

SELINUS UNIVERSITY

**RIGHTS OF ACCUSED UNDER INTERNATIONAL HUMAN
RIGHTS, ISLAM AND DOMESTIC LEGISLATION OF
PAKISTAN.**

By

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Abstract:

This dissertation analytically discusses rights of an accused as envisaged in International Human Rights Instruments, Islam and enshrined in Domestic Legislation of Pakistan. Pakistan being an Islamic Republic and signatory to many Universal Human Rights Instruments is under obligation to ensure protection of Human Rights of every citizen even a person accused of an offence. Under the domestic laws of the country, accused may be categorized as adult accused, woman accused and Juvenile accused because all these persons have been treated differently giving women and juvenile accused more rights than adult accused under criminal law mechanism. This dissertation aims at ascertaining separate rights of all these types of accused given treatment under the Laws of the land.

Constitution, written or unwritten, is considered to be a landmark document granting rights to subjects of the state and most of the Human Rights of the citizens emanate from the constitutional document. The country, since its inception, faced many constitutional crises and in addition to the Government of India Act, 1935 and an Interim Constitution of 1972, framed three constitutions. This dissertation also traces out the rights of an accused under all these Constitutions.

A modern democratic state consists of three (03) important organs known as Legislature, Judicature and Administration. The Judicature of a Country occupies dual status of interpreting Laws made by the Legislature and ensuring non violation of those legal documents. Likewise, judiciary of the country is empowered to safeguard the rights of individuals of State and in case of the any violation of fundamental/human rights; the only recourse is the judiciary. A person who is not familiar with the court structure of a country and General Laws cannot understand the spirit and status of Human Rights within the State. To cope with this phenomenon, this dissertation focuses on drawing a detailed view of structure and hierarchy of Judiciary of the country with their powers.

The dissertation concludes that Pakistan is one of the countries where Human Rights including rights of an accused are adversely violated by the concerned quarters and the dissertation focuses on some suggestion for improvement of criminal justice system of the country in order to protect violation of rights of accused as enunciated under Universal Human Rights Instruments, Islam and Domestic Laws of the country.

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Declaration:

I do hereby attest that I am the sole author of this project/dissertation and that its contents are only the result of the readings and research I have done.

I also hereby declare that, except where explicit reference is made to the contribution of others, this dissertation is the result of my own work and has not been submitted for any other degree at any other institution.

Date: **4th October, 2021. Pakistan.**

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Human Rights Instruments:

- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment Adopted by General Assembly resolution 43/173 of 9 December 1988.
- International Covenant on Civil and Political Rights, 1976
- International Covenant on Economic, Social and Cultural Rights, 1976.
- Organization of Islamic Cooperation “The Cairo Declaration on Human Rights in Islam, 1990”.
- Rome Statute of the International Criminal Court, 1998.
- The American Convention on Human Rights, 1969.
- The Cairo Declaration of the Organization of Islamic Cooperation on Human Rights.
- The Charter of the United Nations, 1945.
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987.
- The Convention on Rights of Child, 1990.
- The Convention on the Elimination of All Forms of Discrimination against Women, 1981.
- The European Convention on Human Rights, 1950.
- The Universal Declaration of Human Rights, 1948.
- The Universal Islamic Declaration of Human Rights, 1981.
- The Vienna Declaration and Program of Action, 1993.
- Covenant on the Rights of the Child in Islam, 2005.

Religious Books:

- The Holy Quran
- The Mulsim Sharif
- The Sahih Ul Bukhari
- The Sunan Al-Tirmidhī
- The Sunnan Abu Dawood

List of Domestic Statutes:

- The Child Marriage Restraint Act, 1929.
- The Code of Criminal Procedure, 1898.
- The Constitution of Pakistan, 1956.
- The Constitution of the Islamic Republic of Pakistan, 1973.
- The Constitution of the Republic of Pakistan, 1962.
- The General Clauses Act, 1897.
- The Juvenile Justice System Act, 2018.
- The Majority Act, 1875.
- The National Accountability Bureau Ordinance, 1999.
- The Pakistan Penal Code, 1860.
- The Police Rules, 1934.
- The Probation of Offenders Ordinance, 1960.
- The Qanoon-e-Shahadat Order, 1984.
- The Rules and Orders of the Lahore High Court Lahore Volume III.

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- Adnan Prince vs. The State: 2017 PLD Supreme Court 147.
- Ali Muhammad vs. The State, PLD 2020 SC 201.
- Ali Raza etc. vs. The State etc. The Supreme Court of Pakistan.
- Anwar Ali Khan vs. Wahid Bukhsh, 1991 SCMR 1608.
- Arshad Jamal versus N. W.F.P Forest Development Corporation and others, 2004 SCMR-468
- Babar Hussain Shah and another vs. Mujeeb Ahmed Khan and another. 2012 SCMR 1235
- Bilal Akbar Bhatti vs. Election Tribunal Multan and 15 others, P L D 2015 Lahore 272.
- District Bar Association Rawalpindi vs. Federation of Pakistan; PLD 2015 SC 401.
- Dr. Kumail Abbas Rizvi VS University of Punjab etc. PLC (CS) 2017 Lahore 569.
- Dr. Muhammad Aslam Khakhi and others vs. The State and others, PLD 2010 Federal Shariat Court 1.
- Ghulam Hussain v. State (PLD 1974 Karachi 91)
- Ghulam Qadir vs. Misiry Fazal Din and others, PLD 1962 Supreme Court 331.
- Hafiz Junaid Mahmood vs. Government of Punjab: PLD 2017 Lahore 1.
- Hazara (Hill Tract) Improvement Trust through Chairman and others versus Mst. Qaiser Elahi and others: 2005 SCMR-678 (a).
- Ikram Bari and 254 Others vs. National Bank of Pakistan through President and Others, 2005 SCMR 100.
- Khalid Rashed v. State, PLD 1972 Lahore 722.
- Khushi Muhammad vs. The State, PLD 1953 FC 170.
- Liaqat Ali & Amanat Ali vs. The State (1998). National Law Reporter, Criminal. Lahore.
- Liberty Papers LTD and other vs. Human Rights Commission of Pakistan, PLD 2015 SC 42.

- Mohtarma Benazir Bhutto and another vs. Federation of Pakistan through Secretary Finance Islamabad, PLD 2010 Federal Shariat Court 229.
- Ms. Shehla Zia and Ors. v. WAPDA: P L D 1994 Supreme Court 693.
- Mst. Asia Bibi vs. The State etc. PLD 2019 SC 64.
- Mst. Sughran Bibi vs. The State (PLD 2018 SC 595).
- Muhammad Asif Iftikhar v. Zila Nazim, Kasur (Ex-Chairman) Zila Council, Kasur and 4 others, PLD 2005 Lahore 381.
- Muhammad Mansha vs. The State, 2018 SCMR 772.
- Muhammad Nawazish Ali vs. Family Judge etc., 2021 LHC 3750.
- Muhammad Rashid Yasin vs. The State, etc, 2021 LHC 3546.
- Mumtaz alias Bhutto vs. The State & another, 2021 LHC 1144.
- Nadeem Asghar Nadeem and others v. Province of the Punjab and others [2015 CLC 1509 : 2016 PLC (C.S.) 155]
- Pakistan International Airlines Corporation (PIAC) versus Nasir Jamal Malik and others, 2001 SCMR 934 (d)
- Raza, Allah Dittah vs. The State etc. Crl. Petitions Nos. 1124-L and 1120-L of 2015.
- Rehmat Ali vs. The State (2005)
- Suo Motu Constitutional Petition No.9 of 1991, [1994 SCMR 1028].
- The State and others vs. M. Idrees Ghauri and others, 2008 SCMR 1118.
- Watan Party and another vs. Federation of Pakistan and others, PLD 2011 Supreme Court 997.

List of Foreign Cases:

- Al-Khawaja and Tahery v United Kingdom [2009] ECHR 26766/05 (20 January 2009).
- Baker v. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 [1999].
- Benoyendra Chandra Pandey And ... vs. Emperor, AIR 1936 Cal 73
- Brewer vs. Williams; 430 U.S 387 [1977].
- Canara Bank V. V K Awasthi: Air 2005 6 SCC 321
- Colozza v. Italy 1985.
- Cooper v Wands worth Board of Works (1863) 14 CB(NS) 180
- Deoman Upadhyaya v. State (AIR 1960 All 1)
- Dr. Bonham's vs. College of Physicians (1610), 8 Co Rep 114 (Dr Bonham's Case). The British Court of Common Pleas.
- Durham vs. United States, 214 F.2d 862 (D.C. Cir. 1954).
- Emperor vs. Shivdas, (1913) 15 BOMLR 315, 19 Ind Cas 507.
- Metropolitan Properties Ltd. v. Lunnon [1968] 3 WLR 694.
- Miranda vs. Arizona, 384 U.S 436 (1966).
- Mohinder Singh Gill v. Chief Election Commissioner: AIR 1978 SC 851
- Pakala Narayana Swami v. Emperor (AIR 1939 PC 47)
- Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 US 833 (1992).
- Quoc Dung Tran v. Her Majesty the Queen [1994] 2 SCR 951.
- R. Latimar: [2001] 1 SCR 3.
- Re JP Linahan, 138 F.2d 650 (2d Cir. 1943)
- Regina vs. Barnsley Licensing Justices (1960 2 Q.B 187).
- Rex vs. Sussex Justices: (1924 1 KB 256).
- Smt. Maneka Gandhi v. Union of India and another: AIR 1978 SC 597
- The Butchers' Benevolent Association of New Orleans v. The Crescent City Live-Stock Landing and

Slaughter-House Company. Slaughterhouse Cases 83 U.S. 16 Wall. 36 36 (1872). U.S. Supreme Court.

- United States v. Wilson 32 U.S (7 Pet.) 150, 160 and 161 (1833).
- Vionet VS Barrat, (1885) 55 LJQB 39.
- Woolmington vs. DPP; [1935] AC 462 (House of Lords).

List of Acronyms:

ACHR:	American Convention on Human Rights 1969.
AIR:	All India Reporter.
ATA:	The Anti Terrorism Act, 1997.
CEDAW:	Convention for the Elimination of All Forms of Discrimination Against Women.
CNSA:	The Control of Narcotics Substances Act, 1997.
Cr.P.C:	The Code of Criminal Procedure 1898.
ECHR:	The European Convention on Human Rights.
F.I.R:	First Information Report.
I.O:	Investigating Officer.
ICCPR:	International Covenant on Civil and Political Rights, 1966.
ICESCR:	International Covenant on Economic, Social and Cultural Rights, 1966.
ICRC:	International Committee of Red Cross
J.I.T:	Joint Investigation Team.
LHC:	Lahore High Court.
M.L.D:	Monthly Law Digest.
N.A.B:	National Accountability Ordinance, 1999.
P.Cr.L.J:	Pakistan Criminal Law Journal.
P.P.C:	The Pakistan Penal Code, 1860.
PLD:	Pakistan Legal Decisions.
SCMR:	Supreme Court Monthly Review.
U.K:	The United Kingdom.
U.S.A:	The United States of America.
UNCAT:	United Nations Convention against Torture and Other Inhuman or Degrading Treatment or Punishment.

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Introduction:

Accused is a person against whom allegation of an offence is leveled by the others. The Supreme Court of Pakistan giving definition to word accused has elaborated that “A person against whom action is taken by the court in advance of the commission of an apprehended crime cannot fall within the expression “person accused of an offence”¹. Human rights are those rights which are associated with the human beings on account of being human beings. These rights are universal and inalienable. Dalacoura Katerina, defining the significance of human rights for the humanity demonstrates that “They are the rights to especially basic freedom and security, without which a person’s existence would be considered less than human”². Pakistan emerged as an Independent State on the globe on 14th August, 1947 from the British Colonialism. The newly created state, in order to fill the constitutional lacunae, on one hand adopted “the Government of India Act, 1935” as interim measures and on the other hand, started constitution making process. To cope with this dilemma, the ever first (1st) Constituent Assembly of the Country was set up with its Inaugural Sessions on 10th of August, 1947. The first and foremost duty of this Constituent Assembly was to frame a Constitution for the newly borne State. On 12th of March, 1949, the Assembly adopted a resolution named as “The Objectives Resolution” which proved a substantial part of constitutional history of the Country by foreseeing constitutional framework for the State. Thereafter, the country in addition to Interim Constitution of 1972 promulgated three Constitutions three (03) consecutive constitutions in 1956, 1962 and 1973 (now in force). During this entire phase, the country faced constitutional crisis many times which led to abrogation, revocation or suspension of the Constitution. All these Constitutional Documents provided for fundamental rights for the subjects of the State including equality, equal treatment and equal protection of Law.

Apart from the Constitution Making, there was another aspect of judicial system with structure and running mechanism. Courts of any country hold immense significance viz. a viz. safeguarding rights of individuals and independent judiciary in inevitable for ensuring fulfillment of rights. The Constitutions adopted

¹ Ghulam Qadir vs. Misiry Fazal Din and others, PLD 1962 Supreme Court 331.

² Dalacoura Katerina, Islam, Liberalism and Human Rights, 1998.

and promulgated by the State provided for different kinds of Courts and to run the business of Criminal Courts, the state implemented the inherited Procedural Law namely “The Code of Criminal Procedure, 1898” and the Sustentative Law known as “The Indian Penal Code 1860(naming as The Pakistan Penal Code, 1860)” mutatis mutandis. However, with the passage of time, the State developed various domestic criminal legislations and established different courts to make up the deficiency of Criminal Laws and Procedure.

After a lapse of about one month of its emergence, the State joined the United Nations as a member state on September 30 the same year. Pakistan became signatory to the Convention on the Rights of Child on 12th November, 1990 and ratified CEDAW in 1996¹. Thereafter, the country went to become a state party to the ICCPR, ICESCR and UNCAT on 17th April, 2008².

Pakistan was established in the name of Islam and the State adopted Islam as its National Religion. It is also embarked in the Constitution of the Country that no law against the norms of Islam shall be framed and implemented in the State. However, the laws already in existence containing contra Islamic Provisions would be brought in conformity with the Teachings of Islam.

The State is responsible for ensuring Human Rights for every citizen even a person accused of an offence because accused is also a human being and occupies certain set of rights under the Universal Human Rights Instruments, Religion Islam and the domestic Legislations of the Country. In the country situation of Human Rights in every sphere of life is dismissal and no person is in the enjoyment of statutory rights awarded to him/her.

Research Objectives, Issues and Questions:

A state is under obligation to protect the rights of its citizens from any kind of usurpation either by the State itself or the other individuals. However, Pakistan is one of the States where human rights are grossly violated whether the individual is an accused of a case, complainant in a case or a layman. Every walk of life is replete with violation of human rights.

¹ World Organization Against Torture, “Rights of the Child in Pakistan”, September 2003, Geneva.

² Amnesty International, “Pakistan Ratifies Key UN Human Rights Treaty”, 18 April, 2008

This research seeks to explore the rights of an accused contained in the International Human Rights Laws, Islam and the Domestic Legislations of the country. Secondly, it focuses on the obligations of the State to safeguard the rights of an accused in the context of these laws especially under the social contract theory. Thirdly, it highlights the judicial structure and hierarchy of the country with powers of these courts. Fourthly, it aims at assessing the role of the Courts in safeguarding rights of an accused. Fifthly, the dissertation highlights the current status of human rights specifically relating to an accused. Sixthly, it proposes some measures to upgrade the system for compliance of rights of an accused.

The pivotal research question is to ascertain the rights of an accused as envisaged under the Universal Human Rights Instruments, Islam and Local Statutes of the Country. However, this question is sub-divided into the following further questions:

- [1]. State Responsibility towards Protection of Rights of an Accused;
- [2]. Rights of Adult Accused persons;
- [3]. Some Special Rights of Minor, Women and Lunatic Accused persons;
- [4]. The Ongoing Situation Regarding Rights of Accused Persons in the Country;
- [5]. Some Imminent and Immediate steps to be taken.

Research Methodology:

The research is mostly carried through both primary and secondary sources. To accomplish the task three (03) different types of research i.e. Descriptive, Analytical and comparative have been applied. Particularly, comparative approach is widely used in the dissertation to examine the rights of accused in Universal Human Rights Instruments, Islam and the Domestic Legislation of Pakistan. Both the qualitative and quantitative research approaches were utilized for data collection. However, the qualitative approach remains dominant over the quantitative approach.

Pakistan is an Islamic Democracy with a Written Constitution which not only adopts Islamic as State Religion but also calls for the Islamic Injunctions as the basic norms for functioning the State. Therefore, every legislation of the Country has to pass through litmus of Islam despite the fact that the country is also a unit of the International Community and signatory of many International Human Rights Conventions. Therefore, the primary source providing basis for research mainly

comprises of the Provisions of International Human Rights Instruments, Islamic Transcripts and Statutes of Pakistan. The Secondary Sources of data include Judgments of Apex Courts, Judgments of Foreign Courts, Books, Law Journals, Online Articles, Newspapers and Other Publications related to the legal fraternity of the country. The recommendations made in the last chapter of the Dissertation are based on personal observation, experience and suggestions put forward by the persons mentioned in the Acknowledgement, who helped me a lot in preparation of this task.

Conclusion:

The dissertation closes with the scenario of accused persons' rights in Pakistan and few suggestions to improve overall judicial and legal structure of the country to avoid miscarriage of justice especially in the perspective of human rights. The dissertation also points out few amendments to the more than two centuries outdated laws prevalent in the country to bring those in conformity with the modern era to ensure the dispensation of justice and guarantee the human rights.

Chapter One: General Criminal Laws in the Country.

Introduction:

There is a plenty of statutes prevalent in the country which govern the criminal administration of justice. Out of these few are general laws which take effect throughout the country while some are Special or Local Laws. Another aspect of the general criminal statutes is their inherited character at the time of independence. These certain statutes containing rights of an accused include:

1. The Pakistan Penal Code, 1860;
2. The Code of Criminal Procedure, 1898;
3. The Probation of Offenders Ordinance, 1960;
4. The Qanoon-e-Shahadat Order, 1984; and
5. The Juvenile Justice System Act, 2018.

The Pakistan Penal Code, 1860:

This Code is based on Indian Penal Code drafted in 1860 by the First Law Commission of India chaired by Lord Thomas Babington Macaulay. It was passed on 6th October, 1860 and given the Roman Act No.XLV of 1860. This remained in force in the United India; however, after partition of the Sub-Continent in 1947, Pakistan mutatis mutandis adopted and implemented the same in the country with the name of “The Pakistan Penal Code, 1860 Act No.XLV of 1860”.

This is a General Substantive Law and takes effect throughout Pakistan. The Code has a preamble articulating the purpose of the Code as to provide a general Penal Code for Pakistan. This Code being a General Penal Code provides punishment for every person who shall be guilty within Pakistan¹ and extra territorial jurisdiction of the Code by punishment for offences committed beyond Pakistan in the same manner as such act had been committed within Pakistan².

It has twenty-three (23) Chapters and five hundred and eleven (511) Sections containing offences, definitions of offences and punishments for those offences. The Code deals with offences against State, Different Institutions and Law Enforcement Agencies of the State and individuals. The code runs in a sequence of

¹ Section 2 of the Pakistan Penal Code, 1860.

² Section 3 Ibid.

defining offence and providing punishment for the offence. The Code also contains offences against religion and Family and provides punishments for those offences.

The Code of Criminal Procedure, 1898:

This is a Procedural or Adjective Law. In the words of Justice (r) Munir Ahmed Mughal “A procedural law is the machinery to implement the substantive law or the mechanism or procedure or the ways and means to do so”¹. The ever first General Criminal Procedure Code (Act XXV of 1861) was framed in 1861 which was replaced by Act X of 1972. Until 1882, no Criminal Procedure existed in uniformity rather there were different and scattered Codes of Criminal Procedures for every Province and Residency Town. In 1882, for the first time, a Uniform Law of Procedure for the whole Sub-Continent came into force by the Act X of 1882. This Act forms the basis of the present Criminal procedure Code which was passed on 22nd March, 1898; however, entered into force on the first day of July, 1898.

Like the Pakistan Penal Code 1860, the Code of Criminal Procedure 1898 was mutatis mutandis applied in the country after division of the Sub-Continent. With the passage of time, this Code went through many amendments and improvements; however, it retains its original name. This is a General Code and takes effect to the whole of the country.

This Code has a preamble while deposes purpose of the Code as consolidation and amending the laws relating to the Criminal procedure. It has nine (09) parts, forty-seven (47) Chapters, 564 Sections and five (05) Schedules. This Code propounds different Courts, their powers and procedure for smooth running of those Courts. This Code also deals with role and power of the Investigating Agencies of offences with their limitations. The Code also retains some of the rights of the Accused.

The Probation of Offenders Ordinance, 1960:

Initially, it was an Ordinance promulgated by the then President of the Republic of Pakistan on 1st November, 1960 but later on, it was adopted and passed by the Legislature of the Country. It also extends to the whole of Pakistan; however, its commencing date was left at the option of different areas of the Country.

¹ Scheme of the Code of Criminal Procedure by Munir Ahmed Mughal.

This Ordinance XLV of 1960 has a preamble which describes its purpose of promulgation as the release on probation of the offenders in certain cases. It has seventeen (17) Sections. This Ordinance lays down different offences liable to probation, procedure and requirements for probation along with conditions of probation. The Ordinance also provides appointment of Probation Officers with their duties.

The Qanoon-e-Shahadat Order, 1984:

The evidence provides basis for every decision of a Court and during British regime, the Imperial Legislative Council enacted “The Indian Evidence Act No.1 of 1872” on March 15, 1872 which came into force on September 1, 1872 for the United India. This Act applied by Pakistan remained in force governing the procedure of evidence in Pakistan by 1984.

In 1984, with the process of Islamization in the country, a large number of statutes including the Law of Evidence called “The Qanoon-e-Shahadat Order, 1984 10 of 1984” were enacted. This Order was assented to by the President of Pakistan on the 30th Muharam-ul-Haram 1405 H, 26th October, 1984 and was given effect on 28th October, 1984. This Order extends to the entire Country and applies to all judicial and quasi judicial proceedings except proceedings before an Arbitrator.

The preamble of the Order narrates its purpose of enactment as to revise, amend and consolidate the law of evidence so as to bring it in conformity with the injunctions of Islam as laid down in the Holy Quran and Sunnah. This Order has one hundred and sixty-six (166) Articles. It provides procedure of evidence for both Civil and Criminal Proceedings. It points out some types of evidence, ways of producing evidence and valuation of the evidence.

The Juvenile Justice System Act, 2018:

In order to save the interests and social reintegration, the State issued Juvenile Justice System Ordinance, 2000 which was later on repealed and the Juvenile Justice System Act, 2018 was promulgated on 22nd May, 2018. This Act extends to the whole of Pakistan.

The preamble of the Act stipulates the provision of criminal justice system and social reintegration of juveniles behind enactment of this Act. This Act consists of twenty-four (24) Sections. This Act provides for establishment of Juvenile Courts, Juvenile Justice Committee and Observation Homes for the juvenile

Offenders. This Act also prohibits identity disclosure and separate trial of the Juvenile from adult accused. This Act also contains special provisions regarding female Juveniles.

Conclusion:

The crux of the legal system of the country depicts that the laws of Pakistan are divided into substantive and procedural or adjective. Both these regulate the procedure of criminal courts in the country. The procedure to adduce, regulate and scrutinize evidence is governed by a separate law “The Qanoon-e-Shahadat Order, 1984”. Moreover, there is a separate Special Statute for trial of juvenile offenders. In addition to these laws, there is also a Special Law in the country providing for probation of offenders on leniency, tender age and previous good character basis.

Chapter No: 2: Structure of Criminal Courts in Pakistan

Introduction:

The Judicature in any democracy occupies great importance. The judiciary of a country is endowed with two fold functions: interpretation of statutes framed by the legislature and safeguarding rights of the citizens. When there is any kind of violation or usurpation of citizens rights at the part of either legislature or administration, the only recourse is the judiciary for redressing the grievance of the affected persons. Pakistan is an Islamic Republic with a written constitution promulgated in 1973 which divides functioning of the State by three (03) organs like Judicature, Legislature and Administration with powers of these institutions. Article 175 (1) of the Constitution depicts a framework of Courts: “There shall be a Supreme Court of Pakistan, a High Court for each Province [and a High Court for the Islamabad Capital Territory] and such other courts as may be established by law ¹”. The portrayal of this article reveals the following Courts:

The Supreme Court of Pakistan:

The Supreme Court of Pakistan is the Highest Court of the Country with Original, Advisory and Appellate Jurisdiction. Appeal against orders of High Courts in some criminal matters lies to the Supreme Court directly and in some cases with the Leave of the Court. In its original jurisdiction, the Supreme Court is empowered with hearing disputes between two or more governments.

The Supreme Court also serves as recourse against infringement of fundamental rights laid down in Chapter II of the Constitution of the Islamic Republic of Pakistan, 1973².

1. A: Shariat Appellate Bench:

Within the Supreme Court of Pakistan, there is a Shariat Appellate Bench which hears appeals against Judgments, Final orders or Sentences passed by the Federal Shariat Court. The purpose of this Appellate Bench is to enable the persons aggrieved against the Federal Shariat Court dealing with Hudud Laws. This

¹ Article 175 (1) of the Constitution of the Islamic Republic of Pakistan, 1973.

² Article 184 (3) Ibid.

Bench is specified to Muslim Judges and Religious Scholars and a Non-Muslim cannot be appointed to Shariat Appellate Bench of the Supreme Court¹.

The Federal Shariat Court:

Article 203 (C) of the Constitution of the Islamic Republic of Pakistan, 1973 provides for establishment of a Federal Shariat Court. This Court has Jurisdiction to decide the vires of any Law or Provision of a Law to be consistent or inconsistent with the injunctions of Islam either of its own motion or on the application of a Citizen of Pakistan or the Federal Government of a Provincial Government.² This Court having powers equivalent to a High Court also serves as Appellate Court for hearing appeals and revisions against decisions of Sessions Courts regarding enforcement of Hudood.³

The High Courts:

Pakistan is a Federal Republic comprising of four (04) Units called Provinces with a Capital known as the Islamabad Capital Territory. The Constitution of the Islamic Republic of Pakistan, 1973 provides a High Court for each Province and a High Court for the Federal Capital. At present there are the following five (05) High Courts in the country:

- I. The Baluchistan High Court.
- II. The Gilgit Baltistan High Court.
- III. The Islamabad High Court.
- IV. The Lahore High Court.
- V. The Peshawar High Court.
- VI. The Sindh High Court.

These High Courts are not only the Highest Courts for a Unite/Province but also the Highest Courts of Appeals and Revisions in criminal cases within a Unit/Province. The High Courts also enjoy the jurisdiction to hold trial of certain offences.

¹ Articles 203 (D) and (F) Ibid.

² Article 203 (D) of the Constitution of the Islamic Republic of Pakistan, 1973.

³ Hudood crimes are offences for which sentence has been fixed in the Holy Quran and Sunnah of the Holy Prophet (PBUH).

Anti Terrorism Courts:

Once the country went through the surge of terrorism at large scale and suffered loss of human lives through manslaughter, devastation, social and commercial damages at both national and international level. These circumstances constrained the State Legislature to take corresponding measures to overcome this dilemma. In this backdrop, the State promulgated Anti Terrorism Act in 1997 evolving Special Anti Terrorism Courts to give special treatment to the persons involved in any kind of terrorism¹.

The CNSA Courts:

Consumption and Trade of contraband narcotics has ever been a candid phenomenon which requires a lot attention by the State. A large number of people are involved in cultivating, selling, purchasing, utilizing and preparing psychotropic substances. To overture this abstemious practice, the Central Government of the State enunciated the Control of Narcotic Substances Act in 1997 providing for setting up special Courts to try offences pertaining to the Narcotic².

The Courts of Sessions:

The next category in criminal Courts is the Courts of Sessions. For the establishment of Courts of Sections, a Unite/Province is divided into Sessions Divisions consisting of one or more Districts³. The Provincial Government may divide a Sessions Division into Sub-Divisions⁴. The Provincial Government shall appoint a Sessions Judge for every Sessions Divisions and may appoint Additional or Assistant Sessions Judges in Sessions Division or Sub-Division⁵. These courts are hold two functions: one as a trial court in heinous offences like murder and rape etc and the other as Courts of Appeal or Revision against the orders and judgments of the Magisterial Courts. These Courts, in some cases can take direct cognizance but in some cases cannot. In some cases, these courts can take cognizance only when a case is forwarded by a Magisterial Court to the Court of Sessions for trial.

¹ Section 13 of the Anti Terrorism Act, 1997.

² Section 45 of the Control of Narcotic Substances Act, 1997.

³ Section 7 of the Code of Criminal Procedure, 1898.

⁴ Section 8 Ibid.

⁵ Section 9 Ibid.

Magisterial Courts:

In criminal administration of justice, Magisterial Courts are the basic courts in a Sessions Divisions and empowered with trial of minor offences and treating with judicial functions of Police Stations within a Local Area. As per criminal justice system of the country, there are the following classes of Magistrates:

- A. Magistrate Empowered Under Section 30 of Cr.P.C¹.
- B. Judicial Magistrate of the 1st Class.
- C. Judicial Magistrate of the 2nd Class and
- D. Judicial Magistrate of the 3rd Class².

Punishments Provided Against Offences:

The criminal justice system of Pakistan provides the following punishments a criminal court may award to an offender:

- Firstly: Qisas, punishment by causing similar hurt at the same part of the body of the convict as he has caused to the victim or by causing his death if he has committed murder³;
- Secondly: Diyat, a specified compensation payable to the heirs of the victim⁴;
- Thirdly: Arsh, a specified compensation to be paid to the victim or his heirs⁵;
- Fourthly: Daman, the compensation determined by the Court to be paid by the offender to the victim for causing hurt not liable to arsh⁶;
- Fifthly: Ta'azir, means punishment other than qisas, diyat, arsh, or daman⁷;
- Sixthly: Death;
- Seventhly: Imprisonment for Life.
- Eighthly: Imprisonment which is of two descriptions, namely: --
Rigorous, i.e., with hard labour.

¹ Section 30 Magistrate is a Court Judicial Magistrate 1st Class which can try all offences except punishable with death and award sentence to a person up to seven (07) years

² Section 6 of the Cr.P.C.

³ Section 299 (K) PPC, 1860.

⁴ Sections 299 (e) and 323 Ibid.

⁵ Section 299 (b) Ibid.

⁶ Section 299 (d) Ibid.

⁷ Section 299 (l) Ibid.

	Simple
Ninthly:	Forfeiture of Property
Tenthly:	Fine. ¹
Eleventh:	Solitary Confinement ² .

Powers of Criminal Courts:

The Dispensation of Justice within a society is a convivial evoked by its representatives and the citizens. Therefore, in a justice system, judiciary serves as reformative institution. The criminal justice system of Pakistan is not exception to this phenomenon and the laws prevalent in the country provide different courts with different powers to impose a variety of punishments from capital punishment to forfeiture of property, fine and solitary confinement. The Table at page portrays Court Hierarchy and various sets of powers of criminal courts.

Conclusion:

The Supreme Court of Pakistan is the Apex Court of the Country with appellate and original jurisdiction. There is also included a Federal Shariat Court in the judicial system of the country. The Supreme Court also provides a Shariat Appellate Bench for redressing grievances against the orders and judgments of this Court. There is a separate High Court for each province and one High Court for Tribal Areas. The High Courts not only deal with appellate jurisdiction but also as supervisory institution of the entire judicial at the Provincial Level. The basic unit of the criminal courts structure of the country is Magisterial Courts. At District Level, there is a Court of Sessions Judge with judicial administration of the whole of the District. However, there are some courts established under a special statute like ATA Courts and CNSA Courts.

¹ Section 53 of the PPC, 1860.

² Section 73 Ibid.

Chapter Three: Obligations of a State to Protect Rights of Citizens.

Introduction:

Modern Welfare States are established with a concept of maintaining peace through dispensation of justice and protection of Human Rights on part of the State is prime responsibility of the State. Justice (r) Dr. Munir Ahmed Mughal commenting on State responsibility to provide justice and safeguard rights of its citizens prescribes that “Internal peace requires the rights guaranteed by law are fully protected. If there is any violation there must be an arrangement where the complainant may go and seek his remedy. To provide justice to its citizens is the basic responsibility of the State. And to achieve this and practically each state is to establish institutions to run its affairs”. A state has to develop a mechanism for protection of Rights of its citizens whosoever they are and wherever they are. The state has also to ensure”¹. A.I in its report published in the year 2000, has observed the responsibility of a state towards protection of its citizens’ rights. The report goes on to conclude that “The human rights obligations of the state are to be fulfilled in relation to any acts by individuals, groups or institutions that violate the human rights of others within its territory. The state can be considered responsible if it fails to take reasonable measures to prevent or respond to human rights violations regardless of the identity of the abuser².” A person who is accused of any offence is also under State responsibility on the grounds that he is presumed to be innocence until proved guilty and in case of guilty he also enjoys some human rights demanding state protection. A democratic state owes obligations under Social Norms of the Society or Social Contract Theory, the International Human Rights Law, Religion and Constitution of the State. So, obligations of Pakistan towards its masses in this scenario are traced out.

Social Contract Theory:

The Concept of Social Contract was, first of all, propounded by Socrates, who is considered to be the founder of this theory, about 200/300 B.C due to which it is also called old/ancient theory. The modern notion of Social Contract

¹ Justice (r) Dr. Munir Ahmed Mughal: “Comparative Study of Administration of Justice in West and in Islam, 2012”.

² Amnesty International <https://www.amnesty.org/en/documents/ior50/001/2000/en/>.

Theory of Law was promulgated by Thomas Hobbes (1588-1679, a U.K based Jurist and Philosopher), John Locke (1632-1704, an English Philosopher and Jurist) and Jean Jacques Rousseau (1712-1778, a French Political and Legal Philosopher) in 17th and 18th Centuries.

According to the spirit of Social Contract Theory of Law, there is a contract in a society between citizens and state and this contract is basis for such society. That's why it is called Social Contract Theory of Law. Key points of this theory are that there is always a contract. Moral and political obligations depend upon the contract. Everyone is equal in the society and no one is vested with the special authority to rule and contract is the authority to rule over the others.

John Locke's version of Social Contract slightly differs from the other Jurists because he puts responsibility of the protection of its citizens on the State. He argued that "all men are created equal with natural rights and the purpose of the government is to protect these natural rights. John Locke contended more that the source of government authority is the consent of the governed (i.e. the people), and the right of revolution is reserved for the governed"¹. Steiner & Alston analyzing this theory with reference to the State Responsibility for protection of rights of its citizens have underlined that "Locke argued in detail that some rights self-evidently pertain to individuals as human beings. The most important rights were the rights to life, liberty and property, but the individual has given up the right to enforce this through a "social contract" to the state (however not given up the right itself.)"².

The Hon'ble Lahore High Court, Lahore in its esteemed judgment has held that "In Pakistan, our Constitution formalizes the Social Contract between the State (all three organs of legislature, executive, judiciary) and the individuals. It commands its citizens to obey the law of the land, pay taxes etc. and in turn assures them of provision of security of their lives and property"³. This fact was also observed by the Hon'ble Lahore High Court, Lahore in another judgment as "According to the theory of Social Contract (theory of Thomas Hobbes and John Lock), Society is nothing but a surrender of certain rights of individuals to the society. It is the primary

¹ The Lawyers and Jurists: article/discuss-the-relevance-of-social-contract-theories-in-the-making-of-ideas-of-human-rights-20

² Steiner & Alston, International Human Rights in Context, 2000.

³ Muhammad Asif Iftikhar vs. Zila Nazim Kasur(Ex-Chairman) Zila Council, Kasur and 4 Others, PLD 2005 Lahore 381.

stage of the present democracy. Later, Rousseau's (1762) classic depiction of the social contract recognized that individuals must surrender personal liberties in exchange for security provided by the government. Similarly, contemporary citizens surrender some individual liberties with the expectation that the system of justice will offer them protection from crime. Islamic Republic of Pakistan, 1973 is the ensuant document of the social contract between the state and its citizens. The citizen is afforded certain basic rights so as for him to enjoy these uninterruptedly subject only to reasonable restrictions and subject to lawful, objective and proportionate qualifications, such that garner and foster public interest rather than retard and thwart it"¹.

In the light of Social Contract Theory, there is an implied contract between the State and the individual according to which the State adopts its power from the subjects and in return ensures the protection of the citizens even the citizen is accused of any offence.

International Human Rights Law:

Different States constitute International Community and peaceful relations between two or more states are governed by International Treaties. These treaties serve as one of the Sources of International Law. A State signing and ratifying any International Law is under obligation to comply with those provisions contained in the Treaties or Conventions. "Under international law, states are responsible for the humanitarian situation in their territory; they are the ultimate guardians of their population's well being. States should always take measures to protect human rights, regardless of who the violator of rights is. If states fail to make efforts with "due diligence" to try to prevent violations by non state actors, they are themselves guilty of violating humanitarian principles"²

The United Nations Organizations is considered to be the pioneer of Human Rights set up in 1945 with a view to avoid War and ensure Equal Fundamental Rights without any discrimination. The States joining the United Nations Organizations come under obligation to ensure protection of human rights in

¹ Muhammad Rashid Yasin vs. The State, etc, 2021 LHC 3546.

² Scheinin, Martin, 2000. "Fundamental Standards of Humanity", Background Paper; International Expert Meeting, Stockholm 22-24 February 2000.

terms enunciated in International Conventions drafted and ratified under the auspices of the United Nations Organizations.

The Universal Declaration of Human Rights adopted on 10th December, 1948 is considered as a yardstick in the field of Human Rights at International Level. Through this Declaration, for the very first time in Human History, Universality of Human Rights was recognized globally. This Declaration was proclaimed by the General Assembly of the United Nations Organizations. At the time of its enactment, however, with the passage of time, it has become customary law which is recognized and adopted by a large number of nations or people. The Preamble of this Declaration categorically states that the Member States “Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms”.¹ The Declaration puts an Obligation on all states to constitute Competent National Tribunals as an effective remedy against violation of fundamental rights contemplating everyone to have the right to remedy. An Article of the Declaration states that “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”².

Pakistan is also a signatory to the ICCPR which also puts obligation on the State to ensure the rights of its individuals within the territory. The Covenant asserts that “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”³. The Covenant further goes to require a State for ensuring provision of remedies against violation of the rights ordained therein. “Each State Party to the present Covenant undertakes: To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official

¹ Preamble to the UDHR, 1948.

² Article 8 of the Universal Declaration of Human Rights, 1948

³ Article 2 (1) of the International Covenant on Civil and Political Rights, 1966.

capacity”¹. In this way the Country is under obligation to ensure compliance of Rights envisaged in this Covenant.

Pakistan is also a party to another International Convention of great importance that is the CRC which entered into force in 1990 in line with the provisions of Article 49 of the UN Charter. The Convention is based on protection of children who are under the age of eighteen (18) years or till he obtains maturity earlier under the National Laws. This Convention also contains a part to be performed by the State party to the Convention through ensuring rights of the children granted under the Convention in accordance with principles laid down in the Charter of the U.N. The Convention says: “States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members”²

There is another International Covenant specifically dealing with certain rights of women which is called Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). This Act was adopted on 18th December, 1979, however, entered force on 3rd September, 1981. This Convent emphasizes on equality between men and women and negates any kind of gender discrimination. This Convent also demands the State Parties to the Covenant to ensure the rights provided in the Covenant and bring Laws of a particular nation in conformity with the provisions of this Convent. The Convention describes that “States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination”³.

Likewise, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly of the UNO

¹ Article 2 (3) (a) Ibid.

² Article 2(2) Convention on the Rights of Child, 1989.

³ Article 2(C) of the Convention on the Elimination of All Forms of Discrimination against Women, 1979.

came into force on 26th June, 1986 being part of International Human Rights Law ordains prohibition of any kind of torture and degrading behavior towards the human persons. Preamble to the said Convention recognizes obligations of State Parties towards protection of Human Rights as “Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms”¹. Furthermore, the Convention manifestly binds the State Parties to take effective measures to prevent torture in the following words: “Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”². The Convention further elaborates responsibilities of a State Party to declare all Acts of Torture as offences. The Convention articulates that “Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture”³.

The International Community organized a World Conference on Human Rights in Vienna on 25th June, 1993 by adopting a Declaration with the name of “Vienna Declaration and Program of Action”. Through this Conference, once again the Sovereign Member States revived the purpose behind establishment of the UNO and reaffirmed their pledge as well as commitment for protection of Human Rights while reiterating Human Rights as top priority by the States. This Conference again required the Member States to fulfill their solemn commitments towards the Rights of their subjects in line with the Charter of the UNO. This conference manifests that “Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments”⁴.

State Obligations under Religion:

Pakistan is one of the States which emerged on the Globe in the name of religion and religious ideology. The forefathers of the Pakistan Movement were pioneers of setting up an Islamic System in the Country. The Founder of the National “Quaid-e-Azam Muhammad Ali Jinnah) while making a broadcast talk to the

¹ Preamble to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

² Article 2 (1) Ibid.

³ Article 4 (1) Ibid.

⁴ Article 1 of the Vienna Declaration and Programme of Action, 1993.

Community of the United States of America in Karachi on 26th February, 1948 propounded that Pakistan should be a Democratic State with essential Principles of Islam. He asserts that “I do not know what the ultimate shape of this constitution is going to be, but I am sure that it will be of a democratic type, embodying the essential principles of Islam. Today, they are as applicable in actual life as they were 1,300 years ago. Islam and its idealism have taught us democracy”¹. The Country, after its natal, adopted a legal and judicial system based on both Western or English and Islamic Laws. The Islam was declared to be State Religion and it was categorically enshrined in the Constitutional document that “The State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void”². Islam is a religion of peace which proclaims equality for every citizen of the state irrespective of his/her sex, race, caste or religion and emphasizes upon the State Authorities to ensure the human rights. Teachings of Islam stem from the Holy Quran and the deeds as well as sayings of the Last Holy Prophet Muhammad (PBUH). In the Holy Quran, Allah has time and again declared equality among Citizens viz. viz. rights. “O mankind, indeed we have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing and Aware”³. The Holy Quran further describes necessity of dispensation of justice as “O you who have believed, be persistently standing firm for Allah, witnesses in justice, and do not let the hatred of a people prevent you from being just. Be just; that is nearer to righteousness. And fear Allah; indeed, Allah is [fully] aware of what you do”⁴. Sarojini Naidu, during a talk observed that “The sense of justice that Islam encompasses “is one of the most wonderful ideals of Islam, because, as I read in the Qur'an, I find those dynamic principles of life, not mystic but practical ethics for the daily conduct of life suited to the whole world”⁵. Islam puts responsibility of safeguarding rights of its subjects as enunciated by Allah Almighty through his last

¹ Quaid-e-Azam Founder of Nationa https://pakistan.gov.pk/Quaid/messages_page3.html.

