

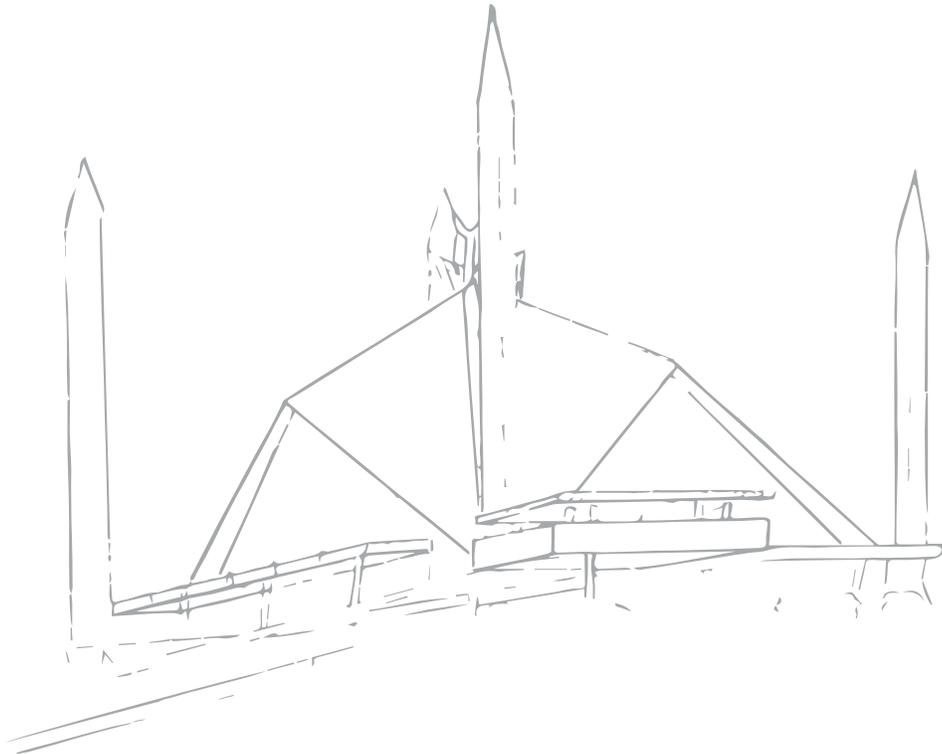


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Rights of the accused in the legal system of Pakistan: a legal analysis

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Abstract

This paper focuses on the rights of accused that are available to him¹ under Pakistani legal system. Accused is often presumed to be an offender before trial which eventually results into snatching away his rights that he ought to have under the law. Pakistani law grants many rights, protections, liberties and remedies to an accused. In this paper rights of the accused have been divided into four prominent categories i.e. pre-trial rights, during trial rights, post-trial rights and exceptional rights. Pakistan being an Islamic state should work for the actual enforcement of the rights that can be availed by an accused under the law because he needs help to get rid of the probable false accusations made against him. This should also be done by the state in order to improve the life of the general public and to meet the ends of justice because denial of the basic rights to an accused may expose him to punishment for a crime that he might not have committed as he is actually innocent in the eyes of law and innocent people cannot be punished.

Keywords: *Accused, Human Rights, Criminal law, Rights of Accused in Pakistani Law*

1. Introduction

In sophisticated societies individuals enjoy different rights, liberties and protections that are ensured to them under law of the land they belong to. These rights and protections are inherent interest of every individual. So is an accused who enjoys number of rights under Pakistani legal system who remains to be innocent until proven guilty after adopting the due process of law. This paper focuses on the rights of the

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¹ Though male gender is used in this article with reference to accused but it also includes the female gender.

accused due to the fact that an offender is often confused with an accused and both are treated equally or even worse. This attitude becomes a reason that those accused of a crime, even if they have not committed any, are deprived of their basic rights that they ought to have under the law.

