" Pakistan's Constitution, 1973. *Middle East Journal*, *28*(1), 10-18.

front of a magistrate[538]within the above-mentioned period of 24 hours, otherwise said custody will be illegal. These 24 hours exclude the time necessary for the journey from the place of arrest to the court of the magistrate and the accused must be produced in person to the magistrate. It has been held in state vs. Nasir Javed Rana that legal guarantees as to produce the accused in person in Court for the purpose of physical remand has been violated and Supreme Court has observed that it is an inalienable right of the accused to be produced before the Court in person and non-compliance is grass level.[539]

5.1 Evidentially Value of Evidence Obtained By Way of Torture

It is the over zealousness of investigating agencies that torture is opted as a means of extracting confessional facts and information that later becomes the basis of conviction of the accused. It is true that torture may be able to extract information about the incident yet the evidentiary value of such confession is difficult to quantify.[540] Some appreciates the effectiveness of torture as a yardstick for extracting absolute truth while critics like Aristotle and the civil society considers it an effort in futile that causes harm with no substantial results thereafter. The determining factors in level of torture inflicted and the inclusion of family members of the accused are mostly ascertained by the socio-cultural norms prevailing in the societies.[541] The main purpose of torture

[538]Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (N.P. Engel, Arlington: 1993) [hereinafter Nowak Commentary], at 244.
[539] PLD 2005 SC 86.
[540]http://www.globalresearch.ca/whos-right-torture-defenders-or-critics/5419511, accessed on 25,Oct,2016,3:30pm)
[541]https://en.wikipedia.org/wiki/Use_of_torture_since_1948#cite_note-Tizon2002-2, accessed on 25,Oct,2016,3:30pm)

is the discovery of true facts pertaining to the incident but sometimes, more often than not, is used as a technique to inflict humiliation and disgrace to the accused nominated in FIR.[542]

The infliction of torture is done during the physical remand granted by the magistrate. Even before being judged, the suspects are at the mercy of the state-owned investigating agencies which makes them susceptible to derogatory and inhuman treatments.[543] It is very unfortunate that trend of using torture as a favorable method has not diminished in recent years. This is despite a rising awareness about inalienable right s of the accused and its importance in fair trial and due process of law. The initial period of 24 hours and later provisions of physical remands can, according to Aristotle's theory, create serious dents in the establishment of true facts. According to him:

> **those under compulsion are as likely to give false evidence as true, some being ready to endure everything rather than tell the truth, while others are ready to make false charges against others, in the hope of being sooner released from torture.[544]**

The obligation of fair treatment and due process of law becomes ever-increasing with the presumption of innocence and the right to an impartial and fair trial. Torture is prohibited in all cases.[545] The consequences of torture is immediate as well as far reaching for the suspect because they are kept in preventative prison, confined, or incarcerated in psychiatric establishments or

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[542]Orlando Tizon, CovertAction Quarterly, Summer 2002. Tizon is assistant director of the Torture Abolition and Survivors Support Coalition (TASSC) in Washington, D.C.

[543]Del Rosso, J. (2015). *Talking about Torture: How Political Discourse Shapes the Debate*. Columbia University Press.

[544]Antonius Matthaeus II, Commentarius de Criminibus, cited in Rudolph, Security, Terrorism and Tortue, p. 163, quoted in Ross, 'A History on Torture'.

[545] PLD 1996 Lah 325.

other institutions.[546] Such accused need to be treated humanitarianly and under all circumstances, inhuman and derogatory treatments should be strictly prohibited as enshrined in the corridors of universal laws worldwide.[547]

Without proper investigation, it is often impossible to prove a crime in court. Amongst the provided positions of the court, a 'more majestic conception of the court's role[548] comprises of ensuring targeted implementation and conduction of the clauses of criminal law.[549] If any incident of misconduct arises during investigation of a case, a separate tribunal or court can deal with such misdemeanor later but the court must not get distracted by such incidents and focus must remain on the occurrence of the original incident before the court. Such department exists in, for example, Australia[550] while in Pakistan, in case of delinquency by the police during investigation, no separate department exists to deal with such misconduct except departmental inquiries under ***estacode*** which can culminate to dismissal or termination of the personnel under inquiry.[551] This also implies the supervisory role of court to observe the conduct of police and whether the investigation has been done impartially fulfilling all the basic criteria of fair trial and due process as according to Lord Ritchie-Calder during a debate on the Criminal Law Revision

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[546]www.irct.org/what-is-torture/effects-of-torture.aspx\, accessed on 25,Oct,2016 ,3:30pm)

[547]http://www.joernmalek.com/ma/ayudar/human_rights/human_rights_by_magnum_picture_31.html

[548]This phrase was used by Stevens J to describe his interpretation of the purpose of the Fourth Amendment to the United States Constitution: *Arizona v Evans*, 514 US 1, 18 (1995).

[549]Under French criminal procedure, which is followed in Spain, the Netherlands and Belgium, in some cases the judiciary takes over investigation at the second phase of the pre-trial stage. The 'power of the examining magistrate to order searches, seizures and telephone interceptions as well as to interrogate the defendant is far wider than that of the police': Richard Volger, 'Criminal Procedure in France' in Richard Vogler and Barbara Huber (eds), *Criminal Procedure in Europe* (Duncker and Humblot, 2008) 171, 205. This *instruction* procedure serves 'as a democratic check on police and prosecution investigation': Gerhard OW Mueller and Fré Le Poole-Griffiths, *ComparativeCriminal Procedure* (NYU Press, 1st ed, 1969)

[550]These include the Crime and Misconduct Commission in Queensland which was set up under the *Crimes and Misconduct Act 2001* (Qld) and the Police Integrity Commission of New South Wales which was created under the *Police Integrity Commission Act 1996* (NSW).

[551]ALI, M. A. (2006). Lack of Transparency and Freedom of Information in Pakistan: An Analysis of State Practice and Realistic Policy Options for Reform. *Open Society Institute International Policy Fellowship Program paper pdc. ceu. hu/archive/00003129/01/mukhtarAli f3. pdf (accessed July 29, 2009)*.

Committee 11th report, **"every innocent person who is brought to trial represents a failure of the police to do their preliminary work properly; ... every acquittal is itself a miscarriage of justice".**[552] While in case of investigation in Pakistan, the courts have no way of ensuring that investigation is done properly and thoroughly where evidence is carefully collected and preserved. Also, there are no supporting departments that may help in ensuring trial rights to the accused. In Pakistan rights at pre- trial stage are minimum and accused is left on his own to pass through investigation procedures without any legal support by the state. Any intervention by the court may amount to interference in Police investigation.[553] But the court can oversee that aspect of pre-trial investigation which is concerned with protecting interests of the concerned parties and ensuring fairness in the trial proceedings.[554] In case dishonest investigation by the police comes to the attention of the court, the court can assess the applicability of the offenses against the accused thus protecting the repute of criminal justice system as a whole.[555]

One of the common methods used by the police for investigation is use of torture and mass arrest of the relatives of accused nominated in FIR to extract bribe. The complainant, on the other hand in connivance with police, involves as many people as possible to avoid defensive strategy from the accused side. Money and influential ties can be important too. Sometimes the investigating police is bribed to influence the investigation as per the wishes of the party or sometimes to be acquitted before a formal charge is levied. The over-zealousness of the police officials to prove their track record better than their predecessors also play its role in hasty and faulty investigation

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[552]United Kingdom, *Parliamentary Debates*, House of Lords, 14 February 1973, vol 338, col 1619.
[553] PLD 2003 KR 209.
[554]Williams, P. W. (1959). Defense of Entrapment and Related Problems in Criminal Prosecution, The. *Fordham L. Rev.*, *28*, 399.
[555] Sec 9 (7) Punjab Criminal Prosecution Services Act 2006.

in which the real apprehenders usually are let loose.[556]Once the chalan is submitted, after thorough investigation, the process is shifted to courts and after submission to the Court under sec 173, the provisions of sec 169 cannot be invoked.[557]

Whenever there is a trace of stimulus, threat or promise in a confession, it can render a confession irrelevant. In Case of Ali Ahmed vs. State[558] the extra Judicial confession was made to "lambardar" on the promise of being helped if he narrated the whole story to save himself from torture of police. Such a confession was considered irrelevant as it was the result of inducement and promise. If the accused is in police custody and is giving confession in presence of police, this act again comes under irrelevancy of statement.[559]

It is settled that the statement of the witness recorded under sec 164 CrPC is not considered a substantive piece of evidence and can only be used to contradict the person in the court who has made the statement. Confessional statement recorded on oath is illegal and has no evidentially value as is the confession made in presence of police.[560] All those confessions, one way or other, made as a result of torture, inducement, pressure, or threat are not reliable piece of evidence and if one accused is giving a confessional statement against another accused, such a statement is not considered reliable.[561] Those confessional statements that bear no certificate from magistrate carries no evidentiary value even though it is volunteered by the accused.

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[556]M.A.K. Chaudhry: Policing in Pakistan, (Lahore: Vanguard Books (Pvt) Ltd. 1997) P. 146

[557]2000 P.Cr.L.J. 25.
[558]1979 P.Cr.L.J 294.
[559]2002 P.Cr.L.J 1072.
[560]1999 P.Cr.L.J 1381.
[561]PLJ 2005 SC AJK 65.

5.2 The Right to Legal Counsel

The legislature has also guaranteed that accused should be defended by a pleader section 340 (1) CrPC says **"any person accused of an offence before a criminal court or against whom proceedings are initiated under this code in any such court, may have right be defended by a pleader".**[562] This section explains that everyone charged with a criminal offense has a primary, unrestricted right to be defended by a pleader and puts an obligation on the court to inform the accused that he has a right to counsel. The accused is at liberty to forego the right of the counsel and defend his case himself. If the accused wants to engage a counsel and he is facing financial restrains he is under legal duty to inform the court to appoint a counsel for his defense on govt. expense. The interest of justice also requires the court to provide effective representations by counsel keeping in view the seriousness of the offence and for the proper disposal of the case in accordance with law. It is pertinent to note that although the legislature has not explained as to whether the right to counsel is available to the accused at all the stages but the wisdom behind this guarantee seems so that the right to counsel should be available at all stages. Especially at pre-trial stage when investigation is being conducted and many cases can have proper disposal at an early stage, reducing not only the back log but also relieving the adversarial system from the accusation of lengthy and cumbersome.[563] But this right to counsel has not been made available during the course of investigation in Pakistan the arrested person has a right to consult counsel and to be represented by a lawyer of his own choice. It was held in Usman vs. State[564] as well as

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[562] Section 340(1) Cr.p.C 1898.

[563] *See* Nowak Commentary, *supra* note 9, at 256 and The Final Report, *supra* note 2, at 71. *See also Henry and Douglas v Jamaica* (571/1994), 26 July 1996, UN Doc CCPR/C/57/D/571/1994, para 9.2. *See* further *supra* notes19-25 and accompanying text.

[564] PLD 1965 Lah 293

in Mon-ud-din Sikandar vs. the Chief Secretary[565] that any law which lacks in opportunity of defense to the arrested person may be deemed as "void" and is a violation of fundamental rights. These and many other cases were the testament to the efforts by the courts that they rendered through their judgments in order to protect the rights of accused before the introduction of article 10-A in the Constitution. The court is to appoint a qualified advocate who may be able to defend the accused in an effective manner. Court should not appoint a counsel who has no experience of murder trial. Such counsel must be provided access all the proceedings of the trial and to the document and effective preparation of the case. It was held in Hakim Khan vs. State that it is no doubt that under the Constitution, an accused person has a right to be defended by counsel of his own choice but if the accused can afford it, then it is not necessary for the state to provide such a facility. He can engage any counsel he likes, but, when he is not able to engage, then the choice is no longer available to him. He is to be satisfied with the counsel assigned by the court. In such cases, the counsel so engaged is not required to file a *wakalat nama.*[566] In Muhammad Iqbal vs. State it was held that expression of counsel of his own choice as expressed in section 340 (1) CrPC is limited in its term for the benefit of any person who is an accused of any offence and has been sent to face trial. But the provision of criminal procedure court is always opened to any amendment and repeal by ordinary legislation. Constitutional right of citizen of Pakistan under its article 10(1) is much wider and more effective because it is immune from any such legislature. This fundamental right of every citizen is general in nature and is applicable to all person who are arrested notwithstanding to the fact whether they have committed an offence to face trial before a criminal court or they have been detained under any preventive law without any commission of offence the phrase "the counsel of his own choice" does not mean that the

[565] PLD 1957 Dacca 101
[566] 1975 SCMR 1

state should provide an advocate to any accused person on state expense .it only gives a right to every accused person to engage an advocate of the choice at his own and if such person is not able to engage any advocate on account of any reason what so ever, then the choice is no longer available to such person. A person who is facing trial in a criminal court may object upon the counsel but such objections must be based on sound footing.[567] It was observed in Liaqat ali vs. State fundamental rights given in article 10 of the constitution to an accused person to be informed as soon as may be after his arrest grounds for such arrest and to consult and be defended by a lawyer that is chosen by him.[568] Since the law provides a counsel of the choice of the accused, yet if the accused is unable to do so, state has the responsibility to appoint as well as pay for the counsel.[569] In case a counsel is engaged, the detainee as well as the counsel must have a judicious opportunity to play its role in the trial proceedings.[570]It has also been held that every citizen in a state governed by the constitution and law has a right to enjoy the protection of law especially in matters of illegal arrest and detention.[571] This is vital for the rule of law and to ensure fairness in the procedures that are pre-requisites of fair trial and equality of law. But it must be kept in mind that it did not mean that an accused could be allowed to hold the criminal adjudication system hostage or create irregularities in the trial with a view to earn a future advantage. If such benefit was admitted, then every accused would either not engage the counsel or permit the counsel appointed by the state to do its job and disrupt the trial with a view to induce an irregularity to gain a future benefit.[572]

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[567] 1994 Law Notes (Karachi) 231
[568] PLJ 1997 Cr.C 1434.
[569]https://pakistanconstitutionlaw.com/p-l-d-2007-karachi-544/, accessed on 25,Aug,2016,3:30pm)
[570] 2000 M.L.D. 294
[571] 1993 M.L.D. 1308
[572]Blaustein, A. P. (1991). Constitution Drafting: The Good, the Bad, and the Beautiful. *Scibes J. Leg. Writing*, *2*, 49.

5.3 Guarantees during Identification Parade

Although identification parade is not the requirement of law but as a part of investigation to reach to the actual culprits, through the identification parade, the alleged witnesses are provided an opportunity to pick up the actual accused but it is observed that these guarantees are violated at each and every step as the process of handing over of the suspect lacks the prerequisite **'rules of caution'** of identification. After initial procedure, once the suspect is produced before the open court, alleged witnesses can easily see the suspect in court and recognize his prominent physical features, even if the face is covered, which is not always the case, and get a solid guess about the identification of the suspect. Occasionally, the witnesses are successful in getting help by police or other like-minded staff in getting photographs of suspect and are facilitated in having a glimpse of the suspect.[573] Conversely, if the suspect is with beard or is clean shaved at the time of occurrence but later on change the appearance, such a fact can hamper the efforts of identifying the actual suspect of identification parade in pre-trial stage. Usually suspect is not kept in separate barracks in prison from other inmates, who could also disclose the identity of suspect.[574] The recent development of conducting press conferences by police to show their efficiency and sometimes printing photographs in print media can also reveal important clues of the identity. During identification parade proper procedure of shuffling the suspect within dummies is not adopted and the procedure of choosing dummies is done by the police without considering the physical features like height, complexion etc., while the magistrate has no

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[573] Amitsingh Bhikamsing Thakur vs State Moharashtra.(2007) i.n.s.c10 (9th January 2007).
[574] Abdul Farijalah and another vs. Republic. Criminal Appeal no.99of 2008(Unreported) at pg 11.

supervisory role as to who would be amongst the dummies and as to whether they have some animosity with suspect or cordial relations with witnesses as they fall within the domain of prison authorities.