² Article 8 (2) of the Constitution of the Islamic Republic of Pakistan, 1973.

³ The Holy Quran 49: 13

⁴ The Holy Quran 5: 8.

⁵ Lectures on “The Ideals of Islam” see Speeches and Writings of Sarojini Naidu, Madras, 1917, p. 167

messenger. “Islamic law has divinely mandated rights for individuals in their specific roles as spouse, parent, child, relative, neighbor, friend, and even foe. In its distribution of rights and responsibilities, Islam has addressed the social, racial, gender, and sectarian issues plaguing the world. Although much of the world, including Muslim nations, have yet to fully implement it, the model of rights and mutual responsibilities enshrined in Islam, has a tremendous potential for individual and social reform¹”. The Second Caliph of Islamic Hazrat Umar Ibn-e-Khattab recognizing state responsibility qua the protection of rights of its citizens wrote a letter to one of his Governors namely Abu Musa Al Ash’ ari directing him to ensure protection of rights and refrain from infringement of the rights of the citizens. The letters says “Let not a judgment you rendered yesterday, and that you have [later] reflected upon, receiving guidance towards the correct view, prevent you from restoring a right. Rights are ancient and cannot be annulled. Restoring a right is by far better than persisting in a manifest error”². In the words of Kamali: “Islam as seen since the first century of Islamic calendar has endowed a certain privacy and protection to the individuals of the society where Muslims need law of Shariah not to tell them what to believe but how to believe and live life according to the divine laws. The negligence in protection of these rights or any imbalance between them can cause a society to expose people to danger and collapse at the cost of justice in the society”³. In this way, the State of Pakistan being an Islamic Republic is under obligation to protect the rights of its citizens as per teachings of the Islam. S.A. Rehman elaborating the importance of human rights in Islam has observed that “The right of a person is considered very important and sacred in Islam law. “In all the sources of Islamic law beginning from Quran to ijti had there is a mention of the concept of human right”⁴. Another Islamic and Religious Scholar Nayyar Shamsi portrayed the importance of human rights and origin in Islam articulating that “Looking at from the historical aspect the concept of human rights in Islam is as old as man himself. Islam has declared and guaranteed it 1400 years ago and every Muslim is bound to accept

¹ Azra Awan: “Human Rights in Islam”.

² Imran A. K. Nyazee: “The Unprecedented Analytical Arrangement of Islamic Laws (2007)”.

³ Muhammad Hashim Kamali, “Principles of Islamic Jurisprudence.”

⁴ S.A. Rehman: “The Quran and Fundamental Human Rights, 1978”.

and follow it”¹. The last sermon delivered by the Holy Prophet (PBUH) known in the history as “Khutba Hajja tul Widah (the departing/farewell, sermon of Pilgrimage)” ordered his followers and believers to obey the rights of the others and avoid usurping the same. This sermon occupies unparalleled and unprecedented place in the field of Human Rights. In this Farewell Sermon, the Holy Prophet (PBUH), not only set equality for all irrespective of any kind of discrimination but also emphasized on observance of rights of the others. He said: “O People, just as you regard this month, this day, and this city as Sacred, so regard the life and property of every Muslim as a sacred trust. Return the goods entrusted to you to their rightful owners. Hurt no one so that no one may hurt you”². A Muslim Scholar S.M. Haider, ascertaining responsibility of an Islamic State regarding safeguarding and violation of human rights has underlined that “These rights are enjoyed by all of its citizens and cannot be violated by the state or another individual. No war no emergency and no crisis can authorize anybody including the state to suspend or abrogate the fundamental rights given by the Quran and Sunnah to the Muslim citizens and non-Muslims living in an Islamic state these rights are enjoyed by all of its citizens and cannot be violated by the state or another individual. No war no emergency and no crisis can authorize anybody including the state to suspend or abrogate the fundamental rights given by the Quran and Sunnah to the Muslim citizens and non-Muslims living in an Islamic state”³. Shah Wali Allah précising the importance and status of human beings in a religious perspective states that “One of the chief objectives that have been pursued by all the Prophets, is to prevent oppression in society which is the biggest source of human misery”⁴.

The Supreme Court of Pakistan interpreting and tracing the responsibilities of an Islamic State declared that “Islamic Welfare State is under obligation to establish a society, which is free from exploitation wherein social and economic justice is guaranteed to its citizens”⁵.

¹ Nayyar Shamsi, “Human Rights and Islam, 2003”

² Ahmed Sakr: “The Farewell Speech of the Prophet (SAW): It’s Universal Approach, 1988”.

³ S.M. Haider, “Islamic Concept of Human Rights, P. 107, 1978”.

⁴ Shah Wali Allah: “Hujjah, vol.2, p. 151”.

⁵ Ikram Bari and 254 Others vs. National Bank of Pakistan through President and Others, 2005 SCMR 100

Constitutional Obligations:

Constitution of a State whether written or unwritten is a source of guarantee rights to its citizens. The same is the case with the Constitution of the Islamic Republic of Pakistan. “The full implementation of human rights requires both a conducive social order and a set of guarantees specifically designed to protect them. The Universal Declaration of Human Rights includes rights that are conducive to a stable social order and provides procedural guarantees to ensure that its human rights provisions are protected”¹. The country, after its birth, went through many constitutional developments including three (03) Constitutions and all these constitutions not only recognized fundamental rights to citizens but also required the State Machinery to protect those rights. The Objectives Resolution adopted on 12th March, 1940 occupies the status of grund-norm in constitutional history of the country. This Resolution provided basis for constitution of the country and remained integral part of all the constitutions imposed in the country. This Objectives Resolution has been made substantial part of the Constitution of the Islamic Republic of Pakistan, 1973 (Now in enforce) through eighteenth (18th) amendment in 2010 by insertion of Article 2-A in the Constitution. It was pledged by the framers of this Resolution that the Futuristic Constitution of the Country would guarantee fundamental rights which obligates the State to safeguard rights of its individuals. The Constitution of the Islamic Republic of Pakistan, 1973 manifests that “To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen. Wherever he may be, and of every other person for the time being within Pakistan”². Furthermore, Constitution of the Country not only puts obligation on the state for violation of rights of its citizens but also debars the State from drafting any law inconsistent with the rights propounded by the Constitution itself. “Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void. (2) The State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such

¹ Human Rights and Constitution Making; United Nations Human Rights Office of the High Commissioner.

² Article 4 (1) of the Constitution of the Islamic Republic of Pakistan, 1973.

contravention, be void”¹. The Constitution further elaborates that “All citizens are equal before law and are entitled to equal protection of law”². In this way, it is constitutional obligation of the State of Pakistan to protect the legitimate rights guaranteed by the Constitution to its subjects.

Conclusion:

The State owes four dimensional obligations towards protecting rights of its citizens whether the affected persons is an accused or complainant or a layman. The first one is a natural phenomenon which occurs impliedly without any documentation. In this scenario under the social contract, every citizen is responsibility of the State because in order to enjoy protection of State all the individuals surrender many rights to the State. The other backdrop of the picture is International Human Rights which the State has ratified and signed. All the Universal Instrument pertaining to Human Rights require their member states to protect the rights of their citizens even they are accused of a case or allegation. These documents have also enshrined some basic and fundamental rights especially to provide justice to the accused persons of State. The third element contributing towards State’s obligations is Islam being state religion of the country. The Islam commands its believers equality among all the citizens and dispensation of justice without any discrimination. The Islamic Injunctions also make the Islamic States bound to ensure rights of all the individuals even they are accused of an offence. Last but not the least, Pakistan is a constitutional state and constitution of the country also emphasizes on the State Machinery to ensure justice, equality and protection of rights of the subjects.

¹ Article 8 (1) & (2) Ibid.

² Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973.

Chapter No: 4: Rights of Accused persons & Principles of Natural Justice.

Introduction:

Principles of Natural Justice are those principles which accrue innately during every trial and these principles do not require any distinction because they are inherent with the human beings like other human rights. Mustafa Rashid Issa elaborating the principles of nature justice goes on to conclude that “Natural justice is another name for common sense justice rules of natural justice are not in codified form these principles imbedded or ingrained or inbuilt in the conscience of human being. It supplies the omission made in codified law and helps in administration of justice. Natural justice is not only confined to ‘fairness’ it will take many shade and color based on the context. Thus natural justice apart from ‘fairness’ also implies reasonableness, equity and equality. They are neither cast in a rigid mould nor can they be put in legal straitjacket. These principles written by nature in the heart of mankind, they are immutable, inviolable, and inalienable”¹. Compliance of these principles of natural justice in any administration of justice guarantees the dispensation of justice in that country. The UDHR, 1948 a landmark judgment in recognition of human rights at international level identifies the principles of natural justice while deciding any matter. The Declaration says that “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”². “The term natural justice signifies basic principles of justice, which are made available to everyone litigant during trial. Principles of natural justice are founded on reason and enlightened public policy. These principles are adapted to circumstances of all cases. Such principles are applicable to decisions of all governmental agencies, tribunals and judgments of all courts. In the present world the importance of principle of natural justice has been gaining its strength and it is now the essence of any judicial system”³. Regarding the principles of natural justice Lord Esher MR has observed that “Natural justice is a pervasive fact of secular law where a spiritual touch enlivens

¹ Mustafa Rashid Issa: “Natural Justice in Islam and Humans Law, 2016”.

² Article 10 of the Universal Declaration of Human Rights, 1948.

³https://www.cusb.ac.in/images/cusbfiles/2020/el/law/PRINCIPLE%20OF%20NATURAL%20JUSTICE_6th%20Sem.pdf

legislation, legislation and adjudication to make fairness a creed of life. It has many colour and shades, many forms and shapes”¹. This fact was further elaborated by the Supreme Court of India in a case by holding that “Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of authority”². The Supreme Court of India also made observation in another case that “principles of natural justice are those rules which have been laid down by courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, Quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice”³.

Audi Alteram Partem:

This Latin legal maxim “audi alteram partem” which is considered to be the essence of any judicial system literally means “listen to the other or let the other side be heard”. This maxim stems from the principle of natural justice and is recognized an inevitable part of a fundamental justice. “Audi alteram partem – from Latin: “Listen to the other side” or “let the other side be heard as well”. It is fundamental legal principle in which each party is entitled to a fair hearing and given the opportunity to respond to evidence against them. This principle forms the basis of the two requirements of natural justice (procedural fairness), the other being the rule against being heard before an independent and “uninterested” adjudicator”⁴.

De. Smith has observed that “Where a statute authorizes interference with properties or other rights and is silent on the question of hearing, the courts would apply rule of universal application and founded on plainest principles of natural justice”⁵. With regard to this principle of Natural Justice, William Wade and Christopher Forsyth have gone to make observation that “the principles of natural justice operate as implied mandatory requirements, non- observance of which

¹ Vionet VS Barrat, (1885) 55 LJQB 39.

² Mohinder Singh Gill v. Chief Election Commissioner: AIR 1978 SC 851

³ Canara Bank V. V K Awasthi: Air 2005 6 SCC 321

⁴ <https://sklawyers.com.au/dictionary/audi-alteram-partem>.

⁵ De. Smith: “Judicial Review of Administrative Action”.

invalidates the exercise of power”¹. The Court of Common Pleas in the U.K first of all took up this principle and laid down in an esteemed judgment by Chief Justice Sir William Erle holding that “Although there is no positive word In the statute requiring that the party shall be heard, yet justice of common law would supply the omission of Legislature”². The Indian Supreme Court while following this principle laid down in a judgment that “even where there is no specific provision for showing cause, yet in a proposed action which affects the rights of an individual it is the duty of the authority to give reasonable opportunity to be heard. This duty is said to be implied by nature of function to be performed by the authority having power to take punitive or damaging action”³. The Supreme Court of Canada also upheld this principle by holding that “The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions”⁴. A domestic legislation of Pakistan also demonstrates this principle of fairness of trial or any other proceedings in the following enactment: “Where, by or under any enactment, a power to make any order or give any direction is conferred on any authority, office or person such power shall be exercised reasonably, fairly, justly and for the advancement of the purposes of the enactment. (2) The authority, office or person making any order or issuing any direction under the powers conferred by or under any enactment shall so far as necessary or appropriate, give reasons for making the order or as the case may be for issuing the direction and shall provide a copy of the order or as the case may be the direction to the person affected prejudicially”⁵.

Islamic View of Audi Alterm Partem:

Islam is a religion of equality and commands equal treatment for all the citizens through its divine principles. On one hand, Islam stresses upon punishing the wrong doer and on the other hand, condemns punishing the wrong person. In other words Islam preaches punishment for the actual offender having afforded him

¹ William Wade and Christopher Forsyth: “Administrative Law”.

² Cooper v Wands worth Board of Works (1863) 14 CB(NS) 180

³ Smt. Maneka Gandhi v. Union of India and another: AIR 1978 SC 597

⁴ Baker v. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 [1999].

⁵ Section 24-A, The General Clauses Act, 1897.

opportunity of hearing through fairness of proceedings. The Holy Quran is a source of guidance for the followers of Islam and this divine scripture contains a plenty of verses commanding justice. “Indeed, Allah commands justice, grace, as well as courtesy to close relatives. He forbids indecency, wickedness, and aggression. He instructs you so perhaps you will be mindful”¹. The same type of a commandment occurs at another part of the Holy Quran which manifestly dictates the followers of the Holy Quran to do justice as “O believers! Stand firm for Allah and bear true testimony. Do not let the hatred of a people lead you to injustice. Be just! That is closer to righteousness. And be mindful of Allah. Surely Allah is All-Aware of what you do”². At another point of the Holy Quran, Allah Almighty has ordered its believers to do justice at any cost even it is against themselves or against their kith and kin. The Holy Quran says: “O believers! Stand firm for justice as witnesses for Allah even if it is against yourselves, your parents, or close relatives. Be they rich or poor, Allah is best to ensure their interests. So do not let your desires cause you to deviate from justice”. If you distort the testimony or refuse to give it, then know that Allah is certainly All-Aware of what you do”³. The Holy Prophet (PBUH), the last messenger and apostle of Allah Almighty, who through his life not only himself did justice and treated all on the basis of equality but also advised his believers to follow his route. The Prophet of Islam, through his deeds and sayings set norms to be followed by the individuals and the society collectively. The Holy Prophet, numerous times, emphasized on doing justice within and outside the society by the Muslims and declared justice sine qua non for a peaceful society. At one occasion, the Holy Prophet declared the person doing justice and avoiding injustice among those who shall be catered with shelter by God on the day is resurrection. The Holy Prophet (PBUH), on the other hand, forbids from doing injustice as “O my slaves, I have forbidden injustice for myself and forbade it also for you. So avoid being unjust to one another”⁴. The same like narration was also made by the Holy Prophet at another juncture in the following words: “Beware of injustice, for injustice will be darkness on the Day of Resurrection”⁵.

¹ The Holy Quran 16: 90

² Ibid 5: 8

³ The Holy Quran 4: 135

⁴ Sahih Muslim.

⁵ Sahih Muslim Saying (Hadith) No: 2578

The Judicature of Pakistan Audi Altrem Partem:

The Supreme Court of Pakistan which being the Apex Court of the Country is not only interpreter of statutes made by the legislature but also provides guidance to other judicature of the State subordinate to it. The Supreme Court of Pakistan also observed fulfillment of the principles of natural justice and deviation from such principles declared violation of human rights in its large judgments. The court in a case observed that “Deviation from such like Rules and Regulations is bound to violate principles of natural justice enshrined in the maxim “audi alteram partem” i.e no one is to be condemned unheard---Where adverse action is being contemplated to be taken against the person/persons, he/they would have at least right to defend such action”¹. The court further observed in another esteemed judgment holding that “Such employee had a vested right of hearing before any order adverse to his interest was passed by virtue of principle of audi alteram partem which was the least requirement---Authorities, in the present case, had passed an order influenced mainly by the fact that the appointment of the employee was illegal, ab initio, void and against the rules---Was incumbent upon authorities that before passing order of terminating / removal of employee, he should have been issued show cause notice and an opportunity of hearing granted and thereafter well consider order should have been passed”². The Supreme Court of Pakistan while taking into consideration the importance of the principles of natural justice in Islamic Perspective interpreted it and laid down that violation of this principle amounts to vitiation of proceedings. The Court held that “The principle of natural justice enshrined in the maxim “audi alteram partem” is one of the most important principles and its violation is always considered enough to vitiate even most solemn proceedings. Where adverse action is contemplated to be taken against the person/persons, he/they would have a right to defend such action, notwithstanding the fact that the statute governing their rights does not contain provision of the principles of natural justice and even in absence thereof, it is to be read / consider as a part of such statute in the interest of justice. It is important to note that the principle of natural is now made inbuilt part of civil contracts. This principle originates from Islamic system of justice as evidenced from

¹ Pakistan International Airlines Corporation (PIAC) versus Nasir Jamal Malik and others, 2001 SCMR 934 (d)

² Arshad Jamal versus N. W.F.P Forest Development Corporation and others, 2004 SCMR-468

historical episode when Iblees was scolded for having misled Hazrat Adam (P.b.h) into disobedience of Allah's command. Almighty Allah called upon Iblees to explain his conduct and after having an explanation from him, which was found untenable, he was condemned and punished for all time to come. The principle of natural justice has to be applied for all kinds of proceedings strictly and departure there-from would render subsequent actions illegal in the eye of law"¹.

Rule against Biasness:

This is another rule of Natural Justice and considered a fundamental right. This rule is based on Latin Maxim "Nemo Judex in Causa Sua" with literal meaning "No one shall be a judge in his own cause". This principle is commonly known as Rule against Bias. This rule enunciates the principle that the person trying an accused must be impartial and independent having no interest whatsoever in the matter. This fact is universally acknowledged that biasness exists in human instinct and any kind of bias may prejudice the proceedings of a case leading to violation of rights of the litigants. To avoid such sort of violation, this principle evolved with the passage of time and developed by the Courts and Jurists to guarantee fairness of proceedings. Mathew Groves explaining the rule against bias and its importance in a trial comments: "the rule against bias is one of the two pillars of natural justice. The hearing rule governs the procedural features of decision making. The bias rule governs the attitude or state of mind of the decision maker. This article examines the foundation of the bias rule and the fiction of the "fair minded and informed observer" by whose conclusions claims of bias are determined. The article considers whether the objective test that supposedly underpins the notion of the fair minded and informed observer does little more than provide a cloak for the subjective views of the judges who apply that doctrine"². Lorne Sossin has distinguished between impartiality and independence of a Tribunal in the following words: "Impartiality is not the same as independence, although the two are closely linked. Impartiality is the tribunal's approach to deciding the cases before it. Independence is the structural or institutional

¹ Hazara (Hill Tract) Improvement Trust through Chairman and others versus Mst. Qaiser Elahi and others: 2005 SCMR-678 (a).

² Mathew Groves "The Rule Against Bias" [2009] UMonashLRS 10

framework which secures this impartiality, not only in the minds of the tribunal members but also the perception of the public”¹.

Human Rights Instruments and Element of Biasness:

The UDHR of 1948 the milestone in the Human Rights worldwide requires its signatories to ensure protection of Human Rights. This Declaration makes bound its member states to provide impartial justice through independence tribunals or courts. The Declaration also provokes the member states to set up Tribunal as Recourse for violation of any of the fundamental rights of its masses. The Declaration states that “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”². The Declaration also stipulates the principle of Natural Justice regarding impartiality and independence of the Tribunals Constituted by the State. The Declaration categorically requires its members to oust the element of bias in any kind of proceedings and the States shall make sure equality in fair and public hearing by an independent and impartial tribunal. The Declaration articulates: “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”³. Another Universal Human Rights Instrument with the name and style of ICCPR contains specific provisions regarding equality before Law and guarantee impartiality and independence of the Tribunals. This Covenant calls for the States to ensure fairness of proceedings through impartial and independence tribunals established by the Domestic Legislations of the Country. This Covenant also declares that the States members to this Covenant must comply with principles of natural justice while determination of a criminal charge or rights and obligations in a civil suit. The Covenant goes on to entail: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”⁴. The European Convention on Human Rights adopted in 1950 is also considered a prominent

¹ Lorne Sossin, “The Uneasy Relationship Between Independence and Appointments in Canadian Administrative Law”.

² Article 8 of the Universal Declaration of Human Rights, 1948.

³ Article 10 of the Universal Declaration of Human Rights, 1948.

⁴ Article 14 (1) of the International Covenant on Civil and Political Rights, 1966

document entailing Human Rights for the European Union and its citizens. Notwithstanding, this Document is inspired by the UDHR and ICCPR besides other universal instruments, nonetheless, it has its own significance in the arena of Human Rights. This Convention also reiterates the fact of Principles of Natural Justice. The Convention goes on to contain: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”¹.

Religious Vision of Biasness:

Islam is admittedly a divine religion which repeatedly emphasized on the dispensation of justice without any discrimination. Allah Almighty in the Holy Book i.e. The Holy Quran has commanded the believers to dispense justice on the basis of equality. It has been repeatedly ordered by God not to decide a case on the basis of personal likes and dislikes involving the element of biasness rather there must be fairness irrespective of any kind of personal involvement. The Holy Quran says that “O believers! Stand firm for Allah and bear true testimony. Do not let the hatred of a people lead you to injustice. Be just! That is closer to righteousness. And be mindful of Allah. Surely Allah is All-Aware of what you do”². The Holy Quran contains another commandment ordering its believers to make any decision between people fairly which eradicates the element of biasness. The translation of the Holy Quran states that “Indeed, Allah commands you to return trusts to their rightful owners; and when you judge between people, judge with fairness. What a noble commandment from Allah to you! Surely Allah is All-Hearing, All-Seeing”³. The Holy Prophet (PBUH) stressed upon dispensation of justice on merit basis without personal involvement even the matter pertains to the family of a Juror. A very famous saying of the Holy Prophet (PBUH) foresees the person doing justice without bias, to be in hell. It states that “The judges are three kinds: two judges are in Hellfire and one judge is in Paradise. A man who judges without the truth while he knows it, he is in Hellfire. A judge who has no knowledge and violates the rights of people, he is in

¹ Article 6 (1) of the European Convention on Human Rights, 1950.

² The Holy Quran 5: 8

³ Ibid 4: 58.

Hellfire. A judge who judges with the truth, he is in Paradise”¹. “Being one of the basic principles of Islamic jurisprudence, law remains aloof disregarding caste, creed, social status or monetary position of a person in society. Justice should be meted out without any favouritism or prejudice”². The Holy Prophet Muhammad (PBUH), while awarding sentence to a woman coming of a prestigious tribe guilty of theft remarked a statement which is preserved in the Islamic Law as divine saying of the Holy Prophet according to which he said: “Many a community ruined itself in the past as they only punished the poor and ignored the offences of the exalted. By Allah, if Muhammad's (My) daughter Faatimah would have committed theft, her hand would have been severed”³.

Literary Observations as Rule Against Biasness:

Commenting on the contribution of element of impartiality in proceedings, Chief Justice Lord Heward ruled that “It is not merely of some importance, but is of fundamental importance that justice should not be done, but should manifestly and undoubtedly be seen to be done”⁴. Lord Justice Delvin giving observation about biasness of a tribunal or presiding officer of a court held that “The Court looks at the impression which would be given to other people. Even if it was impartial as could be, nevertheless if right minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he could not sit. And if he sits, his decisions cannot stand”⁵. Justice Frank observed that “If, however, bias and partiality be defined to mean the total absence of preconceptions in the mind of the Judge, then no one has ever had a fair trial, and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with the predispositions and the process of education, formal and informal, create attitudes which precede reasoning in particular instances and which therefore, by definition are prejudices”⁶. Lord Denning, through an esteemed judgment made an observation that

¹ Sunan Al-Tirmidhī 1322

² Muhammad Iqbal and Dr. Khursheed Iqbal: “Shariah and Evolution of fair Trial Rights in Pakistan”.

³ Sahibh Ul Bukhari

⁴ Rex vs. Sussex Justices: (1924 1 KB 256).

⁵ Regina vs. Barnsley Licensing Justices (1960 2 Q.B 187).

⁶ Justice Frank of United States in re. Linahan 138 F.2d 650 (2d Cir. 1943).

“the reason is plain enough. Justice must be rooted in confidence and confidence is destroyed when right minded people go away thinking, the Judge was biased”¹.

Pakistan And the Element of Biasness:

The State of Pakistan, notwithstanding, has not so far regulated any specific enactment to promulgate this principle, however, there are verdicts of Superior Judiciary of the Country and statements coupled with observations and commentary by literary person who have developed and monitored this phenomenon. Justice (r) Dr. Munir Ahmed Mughal has gone to observe role of an impartial and independent judge as “It is well established principle of justice that at the time of adjudicating between the two parties, the justice should be administered without any fear or favour. There are two things which come in the way of judging a thing fairly, namely either the party appearing before the judge is his relation or friend who has rendered some service for him in the past or for whom he had got certain affections or there are other strains which incline the judge to show his inclination towards that party or the party is an enemy or the one who has committed some wrong to the judge or his relations or friends in the past and a feeling of revenge is thus hidden in his heart. These are two stages where the real test of the judge comes in. He must stand out firmly for justice caring for neither party nor their relationship not their social status and should fear none but God and should administer justice according to nothing but law and law alone”². The August Supreme Court of the Country in a judgment observed that “Supreme object with the Court always is to administer even handed justice to parties in a criminal case without unreasonably leaning in favour of a party, nor depriving the other party of its due right to offer defence. Court must keep the scale of justice even to both sides and the conduct of proceedings must visibly be reflective of its clean and unbiased mind in every sense”³. The Criminal Code ruling the proceedings of criminal courts in Pakistan has put a ban on a Judge or Magistrate to try a case where there is apprehension of bias. It mandates that “No Judge or Magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try any case to or in which he is a party, or personally interested, and no

¹ Metropolitan Properties Ltd. v. Lunnon [1968] 3 WLR 694.

² Justice © Dr. Munir Ahmad Mughal: “Islamic Concept of Human Rights (2012)”

³ Rehmat Ali vs. The State (2005).

Judge or Magistrate shall hear an appeal from any judgment or order passed or made by himself¹.

Conclusion:

The principles of natural justice are those principles which do not require any recognition rather their existence is linked with nature. These principles commonly consist of non condemning of unheard and negation of element of biasness in judicial proceedings. The Universal Human Rights Documents deprecated the violation of these rights by laying down many provisions. The Islamic view point is also based on support and observing these principles of justice associated with nature and curtailed injunctions compatible with those provisions contained in Universal Human Rights Instruments. The Criminal Code governing the regularization of the procedure of criminal courts also prohibits the Presiding Officer of a Court to try any case involving his personal interests. The Courts in Pakistan and literary persons of the legal fraternity also promoted this concept and emphasized on safeguarding legitimate rights of an accused granted under the relevant Statutory Provisions.

¹ Section 556 of the Cr.P.C.

Chapter No: 5: Accused Persons and Right to Fair Trial.

Introduction:

Fair trial means impartial proceedings under the provisions of the relevant law. The right to fair trial is a basic right which is applicable to everyone in the free world. The right to fair trial is the most debated right granted to an accused person during the trial. Without this provision under the law people could suffer persecution resulting from treating them as criminals even there is no cause for such. The right to fair trial is associated with other human or rights like right of hearing, right of life and liberty and due process of law. Zia Ullah Ranjha describing the importance and ingredients of right to fair trial observes that “Under the International Human Rights Law, the right to a fair trial is to cater protection for the right to life and liberty of the person”¹. The right to a fair trial is interpreted as administration of justice by the courts in accordance with the legislated norms to safeguard rights of the litigants. The rules associated with the fair trial refer to provide a fair and public hearing with the presumption of innocence till proved guilty through the independent and impartial courts/tribunals.

Muhammad Athar Waheed elaborating the status of right to fair trial in criminal administration of justice of the country has observed that “In civil cases the right to fair trial extends to both parties. However, in criminal cases it leans towards the accused. One could argue, should a victim of an offence not have the same right as the accused to be accorded a ‘fair trial’? Already, in our criminal justice system, a complainant or a victim is at the mercy of mostly ill-prepared and disinterested public prosecutors, and inefficient and poor police investigation. The conviction rate stands as a testament to this fact”².

Right to Fair Trial and Human Rights Instruments:

The Instruments providing for human rights and their protection are a source of guidelines for the member states. Most of the member states make their domestic legislations pertaining to human rights based on these instruments. So, the Human Rights Instruments also contain and express this right of the accused persons.

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

² Muhammad Ather Waheed, ‘Victims of Crime in Pakistan’

http://www.unafei.or.jp/english/pdf/RS_No81/No81_14PA_Waheed.pdf.

The UDHR curtails that “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”¹. The same right has also been envisaged by the ICCPR which demonstrates that “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”². The Charter of Human Rights adopted by the Arabian Country also entails this right for the persons accused of any offence. The Charter concludes that “Everybody has the right to a fair trial in which sufficient guarantees are ensured, conducted by a competent, independent and impartial tribunal established by law, in judging the grounds of criminal charges brought against him or in determining his rights and obligations. State Parties shall ensure financial aid to those without the necessary means to pay for legal assistance to enable them to defend their rights”³. The European Convention on Human Rights also identifies this right for the citizens of their member states. The Convention underlines that “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”⁴. American Declaration of Human Rights, which is also an important Declaration in the field of Human Rights categorically recognizes this right and makes an articulation to this effect as “Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature”⁵.

The Organization of Islamic Cooperation usually referred to as OIC drafted its own Declaration at Cairo where many principles regarding observance of human rights were enunciated and rights bestowed by Islam to its believers were officially given the shape of writing. The Declaration demonstrates that “All

¹ Article 10 of the UDHR.

² Article 14 (1) of the ICCPR.

³ Article 13 (1) of the Arab Charter on Human Rights.

⁴ Article 6 (1) of the ECHR.

⁵ Article 8 (1) of the American Declaration on Human Rights.

individuals are equal before the law, without distinction. The right to due process and justice is guaranteed to everyone through competent, independent authorities and impartial tribunals, established by law, within a reasonable time”¹. The United Nations Counter Terrorism Implementation Task Force elaborating other rights associated with the fair trial has explained that “The right to a fair trial is one of the fundamental guarantees of human rights and the rule of law, aimed at ensuring the proper administration of justice. It comprises various interrelated attributes and is often linked to the enjoyment of other rights, such as the right to life and the prohibition against torture and other forms of cruel, inhuman or degrading treatment or punishment”².

Right to Fair Trial and Laws in Pakistan:

The Constitution of the Islamic Republic of Pakistan 1973, after signing the ICCPR and CAT, incorporated an Article enunciating the right to fair trial through an amendment in 2010 which 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”³. The Supreme Court of Pakistan while endorsing this right in a world famous Yusuf Raza Gillani (the ex-prime minister of the country) Case observed that “the right to fair trial being prolonged recognized had now been entrenched in our Jurisdiction under Constitutional guarantee”⁴. The same like remarks were also given by His Lordship Mr. Justice Nasir ul Mulk in a judgment holding that “The legislature perhaps intended to give it the same meanings as is broadly, universally recognized and embedded in our own jurisprudence. Thus, in order to determine whether the trial of respondent by this Bench violates the condition or of a fair trial we have to fall back on the principles enunciated in this respect”⁵. Mr. Fahad Ahmed Siddique explaining the right to fair trial in the perspective of the Constitution of the Country commented that “Notwithstanding, Article 10-A of the Constitution does not only relate to

¹ Article 22 (a) of the Cairo Declaration of the Organization of Islamic Cooperation on Human Rights.

² Counter Terrorism Implementation Task Force: “Basic Human Rights Reference Guide; Right to a Fair Trial and Due Process in the Context of Countering Terrorism (October, 2014)”.

³ Article 10 (A) of the Constitution of the Islamic Republic of Pakistan, 1973.

⁴ Supreme Court of Pakistan awarded sentence to the Ex-Prime Minister of Pakistan in Suo Moto Contempt petition; PLD 2012 SC 553, para 27;

⁵ District Bar Association Rawalpindi vs. Federation of Pakistan; PLD 2015 SC 401.

proceedings before a Court or Tribunal but also extends to all proceedings governing the determination of rights and liabilities of a person¹”.

The Hon’ble Lahore High Court, Lahore elaborating and acknowledging fair trial a right in Pakistan ruled that “Pakistan is a constitutional democracy which rests on rule of law which in turn is pillared on fairness and due process. Now with article 10-A of the Constitution, it is fundamental rights of the petitioners that the process of determination of civil and criminal rights must at every step pass the test of fairness and procedural propriety”². This learned Court, has recently gone to hold that “The right to fair trial is considered to be the bedrock of rule of law and is closely linked with human rights protection, more particularly the rights to life, liberty and property. The said right is now universally recognized as a norm of international human rights law. Universal Declaration of Human Rights, 1948, is of paramount importance as it is considered to be declaratory of the customary international law. However, there are other multilateral treaties like the International Covenant on Civil and Political Rights, 1966, and regional human rights instruments, including the European Convention for Protection of Human Rights and Fundamental Freedoms (European Convention), American Convention on Human Rights (American Convention) and African Charter on Human and Peoples' Rights (African Charter), which impose a binding obligation on the States who have ratified them to guarantee the aforesaid right to their people”³.

Rights Ancillary to the Fair Trial:

The concept of Fair Trial is a vast expression and has been given very wide meanings by the Philosophers, Legal Writers, Thinkers and Courts. However, there is not a unanimous definition of the Right to a Fair Trial. None of the Human Rights Instruments provides comprehensive and pragmatic explaining of the term rather all the documents provide just for a fair trial. The Courts of different countries including Pakistan and Law Experts, Philosophers, Researchers and Thinkers have given a variety of other ancillary rights associated with this right by declaring it a vast meaning. Every definition given by any quarters is contains ancillary rights different

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

² Liaqat Ali Chughtai vs. Federation of Pakistan.

³ Muhammad Nawazish Ali vs. Family Judge etc., 2021 LHC 3750.

from the others. Like definition of the term, there is no consensus about ingredients or ancillary rights to this particular right. A minute thrashing of the definitions and ingredients to this right, the common and well understood and renowned ancillary rights to this exclusive right may be traced out which might include but not limited to this sole right.

Due Process:

The term “Due process” possesses great significance in a judicial and legal system which demonstrates that the process for any kind of proceedings ordained by the Law should be observed while deciding rights or liabilities of the parties involved. This term also means that nothing against the law should be done during determination of any criminal charge or civil rights. Due process associated with legal proceedings means that all the legal requirements and formalities given under the relevant law must be fulfilled. “Due process is a course of legal proceedings according to rules and principles that have been established in a system of jurisprudence for the enforcement and protection of private rights. In each case, due process contemplates an exercise of the powers of government as the law permits and sanctions, under recognized safeguards for the protection of individual rights”¹. The first and foremost right of an accused in a criminal justice system is ensuring due process during the whole of the proceedings whether it is pre-trial or trial stage. The formalities put by the Law of the Land must be fulfilled from first step of reporting the matter to the Investigating Agency till final adjudication by the Court. What the law states should be done in that particular way. “Due process of law is interpreted here as rules that are administered through courts of justice in accordance with established and sanctioned legal principles and procedures; with safeguards for the protection of individual rights. The common interpretation of the concept of due process is broader and may include the rules applicable in case of deprivation of liberty, rules related to property and rules related to administrative procedures. Here the concept is limited to the rules applicable to the administration of justice”². “Due process of law is a constitutional guarantee that prevents governments from impacting citizens in an abusive way. In its modern form, due process includes both procedural

¹ <https://www.britannica.com/topic/due-process>.

² <https://www.humanrights.is/en/human-rights-education-project/comparative-analysis-of-selected-case-law-achpr-iachr-echr-hrc/the-rights-to-due-process/what-is-due-process>.

standards that courts must uphold in order to protect peoples' personal liberty and a range of liberty interests that statutes and regulations must not infringe. It traces its origins to Chapter 39 of King John's Magna Carta, which provides that no freeman will be seized, dispossessed of his property, or harmed except "by the law of the land," an expression that referred to customary practices of the court. The phrase "due process of law" first appeared as a substitute for Magna Carta's "the law of the land" in a 1354 statute of King Edward III that restated Magna Carta's guarantee of the liberty of the subject"¹. This factum was interpreted by Edward Coke, the Chief Justice of the British Court of Common Pleas in 1610, where it was held that "any statute that is contrary to "common right and reason" must be declared void"². Mr. Justice Stephen J. Field Judge of the Supreme Court of the United States of America giving a dissenting opinion in a landmark judgment laid down the dictum. "The Slaughter-House Cases were a series of cases before the U.S. Supreme Court that considered the extent to which the Fourteenth Amendment placed limits on the states' legislative powers. While the majority of the court interpreted the amendment narrowly, Justice Stephen J. Field's dissenting opinion argued that the amendment protected individuals from state legislation that infringed upon their "privileges and immunities" under the federal Constitution. Field's dissenting opinion is often seen as an important step toward the modern doctrine of substantive due process, a theory that the Court has developed to defend rights that are not mentioned in the Constitution"³. Due Process has been recognized as a fundamental right in different Human Rights Instrument and ensuring it through courts is obligatory on all the states parties to that particular Human Rights Instruments. "The guarantees of procedural fairness and due process of law are important elements of the right to equality before courts and tribunals and to a fair trial, which is guaranteed in international human right law. Realization of this right requires that the administration of justice is able to guarantee a set of specific rights and that it can ensure that no one will be deprive, in procedural terms, of the right to claim justice. In particular, this right encompasses, among other

¹ <https://www.loc.gov/exhibits/magna-carta-muse-and-mentor/due-process-of-law.html>.

² English Law - Dr. Bonham's Case - Coke, Parliament, Court, and Power - JRank Articles <https://law.jrank.org/pages/6484/English-Law-DR-BONHAM-S-CASE.html#ixzz75mQeIznG>

³ <https://www.loc.gov/exhibits/magna-carta-muse-and-mentor/due-process-of-law.html>.

things, the guarantee of equality of arms and of non-discrimination between the parties to the proceedings”¹.

Islamic Concept of Due Process:

In Islamic perspective of due process, Islam gave a criminal justice system, based on rules and principles entailed in the Holy Quran and Sunnah of the Holy Prophet (PBUH), to its followers. Islam being a religion of peace and quality for all does believe equal protection of rights of every citizen even during a criminal trial. This is the Islamic Teachings which call for punishment on every guilty and insists on doing justice at any costs. With regard to the concept of Due Process in Islamic Criminal Justice System, Sadiq Reza has observed four principles based on due process in Islamic Criminal Justice System. “This Part begins the task of identifying rules and principles of due process that the Quran, Sunna, and classical jurisprudence set out to govern the enforcement of the criminal prohibitions and penalties that those same sources specify. Four such rules or principles are discussed here, each bearing on a discrete aspect of the criminal process chronologically and conceptually. These aspects are: (1) investigation, which encompasses searches and seizures, interrogations, and other methods state officials employ to detect crime, identify suspected offenders, and collect evidence; (2) prosecution, which includes deciding what criminal charges to bring against an alleged offender and formally proceeding with those charges; (3) adjudication, which means the process of reaching a verdict according to evidence (facts) introduced at trial and the governing legal rules; and (4) imprisonment, which can be a form of punishment but can also occur before an offender is convicted (i.e., pretrial detention). For each of these aspects, the rule or principle discussed has been selected because of its prominence in the classical sources and its representativeness as a rule that bears on enforcing Islam's criminal prohibitions and penalties but appears to be ignored today. No single theme fully unites the list that follows, but one common thread stands out and perhaps predominates: how many obstacles are erected to investigating, prosecuting, and

¹ <https://www.icj.org/chapter-5-standards-and-techniques-of-review-in-domestic-adjudication-of-esc-rights-2/5-5-procedural-fairness-and-due-process-of-law>.

punishing a person for violating any of the most serious of sharia crimes (i.e., the hudud')”¹.

Pakistani Vision of the Due Process:

The Constitution of the Islamic Republic of Pakistan, 1973, too, recognizes the right of due process for an accused and guarantees 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”². The August Supreme Court of Pakistan laid down principle that “Although from the very inception the concept of fair trial and due process has always been the golden principles of administration of justice but after incorporation of Article 10-A in the Constitution of the Islamic Republic of Pakistan, 1973 vide 18th Amendment, it has become more important that due process should be adopted for conducting a fair trial and order passed in violation of due process may be considered to be void”³. The Apex Court in another esteemed judgment observed that “Collective human wisdom, since times immemorial has not been able to evolve a better or more humane procedure to prosecute and convict offenders other than due process of law, with procedural safeguards under Constitutional guarantee of fair trial, to hand down sentences mandated there-under on the preponderance of legal evidence, without compromising on the principle of inherent human dignity”⁴. The Supreme Court of Pakistan, once again made an esteemed observation that “It is now a fundamental right that determination of civil rights and obligations of a person shall be through fair trial and due process”⁵. In this backdrop, it is an essentiality of the criminal administration of justice that case of an accused must undergo the scrutiny of due process by accomplishing all the legal requirements and formalities as envisaged in the concerned legislations. The August Supreme Court of Pakistan while laying down the importance of due process of law in criminal proceedings interpreted that “Collective human wisdom, since times immemorial has not been able to evolve a better or more humane procedure to prosecute and convict offenders other than *due process of law*, with procedural

¹ Sadiq Reza, “Due Process in Islamic Criminal Law”.

² Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973.

³ Babar Hussain Shah and another vs. Mujeeb Ahmed Khan and another. 2012 SCMR 1235.

⁴ Ali Raza alias Peter etc. vs. The State etc.

⁵ Nadeem Asghar Nadeem and others v. Province of the Punjab and others [2015 CLC 1509 : 2016 PLC (C.S.) 155]

safeguards under Constitutional guarantee of fair trial, to hand down sentences mandated there under on the preponderance of legal evidence, without compromising on the principle of inherent human dignity”¹.