2. Accused in the Pakistani Legal System

Accused is someone against whom legal proceedings have been initiated² and is under trial for a crime punishable by law.

2.1. Difference between Accused and Offender

Accused is the suspect of the crime which is being investigated by the authorities while offender is the one on whom the commission of the offence has been proved by due process of law. Accused is someone who is charged with a crime or is on trial for a crime. On this basis, accused is not an offender because the former is someone who is a suspect of a crime which is being investigated by the authorities while offender is someone against whom commission of an offence has been proved through due process of law.

2.2. Rights of Accused under Pakistani Law

Accused persons enjoy number of rights under Pakistani law and it gives them adequate protections which are divided into categories such as pre-trial rights, during trial rights, post-trial rights and exceptional rights;

2.2.1. Pre-trial Rights

1: right to be protected against arbitrary or unlawful arrest, detention and searches—.Article 10 of the Constitution of Pakistan³ and Section 60 and 61 of the Criminal Procedure Code⁴ provide right to the accused to be protected against the

² Garner Brayan Ed., "Black's Law Dictionary", (United States of America: Thomson West, 2004), 23.

³ Article 10, The Constitution of the Islamic Republic of Pakistan, 1973.

⁴ Section 60 and 61 of the Code of Criminal Procedure (V of 1898).

arbitrary and unlawful arrest. No one can be arrested and detained without due process of the law. Article 10(1) of the Constitution of Pakistan provides security to the accused that he cannot be detained in custody without being informed about the grounds of arrest.⁵

Writ of *Habeas Corpus* can be filed against illegal detention in High Court. Prisoners seek release by filing a petition for the writ of *Habeas Corpus*. *Habeas Corpus* is a judicial mandate to the prison official to bring the detainee to the Court and it can be determined whether the detainee was lawfully imprisoned or not or he should be released from the custody.⁶ Under Section 491 of the Code of Criminal Procedure High Court has the extra ordinary power. Any High Court can direct the liberty of a person in public or private custody. The Court can also order for the appearance of the prisoner before the court so that he can be examined.⁷ This is pure discretion of the court and not the right of an accused.

Under Section 51 of the Criminal Procedure Code an accused cannot be arrested and searched by a police officer without warrant.⁸ Under Section 100 of the Criminal Procedure Code search cannot be made without search warrant and under Section 103 of the Criminal Procedure Code search shall be made in the presence of witnesses who can be respectable inhabitants of the locality.

2: Production of Accused before Magistrate—Article 10(2) of the Constitution⁹ and Section 61 of the Criminal Procedure Code¹⁰ has fixed the detention of the accused at the Police Station for 24 hours. Beyond 24 hours detention is illegal under the Constitution and the Criminal Procedure Code. The duration of

⁵ Article 10(1), The Constitution of the Islamic Republic of Pakistan, 1973.

⁶ Habeas Corpus. Available online at: <<http://www.lectlaw.com/def/h001.htm>> (Last Accessed: 03.05.2017)

⁷ Section 491 of the Code of Criminal Procedure (V of 1898)

⁸ Section 51, *Ibid.*

⁹ Article 10(2), The Constitution of the Islamic Republic of Pakistan, 1973.

¹⁰ Section 61 of the Code of Criminal Procedure (V of 1898)

24 hours has been stipulated in law because during this time period police can interrogate the accused in their custody. Under Section 344 and 167¹¹ of Code of Criminal Procedure, Magistrate can send an accused person on remand for not more than a duration of 15 days at a time which prohibits the law enforcing agencies to have the custody of the accused for long or unlimited durations for the purpose of investigation