Moreover, legal assistance is also a constitutional right to which an accused is entitled even at identification stage. It is the duty of legal representative to ensure proper conduction of identification parade and that the treatment of accused has been just and fair and despite being the person who may have committed a crime, his basic rights are not violated.[575] This presence is allowed only for observation and subsequent reporting of the parade. In case of any discrepancy, an objection can be raised even during the later stages of trial all the procedures are followed properly.[576] The basic principle of fair trial is based on the assumption that under no conditions, should the dignity and self-respect of a human being be violated at any stage of the trial.[577]If the suspect desires the attendance of a solicitor or friend arrangement must be made for him to attend the parade if he wishes to do so, the person so attending will be required to remain in background observing only and saying nothing.[578]

5.4 Current Procedure of Identification Parade in Pakistan

Identification parade is always conducted by magistrate having jurisdiction to do so. However, there is a difference of opinion as to whether the investigation officer (IO) would directly apply to the magistrate concerned to conduct identification parade, or he would apply to the Session Judge concerned to direct the magistrate for doing so. Though, there are no codified guidelines

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[575]Joubert, C. (2001) South Africa. *Applied law for police officials*. 2nd Edition. Juta Law Publishers, pg. 277.
[576] Interview Conducted at central police station Nyamagana at Mwanza.
[577] Article(6)(d) of the Constitution of United Republic of Tanzania.
[578] Rule 2(d) of PGO No 232.

for the IO to whom he would make request for the conduction of identification parade. However once the order has been passed in this regard, it is the duty of the conducting magistrate to go by the book and witnesses should be kept separated from accused so as to provide an opportunity to the accused and other dummies to change their position accordingly. No number of dummies have been fixed by the law, however the suspect should be lined up among a reasonable number of dummies having the same height, physical features, complexion etc. For the fairness as well as transparency of the procedure of identification parade, it is necessary that the witnesses who intend to identify the accused are required to be kept separate from each other and from the accused as well so that they may not be able to share any information about the suspect. Currently there are four different identification procedures conducted before the trial begins to find out truth in adversarial system.[579]

a) Video identification

b) Identification parade

c) Voice Identification

d) Photograph Identification

For this purpose, video conference methods are also used. In this way it is easier to protect the privacy and have an unbiased Video identification parade of the accused.[580] No doubt the modern devices could be used in identification parade such as tape recorder, cameras, videos and sometimes the help of sniffer dogs etc. However sometimes, after the arrest, the accused is kept in judicial lock up and his identification is facilitated by the photographs available which are

[579] Australian Law Reform Commission, Evidence .ALRC, Page26 (Interim),Volume 1,1995.
[580]Clifford, B. R., Havard, C., Memon, A., & Gabbert, F. (2012). Delay and age effects on identification accuracy and confidence: an investigation using a video identification parade. *Applied Cognitive Psychology*, *26*(1), 130-139.

taken with the help of mobile phones.[581] Indemnification proceedings or facts which establish the identity of accused persons but evidence of identifications parade is only relevant when it is conducted in accordance with requirement of article 22 of the Qanoon-e-Shahadat Order 1984.[582] However when the description of the accused was not given by witnesses in their statements, such omission does reduce value of identification.[583]

Identification parade is a procedure to identify the accused by the witnesses during the identification parade conducted under the supervision of magistrate. It is important only in those cases in which the accused were not apprehended at the spot or were not known to the witnesses. However the witnesses had claimed that they could identify the accused persons by seeing them as they were properly seen by them during the commission of offence or it was claimed by the witnesses that although accused were muffled faces but they could identify them through their voice. If such identification parade test was conducted by the magistrate in accordance with the Rules and Orders of The High Court as well as by the guidelines by the Superior Courts, it could be considered as a substantive piece of evidence and conviction. Also, it could be based by relying upon such evidence if corroborated by other independent and confidence inspiring evidence.

5.5 The right to Open Courts

The legislation and codified laws also give right of access to the public regarding court proceedings. It is generally held that in order to ensure trial to be right and just, open access to

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[581] http://thelawstudy.blogspot.com/2015/04/identification-parade-and-its.html, accessed on 26,Oct,2016,3:30pm)

[582] Yilmaz, I. (2011). Good Governance in Action: Pakistani Muslim Law on Human Rights and Gender-Equality. *European Journal of Economic and Political Studies (EJEPS)*, *4*(2).

[583] 1980 PCRLJ 836

the court is generally granted to the public. This is imperative to find truth during court proceedings because the adversarial trial is essentially a tool of opposing discussion between two parties. The notion of open court may help in finding truth as many sets of ears and eyes would be observing the proceedings. Also, to ensure clarity and impartiality there is left no reason to hide any court proceeding from public eye. It must be kept in sight that this right to open court may be curtailed by the judge if it becomes important for the trial to have restricted proceedings. One of the present-day examples are the prevalent in-camera proceedings of special cases in the court where matters of national security or the privacy of an individual or state is at stake.[584]

Generally the criminal proceeding shall always be held in an open court where general public has an easy access and in exceptional cases the presiding officer of the court has discretion to hold trial in jail however and for that purpose trial court has to make a reference to obtain the sanction of the Government.[585] Magistrate can held trial at any place.[586] Court has power to hold proceedings in camera or at place such as jail.[587]

Here open court also denotes and indicates open justice which is guaranteed in many constitutions of the world and human rights instruments. **"The holding of criminal proceedings in secret has long been regarded as an instrument of oppressive government"**.

There are conflicting opinions about access of general public to court proceedings. Trial itself is a process which is aimed at providing justice in a matter of conflict. The trial and justice provided thus is a fundamental right of individuals where justice needs not only be done but seen

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584Section 352 CrPC 1898.

5852004 P.Cr.L.J 1183

58621 DLR 307

5871991 MLD 739

to be done. This implies openness of court to be the intrinsic factor of trial. The majority of opinion tilts towards keeping the court proceedings open and accessible to public. It is opined that the openness of courts not only keep the prosecutors and judges alert to public scrutiny but also is a reminder for public about the trial proceedings. Many information and witnesses may come forward and provide valuable information about the evidence that can have decisive effect on the outcome of court decisions. In order to find truth, openness of court is an essential feature, without which it may not be possible to do justice with the process of finding the real chronology of facts of the incident.

There are arguments that also favor the in-camera proceedings of trial. Matters of national security and safety as well as safety and security of individuals are the primary reasons provided for keeping trial proceedings inaccessible to general public. Firstly, in-camera proceedings have little ratio compared to open court proceedings and in recent times, the socio-political situation of the countries has made it more relatable than in past times where the access and spread of information across globe has gone lightening fast and can be extremely damaging. Moreover, the fight against terrorism and the strength of networking can render the arrest of a terrorist useless if trial proceedings are open to the general public. Yet, we must not forget that no matter how grave the crime is, the access to basic rights and dignity of man should not be forgotten. Also, the line between absolute necessary reason for in-camera trial proceedings and misuse of this authority is very thin. It is very easy to overstep the reason of necessity in denying the access to court proceedings. Since this is an essential right of public to know and see the truth, grounds to prohibition of access to court proceedings must have a very sound foundation. The generalization of in-camera proceedings can be detrimental to search for truth and the acceptance of such an

action can only be justified if public acceptability can be achieved about the reason behind denial to court proceedings.

5.6 The Guarantee to Adequate Time

The right of an adequate time for necessary preparation of defense has also been guaranteed in legislation as it has been made mandatory that copies of all the documents mentioned in section 265 (C) CrPC. shall be supplied seven days before the commencement of trial.[588] The wisdom behind allowing the accused seven days' time was to provide him an opportunity to know the nature of the allegation and the evidence likely to be produced against him by the prosecution. He also must know about the nature of evidence/witnesses and the documents; prosecution is going to produce against him. The accused is supplied copies of all statements so that he could consult his legal counsel and prepare his defense and to apprise him of the possible prosecution evidence.

The right of the accused to have copies of all relevant documents well in time before the trial takes place, is not available to the accused during investigation. Rather as per Police rules[589] accused have no access even to case diaries. Moreover, in summary trial the trial courts do not provide the fair trial guarantees available to the accused and grant conviction in hurried manners and they record convictions on the basis of their confessional statement. This is also general practice that on the same day copies are supplied to the accused and trial is concluded without providing accused an opportunity to know the nature of the allegation and consult his counsel. The court remains unattended to the right to a council of the accused and to offer him this facility

[588] Sec 265 C CrPC 1898.
[589] Punjab Police Rules 1934.

as these manners the rights of the accused guaranteed by the legislature are violated in blatant manner.

5.7 Right to be Present during Evidence

As per Pakistan's national legislation, evidence is to be taken in presence of accused.[590] This section makes it obligatory that evidence for the prosecution and defense should be taken in the presence of the accused. Except when the presence of the accused is dispensed with under sec 205 CrPC, the evidence should be recorded in presence of his advocate and mere cross examination in the presence of the accused is not sufficient. If evidence is not recorded in the presence of accused, it would be taken that trial has not been conducted in accordance with law[591]. It is not enough to copy a previous deposition in a former case so as to consider it in another case. Two or more cases tried independently being determined on evidence recorded in each case and that too in presence of the accused.[592] Violation of this rule would vitiate the proceeding which would not be curable even by the consent of the accused or his counsel[593]. Under sec 361 CrPC whenever evidence recorded in a language not understood by the accused, it shall be interpreted to him in open court under sec. 352 CrPC, in language understood by him. It has been made mandatory provision and the object of this provision is to make the accused understood the nature of the evidence produced against him and he must know the allegation and incriminating circumstances appearing against him. He may defend himself effectively:

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[590] Sec 353 CrPC 1898.
[591] 1988 MLD 167.
[592] 1950 3 Punjab 209
[593] AIR 1967 Raj 276

because in our courts evidence is recorded in the absence of counsel as well as of the client especially when there are more than one accused facing the trial and if any of the counsel of an accused is present the court proceedings are commenced accordingly.[594]

If the evidence of prosecution or defense is recorded during jail trial or during in camera proceeding this right of the accused to be present shall be infringed. The scholars have pointed out gross violation in this regard as during the trial proceedings in some cases accused are not brought up from the jail and in most of the cases the accused is kept in **'Bakhshi khana'** lockup and trials are conducted in absence of the accused and his counsel. In some cases, the personal attendance is dispensed with under sec. 205 CrPC.[595] Under section 31-A of the National Accountability Ordinance 1999.[596] And section 21 of the Anti-Terrorism Act 1997 also provides for the trial in absentia but the courts have declared all those trials null and void as the lack the fair trial guarantees enshrined in the legislature and codified laws as the evidence to be taken in the presence of accused.

5.8 The Guarantee against Double Jeopardy

The legislature provides protection against double jeopardy section 403 CrPC guarantees that persons once convicted or acquitted not to be tried for same offence. [597] Once a person is tried he is not to be tried again this rule of English law has also been enshrined in the codified law of the

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[594] PLD 2006 Karachi 139

[595] Section 205 Cr.P.C and Section 540-A.

[596]Under section 31-A of the National Accountability Ordinance 1999.

[597] Section 403 Cr.P.C

land.[598] The objective behind the principle of double jeopardy is the result of legal process, promulgation of principle of natural justice elimination of contrary laws jurist prudential rules of offence, the best interest of justice and public interest. The rule of double jeopardy is based upon maxim ***"Nemo Debet bis vexari, si constat curiae quod sit pro una et eadem causa"***, i.e., (none ought to be twice punished, if it be the proved to Court that it be for one and same cause).[599] Constitution of the country provides the safeguard against second prosecution as well as second punishment for the same offence.[600] However, this protection of double jeopardy under article 13 of the Constitution of Pakistan 1973 does not debar reinvestigation of an offence as successive investigation are not hit by article 13.[601] Rule of double Jeopardy as per section 403(1) CrPC also prohibits the second trial for the same offence which has been adjudicated by a Court of Competent Jurisdiction, rule against ***"autrefois convict"*** has received recognition in article 13 of the Constitution of Pakistan 1973.[602]

In Akbari Begum Vs. State [603] It was held that article 13 of the constitution states that no person shall be prosecuted or punished for the same offence more than once. Article 20(2) of the Indian Constitution states that no person shall be prosecuted and punished for the same offence more than once. The term "offense" refers to all those offenses that are punishable by law. They do not include those misdemeanors that occur within the private independence of an individual. It remains to be seen that whether those offense which fall under the category of double jeopardy consists of what ingredients/ have almost similar set of circumstances or even same can give the convict or acquit to be saved from tried again. this is a constitutional right in Pakistan which

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[598]section403 Cr.P.C section 26 of General Clauses Act.
[599] NLR 1998 Cr.P.C. Lahore 184
[600] NLR 1998 Cr.P.C. Lahore 184
[601] 1999 P.Cr.L.J 442
[602] 1995 SCMR 626
[603] PLD 1985 Lahore 123

saves a person from a vicious cycle of trials for the same offense. This not only seriously distorts the truth but also creates a serios backlog of cases in courts which has a great chance of getting out of hand. In article 20(2) of the Indian Constitution the word 'Prosecuted and punished' have been used where in our constitution the words 'prosecuted or punished' have been used. Which are more liberal. Article 13 also provides that where a person has been punished for an offense, he shall not be punished for the same offence again.

In Basheer vs. State[604] as well as in Muhammad Ashiq vs. State [605] it was observed that article 13 of the constitution offers a complete protection against double jeopardy. This protection amount to appeal in subsequent cases presented against the same accused. If the cases have similar set of events, trying again becomes void. The chronology of cases with respect to the seriousness of crime is also taken into consideration. In presence of a sore serious crime like capital murder, other offenses are not discussed in court. Exceptions set out in section 403 CrPC cannot be read in article 13 to whittle down the effect of guarantee under article 13. Accused once acquitted by any court of competent jurisdiction and such finding having attained finality, his conviction on same facts again would not be permissible. It was further observed that article 13 enshrines fundamental right against double jeopardy to many persons. It is a reiteration of legal maxim mentioned before as it was further observed that protection guaranteed article 13 is not contingent on an earlier conviction alone but provides safeguard both against second prosecution as well as second punishment for the same offence. And article 13 of the constitution cannot be interpret unchangeably with section 403 CrPC. Such a narrow and restrictive interpretation of article 13 of the constitution is not accepted.

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[604] 1997 P.CR.L.J 1771
[605] 2000 UC 96

5.9 Guarantees under sec. 164 CrPC

The legislature also guarantees in section 164(3) CrPC that a magistrate before recoding confessional statement will explain to the person that he is not bound to make confessional statement and if he makes it may be used against him as evidence.[606]

Any undue pressure on the accused o testify against himself is strictly prohibited. This right remains available throughout the duration of trial. If any means such as psychological pressure, blackmail or torture is used by the investigating authorities, it is the duty of the accused to bring such illegal means to the attention of the judge and prosecution. Failing to which, the accused runs the risk of legitimizing the wrongful confession regarding criminal charge levied against him. This is one of the most dangerous acts that can jeopardize the truth badly. Self-confession is one of the strongest pieces of evidence against an accused which if filling can move the court proceedings towards a speedy decision. But in case it is extracted through unlawful means, can have implications much deeper than the concerned case. It is the duty of prosecutor and judge to be attentive due to the reason that the arrested accused is usually in a state of fear and most often than not, unaware of his/her rights against self-confession. In section 164 CrPC the confessional statement of a person must be volunteer in nature and it should not be result of any coercion and undue influence.[607]

It is right of the accused that he shall not be compelled to record confession. It is the duty of the magistrate to convey to the person wishes to record his confessional statement that he was not bound by law to record statement and if he records it shall be used as an evidence against him.

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[606] Section 164(3) Cr.P.C
[607] Section 164 Cr.P.C

Magistrate must ask him as to any coercion and undue influence or any threat for recording the confessional statement. But through the analysis of scholar writing as well as decisions of the superior courts it is vivid that most of the confessional statement have been retracted which clearly shows that most of the confessional statement of the result of torture, threat or some inducement. Although Pakistan has ratified the convention against torture but so for no law has been framed by the legislature in this regard. If any complaint is made against such guarantees against torture and inducement codified law does not provide any guideline in this regard. For this reason, proper and prompt legislation is the need of the time.

5.9.1 Guarantee as to Interpreter in Codified Law

Section 361 CrPC provides guarantee the interpretation of evidence to accused or his pleader.[608] This section is a mandatory provision object of which is that the accused person should be in a position to know the allegations and convicting circumstances appearing against him so that he may defend himself effectively.[609] Because whenever any evidence is recorded in a language not understood by the accused or in his absence by his pleader it may infringe his right to a fair trial. The right to an interpreter has been internationally recognized which cannot be alienated from the right to a fair trial. Local as well as foreigners have the right to enjoy the facility of interpreter provided, he is not fluent in language of the Court. The facility of interpreter must be free of cost and it cannot be withheld due to any demand of payment.

This right is available for all and sundry both for the nationals as well as foreigners. Rather it would be more appropriate if this right is ensured for accused which are not proficient in either

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[608] Section 361 CrPC 1898
[609] PLD 2006 Kar.139

English or Urdu. This include people from far flung areas that speak regional languages or foreign nationals not from English speaking countries.[610] If a person can understand the language in which court proceedings are conducted, then this right cannot be demanded by them.[611] The right to interpreter is free and payment for it is not to be demanded. This right becomes more imperative if the accused has serious accusations. Translations of all the documents in the language the accused understands must be presented to him. In Pakistan, the right to interpreter is not available during pre-trial stage while the investigation is going on. This has caused serious problems for foreigners who are usually arrested in narcotics cases and have to languish in jails due to non-availability of interpreter and translator.[612] Also, those persons who belong to the far flung area and have difficulty understanding major languages of Pakistan receive no help in understanding the nature of accusations against them. In Pakistan all the courts used the local dialect of the community in which they located during the Court proceedings especially during the recording of evidence. There is hardly any interpretation done during Court proceedings or during evidence, and where it is done, the accuracy of such interpretation is questionable as they are not trained interpreters. This breeds difficulty in the courts located in the bordering areas of the provinces, like Attock, Rajanpur, etc. So litigants who do not understand the local dialect being used by the Court must be given facility of interpreter as they are most of the times left at the mercy of Court officials.