Expeditious Justice:

States are responsible for protection of fundamental rights of their citizens within the constitutional and legal parameters set by them. In this scenario it is also obligatory upon a State to establish a mechanism for timely and early disposal of matters relating to the fundamental rights. Civil administration of justice in general and criminal administration of justice in particular require expeditious disposal of cases because in criminal case sometimes accused under custody and they cannot be held in prison for indefinite period without determination charges against them. Verily, option of release on bail by the accused persons is available, but each and every accused cannot enjoy this concession. So, it is necessary for the Courts trying criminal case to finally adjudicate upon the matter by adopting expeditious measures. Expeditious dispensation of justice is not only a matter of concern in the Universal Human Rights Instruments but also constitutional and legal phenomenon of judicial system of the country. A Legal Maxim “justice delayed is justice denied”, first literally used phrase as “justice too long delayed is justice denied” in his letter from Birmingham Jail, by Martin Luther King Jr.² is at the back of the development of this concept. Chief Justice of the U.S.A Mr. Justice Warren E. Burger in 1970 during his address to the American Bar Association while articulating importance of expeditious justice remarked that “A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy that confidence and do incalculable damage to society: that people come to believe that inefficiency and delay will drain even a just judgment of its value”³.

Human Rights Instruments and Expeditious Justice:

The world community is also well aware of the delay in disposal of matters especially criminal in nature. Many of the Universal Human Rights Declarations and Conventions contain provisions requiring the member states to

¹ Ali Raza alias Peter etc. & Muhammad Iqbal alias Balu etc.vs. The State etc.,

² https://en.wikipedia.org/wiki/Justice_delayed_is_justice_denied.

³ What's Wrong With the Courts: The Chief Justice Speaks Out (address to ABA meeting, Aug. 10, 1970)

provide inordinate justice to their citizens. The most prominent of these Conventions is the ICCPR which requires the State Parties to ensure speedy and expeditious disposal of cases involving accused persons detained in custody. The Covenant states that “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”¹. This Convention further guarantees and elaborates the conclusion of trial of an accused without unnecessary delay leading to expeditious justice. The Covenant lays down that “To be tried without undue delay”². The same fact has also been followed by the ECHR requiring its member states to conclude trial of the persons arrested within short span of time. The Convention demonstrates that “Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial”³.

The Concept of Expeditious Justice in Pakistan:

The Constitution of the Country binds the State to ensure provision of inexpensive and expeditious justice. “The State shall--- ensure inexpensive and expeditious justice”⁴. The Supreme Court of Pakistan in its world famous Aasia Bibi case held that “As per Article 37 of the Constitution, it is the duty of the State to ensure that justice is dispensed inexpensively and expeditiously to the People of Pakistan”⁵. “The responsibility of a judge ought to embody in himself the fair conduct and a fair decision. The personal traits of honesty and endeavour to dig out truth will add to the credibility of a judge in the dispensation of justice as there are many occasions during the course of trial where an unbiased composed treatment is required to be meted out at a situation when parties are in conflict on an issue in the court of law and by restraining his remarks and sometimes against his own wishes the judge has to maintain a balance between two sides”⁶. The August Supreme Court of

¹ Article 9(4) of the ICCPR, 1966

² Article 14 (3) (C) Ibid.

³ Article 5 (3) of ECHR, 1950.

⁴ Article 37 (d) of the Constitution of the Islamic Republic of Pakistan, 1973.

⁵ Mst. Asia Bibi vs. The State etc. PLD 2019 SC 64.

⁶ http://www.shc.gov.pk/downloads/source_files/JUDICIAL%20CONF%20PAPER.

Pakistan in a well known case acknowledging the right of speedy trial for an accused held that “It is a universal principle of law that to have a speedy trial is the right of every accused person, therefore, unnecessary delay in trial of such cases would amount to denial of justice”¹.

Presumption of Innocence:

An individual has inherent right to enjoy his life according to his choice within the limits prescribed by Law; however, overt acts are part of human instinct. It is also human nature to blame the others on the basis of revenge or sometimes due to some ulterior motives. Moreover, criminal administration of justice stipulates punishments for commission of offences which may go to severe degree harming an innocent person. It is also a fact that in many societies like Pakistan involvement of large number of people in one criminal case is a common trend where most of the innocent persons face hardships of trial either being outright innocent or by dint of others’ actions. This human nature rendered development of this principle by burdening the complainant/prosecution to prove a charge against an accused beyond any reasonable doubt and till such proof declared the accused persons to be innocent. Jeremy Bentham believes that “the guilty must be provided an opportunity to escape the punishment”². In English Legal System, this concept was introduced by Lord Sankey through a judgment by holding that “In referring to the presumption of innocence as a common law rule of evidence, I mean the ‘golden thread’ that runs ‘throughout the web of English Criminal Law’”³. Right to be presumed innocent is a rule of evidentiary law but its importance is totally based in criminal administration of justice. The Bombay High Court, while interpreting the presumption of innocence in a case ruled that “No man can be convicted of an offence where the theory of his guilt is no more likely than the theory of his innocence”⁴.

Human Rights Documents and Presumption of Innocence:

The Human Rights deeds have enormously endorsed the right of presumption of innocence to an accused. The landmark document in the history of human rights is considered to be the UDHR which provided basis and guidelines for

¹ Adnan Prince vs. The State: 2017 PLD Supreme Court 147.

² Jeremy Bentham; “Rationale of Judicial Evidence” 238-39 (Fred B. Rothman & Co. 1995).

³ Woolmington vs. DPP; [1935] AC 462 (House of Lords).

⁴ Emperor Vs. Shivdas, (1913) 15 BOMLR 315, 19 Ind Cas 507

other such type documents. The said Declaration to the extent of this extinctive right to be presumed innocent till proven guilty manifests that “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence”¹. Another Human Rights Convention elucidating civil and political rights stamps this right by articulating that “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law”². The Convention adopted by the European Community curtailing human rights is also in the field which enshrines the same right to be enjoyed by the accused persons in any criminal case. The convention lays down that “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”³. American Declaration on Human Rights, though a regional document like ECHR, yet possesses great significance in determination of numerous principles has also acknowledged this right vividly by exploring that “Every person accused of a criminal offence has the right to be presumed innocent as long as his guilt has been proven according to law”⁴. The European Court of Human Rights especially set up for resolving Human Rights Violation related matters recognizing this right held that “It involves questions of the burden and standard of proof in criminal proceedings as well as the treatment of an accused person that may undermine the presumption of innocence. The right applies to all stages of criminal proceedings, from the time a person is suspected of having committed a criminal offence until and if convicted”⁵.

Islamic Concept of the Presumption of Innocence:

Islam, being a divine religion, has recognized countless rights to the citizens which though are somewhat misconceived by some Critiques and Authors. The Islamic Injunctions are not away from the recognition of this fundamental right to the accused persons belonging to an Islamic State.

¹ Article 11 (1) of the UDHR.

² Article 14 (2) of the ICCPR.

³ Article 6 (2) of the ECHR.

⁴ Article 8 (1) of the American Declaration of Human Rights.

⁵ European Court of Human Rights, *Allenet de Ribemont v. France*, Application No. 15175/89 (1995), para. 37.

The Holy Prophet mentioned this fact repeatedly in his sayings and performed in his daily deeds. One of the most prominent sayings of the Holy Prophet (PBUH) categorically makes a stipulation regarding observance of this right by the state until prosecution proved its case. This prominent saying has been referred to by Bassiouni as “The principle of the presumption of innocence is applicable both to criminal legislation and the implementation of it. In fact, in an early hadith (recorded sayings of the Prophet by his companions), the Prophet stated: “Had men been believed only according to their allegations, some persons would have claimed the blood and properties belonging to others, but the accuser is bound to present positive proof”¹. A same like saying/Hadith has also been narrated by the said author by quoting that “The Prophet said: “avoid using circumstantial evidence in hudud”, which are the most serious of all crimes because they are explicitly mentioned in the Qur’an. Referring to this hadith, Aisha (the wife of the Prophet) reported that the Prophet also said: “Avoid condemning the Muslim to hudud whenever you can, and when you can find a way out for the Muslim then release him for it. If the Imam errs it is better that he errs in favor of innocence [pardon] than in favor of guilt [punishment]”². Tajuddin al-Subki, one of well founded religious scholars has made another attribution to the Holy Prophet (PBUH) by mentioning that “One of the basic presumptions in the Islamic criminal law is that the accused is presumed innocent unless proven guilty. This maxim is deduced from the original maxim, Al-Aîl brÉ’tu al-dhimmat”, that is, ‘The basic presumption is innocence’³.

The Islamic Community in comparison to other regional instruments chalked out some documents to promulgate the laws enunciated by the religion which are still in the field as a source of guidance for the Muslim Countries of the region who are members to those enactments. The Declaration adopted by the OIC at Cairo by members of the said Organization which ordains that “A defendant is innocent until his/her guilt is proven, through due process, by a final judgment by a competent court, established by law, in which he/she shall be given all the guarantees of defence

¹ Bassiouni, note 8, at 44 (Citing Al Baihagi, The 40 Hadith of Imam al Nawawi, No. 33.)

² Bassiouni, note 8, at 43 (Citing Al Turmuzy, No. 1424; Al Baighagi, No. 8/338; Al Hakim, No. 4384)

³ 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.

and fairness”¹. Another document of importance drafted by the Muslim World just to reiterate the rights granted by Islam to its followers and believers also gives place to this right by elucidating that “A defendant is innocent until his guilt is proven in a fair trial in which he shall be given all the guarantees of defence”². The Arabian Countries in response to other Western or English Enactments emitting human rights developed their own charter to the extent of countries situated in Arabian Region. No doubt, this is a regional document but it focuses on the not only the members but also a source of inspiration for non member Muslim States. The Charter manifestly recognizes this right for the citizens of the member states to requiring its members to ensure protection of the right. The relevant provision of the Charter quoted here goes on to state that “The accused shall be presumed innocent until proven guilty at a lawful trial”³.

Judicature of Pakistan and Presumption of Innocence:

As far as right to be presumed innocent until proved guilty in Pakistan is concerned, there are two aspects viz. this right. Some statutes explicitly put some embargoes on the enjoyment of this right by the accused persons while others admit this right in letter and spirit. The Courts of the Country also paid considerable heed to this right. The ATA, 1997 enforced in the country does not recognize this right rather it stipulates that any prohibited substance in possession shall be deemed to be his belonging. The Act lays down that “Any person having in possession any explosive substance with or without explosive devices without lawful justification or having been unlawfully concerned with such explosives substance and devices, shall be presumed, unless contrary is proved, that the explosive substance was for the purpose of terrorism”⁴.

Another special law known as CNSA, 1997 also curtails the same like proposition where a person in possession of any contraband or narcotics is presumed to be guilty. The Act states in an articulate manner that “In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has

¹ Article 22 (C) of The Cairo Declaration of the Organization of Islamic Cooperation on Human Rights

² Article 19 (E) of The Cairo Declaration on Human Rights in Islam.

³ Article 16 of the Arab Charter on Human Rights.

⁴ Section 27 (A) of ATA.

committed an offence under this act”¹ and where in the course of an investigation for an offence committed under this Act or any other law for the time being in force, any document is produced or furnished, or has been seized from the custody or control of any person, the Special Court shall- presume, unless the contrary is proved, the truth of the contents of such document”².

On the other hand, Superior Judiciary of the Country has taken another view by upholding this principle of presumption of innocence. The Supreme Court of Pakistan held that “presumption of innocence is cornerstone of the administration of justice”³. The Supreme Court of Pakistan also observed in another case that “Presumption of innocence remains throughout the case until such time the prosecution on the evidence satisfies the Court beyond reasonable doubt that the accused is guilty of the offence alleged against him”⁴.

The Lahore High Court, Lahore in a case followed the same principle and approach as adopted by the Apex Court of the Country holding that “It is cardinal rule of criminal law that an accused is presumed to be innocent until prosecution proves its case against him beyond shadow of reasonable doubt”⁵.

Another judgment of a Pakistani Superior Court lays down a principle of presumption of innocence by declaring that “Fundamental principle of criminal justice is that an accused person is always presumed to be innocent unless prosecution established his guilt beyond shadow of reasonable doubt. Fair and expeditious trial is right of an accused”⁶.

Right to Life:

Human life is the most important of all the other living organisms in this world and enjoyment of life is a fundamental right of individuals. Right to life is not confined to just life rather it extends to all the other necessities connected with life. It is a principle settled by all the legislations that no one should be deprived of his life except under the law. The essence of all the Human Rights Instruments and other Enactments is to save the human life. However, there is another aspect of the

¹ Section 29 of CNSA.

² Section 30 (C) of the CNSA.

³Suo Moto action concerning allegation of deal between Malik Riaz Hussain and Dr. Arsalan Iftikhar; PLD 2012 SC 664.

⁴Aasia Bibi vs. The State.

⁵ Liaqat Ali & Amanat Ali vs. The State (1998). National Law Reporter, Criminal. Lahore

⁶ Sardar Ibrahim’s Case, 2009.

phenomenon that there exist such circumstances as sanctions taking life of human being but in extra ordinary conditions and under the relevant law.

Right to Life under Human Rights:

The Universal Declaration of Human Rights maintaining this right of individuals guarantees that “everyone has the right to life, liberty and security of person”¹. Another Universal Covenant pertaining to Human Rights acknowledges the right to life as inherent right and puts injunctive responsibility to protect this right with prohibitive of arbitrary deprivation of this right. The Document contemplates “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”². The right to life has also been recognized by the CAT adopted by the General Assembly of the UNO in 1989 ensuring the right to life for children under the age of eighteen (18) years. The convention stipulates that “1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child”³. The ECHR also embodies this right and guarantees protection of this right in the following words: “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law”⁴. The same has also been embedded in American Convention on Human Rights where the protection of human life has been guarantee under the law by the members. The Convention articulates “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life”⁵. A document pertaining to Human Rights adopted by the Council of the League of Arab States adopted in 2004, too, recognizes the right to life and requires its member states to ensure protection of life stating that “Every human being has an inherent right to life. 2. This right shall be protected by law. No one shall be arbitrarily. No one arbitrarily be deprived of his life”⁶.

¹ Article 3 of the UDHR, 1948.

² Article 6 (1) of the ICCPR, 1966.

³ Article 6 of the CAT, 1898.

⁴ Article 2 (1) of the ECHR, 1950.

⁵ Article 4 (1) of the American Convention on Human Rights, 1969.

⁶ Article 5 of Arab Charter on Human Rights 2004

Right to Life under Statutes of Pakistan:

Constitution of the Country envisaging categorically enshrines this concept that “No person shall be deprived of life or liberty save in accordance with law”¹. This right was defined and interpreted by the Supreme Court of Pakistan for the very first time in 1994 through world famous Shehla Zia Case observing and holding that “Article 9 of the Constitution provides that no person shall be deprived of life or liberty save in accordance with law. The word ‘life’ is very significant as it covers all facts of human existence. The word ‘life’ has not been defined in the Constitution but it does not mean nor can it be restricted only to vegetative or animal life or mere existence, from conception to death. Life includes all such amenities and facilities which a person born in a free country, is entitled to enjoy with dignity, legally and constitutionally”². This esteemed and landmark judgment in the field of Human Rights further laid down that “The requirement of acquiring knowledge, to establish home, the freedoms as contemplated by the Constitution, the personal rights and their enjoyment are nothing but part of life. A person is entitled to enjoy his personal rights and to be protected from encroachments on such personal rights, freedom and liberties. Any action taken which may create hazards in life will be encroaching upon the personal rights of a citizen to enjoy life according to law”³.

Islamic Point of View about Human Life:

Islam gives more importance to human life than any other substance in this universe and this is the Islamic concept that no one should be killed without reason. This is the Holy Quran which declares killing of an innocent person amounting to killing of the whole humanity. Islam is the only religion in the world which not prohibits innocent killings but also commands to save the lives of others declaring it equivalent to saving the entire mankind. This notion propounded by the Islam demonstrates proactive importance of Human Life. At one juncture of the Holy Quran Allah Almighty has ordered “And do not kill the soul which Allah has forbidden [to be killed] except by [legal] right. This has He instructed you that you may use reason”⁴. Another verse of the Holy Quran ordains another Commandment

¹ Article 9 of the Constitution of the Islamic Republic of Pakistan, 1973.

² Ms. Shehla Zia and Ors. v. WAPDA P L D 1994 Supreme Court 693 Para No. 12

³ Ibid Para No. 13.

⁴ The Holy Quran 6: 151.

by Allah Almighty “That is why We ordained for the Children of Israel that whoever takes a life—unless as a punishment for murder or mischief in the land—it will be as if they killed all of humanity; and whoever saves a life, it will be as if they saved all of humanity.¹ ‘Although’ Our messengers already came to them with clear proofs, many of them still transgressed afterwards through the land”¹. Another Chapter of the Holy Quran articulates such like injunctions where Allah Almighty has categorically forbidden killing any person by the others. The Holy Quran says: “But whoever kills a believer intentionally - his recompense is Hell, wherein he will abide eternally, and Allah has become angry with him and has cursed him and has prepared for him a great punishment”². There are a number of sayings of the Holy Prophet scattered in various Books of Islamic and other Histories and Ahadith³ which promulgate respect for human life and strictly put a ban on killing of innocent persons. The Holy Prophet (PBUH) not only strictly prohibited killing of his innocent followers i.e. Muslims but also the other minorities/Non Muslims in an Islamic State. A saying of the Holy Prophet (PBUH) containing such injunction is available in Two (02) Books of Ahadith which reads as follows: “One who kills a man under covenant (i.e. a dhimmi) will not even smell the fragrance of Paradise”⁴. Another saying of the Holy Prophet (PBUH) portrayed in two Books of Ahadith also contain commandment to the State to not to deprive any of its citizens without law and cogent reasons. It says that “Life is a God-given gift and the right to life is guaranteed to every human being. It is the duty of individuals, societies and State to protect this right from any violation, and it is prohibited to take away life except for a Shari’ah prescribed reason”⁵.

Prevention against Arbitrary Arrest:

Every human being is born free and after human life, liberty of individuals occupies most prominent place in the field of Human Rights. The UN Human Rights Committee has explained arbitrary arrest in the following words: “arbitrariness is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. ... This means that remand in custody pursuant to lawful arrest

¹ Ibid 5: 32.

² Ibid 4: 93

³ Hadith is saying of the Holy Prophet (PBUH).

⁴ Sahih Ul Bukhari and Sunnan Abu Dawood: <https://www.iium.edu.my/deed/articles/hr/hr.html>.

⁵ Article 2 (a) of The Cairo Declaration on Human Rights in Islam, 1990.

must not only be lawful but reasonable in the circumstances. Remand in custody must further be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime”¹. Obviously, the criminal administration justice of Pakistan provides for arrest of the accused in non-bailable and cognizable cases, but this arrest should not be arbitrary and against the norms of the human rights identified by the Universal Instruments of Human Rights, Religious Scriptures, Constitution of the Country coupled with other Laws regulating the trial. There are certain provisions in the Cr.P.C. 1898 governing arrest of an accused but all of these provisions authorize Police Officer and under some peculiar circumstances to a private person to make an arrest on reasonable ground existing in the Case. On the contrary, any arrest or detention of an accused based on arbitrary or unreasonable grounds is gross infringement of individuals to enjoy the fundamental right of liberty. The UDHR, 1948 categorically acknowledges this fact that “Everyone has the right to life, liberty and security of person”². The Declaration further demonstrates that “No one shall be subjected to arbitrary arrest, detention or exile”³. The same has been further enshrined and elaborated by the ICCPR declaring that no person shall be arrested or detained without reasonable grounds provided by the relevant law of the land. The Covenant goes on to lay down that “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”⁴. This human right against arbitrary arrest and detention has also been acknowledged in another Instrument of Human Rights known and named as The Cairo Declaration which is based OIC. The Declaration holds that “Every person has the right to liberty and security. No one shall be subjected to arbitrary arrest or detention, kidnapping or enforced disappearances. No one shall be deprived of his/her liberty except on such grounds and in accordance with such procedures as are established by law”⁵. This factum is also understood and identified in another Islamic Human Rights document asserting that “It is not permitted without legitimate reason

¹ Communication No. 458/1991, A. W. Mukong v. Cameroon (Views adopted on 21 July 1994), in UN doc. GAOR, A/49/40 (vol. II), p. 181, para. 9.8; footnote omitted from the quotation; emphasis added.

² Article 3 of the UDHR, 1948.

³ Article 9 Ibid

⁴ Article 9 (1) ICCPR.

⁵ Article 4 (a) The Cairo Declaration of the Organization of Islamic Cooperation on Human Rights.

to arrest an individual, or restrict his freedom, to exile or to punish him”¹. There is another Instrument of Human Rights styled as The European Convention on Human Rights; though it is regional in nature, yet it contains the same right of prevention against arbitrary arrest and detention. The Convention stipulates that “Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law”². The American Convention on Human Rights also identifies this right and admits that “No one shall be subject to arbitrary arrest or imprisonment”³. The Human Rights Committee has held that “it is violated if an individual is arrested or detained on grounds which are not clearly established in domestic legislation”; in other words, the grounds for arrest and detention must be “established by law”⁴. Constitution of the Country promulgated in 1973 also strikes down and forbids the State to take any action which is fatal for life or liberty of its citizens. The Constitution goes on to prescribe that “no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law”⁵. The Constitution further puts liability on State and binds it not to deprive any of the citizens from his/her life or liberty arbitrary and without legal provisions. The Document articulates that “No person shall be deprived of life or liberty save in accordance with law”⁶.

Islam, being a religion of justice, also puts embargo on limiting liberty of citizens of an Islamic State. The Islamic Judicial System negates arrest and detention of an individual merely on the basis of suspicion. The Holy Quran repeatedly emphasized on dispensation of justice with due care and caution and ensures equality among all while delivering a verdict. One verse of the Holy Quran commands its believers that “When- ever you judge between people, you should judge with (a sense of) justice”⁷. According to an incident portrayed by Allamah Abu al-'A'la Mawdudi “It is related in the hadith that once the Prophet was delivering a lecture in the mosque, when a man rose during the lecture and said: "O Prophet of

¹ Article 20 Organization of Islamic Cooperation “The Cairo Declaration on Human Rights in Islam”.

² Article 5 (1) of the ECHR, 1950.

³ Article 7(3) of the American Convention on Human Rights, 1969.

⁴ Communication No. 702/1996, C. McLawrence v. Jamaica (Views adopted on 18 July 1997), in UN doc. GAOR, A/52/40 (vol. II), pp. 230-231, Para. 5.5.

⁵ Article 4(2) (a) of the Constitution of the Islamic Republic of Pakistan, 1973.

⁶ Article 9 of the Constitution of the Islamic Republic of Pakistan, 1973.

⁷ The Holy Quran 4: 58.

God, for what crime have my neighbours been arrested?" The Prophet heard the question and continued his speech. The man rose once again and repeated the same question. The Prophet again did not answer and continued his speech. The man rose for a third time and repeated the same question. Then the Prophet ordered that the man's neighbours be released. The reason why the Prophet had kept quiet when the question was repeated twice earlier was that the police officer was present in the mosque and if there were proper reasons for the arrest of the neighbours of this man, he would have got up to explain his position. Since the police officer gave no reasons for these arrests the Prophet ordered that the arrested persons should be released. The police officer was aware of the Islamic law and therefore he did not get up to say: "the administration is aware of the charges against the arrested men, but they cannot be disclosed in public. If the Prophet would inquire about their guilt in camera I would enlighten him." If the police officer had made such a statement, he would have been dismissed then and there. The fact that the police officer did not give any reasons for the arrests in the open court was sufficient reason for the Prophet to give immediate orders for the release of the arrested men"¹.

Conclusion:

As discussed earlier, there is no unanimity among Human Rights Instruments, Scholars and Law Experts about a concise definition, meaning and ingredients of elements associated with the term 'fair trial'. Different scholars and Courts interpreted this term in different ways by establishing multiple other rights subordinate to this exclusive right. Keeping in juxtaposition all the literature available on the subject, the most common rights ancillary to this right include due process, right to life, presumption of innocence, expeditious justice and prohibition against arbitrary arrest. All these rights hold ground vastly in many human rights instruments on both Western/English and Islamic Sides. The Constitution of Pakistan also guarantees the right to fair trial and due process. The Islamic view point is not different from other enactments regarding safeguarding this right of the masses. However, there are two Special Laws i.e. The ATA, 1997 and the CNSA, 1997 in Pakistan which apparently seem contradictory to the concept of presumption of

¹ Allamah Abu al-'A'la Mawdudi: "Human Rights in Islam [Chapter Three]"

innocence until proved guilty because both these Acts declare a person to be in possession of any substance prohibited by these Acts, guilty of the offence.

Chapter No: 6: Rights Inherent to the Person of Accused.

Introduction:

An accused person is also a human being and his being so is entitled to the rights guaranteed to other humans. The person who is even under an allegation of an offence is still human being and remains so. There are certain rights which are available to every human being whether he is complainant or accused and cannot be denied at all. On one hand, a person under charge of any offence enjoys the presumption of innocence and on the other hand, a person behind human is eligible to live his life under the protection of laws guaranteeing rights to a person even an accused. Importance of human life as earlier discussed in previous chapters under the Right to Life, prima-facie seems to be adequate to explore and saving a human life is entitlement of every person. The rights associated with the person of every individual cannot deprive a person to enjoy those rights. These rights, apparently, appear to be above the Investigation and Trial of an accused person. To the extent of an accused and in the backdrop of Pakistan, some of these rights may include as disused hereinafter.

Dignity of Man:

The word ‘dignity’ as defined by the Oxford English Dictionary stands for “the fact of being given honor and respect by people”¹. The essence of all the Laws concerning human rights is to preserve both human beings and humanity. No doubt, a criminal has been declared to be punished for his wrongs but he should neither be degraded nor the minimum standard of dignity assailed by humanity should be contravened even inflicting a corporal sentence on an accused. A basic and common theme of all the Documents containing human rights is to ensure personal freedom and respect for human dignity. Therefore, it is obligatory on each and every organ of a State to respect human dignity while treating an accused during pre-trial and post trial proceedings.

Universal Human Rights and Dignity of Man:

The very first Article of the UDHR, 1948 declares equal dignity for the whole of the human beings by portraying “All human beings are born free and equal

¹Oxford English Dictionary: <https://www.oxfordlearnersdictionaries.com/definition/american-English/dignity>.

in dignity and rights”¹. The ICCPR, 1966 in its preamble mandates the State Parties to the Covenant to considerably ensure respect for human dignity as envisaged under the Charter of the UN by stating that “Recognizing that these rights derive from the inherent dignity of the human person”². Interpreting the status of human dignity among human rights, The U.S. Supreme Court in a case involving the issue of consent of one of the parents prior to abortion delivered a landmark judgment observing that “Dignity is becoming commonplace in the legal texts providing for human rights protections in many jurisdictions. It is used frequently in judicial decisions, for example justifying the removal of restrictions on abortion in the United States”³. The preamble to the ICESCR adopted in 1966, however, entered the field in 1976, also recognizes the human dignity by mandating “Recognizing that these rights derive from the inherent dignity of the human person”⁴. Observing the status and importance of dignity among human rights Laura Valentini underlines that “Human rights are often defined as entitlements that human beings possess just by virtue of their inherent dignity. This conceptual link between human rights and inherent dignity is as popular as it is unhelpful. It invites metaphysical disputes about what, exactly, endows human beings with inherent dignity, and distracts from the core function of human rights: placing constraints on powerful actors, especially states”⁵. Human dignity captures the notion that every human being is uniquely valuable and therefore ought to be accorded the highest respect and care. Although this concept has a long history in philosophical thinking, it emerged with great force in the aftermath of the Second World War, having since then been recognized by the international community as the foundation upon which human rights are based. Indeed, since 1948, international human rights law is explicitly grounded on the assumption that people do have equal basic rights (i.e., that they have equally valid claims to basic goods) because these latter derive from the dignity which is inherent in every human being”⁶.

¹ Article 1 of the UDHR, 1948.

² Preamble to the ICCPR, 1966.

³ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 US 833 (1992).

⁴ Preamble to the ICESCR, 1966.

⁵ Laura Valentini: “Dignity and Human Rights: A Re-conceptualization 2017”.

⁶ Roberto Andorno: “Human Dignity and Human Rights, 2013”.

Islamic View of Human Dignity:

In Islamic philosophy dignity of man is as important as man himself and Islamic Injunctions pay much heed to this right. The Holy Quran ordains that “And We have certainly honored the children of Adam and carried them on the land and sea and provided for them of the good things and preferred them over much of what We have created, with [definite] preference”¹. The Holy Quran on another point lays down that “Allah does not forbid you from those who do not fight you because of religion and do not expel you from your homes - from being righteous toward them and acting justly toward them. Indeed, Allah loves those who act justly”². Sanctity of human life and dignity is so important in Islam that the Holy Quran has declared taking life of oneself tantamount to killing the whole humanity. It makes an articulation that “That is why We ordained for the Children of Israel that whoever takes a life—unless as a punishment for murder or mischief in the land—it will be as if they killed all of humanity; and whoever saves a life, it will be as if they saved all of humanity”³. A well known Islamic Scholar Muhammad Sharif Chaudhary while observing the importance of human dignity in Islamic point of view has gone to hold that “Islamic concept of human rights is essentially based on the idea of human dignity and equality of mankind. The dignity of a person is considered very important and basic right of the individuals in Islam law”⁴. Another Scholar of Muslim origin describes importance of this right referring the Holy Book by concluding that “The Quran prohibits arbitrary arrest or detention as the dignity of man must be respected and any criminal procedure that violates this principle has no legal effect”⁵. The Cairo Declaration of the OIC on Human Rights also embodies the importance of human dignity not only its preamble but also draw an Article recognizing this human rights. The Declaration describes that “Without prejudice to the principles of Islam which affirm human dignity and the respect and protection of human rights”⁶, and “All human beings form one family. They are equal in dignity, rights and obligations,

¹ The Holy Quran, 17: 70

² Ibid 60: 8

³ Ibid 5: 32

⁴ Muhammad Sharif Chaudry: “Human Rights in Islam, All Pakistan Islamic Education Congress, Lahore, 1st Edition, 1993”.

⁵ Muhammad Abdel Haleem, Kate Daniels and Abdel Omar Sherif, Eds., Criminal Justice in Islam: Judicial Procedure in the Shari`a, at 49.

⁶ Preamble to the Cairo Declaration of the OIC on Human Rights.

without any discrimination on the grounds of race, color, language, sex, religion, sect, political opinion, national or social origin, fortune, age, disability or other status”¹. The same fact embeds from another Islamic Documents containing rights of human beings which demonstrates that “All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, color, language, sex, religious belief, political affiliation, social status or other considerations”². Allamah Abu al-'A'la Mawdudi, a religion Scholar, Researcher and Thinker taking about importance of this right in the backdrop of Islam gives a description as “This is the law of Islam for the protection of honour which is indeed much superior to and better than the Western Law of Defamation. According to the Islamic Law if it is proved that someone has attacked the honour of another person, then irrespective of the fact whether or not the victim is able to prove himself a respectable and honourable person the culprit will in any case get his due punishment. But the interesting fact about the Western Law of Defamation is that the person who files suit for defamation has first to prove that he is a man of honour and public esteem and during the interrogation he is subjected to the scurrilous attacks, accusations and innuendoes of the defence council to such an extent that he earns more disgrace than the attack on his reputation against which he had knocked the door of the court of law. On top of it he has also to produce such witnesses as would testify in the court that due to the defamatory accusations of the culprit, the accused stands disgraced in their eyes. Good Gracious! what a subtle point of law, and what an adherence to the spirit of Law! How can this unfair and unjust law be compared to the Divine law? Islam declared blasphemy as a crime irrespective of the fact whether the accused is a man of honour or not, and whether the words used for blasphemy have actually disgraced the victim and harmed his reputation in the eyes of the public or not. According to the Islamic Law the mere proof of the fact that the accused said things which according to common sense could have damaged the reputation and honour of the plaintiff, is enough for the accused to be declared guilty of defamation”³.

¹ Article 1 of the Cairo Declaration of the Organization of Islamic Cooperation on Human Rights.

² Article 1 Cairo Declaration on Human Rights in Islam, 1990.

³ Allamah Abu al-'A'la Mawdudi: “Human Rights in Islam”.

Pakistan and Right to Human Dignity:

The Constitution of Pakistan promulgated in 1973 also confirms the fact of human dignity. The provision incorporated in the Constitutional Document vividly acknowledges human dignity as a fundamental right enjoyable by all the citizens of the State. The Constitution underlines that “The dignity of man and, subject to law, the privacy of home, shall be inviolable”¹. The Lahore High Court, Lahore in a judgment famous as “Hafiz Juanid Case” interpreting the right of dignity held that “Right to life and right to dignity are the epicenters of our constitutional architecture. Right to life recognizes the importance of accessibility to physical, social, economic and cultural environment, to health and education and to information and communication. Such a right, enables persons...to fully enjoy all human rights and fundamental freedoms. Every human being has the inherent right to life and to ensure its effective enjoyment...at par with the others. Right to life and right to dignity are deeply interwoven. The purpose of the constitutional right to human dignity is to realize the constitutional value of human dignity. Thus its purpose is to realize a person’s humanity. The dignity of a human being is his free will; the freedom to shape his life and fulfill himself. It is a person’s freedom to write his life story”². The said Court in another esteemed judgment termed as ‘Kumail Abbas Case’ make another ruling regarding human dignity. The Court ruled that “[T]he right to dignity is one of the cardinal principles of law and one of the most valuable rights, to be observed in every civilized society and more particularly in a country which claims to be an Islamic Country because Islam mandates that human values are to be guarded and protected. This principle is required to be extended further to the cases where any violation of the right to dignity is caused, because human dignity, honour and respect are more important than physical comforts and necessities”³.

The Supreme Court of Pakistan hearing a Suo Motu Constitutional Petition in 1994 stipulated that “According to Article 14(1) of the Constitution of Pakistan (1973) the dignity and self-respect of every man has become inviolable and this guarantee is not subject to law but is an unqualified guarantee. Accordingly, in all circumstances, the dignity of every man is inviolable and executing in public, even

¹ Article 14 (1) of the Constitution of the Islamic Republic of Pakistan, 1973.

² Hafiz Junaid Mahmood vs. Government of Punjab: PLD 2017 Lahore 1.

³ Dr. Kumail Abbas Rizvi VS University of Punjab etc. PLC (CS) 2017 Lahore 569

the worst criminal, appears to violate the dignity of man and constitutes, therefore, a violation of the fundamental right contained in Article 14”¹.

Security of Privacy:

Privacy of person, home and family is another phenomenon acknowledged by every legal field on one hand and on the other contravention to privacy has been strictly forbidden. A person, notwithstanding he is an accused, has right to privacy of his person, home and family and this right cannot be allowed to be infringed by the State Authorities. In Pakistan, there is a common trend that Law Enforcement Agencies conducting raids at houses of accused persons in order to affect arrest them. Entrance to the houses of accused persons at night times by the Police Officials even in day time is a common phenomenon in the country which is not taken into notice by high ups of the Investigating Agencies and the State. This act of the State Agencies is not only illegal and unethical but also contravention to the right of privacy guaranteed by Human Rights Instruments and domestic Laws of the Country.

International Human Rights and Privacy:

The International Human Rights enunciating rights of individuals have gone to observe the right of privacy for every one irrespective of their role in the society. There is no discrepancy regarding the right of privacy whether it is available to respectable of the town or nobles of the nation. On one hand, the Universal Instruments categorically proclaim equality of all before law and on the other hand, wording used by these deeds does not create any distinction between privacy of an accused and a complainant. The Universal Declaration of Human Rights being landmark for the subsequent documents acknowledging this right goes on to hold that “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attack upon his honour and reputation”². The same right has been enshrined by the ICCPR guarantying the privacy for everyone. The Covenant stipulates that “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and

¹ Suo Motu Constitutional Petition No.9 of 1991, [1994 SCMR 1028]

² Article 12 of the UDHR, 1948.

reputation”¹. The Convention on Rights of the Child also curtails provisions specifically protecting privacy of children. The Convention prescribes that “No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation”². The Convention on Human Rights adopted by the European Countries also requires its member states to ensure the right of privacy to its citizens. It embarks on to preserve that “Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the Law”³. The American Declaration on Human Rights has also enshrined the right of privacy and puts an embargo on contravention of this human right. It says that “No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence or of unlawful attacks on his honor or reputation”⁴.

Islam and Right to Privacy:

Islam, like other human rights, not only forbids its believers to violate the privacy of others’ but also requires protection of the same on part of the State. In Islamic injunctions, the right to privacy extends to both the State Machinery and the other individuals of the society. This religion is so conscious of the right of privacy that it commands to pose a sign of his arrival while entering someone’s own house either by knocking at the door or calling ‘Salam’ greeting. The Islamic Scriptures enshrined in the Holy Quran and sayings of the Holy Prophet (PBHU) do not allow entry to another’s house without explicit permission. The Holy Quran commands: “O believers! Do not enter any house other than your own until you have asked for permission and greeted its occupants. This is best for you, so perhaps you will be mindful”⁵. Another verse of this Holy Book categorically orders the follows to refrain from spying the others by saying that “O believers! Avoid many suspicions, ‘for’ indeed, some suspicions are sinful. And do not spy, nor backbite one another. Would any of you like to eat the flesh of their dead brother? You would despise that! And

¹ Article 17 (1) of the ICCPR, 1966.

² Article 16 (1) of the Convention on the Rights of the Child, 1989.

³ Article 8 (1) & (2) of the ECHR.

⁴ Article 11 (2) of the American Declaration of Human Rights.

⁵ The Holy Quran 24: 27.

fear Allah. Surely Allah is 'the' Acceptor of Repentance, Most Merciful"¹. 'Allamah Abu al-'A'la Mawdudi, commenting on right to privacy in Islam makes great analysis of the same by concluding that "The Prophet has gone to the extent of instructing his followers that a man should not enter even his own house suddenly or surreptitiously. He should somehow or other inform or indicate to the dwellers of the house that he is entering the house, so that he may not see his mother, sister or daughter in a condition in which they would not like to be seen, nor would he himself like to see them in that condition. Peering into the houses of other people has also been strictly prohibited, so much so that there is the saying of the Prophet that if a man finds another person secretly peering into his house, and he blinds his eye or eyes as a punishment then he cannot be called to question nor will he be liable to prosecution. The Prophet has even prohibited people from reading the letters of others, so much so that if a man is reading his letter and another man casts sidelong glances at it and tries to read it, his conduct becomes reprehensible. This is the sanctity of privacy that Islam grants to individuals. On the other hand in the modern civilized world we find that not only the letters of other people are read and their correspondence censored, but even their Photostat copies are retained for future use or blackmail. Even bugging devices are secretly fixed in the houses of the people so that one can hear and tape from a distance the conversation taking place behind closed doors. In other words it means that there is no such thing as privacy and to all practical purposes the private life of an individual does not exist"². The Charter adopted by the Arabian Muslim Countries in 2004 also envisaged the privacy of an accused as a human right and puts a ban on its infringement by laying down that "To have the security of his person and his private life respected in all circumstances"³. Another article of the Charter specifies a restriction on violation of right of privacy of a person by portraying "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence or to unlawful attacks on his honor and reputation"⁴. The Declaration of Cairo adopted by the Muslim Leaders also envisaged the right of privacy and forbids its violation by contending that "A private residence is inviolable in all cases.

¹ The Holy Quran 49: 12

² 'Allamah Abu al-'A'la Mawdudi: "Human Rights in Islam".

³ Article 16 (8) of the Arab Charter on Human Rights.

⁴ Article 21 (1) of the Arab Charter on Human Rights.

It will not be entered without permission from its inhabitants or in any unlawful manner, nor shall it be demolished or confiscated and its dwellers evicted”¹. The Holy Prophet on an occasion stated that “It is not allowed for Muslim to frighten another Muslim”².

Pakistan and the Right of Privacy:

The Constitution of the country has also declared privacy of home coupled with dignity of man an inviolable right by posing that “The dignity of man and, subject to law, the privacy of home, shall be inviolable”³. The Code of Criminal Procedure regulating the procedure of arrest in criminal cases in general offences also mandates the Police Officer can have access to a residing place under warrant and permission by the resident on demand. It stipulates that “If any person acting under a warrant of arrest, or any police officer having authority to arrest, has reason to believe that the person to be arrested has entered into, or is within, any place, the person residing in, or being in charge of, such place shall, on demand of such person acting as aforesaid or such police officer, allow him free ingress thereto, and afford all reasonable facilities for a search therein”⁴. The process of investigating offences, criminal justice system of the country is dominated by the Police and to regulate the conduct of this institution, the State enacted an Order in 2002. This Order declares unauthorized interfered with the privacy an offence by members the Police Force stipulating a limit of punishment by providing that “Whoever, being a police officer—without lawful authority, or reasonable cause, enters or searches or causes to be entered or searched any building, vessel, tent or place; shall, for every such offence, on conviction, be punished with imprisonment for a term, which may extend to five years and with fine”⁵. The Constitution as well as other Laws of the Country does not allow infringement to the right privacy even during arrest of an accused and there is clear cut punishment for contravention of this right by any authority. Moreover, a special order regulating conduct of Police Officials declares meddling with privacy of the locales through entry or search an offence punishable under that law.

¹ Article 18 (C) of the Cairo Declaration on Human Rights in Islam.

² Reported by Abu Dawood at No.5004.

³ Article 14(1) of the Constitution of the Islamic Republic of Pakistan, 1973.

⁴ Section 47 of the Cr.P.C. 1898.

⁵ Article 156 (a) of the Police Order, 2002.

Right of Self Defence:

Life of human beings is important of all other living organism and saving lives has the same prerogative, too. It is a fact admitted universally that protection of human rights on equality basis is prime responsibility of a State but state cannot accompany a person by all the time. In many circumstances, human life comes across imminent danger to it and requires retaliation by the individual under threat for survival. In such like situations, the person under likelihood of hurt or murder accrues the right of self defence. The International Covenant on Civil and Political Rights granting rights to the citizens of the member states prescribes that “Everyone has the right to the protection of the law against such interference or attacks”¹. The same is the concept regarding saving property of a person. A human being has not a fundamental right to own property by legal ways but also to protect it from aggression. In this scenario, the right to self defence exists to save a human life or property. This notion traces its roots in Roman law where attack on member of a family was considered equivalent to attack on the entire family and this phenomenon was termed as “dominium”. Subsequently, protection of human life and the right to own property coupled with saving it from any aggression was universally recognized and incorporated in Universal Human Rights Instruments. From Instrument Human Rights Document, this right penetrated other legislations. Dr. Martin Luther, a German Professor, gave the concept of using force against force in his Sermon on Usury in 1520 justifying the use of force and violence. He quotes: “vim vi repellere licet” which means “It is permitted to meet force with force”². The term “self defence” was used by Thomas Hobbes for the very first time in his book “Leviathan or The Matter, Forme and Power of a Commonwealth Ecclesiastical and Civil, commonly referred to as Leviathan”. He goes on to observe that “although some may be stronger or more intelligent than others in their natural state, none are so strong as to be beyond a fear of violent death, which justifies self-defense as the highest necessity”³. Defining the importance and status of right to self defence Susanne Sreedhar comments “The right of self-defense is simultaneously one of the least controversial and one of the most controversial subjects in moral, political and, legal philosophy. On the one hand, most

¹ Article 17 (2) of the ICCPR.

