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RIGHT TO REMAIN SILENT: COMPATIBILITY WITH SHARĪ‘AH AND POSITION IN PAKISTAN

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Abstract

Miserable situation of the rule of law and the protection of fundamental human rights are the common problems of entire Muslim world. Their misery cannot be separated from them unless they sort out certain basic points they are confused with. One of such points is whether the fair procedure towards justice is more important than the justice itself. Protection against compulsion to self-incrimination is a component of the right to fair trial, but, in fact, it is not strictly confined to the trial. It comes into consideration at the very arrest of a suspect, has enormous significance during investigation; and, after all, attracts to the court's procedure. Sunnah of the Prophet Muhammad (May peace and mercy be upon Him)[97] provides a strong shield to the accused from being compelled to incriminate him. On the basis of Holy sayings and practices of the Prophet Muhammad, Sharī‘ah promotes the right of suspects and accused.

Keywords: Fair trial, Self-incrimination, Extra-judicial confession, fundamental rights in Pakistan, Islamic law of confession, comparative study of law.

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[97] In order to maintain smoothness of the language of paper, Supplication shall not be repeated with every repetition of the Holy Name of Prophet Muhammad (ṣallallāhu ‘alaihiwasallam) but it is intended with every repetition of His Holy Name.

Introduction

To remain silent before investigating and judicial authorities and deny to answer their questions is recognised as one of the fundamental human rights. The title "right to remain silent" or "right to silence" cannot be traced out very back in the world history of legal development in respect of human rights protection. This title got prominence by and caught attention in US Supreme Court's decision in *Miranda v. Arizona*,[98] but it doesn't mean that this right has been invented thereby. The rationale behind this right is very old and considered to have its roots back in the history of the development of common law. This paper introduces the gradual growth of the concept and the rationale behind the idea of right to remain silent through centuries and in different areas as per the available references to the history.

This paper is divided into three parts. First part discusses the meaning and scope of the right to remain silent, its historical growth through centuries in Western world and the different aspects of this right. Second part discusses the approach of Islamic law on this right as to show whether it is compatible with the norms of *Sharī'ah*. This is the most important part of the paper because it is essential to investigate the *Sharī'ah* perspective regarding a modern concept or new interpretation of a right if we have to emphasise its applicability in a Muslim country, especially when that right happened to be developed in Western world. Third and the last part describes the constitutional status of "right to remain silent" in Pakistan and its applicability on statutory laws. This part also discusses the practical position of this right in legal process during the investigation of a suspect by police and trial of an accused before court or commission.

[98](1966) 384 US 436.

Western right to remain silent: growth and scope

Although the title of "right to remain silent" is not old enough but the right protected thereunder is ancient. This is to protect a person from criminal liability caused by unfair trial. Its roots can be traced out in the Latin maxim *"nemo tenetur seipsum accusare"* which means that "no one is bound to accuse himself."[99] This maxim watered the English courts to grow the trend of disapproving the practice of compelling accused to confess the guilt.[100]*Cullier v. C*[101]is one of the oldest cases on record in which this maxim was quoted. The importance of this maxim is evident by the words of Coleridge J, who said,[102]"[A] maxim of our law as settled, as important and as wise as almost any other in it."[103] Fifth Amendment of the US Constitution[104] is considered the first constitutional advancement towards the protection against compulsion to criminate oneself, providing that "[n]o person shall […] be compelled in any criminal case to be a witness against himself." By the virtue of the Fifth Amendment, courts of United States added a great contribution in exploring and expanding the concept of protection against self-incrimination.

Although the US Constitution and courts thereof had a great contribution in promotion of the protection against self-incrimination, but it is "not exclusively a US concept"[105] as already have been observed. The European Convention on Human Rights (ECHR), 1950 approved

[99] Black's Law Dictionary, 8th Ed: Garner, A. Baryan (Ed. In Chief), (App. B – Legal Maxims) p. 1737. There are other related maxims like "accusare nemo debet se, nisi coram Deo" meaning "no one is obliged to accuse himself, except before God", see p. 1703; "no one is bound to arm his adversary against himself", see ibid, p. 1037.
[100] It was held by Lord Eldon in Ex Parte Symes, [1805] 11 Ves 521 at 525 (B), that no man can be compelled to answer what has any tendency to criminate him. See also R. v. Scott, (1856), Dears & B 47, 169 ER 909.
[101]Cullier v. Cullier, (1582-1603) 78 ER 457.
[102] In R v. Scott, (1856) Dears and B CC 47 at p. 61 (A).
[103] See ibid. It is quoted by Punjab (India) High Court in Pakhar Singh v. The State, AIR 1958 P H 294, 1958 CriLJ 1084.It is also observed therein that in common law countries, the nemo tenetur principle guarantees at least five rights of the defendant in a criminal trial: (1) the right to remain silent; (2) the right not to be called to testify; (3) the right to speak to an attorney before incriminating oneself; (4) the right not to be coerced into inculpating oneself; and (5) the right not to incriminate oneself in a judicial proceeding.
[104] Amendment 5 – Trial and Punishment, Compensation for Takings; Ratified on 12/15/1791.
[105] See Berger, Mark, Europeanizing Self-Incrimination: The Right to Remain Silent in The European Court of Human Rights, Columbia Journal of European Law, (2016) vol. 12, p. 241.

protection of an accused in respect of fair trial.[106] Following the tone of two highly esteemed documents – US Constitution and ECHR, International Covenant on Civil and Political Rights (ICCPR), 1966 adopted the idea of protection against self-incrimination providing that "[i]n the determination of any criminal charge against him, everyone shall be entitled to the [guaranty] … [n]ot to be compelled to testify against himself or to confess guilt".[107] The said provision of ICCPR resulted in a worldwide acceptance of this protection as a fundamental human right and now a clause of protection against self-incrimination can be found in many of the state constitutions that contain a chapter of fundamental rights.[108]

Miranda v. Arizona,[109]a highly appreciated and equally criticized[110] case of US Supreme Court, has an exclusively vital role in suggesting for the right to protection against self-incrimination a more attractive expression of "right to remain silent" or "right to silence". This case held that it is incumbent on Police to intimate to the suspect at the time of arrest certain rights[111] first of these being right to remain silent if he wishes so to avoid answering the questions put to him which may tend to incriminate him. This intimation of rights is frequently termed as *Mirandarule* or *Miranda warning* which is one aspect of the right to remain silent.[112] The right includes the right to deny answers against incriminating question throughout the legal process – from arrest to the final decision of the court. Hence, it is the duty of the state