The right to an interpreter can be demanded by a suspect during investigation before Police but this right has not been extended at pre-trial stage of investigation in Pakistan. And is confined only to the Court proceedings. The right of accused is infringed by Investigation Officer when he

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[610] General Comment 13, *supra* note 16, para 13.
[611] *See, e.g., Cadoret and Bihan v France* (221/1987 and 323/1988), April 11, 1991, Report to the HRC (A/46/40),1991 at 219.
[612] Bhui, Hindpal Singh. "Foreign national prisoners: Issues and debates." *Race and criminal justice* (2009): 154-69.

records statements of the witnesses and accused remain completely ignorant of the proceedings before Investigation Officer

5.9.2 Guarantee as to Bail

Section 496 CrPC guarantees bail to all the accused persons in bail able offences. Section 496 CrPC guarantees bail in all bail able offences as a matter of right.[613] It has been maintained in the responsibility of courts that

> **the Courts having been cast upon with the duty of fair dispensation of justice are to keep the scale of justice balanced for both the parties in such a way that one party should not get benefit at the cost of other.[614]**

5.9.3 Guarantee to have Copy of the Judgment

Section 371 CrPC guarantees in every case where accused is convicted, a copy of the judgment shall be given to him at the time of pronouncement of the judgment, free of cost and without delay. But it is observed that accused are provided copies of judgment at some belated stage and no translation has ever been made of the Judgment in the language of the accused. This guarantee of the accused has also been violated frequently.[615]

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[613] Section 346 Cr.P.C
[614] ABID USMAN vs. the STATE and others. Criminal Appeals Nos.30-B, 34-B and Criminal Revision No.10-B of 2012, 2013 YLR 895. (19th September 2012).
[615] Section 371 Cr.P.C

5.9.4 Guarantee the Supply of Copies of Proceedings

Section 548 CrPC provides that if any person effected by the Judgment or order passed by the criminal court including the accused has the right to obtain the copy of the judgment.

5.9.5 Right to Appeal

The legislation has also provided right to appeal against conviction and sentence. The aim of this right is the judicial scrutiny of the material available on record made basis of the conviction. The right to appeal is available to all the persons convicted either serving the punishment or have undergone the sentence already.

5.10 Supervisory Role of a Magistrate

In order to create a system which is based on the facilitation of justice for the citizens of country and to channelize and streamline the smooth implementation of management of justice system, the supervisory role of a magistrate, seems to be central. After arrest of the accused, police are bound to produce him before a magistrate. The supervisory role of magistrate begins to run from the arrest of suspect and lodging of FIR,[616] including every step of investigation till the submission of report under sec 173 CrPC. As per police rule, copy of FIR is immediately produced before magistrate.[617] If the investigation is not completed within 24 hours and Police produces the suspect before magistrate and makes request in writing for further custody,[618] the magistrate is not to pass an order mechanically. Rather magistrate must pass such order in the

[616] Sec 54 Cr.P.C.
[617] Sec 61 Cr.P.C
[618] 2013 S.C.M.R. 1326.

presence of accused and in an open court, but it happens frequently that police produces the accused after the court hours at the residence of a magistrate which is against the norms of natural justice.[619]The magistrate should discourage this practice of the police and must pass standing orders to the SHO to produce the accused in the court so that accuse may access the legal counsel for his assistance. If the magistrate is satisfied that there is well founded and sufficient ground for justifying remand of an accused to the Police, he may pass such an order.[620] Magistrate must observe as to whether the suspect has been subjected to torture for the purpose of confession or recovery and if detainee is female she must be medically examined. When accused is produced for further custody and magistrate feels and there is nothing incriminating material against the suspect, magistrate may discharge him.[621] Sec 63 CrPC. prohibits discharge of an accused person except under a special order of a magistrate and only a magistrate can prohibit cancellation of FIR.[622]

Discharge of an accused person is also governed by section 169 CrPC which was at the conclusion of the investigation and on the submission of the report 173 CrPC.[623] If the report under sec 173 CrPC submitted in the form of chalan the magistrate may take cognizance under sec 190 CrPC. If the case is exclusively trial able by the sessions Court, he submit it to court of sessions for its trial. The Magistrate must scrutinize the record and ensure that all the relevant documents are attached with the chalan and this important assignment should not be left to the ministerial staff.[624] It is also the duty of the magistrate to ensure as to whether the entries with

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[619]http://www.commonlii.org/pk/other/PKLJC/reports/49.html, accessed on 25,Oct,2017,3:30pm)
[620]sec 167 Cr.P.C
[621] 2006 PLD 316 SC & Sec 63 Cr.P.C.
[622]Rule 24.7 of the Police Rules 1934.
[623] 2005 MLD 1883 Peshawar.
[624]Braibanti, R. (1963). Public bureaucracy and judiciary in Pakistan.*Bureaucracy and Political Development*, 360-440.

regard to the chalan have been properly made by the staff in the relevant register.[625] The Magistrate is also empowered to bind down the witnesses to appear in the court.[626] The magistrate is also empowered to seek surety bond from the witnesses in this regard. If Police wants the identification parade of a suspect and produces him before the magistrate he must comply with the said requirement.[627]

Magistrate must have ensured that the suspect have been brought in court with muffled face and Police have not facilitated the alleged witnesses to identify the suspect at Police station. The magistrate has to conduct identification parade in impartial manner keeping in view the rules and the relevant provisions of law. He must take special care as to the selection of dummies and recording of the identifying witnesses because identification parade is an important piece of evidence and the fate of the case of capital punishment depends upon it. He must have to record the proceedings in the word of the witnesses. The Magistrate has to submit the identification report to the concerned quarter in a sealed envelope. Magistrate should not furnish unattested copy of identification parade to I.O. If the accused is brought before magistrate for recording his confessional statements under sec 164 CrPC Magistrate having supervisory authority should tell the accused that he is not bound to make confessional statement and if he makes it could be used against him. He must confirm from the suspect making confession that such confession is free from inducement and duress and is volunteer in nature. The Magistrate must exercise his supervisory jurisdiction judiciously and procedure as laid down in sec 364 CrPC.

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[625]Sayeed, K. B. (1958). The political role of Pakistan's civil service. *Pacific Affairs*, *31*(2), 131-146.

[626]Sec 173(5) Cr.P.C.

[627]Article 22, Qanoon e Shahadat Order 1984.

Since the liberty of a citizen has been a paramount consideration and it is this right of liberty and security that is usually curtailed by Police, thus magistrate has supervisory authority over the Police and magistrate is under legal obligation to ensure as to whether the person arrested has been disclosed the reason for his arrest and nature of allegation or not. He must ensure that accused be produced before him within stipulated period prescribed by the law. This supervisory status of a Magistrate must not be superfluous but should be exercised judiciously and his conscious must be satisfied that liberty of a person is not curtailed. Accused has a legal right to explain his point of view and concerns before magistrate.[628] If the accused is not produced before the Magistrate, and the magistrate is not satisfied with the health and condition of the arrested person, automatic granting of remand on police request is deemed illegal. But our magisterial system lack these qualities and pass remand orders in a mechanical manner and without physical appearance of accused.[629] If investigation is not completed within 24 hours under sec 61 CrPC Magistrate can competently grant Police custody irrespective of the fact as to whether he possess or not the Jurisdiction of the matter. However, controversy exist as authority of Magistrate when Police request for remand of an accused. According to some Judgments the magistrate has two options either to grant remand or to decline. According to other view if incriminating evidence available against accused he may be discharged. But to the Magistrate, although no incriminating material was available the accused is sent to Judicial Lockup. Police requesting of physical remand for recovery of some incriminating material under sec. 167 CrPC has either to grant remand or to refuse it and has no authority to take cognizance and discharge the accused of an offence trial able by the court of sessions. The magistrate when exercising authority over Police must conduct the proceeding with open eyes and mind and if he satisfied that the suspect is

[628]Province, K. P., & Colonisation, P. Pakistan Journal of Criminology. *Pakistan Journal of Criminology*,2010 *2*(3).
[629]Mughal, J. R. D., & Ahamd, M. Law of Warrants. *Munir Ahamd, Law of Warrants (November 22, 2011)*.

arrested without any genuine grounds, he must initiate proceeding against the Police Officer under relevant provision of Police Order. Such a police official who makes an arrest unlawfully or without a proper and solid ground is punishable under relevant articles of PPC. But if Police makes request to the Magistrate for second remand, it is not prohibited in law and will be treated as an independent transaction.

However, if an accused is given chalan and his trial is pending before a competent court, police has no authority to take away the accused from the prison without an order of the magistrate.[630] It has been held that accused once sent to judicial custody is neither handed over back to the Police nor the police can take the accused without court permission. If police conclude that the accused is innocent, magistrate may not agree and can take cognizance under the obligation of protecting the rights of the accused. If the Police feels, after an accused has been sent to Judicial lockup that there is enough incriminating material available against the accused, the Police may get the order set aside from competent court or through a magistrate. There is also a controversy as to whether all the orders passed by the magistrate while exercising supervisory role over Police, are Judicial or administrative in nature. There are judgments to support both the views, but the overwhelming view is that all such orders are administrative and executive in nature. It has been held that the justice is not to be administered in courts only, but even during investigation Police has to do justice to parties.

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[630] Article 18 of ICCPR, *S.M.C. No.1 of 2014 and C.M.A. Nos. 217-K/2014 IN S.M.C. No.1/2014 et al.*, Pakistan: Supreme Court, 19 June 2014, see alsohttps://www.supremecourt.gov.pk/latest-judgements/ (accessed on 14th June 2016 at 5:45 am.)

5.11 Conclusion

The fundamental and overarching right to a fair trial is by no means a recent development. The right to a fair trial is grounded in the inherent power of the courts and permeates almost every concept of criminal law and follows the procedure. This right, to some extent, is protected in Pakistan's national legislation which is fundamental and absolute. The criminal trial is concerned with protecting rights. The fair trial is manifested only through the powers of the court to prevent the abuse of process of law. The decisions of courts in Pakistan on numerous occasions also emphasize the need to strike balance between the victim and accused. Although no legal provisions have declared the balance between the prosecution and defense a non-negotiable right, certain judgments can be regarded as torch bearers in this regard. It has been said that:

> **It may be true that at least in some situations the Control of Narcotic Substances Act, 1997 stipulates disproportionately long and harsh sentences and, therefore, for the purposes of safe administration of criminal justice some minimum standards of safety are to be laid down so as to strike a balance between the prosecution and the defense and to obviate chances of miscarriage of justice on account of exaggeration by the investigating agency.**[631]

The right to fair trial is comprised of number of rights and are not confined to trial but runs throughout the criminal process from investigation to appeal. In our adversarial system, facts are ascertained by way of evidence by witnesses. There are, however, cases where the required

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[631]Ameer Zeb vs. the STATE. Criminal Appeal No.565 of 2009, PLD 2012 Supreme Court 380 (18th January, 2012). (On appeal from the judgment dated 30-6-2009 of the Islamabad High Court, Islamabad passed in Criminal Appeal No.293 of 2005).

expertise of forensic expert, the importance of CCTV footage and other surveillance devices are quite relevant to reach the truth. The rule of law is personified in the law of procedure designed to regulate the course of the trial. Accused has a right to be present throughout the trial including at the investigation stage. Although there is provision for the removal of problematic accused and trial can be continued in the absence of such an accused. The right of the accused to participate includes the right to be present during the investigation, present evidence and argument and to cross examine the witnesses. It has rightly been said that **"cross examination has been described as the greatest engine ever invented for the discovery of the truth".**

The accused has the right to be silent and his council will conduct his case i.e. examining and cross examining the witnesses, making opening as well as closing statements etc. The accused has the right of due notice of the charge and the evidence against him, to give evidence and to cross examine the witnesses against him and so on. If an accused person who is innocent otherwise is denied the basic right to fair trial and even if he is not convicted but nonetheless exposed to an unreliable procedure, the trial may turn into a misleading direction and may result in an unjust verdict. Accused right to defend himself is required because the evidence produced by the prosecution can only be convincing if it withstands the scrutiny of the defense.

The evidence of the accused would also serve the aim of establishing the truth. Rule of law account might claim to be able to explain both the right to be heard and to remain silent. In the same way thus offering a truth finding theory. The core of truth finding theory is the idea of calling to account 'the criminal trial, is a process through which accused are called to answer a charge for criminal wrong doer if they are prove to have committed the offence charged, to answer for their conduct in order to find what actually happened. If the accused is found to have committed the offence and have no defense, **"the accused is condemned through a guilty**

verdict". This account portrays a **"criminal trial as a communicative process to find truth by calling the accused to answer",** and through which he can challenge the acquisition of wrong doer, made against him. The ideal of the communicative participation regulates the communicative roles and obligation of the accused, prosecutors, complainants, witnesses and decision makers.

In the adversarial system prevalent in Pakistan, the fair trial rights under the codified laws have been discussed. Many lacunas can be found in the system and there is a great scope of improvement at every stage of trial. Whatever the betterments are to be introduced in legal and judicial system of Pakistan, finding truth should be the ultimate goal of conducting trial. The legal system of Pakistan comprises of many religious and cultural influences, the importance of which cannot be denied. Many ethnicities and schools of thoughts reside in Pakistan. The optimum improvements in codified laws need to take this consideration into account. The history of Pakistan is rampant with examples where legal system is used for temporary gains and personalized preferences. This makes the law not only less credible in the eyes of masses but also less likely to stay same for long. In the next chapter this researcher would discuss an important aspect of fair trial in Pakistan. The Islamization of law has some rapid developments with volatile reactions from opposite factions of the society. What law in Islam means and what its implications in Pakistan's legal system are, will be seen in the next chapter?

CHAPTER 6

FAIR TRIAL GUARANTEES IN ISLAMIC LAW

6. Introduction

In the two previous chapters, this study has discussed the right to a fair trial in Pakistan's constitutional law and national legislation. Moving forward, the study proposes to discuss the right to a fair trial in Islamic law. As discussed in chapter 1, the reason for studying an Islamic perspective of the right to a fair trial is obvious: Islam is the state religion of Pakistan. According to the 1973 constitution of Pakistan, Islam is the guiding principle for the State and society of Pakistan. By the 18th Constitutional Amendment introduced in the year 2010, fair trial got a specific constitutional mandate. The right to a fair trial, as this chapter will argue, however, existed already within the scheme of the fundamental rights with rich jurisprudence developed by the judiciary. The chapter argues that the right to a fair trial is an extension of other fundamental rights which are considered as the same as provided under Islamic law. For this purpose, this chapter will discuss how Islam and Shariah has treated the right to fair trial and how the legislation in Pakistan has tried amalgamating Islamic concept of fair trial and the guarantees of fair trial provided in international covenants and statutes. Also discussed in this chapter would be the problems that are emerging in providing right to fair trial from Islamic point of interpretation. For this purpose, firstly, the sources of Islamic law will be discussed and what efforts have been tried to converge existing laws according to the principles of Islam. At a theoretical level, the vision of Muhammad Ali Jinnah (father of the nation)—Pakistan being a modern Islam State—divulged in his speeches, marks as the starting point. The Objectives

Resolution adopted by Pakistan's first Constituent Assembly, being the next step appears what may be called the first legislative embodiment of that vision.

The major aim of adversarial trial is finding the truth. This is exactly why a trial is conducted. Islamic sharia and legal quest also have concurrent pathways that tries to find truth of an occurrence through trial which eventually leads to the betterment of the society. This very aim along with a clear guidance of supremacy of Allah almighty with creating a society as much as free from errors have been the reason for presenting objective resolution in the Constituent Assembly. Two major landmarks in legislating have been the vision of our nation's father Muhammad Ali Jinnah and the subsequent **"Objective Resolution"** which acted as a universally accepted guideline for all the future legislation in Pakistan and certainly had a lasting effect the consequence of which can be seen not only today but in future legislation as well.