² Dr. Martin Luther: “On Trade and Usury 1519”.

³ https://en.wikipedia.org/wiki/Right_of_self-defense.

every agrees that there is a right of self-defense. On the other hand, there are widespread disagreements over what this right permits. It is morally permitted to cause death of an innocent bystander in self-defense”¹. Thereafter, John Locke, an English Philosopher recognized as “The Father of Liberalism” authored a book “Two Treatises of Government” propounding many new philosophical concepts. He, in this enormously reputed book, declared right to self defence as natural right. In the third (3rd) Chapter of his Second (2nd) Treaty, he prescribes the right of self defence and conditions for exercise of this right. He observes that “I should have a right to destroy that which threatens me with destruction: for, by the fundamental law of nature, man being to be preserved as much as possible, when all cannot be preserved, the safety of the innocent is to be preferred: and one may destroy a man who makes war upon him, or has discovered an enmity to his being, for the same reason that he may kill a wolf or a lion; because such men are not under the ties of the common law of reason, have no other rule, but that of force and violence, and so may be treated as beasts of prey, those dangerous and noxious creatures, that will be sure to destroy him whenever he falls into their power”².

International Scenario Regarding Right of Self Defence:

Right of self defence has been given importance in Human Rights Documents where it has been categorized that every person is endowed with a right to enjoy life and own property which cannot be usurped by the others. The right of a human being to enjoy his life, liberty and security has been recognized by the UDHR, 1948 envisaged as “Everyone has the right to life, liberty and security of person”³. The right of owning property is also a right universally recognized in the Declaration which states that “(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property”⁴. The same fact has also been associated in the ICCPR where it was held that no one shall be deprived of his/her inherent right to life. The Covenant articulates that “Every human being has the inherent right to life. This right shall be protected by law. No one

¹ Susanne Sreedhar: “Defending the Hobbesian Right of Self-defense, 2008”.

² John Locke: “The Two Treatises of Government 1689”.

³ Article 3 of the Universal Declaration of Human Rights, 1948.

⁴ Article 17 (1) & (2) of the Universal Declaration of Human Rights, 1948.

shall be arbitrarily deprived of his life”¹. Jan Hessbruegge commenting on the right of self defence available to an individual articulates that “Rights of resistance find their roots in the victims’ human rights, interpreted in accordance with the right to personal self-defense as a general principle of law. Forcible resistance can also be understood as an exercise of the right to an effective remedy for human rights violations where no effective remedy can be directly obtained from the state authorities. At the individual level, human rights entitle persons to use necessary and proportional force against present or imminent human rights violations by the state that pose a real risk of serious and irreparable harm. In particular, resistance is lawful against extrajudicial killings, torture, and inhuman treatment”².

Islam and Right of Self Defence:

The Holy Quran also ordains commandments concerning self defense. It manifests that “Permission [to fight] has been given to those who are being fought, because they were wronged. And indeed, Allah is competent to give them victory”³. Another juncture of the Holy Quran demonstrates that “And what is the matter with you that you fight not in the cause of Allah and [for] the oppressed among men, women, and children who say, "Our Lord, take us out of this city of oppressive people and appoint for us from Yourself a protector and appoint for us from Yourself a helper”⁴. Another place of the Holy Quran curtails that saver of a life is saver of the entire humanity. It prescribes that “It is as if he had slain mankind entirely. And whoever saves one - it is as if he had saved mankind entirely. And our messengers had certainly come to them with clear proofs. Then indeed many of them, [even] after that, throughout the land, were transgressors”⁵. At another point, the Holy Quran advises its followers to fight against the aggressors to save the innocent people. The Holy Book incorporates “And if two factions among the believers should fight, then make settlement between the two. But if one of them oppresses the other, then fight against the one that oppresses until it returns to the ordinance of Allah. And if it returns, then make settlement between them in justice and act justly. Indeed, Allah

¹ Article 6 (1) of the International Covenant on Civil and Political Rights, 1966.

² Jan Hessbruegge: “Human Rights and Personal Self Defense in International Law, 2017”.

³ The Holy Quran 22: 39

⁴ Ibid 4: 75

⁵ Ibid 5: 32

loves those who act justly”¹. The Holy Quran clears the self defender from any kind of liabilities upon him. It articulates that “And whoever retaliates after having been wronged - those have not upon them any cause for blame”². Identifying the right to defend one’s property the Holy Quran holds that “The cause is only against the ones who wrong the people and tyrannize upon the earth without right. Those will have a painful punishment”³. R. Peters, while discussing the source of self defence in Islamic underlines that “As the foregoing discussion must suggest, the question of self-defence is regulated in Islamic jurisprudence under various perspectives and angles. 104 That is, the legal basis of self-defence is derived from the Quran and other primary sources of Islamic law. Also, it has been ascertained that the Quran and other sources of Islamic jurisprudence defines the right to self-defence in a clear and affirmative matter”⁴. Making an observation about the right of self defense under Islamic Law AA al- Alfi in his renowned book states that “Therefore, the phrase legal basis for self-defence under Islamic jurisprudence means legal reasons underlying the concept of self-defence as specified by Islamic jurisprudence. On the other hand, the notion of jurisprudence encircles both practice and theory of law. In that vein, Islamic jurisprudence is viewed through the prism of an instrument which determines theoretical and practical dimensions of the concept of self-defence”⁵. The Arab Charter on Human Rights also identifies this bestows the right of self defense against any kind of aggression to protect someone’s life or privacy. Its prescription stipulates “Everyone has a right to the protection of the law against such interference or attacks”⁶. Another document of Human Rights adopted by the Muslim World in Cairo specifying human rights envisaged under Islam also describes the right of self defence by stating that “Everyone shall have the right to live in security for himself, his religion, his dependents, his honor and his property”⁷.

¹ The Holy Quran 49: 9.

² Ibid 42: 41

³ Ibid 42: 42

⁴ R. Peters. R Peters, *The Islamization of criminal law: A comparative analysis*, (1994) *die Welt des Islams*, 246-274.

⁵ AA Al-Alfi: “Punishment in Islamic Criminal Law (1982) Bassiouni MC *The Islamic criminal justice system*, 17”.

⁶ Article 21 (2) of the Arab Charter on Human Rights.

⁷ Article 18(a) of the Cairo Declaration on Human Rights in Islam.

The Statutes of Pakistan Governing Right of Self Defence:

This right has also been recognized by Pakistan in its constitution and there incorporations in the domestic legislation of the country which provide for protection of human life and right own property. Regarding protection of human life the constitution of the country underpins that “No person shall be deprived of life or liberty save in accordance with law”¹. The document granting the right to the citizens to acquire or dispose of property demonstrates that “Every citizen shall have the right to acquire, hold and dispose of property in any part of Pakistan, subject to the Constitution and any reasonable restrictions imposed by law in the public interest”². The constitutional document also identifies the fundamental right of citizens to protect their properties. With regard to this proposition, the transcript mandates that “No person shall be deprived of his property save in accordance with law”³. The Pakistan Penal Code 1860 which is a general Penal Code of the country containing punishments for various acts declared offences by legislature of the country, too, curtails this right of citizens of the country. The Code goes on to declare a thing done by any of the subjects in his/her defence not an offence within the parameters of the Criminal Justice System of the Country. The Code underlines that “Nothing is an offence which is done in the exercise of the right of private defence”⁴. Moreover, as per provisions of the Code, a person has right of self defence not to the extent of his own body or property but also to the others’. The relevant provision of the Code reads as “Every person has a right, subject to the restrictions contained in Section 99, to defend: First: His own body, and the body of any other person, against any offence affecting the human body; Secondly: The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass”⁵. No doubt, this Legal Document has admitted the right of self defence but it has also put a restriction or limit to exercise this right and when there is a way to escape, the right does not extent in favor of an individual. This fact has been embedded by the Code as “There is no

¹ Article 9 of the Constitution of the Islamic Republic of Pakistan, 1973.

² Article 23 of the Constitution of the Islamic Republic of Pakistan, 1973.

³ Article 24 (1) Ibid.

⁴ Section 96 of the PPC, 1860

⁵ Section 97 Ibid.

right of private defence in cases in which there is time to have recourse to the protection of the public authorities”¹.

Good Character in Criminal Cases:

Character is composed of natural features and traits of an individual and in criminal litigation in Pakistan it is given much importance especially the character of an accused and the character of a prosecutrix in rape cases. The domestic legislations of Pakistan have provided relaxation for persons of good character or previously not convicted in bail, sentence and appeal. The courts of the country, while taking lenient view of previously good character of an accused, grant bails and pronounce judgments of either acquittal in petty matters or award less severe punishments on such persons. Moreover, there is a Special Law providing for conversion of sentence of persons of good character to probation. The QSO regulates the procedure of evidence in both criminal and civil courts of the country. As per sanctions of this Order, the virtuous character of a person is only relevant in criminal proceedings as compared to civil suits where it is declared to be irrelevant. It categorically prescribes that previous good character of any accused is relevant in criminal proceedings and can be proved by evidence to meter out lenient view of the Court. The relevant Article of the Order says that “In criminal proceedings the fact that the person accused is of a good character is relevant”². Moreover, the QSO not only appreciates good character of the accused during criminal proceedings but also expounds relevancy of bad character of a person. The QSO distinguishes that bad character is not relevant until plea of good character is specifically taken by the accused. It underlines that “In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant”³. This Article of the QSO establishes two scenarios: one is the dominance of good character over the bad one and the other negation of bad character until goodness of character is itself in question.

The other view of good character of an accused in criminal proceedings in the country is probation for adult accused persons on the basis of their quality of character. The Code of Criminal Procedure which is a Procedural Law to

¹ Section 98 Ibid.

² Article 67 of the QSO.

³ Article 68 of the QSO.

regulate the running of a criminal court in the country makes a stipulate in this behalf. The Cr.P.C allows a Court to change conviction of a person into probation in offences not punishable with heavier or severe sentence relying on his antecedent good character. The code relatively makes expound that “When any person not under twenty one years of age is convicted of an offence punishable with imprisonment for not more than seven years, or when any person under twenty one years of age or any woman is convicted of an offence not punishable with death or imprisonment] for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct, and in the meantime to keep the peace and be of good behavior”¹. The same point of view regarding goodness in character of an accused has been taken up by the Probation of Offenders Ordinance which empowers a Trial Court either to admonish an accused of good character previously or send him on probation instead of serving sentence imposed the said person. The Ordinance lays down that “Where a court by which a person, not proved to have been previously convicted, is convicted of an offence punishable with imprisonment for not more than two years is of opinion, having regard to:— (a) the age, character, antecedents or physical or mental condition of the offender, and (b) the nature of the offence or any extenuating circumstances attending the commission of the offence, that it is inexpedient to inflict punishment and that a probation order is not appropriate, the court may, after recording its reasons in writing, make an order discharging him after Due admonition, or, if the court thinks fit, it may likewise make an order discharging him subject to the condition that he enters into a bond, with or without sureties, for committing no offence and being of good behavior during such period not exceeding one year from the date of the order as may be specified therein”².

¹ Section 562 of the Cr.P.C.

² Section 4 (1) of the Probation of Offenders Ordinance, 1960

The above portrayed provisions from the Laws of the Country reveal in an immense manner that good character of accused in criminal cases is relevant which not the situation in the civil litigation is. Moreover, bad character is irrelevant until evidence of good character is adduced by the accused party. Previously good character or non conviction of an accused person in criminal cases is given much importance while passing convictions on such persons for the first time. Even the Courts of the Country are empowered to convert the conviction either with probation or just admonition. The same leniency is adopted by the judicature of the Country while deciding bail matters of previously non convicted accused persons.

Conclusion:

The rights associated with the person of an accused, precisely, include human dignity, privacy, self defence and previous good character receive recognition worldwide in Universal Human Rights Instruments, Laws of Pakistan and Islam, the State Religion of the Country, also permits safeguard against violation of these rights. Under the Universal human Rights, Laws of the Country and Religion, an accused cannot be treated in a way damaging his dignity or disturbing privacy of his own and his family. All the Laws governing the human rights law do not allow interference with the privacy of a person even he is an accused in any case. Likewise, a person is under authority to save life and property not only of his own but also of the others and in doing so, an act of omission performed by any person does not constitute any offence. Moreover, if an accused is, for the very first time, indulged or booked in an offence and he is previously of good character. The extension of good character of a person should go in his favour leading to leniency by the Court while taking up his/her case.

Chapter No: 7: Rights of Accused During Investigation.

Introduction:

The criminal proceedings of a case may be divided into pre-trial or administrative state and during trial or trial stage. The criminal proceedings commence with the commission of offence and reporting the matter to the concerned Investigating Agency which culminates in adjudication of the trial in either acquittal or sentence. The person aggrieved by any offence is under obligation to report the matter to the concerned Investigating Agency with a view to collect evidence and this measure puts the criminal mechanism in action. The person with whom offence is committed is called complainant and the person against whom he alleges the commission is commonly known as accused. After completion of investigation and collection of prosecution evidence, Investigation Report is submitted to the Court for trial wherefrom courts takes cognizance of the case. The Trial Court, first of all, delivers copies of certain documents pertaining to accusation against the accused and frames formal charge wherein the allegation against the accused is put to him. Thereafter, prosecution evidence is recorded and after closure of the evidence, accused is called for to adduce any kind of defence, if so desired. After completion of evidence of both the parties i.e. complainant and the accused, the Trial Court pronounces its judgment either in conviction or acquittal. However, the party aggrieved with judgment of the Trial Court may assail it before the Appellate Court. During this entire procedure, both the parties enjoy the protection of Law and are entitled to equal treatment before Law. It is a rule of Law that rights of neither party be usurped. A party whether he/she is accused is complainant must be awarded the opportunity to contest his case within parameters ordained by the relevant laws.

Registration of FIR:

In criminal administration of justice, registration of FIR for the commission of an offence is of pivotal nature and is considered basis for the subsequent proceedings of the Case. This is the FIR which puts the criminal justice system in action and is regarded as the first step towards commencement of the proceedings. The FIR, later on at the time of evidence is used as documentary evidence to contradict the testimony of the prosecution witnesses. The Cr.P.C. 1898

provides two types of offences: Cognizable¹ and Non-Cognizable², whereas FIR is allowed to be registered where a Cognizable Offence is made out and the matter in Non-Cognizable Cases is directly reported to the Area Magistrate concerned. The provisions mandating registration of FIR under Section 154 of the Cr.P.C. 1898 at the first instance are both statutory and mandatory in nature. In the criminal administration justice of the State, it is not only duty of the aggrieved person to report the matter to the concerned quarters immediately but also the Law Enforcement Agencies are duty bound to record the FIR at once and laxity of any kind is fatal to the rights of the litigants. The Hon'ble Peshawar High Court while remarking about importance of FIR held that "The information given by the informant is called First Information. It becomes foundation of a criminal case and its importance is therefore, paramount in nature"³. However, it is a general concept of our criminal justice system that any kind of fluctuation in FIR is fatal to the case of the prosecution and violates the fundamental rights of equality before Law but astonishingly a Judgment of the Higher Judiciary of the Country declared non registration of FIR equivalent to deprivation of the accused to defend his case. The Judgment asserts "Non registration of FIR deprives the accused of his right to cross examine the first informant on its basis. But it would not vitiate the conviction"⁴. Justice (r) Dr. Munir Ahmed Mughal also propounded the same views and declared the registration of FIR beneficial for protection of rights of the accused in the subsequent proceedings. He states that "By lodging FIR complainant's version comes in black and white. It serves a useful purpose for the accused being protected from subsequent variations. The moment it is lodged the process of investigation is set in"⁵. The Supreme Court of Pakistan explaining the importance of an FIR in criminal case and its trial declared that "An FIR is undoubtedly a most important document in a criminal case, which has been investigated and eventually prosecuted in the Court by the Police. It may not be

¹ Cognizable Offence is an Offence where Police may arrest accused without warrant.

² Non-Cognizable Offence is an Offence where Police cannot arrest accused without Warrant.

³ PLD 2008 Peshawar 53.

⁴ 2000 YLR 2294 (DB).

⁵ Justice (r) Dr. Munir Ahmed Mughal: "Law of Information to the Police and Their Powers to Investigate".

evidence by itself, but it certainly furnishes a clue to the possible truth of the allegations against the accused”¹.

Information in Non-Cognizable Cases:

It is crystal clear proposition of the Criminal Procedural Law that the Police may register FIR and investigate a case regarding commission of a Cognizable Offence. Where there is suspicion of commission of any kind of Non-cognizable Offence, the Police may neither investigate the Case nor arrest the Accused at any cost. In this backdrop, the matter shall be reported to the Concerned Area Magistrate and with the permission of the Area Magistrate, the I.O may initiate investigation. In this scenario arrest of accused like Cognizable Cases is not permitted rather accused may be arrested only after issuance of warrants by the Magistrate empowered by the Law to do so. This mechanism is categorically provided in the Cr.P.C which contains mandatory provisions not to arrest the accused without warrant. The Cr.P.C. 1898 explicitly narrates that “When information is given to an officer in charge of a police station of the commission within the limits of such station of a non cognizable offence, he shall enter in a book to be kept as aforesaid the substance of such information and refer the informant to the Magistrate kept as aforesaid the substance of such information and refer the informant to the Magistrate”². Regarding Investigation in Non-Cognizable Cases, there is another provision which states that “No police officer shall investigate a non cognizable case without the order of a Magistrate of the first or second class having power to try such case [or send the same for trial to the Court of Session]”³. It is necessity of the Criminal Administration of Justice of the Country to put the State Machinery into motion, the commission of offence must be reported and FIR must be lodged with the concerned authorities. This document has double role to play in the subsequent proceedings: one commencement of proceedings which is usually investigation and the other is utilizing the same as a piece of evidence by the prosecution and contradicting the statements of witnesses by the accused during trial. No doubt, this right does not find any explicit place in Human Rights Instruments and there is no clear cut provision regarding registration of

¹ Anwar Ali Khan vs. Wahid Bukhsh, 1991 SCMR 1608.

² Section 155 (1) of the Cr.P.C. 1898.

³ Section 155 (2) the Cr.P.C.

Case in these documents but statutes of the country provide for this mechanism and the Courts of the Country held it a right for both the prosecution and the accused.

Intimation as to Grounds of Arrest:

In criminal administration of justice, arrest of the accused occupies much importance for both the accused himself and the Investigating Agencies. The purpose of investigation is described just to collect evidence for and against the accused. The investigation stage in criminal proceedings amounts to pre-trial stage and afterwards plays a vital role in the trial. The most of the evidence collected during investigation in non bail-able cases, curtails personal liberty of the person so captured and detained. John A. Andrews has noted, ‘the extent to which human rights are respected and protected within the context of its criminal proceedings is an important measure of a society's civilization’¹. In a criminal justice, it is necessary requirement of the trial that accused persons must be given opportunity to defend themselves throughout the proceedings whether it is investigation/pre-trial or trial stage. The purpose behind recognition of this right by the High Rights Champions, apparently, seems to two dimensional: to enable the accused to perceive the allegations against him/her and adduce defence accordingly.

Recognition under Human Rights Instruments:

The majority of Universal Human Rights Instruments by acknowledging this fundamental right have embodied this right by incorporating provisions relating thereto. The accomplishment of this right requires that a person must be informed as to the reasons behind his arrest. Most importantly, the ICCPR puts an embargo on the State Machinery to inform the accused about the grounds or reasons for his/her arrest. The Covenant states 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”². The Convent further elaborates this injunction in another provision manifesting that “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him”³. The same principle has been entailed by the ECHR which

¹ <https://www.tandfonline.com/doi/pdf/10.1080/13642980008406875?needAccess=true>.

² Article 9 (2) of the ICCPR, 1966.

³ Article 14 (3) (a) Ibid.

determines that “Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him”¹. The American Convention on Human Rights has also followed and enshrined this rule for the persons arrested. The Convention says that “During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: prior notification in detail to the accused of the charges against him”². The UN Peacekeeping published a Pre Development Training for Police in 2009 wherein it provided guidelines to the Police Officer as to information of grounds of arrest to the accused persons. The publication remarks: “Right to be informed of the reason for arrest: Any arrested person shall be informed at the time of his/her arrest reason for the arrest. This shall be done in non technical language that the arrest person can easily understand. The arresting officer is not required to fulfill this obligation if the arrest person makes it impossible to do at the time of arrest. If this occurs, the arrest officer shall inform the reason for his arrest at the earliest possible time”³.

Constitution of Pakistan Regarding Reasons for Arrest:

Pakistan is an Islamic Democratic State with a Written Constitution promulgated in the year 1973. The Constitutional Document of the Country curtails a complete Chapter granting numerous fundamental rights to its masses. The Constitution, inter alia, lays down the principle of providing information to an accused. The Constitution of the country also acknowledges this fundamental right of an accused person with stipulation of information as to grounds of his/her arrest as soon as possible. The Constitution embarks as “No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest”⁴. In this scenario, it is a fundamental constitutional right of an accused in the country that he must be informed about the reasons for his arrest for defending himself and adducing evidence accordingly.

¹ Article 6 (3) (a) of the ECHR, 1950.

² Article 8(2)(b) of the American Convention on Human Rights, 1969.

³ UN Peacekeeping PDT Standards, Specialized Training Material for Police 1st edition 2009.

⁴ Article 10 (1) of the Constitution of the Islamic Republic of Pakistan, 1973.

Un-Authorized Detention:

In a criminal justice system arrest of accused is considered to be inevitable for collection of evidence. Although the time of detention of accused after his arrest for his production before a court of competent jurisdiction varies from country to country yet this is a considerable right of an accused that he must be produced before the competent court within a specific time after his arrest. Any kind of lethargic conduct in complying with this provision would tantamount to illegal detention of the accused liable to be penalized under the relevant law. The object behind setting up this specific time period is to save the accused from the clutches of Law Enforcement Agencies and production before the court to decide whether arrest is legitimate or otherwise and the accused is required to be released or not. It also serves the purpose of legalizing arrest of the accused by endorsement of the Court.

Human Rights Instruments and Illegal Detention:

After Human Life, liberty and freedom is the radical consideration of the entire documentation concerning rights worldwide. All the documents enacted regarding protection of human rights grant right of liberty to individuals and requisition member states to ensure such rights. There is a consensus among all the Deeds containing Human Rights regarding illegal detention of a person which not only prohibit arbitrary detention but also put a bar on un-authorized detention of an individual. The ICCPR is the first universal document to recognize this right by putting an embargo on the State Machinery to produce the accused before the Court within reasonable time. The Covenant stipulates “Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release”¹. The same fact is also embedded by the ECHR which articulates that “Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial”². The American Convention on Human Rights also gave identification to this

¹ Article 9 (3) of the ICCPR, 1966.

² Article 5 (3) of the ECHR, 1950.

fact maintaining that “Any person detained shall be brought promptly before a Judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings¹. No doubt these provisions do not specify period of detention after arrest of accused but this issue was resolved by the UN Human Rights Committee in “Stephen v. Jamaica” observing that “the delay between the arrest of an accused and the time before he is brought before a judicial authority should not exceed a few days”². A Resolution adopted by the General Assembly in 1988 setting up certain principles for protection of all persons which regulate that “A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law”³.

Statutes of Pakistan and Illegal Detention:

The legal system of Pakistan curtails a detailed mechanism for arrest and detention of an accused person. However, an accused person cannot be arrested in cases involving non cognizable and bailable offences, if he furnishes sufficient surety to the satisfaction of the Court or the Investigating Officer. The arrest is admissible only in non-bailable and cognizable offences, notwithstanding, for a certain time span. Taking up the time for production of accused before a Court in the perspective of Pakistan, the Constitution as well as other statutes provide this time period for twenty-four (24) hours after arrest of the accused. The Constitution holds that “Every person who is arrested and detained in custody shall be produced before a magistrate within a period of twenty-four hours *of* such arrest, excluding the time necessary for the journey from the place of arrest to the court of the nearest magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate”⁴. The Criminal Procedural Code regulating proceedings of the Criminal Courts of the Country since its inception also stipulates that a person arrest cannot be detained in custody by the Investigating Agencies for more than twenty-four (24)

¹ Article 7 (5) of the American Convention on Human Rights 1969.

² Communication No. 373/1989, L. Stephens v. Jamaica (Views adopted on 18 October 1995), in UN doc. GAOR, A/51/40 (vol. II), p. 9, para. 9.6; emphasis added.

³ Principle No. 11(1) of Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment Adopted by General Assembly resolution 43/173 of 9 December 1988.

⁴ Article 10 (2) of the Constitution of the Islamic Republic of Pakistan, 1973.

hours without authorization by the Magistrate. The Code says that “No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate’s Court”¹. The same rule has been provided by another section of the same code which stipulates “Whenever [any person is arrested and detained in custody, and it appears that the] investigation cannot be completed within the period of twenty-four hours fixed by section 61, and there are grounds for believing that the accusation or information is well founded, the officer in charge of the police station [or the police officer making the investigation if he is not below the rank of sub inspector] shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate”².

Islamic View about Pre-Trial Detention:

The Islamic Criminal Law, like other worldly judicial and legal systems, does not allow detention of an accused without any solid and sound reasoning. There are many verses in the Holy Book and many sayings and instances where the illegal detention of an accused person has been discarded. The same rule concerning illegal detention was, later on, followed by the Companions of the Holy Prophet (PBUH) while deciding criminal matters in Islamic History. “The nature and history of Islamic criminal law is an exceptionally intricate subject and requires analysis at a much broader scale. More so, specific sources on the issue of pre-trial detention are scant and reflect the lack of a uniform body of rules and procedures under Islamic criminal law”³.

Recording Version of the accused During Investigation:

Right to defend one in legal proceedings, whether he/she is accused, is universally acknowledged which cannot be taken away by any institution. In our criminal justice system, the accused has two stages of criminal proceedings to

¹ Section 61 of the Cr.P.C. 1898.

² Section 167 of the Cr.P.C.

³ Ahmed Farooq Malik: “Pre-Trial Arrest and Detention – Its Place in Islamic Criminal Law and Procedure”.https://courtingthelaw.com/2021/05/25/commentary/pre-trial-arrest-and-detention-its-place-in-islamic-criminal-law-and-procedure/#_ftnref1.

produce his defence. One is the investigation primarily intended for collection of evidence and the other is trial before a competent court. In criminal administration of justice of Pakistan, there are two ways available with the accused to adduce his defence. The first is statement of the accused himself and the other is evidence of other witnesses in disproof of allegations leveled against him. The statements of witnesses whether prosecution or defence recorded by the I.O during the course of investigation, notwithstanding, not admissible in evidence during the trial, nonetheless, these serve for comparing statements of witnesses recorded in the court. In the chapter of the dissertation concerning the Principles of Natural Justice, it has been concluded that no person can be denied the right to defend himself. The Cr.P.C. 1898 regulates the general procedure of criminal proceedings by the Police and the Court and this enables the I.O to record version of the accused during the course of investigation. Justice (r) Dr. Munir Ahmed Mughal explaining the right of the accused to present his version during the course of investigation commended that “Investigating Officer is bound to record the version of the accused in every case if presented. Failure of police to record the version of the accused or the evidence sought to be adduced by him amounts to frustrating the Constitutional guarantee set out in Article 10 of the Constitution of Pakistan 1973”¹.

Version of Accused and Laws of Pakistan:

Apparently, there is no explicit separate provision mandating recording the version of the accused during the course of investigation but plain reading of the Section 161 of The Cr.P.C. 1898 depicts that any Police Officer may record statement of any person verse with the facts of the case. The Section reads as “(1)Any police officer making an investigation under this Chapter [or any police officer not below such rank as the [Provincial Government] may, by general or special order, prescribe in this behalf, acting on the requisition of such officer] may examine orally any person supposed to be acquainted with the facts and circumstances of the case”². The August Supreme Court of Pakistan in its esteemed judgment pronounced in 2020 while interpreting person acquainted with the facts of the case remarked “This expression is extensive and, in its plain and ordinary meaning, includes all persons

¹ Justice (r) Dr. Munir Ahmed Mughal: “Laws as to Information in and Investigation into Non-Cognizable Cases as per S. 155 of the Code of Criminal Procedure, 1898”.

² Section 161 (1) of the Cr.P.C. 1898.

who are supposed to be acquainted with the facts and circumstances of the case, and not only the witnesses but also those who are alleged to have committed the offence under investigation in a case. A person who is alleged to have committed the offence, is as much supposed to be acquainted with the facts and circumstances of the case as an alleged eye-witness is. There is no reason to modify or restrict that plain and ordinary meaning of the expression “any person” by interpretation, especially when it does not present any absurdity or inconsistency”¹. This stance was also taken and relied by Lord Aktin in Pakala Narayana Swamy case holding: “That the words in their ordinary meaning would include any person though he may thereafter be accused seems plain. Investigation into crime often includes the examination of a number of persons none of whom or all of whom may be suspected at the time...but eventually accused”². The same like observation was made by Full Bench of the Allahabad High Court in Upadhyaya case maintain that “After the decision of the Privy Council ... it is no longer possible to accept the argument that sections 161 and 162 Criminal Procedure Code do not cover statements made by accused persons and that under those sections an investigating officer is not authorized to record the statements of such persons. Nor is there anything in the section to show that only non-confessional or non incriminatory statements of such accused persons can be recorded. The words used are wide enough to include all kinds of statements, provided of course, they throw some light on the offences under investigation”³. Articles 27 and 28 of the Q.S.O, 1984 declare the first stance taken by the accused during the course of investigation as to his behavior and accidental or intentional nature of the act committed relevant and admissible in evidence. This fact was further corroborated by the Supreme Court of the Country maintaining that “It is an admitted fact that first plea taken by the accused is admissible in evidence under Article 27 of the Qanun-e-Shahadat Order, 1984. Article 27 of the Order 1984 is general principle enabling the Investigating Officer to record the same whereas Article 28 is mere an exception. As a general rule, evidence not forming part of the transaction is not admissible whereas Articles 27/28 are an exception to the said general principle by laying down a rule that admissibility of those facts which might not be tendered in evidence to prove it but

¹ Raza Allah Dittah vs. The State etc. CrI. Petitions Nos. 1124-L and 1120-L of 2015.

² Pakala Narayana Swami v. Emperor (AIR 1939 PC 47)

³ Deoman Upadhyaya v. State (AIR 1960 All 1)

these are relevant to prove the status/mind the person committing it”¹. The Supreme Court of Pakistan in a famous Sughran Bibi Case while delivering a judgment *inter alia* held that “During the investigation conducted after registration of an FIR the investigating officer may record any number of versions of the same incident brought to his notice by different persons which versions are to be recorded by him under section 161, CrPC. in the same case. No separate FIR is to be recorded for any new version of the same incident brought to the notice of the investigating officer during the investigation of the case”². Mr. Justice Dorab Patel of the Sindh High Court, Karachi while drafting a landmark judgment known as Ghulam Hussain case made an outstanding observation that “section 162 of the Code does not draw any distinction between statements by the accused on which the prosecution wished to rely and statement on which accused himself wished to rely....the Courts have evolved a rule.. that a provision intended to protect the accused is not used against him”³.

Prohibition against Torture or any Other Inhuman Treatment:

Evidence in any trial occupies pivotal significance and in criminal cases a crime is considered to be against the state itself, therefore, the state is responsible to prove the charge against the accused persons. In order to collect evidence and prove charge against accused persons, almost every state has Investigating Agencies to investigate a criminal charge and put evidence in the Court in support of the allegation leveled against an accused person. Arrest of accused, though warranted in extra ordinary circumstances under the Human Rights Instruments, is an evil necessity and torture is a common phenomenon to extract confessions from the accused persons. Sometimes, there is an ulterior motive of some type behind torture on accused.

Human Rights Law and Torture:

The International Community recognizing this scenario and to curb this so common practice, in addition to provisions in other Human Rights Instrument prohibiting torture, devised a Convention just for Torture and other Cruel Inhuman Treatment or Punishment in 1984. First of all, torture or any other inhuman or degrading treatment was prohibited in the UDHR in 1948 by articulating that “No one

¹ Raza Allah Dittah vs. The State: Crl. Petition No: 1124-L of 2015 and 1120-L of 2015

² Sughran Bibi vs. The State (PLD 2018 SC 595).

³ Ghulam Hussain v. State (PLD 1974 Karachi 91).

shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”¹. The same prohibition was propounded in another Universal Document pertaining to Human Rights which states that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”². Another Human Rights Document Specifically defining rights of Children has underlined this prohibition by holding that “No child shall be subjected to torture or other cruel, inhuman or degrading treatment or Punishment”³. The UN Human Rights Committee at its forty-fourth (44th) Session held on 10 March, 1982 made a comment about torture giving definition to torture as “torture and inhuman treatment relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim”⁴. The Convention on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by the General Assembly of the United Nations on 10th December, 1984; however, it came into operation on 26th June, 1987. This particular convention stems provisions relating to torture and other cruel or inhuman treatment. At the very outset of this Convention the term “Torture” has been defined which appears as “For the purposes of this 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, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”⁵. This specific convention requires the state parties to draft legislations for eradicating torture by maintaining that “Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory

¹ Article 5 of the UDHR, 1948.

² Article 7 of the ICCPR, 1969.

³ Article 37 of the CRC, 1988.

⁴ United Nations Human Rights Committee: “General Comment No. 20, Paragraph No.5” held on 10th March, 1982.

⁵ Article 1 of the Convention Against Torture, 1984.

under its jurisdiction”¹. This Convention also embodies to declare acts containing the elements of torture offences in their respective jurisdiction. The Convention lays down that “1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature”².

Islamic Principles and Prohibition of Torture:

Islam not only provides equal treatment for all but also forbids from any kind of aggression on the other person. In Islamic Human Rights Laws, this concept has also been incorporated and developed. A Declaration adopted by OIC Countries on Human Rights envisaged this right by maintaining that “No person shall be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment. c. No person shall be subjected to inhuman treatment while in custody; defendants shall be separated from convicted persons”³. So far as Islamic Jurisprudence regarding torture in custody is concerned, there is no consensus on positivity or negativity of torture under custody. There is a variety of views on this point. Sadiq Reza has underlined three approaches towards torture on accused during custody. He quotes: “At least three different views on the legality of beating suspected criminals to obtain confessions can be identified in pre-modern Sunni Muslim juristic discourses. The first view, and the one that apparently prevailed in the early centuries of Islam, is that such beatings are never permissible. Proponents of this view included the eminent jurists Ibn Hazm (d 1064), of the Zahiri school of law, and al-Ghazzali (d 1111), of the Shafi'i school.’0 The second view is that a suspect who is known for relevant prior wrongdoing--for example, a suspected thief who is already known to be a thief--can be beaten to extract a confession; the suspect's reputation provides sufficient circumstantial evidence of guilt of the new accusation to justify the beating. The influential Hanbali jurist Ibn Taymiyya (d 1328) suggested this view, and his disciple Ibn Qayyim (d 1351) adopted and expanded on it; Ibn Qayyim's formulation

¹ Article 2(1) of the Convention Against Torture, 1984.

² Article 4 Ibid.

³ Article 4 (b) & (C) of the Cairo Declaration of the Organization of Islamic Cooperation on Human Rights, 1990.

was in turn copied by the Maliki jurist Ibn Farhun (d 1396) and the Hanafi jurist al-Tarabulusi. The third view is that investigative beatings are forbidden to qadis/judges in courts of Islamic law-but permitted to rulers and other executive authorities. The foremost proponent of this view was the Shafi'i jurist al Mawardi (d 1058), perhaps Islam's most influential political theorist, who said rulers and their agents were authorized to flog suspects to obtain confessions "according to the strength of the accusation"¹.

Domestic Legislation of Pakistan Regarding Torture:

The Constitution of Pakistan also stipulates a fundamental right of every citizen not to put under torture. The Document postulates that "No person shall be subjected to torture for the purpose of extracting evidence"². The Asian Human Rights Commission made a statement about torture in Pakistan in the year 2011. The said report vividly transpires the status of torture in the country. The report concludes that "Torture in custody is a serious problem affecting the rule of law in Pakistan. It is used as the most common means by which to obtain confessional statements and also for extracting bribes. Torture in custody has become endemic and on many occasions the police and members of the armed forces have demonstrated torture in open place to create fear in the general public. The absence of proper complaint centers and no particular law to criminalize torture makes the menace of torture wide spread. The torture cases have to be reported to the police, therefore the police, being the main perpetrators of torture refuse to register the cases. This is the main reason why official data about the cases of torture is not available"³. However, there is only provision in the criminal justice system of Pakistan which specify punishment for Police Officers involved in commission of torture. The State Government, in order to introduce reforms in Police Department ensuring torture free investigation, promulgated an Order for Police Officials to regulate their conduct during investigation. The Order goes on to embark that "Whoever being a Police Officer—inflicts torture or violence to any person in his custody;

¹ Sadiq Reza: "Torture and Islamic Law, 2007"

² Article 14 (2) of the Constitution of the Islamic Republic of Pakistan, 1973.

³<https://reliefweb.int/report/pakistan/government-purposely-avoids-making-law-against-torture-country>

shall for every such offence, on conviction, be punished with imprisonment for a term which may extent to five years and fine”¹.

Timely Completion of Investigation:

Collection of evidence in criminal cases is prime responsibility of Law Enforcement Agencies especially the Local Police. This collection of evidence is given the name of investigation by the Cr.P.C. 1898 in a manner that ““Investigation” includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf”². It is a fact acknowledged in all the Universal Human Rights Documents, Regional Transcripts and Domestic Legislation of the Country that the trial of an under custody accused should be completed within as possible time. Investigation of an offence is considered a pre-trial stage leading to the commencement of trial. After completion of investigation, Investigation Report is submitted to the Courts by the concerned Investigating Agencies which trigger the commencement of trial. Until and unless an Investigation Report is submitted in the Court, a Court cannot start trial of an accused. A person detain in custody whose investigation is not completed within time stipulated by the concerned Statutes, has to suffer agony and anguish more than accused persons enjoying the concession of bail. This is equal to unauthorized custody of detainees because if they are innocent, time submission of Investigation Report may cause finality of their case rendering their release. The negligence on part of the Investigating Agencies amounts to infringement of fundamental right of liberty and also a reason for prolonged suffrage of under custody accused persons.

Human Rights Conventions and Investigation:

Detention of innocent persons has been robustly condemned and criticized by all the forums dealing with Human Rights. The concept developed by the Human Rights Instruments is timely and early conclusion of trial of accused persons preferably those who are detainees in that case. However, none of the Human Rights Deed has specified time limits for completion of investigation of an offence rather this is optional with the Member States to fix time according to the legal and judicial

¹ Section 156 (d) of the Police Order, 2002.

² Section 4 (1) (I) of the Cr.P.C. 1898.

norms of those states. The ICCPR has contemplated that trial of an under custody prisoner shall be commenced and concluded within a reasonable time which impliedly stresses on the need of completion all the pre-trial formalities including completion of investigation and submission of Investigation Report within possible shortest time. The Covenant holds that “Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release”¹. The European Convention on Human Rights has also provided with the same principle by envisaging that “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful”².

Pakistani Laws and Time for Completion of Investigation:

The Criminal Justice System of the Country provides a mechanism for trial of criminal cases according to which regular trial in a Court of Law commences after submission of Investigation Report, sometimes called “Challan”. Criminal Laws regulating the procedure and requirements of investigation in Pakistan specify a time period for completion of investigation and submission of Police Report. The Cr.P.C. 1898 containing a General Mechanism for both Investigation and Trial embeds the commencement of trial of accused persons involving investigation by the Police shall commence on Investigation Report filed by the concerned Police Station. The Code makes an articulation that “If, upon an investigation under this Chapter, it appears to the officer in charge of the police station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report and to try the accused or [send] him for trial”³. This period pertains to fourteen (14) days from registration of the FIR in Offences punishable under the General Law of the Country stipulating the conclusion of Investigation and submission of Report to the Court of Concerned Area Magistrate through a Public Prosecutor. The Cr.P.C governing the procedure of Criminal Courts for trial of General Offences mandated this time period by holding that “Every investigation under this Chapter shall be

¹ Article 9 (3) of the ICCPR, 1966.

² Article 5 (4) of the ECHR, 1950.

³ Section 170 (1) of the Cr.P.C. 1898.

completed without unnecessary delay, and as soon as it is completed, the officer in charge of the police station shall [through the Public Prosecutor,] forward to a Magistrate empowered to take cognizance of the offence on a police report--”¹. The Code further emanates that “Provided that, where investigation is not completed within a period of fourteen days from the date of recording of the first information report under section 154, the officer in charge of the police station shall, within three days of the expiration of such period, forward to the Magistrate through the Public Prosecutor, an interim report in the form prescribed by the Provincial Government stating therein the result of the investigation made until then and the Court shall commence the trial on the basis of such interim report, unless, for reasons to be recorded, the Court decides that the trial should not so commence”². However, this time differs in Anti Terrorism Act where Investigation is conducted by a JIT lays down for completion of investigation within seven (7) days and submission of report by the Joint Investigation Team. The Act says that “The Joint Investigating Team shall complete the Investigation in respect of a case triable by an Anti Terrorism Court within seven working days and forward directly to the Anti-Terrorism Court a report under Section 173 of the Code”³. The period for submission of Investigation Report in another Special Criminal Law of the Country known as NAB Ordinance, 1999 extends upto ninety (90) days. The relevant provision of the Ordinance reads "Notwithstanding anything contained in the code, where the holder of the public office or any other person accused of an offence is arrested by NAB under this Ordinance, NAB shall, as soon as may be, inform him of the grounds and substance on the basis of which he has been arrested and produce him before the court established under this Ordinance within a period of twenty four hours of arrest excluding the time necessary for the journey from the place of arrest to the court and such person shall, having regard to the facts and circumstances of the case, be liable to be detained in the custody of NAB for the purpose of inquiry and investigation for a period not exceeding ninety days provided that no accused arrested under this Ordinance shall be released without the written order of the Chairman NAB or the

¹ Section 172 (1) (a) of the Cr.P.C. 1898.

² Proviso to Section 173 (1) of the Cr.P.C 1898.