[106]See Art. 6 of ECHR, 1950.
[107] Art. 14(3)(g) of ICCPR, 1966.
[108] For example, Art. 13(2) of the Constitution of Islamic Republic of Pakistan, 1973; Art.20 (3) of the Indian Constitution, 1949; and Constitutions of many other countries.
[109](1966) 384 US 436.
[110] Miranda's case is one of the most criticized and most misunderstood criminal procedure cases in American legal history, see Yale Kamisar, How Earl Warren's Twenty-Two Years in Law Enforcement Affected his Work as Chief Justice, 3 Ohio Study Journal of Criminal Law, 11, 26 (2005).
[111]A criminal suspect in police custody must be informed of certain constitutional rights before being interrogated, viz.,(i) the Suspect must be advised of the right to remain silent, (ii) the right to have an attorney present during questioning, and (iii)the right to have an attorney appointed if the suspect cannot afford one. See Miranda v. Arizona,(1966) 384 US 436.
[112]R v. Director of Serious Fraud Office, ex parte Smith, [1993] AC 1, at 30

machinery to provide the suspect or accused an atmosphere where s/he feels free from compulsion to confess the guilt.

The rationale behind excluding self-incriminating statements obtained through torture and violence during investigation by Police is that confessions obtained through torture or force may, most probably, be untrustworthy; because a suspect, obviously, would wish to give the statement according to the desires of Police just to get rid of the pain and mistreatment.[113] It is not only torture and violence which makes the confession unreliable but a confession is also unaccredited if it is based on some improper inducement, threat or promise, or if it was made to a Police Officer, or was made at a time when the accused was in the custody of a Police Officer.[114] Thus it is better to ensure right of accused to silence to avoid all above mentioned malpractices and consequently avoid miscarriage of justice.[115] The idea not only protects innocents from false confessions under compulsion, but also protects a guilty person from aggravating his offense by misrepresentation of the incident either mistakenly or due to the stress or fear. The protection would be active not only during investigation in Police custody, but also during trial in the court.[116]

Another argument supporting the idea of right to silence is that punishment without sufficiently proving the guilt is a barbarous act which must have no place in a civilised society. This argument is based on the fundamental right under presumption of innocence as provided in

[113] See In re: Gault, 387 US 1, 47 (1966) where it was held that "the privilege against self-incrimination is, of course, related to the question of the safeguards necessary to assure that admissions or confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable expressions of the truth."

[114] See cases Abdul Ghani v. E, 1931 LJ 63: 133 IC 55; IllahiBaksh v. E, 16 PR 1886 Cr; Rambit v. E, 65 IC 849: 1922 A 24; In re:B Titus, 1941 M 720; Sidheswar Nath v. E, 56 A 730; In re: ArunchalaReddi, 55 M 717: 138 IC 240; Arizona v. Fulminante, 499 US 279, 285–86 (1991).

[115] Saunders v. United Kingdom, (1997) 23 EHRR 313.

[116] US Supreme Court held that defendant's right not to testify at trial is justified because of his "[e]xcessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him". See Wilson v. US, (1893) 149 US 60, at 66.

Universal Declaration of Human Rights (UDHR) and adopted by ECHR[117] and ICCPR[118] that "[e]everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law…".[119] If one looks deeply into the whole debate, he may conclude that a very basic doctrine of the "presumption of innocence" is providing back to this right, like it works behind many rules and laws regarding procedural justice. Since the accused is presumed innocent, he would have to remain silent and let the state machinery prove the accusation against him through independent collection of evidence. That's why the burden of proof lies on the prosecution. A maxim has also been under practice of English judges for centuries which read as: "*Better that ten guilty persons escape, than that one innocent suffer.*" William Blackstone is thought to be the author of this maxim,[120] that's why it is also known as "Blackstone's ratio". On the basis of this ratio, a practice developed that "benefit of doubt is to be given to accused". It is a rule of prudence founded on public policy as the consequences of an erroneous conviction are much more serious both to the accused and society than the consequences of an erroneous acquittal.[121] This practice has its strict application in criminal prosecutions which causes the judges to require high degree of proof for convicting accused and mere preponderance of evidence is not enough to sustain a verdict like that is in civil cases.[122]

Right to remain silent empowers the accused, to some extents at least, to "exert some control over the course of the interrogation"[123] and aims to protect him from the likelihood of false confessions and subsequently unjust convictions. However, the possibility of this right to be

[117] Art. 6 (2) of ECHR, 1950.
[118] Art. 14 (2) of ICCPR, 1966.
[119] Art. 11 (1) of UDHR, 1948.
[120]SeeBest, WM, The Principles of the Law of Evidence**,** 5th Ed, London, 1870, § 49, 440; see also Muhammad v. E, (1922) 25 CrLJ 938; per Holroyd, J in Sarah Hobseon's case, 1 Lewin CC 261; and In Re: TaritKanti, AIR 1918 Cal 988: 45 IC 338.
[121] Best, The Principles of the Law of Evidence,§ 95.
[122]Edara Venkata Rao v. EdaraVenkayya, 1943 M 38(2): 207 IC 163.
[123]Moran v. Burbine, (1986) 475 US 412, 426.

abused by cunning criminals cannot be excluded.[124] Suggestions have also been proposed by some experts that the substance of the *Miranda* warnings should be reconsidered.[125]In England the police have a legal duty to inform the accused of his privilege against self-incrimination.[126]General Assembly of the United Nations adopted a special convention on this topic titled as *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984*[127] which placed special emphasis on the definitions of "torture" as well as "cruel, inhuman or degrading treatment or punishment" under Articles 1 and 16 respectively. These two Articles read as under:

Article 1. *(1) For the purposes of this Convention, 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.*

Article 16. *(1). Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In*

[124] Stephanos Bibas, The Right to Remain Silent Helps Only The Guilty, 88 IOWA Law Review, vol. 421, 2003, p. 421.
[125] See Godsey, Mark A, Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings, Minnesota Law Review, vol. 90, 2006 pp. 781–825.
[126]Under the provisions of Police and Criminal Evidence Act, 1984.
[127] Adopted on 10 December 1984 and came into force on 26 June 1987.

particular, the obligations contained in Article 10, 11 , 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment.