6.1 Right to Fair Trial in Islam and International Covenants

One out of the only two states in the world which came into being on religious ideology (the other being Israel), Islam since the first day has been taken implicitly as well as explicitly, the guiding principle of all walks of life including legislation. This was expressed many times by our Being a country with over 90 percent Muslim population, it is considered imminent that laws should follow the guidelines of Islam. But we cannot ignore the historical development of law in the region which has the influence of multiple geographical and socio-economic factors as well as the amalgamation of laws that were brought by subsequent attackers over centuries. Since Pakistan came into being when British were the ruling elite of subcontinent, common law was followed in 1947 which naturally flowed into the legal fabric of Pakistan with minor adjustments. In order to understand what Islamic Shariah and jurisprudence offers in terms of

fair trial, international standards of fair trial and due process available in different legal fraternities of the world needs a comparative analysis in light of Islamic provisions of law provided more than 1400 years ago when law itself was just a primitive idea existing only in the minds of a few learned members of societies.[632] Quaid-e-Azam Muhammad Ali Jinnah at numerous occasions before the birth of our nation has emphasized on the importance of legal direction where the dignity of man is not violated under any pretext whatsoever and fair trial with due process of law is given to all and sundry.[633]

Rights given to both accused as well as victim under the doctrine of human rights at regional as well as international covenants are all present in Islamic legal system. Although human rights differ from culture to culture, yet despite some conceptual differences between international human rights and Islamic law, the rights given to both accused as well as victim under international human rights and Islamic law are greatly compatible to each other. In order to make a comparison of how accused is given full rights to prove the charge against him while a court ensures that the integrity and reputation is preserved in trial proceedings without sacrificing truth at the alter of rights preservation.

What human rights in general and right to fair trial and due process in particular have been provided in international constitutions and covenants can be seen through different examples. For example, in U.S. Constitution, Sixth Amendment provides that in all criminal proceedings, the accused shall enjoy the right to a speedy and public trial, by an impartial jury; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses

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[632] Ahmedov, Aibek S. "Origins of Law of Religious Minorities in Islam: Evolution of Concept of Dhimmi as Portrayed in Early Sources." *J. Islamic St. Prac. Int'l L.* 3 (2007): 23.

[633] Khan, Abdul Hamid. "The Dilemma Of Islamic Constitution In Pakistan." *The Journal of Political Science* 17 (1994): 37.

in his favor, and to have the Assistance of Counsel for his defense.[634] It is also observed in the case of Golder vs. United Kingdom that the right to a fair and public hearing before an independent and impartial tribunal under Article 6 of the 1950 Convention has been upheld by the European Convention, which gives the right of free legal assistance of his choice. It is also an admitted right that free communication of legal counsel with the accused cannot be curtailed. Also in the case of Tyrer vs. United Kingdom[635], the imposition of physical punishment by lashing on the Isle of Man is a 'degrading punishment', which violates article 3 of the 1950 Convention.[636]

In the Rome Statute also, an accused has the right to a public trial, unless otherwise against the public interest, with free legal assistance and a translator if deemed necessary, sufficient time to prepare the case and then be heard by a competent impartial judge, so that the truth be found during the occurrence of an incident. Similar rights have also been recognized by the ICCPR and the Council of European Convention on Human Rights.[637] The Pakistani Courts have also recognized similar rights of the accused; that the person arrested must be given reasonable opportunity to engage counsel, and the counsel engaged must be given reasonable opportunity to defend the accused. Similarly, in case of preventive detention, right to make representation must

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[634] U.N. Human Rights Committee, General Comment No. 29, States of Emergency Article 4, paragraph 16, CCPR/C/21/Rev.l/Add.l 1, 31 August 2001;Article 10, Universal Declaration of Human Rights ;Article 26, American Declaration of the Rights and Duties of Man; Articles 9(3), 14(1), 14(3)(c), 14(4), International Covenant on Civil and Political Rights; Article 6(1), Council of Europe Convention for the Protection of Human Rights; Articles 8(1), 8(5), American Convention on Human Rights; Article 7(1)(a), African Charter on Human and Peoples' Rights Articles 60(1), 60(2), 60(4), 63, 64 and 67, The Rome Statute

[635] Article 8(2)(c), Council of Europe Convention for the protection of Human Rights; Article 14(3)(b), American Convention on Human Rights.

[636] Starke, J. G. "Introduction to International Law (An Introduction on International Law)." *Translation of Sumitro Danuredja and Lukas Ginting,(Jakarta: Aksara Persada Indonesia, p. 143* (1989).

[637] Articles 14(3)(d), 9(4), International Covenant on Civil and Political Rights; Article 6(3)(c) European Convention for the Protection of Human Rights

be made available to the detained person. If the accused is a juvenile, the matter of age and corruption at a tender age by the mitigating circumstances must also be kept in mind while providing standard facilities to the accused. The provisions of the law which deny to such person the right to be defended by a legal practitioner are void.[638] The right of the accused to bail is also recognized not only in the Eighth Amendment of the US Bill of Rights, but also in the much earlier 1689 English Bill of Rights, UK.

These and many other examples are an evident proof of how right to fair trial and due process is emphasized in international instruments. It is perhaps this very quality of modern times that is keeping human beings civilized and despite turbulences of all types, the societies are functioning.

The refusal of bail to a detained person can be justified only in cases when there is a matter of public interest and safety or the accused can abscond or commit more crimes or still ore intimidate the victims and witnesses, thereby effecting the court proceedings and thereby the outcome of the case. All other detentions when the bail is refused comes under the fold of illegal detention.[639] Also, the right of the accused to appeal against the judgment to a Higher Court is also established by all the International and regional legal bodies, as well as the constitutions of the world.[640]

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[638]Muslimuddin Sikdar vs. Government of East Pakistan, PLD 1957 Dacca 101; Mohammed Siddiq Khan vs. District Magistrate, PLD 1992 Lah. 140; Mohammed Khan vs. Deputy Commissioner, PLD 1985 Quetta 217;Abdul Hamid Khan vs. District Magistrate PLD 1973 Kar. 344;Malik Mohammed Osman vs. The State, PLD 1965 Lah. 229; Bazal Ahmed Ayubi vs. Province of West Pakistan, PLD 1957 Lah. 388

[639] David Robertson, A Dictionary of Human Rights, Europa Publications Limited, 1997, London, Pp.157

[640] Article 8(2)(h), Convention on Human Rights; Article 59(2), The Rome Statute; Article 13(b), The Constitution of the Islamic Republic of Pakistan 1973 ; Article 20(3), The Indian Constitution.

Dignity and security of the person implies that neither the state authorities nor the other individuals can interfere with his person. Neither he can be arrested nor can he be tortured by the police authorities or other individuals except under the protection of law. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. This punishment should, however, not be cruel, inhuman or degrading. This prohibition is present in both universal and regional treaties and there is a specific convention against torture. The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment states, **'No one shall be subjected to torture or inhuman or degrading treatment or punishment. Every person has a self-respect which should not be injured'.**[641] Under the Convention each state party is bound to prevent in any territory under its jurisdiction the acts of cruel, inhuman or degrading treatment or punishment. In this regard the Universal Declaration of Human Rights declares that, **'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.**[642]

The Council of European Convention for the Protection of Human Rights and Fundamental Freedoms says that, **'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.**[643]

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[641]Muslimuddin Sikdar vs. Government of East Pakistan, PLD 1957 Dacca 101; Mohammed Siddiq Khan vs. District Magistrate, PLD 1992 Lah. 140; Mohammed Khan vs. Deputy Commissioner, PLD 1985 Quetta 217;Abdul Hamid Khan vs. District Magistrate PLD 1973 Kar. 344;Malik Mohammed Osman vs. The State, PLD 1965 Lah. 229; Bazal Ahmed Ayubi vs. Province of West Pakistan, PLD 1957 Lah. 388

[642] Article 8(2)(h), Convention on Human Rights; Article 59(2), The Rome Statute; Article 13(b), The Constitution of the Islamic Republic of Pakistan 1973 ; Article 20(3), The Indian Constitution.

[643] Article 3 of the Council of European Convention for the Protection of Human Rights and Fundamental Freedoms

6.2 Shariah and Concept of Fair Trial in Islam

Shariah literally means 'road' or 'highway'. Its derivation means the beaten track where wild animals come down to drink at their watering place. It refers to the path where waters of life (knowledge and understanding) flow inexhaustibly.[644] Shariah has been the source of adherence amongst the Muslim society and the guidance for not only its submission to Allah almighty but rules to govern and live in the society.

According to Von Grunebaum:

> **for the Muslims, from ninth to nineteenth century, time stood still, and the world was stayed on its centrifugal course. One thing alone made this possible, the adherence of society as a whole.....to the Shariah, the religious law of Islam.**[645]

The main purpose of Shariah is to guide human's search for the truth through a set of laws. Hence, it touches on both transcendent and material experience. Theoretically speaking, this has also been the goal of trial conduction in legal spheres. The quest to fair trial has the same path and circumstances, i.e., the search for truth and reality.[646] This study also supports the truth finding theory of fiar trial as discussed in theorization Chapter of this dissertation. With strict accuracy as body of revealed laws. The reason being rational judgment and human effort has contributed to the development of Shariah and this judgment is considered by Muslims as an enlightened contribution aided by divine help.[647]

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[644]Eaton, Gai. *Islam and the Destiny of Man*. SUNY Press, 1985. Pg 166-167.

[645]Von Grunebaum, Gustave E. *Medieval Islam: a study in cultural orientation*. University of Chicago Press, 2010. Pg. 346.

[646]https://www.ukessays.com/essays/philosophy/the-nature-and-purpose-of-shariah-philosophy-essay.php (accessed on 4th august 2019 at 4:39 am.)

[647] Ibid 3, pg. 167.

6.3 Fair Trial Rights in Early Islamic Society.

The Holy Quran is the ultimate 'constitution' of Islamic community, the words of which are immutable for Muslims, who are bound to obey and follow them in letter and spirit. Shariah is the code which has made the message of Quran and Sunnah for Muslims into a law that is livable and is practical.[648] The first two sources of Islam are the Quran and Sunnah which together constitute the Shariah.

Quran being the divine book of Muslims is not regarded as legal code but gives basic legal guidelines rather than strict legal rules. Although these guidelines cover all aspects of legal arena from arrest, conviction, trial, sentencing and all other aspects, the exact number of legal texts are still not confirmed by the religious scholars.[649] The text in Quran, both legal as well as non-legal dealt mainly in the subjects of zakat, rights of orphans, homicide, usury, property, inheritance, marriage, rights of women, polygamy, divorce, adultery, prohibition of alcohol, halal and haram foods etc., All these guidelines were illuminated and used by the prophet as a judge to give practicability to these divine laws."

The second primary source of Islamic law is Sunnah which constitutes sayings, deeds and unspoken approvals by the Prophet (P.B.U.H). Sunnah is the path that people are to follow. In Islam, it means the way of the Prophet (P.B.U.H) which includes the whole life, saying, actions, character traits and silent as well as verbal approvals. Other than what is narrated by the companions of the Prophet (P.B.U.H), the Sunnah also includes everything including the

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[648] Ahmad, Nazir. "Pakistan: The Tension between Culture and Human Rights." *JL & Soc'y* 29 (2003): 1.

[649]Kamali, Mohammad Hashim. *Principles of Islamic jurisprudence.* Cambridge: Islamic Texts Society, 1991. Pg 19-20.Seealso Coulson, Noel J. "The state and the individual in Islamic law." *International & Comparative Law Quarterly* 6, no. 1 (1957): 49-60. Kamali tells of 350-500 verses dealing with legal matters while Coulson considers 80 verses.

physical features and traits. The Quran and the Sunnah complement each other. The Quran is the word of Allah, whereas the Sunnah is its practical interpretation.[650] The Sunnah also gives a full account of the life of the Prophet (P.B.U.H). The Quran principally deals with basic instructions whereas Sunnah provides necessary explanations and details of those Quranic verses.[651]"

There was nothing more important for Muslims to ensure what Prophet Muhammad (P.B.U.H) said in guidance to the newly emerging society. For this purpose, religious scholars of 2nd and 3rd centuries of Islamic era compiled six books of authentic hadith based mainly on human value of individual 'transmitters' of hadith. The authenticity of hadith was established with painstaking care and detail. The 'mujtahidun' would go to any lengths to ensure that there is no single weak link to 'break the chain' of authenticity.

The word **"fiqh"** means 'jurisprudence', comes from the verb **"faqiha"** means 'he understood'. Understanding the divine guidelines and its implications in all the aspects of daily life. As the basic guidelines have been provided in Quran and the example in Sunnah of the Prophet (p.b.u.h). But the work of elaboration was done by the religious scholars who toiled and worked hard for next two centuries to construct from these basic guidelines, a complete, concrete, thorough and durable legislation of law.

Eaton is of the view that the establishment of hadith by the four schools of law was the first step in the complex and long process of legislation. Legal provisions drawn directly from Quran and Sunnah could not be expected to neither cover every contingency nor the requirements of great

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[650]Rahman, Fazlur. "CONCEPTS SUNNAH, IJTIHĀD AND IJMĀ'IN THE EARLY PERIOD." *Islamic Studies* 1, no. 1 (1962): 5-21.

[651]https://www.islamweb.net/en/article/151024/the-sunnah-the-second-source-of-legislation (accessed on 17th January 2018 at 4:23 am.)

Muslim empire and its bustling cities.[652] A body of law was formed to address every imaginable situation and occurrences, without losing sight of its sacred and impeachable sources. For this purpose, three principal methods were adopted.

a. Intellectual effort (ijtihad) (individual effort of mujtahid).
b. consensus (ijma) (collective work of mujtahideen),
c. analogy (qiyas),

When facing a certain legal issue and there are no clear-cut instructions regarding that problem, *ijtihad* or *ijma* is sought. Although sources of law are hierarchically applied to a problem, *ijma* is considered as third source after Quran and Sunnah. While *ijtihad* is the individual decision of a man with sufficient Islamic knowledge or jurist (*mujtahid*), *ijma*, on the other hand, is the consensus of *mujtahidun* (jurists) on an inquiry of law during a certain time period.[653] The first juristic deduction based on human reasoning is *ijtihad* which deals with complications not explicitly covered by primary sources of Islam. There are many types of *ijtihad* namely *Qiyas, istihsan, maslahah* and *urf.*[654]

When there is a collective agreement on legal deduction, it is called *ijma*, usually done by the *mujtahidun. Mujtahidun* can rightly be called as the earliest architects of Islamic law, as they were the **"scholars of Hadith'"** too.[655] Since *ijma* is supported by verses of Quran and Sunnah, it is considered as lawful and binding. The Quran says, **"Obey Allah and obey the Messenger,**

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[652] Ibid 3, pg 168.

[653]Ali, Abdullah bin Hamid. "Scholarly consensus: Ijma ': between use and misuse." *Journal of Islamic Law and Culture* 12, no. 2 (2010): 92-113.

[654]Hasan, Aznan. "An Introduction to Collective Ijtihad (Ijtihad Jamai): Concept and Applications." *American Journal of Islamic Social Sciences* 20, no. 2 (2003): 26-49.

[655]Ibid 3 pg 167.

and those charged with authority among you".[656] Similarly, the Prophet said, **"my community will never agree upon an error".**[657] which gave a guaranteed soundness to any consensus reached amongst the Muslim community. Although it is generally accepted to be the ijma between the scholars of Islam followed by the general public, but examples are also present when the opinion of Muslim masses was followed by ulema of that era. When coffee was first introduced as a beverage, it was pronounced by ulema as prohibited, but the disagreement of general public changed the view of scholars and coffee was legitimized in due course of time.

6.5 Islamic Law and Right to Justice and Fair Trial

Islam as a legal doctrine establishes justice through Shariah. The standards of justice in Islam surpass all discriminations and balance between the obligations and rights. Shariah provides protection to all and sundry without discrimination. Through Shariah, Islam provides protection of life, liberty, religion, intellect, property, lineage and dignity.[658] Islam as seen since the first century of Islamic calendar has endowed a certain privacy and protection to the individuals of the society where Muslims need law of Shariah not to tell them what to believe but how to believe and live life according to the divine laws. Quran and Sunnah along with secondary sources of law provide elaboration and authority to these guidelines. These norms and principles are acknowledged and expressed by Muslim jurists as legal maxims (**qawaid kulliyah**) that describe the objectives and purposes of Shariah. The negligence in protection of these rights or

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[656]The Holy Quran 4:59.

[657]Narrated by al-Tirmidhi (4:2167), ibn Majah (2:1303), Abu Dawood, and others with slightly different wordings.

[658]Bassiouni, M. Cherif. "The individual Human Rights and Habeas Corpus Islam." *Jami 'ah al Falh Publications, Karachi* (1972): 557.

any imbalance between them can cause a society to expose people to danger and collapse at the cost of justice in the society.[659]

6.6 Fair Trial in Islamic Law

The idea of Islam is that of a community in which every individual life within the relationship of Allah and the mold of circumstances provided to him under the rule of law. The community sheltered and ordered by the Shariah has the sources of law as a 'part of faith'.[660] This community requires a balanced approach of rights and obligations into the fabric of justice. The basis of Islamic law revolves around the provision of rights to individuals which are connected to their Creator in such a way that it **"places many paths in which humans select in conformity of their needs and live according to the Divine norm as indicated by Shariah".**[661]

The approach of Quran commanding oneness of God has created a balance of rights as well as obligations regarding individuals not only acting as a single entity but as a collective part of society. This has created an essence of justice at all levels and for all members of Islamic society regardless of religion or association. Islam's method to balancing the right of God and the individual rights is purpose that it strives for protection of the welfare of both the individual and the community under the parasol of justice.[662] The Quran mentions that the basic purpose of sending the Holy Messengers by Allah to establish a social justice system where equality and justice is guaranteed to all and at all times, when it is revealed that,

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[659] Kamali, Ibid. pg. 76.