³ Section 19(1) (1) of the ATA, 1997.

order of the Court”¹. A Bench of Apex Court of Country took up this prolong period for custody of the accused on remand and time consumption in submission of Investigation Report. The Hon’ble Members of the Bench declared it cruel and injustice and asserted that the prolonged time curtailed in the Ordinance is against the norms of general legal system of the country where the period extends up to maximum fifteen (15) days. The observations of the Bench portrayed are as “Section 24 (d) of the National Accountability Ordinance (NAB) empowers NAB to detain any accused in its custody for the purpose of inquiry and investigation for a period not exceeding 90 days, but the court concerned can remand the accused to custody not exceeding 15 days at a time and for every subsequent remand the court will have to record reasons in writing, the copy of which will have to be sent to the high court concerned. Justice Mazahar Akbar Naqvi wondered why NAB did not file a single reference against the accused after a thorough investigation instead of multiple references. He highlighted that in criminal cases only physical remand of 14 days could be given but 90-day remand was provided in the NAB only to allow the bureau to complete its investigation against accused”².

Conclusion:

The nutshell of the above portrayals is that according to the dictum laid down by the Higher Judiciary of Pakistan registration of FIR against the accused is a right enjoyable by an accused. The Courts in the Country have also identified non registration of FIR against accused violation of his rights because FIR has a role to play in cross examination of the Prosecution Witnesses. Likewise, the accused is also entitled to be informed as to the reasons behind his/her arrest immediately after apprehension. As per Universal Human Rights Deeds, Islamic Provisions and Laws of Pakistan, a person cannot be detained in custody without any cogent reason and against the law. The detention of an accused even for a moment beyond the orders of a competent court amounts to illegal detention which is prohibited by all the concerned Laws. An accused person is also entitled to put forward his version during the course of Investigation to bring his version on the record for the subsequent proceedings of the case. In the same manner, torture or any kind of inhuman treatment

¹ Section 24 (d) of the NAB Ordinance, 1999.

² The “Daily Dawn” December 4, 2020. <https://www.dawn.com/news/1593903>.

on a person under custody or otherwise is not only strictly prohibited by the Human Rights Documents but also an Offence punishable with imprisonment. Furthermore, it is also a right of the accused person that the investigation of the case be completed within the period stipulated by the relevant law for commencement of trial. All these rights have been categorically recognized by the Universal Human Rights Instruments, Regional Human Rights Instruments, Islamic Injunctions and Laws of Pakistan.

Chapter No: 8: Evidentiary Rights of Accused Persons.

Introduction:

Irrefutably, evidence is the most important factors in any trial and it is duty of the Prosecution to prove its case beyond any shadow of doubt. However, under the Human Rights Law, an accused person owes some rights pertaining to the rule of evidence. The person accused of any offence facing criminal charges in a Court has some rights extensively which cannot be derogated during the whole process of proceedings including recording of evidence. In this regard, prosecution is under single obligation to prove its charges but the accused is under dual liability to rebut the evidence of the prosecution and to adduce his own defence. Therefore, accused person is at liberty to adduce his evidence in order disprove the charges leveled by the prosecution it being a human right guaranteed to an accused by the Documents enshrining those rights. Some of the efficient rights might be the following next described.

Right against Self Incrimination and Remain Silent:

Self incrimination generally stands for deposing by one against himself or to be a witness against him/herself which is not warranted under any Human Rights Instrument, Islam or domestic legislation of the Country. The recognition of this right traces its genesis from a legal maxim “*nemo tenetur prodre accusare seipsum*” meaning “No man is obliged to be a witness against himself”. In criminal administration of justice, accused is not bound to rebut anything rather it is duty of the prosecution to prove its case beyond any reasonable doubt. Collection and production of evidence in a criminal case is responsibility of the complainant, State and the Investigating Agencies. In this way, an accused cannot be compelled to disclose anything. The purpose of investigation is described the collection of evidence not extracting confessions from the accused persons or forcing accused persons to make statements against themselves. The accused reserves the right to make any disclosure under the enjoyment of this universal right. This right may be interpreted another way that it is discretion of the accused to tell anything or to remain silent during the entire proceedings of the trial. This right may also be called equated with the burden of proof and defence. This is a right bestowed upon an accused that he can deny to tell anything. Under the provision of this right an accused cannot be forced to be a witness

or make any kind of disclosure as to the alleged offence at all the stages of the case. “The right to silence encompasses only oral representations made by a person and refers to a person’s right not to make oral statement to the police or any other criminal justice actor during the investigation of a criminal offence”¹.

International Scenario of the Maxim:

It is a general principle of criminal administration of justice that complainant is under obligation to substantiate his/her accusation against the accused without reasonable doubt. The laws prevalent in the World or within the State do not allow any organ of the State to compel an accused person to depose against him/her whatever the circumstances be. The ICCPR, 1966 impliedly contains prohibition of torture on accused persons in custody by using the words compelled. The Covenant states that “Not to be compelled to testify against himself or to confess guilt”². The same like language has been used in the American Convention “the right not to be compelled to be a witness against himself or to plead guilty”³. The Supreme Court of the United States of America in World Famous Miranda Case held that “When an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized”⁴. The European Court of Human Rights declared right against self incrimination an absolute right. The Court ruled that “Self-incrimination was an absolute right and even applied where the compulsion to testify resulted in the giving of exculpatory evidence”⁵. This Court also elaborated the right to remain silence in another judgment by holding that “a law that drew adverse inferences from an accused person’s silence did not violate the European Convention because the inferences were not decisive to the finding of criminal responsibility”⁶. The Legal Digest of International Fair Trial Rights while giving their expression as to the right against self incrimination and right to remain silent has incorporated that “The right to silence of an accused person, along with the presumption against any

¹ Rights of the Suspect and the Accused, Part 1: General Fair Trial Rights. <https://www.usip.org/sites/default/files/MC2/MC2-7-Ch4.pdf>.

² Article 14 (3) (g) of the ICCPR.

³ Article 8 (3) (g) of the American Convention.

⁴ Miranda vs. Arizona, 384 U.S 436 (1966)

⁵ Saunders vs. The United Kingdom [Application No. 19187, judgment dated December 17, 1996].

⁶ Murray vs. The United Kingdom, [Application No. 18731/91 dated 27th August, 1991].

adverse inference to be drawn from the exercise by an accused person of this right”¹. Likewise, the ICCPR also reckon this right on behalf of the accused by making an articulation as “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law”².

Laws of Pakistan about Silence and Self Incrimination:

The Constitution of Pakistan has put a clear cut ban on forcing any accused person to be a witness against himself on whatsoever conditions there may be. The Constitution of the Country very clearly bars from using any kind of force against a person to depose him against him/herself. The Constitution specifically lays down that “No person— shall, when accused of an offence, be compelled to be a witness against himself”³. The Constitution of the Country entails the right of self incrimination by mandating that “No person ___ shall, when accused of an offence, be compelled to be a witness against himself”⁴. Another Article of the Constitution also forbids use of torture or violence for the purpose of extracting evidence or compelling an accused to depose against himself. The Article demonstrates that “No person shall be subjected to torture for the purpose of extracting evidence”⁵. The Code of Criminal Procedure, 1898 also gives the same description by articulating that during the course of investigation a person including the accused himself cannot deny answering the questions put to him/her by the I.O but he/she is at liberty to refuse to give reply to answer which may lead to self incrimination in subsequent proceedings. The relevant provision of the Code prescribes that “Such person shall be bound to answer all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture”⁶. There is another curtailment in the Cr.P.C. 1898 which categorically puts embargo on use of any kind of influence or inducement to extract any information from the accused whether it is against him or not, except the information promised under pardon. The Code underlines that “Except as provided in sections 337 and 338, no influence, by means of any promise or threat or otherwise,

¹ Legal Digest of International Fair Trial Rights, pp. 99–102.
<https://www.osce.org/files/f/documents/1/f/94214.pdf#page=16>.

² Article 14 (2) of the ICCPR.

³ Article 13 (b) of the Constitution of the Islamic Republic of Pakistan, 1973.

⁴ Article 13 (3) of the Constitution of the Islamic Republic of Pakistan, 1973.

⁵ Article 14 (2) of the Constitution of the Islamic Republic of Pakistan, 1973.

⁶ Section 161(2) of the Cr.P.C.

shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge”¹. The QSO, 1984 dealing with the procedure of evidence in judicial or quasi judicial proceedings also negates the concept of self incrimination by laying down that statement under compulsion or inducement is not relevant in the criminal administration of justice. The Order depicts as “A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person,--“².

Islam and Right Against Self Incrimination and Remaining Silent:

As far as right against self incrimination in Islamic Law is concerned, “No pressure or coercion can be exerted on the accused and he has the full right to speak freely. In addition, he has the right to be silent. Furthermore, it is proscribed to force any accused to speak or present any information which he or she does not want to present. Any confession, obtained out of duress or coercion of any type, is of no legal value or effect and has no legal validity whatsoever. Obtaining confession under duress or coercion, or any type of illegal pressure is, in fact, a crime under the Islamic law”³. Commenting on right against self incrimination Prof. Dr. Muhammad Munir made an extreme observation by saying that “The trial has to be fair and the cross-examination of accusers and witnesses is a must. The accused cannot be incriminated by the court during the trial or during the investigation. Upholding these principles means that the rights of the accused are fully guaranteed under the Islamic criminal law that has provided excellent procedural requirements to guarantee the rights of the accused”⁴. The Charter adopted by the Arabian Countries known as the Arab Charter on Human Rights also embodies this right of the accused by quoting that “Not to be compelled to testify against himself or to confess to guilt”⁵. Al-Awani explaining this exclusive right available to an accused person has remarked that “The accused has the right to not to speak at all or if he or she chooses to speak, the accused has the right to

¹ Section 343 of the Cr.P.C.

² Article 37 of the Q.S.O.

³ Taha al-AlwÉni, “The rights of the accused during the investigation stage”, in the Accused and His Rights Under Islamic Shari‘a.

⁴ Prof. Dr. Muhammad Munir: “Fundamental Guarantees of the Rights of the Accused in the Islamic Criminal Justice System, 2017”.

⁵ Article 16 (6) of the Arab Charter on Human Rights, 2004.

do so without being coerced or pressured”¹. Awad M Awad has declared right of accused to remain silent a form of defence by the accused by maintaining that “Another aspect of defence is the right of the accused to speak or to remain silent. It is the general opinion of Islamic jurists that the accused is not obliged to speak before the court and if he decides to confess he must do that absolutely free and without any pressure”².

Evidence in Presence of Accused and Cross Examination of PWs:

Evidence is a key player in rendering decisions of cases. This is the evidence which leads a Presiding Officer of a Court to draw a conclusion as to acquittal or conviction of an accused. So, importance of evidence in trials cannot be denied at all. On the other hand, the person against whom the evidence is being brought on record is also entitled to defend himself and prove the charges against him to be false. The best way to shake the veracity of witness is cross examination from the side of the accused person. The Human Rights specifying documents reckon the recording of evidence in presence of accused to afford him/her better understanding of the indictments against him and cross examine the witnesses to disprove his guilt. So, it is fundamental right of an accused that evidence should be recorded in his presence. Regarding presence of accused at the time of recording of prosecution evidence Fawzia Cassim observes that “It is a fundamental principle of criminal procedure that an accused must be physically present at the trial so that he can participate in a meaningful and informed manner in the Criminal Proceedings instituted against him. The accused’s other rights, such as the right to present his case, the right to understand, and the right to confrontation is dependent on this right to be present at the trial. Therefore, an accused’s presence at the trial is fundamental to the accused effectively exercising his rights to defence”³.

Human Rights Instruments:

The ICCPR identifying the right of accused to have the prosecution evidence recorded in his/her presence articulates that “To be tried in his presence, and

¹ Al-Awani, *The Rights of the Accused*, note 65, at 3; al-Suwaylim: *al-Muttaham*, pp 289; 337

² Awad M. Awa d , *The Rights of the Accused under Islamic Criminal Procedure*, in: Mahmoud Cherif Bassiouni (ed.) 106.

³ Fawzia Cassim: “The accused’s right to be present: a key to meaningful participation in the criminal procedure, 2005”.

to defend himself in person or through legal assistance of his own choosing;”¹. requiring the member states to ensure this right of the accused underpins that “To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”². The ECHR categorically identifies this right of the accused to be present at the time of trial and cross examine witnesses produced by the prosecution. The Convention declares that “Everyone charged with a criminal offence has the following minimum rights: to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”³. The European Court of Human Rights in a world famous case known as Case of Colozza ruled that “Although this is not expressly mentioned in paragraph 1 of Article 6 (art. 6-1), the object and purpose of the Article taken as a whole show that a person "charged with a criminal offence" is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 (art. 6-3-c, art. 6-3-d, art. 6-3-e) guarantee to "everyone charged with a criminal offence" the right "to defend himself in person", "to examine or have examined witnesses" and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court", and it is difficult to see how he could exercise these rights without being present”⁴. The European Court of Human Rights in another esteemed judgment made a ruling that non provision of opportunity to the accused for cross examining the prosecution witnesses, the evidence adduced by those witnesses shall be discarded besides in exceptional circumstances. The Court held that “allowing a witness statement to be admitted as evidence where the witness is not available for cross examination and that evidence is the sole or decisive basis for convicting the accused violates the right to a fair trial provided in arts 6 (1) and 6 3(d) of the European Convention on Human Rights”⁵.

Pakistani Legislation and This Right:

In Pakistan, the Cr.P.C and the QSO regulate procedure of production of evidence by both the accused and prosecution. The Cr.P.C regulating recording of evidence in a Criminal Court categorically identifies this right of accused and

¹ Article 14 (3) (d) of the ICCPR.

² Article 14 (3) (e) of the ICCPR.

³ Article 6 (3) (D) of the ECHR.

⁴ Colozza v. Italy 1985.

⁵ Al-Khawaja and Tahery v United Kingdom [2009] ECHR 26766/05 (20 January 2009)

mandates the recording of evidence in presence of the accused. The relevant section of the Code manifestly narrates that “Except as otherwise expressly provided, all evidence taken under [Chapters XX, XXI, XXII and XXIIA] shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader”¹. However, another provision of this Code allows the Court to record evidence of prosecution in absence of accused but it stipulates some conditions wherein a Court may record prosecution evidence even in absence of the accused. Side by side, this Section requires the Court recording evidence in absence of an accused when the accused is absconder and such evidence can only be used against such absconder on his arrest if the person giving evidence is dead or his evidence is unprocurable. The said provision is reproduced as “If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try or send for trial to the Court of Session or High Court] such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions. Any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable”². There is another condition when evidence may be recorded in absence of accused which is dispensation of attendance of accused and in such situation either co-accused of such accused or pleader of such accused would be present at the time of recording of evidence. The Code mandates that “At any stage of an inquiry or trial under this Code, where two or more accused are before the Court, if the Judge or Magistrate is satisfied, for reasons to be recorded, that any one or more of such accused is or are incapable of remaining before the Court, he may, if such accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused”³.

¹ Section 353 of the Cr.P.C.

² Section 512 of the Cr.P.C.

³ Section 540 (A) (1) of the Cr.P.C.

The QSO has defined the cross examination in the following words that “The examination of a witness by the adverse party shall be called his cross-examination”¹. The said Order explaining the right of adverse party to cross examine witness called by the one party prescribes that “Order of examinations.(1) Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined”².

Prohibition against Forced Confessions:

Confession is a statement oral or written by an accused person acknowledging his guilt. In criminal litigation confession is confined to a statement given by accused wherein he admits that he has committed the offence. Importance of confession for awarding sentence to an accused cannot be negated at all. Many times, a Trial Court bases its decision on confessional statements made by the accused persons but in this background there are certain rules connected. However, with the passage of time and new developments in the field of criminal law, this approach has been discouraged to save the accused persons from sentences under their confessional statements. Some years ago, there was a general trend that accused used to mete out sentence on account of his/her confessional statements. But now this approach does not hold any weight because the Courts of Law have realized that there might be something at the back of a confession by an innocent person. So, relying on solitary confession has been revoked by the Courts and it has been made a universal requirement that a confession not substantiated and not corroborated by other evidence may not invoke sentence. This is the rule regarding a voluntary confession before a Competent Court of Law. The other kind of coerced, forced confession or made before any other authority is not entertain-able in a Court of Law and does not bind any punishment on the person of an accused.

Forced Confessions and Human Rights Law:

So far as Universal Human Rights Instruments as to forced or coerced confession are concerned, admittedly, there is no clear cut provision defining or discussing. However, there are certain provisions in those Documents which impliedly put an embargo on exercise of torture to accused persons to extract

¹ Article 132 (2) of the QSO.

² Article 133 (1) of the QSO.

confession and declare an accused person to be innocent until proved guilty while admitting right of an accused person to remain silent during the proceedings of a criminal case. So, in this scenario, it cannot be concluded that there is no identification of forced confessions under the Human Rights Law. Moreover, the Declaration adopted and ratified by the American States is very much clear in this perspective which manifestly demonstrates this fact. The Declaration concludes that “During the proceedings every person is entitled, with full equality, to the following minimum guarantees: A confession of guilt by the accused shall be valid only if it is made without coercion of any kind”¹. So, outright denial to the existence of forced or coerced confession in Human Rights Instruments is not feasible. The Convention against Torture unanimously extricates any statement elicited from any person on the basis of torture or coercion. It is monists that “Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made”².

Pakistan Rules of Confessions:

Pakistan has devised a separate and detailed Law governing the procedure and recording of evidence in both Civil and Criminal Courts of the Country. Taking confession as a serious matter in criminal trial, the law related to the evidence named as “The Qanoon-e-Shahdat Order, 1984” has provided detailed mechanism viz. a viz. confession statements and their relevancy to the proceedings. This Order categorically ousts any confession obtained under any kind of threat, inducement or a promise out of the criteria of taking into consideration by the Court while acting on that confession. The Article of the Order laying this particular rule is reproduced as “A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supporting that by making it he would gain any advantage or avoid and evil of a

¹ Article 8 (3) of the American Declaration on Human Rights.

² Article 15 of the Convention against Torture.

temporal nature in reference to the proceedings against him”¹. Another Article of the Order extricates the confession recorded by a Police Officer on what grounds or reasons it may be, from the recognition of evidence. It stipulates that “No confession made to a police officer shall be proved as against a person accused of any offence”². There is another Article in this Enactment which expels even confessional statement recorded under custody of a police officer. Under this specified article confessions only recorded in presence of a Magistrate are admissible in a Court of Law. It enunciates that “Subject to Article 40, no confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person”³. Initially, the Courts of the Country inflicted sentences of various types including death penalties on the basis of judicial confessions of accused persons but now, the Supreme Court of Pakistan, being the Apex Court of the Country has recently discarded this practice and has set a principle that accused cannot be convicted on the basis of his judicial confession until and unless corroborated by the prosecution witnesses. The August Apex Court of the Country in a universally famous judgment known as “Asia Bibi Case” has set many principles out of which one is non admissibility of extra judicial confession as a reliable piece of evidence. The Court holds that “Confession that allegedly took place at the public gathering is a fragile piece of evidence and utmost care and caution has to be exercised in placing reliance on such a confession. The legal worth of [an] extra-judicial confession is almost equal to naught. It might have been obtained by inducement or coercion”⁴.

Confessional Statements and Islamic Law:

Islamic Law clearly put emphasis on proving guilt of an accused either through independent and persuasive evidence or through confession of the offender. Notwithstanding, there is no room for use of force or illegal means to extract a confession rather the confession must be voluntary and free any type of coercion or duress. On the other hand, use of any kind of duress, torture or coercion has been declared an offence in the Islamic Legal System. Muhammad Abdel Haleem verifying

¹ Article 37 of the Qanoon-e-Shahadat Order, 1984.

² Article 38 of the QSO.

³ Article 39 of the QSO.

⁴ Asia Bibi vs. The State: PLD 2019 SC 64.

the nature of coercion or duress free confession in religious perspective underlines that “It thus follows that any confession obtained out of duress or coercion of any type, has no legal effect”¹. The same Author in another transaction states to observe that “In fact, obtaining a confession under duress, coercion or any other kind of illicit pressure is a crime under Shari`ah”². Another Muslim Scholar, Thinker and Philosopher Osman Abdel Malik commenting on the way admissible for confession as evidence concludes that “In order to be sure and to exclude every influence the accused must have confessed the crime twice or four times (depending on the crimes) in different sessions of the court and if he withdraws his confession afterwards it cannot be used as evidence against him”³. “For a confession to be accepted as evidence, it must be voluntary, unequivocal, occur during a legal hearing, be repeated the same number of times as the number of witnesses required, and be corroborated by other evidence. Seventeen bibliographic listings are provided”⁴.

Burden of Proof:

It is an established and well settled principle of criminal administration of justice that prosecution is bound to prove its case against an accused beyond any reasonable doubt. Mere allegation is nothing until it is proved without a pinch of salt. This rule is commonly identified as a right granted to accused and is based on a Latin Maxim “Ei qui-affirmative non qui negate incumit probation” which is also phrased as “Ei incumit probatio qui dicit, non qui negat.” Both these terms/maxims briefly and precisely mean that the complainant is required to prove his assertion whereas the person denying such allegation is not under any liability to prove it. In other words, the burden of proof of a fact lies upon the person who alleges the existence or non-existence of such fact. This maxim may somewhat relate to another legal terminology i.e. presumption of innocence which underlines that a person is presumed to be innocent until proved guilty. The word “proof” indicates anything which serves to

¹ Muhammad Abdel Haleem, Kate Daniels and Abdel Omar Sherif, Citing Taha J. Al-Awani, *The Rights of the Accused in Islam*, Arab Law Quarterly, Vol. 10, No. 1, at 38 (1995).

² Muhammad Abdel Haleem, Kate Daniels and Abdel Omar Sherif, Citing Taha J. Al-Awani, *The Rights of the Accused in Islam*, Arab Law Quarterly, Vol. 10, No. 1, at 41 (1995).

³ Osman Abd-el-Malek al-Saleh, *The Right of the Individual to Personal Security in Islam*, in: Mahmoud Cherif Bassiouni (ed.), (note 10) 73.

⁴ M M Salama, “General Principles of Criminal Evidence in Islamic Jurisprudence (From Islamic Criminal Justice System, P 109-123, 1982, M Cherif Bassiouni, ed. - See NCJ-87479)

convince the mind of a judge about the truth or falsehood regarding a fact or proposition. It does not necessarily refer to numbers but any evidence that would induce a reasonable person to reach a conclusion. Lord Sankey ruling about the burden of proof remarked that “the burden on the prosecution to prove the guilt of the accused beyond a reasonable doubt as golden thread that running through the common law of England”¹. Best explaining the burden of proof argues that “It is an obligation created for a party having a claim against the other party and is governed by certain rules. These rules have their foundation in the principles of natural reason, supplemented by additional weight through legal reasoning”². The Supreme Court of Pakistan in its judgment laid down that “In criminal jurisprudence, the general principle is that the prosecution has to prove its case against the accused beyond reasonable doubt by producing convincing, credible and cogent evidence in order to be successful in getting a conviction. This burden does not shift from the prosecution even if the accused takes a plea and fails to establish it. If there is any room for doubt in the prosecution case, the accused would be entitled to benefit from it, not as a matter of grace but as a matter of right”³.

Burden of Proof and Human Rights Instruments:

The Universal Human Rights Instruments have made stipulations that a person is innocent until he/she is proved guilty which impliedly and broadly speaks that the person coming to a Court of Law with an allegation must prove that allegation. In this sense, the burden of proof lies on the complainant or prosecution side and this fact is also incorporated in many Human Rights Deeds which categorically declare an accused person innocent. The first and the most prominently known is the UDHR which is a landmark for the subsequent enactments. This Declaration with extreme manifestation propounds that “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence”⁴. The same stipulation has been enunciated by the ICCPR wherein presumption of innocent till proven guilty has been recognized as a right for a person accused of any

¹ Woolmington V DPP [1935] AC 462.

² Best; “Law of Evidence, 12th Edition, and Section 265”.

³ Muhammad Mansha vs. The State, 2018 SCMR 772.

⁴ Article 11 (1) of the UDHR.

offence which means that until the prosecution discharge its liability to prove the charge, the accused would be dealt with as innocent. It says that “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law”¹. The ECHR has also followed the same route by incorporating a provision declaring an accused to be innocent until the prosecution proves its case in accordance with law of the land. The Convention articulates that “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”². Lord Denning in the case of *Miller* explaining and interpreting the standard of proof of guilt of an accused held “that degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence —of course, it is possible but not in the least probable, the case is proved beyond reasonable doubt”³. The Office of the United Nations High Commissioner for Refugees Geneva has elaborated the liability of complainant to discharge the burden put on him by the laws. It says that “According to general legal principles of the law of evidence, the burden of proof lies on the person who makes the assertion. The burden of proof is discharged by the applicant rendering a truthful account of facts relevant to the claim so that, based on the facts; a proper decision may be reached”⁴. All these narrations lead to infer that proving an allegation exclusively lays on the complainant or prosecution otherwise the presumption of innocence undoubtedly favours the accused. The Human Rights Committee of the UN has, too, explained the term by commenting that “The presumption of innocence imposes a burden of proof on the prosecution, i.e. a burden to prove the guilt of a person accused of a criminal offence. To discharge this burden, the prosecution must prove the guilt of the accused person beyond reasonable doubt”⁵.

¹ Article 14 (2) of the ICCPR.

² Article 6 (2) of the ECHR.

³ *Miller v. Ministers of Pensions*: [1947] 2 ALL E.R.

⁴ Office of the United Nations High Commissioner for Refugees Geneva, Note on Burden and Standard of Proof in Refugee Claims 16 December 1998. <https://www.refworld.org/pdfid/3ae6b3338.pdf>.

⁵ General Comment 32, para. 30. See, for example: Human Rights Committee, *J.O. v. France*,

Burden of Proof and Laws of Pakistan:

In Pakistan there is detailed mechanism to adduce evidence and produce the allegation leveled against an accused person. The Law of Pakistan concerned with regulation of evidence, production of evidence, credibility of evidence and reliability of evidence is quite clear in putting the burden to prove the indictment against the person accused of allegations. The QSO in a very precise, pragmatic and clear way identifies this responsibility of the claimant by underlining that “Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”¹. There is another rule laid down in the said Order, there is another provision which urges a person to prove the subsistence of a peculiar fact, it is the liability of that sole person to substantiate such existence. The relevant provision of the QSO reproduced mandates that “When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person”². The article of the QSO also puts to prove that a person who alleges any fact it is duty of the said person to prove the same.

The Legal and Judicial System of Pakistan depicts another aspect of the matter wherein under few exemptions the burden of proof shifts towards the accused. The QSO elucidates this fact as “Burden of proving that case of accused comes within exceptions. When a person is accused of any offence the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Pakistan Penal Code (Act XLV of 1860), or within any special exception of proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances”³. Obviously, this Article of the QSO shifts burden of proof on the accused persons, but it occurs only in case the prosecution succeeds to discharge its function by proving the allegation. In order to invoke the provisions of this Article, prosecution cannot be declared immune to satisfy its primary duty of proving the

Communication No. 1620/2007, UN Doc CCPR/C/101/D/1620/2007/Rev.2 (2011), para. 9.6

¹ Article 117 (1) of the QSO.

² Article 117 (2) of the QSO.

³ Article 121 of the QSO.

charges rather first the prosecution would undergo to substantiate its version, and then the burden would lie on the accused. This principle has been laid down by the Supreme Court of Pakistan while pronouncing a judgment which holds that “Burden of proof on the accused to establish his plea in defence does not arise until the case is established against him by the prosecution. Prosecution must prove its case beyond reasonable doubt irrespective of any plea raised by the accused in defence”¹. The same principle has recently been reiterated and reestablished by the August Supreme Court of the Country in a judgment holding that “Burden is always on the prosecution to prove its case and it is only when a prima facie case is made out against the accused sufficient to justify his conviction, does the burden shift upon the accused under Article 121 of the QSO...If the prosecution fails to prove its case against the accused, the question of shifting of burden upon the accused does not arise”². The same proposition has been rendered by another judgment decided in the United India before its partition and creation of Pakistan. The said judgment establishes that “The Onus of proof never shifts to the accused, and they are under no obligation to prove their innocence or adduce evidence in their defence or make any statement”³.

Islamic Jurisprudence and Burden of Proof:

Islam being a religion for all does not believe in sentencing or upholding innocent people on groundless charges. These are the teachings and injunctions of this religion that uphold acquitting a culprit rather than convicting an innocent person. In Islamic preview, evidence also occupies pivotal and central place in the decision making. The Islamic Law also requires the person claiming or making a charge to prove it. The Holy Prophet very clearly commanded the complainant to prove his version by stating that “Burden of proof lies on the plaintiff/complainant and the oath is on the person who denies”⁴. The Holy Prophet (PBUH), on another occasion reiterated this responsibility of the claimant to substantiate his/her claim against the accused. He said: “If people were to be given things merely on their claims, some people would have claimed lives and properties of other people. But conclusive evidence (albayyinah/البينة) is the responsibility of the plaintiff while the

¹ Shamoona alias Shamma vs. The State, 1995 SCMR 1377.

² Ali Muhammad vs. The State, PLD 2020 SC 201.

³ Benoyendra Chandra Pandey And ... vs. Emperor, AIR 1936 Cal 73.

⁴ Ahmed B. Hussain, Al Sunan Al Kubra Al-Baihaqi (Nashr al Sunnah, Multan).

onus of oath is on the defendant”¹. Bassiouni, while elaborating this phenomenon of the Islamic Law and Injunctions goes on to make an observation that “It is thus a fundamental rule in Islamic criminal law that: “The burden of proof is on the proponent, and the oath is incumbent on the one who denies”². The same narration has been portrayed by another Religious Scholar Pro. Dr. Muhammad Munir while making a precise and pragmatic articulation that “The onus of proof lies with the claimant and denial shall be supported by oath”³. The said Author has also made another observation to the effect of burden of proof in Islamic perspective. He states that “The burden of proof is on the accuser, and he who negates should be asked to take the oath. Reconciliation is desirable among Muslims except where there is agreement on something which legitimizes that which is prohibited or prohibits that which is legitimate. He who claims even a doubtful right and proves it, accord him the right, but if he cannot provide it then rule against him:’ for (in both cases) it is the best that you can do”⁴. Matba‘at al-Istiqamah, Cairo has referred a letter issued by the second (2nd) Caliph Hazrat Omar to Abu Musa Al Ash-ari wherein he commanded him to urge the accuser to prove his claim and in case the accused denies the allegation, ask him to administer oath. It states that “The famous letter of ‘Umar b. al-KhaïËb to AbË MËsË al-Ash‘arË (R.A.) has referred to this ÍadËth. It says, “The burden of proof is on the accuser, and he who negates should be asked to take the oath”⁵. The above quoted chunks from different writings transpire that as per Islamic Injunctions, complainant/prosecution is under obligation to prove its case and in proving so, the burden shifts to accused who is to take oath in support of his/her negation of the charge.

¹ Sunan Ibn Majah, Vol. 2, p. 778

² Bassiouni, note 8, at 44 (Referencing Ahmad ibn al-Husayn al-Bayhaqi, Kitab al-Sunan al-Kubra, 253 (Vol. 10, Beirut, Lebanon: Dar Al Fikr, 1925).

³ Prof. Dr. Muhammad Munir, Fundamental Guarantees of the Rights of the Accused in the Islamic Criminal Justice System, Hamdard Islamicus Page 45, Vol XL, No.4 available at <https://ssrn.com/abstract=3093026>.

⁴ Prof. Dr. Muhammad Munir, Fundamental Guarantees of the Rights of the Accused in the Islamic Criminal Justice System, Hamdard Islamicus Page 56, Vol XL, No.4 available at <https://ssrn.com/abstract=3093026>.

⁵ AbË Bakr MuÍammad b. Khalaf b. HayyËn WakË‘, AkhbËr al-QuìËh, ed. ‘Abd al-‘AzËz MuÍtafË al-MarËghË, 3 vols., Cairo, Matba‘at al-Istiqamah, 1947-1950

Conclusion:

The above debated narrations lead to convey that under the Rules of Human Rights no one can be compelled to depose against himself even under any kind of influential circumstances. An accused person cannot be forced to give evidence and break his silence at any stage of the criminal proceedings. It is exclusive right of an accused person that he may enjoy the prerogative of silence throughout the criminal proceedings and this silence cannot lead the court make any inference against the accused rather it is prosecution who is to prove its case. The Human Rights Mechanism not only guarantee a right to cross examine the Prosecution Witnesses but also to record evidence of these witnesses in his/her presence to make him/her understand the gist of the same for better preparation of defence. It is also evident from the facts mentioned above that like privilege of silence, an accused cannot be compelled to confess his guilty and any kind of confession made under such compulsion, coercion or threat is not admissible in the Court for conviction of the Court. The Supreme Court of Pakistan has ruled that even the voluntary confession of the accused must find corroboration from independence and confidence inspiring evidence for conviction of the accused. Another reality coming to light in this chapter is bearing the burden of proving guilt of the accused by the prosecution. The prosecution cannot take advantage of loopholes on the part of the accused rather burden of proof exclusively lies on the prosecution. As per verdicts and rulings of Superior Judiciary of the Country it only diverts to the accused when the prosecution successfully discharges its duty by proving the same. So, burden of proof, initially, is on the shoulders of the prosecution through any circumstances.

Chapter No: 9: Rights of Accused Person During Trial.

Introduction:

The second stage of the criminal proceedings is the trial of the offence. The Trial of an offence decides about the guilt or innocence of a person. This is trial where not only prosecution evidence is scrutinized but also mistakes, malpractices or violations committed by the Investigation Agencies are put on anvil. During trial either prosecution succeeds in conviction of the accused or loses its case by acquittal of the accused. So, this is not a just second stage but a deciding stage. It is a settled principle of law that the trial of a case should not miss any technicality or irregularity while making a decision. It is also established by Law that accused persons should not be deprived of their rights even during trial. The rights of an accused during trial or at trial stage generally as include as mentioned in the next section of this chapter.

Right of Representation through a Counsel/Attorney of Choice:

Choice and dissent is instinctive in human nature and act according to one's own choice is a fundamental human rights. The same is the case with defending oneself through a counsel of his/her choice because defence in criminal trials is a basic right of every accused. The Supreme Court of the United States of America ruling about importance of a counsel/representative declared it an essentiality of trial and held that "With the initiation of adversary proceedings, right of representation of an accused through a counsel commences which is a necessity for fulfillment of fair trial"¹. Defence by an accused person in any proceedings is an absolute fundamental right having worldwide recognition. Apart from this fact, there is a plethora of laws and statutes which can only be dealt with by an Expert of the field. In this particular perspective, an accused even literate cannot understand the soul and depth of the laws which may prejudice his defence by leading to conviction due to misunderstanding of

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

misconception of law. There is another aspect of the case, sense of satisfaction and dissatisfaction keenly exist in human psychology. A person accused of an offence aspiring to employ a person of his/her choice to pursue his case creates a sense of satisfaction and reliance in that particular individual. Moreover, a person who is not given vast variety of choice to engage a Legal Practitioner whom the aggrieved person trusts may not only prejudice his right of choice but also increases sense of dissatisfaction over the proceedings of the trial. In this whole backdrop, there must be a wide range of options for a person to defend his counsel. There is another factor where state provides counsel or attorney to an accused on its expenses. In this case, there should also be a choice from among lawyers rather than just one representative. Moreover, each and every person is not able to engage a counsel to defend himself especially in third (3rd) World Countries and this lacuna may lead to miscarriage of justice by depriving the accused person to tender his defence. Keeping this scenario in view, to save the rights of the accused persons, the pioneers of the human rights and framers of the Constitutions as well as other statutes of the modern world have catered the accused persons with the right of consultation and representation by the Legal Practitioner of his/her own choice.

International Human Rights and Choice of Counsel:

This fact is universally admitted that in developing or third world countries each and every person has not sufficient means to engage and pay a counsel which may defect the case of an accused amounting to violation of his/her right. Redressing this phenomenon, the Human Rights Instruments and Statutes of the country have put responsibility on the State to provide a Counsel to a deserving accused on state expenses. This right has been recognized in the ICCPR entitling an accused to consult a Legal Practitioner or Counsel of his/her own choice for his defence. The Covenant lays down that “To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it”¹. The UN Human Rights Committee reiterated this right of an accused person emphasizing on provision

¹ Article 14 (3) (d) of the ICCPR, 1966.

of legal assistance to an accused by the State if the accused is incapacitated to meet up this requirement. The Committee further required the States to ensure Counsel's presence at each and every stage of a criminal proceedings and it directed the States to provide free Legal Counsel to accused persons unable to engage a Legal Practitioner. The Committee remarked that "If the individual cannot afford to pay, such counsel must be assigned to them free of charge. The availability of legal assistance is imperative in determining whether an accused can access the relevant proceedings or participate in them in a meaningful way"¹. There are two scenarios regarding representation of accused through counsel: one is the choice to engage a counsel and the other is provision of counsel by the State itself in case the accused is unable to afford a counsel. The non provision of a counsel to an accused either of his own choice or on the State expenses is marked as violation of fundamental rights by the Universal Human Rights Instruments and it is responsibility of the State to do the needful.

Right to Engage Counsel under Laws of Pakistan:

The legal and judicial system of Pakistan is a combination of complexity which is not easily understandable by each and every citizen of the country especially with a low literacy rate. Moreover, there is certain legal terminology which is not common to a layman. The Constitution of the Country also developed this right of the accused and incorporated the same providing that the accused person shall be entitled to his defence through a counsel of his/her choice and this right shall not be denied by the state. The Constitution prescribes that "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult and be defended by a legal practitioner of his choice"². This fact has also been embedded in the Cr.P.C. 1898 where this right of the accused has been endorsed as "Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader"³. In 2009 a National Judicial Policy Making Committee under the Chairmanship of the then Chief Justice of Pakistan Mr. Justice Iftikhar Muhammad Chaudhary devised a

¹ UN Human Rights Committee (23rd August, 2007).

² Article 10 (1) of the Constitution of the Islamic Republic of Pakistan, 1973.

³ Section 340 (1) of the Cr.P.C. 1898

National Judicial Policy to give impetus to the disposal of cases by courts in order to lessen the burden of pending bulks of cases in various courts of the Country. The policy went under revision in 2012. In this Policy, non representation of accused by counsel in criminal cases was also marked one of the reasons behind delay in disposal of criminal cases. Therefore, the National Judicial Policy, 2009 set up a mechanism for affording legal representation to the accused. The Policy concludes “In criminal cases, non-representation of accused by Counsel is also a source of delay in trial, therefore, the Chief Justices of High Courts, in consultation with the Chairman of the Legal Aid Committee of the Provincial Bar Councils or Pakistan Bar Council, may appoint lawyer in such cases to avoid delay”¹. The Lahore High Court Rules and Orders which govern the procedural mechanism of the High Court itself and other courts both Civil and Criminal in the province also put responsibility on the court to make sure legal representation of an accused especially in offences punishable with capital sentence even at the state expenses. The wording of these rules clarifies that “If the accused is unrepresented in a Sessions case and cannot afford to engage a counsel, the Sessions Judge shall make arrangement to employ a counsel at Government expense. Counsel in such cases should be appointed well in time to enable him to study the documents mentioned in section 265-C of the Code of Criminal Procedure”². A Higher Court of Pakistan while admitting right of representation of the accused held that “No trial without proving legal assistance for a capital sentence”³. The same like observation was also made by another Court of the Country in a famous Dr. Ghous Muhammad case while holding that “The Courts in Pakistan are supposed to discharge a higher duty to do complete justice, which duty can only be performed if the Court scrutinizes testimonies by confronting and cross-examining witnesses to ascertain the truth. Such duty exists even when the accused is represented through competent counsel, while the vigor of such duty can well be appreciated in cases where the accused is unrepresented”⁴. The Supreme Court of Pakistan while observing importance of a Legal Counsel in order to cross examine prosecution witnesses held that cross examination by the accused himself cannot

¹ Paragraph No.13, National Judicial Policy 2009.

² Part C (1) Chapter 24 Rules and Orders of the Lahore High Court Lahore Volume III.

³ 1991 P.Cr.L.J 197.

⁴ 1997 MLD 1697 [Dr. Ghous Muhammad Case].

serve the purpose curtailed in cross examination. The court laid down that “Practice of providing an opportunity to accused to cross examine the witnesses himself has been deprecated because the ability of accused to cross-examine the witnesses cannot be substituted with that of a counsel”¹. The Apex Court of the Country in its esteemed judgment delivered in 2010 put responsibility on the State to bear the expenses of defence counsel to ensure the dispensation of justice. The judgment states “Law protects such rights of accused as a duty case upon the State to bear the expenses of the counsel, if the accused is unable to engage a counsel of his choice due to financial restraints”².

Islam and Right of Counsel:

Islam proclaiming equality before law for each and every individual of the society does not put any bar on engaging a counsel for representation. Even Islam gives the concept of repetitive through guardianship (Wali) in many civil and criminal matters. However, there is no explicit provision in early days of the religion. On the other hand, production of defence is a recognized fundamental right in Islamic Jurisprudence violation of which is clearly prohibited at many occasions. A prominent couplet from the Holy Quran is reproduced as reference which states that “If the debtor be feeble minded, weak, or incapable of dictating, let his guardian dictate equitably”³. The Prophet (PBUH) is reported to have said: “Then you bring your litigations to me; and some of you might superbly argue your case much better than the other litigant so that I decide in his favour on the basis of whatever I hear. So, I might be wrongly awarding some else’s property to his fellow Muslim, then he shouldn’t take it, for I give him a part of hellfire”⁴. Both these conceptual situations may lead to an inference that in Islamic Laws there is no such prohibition on providing legal representation to an accused. Muhammad Abdel Haleem commenting on right of counsel in Islamic Laws observes that “While classical Shari’ah did not expressly include any provisions requiring a court to provide the accused with access to counsel, the essential qualities of a fair and just trial cannot be fulfilled in today’s society without such a right. Modern day Shari’ah scholars recognize the right to an

¹ 2010 P.Cr.L.J and 1993 SCMR 550 [ref.]

² 2010 P.Cr.L.J 812.

³ The Holy Quran 2: 282.