***(**2). The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibit cruel, inhuman or degrading treatment or punishment or which relate to extradition or expulsion.*

In 2012, the General Assembly also passed a resolution on *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*.[128][129] Guideline 3[130] of this Convention reads as: "The states should introduce measures to promptly inform every person detained, arrested, suspected or accused of, or charged with a criminal offence of his or her right to remain silent."[131]

Compatibility with *Sharī'ah*

The Concern of this part is to find out answer to the question whether the right to remain silent, as contemplated and demonstrated by Western law and embodied in International Instruments, is compatible with *Sharī'ah*? When one would have to lay stress on applicability of certain right in a Muslim society or Muslim majority area, the check of the compatibility of that right with *Shai'ah* becomes very important because Muslims usually show reluctance in adopting a right, especially a legal one, unless *Sharī'ah* confirms the same. Perspective of *Sharī'ah* shall be traced out here by discussing the relevant portion of the Holy Qur'ān, the adjudications of Prophet Muhammad incases put before Him and by analysing the practices and opinions of

[128] www.unodc.org/documents/justice-and-prison-reform/UN_principles_andguidlines_ on_access_to_legal_aid.pdf last accessed 20.011 2018

[130] Titled as: "Other rights of persons detained, arrested, suspected or accused of, or charged with a criminal offence."

[131] See Article 43 of United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 2012.

Muslim jurists. The Holy Qur'ān say, "O ye who believe!stand out firmly for justice, as witnesses to Allāh, even as against yourselves, or your parents, or your kin, and whether it be [against] rich or poor…"[132]Now what is meant in this verse by the phrase "even as against yourselves"? Has this verse made mandatory for Muslims to be witness against themselves or to confess the guilt? It is also important to investigate that can an authority like *qāḍī*or *'āmir* compel a suspect to confess the guilt?

Confession and its Retraction: Abūal-Mandhar– MoulāAbūZar– reported that AbūUmayyah narrated that a thief was brought before the Holy Prophet and he confessed to have committed theft but he was not in possession of the stolen property. On this the Prophet said that he thinks he has not committed theft. The Prophet repeated this twice but the man each time replied, why not, he did commit theft. The Prophet gave verdict of amputation of hand and then said to the thief, "Say, I beg forgiveness from Allāh and make woe not to repeat the act." Then Prophet said, "May Allāh accept his repentance, Allāh accept his repentance."[133]

The practice of Prophet Muhammad is very clear in respect of confession of guilt in a case of confession by a person named Mā'iz.[134]Mā'iz came forward to the Holy Prophet and confessed that he has committed adultery. The Holy Prophet ignored him by turning His face to other side but he remained confessing until he confessed four times. Even after his confession four times, the Prophet asked Mā'izcertain questions to get satisfaction regarding soundness of his mind. After all this, the Prophet ordered for execution of *ḥadd* punishment.[135] According to another chain, it is reported that the Holy Prophet sent someone to his folks to enquire into his

[132]Al-Qur'ān, 4:135 (as translation by Abdullah Yusus Ali).
[133]Al-Bayhiqī, Abū Bakr, Aḥmad bin Ḥussain, Al-Sunan al-Kubrā(hereinafter Al-Bayhiqī), Beirut, 2003, Ḥadīth no. 17275-6.
[134] 'uraib bin Malik famous as Ma'iz.
[135] SeeAl-Bukhārī, Muhammad bin Ismā'īl, Al-Jāmi' Al-Musnad Al-Ṣaḥīḥ Al-Mukhtaṣar (hereinafter Al-Bukhārī), Beirut, 1422 AH, vol. 8, pp. 165, 167, Ḥadīth no. ٦٨١٥, ٦٨٢٥.

mental health.[136]A point worth focusing in this case is that even after the Prophet have inquired about the soundness of confessor's mind, He further investigated the offence of adultery asking the confessor certain questions, like; (*i*) may be you have just kissed her, (*ii*) or just watched her body, (*iii*) or just touched her body. The confessor didn't retracted so Prophet finally asked him, "Do you really know what constitutes the offence of *zinā* (adultery)?" After all this satisfaction, the Prophet gave order for his execution under the *ḥadd* of *rajam* (stoning to death).[137]This is the best evidence of the fact that Prophet Muhammad considered the confession as a very serious matter and took great care in basing on it the punishment of *ḥadd*. Confession *per se* has not been considered the proof of offence, rather it was relied after getting satisfaction regarding the truthfulness of confessor's statement by questioning him and the soundness of his mind.

The story of the confession of Mā'izhas another aspect that is found in the narration by Ibn Shahāb (one of the narrators) who said "One who had heard Jābir bin 'Abdullah saying this, informed me thus: "I was one of those who stoned him. We stoned him at the place of prayer (either that of Eid or a funeral). When the stones hurt him, he ran away. We caught him in the *ḥarrah* and stoned him (to death)".[138] The Holy Prophet is reported to have argued on this chasing and catching him again and have him stoned, "Why didn't you people let him go? Perhaps, he begs forgiveness from Allāh."[139]This argument shows that He have regarded this try to escape as a retraction of confessionary statement. According to ImāmShāfi'ī, if a man runs away when stones are flung at him, stoning should be stopped, and if the offender contradicts his confession, he should be let off, but if he sticks to his words, then he should be stoned again until

[136]AbūDā'ūd, Al-Sajistānī, Sulaymān bin Al-Ash'ath, SunanAbīDā'ūd (hereinafter AbūDā'ūd), Beirut, 2009, vol. 4, p. 146, Ḥadīth no. 4421; Mālik bin Anas, Al-Aṣbaḥī, Imām, Al-Muwaṭṭā, Abū Dhabi, 2004, vol. 5, p. 1196, Ḥadīth no. 3036.
[137]Al-Bukhārī, vol. 8, p. 167, Ḥadīth no. 6824.
[138]Ibid. Ḥadīth no. 6826.
[139] Ibn-i-AbīShaybah, Abū Bakr, 'Abdullāh bin Muhammad, Al-Muṣannaffī al-Aḥadīthwa al-Āthār (hereinafter Ibn-i-AbīShaybah), Riyadh, 1409 AH, vol. 2, p. 161, Ḥadīth no. 648.

he dies. Thus according to AbūḤanīfah, Shāfi'ī and others, a confection loses its power if retracted by the confessor.[140] Names of Caliph Abū Bakr and Umar are also given by Al-Māwardī to have the same opinion.[141]However, ImāmMālikdoes not subscribe to this opinion and says that a person who has made confession of his offence, *i.e.,zinā,*should be stoned to death even if he is to be chased.