3: Protection against Ex-Post Facto law—.Ex-post facto law is used in reference to criminal law which applies retroactively by criminalizing the conduct that was legal when originally performed. US law also prohibits ex-post facto law.¹² It also includes increasing the punishment for an existing crime, depriving the defendant of the defense available at the time the act was committed or rendering an act punishable in more disadvantageous manner as compared to the punishment of the crime when it was committed.¹³ It is based on the legal maxim, *nulla poena sine lege* i.e. there can be no punishment without law.¹⁴ So it is prohibited because it is unjustified and against fundamental human rights to punish someone for a crime that was not punishable by law when it was committed or giving increased punishment for the same crime

Article 12 of the Constitution of Pakistan gives the right to the accused that s/he cannot be granted punishment for an act or omission which was not punishable by law at the time when it was committed by the accused.¹⁵ Moreover it states that the accused cannot be awarded with a greater or a different

¹¹ Section 344 and 167 of the Code of Criminal Procedure (V of 1898)

¹²Legal Information Institute, Ex post Facto. Available online at: <https://www.law.cornell.edu/wex/ex_post_facto > (Last Accessed: 27.05.2017)

¹³ Judie Zollar, “Prohibition against Ex Post Facto Laws”, House Research. Available online at: <www.house.leg.state.mn.us> (Last Accessed: 28.05.2017)

¹⁴Ex Post Facto, The Heritage Guide to the Constitution. Available online at: <<http://www.heritage.org/constitution/articles/1/essays/63/ex-post-facto>> (Last Accessed: 27.05.2017)

¹⁵ Article 12, The Constitution of the Islamic Republic of Pakistan, 1973.

punishment for a crime at the time when that offence was committed. It is against the human rights of an accused that he be punished for commission or omission of an act when it was not declared crime or offence under the law.

4: Right to be informed immediately of the grounds of arrest—.Article 10(1) of the Constitution¹⁶ and Section 50, 55 and 75 of the Criminal Procedure Code¹⁷ grants the right to an accused to be informed about the reasons for his arrest immediately after he is being arrested. This provision of law has empowered the accused in a way that he cannot be arrested arbitrarily without any reason. He would know the reasons for his arrest and can prepare his case to contest in court of law according to the accusation made against him.

5: Right to fair trial—.Article 10A of the Constitution envisages that an accused has the right to fair trial and to be tried by independent judiciary in compliance with due process of law.¹⁸ He has right to open trial in an open court.¹⁹

6: Right to restrain Police from intrusion on his privacy—.Article 14(1) of the Constitution of Pakistan declares the dignity of a man and privacy of his home to be inviolable.²⁰ Privacy of home cannot be violated except when it is necessary and in compliance of the due procedure for doing so but not arbitrarily.

2. 2. 2. During Trial Rights

i. Freedom from Torture—.Torture is banned and prohibited at all times. Torture includes cruel, inhumane and degrading treatment or punishment.²¹ It is prohibited under United Nations Convention against Torture because it is against human rights to expose an individual to unbearable circumstances which may affect him adversely. Article 14(2) of the

¹⁶ *Ibid.*

¹⁷ Section 50, 55 and 75 of the Code of Criminal Procedure (V of 1898)

¹⁸ Article 10A, The Constitution of the Islamic Republic of Pakistan, 1973

¹⁹ Dr. Ashutosh “Rights of Accused” (Delhi: *Universal Law Publishing Co. Pvt. Ltd.*, 2010), 243.

²⁰Article 14(1), *Ibid.*

²¹ Torture, “*Human Rights Watch*” Available online at: <<https://www.hrw.org>> (Last Accessed: 28.05.2017)

Constitution prohibits the use of torture for the purpose of extracting evidence. An accused under the light of this provision cannot be tortured.²² He cannot be beaten merely for the reason of pulling out the statement from him with regard to the charges he is accused of.

ii. Protection against Double Jeopardy—It is based on the legal maxim *nemo debet bis vexari pro una et eadem causa* i.e. no person should be twice disturbed for the same cause. This means that no one shall be punished or put in peril twice for the same matter.²³ Article 13(a) of the Constitution²⁴ and Section 403 of Criminal Procedure Code²⁵ provides for the protection against double jeopardy i.e. he cannot be tried twice for the same offence. An accused cannot be prosecuted and punished twice for the same crime. The rule laid down in Section 403 of the Criminal Procedure Code is similar to the principle of *res judicata* laid down in Section 11 of Civil Procedure Code.