[660]Watt, W. Montgomery, and W. Montgomery Watt. *Islam and the Integration of Society*. Routledge, 2008. Pg 234.

[661]Nasr, Seyyed Hossein, Titus Burckhardt, and Huston Smith. *Ideals and realities of Islam*. London: Allen and Unwin, 1975. Pg 98.

[662]Awan, Mehboob Pervez. "Civil Liberties." *Human Rights Constitutional Protections, Federal Law House, Rawalpindi,* (2003): 107.

"We sent Our Messengers with Clear Signs and sent down with them the Book and the Balance of right and wrong that people may stand forth in justice".[663]

Similarly, it is revealed,

"and the sky has He raised high, and He has set the Balance (of Justice), in order that you may not transgress (due) balance. So, establish weight with justice and fall not short in the balance".[664]

The Prophet (P.B.U.H) said in this regard:

> **O people! Listen unto my words and understand me. Be aware that all Muslims are brothers unto one another. You are one brotherhood. Nothing which belongs to another is lawful unto his brother, unless freely given out of goodwill. Guard yourselves against committing injustice.**[665]

Similarly, the path of seeking truth and justice was evident when Abu Bakr, the first caliph of Muslims, in his first official speech, said:

> **O People.; I have been appointed ruler upon you, while I am not the best of you. If you see me with truth, help me, and if with falseness set me right. The strong among you, in my opinion, is the weak until I snatch the right from him and the weaker among you, in my view, is the strong, unless I redress his wrong.**[666]

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[663] The Holy Quran: 57:25

[664] The Holy Quran: 23: 7-9

[665]Hafiz Ibn Hajjar al Askalani, Al Mutalib Al Alia, Chapter baiul muttar hadith No.1468&Chapter al ghasab, Hadith No.1517

[666]Ibn Saad, Al-Tabaqat-ul Qubra,1/183.

His address was a testament to the importance of right to fair trial while being appointed a ruler. The doubt of human error which can cause any injustice needs to be removed. This address was the basis of jury in Islam which not only assists but ensures the provision of human rights especially fair trial rights.

6.7 Human Rights: Islamic Law Perspective.

Right to fair trial is a fully developed concept in Islamic law which not only provides judicial and social mechanism for attaining truth and fairness during trial but also creates a balance of rights between the accused and the victim. No distinctions in dignity and fundamental rights between one man and another on the basis of race, sex, blood relations or wealth has been made by Islam. Islam not only provides legal remedies but also examples of court decisions based, theoretically speaking, on ethical values of Muslim society. These court decisions were based on moral unrighteousness and determined truth during the chronology of events of a trial. The incentive of doing good deeds and intentions in Islam is further cemented by the concept of reward in the 'hereafter', which served as an impetus for enforcement of the Human Rights is an Islamic State. Being a welfare state, Islamic society put great value on preserving and promoting morals and human rights within its community.

Shariah is divided into the rights of God and the rights of the people, where the rights of God are also linked to the benefit of the mankind. It has been stated by the scholars[667] that:

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[667]Thornely, J. W. A. "Jowitt's Dictionary of English Law. By the late the Right Honourable the Earl Jowitt and Clifford Walsh, ll. m., Solicitor of the Supreme Court. by John Burke, Barrister, Sometime Editor of Current Law.[London: Sweet & Maxwell Ltd. 1977. 2 Vols.: vii, 1,922 and (Bibliography) 13 pp.£ 45· 00 net.]-Osborn's Concise Law Dictionary. by John Burke, of Lincoln's Inn, Barrister-at-Law.[London: Sweet & Maxwell Ltd. 1976. vii, 352 and (Law Report Abbreviations & Regnal Years) 43 pp. Cased.£ 3· 25; paperback,£ 2 ...." *The Cambridge Law Journal* 37, no. 2 (1978): 350-351.

Rights of former class (i.e. Rights of God) are such as involve benefit to the community at large and not merely to a particular individual.....the rights of God correspond to public rights and since the Mohammedan Law regards the observance of obligatory devotional acts as being beneficial to the community there is no difficulty in describing all rights of God as 'Public Rights'.[668]

Being a complete code of life, the rights of mankind, according to Shariah are innumerable and results in a complete code of life. Not only Quranic verses give divine commands but the last sermon of the Holy Prophet (P.B.U.H) is regarded as **"the first comprehensive charter found on the basic fundamental rights of man)".**[669] In order to better understand how and what rights have been given in Islam as rights to fair trial, some important rights are discussed below in the lights of Islamic teachings.

1. **The right to life:**

The right to life is of ultimate importance in Islam and punishment to settle the score in the same manner and severity is given for a person infringing this right. The Quran says, **"And do not kill anyone which Allah has forbidden except for a just cause".** Similarly, the punishment for this crime is again described as **"and we ordained therein for them: Life for Life".**[670]

The Holy Prophet (P.B.U.H) in his Farewell Sermon also put in the following words; **"your blood and your property are as sacred as is this Day and this Month (i.e., 9th Zul-Hajj)".**[671] The importance and universality of this right has been recognized by all the nations of the world

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[668]A.I.R, 1943 P.C 164.

[669]Chapter 1st of the Constitution of Pakistan, 1973.

[670] The Holy Quran 2:178.

[671]https://www.whyislam.org/muhammad/last-sermon-of-the-prophet-muhammad-pbuh/ (accessed on 17th November 2018 at 4:56 am.)

and UDHR affirmed this right to life to every living soul.[672] Similarly, The Right of Private Defence is not alien to Islamic Law as the circumstances play a vital role in Islam. The apprehension of life or extreme duress may grant a person punishment of his offences. A thief may have his hand cut but not if he stole because of hunger or if he stole for the danger to his life.[673] The right to life is protected by the State through its executive and judicial branches and promoted through economic and social development. It needs to be argued that the right to life is protected in the same manner as international human rights standards generally provide. Further that the recognition and protection of the right to life in Islamic law is greatly if not at all fully compatible with the international human rights standards.

2. **Right to personal freedom**

The right to personal freedom has always enjoyed central position in Islamic society. The doctrine of Shariah rather than a straitjacket of strict laws, is a flexible framework with adequate space for free movement and individual differences. The right personal freedom conforms to regulations within divinely ordained pattern but free within the personal life from the societal pressures and the impositions of the state other than those prescribed in sources of Islamic law. It is said in Quran, **"He it is, who has made the earth subservient to you, so walk in the path, therefore, and eat of His provision, and to Him will be the resurrection".**[674] Also it is again revealed, **"O you who believe! Avoid much suspicion; indeed, some suspicions are sins".**[675]Holy Prophet (p.b.u.h) has also approved the right to personal freedom. Imam Khattabi

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[672]Hannum, Hurst. "The UDHR in national and international law." *Health and Human rights* (1998): 144-158.

[673]Peters, Rudolph. *Crime and punishment in Islamic law: Theory and practice from the sixteenth to the twenty-first century*. No. 2. Cambridge University Press, 2005.

[674] The Holy Quran Surah Mulk. 67:15.

[675] The Holy Quransūrat l-ḥujurāt 49:12.

argues in his "Mualim-ul-Sunnan" also argues that other than imprisonment on the basis of investigation or under the orders of the court, **"there is no other ground on which a person could be deprived of his freedom"**. Once while visiting Egypt, Caliph Umar (RA) addressed Amr-bin-Al'as, the governor of Egypt in these words, **"O Amr, why you have started making the people slaves when their mothers had given them birth as free persons"**.[676]

3. Protection against Arbitrary Arrest and Detention

In Islam, arbitrary arrest and detention is prohibited as no person shall be detained unless the offense is proved in an open court. In the absence of officially appointed court proceedings, no person, according to Islam, can be arrested and put in prison. Also, if a person is arrested, he must be given complete opportunity and resources to able to put his defense against the charge.[677] Specific reason for arrest and detention must be provided before arresting an individual. The court proceedings are of paramount importance as even if a charge is levied against an accused, proper investigation must be done to uncover truth and concrete and solid evidence must be provided in case an arrest is to be made. Moreover, in Islam, no man can be punished for a crime committed by someone else, merely on the basis of association like relatives, father, son etc.[678]

The Prophet (P.B.U.H) never used arrest or detention against a person merely on allegation. In a hadith it is related that a man rose during khutba (lecture/sermon) in mosque and said, "O Messenger of Allah, for what crime have my neighbors been arrested"? The Prophet (P.B.U.H)

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[676]Futu-a-Misr wa Akbaroha 4/234; Zakria-a;l Qandalwi, Hayat-us Sahabah,2/232.

[677]Chaudhry, Muhammad Sharif. "Human Rights in Islam." All Pakistan Islamic Education Congress, 1993. See alsoRahman, Afzalur. "Muhammad: Encyclopaedia of Seerah (Vol 2)." *London: The Muslim Schools Trust* (1982).

[678]Patwari, M. I. "Human Rights in Islamic Law and International Law. A Comparison." *Human Rights in Islam, Genuine Publications Ltd., New Delhi,* (1993): 54-55.

remained quiet even after the person repeated the question several times. The reason was the presence of arresting person who was present during that time and was not able to give explanation regarding the arrest. Then Prophet (P.B.U.H) ordered the release of the prisoner in absence of plausible evidence.[679] Also it is said that Umar (RA) once described arbitrary arrest and detention in these words, **"In Islam no person can be put behind the bars except in accordance with the law".**[680]

During the early times of Islam, the problem (fitna) of Kharijis was a source of unrest and nuisance for Muslims. Despite their nefarious activities and their open threats of life and abuse to Caliph Ali (RA), whenever they were arrested, Caliph Ali (RA) would set them free telling his officers, **"As long as they do not actually perpetrate offences against the State, the mere use of abusive language or the threat of use of force are not such offences for which they can be imprisoned".**[681] Also Imam Abu Hanifah chronicled the saying of the Caliph Ali (RA) as: **"As long as they do not set out on armed rebellion, the Caliph of the Faithful will not interfere with them".**[682]

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[679]Chaudhry, Muhammad Sharif. "Human Rights in Islam, All Pakistan Islamic Education Congress, Lahore, 1993." *MI Patwari, Human Rights in Islamic Law and International Law: A* (1993): 54-82.

[680]Futu-a-Misr wa Akbaroha 4/234; Zakria-a;l Qandalwi, Hayat-us Sahabah,7/246.

[681]Ibid

[682]Abu al-Ala Mawdoodi, Al-Tawhid, Vol.4, No.3, The Islamic Foundation, London, RajabRamadan, 1407, April-June, 1987, p.75, 76

Imam Abu Yusuf in his *Kitab-ul-Kharaj* laid down that **"no person can be detained or arrested on the basis of any set of certain allegations made against him".**[683] In case of a perceived danger against a suspect, Maulana Maududi explains that:

> **if the Government suspects that a particular individual has committed a crime or he is likely to commit an offence in the near future then they should give reasons for their suspicion before a court of law and the culprit or the suspect should be allowed to produce his defense in an open court.**[684]

4. Protection of Dignity of a Person

In Islam, protection of dignity of man is of great importance. It must be protected as the very fabric of Muslim community is based on the protection of dignity of man (human being). Punishments that are injurious to the dignity and self-respect of a man are prohibited. Any form of experimentation on physical or moral dignity of a person or attempt to use him as a commercial transaction to exploit his circumstances to the less fortunate segments of the society are strictly forbidden. The injunctions of the Holy Quran clearly tell on this argument, as:

> **O you who believe stand out firmly for justice, as witness to Allah, even though it is against yourselves, or your parents, or your kin, the rich or poor; Allah is better protector to those; so, follow not the lusts (of your hearts) lest you avoid justice; and if you distort your witness or refuse to give it, verily, Allah is ever Well-Acquainted with what you do.**[685]

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[683]Abu Yusuf Yaqub Ibn Ibrahim, Kitab al-Khiraj, Al Mataba Al-Salafiyyah, Cairo, Egypt, 2nd Edition, 1352/ 1933, Pp.238

[684]Abu al-Ala Mawdoodi, Al-Tawhid, Vol.4, No.3, The Islamic Foundation, London, RajabRamadan, 1407, April-June, 1987, Pp.74

[685] The Holy Quran: 4:135.

Similarly, it has been said that,

> **Verily! Allah commands that you should render back the trusts to those whom they are due; and that when you judge between men, you judge with justice'.**[686] It is further declared, **'O you who believe stand out firmly for justice, as witness to Allah, and let not the enmity and hatred of others make you to depart from justice; be just; that is nearer to piety; and fear Allah .Verily Allah is well-acquainted with what you do'.**[687]

5. **Right to Lawful Retribution (Qisas):**

Just like the law of Tort is of paramount importance in western society, without which chaos and insecurity may become the order of the day, right to lawful retribution is that broad spectrum principle of Islamic law which is of utmost importance in Muslim society. The chaos and societal problems that Muslim communities face on day-to-day basis is that non-implementation of Qisas has led to many social problems, including peace and social order. The importance and utility of this right can be seen in the verses of Quran, when it is said, **"and there is (a saving of) life for you in Al-Qisas, O' men of understanding that you may become pious".**[688] Similarly it is again emphasized while establishing the broad principle of Qisas that, **"and we ordained there for them: Life for Life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal".**[689]"

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[686] The Holy Quran: 4:58.

[687] The Holy Quran: 5:8.

[688] The Holy Quran Al-Baqarah 2:179.

[689] The Holy Quran Al Maidah 5: 45.

The law to lawful retaliation not only addresses the importance of fairness in a society but can be an effective tool in legal systems to avoid lengthy and complicated court proceedings. In many countries following common law practices through adversarial system, the back log of cases not only burdened the system in delaying justice but also create a lag of inefficiency in dealing with future cases. The right of Qisas is of utmost importance in criminal law arena of a country as it not only serves as a warning for future criminal intentions but also help solve a majority of cases in time that not only is efficient but leaves behind the maxim of delayed justice.

The law to rightful retribution was introduced at a time when revenge was a boastful pride, and the loss of a single life or whim of an insult could carry implications far beyond the initiating generations. Such a right was unimaginable in any other legal system to create a balance between the accused and the victim. The balance between the two arms and its allied problems can easily be rein-checked through this law of Qisas (retribution).[690]

6. **Right to Equality before Law**

Perhaps the most distinguished hallmark of Islamic society is the right of equality before law. This law has also been at the forefront of international covenants and statutes. Equality before law is perhaps the first law which gives legitimization of all other human rights laws and fair trial rights to all and sundry through dignity. This is evident in clauses of ICCPR, UDHR and almost all international legal standards.[691] Instructions regarding this right in Islam are loud and clear. Being one of the basic principles of Islamic jurisprudence, law remains the disregarding caste, creed, social status or monetary position of a person in society. Justice should be meted out

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[690]Moore Jr, Richter H. "Courts, law, justice, and criminal trials in Saudi Arabia." *International Journal of Comparative and Applied Criminal Justice* 11, no. 1-2 (1987): 61-67.

[691] The detailed discussion has been provided to this point in third chapter by the author.

without any favouritism or prejudice. Similarly, no hatred or enmity should be a hindrance in dispensing justice. It is revealed in Quran, **"indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice. Excellent is that which Allah instructs you. Indeed, Allah is ever hearing and seeing".**[692] It is also revealed in Quran that:

> **O mankind, indeed, we have created you from male and female, and have made you into nations and tribes, that you may know one another. Indeed, the most honoured of you in the sight of Allah is the most righteous. Indeed, Allah is Knowing and Acquainted.**[693]

The Holy Prophet (P.B.U.H) also emphasized the equality before law as the basis of social justice in a community. It was revealed by the Prophet (P.B.U.H) that:

> **O mankind, your Lord is One and your father is one. You all descended from Adam, and Adam was created from earth. He is most honoured among you in the sight of God who is most upright. No Arab is superior to a non-Arab, no coloured person to a white person, or a white person to a coloured person except by Taqwa (piety).**[694]

In his last sermon the Holy Prophet (P.B.U.H) said **"every Muslim is a brother to every Muslim and that the Muslims constitute one brotherhood. Nothing shall be legitimate to a Muslim which belongs to a fellow Muslim unless it was given freely and willingly. Do not**

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[692] The Holy Quran 4:58.