⁴ Al-Sahih Muslim Hadith No. 1713

attorney as a fundamental right of the accused in any criminal proceeding”¹. Another renowned Muslim Scholar regarding Legal Representation has remarked that “As to the position of Islamic law, of course, the profession of a legal counsel to a defendant as it exists today did not exist in the time of the Prophet and the following centuries when the most important developments of Islamic law took place. But modern authors hold the opinion that the general principles of the Shari’a do not deny to the accused the right to be assisted by a counsel”². Dr. Muhammad Munir in his book has also noted down this right of an accused duly identified and enshrined by the Islamic Principles. He underlines the acknowledgement of this right as “A common accused is not an expert in law and he does not know the nitty-gritty of conducting a criminal trial and avoiding self-incrimination etc. It is, therefore, essential for a fair and just trial under the Islamic law in today’s societies that the accused should be represented by an attorney of his choice. The Islamic law allows any person to be represented by an agent or attorney and this is based on the Qur’Én, the Sunnah of the Prophet (PBUH), Ijma or Consensus of the Companions of the Prophet (PBUM), and Qiyas or Analogy”³.

Provision of Interpreter:

Right to defend himself by the accused is a universal human right envisaged in various Human Rights Instruments, decisions of the Courts and Domestic Legislation of the Country. This fact is also admitted one that usually an accused being ignorant of spirit and depth of Laws cannot properly defend him/her. Moreover, cross examination of the Prosecution Witnesses, which is an efficacious tool to elicit truth from a witness, cannot be conducted by a person who is not well versed with legal formalities and intricacies of proceedings and procedure of the court. An accused who is illiterate even cannot understand the evidence adduced by the prosecution. Apart from this fact, approximately, all the court proceedings are recorded in English not commonly known by the citizens of the State. Besides this fact, it is also an established fact that without proper defence by the accused, there is

¹ Muhammad Abdel Haleem, Kate Daniels and Abdel Omar Sherif, at 50 (Citing Al-Awani, The Rights of the Accused, note 65, at 35).

² Osman Abd-el-Malek al-Saleh, The Right of the Individual to Personal Security in Islam, in: Mahmoud Cherif Bassiouni (ed.), (note 10), page-81.

³ Prof. Dr. Muhammad Munir, “Fundamental Guarantees of the Rights of the Accused in the Islamic Criminal Justice system”.

no fairness in the trial. So, in order to provide an opportunity to an accused to make his defence in a better way when he/she is unable to conceive the proceedings of a Court of Law, he must be provided with an Interpreter.

The Human Rights Instruments and Right of Interpreter:

The International Covenant on Civil and Political Rights adopted in 1966 entailed this right of the accused and required the Member States to provide Interpreter to an accused if he is unable to understand the proceedings or language of the Court. The Covenant articulates that “To have the free assistance of an interpreter if he cannot understand or speak the language used in court”¹. The same right has been entailed by the ECHR which observes that “Everyone charged with a criminal offence has the following minimum rights: to have the free assistance of an interpreter if he cannot understand or speak the language used in court”². The Rome Statute of the International Criminal Court drafted on July 17, 1998, however, came into effect in 2002 also identified this right of an accused at International Level. The Statute states that “a person shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness”³. In the words of Julia Sherman “The recognition of the right to an interpreter as a norm of customary international law is important both in theory for the elucidation of international law and also in practice for individuals who have suffered a violation but lack an international forum in which they could vindicate their rights Identifying the right to an interpreter as a right protected under customary international law consequently helps to provide greater protection of such rights for claimants”⁴. Regarding provision of Interpreter to an accused in criminal proceedings Stafford has underlined that “the non-English-speaking defendant in a criminal proceeding poses increasing problems for the administration of criminal justice. Minorities for who English is not the principal language or who speak such unusual dialects of English as to cloud understanding and communication make up a

¹ Article 14 (3) (f) of the ICCPR, 1966.

² Article 6 (3) (e) of the ECHR, 1950.

³ Article 55 (1) (C) of the Rome Statute of the International Criminal Court

⁴ Julia Sherrman: “The Right to an Interpreter under Customary International Law”.

discouraging proportion of offenders”¹. The Supreme Court of Canada in a judgment has declared provision of Interpreter to an accused a rule of Natural Justice holding that “The right of an accused who does not understand or speak the language of the proceedings to obtain the assistance of an interpreter ensures that a person charged with a criminal offence hears the case against him or her and is given a full opportunity to answer it. This right is also intimately related to our basic notions of justice, including the appearance of fairness, and to our society's claim to be multicultural”². In Pakistan the situation is somewhat different.

Statutory Provisions in Pakistan:

The Constitution of the Country does not provide for any kind of Interpreter to the accused. However, interpreting evidence to the accused has been put on the Court taking down evidence of witnesses by the Cr.P.C. 1898 regulating the procedure of Criminal Courts in the Country. The Code, on one hand authorizes the Provincial Government to circulate any direction to the Court for recording of evidence in mother tongue of the Judge or Magistrate. It stipulates “The Provincial Government, may direct that in any district or part of a district, or in proceedings before any Court of Session, or before any Magistrate or class of Magistrates the evidence of each witness shall, in the cases referred to in section 356, be taken down by the Sessions Judge or Magistrate with his own hand and in his mother-tongue”³. The Code further provides that “Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open Court in a language understood by him”⁴. In this perspective, there is a clear cut obligation on the trial court to make the charges and evidence against the accused understand him for better running of the procedure of the Court and production of defence in a better way.

Prevention against Double Jeopardy:

There is no denying the fact that a person liable for an offence is liable to punishable. However, this punishment should not only be based on legal terms but also after completion of all Codal and Legal requirements set out in the law. There is

¹ Safford J.B: “No Comprendo: The Non-English-Speaking Defendant and the Criminal Process”.

² Quoc Dung Tran v. Her Majesty The Queen [1994] 2 SCR 951.

³ Section 357 (1) of the Cr.P.C.

⁴ Section 361 (1) of the Cr.P.C.

another theory regarding punishment of offenders that a person cannot be sentenced twice for the one and the same act. In other words, a person acquitted of one offence cannot be convicted subsequently and vice versa by initiating another trial for the same offence. This right is derived from a Latin doctrine ‘Nemo debet bis vexari’ standing for ‘a man must not be put twice in peril for the same offence’. This privilege for an offender has been identified as fundamental right in many Human Rights Instruments, constitutions of many States including Pakistan and in Islamic legislations. This privilege for an offender has been identified as fundamental right in many Human Rights Instruments, constitutions of Pakistan and in Islamic legislations. Universal Human Rights Instruments like ICCPR curtailing a number other civil and political rights of accused persons enunciates this right and put an embargo on the State Machinery of a State not to trial a person twice for the same offence. The Convention mandates in clear cut way that “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”¹. The American Declaration, though a Regional Document, yet is of grave concern with the stipulation of human rights in other countries ascribes the same right to an accused person by stating that “An accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same Cause”². Likewise, the Charter of Human Rights manipulated by the Arabian Peninsula is also a Regional Deed affecting the legislations of Muslim Countries of the Area has great impact. The right against double jeopardy has also been identified by this Charter by underline that “No one shall be tried twice for the same offense. Anyone against whom such proceedings are brought shall have the right to challenge their legality and to demand his release”³.

Laws of Pakistan and the Doctrine of Double Jeopardy:

Pakistan is an independent State with a Written Constitutional Document providing fundamental rights to the citizens of the State. This particular document being affected by both the Universal Conventions on Human Rights and Islamic Law also endorses this right of an accused person against double jeopardy. The concerned Article of the Constitution in a way requires the State not to allow the

¹ Article 14(7) of the ICCPR.

² Article 8 (4) of the American Declaration on Human Rights.

³ Article 19 (1) of the Arab Charter on Human Rights.

prosecution or sentence for commission of an offence twice. It elaborates and explains that “No person— shall be prosecuted or punished for the same offence more than once”¹. The Code of Criminal Procedure, 1898 governing the procedure of the criminal courts in the country is not exception this rule. The Cr.P.C goes on to declare that “A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence”². Likewise, another Law prevalent in the Country known with the name of General Clauses Act, 1897 which provides general explanations and interpretations to many legal terms used in domestic legislations of Pakistan also identifies this right of accused by narrating that “Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence”³.

Retrospective Punishment:

It is a general concept of criminal administration of justice that accused persons, if proved guilty, can only be awarded sentence provided for the offence. This conception also leads to another conclusion that when there is no law, there is no punishment. The basic idea behind the development of this concept of doctrine is to save the person from receiving a punishment for an act of omission which is not prohibited by stipulation of punishment under any of the laws. A person should not be punished for an act not an offence under any law for the time being in force. In the words of Daniel Troy “This concept and right is based on a maxim “nulla poena sine lege” meaning no punishment without law”⁴. This principle requires that before sentencing an accused person for any overt act, the legislature of the State must enunciate that act as offence with sentence. This notion has received confirmation in many Universal Human Rights Documents, Regional Enactments and Constitutions of States.

¹ Article 13 (a) of the Constitution of the Islamic Republic of Pakistan, 1973.

² Section 403 Cr.P.C.

³ Rule 26 of the General Clauses Act, 1897.

⁴Daniel Troy “Ex post Facto, The Heritage Guide to the Constitution.”

Human Rights Documents and Retrospective Punishment:

The first ever Declaration to grant universality to the Human Rights is the UDHR which, too, paved the way for other legislations afterwards. The concept of retrospective punishment, for the first time, was introduced in this Declaration putting a ban on awarding sentence for acts not declared as offences with punishments. The Declaration holds that “No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed”¹. The Convention dealing with Civil and Political Rights of the Citizens is not exception to the identification of this human right. The convention prescribes that “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby”². This concept has also received recognition in the European Convention where it is categorically mentioned that there is neither punishment without law nor heavier that envisaged by law. The Convention underlines that “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed”³. The Convention on Human Rights in American Continent has also given identification to this right and has laid an embargo on awarding sentence for an act of omission not specifically declared offence with punishment at the time of its commission. The Convention states that “No one shall be convicted of any act or omission that did not constitute a criminal offence, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one

¹ Article 11 (2) of the UDHR.

² Article 15 (1) of the ICCPR.

³ Article 7 (1) of ECHR.

that applicable at the time the criminal offense was committed”¹. Another Instrument pertaining to Arabian Area and promulgated by the Arabian Nations maintains the observance of this norm while sentencing an accused person.

Pakistani Laws and Retrospective Punishment:

Pakistan is a member of International Community as an Independent Islamic Democratic State and signatory of many Universal Human Rights Instruments which curtail and emphasize the member states to make sure the rights of their citizens. In compliance of this requisition, the Constitution of the Country adopted in 1973 entails protection against retrospective punishment. The Constitution states that “No law shall authorize the punishment of a person—for an act or omission that was not punishable by law at the time of the act or omission”². Another Article of the Constitution prescribes that “No law shall authorize the punishment of a person— for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed”³. The Supreme Court of Pakistan in a well known judgment explained this fact that if the commission of an act is not punishable under law, the accused cannot be put to prosecution or conviction. The Court laid down that “Person who is blamed to have committed an offence if is not accountable in criminal law for his action, he cannot be subjected to prosecution”⁴. Both the above quoted Article from the Constitution of the Country and a landmark judgment passed by the August Supreme Court make it vivid that sentence not provided by law or other than provided by law is allowed in the criminal administration of justice of the Country and this is a fundamental human right embodied by the Universal Human Rights Instruments.

Shariah Law and Retrospective Punishment:

This is an admitted and developed fact of Islamic Law and Jurisprudence do not permit the State to violate rights of individuals. No doubt, there is no crystal clear provision regarding retrospective but the precedents set by the Religious Monarchs are sufficient to portray that there is no room for sentence not provided by Islamic Judicial System or other than ventured by the Islamic System.

¹ Article 9 of the American Convention on Human Rights.

² Article 12 (1) of the Constitution of the Islamic Republic of Pakistan, 1973.

³ Article 12 (2) of the Constitution of the Islamic Republic of Pakistan, 1973.

⁴ The State and others vs. M. Idrees Ghauri and others, 2008 SCMR 1118

Moreover, there are certain fixed quantities and qualities of sentence for various offences which cannot be altered at any cost because those are known as limits (Hudu) by Allah Almighty. It is an implied concept in Islamic Legal System that a Judge cannot go beyond the types or limits of sentences fixed for offences in the Islamic Judicial System. In this way, there is no doctrine or need to deviate from those limits entailed by Allah Almighty and practiced, preached and taught by his Last Messenger. Apart from this universal acknowledgment there are certain Human Rights Instruments adopted and verified by the Muslim Organizations and Countries which specifically put bar on this exercise. One of these Documents is Declaration adopted by the Muslim Countries at Cairo which specifies that “There shall be no crime or punishment except as provided for in the law at the time of the commission of crime”¹. Another Declaration, too, given effect at Cairo also curtails this notion that “There shall be no crime or punishment except as provided for in the Shari'ah”². Furthermore, The Arab Charter on Human Rights which is purely an Enactment of the Muslim Countries confirms that “There shall be no crime or punishment except as provided by a previously promulgated law. The accused shall benefit from subsequent legislation if it is in his favour”³. Last but not the least, Silvia Tellenbach explaining the concept of Islamic Laws and Injunctions about retrospective or other punishment than provided by law commented that “The Quran and the other sources, however, do not give a comprehensive list of what is good and what is blameworthy. There is no doubt that the Islamic judge does not have an unlimited discretion to create new crimes or to inflict new punishments. But this general limitation is much broader than the principle of legality which requires an exact definition of the acts that are to be punished under the circumstances of a certain time and a certain place”⁴.

Right to Bail:

Bail is a temporary release of an accused from the Law Enforcement Agencies in a Country. It is considered one of the most serious human rights afforded to an accused because it serves as a safeguard against illegal detention for an innocent person. Justice (r) Dr. Munir Ahmed Mughal commenting on the concept of bail in

¹ Article 22(D) of The Cairo Declaration of the Organization of Islamic Cooperation on Human Rights.

² Article 19 (d) of The Cairo Declaration on Human Rights in Islam

³ Article 15 of the Arab Charter on Human Rights.

⁴ Silvia Tellenbach “Fair Trial Guarantees in Criminal Proceedings Under Islamic, Afghan Constitutional and international Law, 2004”.

criminal administration of justice has observed that “The concept of bail emerges from the conflict between the police power to The concept of bail emerges from the conflict between the police power to approaching the criminal Court with a prayer for keeping the accused in custody”¹. Bails are usually of three types: Pre-arrest Bail, Post Arrest Bail and Post Conviction Bail. The Pre-arrest Bail is also called anticipatory and sometimes referred to as Protective Bail. This type of bail is purely based on the concept of saving the skin of an innocent person from the clutches of the State Machinery especially the Law Enforcement Agencies. The second type of Post Arrest Bail is taken into consideration when either the accused person is arrested by the Agencies before or without applying for a Pre-arrest bail or his/her plea for Pre-arrest Bail meets failure. The third type of bail is a remedy against conviction and is entertained by the Appellate Authority. The names given to and the types of bail are sufficient to explore the purpose behind provision of this remedy to the aggrieved persons. The Federal Shariat Court of Pakistan explaining the importance of bail and its role in criminal proceedings made a ruling that “The basic concept of bail is release of a person from the custody of the police or delivery into the hands of sureties, who undertake to produce him in court whenever required to do so”².

Human Rights and Right to Bail:

As discussed in earlier chapters of this dissertation the prime objective at the back of adoption of Human Rights Instruments was saving the human lives and individuals liberties. Therefore, almost all the Human Rights Deeds have given much importance to individual freedom and liberty next to human life. The first Instrument to embed the recognition of the right to bail was the ICCPR which provided bail as remedy. The Convention stipulates that “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”³. Thereafter, the same approach was imitated by the European Nations while drafting their own separate Convention on Human Rights. This Convention mandates that “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his

¹ Justice (r) Dr. Munir Ahmed Mughal, “Law of Offence and Bail in Pakistan, 2011”.

² Khushi Muhammad vs. The State, PLD 1953 FC 170.

³ Article 9 (4) of the ICCPR.

detention shall be decided speedily by a court and his release ordered if the detention is not lawful”¹. “It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment”². The ICCPR is also one of the sources for development of right to bail for the convicts by demonstrating that “Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful”³. The American Convention on Human Rights is not behind the above depictions in envisaging their particular right. The Convention maintains that “Anyone arrested or detained on a criminal charge shall be brought promptly before a Judge or other officer authorized by law to exercise judicial power, and shall be entitled to trial within a reasonable time, or to release. The release may be subject to guarantees to appear for trial. It shall not be a general rule that persons awaiting trial shall be held in custody”⁴.

Pakistani Law and Right to Bail:

As far as right to bail in judicial and legal system of Pakistan is concerned, the Law Enforcement Agencies cannot make arrest of any accused in non cognizable cases without permission and warrant of arrest issued by the Concerned Area Magistrate. These are only the cognizable cases or offences that allow for arrest and detention of an accused without arrest warrant. So, by now, there is no concept of bail in non cognizable cases in the country. With regard to cognizable cases of offences, there are two types of offences:ailable and Non-ailable. Inailable Offences, bail to an accused is granted as a matter of right and this fact is incorporated in the Code of Criminal Procedure which affirms this right of the accused. This phenomenon has rightly been mandated by the Cr.P.C by holding that “When any person other than a person accused of a non-ailable offence is arrested or detained without warrant by an officer incharge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at

¹ Article 5 (4) of the ECHR.

² Article 9 (3) of the ICCPR.

³ Article 7 (6) of the American Convention on Human Rights.

⁴ Article 14 (5) of the Arab Charter on Human Rights.

any stage of the proceedings before such Court to give bail, such person shall be released on bail : Provided that such officer or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided”.

Pre-Arrest Bail:

Admittedly, there is no specific provision in Statutes of the Country exclusively dealing with the Pre-Arrest Bail. However, the concept of Pre-Arrest Bail in Pakistan was developed by Chief Justice A.R Cornelius and this notion traces its genesis in a Section of the Cr.P.C which empowers the High Court and Sessions Court to exercise the power of granting Bail. This is a Section in the Code of Criminal Procedure which underlines that “The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case, and shall not be excessive; and the High Court or Court of Session may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail, or that the bail required by a police officer or Magistrate be reduced”¹. The concept of pre-arrest or anticipatory bail was developed by the Lahore High Court, Lahore in a judgment by holding that “When sections 497 and 498, Cr.P.C. were enacted probably the framers of the Code did not clearly visualize anticipatory bail. It is, however, through precedent law which has now the force of statutory law that a petition for anticipatory bail under section 498 read with section 497 can competently be made”².

Post Arrest Bail:

The main Regulator of the Procedure of the Criminal Courts is the Code of Criminal Procedure, 1898 which articulates detail of the process concerning issuance of Post Arrest Bail to an accused person. The relevant provision of the Code says that “When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer incharge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such Court to give bail, such person shall be released on bail: Provided that such officer or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a

¹ Section 498 of the Cr.P.C.

² Khalid Rashed v. State PLD 1972 Lahore 722.

bond without sureties for his appearance as hereinafter provided”¹. This factum has recently been interpreted and endorsed by the Lahore High Court, Lahore in a judgment by declaring that “In Bailable Offences, a Court cannot reject or dismiss pre-arrest or post arrest bail under any circumstances”². With regard to Post arrest bail, there are also provisions in the Code of Criminal Procedure, 1898 which put conditions on grant of Post Arrest Bail to an arrested or detained accused. In other words, case of an accused coming under the ambit of prohibitory clause of the Cr.P.C. under usual circumstances is not entitled to enjoy the concession of bail rather it is conditional with exceptional circumstances. According to the scheme of Law of Bail in Pakistan, bail in offences punishment with capital punishment, life imprisonment or sentence for ten or more years, is not usually granted rather it is granted in exceptional circumstances of case. The Code of Criminal Procedure, 1898 envisages a provision dealing with Post Arrest Bail which is commonly referred to as Prohibitory Clause. The said provision lays down that “When any person accused of any Non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life or imprisonment for ten years”³.

Furthermore, the Criminal Law of the Country ventures few exceptions for grant to bail where after a stipulated period of arrest non completion of trial of the case or delay usually not caused by the accused renders him/her entitled to the concession of Post Arrest Bail. However, this time span is different for adult accused, an accused under the age of sixteen (16) years and a woman accused. The said conditional sentence/proviso of the Cr.P.C. prescribes that “Provided further that the Court shall, except where it is of the opinion that the delay in the trial of the accused has been occasioned by an act or omission of the accused or any other person acting on his behalf, direct that any person shall be released on bail—

¹ Section 496 of the Cr.P.C.

² Mumtaz alias Bhutto vs. The State & another, 2021 LHC 1144.

³ Section 497 (1) of the Cr.P.C.

- (a) Who, being accused of any offence not punishable with death, has been detained for such offence for a continuous period exceeding one year or in case of a woman exceeding six months and whose trial for such offence has not concluded; or
- (b) Who, being accused of an offence punishable with death, has been detained for such offence for a continuous period exceeding two years and in case of woman exceeding one year and whose trial for such offence has not concluded”¹.

Bail after Conviction:

The Laws of the Country also affirm the right of a convicted person to assail the vires of his/her conviction coupled with the right of bail on conviction. This type of bail is only the prerogative and jurisdiction of Appellate Court. The Cr.P.C. conferring power on an Appellate Court to release a convict on bail during pendency of appeal prescribes that “Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail or on his own bond”². Furthermore, this jurisdiction and discretion of the Court can be exercised at the time of preferring of appeal by the convict while suspending the sentence awarded to a convict and afterwards during hearing of the appeal, if the appeal is not decided within a period stipulated by law. The other relevant provision of law regulating the latter discretion of the Court reads as “An Appellate Court shall, except where it is of the opinion that the delay in the decision of appeal has been occasioned by an act or omission of the appellant or any other person acting on his behalf, order a convicted person to be released on bail who has been sentenced—

- (a) to imprisonment for a period not exceeding three years and whose appeal has not been decided within a period of six months of his conviction;
- (b) to imprisonment for a period exceeding three years but not exceeding seven years and whose appeal has not been decided within a period of one year of his conviction;
- or

¹ Proviso 3 to Section 497 (1) of the Cr.P.C.

² Section 426 (1) of the Cr.P.C.

(c) to imprisonment for life or imprisonment exceeding seven years and whose appeal has not been decided within a period of two years of this conviction”¹. Moreover, in Pakistan under AT, 1997 appeal against conviction lies to the High Court and does not allow the High Court to grant a bail to a person convicted under the said Law. The Act mandates that “Pending the appeal the High Court shall not release the accused on bail”².

Islam and Right to Bail:

Islam has laid much focus on dispensation of justice for all by the State and it is also a concept developed by Islam that liberty of any individual must not be fortified without any plausible legal cause at any cost. There is a difference of opinion about right to bail under Islamic Injunctions and few Scholars and Jurists argue that the Islamic Teachings do not have any kind of temporary release of an accused. “In another instance, the Prophet (PBUH) is reported to have told his wife, Hazrat Aisha (RA), to “...remove punishments as possible as you can; and set the accused free if he has a chance, because it’s much better for the judge to be wrong in acquittal than to be wrong in punishment”³. Syed Abul A’la Maududi quoting a saying of the Holy Prophet (PBUH) has explained the interim release of an accused by stating that “One of the most quoted examples is when the Prophet (PBUH) was delivering a lecture in a mosque once and a man asked him, “O Prophet of God, for what crime have my neighbours been arrested?” The Prophet (PBUH) heard the question and did not answer. The man repeated the same question. The Prophet (PBUH) again did not answer and continued his speech. The man raised the same question the third time. Then the Prophet (PBUH) ordered that the man’s neighbours be released. It is said that the reason why the Prophet (PBUH) had kept quiet the first two times was that the police officer who had made the arrest was present in the mosque and had there been proper reasons for the arrest, he would have got up to explain his position. Since

¹ Section 426 (2) of the Cr.P.C.

² Section 25 (8) of the ATA.

³ Gamal Atia, An Interpretive Memo on the Questionnaire of “Right to Fair Trial”, available at <http://hrlibrary.umn.edu/fairtrial/wrft-att.htm>.

the police officer gave no reasons for the arrests, the Prophet (PBUH) ordered that the arrested persons should be released”¹.

Right to Pardon:

Pardon is an administrative or executive decision conferred upon certain authorities to release an accused from the consequences of offence committed by him pre or post conviction. The International Committee of the Red Cross has defined Pardon as “Pardons may be granted to individuals who have been convicted of a crime and, when used judiciously, they are an important and legitimate component of legal systems throughout the world. Pardons can also be controversial, and it is important that the pardon process balances the interests of the accused or convicted individual with the interests of justice and broader society. These broader interests may include the need for accountability and for victims to see justice as having been served”². The Laws and Human Rights Instruments on one hand have prescribed for equality in deciding criminal cases and on the other hand have equipped persons convicted with the leniency of pardon. There are many enactments which declare pardon for persons sentenced with death penalty to be a human right and require the States to look this right into consideration through their domestic legislations.

International Human Rights and Pardon:

The ICCPR stipulates for the States member to the Covenant to grant pardons in case of accused persons convicted with capital punishment. The Covenant says that “Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases”³. The same approach was followed by the American Convention on Human Rights adopted in 1969 which laid down the principle that “Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by

¹ Syed Abul A’la Maududi, Human Rights in Islam available at https://archive.org/stream/MaulanaMaududiHumanRightsInIslam/Maulana_Maududi_Human_Rights_in_Islam_djvu.txt.

²ICRC: <https://reliefweb.int/report/world/icrc-explainer-what-does-international-law-say-aboutpardons-war-crimes>.

³ Article 6 (4) of the ICCPR, 1966.

the competent authority”¹. The Supreme Court of Canada in a case known as “The Latimar Case” established a principle that where courts are unable to dispense with justice, the offender should be released by the executive in exercise of the power of pardon. The Court laid down that “Where the courts are unable to provide an appropriate remedy in cases that the executive sees as unjust imprisonment, the executive is permitted to dispense “mercy”, and order the release of the offender”². Chief Justice of the U.S.A. Supreme Court in a judgment making observation about powers of the court to grant pardons gave a historic view by maintaining that “As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institution ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it. A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the Court. . . . A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him”³. Highlighting importance of pardon for persons wrongfully or unlawfully convicted, Sharpe opined that “Pardons have a role to play in avoiding legal proceedings where they would be clearly contrary to the public interest or the promotion of some important public purpose, such as reconciliation after a traumatic or catastrophic event”⁴.

Pakistani Laws and Right to Pardon:

The Constitution of Pakistan also identifies this right of pardon to the persons awarded sentences. However, the Document vests the President of the Country, who is also Head of the State, with the power to grant pardons to the persons

¹ Article 4 (6) of American Convention on Human Rights, 1969.

² R. Latimar: [2001] 1 SCR 3

³ United States v. Wilson 32 U.S (7 Pet.) 150, 160 and 161 (1833).

⁴ <https://www.ibanet.org/article/465431E6-8846-4A89-BA0A-6A8B85E5ED1D>.

convicted by any authority in the country. The Constitution mandated that “The President shall have power to grant pardon, reprieve and respite, and to remit, suspend or commute any sentence passed by any court, tribunal or other authority”¹. The Penal Laws of the Country also provide for pardon and commutation of sentence. The PPC, 1860 envisaged commutation of sentence by empowering both the Federal and the concerned Provincial Government to commute death sentence for any other punishment curtailed in the Code. However, the right to commute sentence of Life Imprisonment is subject of the concerned Provincial Government. However, this commutation cannot be made by either government without consent of the legal heirs of the victim/deceased in cases of murder. The provisions of the PPC, 1860 are laid down the following principles: “In every case in which sentence of death shall have been passed the Federal Government or the Provincial Government of the Province within which the offender shall have been sentenced may, without the consent of the offender, commute the punishment for any other punishment provided by this Code:

Provided, that, in a case in which sentence of death shall have been passed against an offender convicted for an offence of qatl, such sentence shall not be commuted without the consent of the heirs of the victim”² and “In every case in which sentence of imprisonment for life shall have been passed, the Provincial Government of the Province within which the offender, shall have been sentenced may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding fourteen years:

Provided that, in a case in which sentence of imprisonment for life shall have been passed against an offender convicted for an offence punishable under Chapter XVI, such punishment shall not be commuted without the consent of the victim or, as the case may be, of his heirs”³. The Code also saves the prerogative of the Present acknowledged under the Constitutional Document of the Country, subject o the same condition of consent by the legal heirs of deceased, by portraying that “Nothing in Section fifty-four or Section fifty-five shall derogate from the right of the President to grant pardons, reprieves, respites or remissions of punishment:

¹ Article 45 of the Constitution of the Islamic Republic of Pakistan, 1973.

² Section 54 of the Pakistan Penal Code.

³ Section 55 of the PPC.

Provided that such right shall not without the consent of the victim or, as the case may be, of the heirs of the victim, be exercised for any sentence awarded under Chapter XVI”¹. The same principle has been enunciated in the Criminal Code of Procedure adopted in 1898 where it has been envisaged that the Federal or the Provincial Governments may exercise the right of commutation but these provisions shall not over rule the law laid down under Sections 54 or 55 of the PPC, 1860. The relevant provisions of the Code Supra are reproduced as “The [Provincial Government] may, without the consent of the person sentenced, commute any one of the following sentences or any other mentioned after it: death, imprisonment for life, rigorous imprisonment for a term not exceeding that to which he might have been sentenced, simple imprisonment for a like term, fine. (2) Nothing in this section shall affect the provisions of section 54 or section 55 of the Pakistan Penal Code”². This Code also endorses the power of the President of Pakistan bestow under the Constitution of the Country articulating that the President is also authorized to commute sentences of an accused. The Code says that “The powers conferred by sections 401 and 402 upon the Provincial Government may, in the case of sentences of death, also be exercised by the President”³. The General Criminal Procedural Code regulating the proceedings of Criminal Courts in the Country also empowers the High Court and the Court of Sessions along with the Public Prosecutors to tender pardon to accused persons who are accomplice in any offence. However, this is a conditional pardon with intent and promise to ascertain valuable information from an accused in cases exclusively triable by the High Court or Court of Sessions, or offences punishment up to ten (10) years of offences punishable under section 211 of the PPC, 1860. Moreover, this tendering of pardon to an accomplice by the Public Prosecutor may be at any stage of investigation, or inquiry into or trial of the offences and by the Courts is before pronouncement of final decision. This procedure also followed the principle that in cases involving murder or hurt, an accused cannot be offer pardon without consent of the victim or his/her legal heirs. Furthermore, acceptance of this conditional pardon by the accused transforms him/her from accused to witnesses of the case, if he gives true account of the facts in his knowledge. The provision

¹ Section 55-A of the Pakistan Penal Code.

² Section 402 of the Cr.P.C.

³ Section 402-A of the Cr.P.C.

precisely transpiring the above narrated facts states that “At any time before the judgment is passed, the High Court or the Court of Session trying the case may, with the view of obtaining on the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to any such offence, tender, or order the officer-in-charge of the prosecution in the district to tender, a pardon on the same condition to such person”¹.

The approach of pardon with the name of ‘Plea Bargain’ has been embodied in another law of the Country named as “The NAB Ordinance, 1999” specifically dealing with malpractices at large scale by the public authorities. The Section of the Ordinance prescribes that “Notwithstanding anything contained in the Code, at any stage of investigation or inquiry, the Chairman may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to any offence, tender a full or conditional pardon to such a person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relating to the said offence including the names of the persons involved therein whether as principals or abettors or otherwise”².

Islamic Laws and Pardon:

Islamic Principles and Right to Pardon:

The concept of pardon in Islamic Teachings is quite different from other perceptions. The Islamic injunctions give a different view of pardon as compared to other laws. In Islam, there are two types of offences: Hudud³ and Ta’azir⁴. In Islam, there is no concept of pardon, commutation, reprieve or compounding the offences in sentences awarded under the Hudud Law because these Hududs (limits) are ascribed to God. However, the concept of pardon is quite different in other type of Ta’azir Laws, because, in Islam, there is either Compounding the offence or waiver of the right by the victim or legal heirs of the victim. Drawing a comparison between compounding and waiver (forgiveness), the more emphasizes is laid on the waiver by the Islamic Principles of life. The Holy contains numerous verses commanding its believers to abdicate from sentence of an accused rather

¹ Section 338 of the Cr.P.C. 1898.

² Section 26 (a) of the NAB Ordinance.

³ Hudud are offences for which punishment and limit of punishment is provided by Allah Almighty and cannot be changed at any cost.

⁴ Ta’azir are offences punishment for which depends upon discretion of the Judge.

forgiving the faulty. The Holy Quran says: “O you who have believed, indeed, among your spouses and your children are enemies to you, so beware of them. But if you pardon and overlook and forgive - then indeed, Allah is Forgiving and Merciful”¹. Another spot of the Holy Quran suggests that “And whatever strikes you of disaster - it is for what your hands have earned; but He pardons much”². At another place, the Holy Quran advises his followers to forgive the person and patching up the matter with the aggressive. The Holy Quran demonstrates that “And the retribution for an evil act is an evil one like it, but whoever pardons and makes reconciliation - his reward is [due] from Allah. Indeed, He does not like wrongdoers”³. Pakistan is an Islamic Republic which adopted Islamic Laws, besides, the Inherited English Legal System. The rule of waiver and compounding the offence also exists in General Laws of the Country which entitled the victim in case of hurt and legal heirs of the victim in case of murder to waive or compound the offence. However, when there is no legal heir or legal heirs who cannot compound or waive the offence, the right devolves upon the State. The relevant legal provision relating to waiver embarks: “In the case of qatl-i-amd, and adult sane wali may, at any time and without any compensation, waive his right of qisas”⁴. The Section governing the right to compound an offence stipulates that “In the case of qatl-i-amd, an adult sane wali may, at any time on accepting badal-i-sulh, compound his right of qisas”⁵. Azim Khamisa, father of Tariq Khamisa murdered by a mob led by a Teenager Tony Hicks in America, forgave Tony, the murderer of his son by stating that “You do forgiveness for yourself, because it moves you on. The fact that it can also heal the perpetrator is the icing on the cake”⁶.

Right to Appeal:

Appeal is a term used for approaching a Superior Authority against order or judgment of an Inferior Authority. It is a settled and admitted principle of administration of justice that where there is general rule there is an exception. The same case is with the criminal administration of justice because where there is conviction there is a remedy. An appeal, in ordinary course of nature and law, has

¹ The Holy Quran 64: 14.

² Ibid 42: 30

³ The Holy Quran 42: 40

⁴ Section 309 of the Pakistan Penal Code, 1860.

⁵ Section 310 Ibid.

⁶ Azam Khamisa: <https://www.bbc.co.uk/bitesize/guides/z98d3k7/revision/6>.

two fold functions: eradicate illegalities in the procedure adopted by the Trial Court and monitor the Trial Court. In this way, the appeal also serves as a source of accountability for the lower judiciary. Justice (r) Dr. Munir Ahmed Mughal defining word ‘appeal’ has mentioned that “The word appeal means to remove a cause formally from an inferior Court to a higher Court with a view to ascertain whether the judgment is sustainable having been passed by a Court of competent jurisdiction, sentence being awarded according to law and proceedings conducted conforming the provision so provided”¹. Right o appeal is considered a natural phenomenon because human beings are not immune to error and through an appeal errors of law and procedure can be mended by the Appellate Court.

Right to Appeal and Human Rights Instruments:

The main emphasis of the entire documentation ordaining human rights is to deliver dispensation of justice by the States to their nationals irrespective of any discrimination. This Right to Appeal also takes place in many of the Human Rights Instruments which direct the Member States to provide a right of appeal to the convict. The most prominent Convention concerning the Civil and Political Rights of Citizens is the ICCPR which categorized the right of appeal to the persons who have undergone conviction. It stipulates that “Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law”². The Working Group on Arbitrary Detention in its report has endorsed the enunciation prescribed by the ICCPR and in a clear cut way identified and verified the right to appeal granted to a convict by the Convention. The Report underlines that “Article 14(5) of the ICCPR guarantees the right of everyone convicted of a crime to have his or her conviction and sentence reviewed. The right to appeal is equally applicable to persons convicted by a court of having carried out terrorist acts”³. The same approach has been enshrined by the other Human Rights Convention adopted by the American Continental which manifests that “During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: the right to

¹ Justice (r) Dr. Munir Ahmed Mughal, “Law of Reference and Revision, 2012 Ch: XXXII (Ss. 432-444) Code of Criminal Procedure, 1898”.

² Article 14 (5) of the ICCPR.

³ Report of the Working Group on Arbitrary Detention (A/HRC/10/21), para. 54(h).

appeal the judgment to a higher court”¹. In this scenario it is an admitted fact that the right to file an appeal by a Convict has been given consideration and recognition worldwide through the Convention providing civil and political rights along with other Regional Documents like American Convention on Human Rights and ECHR.

Right to Appeal in Legislation of Pakistan:

Pakistan is a Country with codified Criminal Administration of Justice where like other rights of accused, right to an appeal also possesses identification. Commenting on right to appeal in Pakistan Niaz A Shah has observed that “The constitution and law guarantee the right to appeal and review by a higher tribunal. The right to appeal and judicial review is also entrenched within the hierarchical jurisdictional judicial structure of Pakistan. Pakistani law guarantees the right to appeal from various lower first instance courts to the district courts followed by the right of appeal to the superior courts. The High Court has appellate jurisdiction. The Supreme Court of Pakistan has also appellate jurisdiction. The Federal Shariat Court of Pakistan has appellate jurisdiction and review power over cases involving Islamic law”². The Code of Criminal Procedure regulating the proceedings and procedure of Criminal Courts in the Country not only admits this right of a convict but also lays down the manner and requirements for filing appeal even the forum to prefer an appeal. The most important provision endorsing the right of appeal elucidate that appeal can only be filed under the provisions of this Code or any law specifically granting the right to avail this remedy. The Code maintains that “No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force”³. The Cr.P.C prescribing procedure and authority competent to entertain an appeal categorically allows appeal against the conviction passed by a Judicial Magistrate or a Special Magistrate to the Court of Sessions. It states that “Any person convicted on a trial held by an Assistant Sessions Judge, or a Judicial Magistrate, Special Magistrate, or any person sentenced under section 349 may appeal to the Court of Session”⁴. The Cr.P.C also provides that where the sentence passed by a Magistrate exceeds four (04) years, in this backdrop

¹ Article 8 (2) (h) of the American Convention on Human Rights.

² Niaz A Shah: “The Right to a Fair Trial and the Military Justice System in Pakistan”.

³ Section 404 of the Cr.P.C.

⁴ Section 408 of the Cr.P.C.

the appeal shall also lie to the High Court concerned. The Code makes a statement as “When in any case an Assistant Sessions Judge or a Magistrate specially empowered under section 30 passes any sentence of imprisonment for a term exceeding four years, the appeal of all or any of the accused convicted at such trial shall lie to the High Court”¹. Likewise, as per mandate of the Cr.P.C appeal against conviction passed by a Sessions Judge, under the code, lies to the High Court. The Cr.P.C articulates that “Any person convicted on a trial held by a Sessions Judge, or an Additional Sessions Judge, may appeal to the High Court”².

Apart from the above narrations, admittedly a Provincial High Court may also act as a Trial Court in high profile cases. In this scenario, the High Court serves as both “the Trial Court” and subsequently the Appellate Court. The relevant provision of the Cr.P.C is reproduced to explain this manifestation which reads as “Except in cases in which an appeal lies to the Supreme Court under Article 185 of the Constitution any person convicted on a trial held by a High Court in the exercise of its original criminal jurisdiction may, notwithstanding anything contained in section 418 or section 423, subsection (2), or in the Letters Patent of any High Court, appeal to the High Court”³. The law granting the right to an appeal, too, lays down the ground on which an appeal may be preferred by a convict. According to the curtailments of the Cr.P.C there is broad scope of grounds because appeal may be filed on both factual and legal grounds. The Code propounds that “An appeal may lie on a matter of fact as well as a matter of law”⁴. The law pertaining to accountability also envisages the right of appeal to a convict which goes on to lay down that “Any party to the proceedings aggrieved by the final judgment and order of thy Court under this Ordinance may, within ten days of the final Judgment and order of the Accountability Court prefer an appeal to the High Court of the Province where the Court is situated”⁵. Admittedly, there are many courts which are established under any special law or for any specific cause. In that situation, right to bail for a convict has also been enshrined by the Cr.P.C which articulates that “ (1) An Appeal against the order of a Special Court Comprising a Sessions Judge or an Additional Sessions

¹ Section 408 (b) of the Cr.P.C.

² Section 410 of the Cr.P.C.

³ Section 411 (A) (1) of Cr.P.C.

⁴ Section 418 of Cr.P.C.

⁵ Section 32 (a) of the NAB Ordinance.

Judge shall lie to the High Court and shall be heard by a bench of not less than two Judges of That Court. (2) An Appeal against the order of a Special Court comprising a Judicial Magistrate shall lie to a Sessions Judge or an Additional Sessions Judge”¹. The Anti Terrorism Courts also acknowledge the right of a convict to prefer an appeal to a High Court against his/her conviction. The relevant section of the ATA states that “An appeal against the final judgment of an Anti-Terrorism Court shall lie to a High Court”².

The Federal Shariat Court of Pakistan in a judgment acknowledging the right of appeal enjoyable by an aggrieved person held that “Notice and right of appeal has to be provided whenever an order adverse to the interest of an aggrieved person is passed by any authority and such principles to be read as part of every statute”³. The Federal Shariat Court of Pakistan in another world famous judgment known as Mohtarma Benazir Case declared that “Islamic Injunctions and teachings grant to every aggrieved person the freedom to lodge protest. Every aggrieved person has a right of representation. He is free to lodge an appeal against an order affecting him adversely and it is his right that his appeal will be adjudicated upon without inordinate delay by an independent tribunal. He can, under no circumstances be stopped from exercising his basic right”⁴.

Right and Time for Preparation of Defence:

In criminal administration of justice, defence by an accused either himself or through a legal representative is an admitted right. It may not be out of place to mention here that the right to defend by accused has derived from natural justice providing condemnation unheard and the presumption of innocence. As the complainant or prosecution has vast right to adduce evidence, the accused has right to defend himself against the indictment of the prosecution. The Courts of Law have deprecated and discarded the practices of criminal trials without providing both defence and adequate time for preparation of defence on part of the accused. This right extends not only to adduce sufficient defence by the accused but also to shake the veracity of the prosecution evidence either by cross examination. The notion of

¹ Section 48 of the CNSA.

² Section 25 (1) of the ATA.

³ Dr. Muhammad Aslam Khakhi and others vs. The State and others, PLD 2010 Federal Shariat Court 1

⁴ Mohtarma Benazir Bhutto and another vs. Federation of Pakistan through Secretary Finance Islamabad, PLD 2010 Federal Shariat Court 229.

defence by the accused is as old as the criminal law itself because without provision of right to defend to an accused, there is no absoluteness of the trial. Taha’j al Alwani explaining the importance of right to defence for an accused states that “The accused has the right to defend himself/herself against any accusation. This may be accomplished by proving that the evidence cited is invalid or by presenting other evidence that contradicts it. In any case, the accused must be allowed to exercise this right so that the accusation does not turn into a conviction”¹.