iii. Right of the arrested person not to be subjected to unnecessary restraint—Unnecessary restraint is aimed to restrict or prevent the movement unjustifiably. Section 50 of the Criminal Procedure Code speaks of the right of an accused when arrested. The law allows him only to be restrained only to the extent it is necessary to prevent his escape from police custody.²⁶ It is violation of his right if he is excessively chained or is kept in inhumane conditions than it is required to restrain him.

iv. Right to be treated under due process of Law—Due process of law is a constitutional guarantee which prevents the governments from abusing the rights of the citizens.²⁷ Due process includes substantive due process and procedural due

²² Article 14(2), The Constitution of the Islamic Republic of Pakistan, 1973

²³ P L D 1979 Lah. 349; P L J 1979 Cr. C. 76.

²⁴ Article 13(a), *Ibid.*

²⁵ Section 403 of the Code of Criminal Procedure (V of 1898)

²⁶ Section 50, *Ibid.*

²⁷ Magna Carta: Muse and Mentor, "Due Process of Law", Library of Congress. Available online at: <<https://www.loc.gov>> (Last Accessed: 28.05.2017)

process.

Article 10-A of the Constitution states that a person is to be dealt under due process of law in any condition. An accused cannot be tried extra ordinarily for any charge against him. He should be prosecuted under the substantive and the procedural law as according to the charges he is accused of.²⁸

v. Right of Access to Justice and Equality before Law – Article 25 of the Constitution of Pakistan preaches that all Pakistani citizens enjoy equal protection of law and no one is above law. They cannot be distinguished and discriminated on the basis of their gender. This right is also available to all Pakistani citizens in general but this is also available to an accused under Pakistani law and it cannot be snatched from him in any condition because this is fundamental right of every Pakistani citizen.²⁹ All of the citizens enjoy equal access to law and in response law protects them equally as no one is above the law.

vi. Right to Counsel of choice – The accused has the right to consult a lawyer of his own choice to represent his stance in the court of law and Article 22(1) of the Constitution³⁰ and Section 353 of the Criminal Procedure Code advocates the same³¹. It gives him a right to be defended by a pleader so that he can defend himself in a reasonable way and present his stance. He has the right to enjoy free legal aid if he is economically incapable.³²

vii. Right not to be a witness against himself – Article 13(b) of the Constitution gives the right to the accused that he cannot be compelled to be witness against himself if he is accused of any charge.³³ It is his fundamental right under the Constitution that he cannot be forced or compelled to give evidence against himself in any case.

²⁸ Article 10A, The Constitution of the Islamic Republic of Pakistan, 1973.

²⁹ Article 25, *Ibid.*

³⁰ Article 22(1), *Ibid.*

³¹ Section 353 of the Code of Criminal Procedure (V of 1898)

³² Dr. Ashutosh "Rights of Accused" (Delhi: *Universal Law Publishing Co. Pvt. Ltd.*, 2010), 253.

³³ Article 13(b), The Constitution of the Islamic Republic of Pakistan, 1973.

viii. *Right to get copies of the report, documents and statements of witnesses on which the prosecution relies—*

.Section 265-C of the Criminal Procedure Code gives the right to the accused to be supplied with the first information report (FIR), police report, statements of all witnesses recorded under Section 161 and 164 of the Criminal Procedure Code, note of investigation officer on his first visit to the place of occurrence and on the recoveries made from that place within a duration of seven days and free of cost.³⁴ Accused has the right to ask for the copy of statements for the purpose of contradiction of witnesses for the prosecution.³⁵ The copies of the statements of the witnesses recorded in Court must be supplied to the accused before hearing.³⁶

ix. *Right to insist that evidence be recorded in his presence except in some special circumstances—*