[693] The Holy Quran 49:13.

[694] Fadel, Mohammad. "Is Historicism a Viable Strategy for Islamic Law Reform? The Case of' Never Shall a Folk Prosper Who Have Appointed a Woman to Rule Them'." *Islamic Law and Society* 18, no. 2 (2011): 131-176.

therefore do injustice to yourselves".[695] These are but a few instances out of many when the right of equality before the law is provided in Islam. The concept of social equality and justice play a vital role in the criminal system of Islam as this right proves fearsome for the present law breakers as well as discouraging for the future criminals.

These are a few of rights given in Islamic jurisprudence. The divine system given in Islam even centuries ago was not only complete, sophisticated but up to date for all the times to come. This classic quality of Islamic law has the effect that all the major constitutions of the world have reverberated provisions of Islamic jurisprudence. While modern nation-states have adopted these standards in the post-world war II political system, Islam has adopted it about 1400 years ago. How Pakistani legal scenario is adapting to the Islamic provisions provided by Shariah keeping in view the geographical and socio-cultural norms will be discussed below.

7. Presumption of Innocence in Islam

One of the fundamentals of Islamic law is that accused is presumed to be innocent unless proven otherwise. It would be admittedly misleading to claim that the presumption of innocence had been introduced by Islam. Rather, Islam had endorsed and substantially helped to develop the ethical principle into a largely uncontested global norm. Under a historical analysis, two underlying principles can be distinguished from the legal presumption; the first of which asserts the burden of proving on the accuser whilst the latter extends that it is the conviction and not the accusation which affirms criminal status. Before the introductions of both Christianity and Islam, the first of the two maxims had emerged as early as eighteenth-century BC when the Babylonian Code of Hammurabi incorporated it as one of its core principles. This maxim is deduced from

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[695] https://www.paknavy.gov.pk/the%20last%20sermon%20english.pdf (accessed on 28th dec 2020 at 04:28 am.)

'Al-Asl bra'tu al-dhimmat'.[696] As per the said maxim, unless a competent court, through compelling evidence proves otherwise, every individual is born innocent and without sin. One may argue that the presumption of innocence as enunciated in article 14 of the ICCPR, as a component of the right to a fair trial, is embedded in the historical past as already a universally accepted norm of criminal justice.

It was prominently in Islamic Iberia, or what more-or-less constitutes modern-day Spain, that the presumption of innocence had been later implemented by their qadis (judges) whose judgements were revoked in cases of renewed questions of fact. [697] Iberian qadis are today renowned for their highly principled and ethical nature and remain responsible for a paradigmatic, Islamic politics which many of our modern-day Muslim states should at least incorporate to a greater extent. As early as twelfth century Hispania, Delfina Serrano finds that only once the claimant had relevant evidence did the qadi invite the defendant to present her or his case, highlighting the similarities between Islamic Iberia and Christian Rome long after the fall of the Roman Empire in Western Europe.[698]

8. Right to Fair and Public Trial Before an Impartial Judge.

It is prohibited in all the schools of thought to torture people on the basis of suspicion for the sake of information, rather when there is suspicious about someone they should be left until clear

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[696] Tajuddin al-Subki, Al-Ashbah wa al-NazÉ'ir, Ed., 'Adil Ahmad and 'Ali Muhammad, Beirut, Dar al-Kutub, 771 A.H., I, p. 218.

[697] Serrano, Delfina. "Legal Practice in an Andalusī-Maghribī Source from the Twelfth Century CE: The Madhāhib al-Hukkām fī Nawāzil al-Ahkām." *Islamic Law and Society* 7, no. 2 (2000): 187-234.

[698] Munir, Muhammad. "Fundamental Guarantees of the Rights of the Accused in Islamic Criminal Justice System." *Hamdard Islamicus* 40 (2017): 45-65.

evidence is provided. Impartiality of the judge has been emphasized in the very fabric of Islamic justice system. No one should be held accountable on the basis of mere suspicion. The letter of Hazrat Umer bin Al-Khitab R.A. to Abu Musa al-Ashari R.A., which is comprehensive as to the right of fair and public trial before an impartial judge. This speaks volumes about the equalization between the parties and **'let equality be manifest in your expressions and judgment. Your decisions should not be biased in favor of the powerful and poor should not be deprived of justice because of poverty'**.[699] Similarly, Hazrat Umer said, **'O Amr, why you have started making the people slaves when their mothers had given them birth as free persons.**[700]

9. Prohibition of Torture

Torture can be defined as intentional infliction of severe mental or physical pain on an individual to gain confession, information or to break the spirit of human soul. This act, which is as old as human history is usually applied by state investigators or goons alike, who are usually politically motivated. Torture, despite its terrorizing impact was not strictly prohibited in medieval times in Europe and often justified as 'purge of sins' and approved by the church. Torture encompasses a vast and diverse area and can be physical, mental or sexual in nature.

Islam being the first doctrine of day-to-day life, emphasized the dignity of man, accused or not, also prohibited use of torture. Yet the intricacies of modern times have made the topic of prohibition of torture and Islamic Shariah as one of the most debatable concepts amongst academics. The Quran and Sunnah prohibit use of torture on an accused. The Prophet

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[699] Al-Hamdi, Ridho. "HOW DO ISLAM AND GOOD GOVERNANCE ADDRESS PUBLIC ISSUES? A COMPARATIVE VIEW IN THE CASE OF POVERTY AND CORRUPTION." *DEMOCRATIC GOVERNANCE*: 133.

[700] Futu-a-Misr wa Akbaroha 4/234; Zakria-a;l Qandalwi, Hayat-us Sahabah,2/232.

Mohammed (P.B.U.H) said, **"A Muslim is unlawful to another Muslim, his blood, his wealth and his honor."**[701] Another Hadith states that **"God shall torture on the Day of Recompense those who inflict torture on people in life."**[702] Also, Hazrat Omar ibn Abdul Aziz's is asked by one of his stewards whether to torture those who refused to pay taxes. There upon the Khalif is said to have replied in a letter: **"I wonder at your will from God's wrath, and as my satisfaction will save you from God's anger... for torturing them."**[703]

As far as interpretations are concerned those eminent scholars of Islam which are against the use of torture are Ibn Hazm (d1064), al-Ghazzali (d1111) of the Shafi School of Law and the Zahiri school of law. This view is similar to the international covenants and statutes adopted worldwide. On the other hand, Ibn Taymiyya (d1328), Ibn Qayyim (d1351), Ibn Farhun (d1396) Maliki jurist, and al-Tarabulusi (d1440), belonging to the Hanafi sect are of the view that the suspect who is being beaten for getting information is commonly known for relevant actions-priori wrongdoing. Thus the **"suspect's reputation provides sufficient circumstantial evidence of guilt of the new accusation to justify the beating."**[704] Similar was the case during that time in medieval Europe where a suspicion or half proof was enough to warrant torturous acts on an accused.[705] Although Constitution and law prevents torture in Muslim world, yet it is practiced

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[701] Hadith No: 6541 https://ahadith.net/muslim/book/45/chapter/9/hadith/6537

[702] Richard J. Temill, World Criminal Justice Systems: A Comparative Survey (Routledge: Anderson Publishers, 2012), p. 576.

[703]For detail see Mashood A. Baderin, International Human Rights and Islam (New York: Oxford University Press, 2003), p. 76, and M. Cherif Bassiouni, The Islamic Criminal Justice System (New York: Oceana Publications, 1982), p. 55.

[704] Rahim, Abdur. *The Principles of Muhammadan Jurisprudence According to the Hanafi, Maliki, Shafi'i and Hanbali Schools*. Luzac, 1911.

[705]Sadiq Reza, "torture and Islamic Law", Chicago Journal of International Law, Vol. 8, no. 1 (2007), p. 24: Available at: http://chicagounbound.uchicago.edu/cjil/vol8/iss1/4

on different pretexts one way or the other all over the world. [706] Major scholars like Oona Hathaway[707] and Ted Shanke along with Robert C. Blitt[708] has done extensive research on Torture, its sources methods and implications. According to them, although it is forbidden to implicit torture as it is derogatory to human dignity, yet laws in majority of Muslim countries are unclear regarding prohibition of torture. The Islamic declarations of human rights can nonetheless serve as further evidence that the confession of torture is being rejected in Islamic laws. In the General Islamic Declaration of Human Rights, the Cairo Declaration on Human Rights and the Arab Human Rights Charter—all three expressions of more conservative Islamic convictions—include a ban on torture. The General Islamic Declaration of Human Rights contains an explicit prohibition of torture in Right to Protection of Torture-Article VII, which states:

> **No person shall be subjected to torture in mind or body, or degraded, or threatened with injury either to himself or to anyone related to or held dear by him, or forcibly made to confess to the commission of a crime or forced to consent to an act which is injurious to his interests.[709]**

Similarly, According to Arab Charter of Human Rights, article 13 (a) states:

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707 Hathaway, Oona A. "Do human rights treaties make a difference?." *The Yale Law Journal* 111, no. 8 (2002): 1935-2042.

708 Stahnke, Tad, and Robert C. Blitt. "The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries." *Int'l J. Civ. Soc'y L.* 5 (2007): 43.

709 Greer, Steven. "Is the prohibition against torture, cruel, inhuman and degrading treatment really 'absolute'in international human rights law?." *Human Rights Law Review* 15, no. 1 (2015): 101-137.

> **The States parties shall protect every person in their territory from being subjected to physical or mental torture or cruel, inhuman or degrading treatment. They shall take effective measures to prevent such acts and shall regard the practice there of, or participation therein, as a punishable offence.**[710]

The Cairo Declaration on Human Rights also contains in Article 20, sentence 2, a prohibition of torture:

> **It is not permitted without legitimate reason to arrest an individual, or restrict his freedom, to exile or to punish him. It is not permitted to subject him to physical or psychological torture or to any form of maltreatment, cruelty or indignity. Nor is it permitted to subject an individual to medical or scientific experiments without his consent or at the risk of his health or of his life. Nor is it permitted to promulgate emergency laws that would provide executive authority for such actions.**[711]

Globalization and awareness amongst the masses has led to a rejection of torture as a means to the ends and can change the direction of future course of thoughts. The recent death of George Floyd has sprung into a global campaign against many injustices, torture amongst them at the top. Thus, despite clear instructions in favor of prohibition of torture in Islam, Muslim legislatures have yet to formulate a detailed and comprehensive legislation as to how to extract information while preserving that dignity of humans at individual as well as collective level which is the trademark of Muslim jurisprudence and which has created such successful and as much as humanly possible utopian societies that flourished and prospered for centuries.

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[710] Vitkauskaite-Meurice, Dalia. "The Arab charter on human rights: the naissance of new regional human rights system or a challenge to the universality of human rights?." *Jurisprudencija* 1, no. 119 (2010).

[711] Cairo Declaration on Human Rights in Islam, Aug. 5, 1990, http://www.bahaistudies.net/neurelitism/library/Cairo_Declaration_on_Human_Right s_in_Islam.pdf

6.7 Creation of Pakistan and Objective Resolution

Since the idea of inception of Pakistan was based on the ideology that Muslims need a homeland where they are free to practice their doctrine of Islam with no fear of reprisal, the idea of a state where the basic rights including that of legal aspect of all inhabitants would be equal and within the conformities of Islam was the major inspiration and reason behind the creation of this state. Quaid-e-Azam Muhammad Ali Jinnah as well as the founders of Pakistan envisioned this state to be a modern Islamic state where Islamic law would be supreme. In his speech to the first Constituent Assembly, Jinnah said, **"the first duty of a government is to maintain law and order, so that the life, property and religious beliefs of its subjects are fully protected by the State".**[712] Also in the same speech he said:

> **you are free; you are free to go to your temples; you are free to go to your mosques or to any other place or worship in this State of Pakistan. You may belong to any religion or caste or creed that has nothing to do with the business of the State.**[713]

From the very start, there has been two groups of modernist and religious activists, with opposing opinions regarding whether the country would be run as a secular state or a religious one ruled by the Shariah. This conflict has more to do with ignorance of the Islamic history where Shariah being a complete code of life gives more personal liberty and choices than any other system of governance based on religion. As discussed before, the Islamic system of

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[712] http://www.pakistani.org/pakistan/legislation/constituent_address_11aug1947.html (accessed on 17th February 2019 at 5:39 am.)

[713] Ibid

governance stayed almost static from 9th to 19th century owing to the personal liberty a person enjoyed along with the protection the state provided.[714]

The same concept was also adapted by the Constituent Assembly when Objective Resolution was presented as a guideline for the future constitutions and legislation in Pakistan. In this resolution, the sovereignty of everything and everyone was attributed to Allah Almighty., which the people of Pakistan will use as a sacred trust and within the limits described by Him. This declaration laid down the basics of Islamic ideology and the Islamic principles of democracy, equality, fairness and social justice and cultural protection of all citizens including religious minorities for the future law formulation in Pakistan. The objection of some non-Muslim members of Constituent Assembly that the proclamation of sovereignty of Allah would be contrary to the democratic nature of the new state, was settled down by members of the assembly on the argument that Pakistan was essentially not a theocratic state,[715] rather many constitutions of the world including USA and Ireland are working under similar words and beliefs.[716] Moreover, representative democracy was not ruled out by the objective resolution.[717]"

The objectives resolution, with minor amendments, was adopted as a preamble and guideline to the ideology of Pakistan to all the subsequent constitution of Pakistan. Later on, through article

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[714]Vikør, Knut S. "The Sharia and the nation state: Who can codify the divine law?." *The Middle East in a globalized world* (1998).

[715] Ibid

[716]Schmid, Konrad. "In the Name of God? The Problem of Religious or Non-religious Preambles of State Constitutions in Post-atheistic Contexts." *Occasional Papers on Religion in Eastern Europe* 24, no. 1 (2004): 3.

[717]Haq, Mahfuzul, and MAHFUZUL HUQ. "Some Reflections on Islam and Constitution-Making in Pakistan: 1947-56." *Islamic Studies* 5, no. 2 (1966): 209-220.

2-A, it was made a substantive part of the constitution.[718] Although in case of Zia-ur-Rehman case, Supreme Court held Objective Resolution to be a preamble of the state.[719] Yet this preamble initially became the guiding force for all the constitutions adopted in Pakistan and later became an integral part of Constitution of Pakistan 1973. Due to the importance attached to this resolution, all three constitutions of Pakistan adopted, in similar way, Islamic provisions, albeit minor differences.

6.8 The Islamic Provisions of the 1973 Constitution

As Islam is the state religion of Pakistan, the Constitutional name of the country is also Islamic Republic of Pakistan. The set of laws and legal traditions which Pakistan inherited in 1947 was an amalgam of religious (Islamic and laws of ancient cultures like Hinduism) and cultural traditions with a major portion of legal traditions following common law in United Kingdom under the British Crown. It was but a natural demand that all existing laws shall be made in accordance with the teachings and guidelines of Islam[720]and no law shall be decreed which is unacceptable to such injunctions.[721]

Due to these clear guidelines, it is required from the Islamic Ideology Council to make recommendations to National and provincial legislatures to make laws which enable and encourage Muslims to live their lives in accordance with the principles laid out by Quran and

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[718]Kennedy, Charles H. "Repugnancy to Islam–Who Decides? Islam and Legal Reform in Pakistan." *International & Comparative Law Quarterly* 41, no. 4 (1992): 769-787.

[719]State v Zia ur Rehman, PLD 1973 SC 49.

[720] Art. 1 and 2 of Art. 41 of the Constitution of Pakistan 1973 provides that both the President and the Prime Minister shall be Muslims.

[721]The 1973 constitution, Art. 227.

Sunnah.[722] Although the recommendations by the objective resolution and the Islamic provisions were adopted in all the three constitutions of Pakistan, a big support to this adoption was also the rights provided in international covenants and statutes at international organizations around the same time line starting from 1945 to 1948 (the year UDHR was adopted) and so on. Yet one of the biggest challenges was the successful legislation where laws had practicality to it and the implementation of these laws at individual as well as national level. These adoptions are also claimed to be a sort of compromise between the modernists and the Islamic activists and thus the clear and precise definition of concept of Islamic state was not provided.[723] Also, the ideology Council is tasked with making Islamic laws as well as adapting existing laws according to Islamic provisions, have no binding effect on the Government, thus reducing it to a mere suggesting body.[724]

The successive governments in Pakistan, belonging to different modes of governance, has personal preference and liking evident in constitutional amendments, especially in case of Islamization of existing laws. For example, Ayub' era was marked by the efforts of modernizing the legal system with a secular mindset but faced backlash from the religious elements of the government and society and had to take back the proposed amendments. Out of the three constitutions of 1956, 1962 and 1973, the tilt towards Islamization for legislation was most profound with maximum Islamic provisions in the constitution.[725] Another shift of preferences

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[722] The 1973 constitution, Art. 228. Under this article, the national and/or a provincial legislature can also seek the opinion of the Council as to whether a proposed law is or is not against the Injunctions of Islam.