Compulsion to Self-incrimination: There arises a question whether Muslims are compelled to incriminate themselves and duty bound to confess their crimes and offences? The same story of Mā'iz guides us in this regard. The part of his story relevant to this question is that after when he has been executed, the Prophet addressing another person named Hazāl said, "Verily, it would have been better for you, if you had concealed it".[142] Ibn-i-Munkadir narrated that Hazāl had asked Mā'iz to go to the Holy Prophet and to tell him the offence that he had committed.[143] It shows that it was not an ideal situation for the Holy Prophet to execute someone on his sin if there be a tendency to let Him avoided punishment by sinner's remaining silent on that.

The phrase "even if it be against yourself" as used in the above referred verse of Sūrah Al-Nisā[144]of the Holy Qur'ān, relates to the confession or admission of owing rights of others while appearing as a witness for them.[145] This is held obligatory upon Muslims under this verse when they were asked to appear as witness by the party.[146]Ibn-i-Kathīr argued under this verse that a person when called in the court and asked to answer a question, he must say truth even if

[140]Al-Māwardī, Ab al-Ḥasan, Alī bin Muhammad, Al-Ḥāwī Al-Kabīr, Beirut, 1999, vol. 13, p. 210.
[141]Ibid.
[142]AbūDā'ūd, vol. 4, p. 134, Ḥadīth no. 4377; Ibn-i-AbīShaybah, Ḥadīth no. 28784.
[143]'Abd al-Razzāq bin Humām, Al-San'ānī, Al-Ḥumairī, Al-Muṣannaf (hereinafter 'Abd al-Razzāq), Beirut, 1413 AH, vol. 7, p. 322, Ḥadīth no. 13342; the full version of story is that Ma'iz first went to Abu Bakr r.a and 'Umar bin Al-Khattab one by one and asked them that what should he do? They both advised him to remain silent and beg forgiveness of that sin from Allah.
[144]Supra Note 35.
[145] Ibn-i-Qayyim, Al-Jauzīyah, Muhammad bin Abī Bakr, Tafsīr al-Qur'ān al-Karīm, Beirut, 1410 AH, Vol. 1, p. 178.
[146]Al-Jaṣṣāṣ, Aḥmad bin 'Alī, Abū Bakr al-Rāzī, Aḥkām al-Qur'ān, Beirut, 1994, vol. ٣, p. ٢٧٢.

there be his loss in disposing the truth,[147] because such person is supposed to have belief that if he said truth due to the "fear of Allāh, He prepares a way out"[148] for him and that "if someone puts his trust in Allāh, sufficient is (Allāh) for him" and "will surely accomplish his purpose."[149]Islam asks its followers to let themselves free of liabilities regarding the rights of others and if they owe someone, they should return to the owner what is due to him, even if the judge decreed in their favour but they know that the right actually belongs to someone else.[150]

Hence, the above mentioned verse of Sūrah Al-Nisā gives the idea that justice is not something to be demanded from others only, instead, it should also be extracted from one's own self. It means that one should say nothing against what is true and just, even when one has to declare something against himself, even if such an action is likely to bring personal loss upon him, because this loss is insignificant, tiny and transitory[151] as compared to the loss of the life hereafter. Whether all this mean that some authorities including police, magistrates, and judges can be allowed to compel a person to confess before them or it places merely a moral obligation? This question may be understood after some necessary discussions as follow.

Benefit of Doubt and Burden of Proof: *Sharī'ah* recognised that the benefit of doubt to be given to accused in cases of *ḥadd*. Blackstone ration of "ten guilty men" seems to have been reproduced in legal history of the world when it is seen in comparison with the instruction given to Muslims by Prophet Muhammad to go, as far as possible, to avoid the execution of *ḥadd* punishments. He the Prophet said, "Avert the legal penalties from the Muslims as much as

[147]Ibn-i-Kathīr, Abul-Fida, Ismā'īl bin 'Umar bin Kathīr, Tafsīr al-Qur'ān al-'Aẓīm, 1999, vol. II, p. 433.
[148] Qur'ān, ٦٥: 2.
[149]ibid, ٦٥: 3.
[150]It is reported that Umm-i-Salamah said: "The Messenger of Allāh said: I am only a human and you refer your disputes to me, and some of you may be more eloquent in arguing than others, so I pass judgment according to what I hear. If I rule in favor of someone at the expense of his brother's rights, he should not take anything from him, for I have only apportioned him a piece of the Fire." See Abū Dā'ūd, vol. 3, p. 301, Ḥadīth no. 3583.
[151]Uthmānī, Muhammad Shafī', Mufti, Ma'ārif al-Qur'ān, (Trans. Eng: Ḥasan 'Askarī& Muhammad Shamīm, Revised by J. Mufti Taqi Usmani), Karachi, vol. 2, p. 603.

possible, if he has a way out then leave him to his way, for if the *imām* makes a mistake in forgiving one it would be better than making a mistake in punishing him."[152] At another place it is mentioned that "avoid the execution of *ḥadd* if there be any doubt".[153] It is quite clear from analysing these sayings of the Holy Prophet that benefit of doubt must be given to the accused in criminal matters falling under the domain of *ḥadd* at least, as He specifically mentioned it in purview of *ḥadd* cases. These sayings are also invoking, successfully, the idea of presumption of innocence. One of the basic maxims of Islamic jurisprudence is that "the freedom from liability is a fundamental principle".[154] The maxim eloquently talks about the "presumption of innocence" that the neutral status of every human being is freedom from liability and he who accuses someone, must have to prove his accusation.[155]We have to investigate here *firstly,* whether the burden of proof rests, exclusively, on the prosecution or places some liability on the accused too? *Secondly* that has the *Islamic law* created any difference between civil and criminal cases as to place burden of proof?