Human Rights Instruments and Right to Defence:

The acknowledgment of affording reasonable opportunity and time to defend himself by the accused does exist in many instruments. The Human Rights Instruments have also given much importance to this right and contain many provisions guaranteeing this right to the accused persons. The first universal acknowledgment of this right is enacted in the UDHR wherein an accused person was declared to be presumed innocent in addition to guarantee for his/her defence. The Declaration mandates that “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence”². The next Human Rights Instrument to recognize this right is the ICCPR which not only emphasizes on opportunity of defence but also reasonable time for preparation of the same. It mandates that “Everyone shall be entitled to the following minimum guarantees, in full equality: to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing”³. Thereafter, the Convention of Human Rights prevalent in the American Continent taking this right into focus the right of defence to the accused. This Convention also stipulates the right of the accused extending to procure attendance of witnesses during trial. The Convention, makes a detailed articulation by prescribing that “During the proceedings every person is entitled, with full equality, to the following minimum guarantees: the right of the defense to examine witnesses present in the court and to obtain the appearance, as witness, of experts or other persons who may throw light on the facts”⁴. The said

¹ Taha’J al Alwani: “The Rights of accused in Islam Part Two”.

² Article 11 (1) of the UDHR.

³ Article 14 (b) of the ICCPR.

⁴ Article 8 (2) (f) of the American Convention on Human Rights.

Convention further identifies the sanctioning of sufficient time for preparation of defence to the accused and his counsel. It observes that “During the proceedings every person is entitled, with full equality, to the following minimum guarantees: adequate time and means for the preparation of his defense”¹. The European Court of Human Rights in a well renowned case titled *Kostovski v. Netherlands* by endorsing the guarantee of defence to an accused held that “An accused person must be given an adequate opportunity to challenge and question a witness, either at the time that the witness gave his or her statement to investigating authorities, or at some later stage in the proceedings, such as at the trial itself”².

Pakistani Laws Concerning Defence:

The native Laws of Pakistan are not immune to the admittance of granting a right to an accused to tender his defence during criminal proceedings. The judicial and legal system of Pakistan also recognizes two types of defence for an accused. The first one is the production of evidence by accused which may be statement of the accused or other witnesses to corroborate the innocence of the accused or to depose against the prosecution witnesses. The other kind of defence is the right to cross examine the witnesses brought by the prosecution. The domestic legislation of the country also endorses the employment of any counsel or legal practitioner by the accused to defend himself in the Court. The Cr.P.C laying down this right of the accused viz. defence goes on to declare that “Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader”³. Another provision of the Code allows the accused to appear himself as witness in disproof of the charges leveled against him. It reads as “Any person accused of an offence before a Criminal Court or against whom proceedings are instituted under this Code in any such Court shall, if he does not plead guilty, give evidence on oath in disproof of the charges or allegations made against him or any person charged or tried together with

¹ Article 8 (2) (C) of the American Declaration on Human Rights.

² European Court of Human Rights, *Kostovski v. Netherlands*, Application No. 11454/85 (1989), para. 44

³ Section 340 (1) of the Cr.P.C.

him at the same trial”¹. This right has also been envisaged by another Special Law regulating the proceedings of criminal cases involving malpractices of heavy amounts. It underlines that “Any person charged with an offence punishable under this Act shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him”².

The Concept of Islam about Defence by the Accused:

Islam does not put any bar on hearing the accused and provide right to defence to an accused rather there are numerous occasions where it was commanded that accused be given opportunity to advance his/her stance in order to reject the claim of the prosecution. The Holy Prophet (PBUH) appointing Hazrat Ali as Governor of Yemen advised him to decide a case by hearing both the parties which sufficient conclude the existence of right of defence to an accused. Taha’j Al-Awani has quoted this saying of the Holy Prophet (PBUH) as “It is well known hadith, the Prophet is reported to have told ‘Ali’ who he had just appointed as governor of Yemen: “O, Ali! People will come to you asking for judgments. When the two parties to a dispute come to you, do not decide in favour of either party until you have heard all that both parties have to say””³. Muhammad Abdel Haleem refereeing from the Hadith attributed to the Holy Prophet (PBUH) regarding the right of defence to an accused is of the opinion that “This right includes the right to challenge evidence presented against the accused and the right to present contrary evidence, the right to be heard, and the right to full equality in treatment with the accuser or opponent before the court or the judge. The Sunnah guarantees these rights, as mentioned in the hadith. Furthermore, the accused has the right to defend herself or himself, or alternatively, can request that an expert or an attorney represent her or him”⁴. Qudemah, Al-Mughne observing the status of defence afforded to an accused under the Islamic Laws comments that “The defendant has the right to refute the evidence presented against him or her and the right to present evidence to the contrary and rebut the allegations against himself. He has the right to be heard and the right to full equality

¹ Section 340 92) of the Cr.P.C.

² Section 29 of the NAB Ordinance.

³ Taha’j al-Awani, “The Right of the Accused in Islam (Part Two)”.

⁴ Muhammad Abdel Haleem, Kate Daniels and Abdel Omar Sherif, Eds., *Criminal Justice in Islam: Judicial Procedure in the Shari`a*, at 49, (I.B. Tauris & Co. Ltd., 2003) (Citing Taha J. Al-Awani, *The Rights of the Accused in Islam*, Arab Law Quarterly, Vol. 10, No. 1, at 38 (1995).

in treatment with the accuser or opponent before the court or judge. The Sunnah ensures all these rights. Muslim jurists argue that the accused has the right to rebut the evidence against him and question the integrity of witnesses. They opine that when the judge has heard the testimony of the witnesses against the accused he must ask the accused to come forward and let the judge know if he has any questions regarding the integrity of the witnesses”¹.

Criminal Liability:

A criminal act is considered against the whole of the society and the State and it is basic responsibility of the State not only to dispense justice but also devise mechanism providing justice. The State is also obliged not to punish an innocent person. To inflict sentence on the real culprit, it is a necessity and right of the persons roped in the trial, to determine liability and responsibility of the real culprit. Pakistan, no doubt, is a developing country and is somewhat governed by caste ridden and is mostly based on tribes where prolonged and family based animosities are common among the public. Moreover, the people of the country are in extreme habit of roping and booking the entire family of the opponents for an act of one person. Most of the FIRs and criminal cases contain names of even all the members of family which is not only miscarriage of justice, mental and physical agony for the innocents but also burden on courts to thrash the chef to punish the real offender. In this backdrop and prevalent situation, it is a herculean task for a Court to determine the actual criminal liability and award sentence accordingly. In criminal law, vicarious liability occurs when one person is held liable for the criminal actions of someone else. It assigns liability to an individual who did not directly cause the harm in question. Criminal law tends to stay away from vicarious liability due to the notion that a person is liable for their actions and not the actions of others. There are exceptions, of course, as vicarious liability is used in limited circumstances in some criminal cases”².

¹ QudÉmah, Al-MughnÉ, vol. IX, p. 87; al-MaqdisÉ, Al-SharÍ al-KabÉr ‘ala matnul MuqnÉ‘ vol. VI, p. 182; and al-ShirÉzÉ, Al-Muhazzab fi al-Imam al-ShÉhfi‘É, Beirut, Dar al-Ma‘rifah, 1379, vol. II, p. 303

² Understanding Vicarious Liability in Criminal Law. <https://www.legalmatch.com/law-library/article/vicarious-liability-in-criminal-law.html>.

Criminal Liability and Islam:

There is no denying this fact that all the laws whether divine, inherited or enacted lay stress on punishing the actual culprit not the innocent. There is also presumption of innocence and benefit of doubt in the field for the offenders which have their sole purpose to save the skin of an innocent person. The Islamic perception of liability viz. an offence is, too, compatible with this version not punish an innocent person and the liability for an offence only lies on the person committing the same not otherwise. The Holy Quran explaining the liability goes on to mandate that “And that there is not for man except that [good] for which he strives”¹. At another point, this Holy Book has stressed on the liability of a person to his own extent. It states that “Whoever does good, it is to their own benefit. And whoever does evil, it is to their own loss. Your Lord is never unjust to ‘His’ creation”². Another verse of the Holy Quran describes the same concept by arguing that “Divine grace is’ neither by your wishes nor those of the People of the Book! Whoever commits evil will be rewarded accordingly, and they will find no protector or helper besides Allah”³. The Holy Quran at another point has made it clear that no one is responsible for the wrongs done by the others rather it is the sole responsibility of the Wrong Doers to face the music of their bad deeds. It expounds that “No soul burdened with sin will bear the burden of another. And if a sin-burdened soul cries for help with its burden, none of it will be carried—even by a close relative. You ‘O Prophet’ can only warn those who stand in awe of their Lord without seeing Him and establish prayer. Whoever purifies themselves, they only do so for their own good. And to Allah is the final return”⁴. The Holy Quran has repeated the notion of personal liability regarding an offence at many places of the Book. Another couplet of this Scripture holds that “Say, “Is it other than Allah I should desire as a lord while He is the Lord of all things? And every soul earns not [blame] except against itself, and no bearer of burdens will bear the burden of another. Then to your Lord is your return, and He will inform you concerning that over which you used to differ”⁵. The Holy Prophet (PBUH) being interpreter and pure paradigm of the injunctions ordained in the Holy Book has also

¹ The Holy Quran 53 : 39

² The Holy Quran 41 : 46

³ The Holy Quran 4 : 123

⁴ The Holy Quran 35 : 18

⁵ The Holy Quran 6: 164

displaced the same principle at many times. One of his well known sayings has been referred to by M. Charif Bissiouni which very clear exhibition of this factor which states as “The Holy Prophet also pronounced the same thing in his many sayings regarding liability of a person. A well known saying of the Holy Prophet (PBUH) states that “A soul is not held responsible for acts committed by his father or by his brother”¹.

The documents accepted by the Muslim Community of Arabic Region have also incorporated the same fact by elucidating the liability of an offence on the person who performs the same. The Cairo Declaration of OIC on Human Rights makes a stipulation by putting liability on the doer and declaring him/her responsibility for the consequences of his act. It says that “Criminal liability is personal”². There is another Declaration adopted by the Countries of Arabic Region which particularly relates to human rights in Islam wherein this fact has been recognized and endorsed that liability of a criminal act lays only the person who does so and not on the others. It underpins that “Liability is in essence personal”³. In this view of the perspective, Islam binds the person liable for offences committed by him/her and there is no conceptualization of criminal liability on anyone else.

Criminal Liability and Laws of Pakistan:

Verily, Pakistan is an Islamic Democratic State and it takes obligation to bring all the legislations within the parameters prescribed by Islam but it contains a dual system comprising of Western/English Laws and Islamic Laws. Likewise, the legal and judicial system of Pakistan occupies dual status containing provisions from both the legal and judicial systems. The most of the law of the country regulating criminal procedure are borrowed from the Western/English Jurisprudence. In the same manner, the determination of criminal liability is, to some extent, different from the perception given by Islamic Injunctions. The Legal and Judicial System of Pakistan provides two ways to trace out liability of a criminal out of which one makes the accused himself alone responsible for his own acts or omissions whereas the other curtails punishment even offence is committed by the others.

¹ Abu Dawood Hadith No: 4495 referred by M. Charif Bissiouni The Shari’a, Islamic Law, and Post-Conflict Justice, Presented at ISISC May 2011 Specialization Course: ICL 2011 - The Shari’a: Sources of Law and Selected Legal Aspects at 1 (May 2011).

² Article 22 (b) of The Cairo Declaration of the Organization of Islamic Cooperation on Human Rights.

³ Article 19(C) of The Cairo Declaration on Human Rights in Islam.

Under the criminal justice system of the country, a person is liable for the acts or omission of the others in some scenarios which include acts or omissions committed under common intention or common object, acts of conspiracy, abetment of an offence and accomplice liability. Regarding liability of an individual under common intention the Pakistan Penal Code, 1860 lays down that “When a criminal act is done by several persons, in furtherance of the common intention of all, each of such person is liable for that act in the same manner as if it were done by him alone”¹. This Section of the PPC categorically discloses that when more than one persons conjointly commit an offence each of those persons is equally under liability for the offence. The other provisions contained in the PPC clearly mandate that the person who abets or conspires an offence with the others he is also liable for the offence whether he actually performed the occurrence or not. Mere abetting or conspiring an offence puts liability for the offence on the abettor or conspirator which makes him/her responsible for the act of omission of others. However, in this backdrop the intention of the actual offender and the abettor must be the same. The relevant section of the PPC holds that “A person abets an offence, who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor”². The liability for an conspiracy provided under the Penal Code also pertains to the same like language wherein agreement between two or more persons about commission of offence been termed conspiracy. In this situation, commission of offence by one of the Conspirators, all the persons involved in the commission of offence conspired against are under criminal liability and guilty of the same offence. The Code says that “When two or more persons agree to do, or cause to be done, (1) an illegal act, or (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy”. The factor of accomplice liability is available under the Article of the QSO which prescribes that “When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons is proved, — (a) such confession shall be proof against the person; making it; and (b) the Court may take into consideration such confession as circumstantial evidence

¹ Section 34 of the PPC.

² Section 108 of the PPC.

against such other person”¹. These portrayed portions from the enactments in Pakistan it becomes crystal clear that in the domestic laws of Pakistan under certain circumstances a person can be awarded sentence for acts or omissions committed by his co-accused persons.

Compensation against False Accusation:

Enjoyment of life with honour and prestige beyond any hazards is innate right of every human being. Human life may be hampered by criminal proceedings initiated on false and baseless allegations and sometimes an innocent person has to suffer a lot without commission of any offence. Moreover, criminal proceedings or trial itself is source of anguish and agony for an innocent person. Likewise arrest of a person or initial conviction, though, later on converted into acquittal by an Appellate Court is also a prolonged suffering by the aggrieved person. It is also admitted fact that both the parties viz. complainant and accused very well know the truth of proceedings out of the court. To curb this practice and save the innocent persons from false accusations, the Universal Human Rights Instruments and National Legislation of Pakistan have laid down for provisions for compensating the aggrieved person. Even there are some provisions in the Local Laws of Pakistan which stipulate penalization for false and baseless accusation.

Universal Human Rights and Compensation against False Accusation:

All the Human Rights Instruments, verily, revolve around protection of right of individuals from the State and from the other individuals. It is also an acknowledgment that rights of one person are duties of the other and vice versa. In this conceptualization, it can safely be concluded that enjoyment of life being a human right cannot be permitted to be violated by the others being under duty to save the same. Therefore, Human Rights emitting Deeds have also prescribed for compensation against false allegations so that an innocent may not suffer at the hands of the others. The most important of these documents is the ICCPR dealing with civil and political rights of individuals. This Covenant in a very clear and manifested way entitles a sufferer of illegal detention to have compensatory rights against the false accuser. It stipulates that “Anyone who has been the victim of unlawful arrest or

¹ Article 43 of the QSO.

detention shall have an enforceable right to compensation”¹. The other document, though regional in nature, yet identifies the right of a victim of false indictment to recover compensation from the person lodging false information behind his sufferings. It says that “Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation”². The Nations adopting the American Declaration also enshrined this right for an innocent person undergoing miscarriage of justice. The Declaration manifests that “Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice”³.

Islam and Right to Compensation:

Islam have many relaxing principles, apparently, seems to be the most strict religion in treating false accusation which has prescribed severe punishment for making a false allegation especially against pious women. The most severe punishment for making a false accusation against chastity and decency of woman in the religion which extends to whipping eighty (80) strips on the person of making such an accusation. The Holy Prophet (PBUH) describing the wages for making a false accusation against a person declared it to destroy good deeds (virtues) of a false accuser for hundred years by saying that “making a false accusation against any chaste woman destroys the virtuous deeds of 100 years”⁴. Muhammad Abdel Haleem noting down this phenomenon commented that “Under Shari`ah, judges are responsible for mistakes and wrongdoing because they have full authority over all criminal proceedings”⁵. The same Author at another point further elaborated this concept articulated in the Islamic Teachings and described that “Furthermore, if a person in charge of executing a criminal procedure (i.e. an arrest or executing a sentence), that person could be held responsible for a crime and could potentially be

¹ Article 9 (5) of the ICCPR, 1966.

² Article 5 (5) of the ECHR, 1950.

³ Article 10 of the American Declaration on Human Rights.

⁴ Al-Mu`jam-ul-Kabeer, vol. 3, pp. 168, Hadees 3023.

⁵ Muhammad Abdel Haleem, Kate Daniels and Abdel Omar Sherif, Citing Taha J. Al-Awani, The Rights of the Accused in Islam, Arab Law Quarterly, Vol. 10, No. 1, at 41 (1995).

liable to pay compensation, if the victim accepts payment. Any violation of these basic rights could result in a qisas crime, thus requiring a qisas punishment”¹. The Cairo Declaration of the OIC on Human Rights has also envisaged compensation for the victims of false allegations and charges. The Declaration stipulates that “Victims of lawfully proven miscarriage of justice shall have the right to be compensated according to law”². The Charter of the Arabian Countries also enshrined the same proposition with some lingual variation by holding that “Anyone who is the victim of unlawful arrest or detention shall be entitled to compensation”³.

Pakistan and Compensation against False Accusation:

Pakistan being an Islamic Democratic State and signatory of Universal Human Rights Instruments at International National Level is under unrefute-able obligation to provide the right to life and other amenities associated herewith. Admittedly honour, dignity and respect are essentialities attached to life of nations of an independent state and ensuring it lies on the State. Article 9 of the Constitution of the Country guarantees this right to its subjects. In Pakistan there are two types of remedies available against the charges comprising of false, frivolous and baseless facts. The one is penal and the other is monetary. Earlier, the penalized remedy containing in the Pakistan Penal Code was just available against the private persons who knowing and believing submits false information to a Public Servant with intent to initiate criminal proceedings against the others. In Pakistan, Police Officials are also in habit of lodging false FIRs against innocent persons especially under CNSA by manipulating contraband narcotics and illegal weapons to show progress revealing their progress. The Government of the country; realizing the gravity of this issue, to cope with and curb this introduced amendments to the Penal Code in 2014 and extended this remedy against public servants themselves. Now a days, the penal remedy against false accusation and charges lies with an innocent person to sue against both the Public Servants and the other individuals. The PPC regulating the remedy against individuals lays down that “Whoever gives to any public servant any

¹ Muhammad Abdel Haleem, Kate Daniels and Abdel Omar Sherif, Citing Taha J. Al-Awani, *The Rights of the Accused in Islam*, Arab Law Quarterly, Vol. 10, No. 1, at 51 (1995).

² Article 22 (e) of The Cairo Declaration of the Organization of Islamic Cooperation on Human Rights.

³ Article 14 (7) of the Arab Charter on Human Rights.

information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, such public servant—

(a) to do or omit anything which such public servant ought not to do or omit if the true state of facts respecting which such information is given were known by him, or

(b) to use the lawful power of such public servant to the injury or annoyance of any person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both”¹. Likewise, the other mandatory provision authorizing an innocent sufferer to sue against the public servants states that “whoever, being a police officer or public officer knowing and falsely files or registers first information report for some alleged offence reported to him wherein such officer has reason to believe that no such offence has been committed shall be punished with imprisonment of either description for a term which shall be not be less than ten years and more than fourteen years and with fine which shall not be less than rupees ten hundred thousand”². The other monetary remedy, which provides huge compensation against false accusations and charges which damage reputation, personality or liberty of a person, is a civil suit. Under the Laws of the Country a person or sufferer of any wrong action of the accuser may file a suit for damages against the latter. In this scenario, the affected person may file a civil suit for recovery of compensation against damages caused to him through false, frivolous and baseless criminal litigation causing harm to the former’s reputation, respect and status in the society. The Apex Court of Pakistan interpreting and explaining violation of dignity of others held that “Anyone who committed an act of malice by defaming any person, would be guilty under the Constitution and would cross the red line of prohibition imposed by the Constitution, attracting serious penal consequences under the law and the person violating the same had to be dealt with under the law--- When a person was disgraced, his/her dignity was brought to almost naught, thus no lenient treatment should be shown to anyone in such regard nor anyone could plead the unbridled right of expression and right to have access to information”³.

¹ Section 182 of the PPC.

² Section 166 (A) (1) of the PPC.

³ Liberty Papers LTD and other vs. Human Rights Commission of Pakistan, PLD 2015 SC 42.

Conclusion:

This Chapter articulates extensive rights available to an accused during trial of an offence. The most important of those rights are right to defence and Legal Representation of a Choice. This right is categorically contained almost in all the Human Rights Instruments, Laws of Pakistan and in Islamic Injunctions. Provision of an Interpreter to an accused who does not understand the Laws and Proceedings of a Court also catches the worldwide identification so that a trial may fulfill all the prerequisites of its finality. Another right discussed in this chapter and occupying a wide recognition is the second trial for one offence after once it attained finality. It is a well laid down right of an accused that he cannot be tried twice for the one and the same offence. Moreover, punishment on a person for an act or omission not declared offence by the laws is also condemned by the Human Rights Instruments, Islamic Provisions and Laws of Pakistan. Only sentence provided for an offence can be awarded to an accused. Right to Bail and Appeal are also among prominent rights guaranteed by all the concerned documents and it has been declared that any lethargy in observance of these rights by any Individual or Institution amounts to contravention of Human Rights. Defence, Time and Preparation of Defence is also universally admitted right of an accused which cannot be denied during the trial and sufficient time to an accused for advancement of his defence is also a right allowed in favor of accused. Criminal Liability under the Universal Human Rights, apparently, is not a subject but the Islamic Prescriptions put liability on the person committing the offence and not on others. On the other hand, the Statutes of Pakistan have distinguishable approach where concept of constructive and vicarious liability exists in shape of abetment, attempt or conspiracy of an offence where a person may be guilty liable to punishable for the acts of omissions of the others. For the sufferings of accused on account of false and baseless accusations is also a subject of the Human Rights and such sufferer is entitled to recover compensation against those charges, if proved wrong.

Chapter No: 10: Special Rights for Women, Children and Lunatic.

Introduction:

It is a general rule established by the framers and pioneers of the criminal justice system that in a criminal act intention of a person is of great significance. The Courts while deciding a criminal case take into consideration the intention of the accused behind the commission offence. Different theories of criminal justice system have declared specific intention commonly referred as 'mens rea' of an accused to commit the certain offence. Many jurists consider that where there is no specific intention to commit an offence, the accused should not mete out harsh or severe punishment. In this background of the circumstances, the persons who either do not know the consequences of their act or unable to distinguish between an act or omission leading to offence like children and lunatics or insane persons have been provided some special treatment by the International and National Laws of Modern States. There is an International Convention which specifically deals with the rights of persons who have not attained majority grants countless rights to those persons. Moreover, women are considered vulnerable as compared to their opposite genre on

account of their biological physical structure and they also deserve special treatment and superior rights not available to male accused of convicts in criminal administration of justice. All these categories of accused persons entitle to avail some extra rights are discussed separately.

Minor or Child Accused:

A person who has not attained sufficient majority is usually termed as minor as opposed to adult. There are contradictory views about the actual age when a minor attains majority but most legislations in the World have relied upon the age of eighteen (18) years for gaining adequate majority. It is most probably presumed that a person who is under age cannot conceive the consequences and liabilities of his acts or omissions due to which he is not liable to take any kind of serious responsibilities and is not declared to be able to perform his liabilities as required by the Laws. The Convention concerning Children's Right has given two ways definition to the term child. On one hand it has fixed age of majority as eighteen (18) years and on the other hand, it has left this option with the State Legislation in case the age of majority is determined the age earlier to the former. It articulates that "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier"¹. The same criterion is available in Pakistan where a Special Act concerned with determination of majority of persons is promulgated. It says that "every person domiciled in Pakistan is deemed to have attained his majority when he shall complete his age of 18 years and not before"². There is another enactment in the Country which follows this rule for male child while the age of puberty for female is declared lesser than a female child, but this is for the purpose of entering marriage. It maintains that "child means a person who, if a male, is under eighteen years of age, and if a female, is under sixteen years of age"³. The recently introduced law regulating the procedure to try cases of juveniles in Pakistan has reiterated the age demonstrated earlier. It embarks on holding that "child means a person who at the time of commission of an offence has not attained the age of eighteen years"⁴. Justice (r) Dr. Munir Ahmed Mughal

¹ Article 1 of the CRC.

² Section 3 of the Majority Act, 1875.

³ Section 2(a) of the Child Marriage Restraint Act, 1929.

⁴ Section 2 (b) of the Juvenile Justice System Act, 2018.

pointing out importance of separate proceedings for minor accused persons to ensure their welfare and self respect goes on to describe that “Modern Scientific Techniques should also be availed of course with care and caution. The interest of the child or welfare of the child should remain supreme and at the top. Welfare of the juvenile should not be knocked out on hyper technical grounds. A child who becomes major after the relevant date of occurrence is to be considered a child throughout the whole proceedings. His rights are to be protected keeping local, national and even international standards of fair trial and his right to have access to justice. Constitutional guarantees available to him are to remain available to a child at all stages of his trial. The question of bail is not to be taken lightly. Grant of bail is the right of the juvenile and it should not be denied on flimsy Grounds”¹.

Tracing out the age of majority in Islamic Laws, there is no specifically embodied age for determination of majority rather these are biological signs on human physique which reveal the majority of a child. The same fact has been incorporated and endorsed by the Covenant on the Rights of Child in Islam by stating that “For the purpose of the present Covenant, a child means every human being who, according to the law applicable to him/her, has not attained maturity”².

Rights of Child Accused under Human Rights:

Under the International Human Rights accused persons who are minor or child and have not reached the requisite age of majority have been reckoned as separate entities entitled to special relief in addition to benefits granted to adult accused persons. The International Community to save the minor or child accused persons from regular treatment available with the adult accused persons has formulated a Convention embedding the rights of children whether they are accused/convict or aggrieved. This Convention has not only envisaged and acknowledged certain additional or extra rights for a minor or child accused but also desired the member states to make legislations ensuring those certain rights. The first and the foremost provision of the CRC provide immunity to an accused from criminal liability and lays down that a child who has not come of age is exempted from criminal liability. The Convention clearly puts an embargo on act of a person under

¹ Justice (r) Dr. Munir Ahmed Mughal, “Juvenile Justice in Pakistan-How to Achieve Desired Results? 2014”

² Article 1 of Covenant on the Rights of the Child in Islam.

the age of majority to declare his act to be a criminal act and suffer any sentence for the act or omission provided. The Convention stipulates that “The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law”¹. Another extra right awarded to a child or minor accused under the Universal Human Rights Instrument is prohibition of torture or inhuman treatment or punishment. This is not a novice commandment because the same like prohibition is available to adult accused persons. The extra thing lying with the rights of a child or minor accused is the imposition of death penalty or life imprisonment on a child or minor accused. This right as compared to adult accused persons is in addition to other rights. The convention says that “No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age”². These provisions categorically depict that under the CRC, no child can be inflicted with capital punishment or life imprisonment, besides, the other rights available to an adult accused. “Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women”³. “Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication”⁴.

Minor Accused and Domestic Laws of Pakistan:

Pakistan is an independent member state of the CRC and an Islamic Democracy has also drafted legislations to ensure the rights guaranteed to an accused person who is under age. As mentioned earlier, main and general criminal laws of Pakistan are inherited from the British which subsequently were penetrated by Islamic Provisions through amendments. The criminal justice system of the country was already containing a variety of provisions safeguarding the special rights enjoyable by a minor or child accused which went through rectifications after Pakistan joining the CRC. The Country has also promulgated a separate Act governing the procedure of minor or juvenile persons involved in criminal cases which regulate the procedure of

¹ Article 3 (a) of the CRC.

² Article 37 (a) of the CRC.

³ Article 6 (5) of the ICCPR.

⁴ Article 10 (2) (b) of the ICCPR.

Juvenile Courts in Pakistan apart from other regulations underpinned in other laws of the country. The said Act mandates on the Provincial Governments of the State to set up Juvenile Courts. It stipulates that “The Provincial Government shall, in consultation with the Chief Justice of High Court, by notification in the official Gazette, establish one or more juvenile courts for any local area within its jurisdiction”¹. Under the provisions of this Act, a juvenile offender cannot be charged jointly with an adult accused which is an enormous achievement of this act because it is human psychology that he learns many things around him and company of a bad man may adversely affect the child. It says that “Notwithstanding anything contained in section 239 of the Code, or any other law for the time being in force, no child shall be charged with or tried for an offence together with an adult”². The Act puts a ban on a juvenile court to fix or hear case of any other party in presence of the juvenile accused and when the case of a minor accused is fixed, there must not be any other case. The Act manifests that “A juvenile court shall not ordinarily take up any other case on a day when the case of a child accused is fixed for evidence on such day”³. Moreover identity of a child has also been secured from exposure and a limitation has been put on disclosing identity of a minor accused and the proceedings of the Juvenile Court by prescribing that “Unless the juvenile court specifically authorizes, the court proceedings shall not be published in any newspaper, magazine or journal in any form which may disclose the name, address, school or any identification or particulars calculated to lead directly or indirectly to the identification of such child nor shall any picture of the child be published”⁴.

Right to bail for an accused is universally recognized and different types of bail and grounds for bail have emerged with the passage of time. However, taking bail of a minor or child accused person, the offence punishable with imprisonment for less than ten (10) years has been declared asailable by the Act. It argues that “Where a child under the age of fifteen years is arrested or detained for an offence which is punishable with imprisonment of less than ten years, shall be treated

¹ Section 4 (1) of the Juvenile Justice System Act, 2018.

² Section 5 (1) of the Juvenile Justice System Act, 2018.

³ Section 6 (1) of the Juvenile Justice System Act, 2018.

⁴ Section 8 of the Juvenile Justice System Act, 2018.

as if he was accused of commission of a bailable offence”¹. The same rule has been curtailed by the Cr.P.C providing procedure for grant of bail to accused persons where it has been provided that the Court may release a person on bail who is under the age of sixteen (16) years. It regulates that “Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail”².

The Juvenile Act also prohibits preventive detention of an accused person who is under the age of fifteen (15) years which is not available to an adult accused under the domestic laws of the country. The act articulates that “No child under the age of fifteen years shall be arrested under any of the laws dealing with preventive detention or under the provisions of Chapter VIII of the Code”³.

Death penalty for a child has been banned under the Universal Human Rights Deeds and Pakistan following this approach has also created the same scenario by providing that any accused who is child shall not meter out capital punishment. It concludes that “Notwithstanding anything to the contrary contained in any law for the time being in force no child shall be- (a) awarded punishment of death, or ordered to labour during the time spent in any borstal or such other institution;”⁴. The Penal Laws of Pakistan have also declared a person, who is either a minor or unable to perceive the outcome of his act or omission, exempt from the corollary and punishment ordained by the illegal act of omission. The Penal Code lays down that “Act of a child under seven years of age. Nothing is an offence which is done by a child under seven years of age”⁵. It further stipulates that “Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion”⁶. “Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women”⁷.

¹ Section 10 (5) of the Juvenile Justice System Act, 2018.

² Proviso 1 to Section 497 of the Cr.P.C.

³ Section 10 (6) of the Juvenile Justice System Act, 2018.

⁴ Section 12 (a), (b) of the Juvenile Justice System Act, 2018.

⁵ Section 82 of the PPC.

⁶ Section 83 of the PPC.

⁷ Article 6 (5) of the ICCPR.

Islamic Laws and Minor Accused:

Islam proclaiming equality and equal treatment for all consider the children innocent until they attain majority. A prominent and universally famous saying of the Holy Prophet (PBUH) existing in Musnad Ahmed Bin Hambal clarifies Islamic point of view about criminal liability of a child and declares a child not sufficiently matured free from the consequences of his act. He said: “Three persons are not accountable: a child until he or she reaches the age of puberty, a person in sleep until he awakes and an insane until he becomes normal¹”. Muhammad Saiful Islam noting down punishment for juveniles in Islamic Law and History comments that “In the Islamic law juvenile shall not be punished with Qisas and Hadd. This paper aims to examine the Islamic principles of justice to juvenile offender which explains by the Quran and Hadith”². The Organization of Islamic Conference (OIC) has evolved a Covenant on the Right of Children in Islam to ensure the protection of children of an Islamic State. Commenting on position of child rights in Islam and the importance of Covenant by the OIC, Nasrin Mosaffa has argued that “Islamic texts and traditions show significant importance for child protection, but what has been done until today by OIC as a main intergovernmental Organization guided by Islamic principles, values and norms, is not sufficient. Covenant on the Rights of the Child in Islam is the first human rights binding document adopted by OIC as part of consecutive efforts of OIC to promote protection of children”³. This Covenant mandates many civil rights of a child including rights usually available to a juvenile offender. finding its basis from, believing in and ensuring the Teachings of Islamic Injunctions forbids any kind of torture, inhuman behavior by stipulating that “State Parties shall take necessary measures to protect the child from: all forms of torture or inhuman or humiliating treatment in all circumstances and conditions,”⁴.The same right has been elucidated by the Arab Charter of Human Rights where it has been stipulated that “The death penalty shall not be inflicted on a person under 18 years of

¹ Ahmed Bin Hambal, Musnad Ahmad bin Hanbal Jilid I, III, IV-VI. Beirut: Dar al Fikr, 1999.

² Muhammad Saiful Islam, Criminal Accountability and Juvenile Offenders: A Study under Islamic Principles, International Law and the Children Act, 2013.

³ Nasrin Musaffa, <https://www.degruyter.com/document/doi/10.2202/1554-4419.1220/html>.

⁴ Article 17 (2) of the Covenant on the Rights of the Child in Islam.

age, unless otherwise provided by the law in force at the time of the commission of the crime”¹.

Women Accused:

Women, having biological differences than men, are not physically as strong as the latter. Offence and sentence are complementary for each other. Therefore, there are certain special concessions allowed to women accused of an offence which are commonly not in favour of male persons. The vulnerability of female folk is admitted and recognized by all legal and judicial forums and transcripts by granting preference in some of the rights lying with a male accused. Apart from this fact, chastity of a woman and its protection in different societies is also behind recognition of such preferred prerogatives for a woman accused. Most of the religions of the world in their Teachings preach some extra rights for women accused of offences.

Women Accused and Universal Human Rights Instruments:

There is a Convention dealing with Discrimination against Women but it is, obviously, silent to acknowledge any punitive rights of women in a State. The only right specified to women is eradication of discrimination of any kind between man and woman.

Rights of Women Accused Under Islamic Laws:

Islam not only believes in equality among its followers but also proclaims the same through its Injunctions set out in the Holy Quran and Sunnah (way of living and treating of the Holy Prophet (PBUH)). The flaws in the personality of a woman are very well reckoned by this religion and much focus has been laid on saving the women and their chastity. In Islam, chastity of women has been given much importance both by the Holy Quran and Sayings (Ahadith) of the Holy Prophet (PBUH). The injunctions of Islam stipulate that this prerogative of women must not be infringed even during criminal proceedings whether she is an aggressor or aggrieved. Allamah Abu al-'A'la Mawdudi, underlining the protection of women chastity comments: “The third important thing that we find in the Charter of Human Rights granted by Islam is that a woman's chastity has to be respected and protected under all circumstances, whether she belongs to our own nation or to the nation of an

¹ Article 7 (1) of the Arab Charter on Human Rights.

enemy, whether we find her in the wild forest or in a conquered city; whether she is our co-religionist or belongs to some other religion or has no religion at all. Since the violation of chastity of a woman is forbidden in Islam, a Muslim who perpetrates this crime cannot escape punishment whether he receives it in this world or in the Hereafter. This concept of sanctity of chastity and protection of women can be found nowhere else except in Islam”¹. The Arab Charter on Human Rights prohibits execution of death sentence upon a pregnant woman rather there is a proposition to postpone the same till delivery of child and subject to interests of the newly born child. The Charter holds that “The death penalty shall not be carried out on a pregnant woman prior to her delivery or on a nursing mother within two years from the date on which she gave birth. In any case, the interests of the infant shall prevail”².

Laws of Pakistan and a Female Accused:

Like the rights of a child accused, the state of Pakistan has laid much emphasis on protection of women even they are accused of an accused. The main theme of the Pakistan’s legislation is to save the modesty of women and their procreative role towards humanity while undergoing the criminal proceedings. The first and the most important right reckoned in the Legislation of Pakistan is deferment of capital punishment awarded to a pregnant women and even commutation of death sentence with life imprisonment is permitted under the laws of the Country. The relevant provision of the Cr.P.C is reproduced for ready reference which articulates that “If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to imprisonment for life”³. Regarding the chastity of the women accused it is categorically forbidden that in case of a necessity a woman accused can only be searched by the other female. It stipulates that “Whenever it is necessary to cause a woman to be searched, the search shall be made by another woman, with strict regard to decency”⁴. Under this provision not only it is commanded that a woman can only be searched in dire necessity but also search through a female so that decency and chastity may be preserved.

¹Allamah Abu al-'A'la Mawdudi al Tawhid Journal, vol. IV No. 3 Rajab-Ramadhan 1407.

² Article 7(2) of the Arab Charter on Human Rights.

³ Section 382 of the Cr.P.C.

⁴ Section 53 of the Cr.P.C.

The female accused persons have also been granted concession in rules and regulations governing the procedure of bail in the Country. Identifying the role of women in the society and their charter, the courts of the Country have been empowered to grant bail to women accused in prohibitory clause of bail regulations which, contrarily not affordable to male accused that the accused persons charged with offences having death penalty, life imprisonment or sentence of ten years are not entitled to the concession of bail. The proviso to the concerned Section prescribes that “Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail”¹. Admittedly, grant of bail is a discretionary matter and the court exercising their discretion cancel or refuse bail of a woman accused in offences falling under prohibitory clause; the woman accused shall be able to avail the concession of bail after a lapse of six (06) months of her detention. The other proviso mandates that “Provided further that where a woman accused of an offence is refused bail under the foregoing proviso, she shall be released on bail if she has been detained for a continuous period of six months and whose trial for such offence has not been concluded, unless the court is of the opinion that the delay in the trial of the accused has been occasioned by an act or omission of the accused or any other person acting on her behalf”². The women accused persons, under the Pakistan Laws, are also endowed with extra right of probation for any offence not punishable with death as compared to male accused that can only sent on probation in some offences with lesser punishment. The relevant provision of the Probation Laws prescribes that “Where a court by which—any female person is convicted of any offence other than an offence punishable with death, is of opinion that, having regard to the circumstances including the nature of the offence and the character of the offender, it is expedient to do so, the court may, for reasons to be recorded in writing, instead of sentencing the person at once, make a probation order...”³

Moreover, Police Custody of a Women Accused in minor offences is not permitted under the law rather police custody can only be sought in cases involving murder and robbery which, too, is discretionary and depends on the facts

¹ Proviso 1 to Section 497 of the Cr.P.C.

² Proviso 2 to Section 497 (1) of Cr.P.C.

³ Section 5 (2) of the Probation of Offenders Ordinance, 1960.

and circumstances of the case. This fact is held in the following Section of the Cr.P.C which goes on to narrate that “Notwithstanding anything contained in sections 60 and 61 or hereinbefore to the contrary, where the accused forwarded under subsection (2) is a female, the Magistrate shall not, except in the cases involving qatl or dacoity supported by reasons to be recorded in writing, authorize the detention of the accused in police custody, and the police officer making an investigation shall interrogate the accused referred to in subsection (1) in the prison in the presence of an officer of jail and a female police officer”¹. The above quoted provision makes another reflection that a female accused cannot be interrogated without presence of a female police officer by a male police officer only in Jail Premises.

Lunatics Accused:

Lunatic is a person who does not have control over his mind and thinking. These types of persons, being out of senses, do not justify the corollaries of their acts and it is well established fact under criminal administration of justice that the person who is not aware of the consequences of his action or omission should not be blamed for the same. Justice (r) Dr. Munir Ahmed Mughal ascertaining the liability of an insane person has traced out that “In the Criminal Law, the traditional common law M' Naghten Rules excused all persons from liability if they did not understand what they were doing or, if they did, that they did not know it was wrong. The consequences of this excuse were that those accused were detained indefinitely or until the medical authorities certified that it was safe to release them back into the community. This consequence was felt to be too draconian and so statutes have introduced new defences that will limit or reduce the liability of those accused of committing offences if they were suffering from a mental illness at the relevant time such defences are called the insanity and mental disorder defences”². The U.S Court of Appeals in a world famous judgment interpreted this plea of a lunatic accused by holding that “An accused is not criminally responsible if his unlawful act was the product of mental disease or defect”³.

¹ Section 167 (5) of the Cr.P.C.

² Justice (r) Dr. Munir Ahmed Mughal: “What are Various Kinds of Approaches to Criminology, 2011.”

³ Durham vs. United States, 214 F.2d 862 (D.C. Cir. 1954).

Laws of Pakistan and Lunatics:

In the legislation of Pakistan, word 'lunatic' has been given the name of 'unsound mind'. In the country there are two treatments provided for a lunatic: one is exemption from the liability of an offence and the other is the way wherein he/she is to be dealt with. A lunatic being mentally sufferer is considered special persons asking for certain treatment. The Pakistan Penal Code directly and in a very clear cut way declares act of a person of unsound mind not liable to criminal penalty. It lays down that "Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law"¹. The Code going too far to declare short term unsoundness of mind occurred due to intoxication managed by others, to be within the same meaning. However, it is a statutory requirement of the Code that the person so affected by intoxication must not be able to understand the nature of his act. The relevant provision goes on to hold that "Act of a person incapable of judgment by reason of intoxication caused against his will. Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law; provided that the thing which intoxicated him was administered to him without his knowledge or against his will"². Another Section of the Penal Code even permit the Court trying a Case of an insane or lunatic person to acquit him on this ground. Though the provision is not straight forward, yet giving the meanings of the section it can easily understood that the Court is vested with implied and discretionary power to acquit a person on the basis of insanity or lunacy. It reads as "Whenever any person is acquitted upon the ground that, at the time at which he is alleged to have committed an offence, he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence, or that it was wrong or contrary to law, the finding shall state specifically whether he committed the act or not"³.

¹ Section 84 of the PPC.

² Section 85 of the PPC.

³ Section 470 of Cr.P.C.

Chapter No: 11: Current Scenario in Pakistan.