[723]Mehdi, Rubya. *The Islamization of the Law in Pakistan (RLE Politics of Islam)*. Routledge, 2013. Pg 84-102.

[724]Hayat, Qamar. "The Council of Islamic Ideology as a Constitutional Institution: A Critical Analysis." PhD diss., 2017.

[725]Iqbal, Javid. "Islamization in Pakistan." *Journal of South Asian and Middle Eastern Studies* 8, no. 3 (1985): 38.

was very evident during Zia's regime when extensive efforts were made not only for the implementation of Islamic provisions of the Constitution of 1973, but new constitutional reforms were introduced as well (detailed description of this period is discussed later in this chapter).

Despite conflicting efforts regarding Islamization of the legal doctrines, the debate between the modernists and the activists has escalated further. The question of Islamization of legal system is still not only unanswered but the gap of trust amongst them is increasing. One reason for this is that like in all regions of the world, poorer masses are more religion oriented and Pakistan being a third world country, has its majority of people's sympathies with the activists. As war against terrorism is started against those elements who had played the religion card to gain sympathies, the society has split into two opposing opinions and a sharp demarcation can be seen amongst the society. This division has repressed the hope of a unified opinion regarding adoption of Islamic principles of social justice. The international instruments also view the Islamization of legal system in Pakistan with divided opinion and suspicion as the real spirit of Islamic law is either hidden or misinterpreted to them.[726] In such a scenario, the implementation of an international instrument, like the declaration, in Pakistan requires a proper theoretical understanding of the Islamic principles of social justice.[727]"

6.9 Evolution of Criminal Judicial System in Pakistan

The echo of Islamization of Pakistan's legal system has been heard from time to time since independence, but the process started when Gen Zia gave a presidential order in 1979[728] to

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[726]Abbas, Hassan. *Pakistan's Drift into Extremism: Allah, the Army, and America's War on Terror: Allah, the Army, and America's War on Terror*. Routledge, 2015.

[727] Iqbal, Khurshid. *The right to development in international law: the case of Pakistan*. Routledge, 2009.

[728]General Zia-ul-Haq seized power through coup on 5 July 1977.

establish Shariah benches in all four High Courts with the sole purpose of making the laws in accordance with Islam. Any law which was considered as contradictory to the Islamic provisions was to be struck down. This effort was later upgraded in 1980 with the establishment of Federal Shariat Court through constitutional amendment,[729] carrying forward the same task as of Shariat benches regarding Islamization of legislation.[730] This movement of Islamization was mainly focused on judicial, economic and educational sectors. Since this dissertation is mainly concerned with judicial reforms, especially in the criminal sector, the researcher will try to focus on this criminal judicial system in Pakistan."

In early 1979, Zia announced several reformations in an effort of molding the society more towards Islamic principles, an overall environment was introduced in the country which was named by the critics as Islamization in Pakistan. Many measurements like offering namaz, respecting Ramzan through special ordinance and facilitating maximum people to perform Hajj were also introduced. These efforts were welcomed by the general public but perhaps the most controversial were the Hadood laws in which four punishments were announced dealing with theft, adultery, false accusations and drinking. Punishments of cutting hands, whipping with lashes and stoning to death accompanied Hadood laws. [731] Although these punishments were according to Islamic principles of Shariah and according to many critics like Gai Eaton, much less than the punishments meted out during mediaeval times in Europe,[732] yet there was an element of initial shock accompanied with fear for the general public. Appeal to these

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[729]Art. 203(C) of the Constitution, the Federal Shariat Court consist of eight Muslim judges, including three judges from among Ulema, who are, or have been qualified to be judges of the High Court.

[730]Under Art. 203D, such law shall cease to have effect on the day the decision of the Court becomes effective.

[731]Iqbal, Khurshid. *The right to development in international law: the case of Pakistan*. Routledge, 2009.

[732] Eaton, Gai. *Islam and the Destiny of Man*. SUNY Press, 1985.

punishments can only be made at Shariat Court. The law of whipping was abolished in 1996 except in Hadd cases of adultery.[733] Yet these strict punishments were only implemented if undeniable proof of evidence was provided to the court. Similarly, pregnancy was also considered a proof of adultery for women.[734] Theft and armed robbery are punishable with amputation of a hand. In 1984, the Evidence Act 1872 was revised and was given the name of Qanoon-e-Shahadat Act 1984.[735] It was made obligatory that any documented evidence regarding financial transaction or agreement between the parties must be countersigned by either two adult and sane men or one man and two women who are adults, to keep as a documentary evidence along with witnesses.[736]"

Moving along the path of Islamization, the Parliament was renamed in 1985 as **'Majlis-e-Shoora'** and as mentioned above, Objectives Resolution was declared a substantive part of the Constitution of Pakistan 1973. On 15th June 1988, a Shariat Ordinance was promulgated declaring Shariah as the supreme law in Pakistan.

Zia's death just two months after declaring the Shariah Ordinance apparently stopped the process of Islamization. One of the reasons was the political instability and the economic Chaos the country was facing at that time. Some argue that despite, the personal tilt of Zia towards Islam, the process of Islamization was used more for the political gains in which too much emphasis was put on punishments rather than the true picture of universality and peaceful progress and

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[733]Imran, Rahat. "Legal injustices: The Zina Hudood Ordinance of Pakistan and its implications for women." *Journal of International Women's Studies* 7, no. 2 (2005): 78-100.

[734]Cheema, Moeen H. "Cases and controversies: pregnancy as proof of guilt under Pakistan's Hudood Laws." *Brook. J. Int'l L.* 32 (2006): 121.

[735]The Qanun-e-Shahadat order (the law of evidence) 1984.

[736]Iqbal, Nasira. "Legal Pluralism in Pakistan and Its Implications on Women's Rights." *Scratching the Surface: Democracy, Traditions, Gender* (2007): 101.

protection for individuals in the society, which had remained the hallmark of Muslim society for many centuries. Whether the intentions of General Zia were true toothier cause or not, but the lack of strategy, planning and then ineffective implementation turned this half-cooked effort into a set of legislation which could not be further from the true spirit of Islam."

After Zia's death in 1988 the efforts to shift legislation towards Islamization continued. In 1988, President Ghulam Ishaq Khan also implemented an amended 'Shariat Ordinance'. The Senate also proposed a Shariat Bill in 1990 but was not passed by the senate. In 1990, the the Qisas and Diyat Ordinance was introduced. This ordinance dealt with criminal law offenses of murder and injury. According to this ordinance, most of the offenses were compoundable. A woman as a legal heir of the deceased had half share as amount of Diyat. But the old custom of giving away women in marriage to complainant party was abolished. Similarly, the Parliament also passed the Enforcement of Shariah Act in 1991."

Despite the fact that Federal Shariat Court was initially considered a powerful and authoritative court where the appeal as well as revision against punishments awarded by ordinary courts can be made, yet the jurisdiction of this court remined constrained.[737] These efforts by Zia were not able to bring the desired results and this legislation was not fruitful as it did not bring any substantive change. Just like the Man, the Boy and the Donkey in Aesop's Fables[738] neither Ulema nor modernists and neither the general public accepted the Islamization without criticism. All these groups considered these attempts maligned with the personal gain and attempt to have firmer grip on the rule in Pakistan. The Hadood laws raised much hue and cry and overshadowed

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[737]Art. 203 DD. Constitution of Pakistan 1973.

[738] https://www.bartleby.com/17/1/62.html (accessed on 17th November 2019 at 4:37 am.)

all the good efforts in promoting the true essence of Shariah in Pakistan. This legal scenario continued till 1999 when the regime of another military general took a somersault view against the Islamization of Zia's regime. General Musharraf 1999-2008 not only discontinued Islamization, but also made successful attempts to nullify the reforms introduced by Zia. The introduction of Women Protection Act in 2006, despite protests of the religious scholars, proved to have radical effects on the society.[739] General Musharraf also challenged the constitutionality of Hasba bill that was introduced twice by the religious parties in provincial legislature.[740]

6.10 Prospects and Challenges of Fair Trial in Pakistan

Although Objective Resolution clearly marked the direction of legislation in Pakistan in 1949, it was in late 1960s that courts in Pakistan started increasingly recognizing and relying on the principles of Shariah, disregarding the customs of the land that had cultural influences.[741] Numerous examples were present during that era. For example, Supreme Court decided that it was un-Islamic for a woman to relinquish part of her inheritance in favor of her male relatives. Similarly, a well-off person was advised to take care of his poor relatives within the prohibited degrees (blood relations, to whom marriage is not permitted under Islamic law).[742]

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[739]According to this law, rape is now a tazir offence punishable with death or life imprisonment, fornication (zina) is punishable with five years' imprisonment and a fine of up to ten thousand rupees. A complaint of these offences can now be made to the Court (instead of to the police).

[740]Iqbal, Nasir. "Hasba clauses ruled contrary to constitution: NWFP governor may not assent to law: SC." (2005).

[741]Lau, Martin. *The role of Islam in the legal system of Pakistan*. Brill Nijhoff, 2005. Pg.9

[742]Haji Nizam Khan v Additional District Judge, Lyallpur, PLD 1976 Lahore 930 and 950. This case was approved by the Supreme Court in PLD 1982 SC 139; for a similar precedent see also Fazlul Quader Choudhry V Muhammad Abdul Haq, PLD 1963 SC 486; it was held that the courts can scrutinize the acts of other branches like the executive and legislature, though this power does not give to the Court any practical or real omnipotence at 521).

Justice Cornelius in his judgment in 1970 was of the view that, **"in Pakistan the concept of the rule of law should indicate nothing else than Shariah".**[743] The jurisprudence of the Court in the Hudood laws introduced by General Zia is inconsistent. This can partly be attributed to the fact that courts in 1991 were allowed the additional role of "mujtahid". The empowerment of courts by the introduction of Shariah Act 1991 has allowed the courts to do "judicial Ijtihad".[744] In several cases, the Federal Shariat Court amended the verdicts of the lower courts in different cases, for example, that a case of rape cannot be changed to that of zina[745] and the absence of marks of violence on the body of victim is not a guarantee of no crime.[746] The Court's method to the presence of pregnancy as a proof of guilt is also inconsistent in a number of different cases.[747] Also the requirement of four male eye witnesses was declared to be contrary to Quran and Sunnah as well as natural laws itself.[748] The courts have in past tried to keep a balance between the protection of human rights as well as the norms of Shariah. The insertion of article 10-A in the Constitution has further widened the scope of ensuring fair trial rights. There is a gradual but consistent development of fair trial rights due to wide and diversified interpretation of article 10-A of the Constitution. The recent decision by a seven-member bench of Supreme Court has stated in Yousaf Raza Gillani case that the right to be provided with fair trial to the

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[743]A. R. Cornelius, Fundamental Rights under Shariat, PLD Journal, 1970, 144-5 at 145.

[744]See sec. 4: (a) while interpreting the statute law, if more than one interpretation is possible, the one consistent with the Islamic principles and jurisprudence shall be adopted by the Court; and (b) where two or more interpretation are equally possible the interpretation which advances the Principles of Policy and Islamic provisions in the Constitution shall be adopted by the Court.

[745]Mst. Taslem vs. The State PLJ 1996, FSC 138.

[746]Muhammad Nawaz vs. The State, 1990 SCMR 886; Muhammad Sadiq v The State, 1997 P.Cr.L.J 546 (FSC); Muhammad Qasim v The State, 1997 P.Cr.L.J 10965 FSC.

[747]See Mst. Jehan Mina v The State, PLJ 1983 FSC 134 9pregnancy was considered sufficient proof) Mst. Siani v The State, PLD 1984 FSC 121 (pregnancy was not considered sufficient proof).

[748]Begum Rashida Patel v Federation of Pakistan, PLD 1989 FSC 95.

accused has been recognized for a long time in the Constitution and with the introduction of article 10-A, became **"well entrenched in our jurisprudence".** Any legislation contrary to this right or undermining this right will be considered as void. The importance and applications have raised right to fair trial to "higher pedestal" in order to protect the safety and liberty of the citizens of Pakistan. In a conference in 1991, the judiciary restated their obligation to protecting the fundamental rights of people in accordance with the teachings of Islam.[749] In the constitutional and judicial system of Pakistan, Islamic aspect is predominant.[750] However, the ruling of the court still favors that protection of human rights especially fair trial rights must not be in conflict with the norms of Islam and Shariah.[751]

The introduction of article 10-A has been hailed as a positive and much needed step towards protection of trial rights. Although Islam is a complete code of conduct, under whose guidelines elaborating right to fair trial gives it more scope and meaning but present judicial system is seen to be at a launching position regarding human rights. One of the major reasons is the fact that the first widespread and much publicized campaign of Islamization was not well planned and revolved around punishments. Those punishments gradually concentrated on very few areas of criminal law like zina, rape, khamr (wine) and blasphemy. Economic and social reforms, trial proceedings and criminal law and other important arenas were largely ignored. This is also partly due to the cry foul by the information dispensing agencies in Pakistan.[752] In present time, Islamization judicial system in Pakistan is related to confusion, misunderstanding and

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[749]Judicial conference, Quetta, 1991, details of proceedings in PLD Journal 1991, 126-39.

[750]Shakir, Naeem. "Islamic shariah and blasphemy laws in Pakistan." *The Round Table* 104, no. 3 (2015): 307-317.

[751]Zaheer-ud-din vs. The State, 1993 SCMR 1718.

[752] Wasti, Aarij S. "The Hudood Laws of Pakistan: a social and legal misfit in today's society." *Dalhousie J. Legal Stud.* 12 (2003): 63.

stereotyping. The scope of making criminal laws especially fair trial rights in accordance with Islam seems, at present to be quite bleak[753].

6.11 Conclusion

Pakistan was created in the name of Islam and the general masses have a strong and binding attachment with their religion. This is because out of the two parts, one is of belief and the other is about the rules and regulations of living life in Islam. Since the belief is not only inflexible but to have flexibilities and doubts amount to leaving the membership of the religion, it is always the rules and conducts that are subject of debate. More so in Subcontinent and then in Pakistan, the time period is relatively recent, and many religions and cultures have amalgamated in this region. The lack of strength in institutions and the personal preferences of the democratic and dictator rulers have pulled the legislation in opposite directions too many times. The result is a hotch potch of laws with no clear sense of belonging.[754] The inefficient implementation has led to further confusion about the association of laws especially criminal laws.

Right to fair trial is perhaps one of the most debated topics of present times. International and regional instruments have formulated clear laws which protect the right to fair trial and due process in all kinds of diverse scenarios. Islam is also truly clear about such basic human rights as is described by the researcher beforehand in this chapter. Yet not only Muslim jurists in general but Pakistani jurists and legislators have failed to amalgamate the right to fair trial according to Islamic provisions and make it a reality for all and sundry. The right to fair trial has

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[753] Fuller, Graham E. "The future of political Islam." In *The Future of Political Islam*, pp. 193-213. Palgrave Macmillan, New York, 2003.

[754] http://iri.aiou.edu.pk/indexing/wp-content/uploads/2018/06/DrSiddique-AFKAR-1-1.pdf (accessed on 4th October 2019 at 6:47 am.)

been provided in Islam in clear words, the practical application and benefits of which had been observed in peaceful and thriving Muslim communities for centuries. The effort of Islamizing legislation itself has created an impression of cruelty and inhuman treatment of the accused in Pakistani society. But this is more to do with incomplete and in-depth study of Shariah laws. If Shariah laws are implemented in their true letter and spirit, society in Pakistan would go as close to perfection as possible, but the current situation is totally opposite where the name of Shariah and Islamic Laws is synonymous with barbarism and terrorism. It's a long way to go for the laws to be created and implemented according to the true spirit of Islam. The introduction of article 10-A of the Constitution has been a commendable act but introduction of Islamic provisions in providing right to fair trial can introduce further refinement in legislation pertaining to trial rights in Pakistan.

CHAPTER 7

CONCLUSION & RECOMMENDATIONS

Taken from *"the court scene" from the Amistad. Murals by Hale Woodruff (1939) (Talladega college)*

In a society, removal of trust in criminal system of a state cannot only cause havoc in the lives of individuals but also, is the pendulum that balances and stabilize a society by keeping all segments of a society work in seamless harmony. This dissertation has aimed at discussing one of the most important topics of domestic as well as international legislation. Provision of right to fair trial with upholding equality of arms has not only been a major concern of international legal fraternity but a subject which hit hard the scenario at home as well.