The Islamic law on burden of proof is based on the saying of the Holy Prophet that "the proof is due from *mudda'ī* (the claimant) and the oath is due from *mudda'ā'alayh* (one against whom the claim has been made)"[156] who is "the party who denies".[157] Here *mudda'ī* is held liable to prove his case whereas *mudda'ā'alayh* is asked to take oath. It means that the party to dispute which is alleging something has to prove it and if he fails to prove the allegation then

[152] Al-Tirmidhī, Abū 'Īsā, Muhammad bin 'Īsā, Sunan Al-Tirmidhī(hereinafter Al-Tirmidhī), Beirut, 1998, vol. III, p. 85, Ḥadīth no. 1424; Ibn-i-AbīShaybah, vol. V, p. 512, Ḥadīth no. 28502.
[153]Al-Bayhiqī, vol. VIII, p. 54, Ḥadīth no. 15922.
[154] The Arabic text of the maxim is "Al-aṣlubarā't al-ḍimmah", see Al-Siyūṭī, Al-Ashbāhwa al-Naẓā'ir, p. 53; see alsoAl-Subkī, Al-Ashbāhwal-Naẓā'ir, p. 218; Ibn-i-Nujaim, Al-Ashbāhwal-Naẓā'ir, p. 50; and Majallah, Article 8.
[155]See Al-Sarkhasī, Al-Mabsūṭ, Beirut, 1993, vol. XVII, p. 28.
[156]Al-Tirmidhī, vol. III, p. 19, Ḥadīth nos. 1341-2.
[157]Al-Bayhiqī, vol. X, p. 327, Ḥadīth no. 21201.

opponent, *i.e.* the denier of allegation, is to take oath in his favour.[158]Imām Ghazālī says that this pattern is adopted by *Sharī'ah* on logical ground and cannot be rotated.[159]Let's find out what are these logical grounds?

The Terms *mudda'ī* and *mudda'ā'alayh* are comprehensive and both are used in *Sharī'ah* for the opposite parties in a legal case notwithstanding the description of the case being either civil or criminal. So the term *mudda'ī* may include a plaintiff (in a civil case), the prosecution (in a criminal case); and also applicant and petitioner whatever title the use. Likewise, a *mudda'ā'alayh* may also be used for a defendant of any case including an accused. Since it is clear that we don't find the difference between the terms *mudda'ā'alayh* in respect of its being defendant in either of the cases, we have to trace out whether the *mudda'ā'alay h*as used in the saying of the Holy Prophet giving the rule regarding burden of proof[160] is also to be applied on both civil and criminal cases without discrimination or it is different in both type of cases? Keeping in view prior discussions it can be understood that the rule is not attracted to the case of *ḥadd*, because the benefit of doubt was asked by the Holy Prophet[161]to be given to accused which requires to simply give advantage of unsuccessfulness of the *mudda'ī* to sufficiently prove his allegation. Hence, an accused in the *ḥudūd* cases cannot be compelled to take oath in order to get free from liability. Thus, it indicates that requiring the *mudda'ī* to take oath is not unavertable rule to the extent of *ḥudūd* cases, at least, on which this rule is not applicable. Imām Abū Ḥanīfah's opinion is that there are certain cases where rule of oath is not attracted.

These are the cases where subject-meter is something which cannot be attributed as wealth nor the wealth is claimed therein, *e.g.*;*nikāḥ* (marriage), *ṭalāq* (divorce), *raj'at* (

[158]Ibn al-Humām, Muhammad bin 'Abd al-Wahid, Fatḥ al-Qadīr, Beirut, vol. 8, p. 159; see alsoAl-Māwardī, Al-Ḥāwī Al-Kabīr, vol. 17, p. 69.
[159] Al-Ghazālī, AbūḤāmid, Muhammad bin Muhammad, Al-Mustaṣfā, Beirut, 1993, p. 162.
[160] Supra Notes 59 and 60.
[161]Supra Note 55 and 56.

repudiation of divorce), *'īlā'* (annulment),[162] *nasab* (paternity), *riqq* (slavery),*istīlād* (want of child), *qadhaf* (perjury), *etc*. However, according to ImāmShafi'ī, every right which can be claimed and suit thereof is maintainable, oath is mandatory on the denier in case the *muddaʿī* failed to prove; and it is equally applied on cases either involving wealth (gift, debt, etc.) or other than wealth like *qiṣāṣ*, *nikāh*, *ṭalāq*, *'itq*(freedom of slave), *nasab*, etc.[163] Al-Māwardī argued that demand of oath from defendant shall be determined watching the nature of right alleged to have been infringed. If claim involved infringement of pure right of human, oath shall be necessary, as in aforementioned cases. In case of the infringement of pure right of Allāh, oath shall not be necessary, like in case of *zinā*. If infringed right was a mix right of Allāh and human, like in theft liable to *ḥadd*, then oath would be called for the sake of recovering property but *ḥadd* could not be executed if defendant denies to take oath.[164]

Torturing the Accused (Ḍarb al-Muttahim: It is reported[165] that a person who confessed the guilt of theft was brought before Caliph 'Umar bin Al-Khaṭṭāb who, watching the sings of torture on the confessor's hands inquired the matter. In inquiry, the confessor retracted his confession and said, "By Allāh, I'm not a thief yet I'm compelled to confess." Caliph 'Umar set that person free and didn't amputate his hand. Al-Sarkhasī, a great Ḥanafī jurist, says that "if a person confessed to have committed theft in the consequence of punishment, torture, threat of detention, etc., his confession is invalid."[166] Al-Sarkhasī supported his view quoting the statement of Shurayḥ – a famous *qāḍī*in early Muslim state appointed by Caliph 'Umar as Chief *Qāḍī*– that he is reported to have made remarks on this issue and said, "Detention is abhorrence; and threat is

[162] It is annulment of a marriage after husband's sworn testimony to have refrained from marital intercourse for a period of at least four months. See Hans Wehr, A Dictionary of Modern Written Arabic, 3rd Ed, New York, 1976, p. 1101.
[163]Al-Māwardī, Al-Ḥāwī Al-Kabīr, vol. 17, p. 146.
[164]Ibid, p. 147.
[165]ʿAbd al-Razzāq, vol. 10, p. 193, Ḥadīth no. 18793.
[166]Al-Sarkhasī, Al-Mabsūṭ, vol. 9, p. 184.

abhorrence; and imprisonment is abhorrence; and torture is abhorrence."[167] This is because the confession is admissible only when it appears to be truthful being voluntary, but it will obviously be false if not voluntary as made in the result of inducement or threat. Al-Sarkhasī said, "Some of the later jurists of Ḥanafī school opined in favour of the admissibility of confession attained by using force because in our time thieves do not confess voluntarily." However, Ḥasan bin Ziyād was asked by a person from government if torturing the accused of theft were allowed under *Sharī'ah*, to extract confession? He allowed and said that torture must not be such to give cuts on body or exposing bone. Nevertheless he was not confident, so right after allowing the torture changed his opinion and followed the person and reached the door of the governor. He found that they just recovered the stolen property from accused on basis of confession extracted through torture. On this, Ḥasan blurted, 'I never witnessed such an amalgamation of justice and injustice."[168]