.Under Section 353 of the Code of the Criminal Procedure it is the right of the accused that the witnesses should be carried out in the presence of the accused or his pleader or attorney.³⁷ It is the basic principle of criminal justice.³⁸ If the accused requests for the exemption from personal attendance and the Court grants it, the accused cannot complain that the exemption was wrongly granted to him and the trial should be held null and void.³⁹

x. *Right to be examined in the language Accused understands—*

.Section 364, 360, 361 and 357 of the Criminal Procedure Code gives the right to the accused to be examined by Magistrate or the Court in the language which the accused understands. If the proceedings of the court are in the language the accused does not understand then they shall be interpreted to him in the language he understands as to make him know about the proceedings being conducted and the charges he has been accused of. He shall also be made to read the statement that he has given so that he can explain the previously given

³⁴ Section 265-C of the Code of Criminal Procedure (V of 1898)

³⁵ P L D 1955 Lah.59.

³⁶ P L D 1960 Azad J&K 14.

³⁷ Section 353 of the Code of Criminal Procedure (V of 1898)

³⁸ 1981P.Cr.L.J. 194

³⁹ 14 D L R 355 (DB.)

answers in detail or add something to them.

xi. *Right to have due notice of the charges*—Section 364 of the Code of Criminal Procedure states that the accused examined by the Magistrate or by the Court, every question put to him and every reply given by him for those questions shall be recorded.⁴⁰ Under Section 364(2) the accused shall declare that the statements made are true and the record shall be signed by the accused and the Judge of the Court shall certify that the examination was taken in his presence and the record contains the full and true account of the statement made by the accused.

⁴¹

Under Section 360 of the Criminal Procedure Code the statement made by the witness shall be read over to him in the presence of the accused or his pleader. During this process if the witness denies the correctness of any part of the statement read over to him the Magistrate shall make a memorandum of the objection made to the statement made by the witness and shall add his remarks as he thinks fit.⁴²

xii. *Right to test the evidence by cross-examination*—Section 133 and 134 of Qanun e Shahadat Order⁴³ gives the accused right to test the evidence given against him by cross examination of the witnesses through his counsel or lawyer so he can defend the allegations made against him in a reasonable manner. Under Section 505 of the Code of Criminal Procedure the witnesses produced in trial can be examined, cross examined and re-examined.⁴⁴

xiii. *Right to have an opportunity for explaining the circumstances appearing in evidence against the accused at the trial*—Basic principles of natural justice should be ensured and an accused cannot be punished unheard. He should be provided ample opportunity to justify himself in the course of allegations made against him. Section 364 of Criminal Procedure Code states that “whenever the accused be examined by the Court, the

⁴⁰ Section 364 of the Code of Criminal Procedure (V of 1898)

⁴¹ Section 364(2), *Ibid.*

⁴² Section 360, *Ibid.*

⁴³ Section 133 and 134 of The Qanun -E- Shahadat (Order 10 of 1984)

⁴⁴ Section 505 of the Code of Criminal Procedure (V of 1898)

questions put to him and the answers given by him shall be recorded. The record shall be shown or read to him and he shall be at liberty to explain or add to his answers.”⁴⁵

xiv. Right to be tried by an independent and impartial Judge—Article 175 of the Constitution⁴⁶ is the corner stone for the separation and independence of judiciary which is an important element to ensure the fundamental right to access to justice.⁴⁷ An accused has right to be tried by an independent judiciary and an impartial judge so that he can compete the charges against him in a fair trial.