This modest effort has exposed and examined only a small part of tip of an iceberg of the problem of trial rights in Pakistan. Fair trial rights are such a vast subject that it was not possible

to do full justice with this topic in one dissertation. Yet this is one of the more comprehensive work done on the crucial subject of fair trial rights until now. This dissertation aims to be the pioneering work in analysing and examining fair trial rights in Pakistan. Although a signatory of the comity of nations in 1948, aiming at championing human rights, it took more than 50 years for inclusion of fair trial rights in Constitution of Pakistan 1973 in the shape of article 10-A through 18th amendment. Inclusion of article 10-A in Constitution has made it a fundamental right, denial of which will be assumed a denial of constitutional right. Right to fair trial and equality of arms are often mentioned in one breath as victim and accused both are but two sides of the same chronology of events being discussed in a trial. This research work has analysed and explored right to fair trial with reference to both prosecution and defense.

In order to have an idea of how this research has progressed in previous chapters, a brief chronology of contents of the chapters will be discussed. The concept of fair trial is as old as the history of humans itself. This research has initially explored the concept of fair trial and how it has developed over centuries into its present form. Before the written literature became published and widely available, the concept of trial was attached with right and wrong and the morality of a society. Cultural relativism played a major role in giving regional distinctions to the common concept of fair and just trial. Historically speaking fair trial has been given many different contextual meanings by different scholars. Different theories have been applied to understand and explain trial in adversarial system. Application of theoretical framework can create a deduced logic of the problem that society faces.

Since right to fair trial has been a flashing point for a society in present times, it is pertinent that logical explanations must be deducted in order to not only find plausible justifications of the past events but better responses to legal issues for the future times to come. Legislation is that pillar

of the society which has deep impacts lasting for many decades, if not the whole historical interpretation whenever and wherever. Trial under adversarial system has, over centuries, emerged from a simple debate between the two opposing parties to a series of complex mechanisms, the implications of which are far reaching on the life of an individual and society as a whole. Trial in its early stages was considered to be more close to the ordeal with burden of proof on accused to the present adversarial system which is mainly governed by the Common Laws, essentially letting many critics like Ian Langfold to take the credit of adversarial system to be a brain child of British legacy and origin.[755]

As theory is the paradigm to give logic to law, many theories have been discussed in this dissertation. The rights theory is concerned with protection of rights of accused and victim both against the vast resources and influence of government. Although this theory is a result of lacunas found in the current procedures of adversarial system, yet the demands of rights theorist do not resonate practicality of achieving its lofty goals against the government machinery. On the other hand, Bargains Incentive theory believes trial to be a wastage of resources and time both for prosecution and defense. Although contradictory to the prime aim of finding truth in a trial, a major portion of cases do adopt bargaining as tool for attaining justice. Due to ever increasing backlog of cases and the uncertainty of lengthy trials, bargained justice is gaining momentum in legal arenas. Alternate Dispute Resolution (ADR) can also be termed as an offshoot of Bargains Incentive theory and is gaining momentum in legal corridors around the world.

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[755]Langford, Ian. "Fair trial: The history of an idea." *Journal of Human rights* 8, no. 1 (2009): 37-52.

On the other hand there are theorists who put emphasis on the internal morality of concerned personnel. Fair decision theory believes in decisions that are fair to both government and the individual despite having a vast difference in the resources of both. Mechanisms essentially relying on the moral strength of prosecution, defense and judge may be an appealing theory acceptable to all the parties but give no mention to discovering truth. Such decisions may seem too good to be true but can pose grave consequences for present legal environment and as a defective precedent in legislation.

Another theory that aims at explaining the adversarial system is Norms theory. Theoretical explanation of a legal problem is one aspect while its practical implications in real time scenario is an altogether different situation. Norms theory deals with the perception of general public about the decision by court. Since judges and courts are all influenced by the general public, for the decision to be accepted as a norm, quest for truth may get sacrificed at the altar of norm and many innocent accused may get convicted. The present judicial system in Pakistan is, unfortunately, inching towards the gaining accolades of public opinion, which in turn is mostly influenced by media, instead of **"justice being blind and fearless"**.[756]

The most accurate and befitting theory to explain the intricate procedures of adversarial system, according to this researcher, is Truth finding theory. Truth is that powerful question that is associated with fair and just trial since the commencement of trial itself. With essentially a passive audience in the figure of a judge, the responsibility of finding truth lies of the statements of prosecution and defense which can reveal truth despite giving opposing accounts of the same

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[756]Bufkin, Jana L., and Vickie R. Luttrell. "Neuroimaging studies of aggressive and violent behavior: current findings and implications for criminology and criminal justice." *Trauma, Violence, & Abuse* 6, no. 2 (2005): 176-191.

incident. In the present legal system of Pakistan, the major concern of legal and learned fraternity of the society is that truth is the first sacrifice in courts when fair trial rights are not provided to accused. Similar issue also arises when either the victim is dead or is facing languish in addition to the original ordeal he has to face.

In order to understand how fair trial rights have developed in Pakistan, it would befitting to have an overview of trial rights in international statutes and covenants. The regional destruction of 100 years wars and other fights in Europe drove masses to exploration while global destruction of world wars mass violations in human rights led to the formation of UN which led to formation of international organizations like UDHR and ICCPR. For the first time, human rights, notably fair trial rights were given the status of official documentation rectified by millions of residents around the globe. These covenants especially ICCPR dealt in detail with the right to fair and just trial to all and sundry with equality of arms for prosecution and defense. The humanly possible detailed effort in providing fair trial rights by ICCPR is commendable.

Many rights have been granted in articles 14 and 15 of ICCPR at all the stages of trial. These rights have been rectified and are overlapping in other covenants and statutes and have been provided in numerous decisions by international courts like ICC, ICJ and tribunals for Rwanda, Yugoslavia and Lebanon.[757] Out of many rights that are provided, following rights have been discussed in this dissertation. Prohibition against arbitrary arrest and detention, right to know the reason of arrest, right to legal counsel, equality before courts and tribunals, provision of adequate time and facilities to prepare for one's defense. Prohibition of torture and inhumane conditions, the right to be heard by impartial and competent authority, the right to double jeopardy and right

[757] https://www.icj-cij.org/en/list-of-all-cases (accessed on 16th November 2019 at 3:55 am.)

to appeal. There are many other rights that have been provided but due to comprehensiveness of the rights and shortage of place to discuss these rights in detail, a few of the above mentioned has been discussed.

Pakistan affirmed these rights in 1948 right after its independence, laying foundation for the future Constitution to be mindful of human rights including fair trial rights. But the formal inclusion of article 10-A has promulgated a guideline for procedural laws to act in accordance with fair trial rights. Since bulk of legislation in Pakistan has taken its origin from English Law that was adapted in Subcontinent as per the needs of local circumstances, different articles other than article 10-A also deal with fair trial rights. These articles include article 2-A concerning independence and impartiality of judiciary. History of Pakistan had numerous occasions when absence of Constitution undermined the authority of judiciary. Similarly, the jurisdiction of Judiciary in Pakistan has been transgressed at many occasions either covertly or openly.[758] Without having an independent and impartial judiciary, trial rights given in Constitution give little or no benefit to the aggrieved litigants in courts. Article 4 of the Constitution gives the protection of Constitution to all citizens. This article binds every legal action to have a plausible reason as Constitution is the supreme legislative document. This article addresses one of the most important aspects of governance i.e., 'rule of law' also called in Pakistan as 'according to law'. The earlier legislation in Pakistan did not have this clause but the Constitution of 1973 gave this as a basic right to all the citizens. Many basic rights that are provided became inalienable rights of people where no government or institution can pass any restraining orders against them. These basic human rights got an added protection of this article as well.

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[758] https://sahsol.lums.edu.pk/law-journal/challenging-state-authority-or-running-parallel-judicial-system-%E2%80%98ulama-versus-judiciary (accessed on 18th November 2019 at 4:08 am.)

The most significant and vital article that deals with right to fair trial is article 10-A of the Constitution. Its inclusion in 2010 was a turning point in constitutional effort of providing fair trial and due process in the courts. Three important grounds covered in this article are safeguard to arbitrary arrest and detention, the right to know the reason of arrest and in case a person is arrested the provision of legal counsel. These are broad spectrum rights which are to some extend available to accused but only during trial.

Since Pakistan is a state where legislation is directed towards supremacy of Allah and Islam, there have been efforts of Islamization of legislation in Pakistan. The most prominent is the era of Gen Zia when efforts to create Federal Shariat Court was established and laws were enacted to convert existing laws according to Shariah. Although highly controversial, these laws did make an effort towards the Islamization of legislation in Pakistan, yet the main emphasis stayed on moral punishments in the shape of Hadood Laws. This movement in the long run proved less beneficial than its initial intention as the real spirit of Islam was over shadowed by Hadood laws and for an outsider Shariah laws became synonymous with 'barbarous punishments' and congested tough lives of individuals.[759] Islam is not only congruent but a predecessor in human rights as well as independent and complete code of conduct for a society. This is because it relies on the legal sources of Islam and the Divine power for credibility. Islamic societies based on Shariah have shown peace and progress as close to humanly perfection as possible.[760] For this reason parallels have been drawn in this dissertation, between rights guaranteed in Islamic jurisprudence and international covenants to show the universality of need to protect basic human rights including fair trial rights.

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[759]Ashfaq, Abira. "The Hudood Laws of Pakistan; Voices from Prison and a Call for Repeal." *New Politics* 10, no. 4 (2006): 39.

[760]Eaton, Gai. *Remembering God: Reflections on Islam*. Kazi Publications, 2000.

7.1 Pre-Trial Trial Rights.

These rights are not available at pre-trial stage when a person is arrested. Most fair trial rights are infringed at pre-trial stage.[761] This dissertation has attempted to clarify the extent to which role of prohibition of arbitrary arrest and detention is crucial to provision of fair trial and due process. Right must be protected from the first step of registration of FIR to conviction or acquittal. A society where rule of law is supreme, a society of respectful and mindful human beings is built. FIR copy is neither provided to the accused or counsel at pre-trial stage. Similarly, no legal counsel is provided at identification parade, investigation or in the presence of confessional statement.

Also, not at the time physical or judicial remand is given by the magistrate. When a person was arrested, in Constitution of Pakistan 1956, it was mandatory to produce the accused immediately upon arrest, but no such provision has been granted in constitution of Pakistan 1973. On it place, a mandatory period of 24 hours is granted to investigation, in which the accused is to be produced before magistrate, which could the last 10 minutes of those 24 hours. These 24 hours window is most crucial in terms of violations of human rights. Arrest of an individual is the foundation stone on which the whole edifice of trial is built. Truth is the first of many sacrifices that can happen during this time. Physical torture and psychological manipulations afflicted on an accused can last for a long time. At the time of arrest, no Miranda warning is issued to the arrested person whereas this is mandatory in many countries, for example in US, according to this act, during trial, many trial rights are provided to both accused as well as victim. There is a period of 14 days for ordinary courts and 90 days for special courts to present an arrested person in front of magistrate.]

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[761] http://www.pakistani.org/pakistan/constitution/part2.ch1.html (access on 24th august 2018 at 4:37 am.)

There is no legislation or rules for arrangement of food, medicine or meeting the family members for the accused at pre-trial stage in Pakistan. Once an accused is sent to jail, there is a proper system of messing and lodging for the accused in the shape of prison lodging. Provision of legal counsel at pre-trial stage can play a pivotal role in reducing the back log of cases. A substantial portion of cases in Pakistani legal system consists of those accused who remain languishing in jails and when the trial starts, are acquitted due to lack of evidence.

The other provisions of Constitution that deals with basic human rights leading to fair and just trial and due process of law are article 12 that deals with retrospective punishment. Pakistan's law is essentially following Common law and there is no provision of retrospective effect in British law. Also, the retrospective element in law can have catastrophic and complicated effects which courts may not be able to handle easily. Article 13 gives protection against double jeopardy and self-incrimination. These two laws are not only fundamental in providing a justice in a trial but to give protection against derogatory and less than human treatment for any person and gives a sense of equality and belonging in the citizens of a country.

Similarly, article 14 provides dignity and privacy as well as protection against torture whereas article 25 gives equality before the law without any discrimination. Protection against torture is one of the most sensitive topics in present legal scenario of Pakistan. Mostly the lower and lower middle class of the society are subjected to it, if they are arrested. Only some provisions of CrPC and CPC provide some shelter against torture whereas there is no effective legislation for prohibiting custodial torture and criminalises torture in law in Pakistan. Instead a cocktail of different sections is used. (Sec. 166 can be applied). Although the evidentiary value of such confession is very weak It is important to remember that investigation by law enforcement

agencies (police) is the early step in ridden with abuse, it sets the course for a trial where the foundations are weak and trials rights become difficult to observe.

7.2 During Trial Rights

The provision of jury in Pakistan is an important step in provision of fair trial rights during trial proceedings. The provision of jury is an essential tool in ensuring the balance between the arms. Similarly, the capacity, efficiency and competence of police could be enhanced first by depoliticising the transfer and posting and then optimizing its efficiency. Through intensive and meaningful police training should be so designed that it must be equipped on modern scientific lines. They must recruit forensics experts so that crime scene evidence may be collected and analysed in required time. although many rights are provided to the accused during trial, yet the accused has to face many hardships in attaining copies of evidence. 265 (C) copies of all evidence and police case diaries and confessional statement of accused under sec 164 CrPC are not provided to the accused because the police case diaries are sealed. 'Question sample' is the sample that is sent for forensic analysis. Forensic facilities are only available in big cities and evidence from small city or rural crime is usually lost in lieu of delay in time and provision of testing facilities. Geo-fencing is another technique to reach culprits. Due to lack of forensic labs, police must be taught how to collect DNA sample, human skulls and bones. To verify the genuineness of the DNA profiling and to rule out the contamination as per forensic protocol, re-arranged blanks and alibi samples are run along with every question sample. Geo-fencing is done by the police collaborating with cellular phone companies and PTA. Copies of census are also consulted in order to get a knowledge of all the inhabitants of the area.

Scrutiny by the prosecution and the report submitted therein under sec 9 sub sec 7 do not give report fairly. They do not disclose that this evidence is deficient, and commencement of trial is

not recommended based on this evidence. Stereotype report is usually written due to which it takes a long time before this lacuna is discovered and the accused is acquitted due to lack of plausible evidence. Sec 265 (D) CrPC contains that if evidence is not sufficient, court can have the right of not framing the charge, but such examples are almost negligible in Pakistani courts. And the courts do not exercise this right in the favour of accused. Similarly, sec 265 (E) contains that if accused plead guilty, conviction is recorded by the court. But this exercise is against the nature and spirit of fair trial rights.[762] Some of the grey areas in implementing fair trial rights is the availability of inadequate resources devoted for justice department. A clear example is the meagre amount paid to public prosecutors. Counsel provided to the accused is given such meagre payment that there is no incentive for competent lawyers with experience to plead the case of the accused. Right to counsel is available to only those offenses/cases of major penalty of death and life imprisonment.

7.3 After Trial

The legal system in Pakistan is essentially more tilted towards the favour of the rich who can buy their help in many instances. For example, jail petitions for those accused who cannot secure outside legal help have their petitions roam the corridors of justice for a long time without much benefit. The right to appeal is a 'luxury' only with resources can afford to enjoy in the legal system of Pakistan.

Finding truth through a just and fair decision is the ultimate aim of trial in courts. Recent history in Pakistan has seen lowering the standards of finding truth and morality of courts in the name of speedy justice. Justice is the pivot around which the balance of the society revolves. It is true that

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[762]2000 P.Cr.L.J 837.

"delayed justice amounts to denied justice" but hasty decisions can create a damage equalizing the time of lengthy and complicated court procedures. The legal system in Pakistan is essentially tilted towards the rights of the accused. Despite many voids in establishing and implementing fair trial rights, efforts are made to give some level of protection to the accused. Separation of Judiciary from executive in 1996 has been one of the most significant steps in realizing the goal of fair and just trials through due process of law. Juvenile Justice System 2000 protects the rights of juvenile accused and convicts through separate trial. Prison and bail systems.[763] The introduction of Prosecution act in 2006 has provided much needed albeit not enough relief to the accused as they are proving to be a bridge between police (investigating agencies) and the courts in Pakistan.[764]

Measures highlighted are not exhaustive in nature but principally complimentary. As one of the most important pillars of the state that deals with citizens in time of anguish the breach of trust for general public in trial can result in frustration and discontentment that can have far reaching effects on the society. The measures to improve the condition of fair trial rights in Pakistan must be adopted as a multi-pronged policy as it is a complex process of changing attitudes, affinities and habits. It must not be left alone to the government. The state and society must be able to meet the expectations of individual rights. Prompt justice which is achievable within a foreseeable time period can restore the confidence of individuals in legal system and can curb the impulses of evilness and malice and the sense of belonging among the members of society in a short span of time.

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[763]https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/81784/88955/F1964251258/PAK81784.pdf (accessed on 14th October 2019 at 6:29 am.)

[764]http://punjablaws.gov.pk/laws/483.html (accessed on 14th October 2019 at 4:37 am.)

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