Qarāfī, a famous Mālikī jurist, allowed torture for accused if there be a strong accusation against him, but also held that if accused confessed while he be tortured then *qāḍī* shall inquire the matter and if found that the confession was merely the outcome of violence or accused retracted during inquiry than confession shall lose its admissibility. However, he further held that *qāḍī* may base the decree on such confession but attributed such a decree extremely abominable.[169] Al-Shāmī, quoting from Abū Bakr A'mash, said that if allegation was denied by *mudda'ā'alayh* then authorities were to find some presumption, like; possession of stolen

[167]'Abd al-Razzāq, vol. 10, p. 193, Ḥadīth no. 18791; Ibn-i-AbīShaybah, vol. 5, p. 493.
[168]Al-Sarkhasī, Al-Mabsūṭ, vol. 9, p. 184.
[169]Qarāfī, Abul-'Abbās, Ahmad bin Idrīs, Al-Dhakhirah, Beirut, 1994, vol. 10, p. 41.

property or joining company of thieves and persons of immoral characters, etc. If there be a strong presumption then the torture can be devised for the sake of extracting information.[170]

Keeping all the given opinions in view, one may conclude that even those jurists who allowed the torture for accused (*ḍarb al-muttahim*) admitted that no authority could be found in the primary sources of *Sharī'ah* on admissibility of a confession lead by torture and violence to accused. Some jurists allowed it under the head of *siyāsah* (political basis) and didn't consider it an ideal situation to extract information by using force. Furthermore, it is also apparent that the question of torture has only been discussed in the case of theft and allowed torture only for recovery of the stolen property. However, all jurists are clear on the point that the execution of *ḥadd* punishment allocated to commission of theft, *i.e.*amputation of hand from wrist, cannot be based on such confessions and subsequent recovery of property. Another important point pertinent to mention here is that the abominable and abhorrent act of violence has only been embraced for the sake of recovery of the rights of some other, *i.e.* stolen property. That's why Qarāfī allowed torture on the condition of existing strong and convincing accusation.

Position of right to remain silent in Pakistan

The term "right to remain silent" is totally alien to Pakistani laws, bars, benches, public and police. Right to protection against self-incrimination, however, was introduced in Constitution of Pakistan, 1973 for the first time.[171] Article 13 of the Constitution reads as below:–

[170]Al-Shāmī, Ibn-i-'Ābidīn, Muhammad Amin bin Umar, Radd al-Muḥtāralā al-Durr al-Mukhtār, Beirut, 1992, vol. 4, p. 88.

[171] Although there were chapters of rights in prior two repealed Constitutions – those of 1956 and 1962 – but this right was not embodied therein.

Protection against Double Punishment and Self-Incrimination. *"No person […] (b) shall, when accused of an offence, be compelled to be a witness against himself."*

It is intended in this part of the paper to review the statutory laws of Pakistan to investigate the position of protection against self-incrimination as accepted by constitution as a fundamental right of every citizen of Pakistan. Discussion will be made with reference to relevant provisions of laws including evidence, anti-terrorism and criminal procedure along with code of conduct of the police and rules applicable thereto.

Confession to Police Officer and in Police Custody: In British India, Section 25 of the Evidence Act, 1872 were introduced by the Crown which provided that"[n]o confession made to a Police Officer[172] shall be proved as against a person accused of any offence". Section 26 further explains the matter and provides that a confession made in police custody shall not be proved as against accused person, "unless it be made in the immediate presence of a Magistrate". The situation created by these Sections was not the same as it was in England. At that time, in England, a confession was not to become inadmissible by reason of the mere fact that it is made to a police officer.[173] The rule embodied in these Sections was enacted in view of the special circumstances of Indian Sub-continent, observing the notorious fact that confessions in this area were usually obtained by the police through deceit and torture.[174] The object of the Legislature in enacting these Sections was to put a stop to the extortion of confessions by the police malpractices,[175] because it is the widespread and rampant practice of police to use third-degree methods for extracting confessions from accused.[176] The Same provisions were borrowed in

[172] As to statements made to a police officer investigating a case, see Sec. 162 of the CrPC, 1898 (Act V of 1898).
[173]SeePhipson, Sidney L., The Law of Evidence, 7th Ed, London, 1930, p. 258.
[174]SeeQE v. BepinBehari Dev, 2 CWN 71, 74; Jogijiban Chosev.E, 2 IC 681; QE v. Babu Lal, 6 A 509, 523 (FB); but see 6 A 550, 551; State of Punjab v. Barkat Ram, AIR 1962 SC 276, 280: (1962) CriLJ 217.
[175]QE v. Babu Lal, (1884) 6 A 509, 523**(FB)**; approved in Noor Aga v. State of Punjab, (2008) 16 SCC 417: (2010) 3 SCC (Cri) 748; see also Raju Premji v. Customs, (2009) 16 SCC 496, at 503.
[176]Arup Bhuyan v. State of Assam, AIR 2011 SC 957: 2011 CriLJ 1455.

drafting Islamised version of law of Evidence which was promulgated under title "*Qānūn-e-Shahādat, 1984*" and replaced Evidence Act, 1872. Article 38 and 39 of Qānūn-e-Shahādatare the same provisions of Section 25 and 26 of the Act, 1872 but only renumbered asno repugnancy to injunctions of Islam was found in the these Sections.[177]Disclosure of self-incriminating facts before police have no legal value under Article 38 and 39 of Qānūn-e-Shahādat, 1984.[178]It is not necessary for application of Article 39 that the maker of the confession must have been formally arrested.[179] It is sufficient if custody of police was proved either legal or illegal.[180]

Supreme Court of Pakistan have been continuously holding that extra-judicial confession is always treated as a weak piece of evidence,[181]which can, easily, be procured whenever direct evidence is not available.[182] Therefore, while placing reliance on it, courts have to exercise utmost care and caution[183]and should be reluctant to act upon such confession.[184]But extra-judicial confession corroborated by oral evidence of unimpeachable character is not inadmissible but forms basis of conviction.[185] Three-fold test is required to make extra-judicial confession a basis of conviction; *firstly*, in fact it was made; *secondly*, it was voluntarily made; and *thirdly*, it was truly made.[186]FSC held in *Abid Mahmood case*,[187] "… it is also a normal practice here [in Pakistan] that when investigating officer of police would fail to properly investigate the case, he would resort to padding and concoction like extra-judicial confession and such confession by