Introduction:

Pakistan is an independent member state of both the UNO and International Human Rights Conventions such as the UDHR, The ICCPR and CAT which require a country to ensure and comply with the right of fair trial through Report Mechanism based on adopted measures qua implementation of these rights. Unfortunately, Pakistan is one of the countries with high rate of human rights violation in every sphere of life. The same is the case with the right of an accused person whether he/she is at pre-trial stage or under trial prisoner. Fairness of trials in Courts/Tribunals of a country in safeguarding the legitimate rights of its nationals portrays the administration and dispensation of justice within a nation. Unfortunately, like other human rights laws, right to fair trial has been contentious in Pakistan and has not been secured by the concerned agencies and denial of this human stands still in judicial system of Pakistan. Sardar

Hamza Ali commenting on criminal justice system of the country observed that “Our criminal justice system has overwhelmingly failed to serve the masses in true spirit in every stage from reporting the crime to conclusion of trial and is replete with plethora of shortcomings triggering the system ineffective”¹. Haider Zeshan elaborating the position of rule of law in the protection of Human Rights asserts that “Protection of Human Rights through the rule of law is the common dilemma of the entire Muslim world including Pakistan. One of these rights is the fair procedure which is more important as compared to the justice itself”².

International Agencies’ Reports About Justice System of Pakistan:

Pakistan, being a part of International Community and member of many Universal Human Rights Instruments, usually comes under observation of the Agencies working for human rights worldwide. The reports of such Observer Organizations are one of the sources to understand the ongoing situation in a country or region. Most of the reports published about status of human Rights in Pakistan portray the prevalent situation concerning the justice system, human rights scenario and other factors most probably expound the situation in the Country. As per WJP Rule of Law Index published in March, 2020, “Pakistan was ranked at number 126 out of 128 countries on the Rule of Law and placed at number 6 out of 8 Countries in the South Eastern Region”³. Asian Human Rights Commission while observing the status of torture under custody in Pakistan has remarked that “Torture in custody is a serious problem affecting the rule of law in Pakistan. It is used as the most common means to obtain confession statements. As yet, there has been no serious effort by the government to make torture a crime in the country. It provides impunity to the perpetrators who are mostly either policemen or members of the armed forces. Furthermore, there is no means for the protection of witnesses. This discourages victims from making complaints. While the international jurisprudence on the issue has evolved into very high standards, the situation in Pakistan resembles the stone ages. It is in the day-to-day work of the lower judiciary that this underdevelopment is

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

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

³ WJP Rule of Law Index 2020.

mostly visible. One example is the practice of the lower court judges allowing remand custody of the detainees with ease while it is clear that anyone detained will be subjected to torture in Pakistan”¹. The A.I in its Report on Right to a fair trial, 2002 about its essentiality observed “that during the trial an individual is confronted with the State Machinery i.e. Police and Courts and treatment of such individuals during trial demonstrates the respect of a State for Human Rights”². The A.I in its recent report, 2021 went to conclude that “Arbitrary detention, torture, deaths in custody, forced disappearances, and extrajudicial executions are rampant. The government of Pakistan has failed to protect individuals—particularly women, religious minorities and children – from violence and other human rights abuses committed in the home, in the community, and while in legal custody”³. The significance of these rights in the security of common liberties is highlighted by the way that the execution of all basic freedoms relies on the appropriate organization of equity. At whatever point an individual's privileges are meddled with, she/he can just guard herself/himself sufficiently on the off chance that she/he appreciates a powerful plan of action to fair treatment. All these reports and facts are sufficient to expose the judicial system of a Country especially regarding rights of an accused where extra judicial killings, forced displacements, under custody torture and killings are common practice creating grave concern.

Outdated Criminal laws:

Pakistan got independence from the British Colonialism in the mid of twentieth (20th) Century and inherited pre-partition legal system imposed in the country which is still in vogue. The General Criminal Laws like the Pakistan Penal Code enforced in 1860 and the Code of Criminal Procedure Code entered the field in 1898 are the main and general laws which regulate and govern the system of the country. These Codes having effect through Pakistan, unless otherwise provided in any special or local law, run the criminal justice system of the State and provide mechanism for Court Procedures in the Country. The Pakistan Penal Code, 1860 has been amended

¹ Asian Human Rights Commission. <http://www.humanrights.asia/tortures/torture-in-pakistan/>.

² Amnesty International, the Right to Fair Trial, 2002.

³ Amnesty International, Pakistan Human Rights Concerns, 2021

many times, sometimes to insert Islamic Provisions and sometimes incorporation of new offences but it is still not up to the mark and contains laws of primitive time. On the other hand, the Procedural Code has not seen many amendments which require more rectification than the Penal Code to speed up the process of justice in both investigation and trials of criminal cases. This Code regulates the criminal proceedings from information of the offence to final adjudication of the case. So, this is also concerning the Investigation of cases which is an important factor in the administration of criminal justice system. The more than hundred years old investigation mechanism provided in this code is not compatible with the ever changing society dominated by technology leading to modern investigation techniques. Another tragedy with the Criminal Justice System of Pakistan in Police and Police Station Organization which, too, stands on Police Rules framed in the year 1934 which are not ready to meet up the new trends of the time. These rule occupy the most dominant space in the Police Department and the entire Police Structure revolves around these rules. Mostly, powers of arrest and detention, ways of arrest, preparation of police reports and maintenance of the Police Stations emit from these rules which are an embodiment of delayed and un-fair justice in the country. The Law concerning collection, admissibility and reliability of evidence in the justice system is not an exception to these obsolete Laws. Apparently, it was reshaped in 1984 and given Islamic Name under the disguise to bring it in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah. Actually, it incorporated just five (05) new articles i.e. Articles Nos. 3, 4, 17, 42 and 44 and the rest of the Order is based on the Indian Law of Evidence promulgated in 1872. This fact also makes it an old aged law. Jibrán Jamshéd criticizing this old aged criminal justice system remarks that “The Criminal Justice System in Pakistan is outdated and in dismal condition. The system in Pakistan is so much ineffective and outdated that it is very easy for any influential and wealthy person to get himself acquitted after committing any sort of offence. There are so many loopholes in Pakistan’s Criminal Justice System that it becomes very easy for any offender to got clean chit from courts. For

this reason the system also lost the confidence of people, especially educated strata of society who always try to resolve their disputes outside the Criminal Justice System”¹. Mr. Shaukat Javed pointing out flaws in our criminal justice system argues that “Our criminal justice system is ineffective because it is lengthy, expensive, outmoded, tardy and devoid of deterrent value. All extremist organizations target the weaknesses of the criminal justice system as a rallying slogan to appeal to the public”².

Bulk of Cases Pending in Various Courts of the Country:

Early and timely disposal of cases specifically where the accused is under custody must be ensured by the State. A person under custody who is presumed to be innocent until proved guilty, obviously, suffers from mental and physical agony and early disposal of the case, if acquitted would bring him liberty and if convicted the right to appeal. The appeal, subsequently, may lead to bail or release or confirmation of sentence finally deciding fate of an accused. A port published by the GEO News in June, 2021 gives a brief of cases pending in different courts of the country with judges working in the Courts against sanctioned strength. “There are currently 2,159,655 cases pending in Pakistani courts which are being heard or will be heard by 3,067 judges in the country. Out of these, in several cases, the parties to a case have passed away and their descendents are now seeking remedy from the courts. In district and high courts across the country, 1,048 posts of judges lie vacant waiting to be filled. The Supreme Court of Pakistan has to hear 51,138 pending cases (details are available in Table 1 and Table 2)”³.

Expeditious justice is a Constitutional responsibility of the State under Article 37 (D) of the Constitution of the Islamic Republic of Pakistan, 1973 and state is required to provide expeditious and timely justice to its justice. The failure of the State to meet up this requirement amounts to “justice delayed justice denied”. The persons under custody whose cases or appeals are pending in different courts are not only suffering but also an additional burden on the official resources of the government to maintain

¹ Jibran Jamshed, “Criminal Justice System in Pakistan; May, 2018”.

² Shaukat Javed, Revamp the criminal justice system.

³ Geo News, <https://www.geo.tv/latest/355753-how-many-cases-are-pending-in-pakistans-courts-and-why>.

those under trial captives. Most of the accused persons prove innocent or get released extending benefit of doubt but after too prolonged time and suffrage of those persons cannot be compensated at all. In this way, the current pendency of cases in huge number, which is increasing day by day, is a challenge for both the Courts and the other concerned quarters to overcome.

Custodial Torture and Deaths:

Admittedly, Pakistan is not much developed country in the field of technology and unluckily, at the moment modern devices to investigate a case are not available to the Police Officials. Moreover, primitive police officials serving with the department are not acquitted and familiar with the devices (not up to date) and unable to use those instruments effectively. The un-educated police officials are not aware of the modern investigative techniques rather they follow the obsolete ways like footprints of accused persons to trace the culprits. In this backdrop, the officials to avoid the hazardous efforts to trace the real culprits or collect evidence against them, much emphasis is laid on extracting confessions from the arrested persons regardless whether they are the real culprits or not. This practice to achieve extra judicial confessions is backed by both inhuman treatment and torture which sometimes causes death of the victim. The most affected persons include the notorious of the vicinity or previously involved in any criminal case notwithstanding they were innocent and met acquittal in the earlier cases.

Moreover, there is another cause behind custodial torture which is personal enmities or grudges either by the Police officers themselves or any political figure of the area. Influential persons use the Police as a tool to take revenge on their opponents or in some cases the influential masters utilized the police officials to dispose of their servants for not abiding by their behests. This is also one of the major factors behind the custodial torture and killings of persons under custody. In this way, not only people are deprived of their rights to face a trial under the law but also given inhuman treatment and even deaths occur due to torture of persons who are to be presumed innocent till they prove guilty.

Fake Police Encounters have also occupied the status of fashion in the country begetting many Encounter Specialists in the Police Department.

This type of showmen is considered a sign of bravery for the officials. In fake encounters the same approach as adopted in under custody cases, is applied by the Police. These encounters are either a way to do away with record holder notorious persons of the area, who otherwise, escape punishment due to loopholes in the judicial system of the country or to comply with instructions of any statesman which hardly comes to light. This scenario also deprives the accused persons of their rights guaranteed under the Constitution and other laws of the country.

An editorial in “The Dawn” Newspaper, exposing this practice in Pakistan has maintained that “One can hope that individuals in custody will no longer emerge from detention with their bodies and spirits broken, often having confessed to crimes they did not commit simply to make the pain stop. That is, of course, if they emerge alive at all”¹.

A report submitted by the Human Rights Commission of Pakistan and quoted by DW Made for Minds categorically exposes these killings in very effective way. It states that “According to the Human Rights Commission of Pakistan, over 2,000 people were killed in 2015 in armed encounters with the police. Most of these incidents took place in the province of Punjab. HRW quoted a police officer as saying that an "encounter killing is a way of ensuring that a known criminal does not escape justice because of lack of evidence and witnesses. HRW also discovered that custodial beatings with batons and strips of leather, sexual violence, and forcing criminals to witness torture were commonly used by police. Suspects were tortured "to obtain confessions or other information, to coerce bribes or because of pressure from local politicians or landowners”². Zoha Waseem in the backdrop of killing of an innocent young man namely Naqeeb Ullah Mehsud, University Student, in police encounter observing the position and effects of fake police encounters expounds that “Over the past decade, thousands have been killed in police ‘encounter killings’, which remains a notorious practice even after the extrajudicial killing of an innocent young man Naqeebullah Mehsud in police custody in Karachi generated international outrage”³.

¹ The Dawn, July 14, 2021. <https://www.dawn.com/news/1634998/criminalising-torture>.

² DW Made for Minds. <https://www.dw.com/en/new-hrw-report-charges-pakistan-police-with-torture-extrajudicial-killings/a-35890209>.

³ Zoha Waseem. The Problems with Policing Pakistan. <https://www.dawn.com/news/1622864>.

A judgment pronounced by the Supreme Court of Pakistan taking up a Suo Motu Constitutional Petition interpreted the concept of killing of innocent person under Islam where it was held that “Islam is a religion of peace and tolerance and stands for safety, security and sanctity of human life---Islam abhors unlawful killing of innocent people and strictly prohibits it”¹.

Forced Disappearances:

Another dilemma of the criminal administration justice of Pakistan is forced disappearances by the Laws Enforcement Agencies of the Countries. As per laws concerning human rights, constitution and other criminal laws implemented in the Country, a person can neither is deprived of his/her liberty without process available in law, nor put under illegal custody/detention and subject to torture. Admittedly, this practice has taken wide space and a large number of people have gone missing under suspicion of criminal activities. Be the case as it may but every person is entitled to legal protection and due process of law coupled with fair trial. The detention of any person on the basis of suspicion without affording him opportunity to defend himself and disprove the charge is not only deprivation of fundamental rights but also constitutes different offences like illegal detention and torture punishable under criminal laws of the country. This is not a new phenomenon rather it stands in legal system of Pakistan since long but it got impetus after the worldwide famous incident of 9/11 approximately a decade ago. The Human Rights Watch observing status of missing persons or forced disappearances this year remarks that “International human rights law strictly prohibits enforced disappearances, the detention of an individual in which the state denies holding the person or refuses to provide information on their fate or whereabouts. In addition to the grave harm to the person, enforced disappearances cause continuing suffering for family members. Pakistani authorities, including law enforcement agencies and the criminal justice system, have long failed to demonstrate the political will to end enforced disappearances. He now has an opportunity to signal to Pakistanis and the world that his government is intent on ending this illegal practice. This means not only taking action on pending cases but investigating and appropriately prosecuting those

¹ Watan Party and another vs. Federation of Pakistan and others, PLD 2011 Supreme Court 997.

responsible to prevent future disappearances”¹. Nasrullah Baloch, Chairperson Voice for Balochistan Missing Persons commented on the cases of missing persons or forced disappearances as “Soon, this extrajudicial practice spread to Balochistan and started to be used against anyone demanding social justice and equal rights. Many political workers, students, teachers and activists who committed no other crime than trying to help those in need or demanding basic rights and freedoms for Baloch communities, have been targeted”². The Amnesty International published a report in 2019 observing the situation of missing persons stated that “Enforced disappearances have long been a stain on Pakistan’s human rights record. Despite the pledges of successive governments to criminalize the practice, there has been slow movement on legislation while people continue to be forcibly disappeared with impunity. The groups and individuals targeted in enforced disappearances in Pakistan include people from Sindhi, Baloch, Pashtun ethnicities, the Shia community, political activists, human rights defenders, members and supporters of religious and nationalist groups, suspected members of armed groups, and proscribed religious and political organizations in Pakistan. In some cases, persons are openly taken into custody by the police or intelligence agencies, and families trying to find out where they are held are denied information by the authorities. Some victims are eventually released or their whereabouts are disclosed to their families but they continue to be held in arbitrary detention including in internment camps. Those forcibly disappeared are also at risk of torture and death during captivity”³.

Naghma Iqtidar, a prominent Human Rights Defender from Pakistan declared forced disappearances as major issue urging its solution. She observes that “The issue of enforced disappearances, or what is commonly known as a missing persons issue, is one of the major human rights concerns in Pakistan and we are yet to see a reasonable solution”⁴. In 2020, The UN Special Rapporteur commenting on case of Mr. Idris Khatak; a consultant for Amnesty International and Human Rights Watch on reports of Missing Persons, who went missing, pointed out worse situation of

¹ Human Rights Watch, <https://www.hrw.org/news/2021/03/22/end-pakistans-enforced-disappearances>.

² Nasrullah Baloch, AlJazeera. <https://www.aljazeera.com/opinions/2021/3/9/addressing-pakistans-epidemic-of-forced-disappearances>.

³ Amnesty International. <https://www.amnesty.org/en/latest/press-release/2019/03/pakistan-enduring-enforced-disappearances/>.

⁴ Naghma Iqtidar. <https://nhrf.no/blog/enforced-disappearances-in-pakistan>.

forced disappearances or missing persons and required the state to put a curb on this practice by taking effective measures and provide justice to the citizens of the State. It states that “We condemn in the strongest possible terms the enforced disappearance of Mr. Khattak by Pakistan, the experts said. The mere acknowledgment that he is in custody does not absolve Pakistan of its human rights obligations. Pakistani authorities must produce him and guarantee him a fair trial. We are concerned that Mr. Khattak’s human rights are being violated, the experts said. He has not been allowed to speak to his lawyer, family and he allegedly has not been given a medical examination by an external independent doctor”¹.

Conclusion:

It is established that Pakistan, currently, is having a failed criminal justice system prevalent in the Country with most of the laws like the Pakistan Penal Code, 1860, the Code of Criminal Procedure, 1898, the Police Rules, 1934 and the Law of Evidence. The system is exaggerated with flaws from investigation till final adjudication of the criminal case. The system could not succeed the serve the people of the country in protection of their human rights. There are near about two (02) millions of cases pending in courts and the litigants are at the mercy of the courts to seek and meet justice, a basic and natural human right. Moreover, custodial torture, extra judicial killings and forced disappearances of persons whether guilty or innocent, without providing right to defend and other rights including due process and fair trial through impartial and unbiased tribunal or court are also major problems with the criminal justice system of the country. All these facts and figures are lead to a safer conclusion as to violation of human rights of accused persons in the State.

¹ UN Human Rights Office of the High Commissioner,
<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26207&LangID=E>.

Chapter No: 12: Suggestions for Safeguarding Rights of Accused.

Introduction:

Three organs namely Police, Prosecution and Courts are the main contributors of dispensation of criminal justice system. The more these Institutions are efficient and vigilant, the more system flourishes and provides justice to the aggrieved persons. As earlier discussed and expounded in the last preceding Chapter, the criminal justice system of the Country is not as performing as it is expected. The justice system of the country has adversely affects the rights of both the parties involved in criminal litigation and both of them suffer at the hands of these three institutions. The Police, on the one hand prolong investigations and on the other hand violate fundamental and human rights of accused persons by putting them under

unauthorized detentions and committing torture which sometimes triggers death of a captive. The same is the case with the other player of the criminal justice system i.e. prosecution. The prosecution does not take interest in pursuing a case as it compared to private persons and result is either acquittal of a real culprit or sentence for an innocent. The Courts being the most important organ and the last resort to seek remedy are also not lessening the burden of pending cases and accused persons who are in custody are at suffrage both mental and physical. Undoubtedly, all these players perform their roles within legal parameters but the Laws mainly governing the criminal justice system of the country are not able to cope with the ever changing trends and priorities of the citizens and the offenders as well. The obligations of the state ascertained in earlier chapters of this dissertation and current circumstances narrated in the last preceding chapter sufficiently reveal that the entire criminal justice system of the Country is in dire need of reformation. The Criminal Laws, Judiciary and Law Enforcement Agencies Specially Local Police, being the key players of the criminal administration of justice require immediate Reforms. Keeping culture, civilization, education rate, living styles and standards of the masses and general trends adopted by both the Police and the Locales in view, some essential reforms in all the Key Participants are proposed for development of the system.

Reforms in General Criminal Laws:

Obviously, most of the laws concerning the criminal administration of justice e.g. The PPC 1860 and the Code of Criminal Procedure 1898 are inherited from the British after colonialism came to an end in 1947. These laws were framed and imposed by the British Crown in a specific age to hold control over the Indians of the Sub-Continent. These laws have gone outdated and are unable keep pace with the modern technical age where commission of offences has, too, shifted to technology and its related mechanism. Likewise, another enactment which just regulates the functioning of Police and Police Stations known as “The Police Rules 1934” also entered into force near about a century ago. These rules lay down a process and Police Station Culture pertaining to approximately a hundred years ago which was dominant by the British Government and their purpose was just to prolong their rule through any means. Police is like backbone of a criminal justice system especially in Pakistan where collection of evidence, its presentation

before the court and investigation of a case lie with this department. So, reforms in Police Station Culture of the country through new enactments compatible with the prevalent circumstances in the State. All these Laws borrowed from the British were implemented for a slave nation but now the nation has its own culture, values and ways of living, therefore, these old ages laws framed by foreign rulers do not seem to rule the justice system of an independent nation with unique taste of living. The Codes coupled with Rules do not come to fit to criminal administration of justice especially where offenders are also changing their techniques of commission of offences. No doubt, the Government of Pakistan promulgated an Order in 2002 termed as “The Police Order, 2002” for the entire country to introduce reforms within the department but this Order is not comprehensive as the Rules of 1934 still in existence. The former does not cover and control the entire structure of the police department and functioning of Department and does not substitute for the Police Rules of 1934. So, efforts of the government of the country regarding reformation of the laws regarding police conduct cannot be denied at all but these efforts, apparently, do not appear to come forward to replace the old fashioned and obsolete rules implemented in the Country. These laws and rules require keen amendments or to frame laws afresh to bring them in conformity with the modern scientific and electric phenomenon of the ever changing circumstances.

Increase the Number of Judicial Officers and Police Personnel:

Pakistan is a thickly populated country and in population stands at number five in the independent countries of the globe. The population of the country is increasing day by day. It is a factor socially and economically acknowledged that the unhampered enhancement in population begets many social and economic problems. The reason behind pendency of backlog of cases in various courts of the country is also incensement in the population. The increase in population is not only increasing the crime rate due to multiple facts but also adding to the number of cases pending in different courts. The Judicial Officers and Police Personnel are not enlisting according to the ratio of the population to cope with this matter. It is dire need of the time to escalate the number of officials concerning the criminal justice system. It, one hand, decreases the burden of pending cases but also a relief to the

persons under custody. Apart from this fact, as described in the previous Chapter, many Courts are working with fewer judges than sanctioned by the State which is, too, a cause for delay in disposal of criminal cases. Most of the Country's population believes in traditions and customs and a huge number of murder cases arise out of traditional revenge where either of the party fails to receive justice. Law Reform Committee constituted in 2015 for advancement of the judicial system of Pakistan also proposed to increase the number of judges in the judicial infrastructure of the country.

The same is the case with the Police Department where shortage of officials is also visible. A Police Station for a specified area is the basic unit of a criminal justice system for the inhabitants of that particular area. The Police Stations of the Country do not have sufficient police officials to arrest accused persons, collect evidence against them and tender evidence in the Courts of Law. Many police officials have been deployed by the Police Administration as security for Politicians, Statesmen and Highly ranked officials in the Service of the Country. By re-calling those officials from such type of duties, the deficiency of police officials in Police Stations may be overcome to some extent but new appointments are required to be made to complete timely investigations and ensure diligence on part of the Police Officials.

Verily, the State and Government of Pakistan have not sufficient resources to incur the burden of newly recruited officials but dispensation of justice is, admittedly, the most urged obligation of the state. The provision of the Justice may not only bring the number of newly registered cases down but also lessen the burden of courts and other Law Enforcement Agencies including Prisons consuming state resources to maintain the prisoners. To meet up the expenses of additional recruitments, the Government may draw budget from any other development project to ensure justice in the country or reduce other luxurious spending by the Statesmen. In this way, it is primary responsibly of the State to provide justice to its citizens at any cost.

Professional and Technical Training:

There is no denial of the fact that with the passage of time and conversion of human age into modern technical, mechanical and electrical age, the culprits have also mend their ways to adopt these developments to save their skins.

Moreover, owing to involvement of large scale of technology in the commission of offences, forensic evidence is gaining more popularity in a criminal trial and courts are now developing tendency to rely on evidence brought on record based on forensic. Unfortunately, Pakistan is much behind in technology in every sphere of life and on the one hand there are not so developed modern mechanical devices to trace out the real culprits and on the other hand the police officials being less educated and devoid of operating the modern devices. Both of these scenarios cause arrest and detention of innocent persons to rope in untraced cases just to show some kind of progress. Moreover, there is not sufficient tendency towards professional training to the police officials and the Presiding Officers of the Courts even on annually basis which is need of the hour. In ever changing situation of the world at both national and international levels demands that all the concerned must be familiar with the modern world which is only possible for training to both the Police Officials and the Judicial Officers to ensure proper performance leading towards betterment of the criminal justice system. An article Published in “The Dawn” puts emphasis on the importance of training articulates that “Law-enforcement officials must be imparted training in forensic evidence gathering techniques and in alternative methods of interrogation. This legislative change requires nothing less than a cognitive shift in how policing is viewed. Barbaric practices undermine the rule of the law, rather than strengthening it. Equally important, when the legislation against torture and custodial death is on the statute books, it must be implemented strictly without regard to rank or connections”¹. This perspective suggests that both the Judicial Officers and the Police Officials must undergo professional and technical training sessions even on annual basis so that they might bring the real culprit to the dock instead of contravening the rights of innocent people.

Appointment of Law Officers in Police Stations:

Criminal proceedings usually take start from a Police Station which has a core value in the criminal administration of justice. There is the most critical dilemma of the country is ignorance of the Police Officials of basic laws ruling the procedure. There are even incidents where the Police Officials chalking out FIRs do not add the provisions of law creating an offence as per contents of the complainant

¹ The Dawn, July 14, 2021. <https://www.dawn.com/news/1634998/criminalising-torture>.

field by an aggrieved person. The person In-charge of a Police Station, even, does not understand the procedure required to be followed properly and any step against the law or rules damages case of either the complainant or the complainant amounting to contravention of human rights of any of the parties. Moreover, a large number of cases pending in the Appellate Courts of the Country consist of appeals or revisions which arise out of a decision of a Trial Court against procedural mistake committed by a Police Official. Importance of Police Officials and Police Station cannot be ignored in dispensation of justice which may enhance or diminish the opportunities of justice. There are few ignorant acts committed by police officials are curable by a Court of Law but most of these acts are not. In this scenario, there must be a person familiar with legal education for guidance of the Police Officials in the administration of justice at both ends. The most probably a Law Officer might be the solution to eradicate this lethargy to do the needful by providing legal and procedural guidance to the Investigating Officers.

Teaching and Training on Human Rights:

At present, the human rights are not included in syllabus of the country rather one chapter of the Constitution pertaining to fundamental rights is sometimes considered sufficient to teach to the law students. Most of the lawyers and police officials are much acquainted with the human rights at universal level. Moreover, Presiding Officers of Courts at District Level do not take pains to discuss or consider while deciding a matter. Specifically, no one is ready to pay heed towards rights awarded to an accused rather it is a common social thinking of our people a person involved in any criminal case is put to trial even on media irrespective of his guilt or innocence. The countrymen develop a certain and specified attitude towards any accused despite the acknowledged fact that he/she is to be presumed innocent till proved otherwise. This phenomenon gets more impetus when an audio or video of any occurrence, irrespective of its veracity, goes viral on media. The people declare a person shown in any video or recorded on audio without forensic analysis of such video or audio guilty. This collective approach not only demonstrates our behavior but also requires promotion of human right “presumption of innocence”. During investigation or trial, Law Enforcement Agencies and other concerned do not treat an accused as a human being with certain inherited rights rather take that person as guilty at their own. Police Officials should also be aware of the rights guaranteed to an

accused during investigation and even during trial. This ignorance of basic human rights of an accused on part of the Judicial Officers and Policemen renders contravention of rights of an accused person. In this view of the matter, it is important to include the subject of human rights in syllabus. It is also essentiality that the judges of the District/Sub-ordinate Judiciary as well as the Police Officials should go under training regarding human rights. Even the general public be also made aware of their human rights either through education or through promotional advertisements like other activities of the government sector.

Prosecutors are also a significant component of Criminal Justice System but at present the Prosecutors lack proper and modern skills to conduct the trial in the courts/tribunals even in heinous offences. Non production of proper and available evidence is also a factor responsible for poor administration of justice by the Public Prosecutors. Therefore, the Public Prosecutors should also be made bound to go through trainings on minimum annual basis.

Reforming the Attitude of Police Officials:

Police of any country plays imminently important role in administration of justice and till accurate and desired performance by this department a system cannot deliver in true sense. The first and foremost duty of every public servant including police officials is to handle and treat the masses of the country to redress their grievances at the earliest. U.S Department of Justice regarding role of police department towards public dealing has observed that “Policemen must have the highest standard of integrity because the society invests a high level of trust on its police. Every police department should notice that s/he has is held to a higher standard than privilege citizen. Their conduct, both on and off duty, must be beyond reproach. There must not be even a perception in the public’s mind that the department’s ethics are open to question”¹. Inhuman or cruel behavior of any police official towards any accused not only amounts to violation of human rights under the law and but also a hindrance in provision of justice. Advocate Shafay Haider commenting on role and importance of Police a Criminal Justice System argues that “The police has been entrusted under law to protect the life and property of citizens of

¹ www.usdoj.gov/crs.

the country. Criminal Procedure Code and Police Order 2002 provide necessary legal cover to the police to perform this function and bring criminals to book. Police is the first and foremost component of the criminal justice system. Persons aggrieved of highhandedness approach the police for legal protection and redressal of grievances. This forms the basis of criminal action and the foundation of criminal justice system”¹. Therefore, it is mandatory constitutional and legal requirement that the police officials should be polite, humble and affectionate towards the public in general. It is a general conception among the masses of the country regarding attitude of conduct of police officials that a layman does not bother to report a petty matter to the Police. Moreover, committing torture and killings under custody are a determinant of police behavior towards its citizens. So, it is stringently recommended that the police of the country must go under reformation as well as special trainings and sessions on morality and public dealing.

Language of the Proceedings and FIR:

Criminal law comes to the field as soon as the matter is reported to the concerned Agencies. Thereafter the next stage in criminal cases is the registration of FIR which occupies outstanding importance in the court. The FIR serves two purposes; the one is activation of the State Machinery and the other is confrontation of statement of the complainant made to the police in shape of FIR. The Supreme Court of Pakistan interpreting the significance of an FIR laid down that “The FIR shapes all the subsequent proceedings in a criminal matter, and have bearings even on the outcomes of trials; it virtually controls the criminal proceedings. Before discussing the law points, it will be apposite to first briefly highlight the facts of the case, in which the judgment has been delivered”². The FIR being the very first report regarding the commission of offence, when confronted by the complainant or other witnesses they cannot reiterate the facts of FIR it being in language other than spoken by the complainant and witnesses. Obviously, literacy rate in the country is quite below due to which every litigator is not able to understand the proceedings of court usually recorded in English and in our courts there is no proper arrangement of

¹ Advocate Shafay Haider. <https://pakistanlaw.pk/articles/1578/criminal-justice-system-in-pakistan-a-critical-analysis>.

² Mst. Sughran Bibi vs. The State. PLD 2018 SC 595.

Translators or Interpreters to make understand the proceedings of the Court to the parties despite the fact that provision of Translator or Interpreter is a Fundamental Human Right. Therefore, the registration of FIR and proceedings of the Courts must be either recorded in language understood by the parties or proper arrangement of Interpreters or Translators. The Code of Criminal Procedure applied in the Court empowers the provincial government to make the proceedings of court in regional languages. It states that “The Provincial Government may determine what, for the purposes of this Code, shall be deemed to be the language of each Court within the territories administered by such Government, other than the High Courts”¹.

Modern Investigation Techniques and Devices:

An efficacious criminal justice system is prerequisite for protection of human rights and police are considered to be a key player. There is no denying the fact that all the decisions of the courts are based on evidence and evidence is the grund norm for decisions of cases both civil and criminal. Unlike civil cases, an offence is considered against the state and it is responsibility of the state not only to punish the guilty but also to save the innocent. The production of evidence lies with the complainant whereas tracing of offenders, collection of evidence and tender of evidence in courts is the State liability. The Police Department performs the task of evidence collection on part of the State and presents the same and pleads the case in the court against the accused person. The current scenario of the country depicts that the Police in addition to other Investigating Agencies lack the modern techniques and technology to trace out the offender and prove the offence against the offender as opposed to the modern ways of committing offences. No doubt, the Central Legislature has promulgated Investigation for Fair Trial Act, 2013 but legislation without effectiveness is useless. The lack of proper and reliable evidence during trial not only deprives the complainant but also at sometimes renders convictions for innocent persons who initially serve prolonged sentences but during appeal they are acquitted due to insufficiency of evidence. Therefore, all the Law Enforcement Agencies especially the

¹ Section 558 of the Cr.P.C.

police department should be provided with modern devices for tracing the real culprits, evidence collecting instruments and training to use the same efficiently.

Timely Submission of Investigation Reports:

The investigation of a criminal case commences with the registration of the FIR and comes to a conclusion on submission of the investigation report in a Court of Law. Thereafter, the second and the crucial stage of trial takes place. An ordinary Trial Court cannot take a suo moto action to grant remedy to a victim rather under the law of the land, it takes cognizance either on submission of police reports or on filing private complaints by individuals. In this backdrop, trial can only be commenced by a Court after submission of police report. However, this is a big taboo for the department to conclude investigation and submit reports thereof within stipulated period in most of the cases. According to Section 173 of the General Criminal Procedure Code implemented in the country, it is statutory requirement to submit report of the investigation within fourteen (14) days plus three (03) days for submission of interim report from registration of the Case but in absence of an adequate check on this practice, hardly a few investigation reports come up within the stipulated period. The accused persons being in custody have to face prolonged detention without commencement of trial due to non submission of reports of investigation within the requisite time period. Non submission of investigation reports within specified time is fatal for both the complainant and accused persons but the accused persons in custody is at more violation of his rights regarding speedy and expeditious justice. Therefore, the state is in a dire need to establish a mechanism ensuring submission of reports under section 173 of Cr.P.C within time to meet the requirements of fair trial in the shape of speedy trial.

Accountability of Police Department:

Admittedly, police is an important part of administration of criminal justice but as per words of British Politician John Dalberg Acton “power corrupts and absolute power corrupts absolutely”. The police of the country owe extensive powers regarding both investigation and accused. Even

a Person In-charge of a Police Station being outright ignorant of law and rights of the parties is authorize to allow bail and let loose any person. Even the State Police enjoys extreme power to arrest any person under suspicion and search him. This power is one of the reasons behind pending of so many cases in the Courts, because, the police officials declare accused persons innocent without any cogent reasons. This tendency leads the complainant to file private complaints in the court in addition to FIRs lodged and the Court has to run both the complaint case and the FIR Case simultaneously. On the other hand, the police department, under the guise of this extraordinary power to arrest anyone, arrests innocent persons to put them to torture, illegal detentions and even deaths of innocent persons. The only remedy available against this conduct is either inquiry, usually carried out by other senior officials of the same department or a private complaint. In both these situations, an accused being victim or even deceased does not succeed to get justice. To curb this practice, there must be accountability for this department to have a check on the working and functioning of the department in order to save innocent persons from the clutches of death at its hands.

Diminish Political Influence in the Police:

The police department of the Country is much influenced by the Politicians and Statesmen because under the rules and regulations prevalent in the country, administration of police department at provincial level is under the authority of Chief Minister, who are irrefutably a political figures belonging to a party enjoying majority in the government. The Head of the Department at the Provincial Level is given the tile of I.G.P (Inspector General of Police) who is appointed by the Prime Minister. The other administration of the Department lies under the authority of the Chief Minister of the Province concerned and postings, transfers and appointments of High-ups of Police are made by him/her alone. There are many off the record examples and complaints where a Parliamentarian, being member of the Ruling Party, gets the appointment of the District Police Officer for his Area of Candidacy and uses such Officer for his ulterior motives especially to threaten, blackmail and cause suffering to his opponents whether political or laborers. The chain of political influence emitting from the Inspector General

reaches to a Constable in service of the Department and all these persons arrest, detain and even misplace those persons to unknown places or kill innocent people in fake encounters on behest of political personalities. This practice, on one hand is clear cut infringement of rights of an accused and on the other hand looses confidence of the people in the department and they avoid visiting the Police Stations.

Strict Actions Against false & Baseless Allegations:

As discussed earlier in this dissertation, Pakistan is a land of traditions and customs where people possess many traditions and follow them. One of these traditions is roping multiple persons for the act or omission of one. The witnesses few times natural and most times planted depose against the persons booked in a criminal case. The Courts of the Country acquit the accused persons not involved in the commission of offence but did not apply the law available for prosecution against false accusations and perjury. This lacuna sets precedent for others and encourages them to follow the same way. The Law of the country provides sentence for the person who levels false allegations against the others and perjury against innocent persons is also punishable under the Law. There is also another remedy in the shape of suit for damages against the persons manipulating innocent persons in criminal cases. Apart from these facts, another rampant practice in the country is patching up the matter. Initially, the complainant lodges FIR based on true of false allegations but afterwards either during the course of investigation or proceedings of the trial exonerate the accused from the commission of offence either under a compromise or on the basis of removal of suspicion cast upon the accused. In both these factors, the accused is absolved from the commission of offence but after suffering from mental and physical agony at the hands of the complainant and witnesses. The courts of the Country do not take into consideration these malpractices on the part of the complainant and witnesses at the time of acquittal of an accused declaring him innocent. There are hardly few examples where courts showed concern about these false and baseless involvements. The complainant and witnesses are neither punished nor imposed costs for their atrocities to compensate the accused persons suffered at the hands of these persons. This practice also requires strict and

solid measures especially by the courts to exercise the power of penalizing the baseless accusers and supporters of such accusations by adopting stringent approach.

Conclusion:

To conclude, it can be stated that the criminal justice system of Pakistan is in critical condition and requires overall rectification. However, to the extent of ensuring human rights guarantee to the accused persons under the Universal Human Rights Instruments, Islamic Injunctions and Constitution as well as other laws of the country certain immediate reforms are necessity of the time. The recruitment of the Judicial Officers and Police Officials should be raised in proportion to the increasing population to make sure expeditious and timely disposal of the cases. The General Criminal Laws of the Country being more than one and half a century old also require either repealing or amendments to bring those in conformity with the ongoing scenario of the world and the country. The officials of three main key players of the administration of justice i.e. Judiciary, Prosecution and Police should also be provided professional and technical trainings coupled with the provision of modern devices to trace the real culprit. The Police Department also required to be free from political influence and public friendly with accountability of the department. Ensuring submission of Police Investigation Reports within stipulated time also requires a solid check and mechanism. The complainant and the witnesses engaged in false charges against accused persons triggering anguish and agony for them must also be met with punishments or compensations to curb the roping of the entire family of an accused.

Table No: 1.

Sr. No:	Name of the Court	Powers of the Courts.
01	The Supreme Court of Pakistan.	Subject to this Article, the Supreme Court shall have jurisdiction to hear and determine appeals from judgments, decrees, final orders or sentences of a High Court ¹
02	The High Courts	A High Court may pass any sentences authorized by law ² .
03		A Sessions Judge or Additional Sessions

¹ Article 185 (1) of the Constitution of the Islamic Republic of Pakistan.

² Section 31 (1) of the Cr.P.C, 1898.

	The Court of Sessions	Judge may pass any sentence authorized by law; but any sentence of death passed by any such Judge shall be subject to confirmation by the High Court ¹ .
04	Magistrate Section 30	The Provincial Government may invest any Magistrate of the first class with power to try as a Magistrate all offences not punishable with death ² .
05	Magistrate of the 1st Class	Imprisonment for a term not exceeding three years including such solitary confinement as is authorized by law; Fine not exceeding forty five thousands rupees; arsh; daman; Whipping.
06	Magistrate of the 2nd Class	Imprisonment for a term not exceeding one year, including such solitary confinement as is authorized by law; Fine not exceeding fifteen thousand rupees;
07	Magistrate of the 3rd Class	Imprisonment for a term not exceeding one month; Fine not exceeding three thousand rupees ³ .

Table No: 2.

Sr. No:	Name of the Court	Pending Cases
01	The Supreme Court of Pakistan	51,138
02	The Lahore High Court, Lahore	193,030
03	District Judiciary of the Punjab	1,345,632
04	The Sindh High Court, Karachi	83,150
05	District Judiciary of the Sindh.	115,296
06	The Peshawar High Court, Peshawar	42,180

¹ Section 31 (2) Ibid.

² Section 30 of the Cr.P.C 1898

³ Section 32 (1) Ibid.

07	District Judiciary of the Khybar Pakhtunkhwa	240,436
08	The Baluchistan High Court, Quetta.	4,663
09	District Judiciary of the Baluchistan	15,729
10	The Islamabad High Court, Islamabad.	16,374
11	District Judiciary Islamabad Capital Territory.	51,849

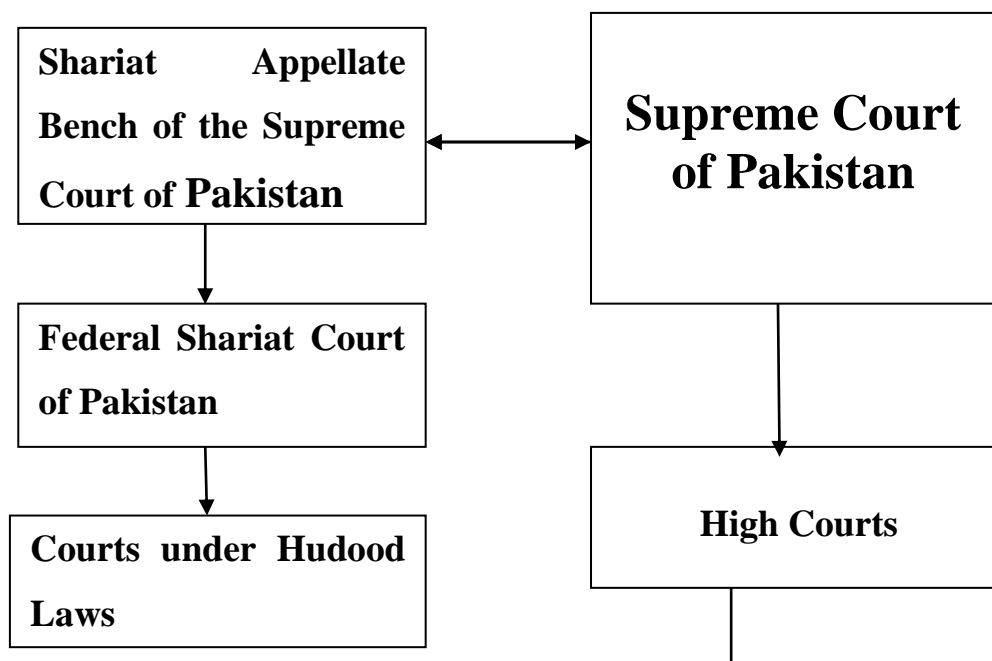
Table No: 3.

Sr. No:	Name of the Court and Province	Sanctioned Strength.	Working Judges
01	The Supreme Court of Pakistan	17	16
02	The Lahore High Court, Lahore	60	49
03	District Judiciary of the Punjab	2364	1616
04	The Sindh High Court, Karachi	40	31
05	District Judiciary of the Sindh.	622	568

06	The Peshawar High Court, Peshawar	20	14
07	District Judiciary of the Khybar Pakhtunkhwa	596	472
08	The Baluchistan High Court, Quetta.	15	09
09	District Judiciary of the Baluchistan	270	208
10	The Islamabad High Court, Islamabad.	10	06
11	District Judiciary Islamabad Capital Territory.	103	70

Figure No: 1.

Criminal Courts Structure and Hierarchy in Pakistan.



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