2. 2. 3. Post- trial Rights

i. Right to Bail—Bail is release of a person from the custody of police and delivery into the hand of sureties who undertake to produce him in Court whenever required to do so.⁴⁸ An accused has the right to be released on bail, if he has been arrested for commission of a bailable offence and Section 496 of the Criminal Procedure Code endorses the same.⁴⁹ In case of a non-bailable offence the granting of bail is not a right but a grace given to the accused.

ii. Right to Appeal—Section 408, 410, 411-A of the Code of Criminal Procedure⁵⁰ and Article 185, 203-F, 212 of the Constitution of Pakistan⁵¹ gives the right to the accused in case of conviction, to file the appeal in appropriate forum in lieu of the judgement pronounced against him.

iii. Right to get copy of the judgment when sentenced to imprisonment—Section 371 of the Criminal Procedure Code

⁴⁵ Section 364, *Ibid.*

⁴⁶ Article 175, The Constitution of the Islamic Republic of Pakistan, 1973

⁴⁷ P L D 1993 SC 341. Available online at : <<https://pakistanconstitutionlaw.com/pld-1993-sc-341-2/>> (Last Accessed: 05.05.2017)

⁴⁸ 5 D L R (F.C.) 154.

⁴⁹ Section 496 of the Code of Criminal Procedure (V of 1898).

⁵⁰ Section 408, 410, 411-A of the Code of Criminal Procedure (V of 1898)

⁵¹ Article 185, 203-F, 212, The Constitution of the Islamic Republic of Pakistan, 1973

provides the right to an accused convicted of an offence to receive the copy of the judgement at the time of pronouncement of the judgement. If the accused does not understand the language of the court or language of the judgement in which it is pronounced he can also be given translation of the judgement in the language he understands free of cost without any delay.⁵² If the accused is sentenced with death punishment by a Sessions judge he will be informed about the duration within which he can file an appeal.⁵³

2. 2. 4. Exceptional Rights

Law also protects the rights of vulnerable groups who need extra care and protection. These include;

i. Lunatics – Under Section 464 of the Code of Criminal Procedure if an accused is lunatic and is unable to make his defence at the time of trial, the court shall ascertain whether he is lunatic or not. If he is found to be a person of unsound mind, the Court may release him on assurance that he will be cared for, even if the case against him is non bailable.⁵⁴ Under Section 497 of the Code of Criminal Procedure the Court may direct that any sick or infirm person accused of an offence be released on bail even if the offence is non- bailable.⁵⁵

ii. Women – Section 52 of the Criminal Procedure Code provides special protection to women if she is accused of any offence and it is necessary to search her it shall be done by another woman in compliance with decency.⁵⁶

iii. Minor – Under Section 497 of the Code of Criminal Procedure, the Court may direct the order of release on bail of a person under the age of sixteen years.⁵⁷

⁵²Section 371 of the Code of Criminal Procedure (V of 1898)

⁵³Section 371(2), *Ibid.*

⁵⁴ Section 464, *Ibid.*

⁵⁵ Section 497, *Ibid.*

⁵⁶ Section 52, *Ibid.*

⁵⁷ Section 497, *Ibid.*

3. Conclusions and Recommendations

It can be observed that Pakistani law provides enough rights and protections to the accused but it is because of the faulty enforcement mechanism which sometimes make an innocent suffer which raises questions on the whole system because the system is formed to facilitate the people. It is concluded that enforcement mechanism of laws should be made more effective as to meet the basic needs of justice so that no innocent gets trapped in and no offender evades the law. Following steps can be taken to make situation better for those who are accused of an offence and are seeking justice. Accused should be given their due rights and for this judges, police and other institutions attached with the trial process should come together and play their part to make the system better so that speedy relief could be provided specially to those who are innocent. Awareness amongst general public need to be created so they can differentiate between an accuse and an offender and give him his due rights so that he does not have to carry the stigma for being once accused of an offence which he never committed. A system should be developed to assure that while registering FIR the Police does not exercise its discretion and report the true facts in the FIR. To ensure this there should be another officer to check that the incident and offences are correctly reported in FIR. This would reduce the exercise of abuse of power by the Police Officer too.