[177]Wali Muhammad v. State, 2014 PCrLJ 206; reference has been made to a case 2005 SCMR 277(a) where Supreme Court of Pakistan held that Extra-judicial confession is a very week type of evidence and no conviction on it can be awarded without its strong corroboration available on the record.
[178]Wali Muhammad v. State, 2014 PCrLJ 206 (FSC); Saeed Ahmad v. State, 2011 SCMR 1686; see also Muhammad Imran v. State, 2011 MLD (Kar) 650; Sharif v. State, 2000 PCrLJ 562; Liaquat Ali v. State, 1999 PCrLJ 1469.
[179]Hakam v. E, 1940 L 129; ChodaAtchenah, 3 MHC 318; Maharani v. E, 1948 A 7.
[180]E v. MstJugia, AIR 1938 P 308.
[181]Muhammad Aslam v. Sabir Hussain, 2009 SCMR 985.
[182]Sarfraz Khan v. State, 1996 SCMR 188; see also Muhammad Aslam v. State, 1996 PCrLJ 287.
[183]Ibid.
[184]Rahzan v. State, PLD 1960 Lah 24; Seetan v. State, 1988 PCRLJ 939.
[185]Abdul Khaliq Patwari v. State, 1968 PCrLJ 869; Haribar Paik v. State, 1985 CrLJ 432 (Orissa).
[186]Sarfraz Khan v. State, 1996 SCMR 188.
[187]Abid Mahmood v. State, 2009 PCrLJ 894 (FSC).

now had become the sign of incompetent investigation." Judicial mind, before relying upon such weak type of evidence of extra-judicial confession which was capable of being effortlessly procured, must ask a few questions, like why accused would at all confess; what was the time-lag between the occurrence and the confession, whether accused had been hilly trapped during investigation before making confession; what was the nature and gravity of the offence involved; what was the relationship or friendship of the witnesses with the maker of confession; and what, above all, was the position or authority held by the witness.[188]When a man of sound mind and mature age would make a judicial confession in ordinary simple language, after he had been duly warned, and the court was satisfied that it was voluntary, true and trustworthy, it could be made the foundation for conviction.[189] Weight to be attached to a confession would depend on the facts and circumstances of each case.[190]

Sole retracted judicial confession, could be made a ground for conviction, if such judicial confession, was made, voluntarily; and was of confidence inspiring; and had not been obtained under coercion.[191]But courts, in Pakistan, have laid it down as a rule of prudence, that a retracted confession should not, by itself, be made the basis of conviction and that the court should insist upon some independent and strong evidence in corroboration of the confession,[192] because retracted confession is a tainted piece of evidence and one piece of tainted evidence would not corroborate another piece of tainted evidence.[193]

[188]Ibid.
[189]Suleman v. State, 2012 YLR 2395 (FSC).
[190]Ibid.
[191]Muhammad Ashraf v. State, 2016 YLR 1543 (FSC).
[192]Kher Singh v. State, 1989 PSC 533; Arabistan v. State, 1992 SCMR 754; Muhammad Ali v. State, 2002 PCrLJ (Kar) 1631; Muhammad Ismail v. State, 2011 MLD (Kar) 967.
[193]Muhammad Ali v. State, 2002 PCrLJ (Kar) 1631.

Inducement, Threat or Promise: A confession if voluntary and true can by itself form basis of accused's conviction [194] and voluntary confession means that it must not be caused by inducement, threat or promise.

Article 37 of the Qānūn-e-Shahādat, 1984gives rule to check the voluntariness of a confession which reads as below:

Confessions of caused by inducement, threat or promise, when irrelevant in criminal proceedings.— *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 supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.*

Procedure of Recording Statement under Article 164 of the Code of Criminal Procedure, 1898: Only an authorised judicial officer can record a confession and "a confession made to a Police Officer must be ruled out of evidence".[195] Duty has been placed under Section 164 of the Code of Criminal Procedure (CrPC) on Magistrate to explain to the accused before recording his confession that "he is not bound to make a confession and that if he does so it may be used as evidence against him".[196] Magistrate is also duty bound to conduct questioning session before recording accused's confessionary statement to get belief that the statement is voluntary and there is no reason to render the statement involuntarily. Magistrate is

[194] State v. Jatindra Kumar Sutradhar, PLD 1968 Dacca 742.
[195] Sabur-ur-Rahman v. Government of Singh, PLD 1989 Kar 572; referred to Q v. HurriboleChunderGhose, AIR 1 Cal 207.
[196] Sec. 164 (3) of CrPC, 1898.

also under obligation to record exact statement carefully and "make a memorandum at the foot of such record".[197] Questions to be asked from deponent are that "for how long have you been with police; that has any pressure been brought to bear upon you to make confession; that have you been threatened to make confession; that has any inducement been given to you; that why are you making this confession and that have you been maltreated by police; etc."[198] However, the statements made by an accused person in the course of investigation are excluded by Section 162 of the CrPC.[199]

Self-Incrimination under Anti-Terrorism: An exception to the rule embodied in Article 37 to 39 of the Qānūn-e-Shahādat, 1984 and as interpreted by worthy courts of the country, has been given in the Anti-terrorism Act (ATA), 1997 by introducing[200] Section 21-H.[201]This Section provided that where, in any court, proceedings held under ATA, 1997, the produced evidence "raises the presumption that there is a reasonable probability that the accused has committed the offence, any confession made by the accused during investigation, without being compelled, before a police officer of a certain rank, may be admissible in evidence against him, if the Court so deems fit."[202]

This provision caused to give very wide powers to police regarding the investigation of a person caught as a suspect to involve into terrorism activities. Some Pakistani courts held that this provision is a violation of human rights and is repugnant to Articles 13(b) & 25 of the Constitution, 1973.[203]The provision was discussed by the Quetta High Court and held that though Section 21-H has made the confessional statement recorded before police officer of the

[197]Ibid.
[198] State v. Kalab Ali, 2010 GBLR 256 (Supreme Appellate Court, Gilgat).
[199] Muhammad Ali v. State, 2015 PCrLJ (Kar) 1448.
[200] Through the Anti-terrorism (Amendment) Ordinance, (XXXIX of) 2001.
[201] ATA, 1997, Sec. 21-H, "Conditional admissibility of confession".
[202] Ibid.
[203] Dhani Bakhsh v. State, 2006 PCRLJ (Quetta) 1671; State v. Shakeel Ahmad, 2015 MLD 1374 (Gilgat-Baltistan Chief Court).

said rank admissible, but the admissible evidence did not necessarily mean that it is credible as well.[204] Thus such a confession could not be used as exclusive piece of evidence, upon which conviction could be based, if said statement was not corroborated by a strong piece of evidence.[205]

Code of Conduct for Police: Besides prescribing attitude and responsibilities of police and general duties of police, Article 114 of Police Order, 2002 has laid down that Provincial Police Officer shall prescribe a code of conduct for police officers. Code of Conduct has been prescribed in Police Rules, 2002.Clause (v) of Rule 6.46 of the same states as under:

> *(v) No police officer may inflict, instigate or tolerate any act of torture or other cruel, in-human, or degrading treatment or punishment nor any police officer may invoke superior order, state of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, in-human, or degrading treatment or punishment.*

According to Rule 34.8 Every Regional Police Officer shall conduct Inspections of all districts under his charge[206] for evaluating the performance of the District Police Offices and shall send their reports to the Provincial Police Officer. Rule 34.9 required Regional Police Officers to inspect, along with others points, the "cases dealing with death or torture in police custody"[207] in preparing report of such inspections. By the virtue of Rule 30.5 **a**ny police officer who

[204] Dhani Bakhsh v. State, 2006 PCRLJ (Quetta) 1671. Quetta High Court explained that "a confessional statements recorded by Police Officer though may be above board and transparent but fact would remain to be explained as to what was unusual and extraordinary which compelled police officer to record statement himself instead of Judicial Magistrate. Accused when produced by one police officer before another Police officer he could neither feel free nor think that he was in safe hands. For accused all police officers, irrespective of their ranks, were chips of same block. Decision about admissibility of confessional statements under Section 21-H of Anti-Terrorism Act was left to discretion of Court and before relying upon such statements, Court was to satisfy itself about the credibility of such statements.

[205] State v. Shakeel Ahmad, 2015 MLD 1374 (Gilgat-Baltistan Chief Court).

[206] In accordance with a schedule notified by them in advance by end of January of the year.

[207] Rule 34.9 clause (XIII).

contravenes code of conduct may be dealt with under efficiency and discipline rules contained in Chapter VIII and may be awarded one or more punishments prescribed in Chapter VIII of these rules. The Police Order, 2002 under its Article 156 provides penalty for torture inflicted on accused by police officer stating as under:

Whoever, being a police officer […] (d) inflicts torture or violence to any person in his custody; shall, for every such offence, on conviction, be punished with imprisonment for a term, which may extend to five years and with fine.

Conclusions

The "presumption of innocence" is very basic idea which works like a *grund norm* and provides base to many rules and laws. Since neutral state of every human being is freedom from liabilities of others, it is obvious that one who alleges against the neutral state should be asked to prove it in a transparent, fair and public trial. Accused must be given full opportunity of legal representation and must not be compelled to give evidence against himself. He would, instead, remain silent as he is to set out of litigation automatically if accusation is not proved. Although, *Sharī'ah* placed burden on the *mudda'ī* party in all cases to prove his/her claim but the rule requiring oath to be taken by *mudda'ā'alayhi* is not attracted to all cases. Jurists differed as to what would be the basis to determine in which cases oath is necessary and in which it is not. Al-Māwardī's eloquently divided cases between those where oath is necessary and those where oath is not, keeping in view nature of the right involved. Thus, right to remain silent is not conversant with *Sharī'ah* to the extent of the demand of taking oath in every cases involving right of human being, according to *Shafi'ī* school; and only in cases involving wealth, according to Ḥanafī school. However, Ḥanafī school narrow down the orbit of reference to oath leaving only few cases.

Confession is considered very week type of evidence by *Sharī'ah* as well as common law based systems. Some Muslim jurist, especially those belonging to Mālikī and Ḥanafī schools, decreed in favour of torturing accused as has been discussed in second part of the paper. The discussion made on this issue shows that all they discussed was the issue of torture in the context of theft where right of the owners of stolen property has been infringed. Secondly, they were clear on the point that compulsion was an evil and could only be allowed where it looks fruitful in order to recover stolen property rather than to prove the guilt. That's why they also held that punishment of theft, *i.e.* the amputation of hand cannot be awarded on such a confession. Thirdly, they allowed it only when there was a strong apprehension of accused's involvement in theft. Fourthly, jurists were admitting that the real status of *Sharī'ah* is against torturing accused but they were compelled to allow this due to the reason that the number of theft cases were accelerating day by day and owners of stolen property were failing to establish the evidence according to the required criterion. The practice of the Holy Prophet, Caliph 'Umar and remarks of *qāḍī* Shurayḥ, as given in this paper, are good examples for understanding that *Sharī'ah* condemned the practice of obtaining confession of accused through force and threat. So, right of accuse to remain silent is protected in *Sharī'ah* by providing shield against self-incrimination.

The term "right to remain silent" in alien to Pakistani laws. The word Self-incrimination has been introduced by Article 13 (b) of the Constitution, 1973. It is quite unfortunate that no effective practical step could have been taken since than towards securing the protection of this right. Forget whatever is written in Police Order and Police Rules, the greatest pride of Pakistani police is their ability to have confessions extracted through infliction of torture which they count as their efficiency instead of an evil. Almost no advancement could have been made by the legislature for effective check on police against third degree violence, illegal detention, and

forced confession. An organisation of human rights "Madadgar Foundation" has collected 2071 cases of police torture involving torture to men, women and minors, reported throughout Pakistan between years 2000 to 2013.[208] This number of cases is, undoubtedly, just a little percentage of the real number as most of the cases could not have be reported by victims due to many reasons, like; fear of death, plotting by landlords and political icons with police and other investigating authorities, untraceability of detained persons due to use of private lockups and torture cells, etc. Courts frequently hold that extra-judicial confessions and those made before police are inadmissible evidence but there is no serious attempt to eradicate this evil on part of the government. Position of right to remain silent or protection against self-incrimination is very poor and miserable in the country and effective legislative and practical reforms are emerging need of the day. People of Pakistan are also unaware of their right to remain silent or right to protection against self-incrimination. People have to be educated to get them aware of their rights so that they can claim for protection thereof. Pakistan has signed[209] the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* but made reservation upon ratification[210] on three of its Articles namely; Articles 8(2), 20 and 30(1). The State should abide by this Convention and should effectively take steps towards application of those parts of the same that are not, anyway, against the injunctions of Islam.

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[208] http://www.madadgaar.org/data.html
[209] On 17 April 2008.
[210] 23 June 2010.