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Criminal Procedure is Criminal Justice in Action: Transition to Islamic Criminal Procedure is a Way Forward for Pakistan

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Abstract: *The Criminal law is the strongest arm of all the normative systems of society which saves the society from evils, punishes the criminals, curbs, and prevents crimes in the society, frees it of crime or makes continuous efforts to keep it at bay or at least makes offences unattractive, unpleasant, hateful, and unaccepted activity in our society. The criminal procedure is criminal justice in action. The failure of the procedural law means failure of the social goals set by society. With the help of qualitative research methodology, this article discusses the importance of criminal procedural law in the administration of the Criminal Justice System (CJS). It points out the two types of criminal procedural laws in Pakistan; constitutional and ordinary. It also analyses the current situation of the CJS of Pakistan. It also highlights the major problems in the criminal procedure of Pakistan and pointed out the need of revamping the criminal procedure. It also pointed out the need to transition from existing criminal procedural laws of Pakistan to Islamic Criminal Procedure.*

Key Words: Adversarial, Criminal Procedure, Criminal Justice System, Islamic Criminal Procedure, Inquisitorial, Inefficiency, Transition

Introduction

Protection of life, liberty, honour and property of citizens and non-citizens is the basic responsibility of all three organs of the government which is largely attained through the enforcement of criminal law that plays a key role in maintaining Peace, tranquillity, and smooth growth of the society. Enforcement of criminal law means the detection of suspects, arrest of the accused, investigation of crimes, charging, adjudication, convicting or acquitting, sentencing the convicts and execution of the punishments. Proper enforcement of criminal law provides a sense of security and protection of liberty, life, property, and honour which are the fundamental rights of every citizen. According to Lord *Hobhouse*, a civilized system for the supremacy of the 'rule of law' and proper enforcement of 'social

contract' can only be established by devising an effective system of criminal law and its enforcement by the state (not by the private person) through efficient procedural laws (Karim, 2020, p.145). Devising good laws is quite easy but making them effective is exceedingly difficult. The criminal laws are enforced through the criminal procedure so without effective criminal procedural laws, the CJS does not work efficiently. If CJS does not work efficiently and effectively then people take the laws into their own hands and try to enforce their rights on their own which leads to anarchy and internal disturbance of the law-and-order situations of the country (Iqbal, 2015). The means being employed for bringing the people to justice is more important in civilized nations than in the end. It is a well-established principle of criminal jurisprudence that "the ends do not justify the means" (*Miranda case*, 1966). According to an

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influential group of thinkers, as society needs armed forces to defend against any kind of external aggression, it also needs very efficient and strong CJS for the maintenance of internal peace and stability. Internal peace and stability are as important as the defence against external aggression (Karim, 2019, p. 96). The state makes suitable criminal laws including criminal procedural laws as preventive and punitive measures for preventing private retribution (Friendly, 1965, p.929). Currently, a great debate on the criminal procedure is in process. Members of the legal landscape; judges, prosecutors, the police, lawyers, academics; teachers and students even laypersons are taking part in this debate for the achievement of the highest order in society.

Importance of Criminal Procedure

Substantive and procedural laws are two kinds of criminal law. The former identifies certain social interests, goals, and ends that it seeks to achieve. It prescribes punishments for criminals who invade the rights of any citizen so as to give effect to the fundamental guarantees provided by the Constitution. In other words, it defines the rights, object and purpose of litigation, and governs the conduct of the parties outside the court, however, the latter determines process or procedures or remedies for enforcement of rights, provides means through which the end of justice attained, governs the relations between litigants and courts and deals with affairs in the court (Salmond, 2007, p. 207, Nyazee, 2007 p.323-25, Karim, 2020, p. 990). Substantive laws are found laced in with procedure and without suitable procedure, they will fail to achieve their desired purposes. Substantive laws can only be implemented, and criminals can only be punished if the procedural laws are efficient and adequate to ascertain the truth. Thus, procedural laws are the proper function of the CJS (Karim, 2019, p. 95). Criminal procedural laws enable the courts to administer criminal justice in society with the object to achieve certain ends. The state can only attain certain important ends and goals through the enforcement of effective criminal law. The state adopts procedural law as

means to achieve these goals more effectively (Parmelee, 1913, p. 363). Means are very important for reaching a just conclusion. For effective enforcement of substantive penal laws, the states enact adequate procedural laws. An efficient and effective system of criminal procedure is very crucial for the effective enforcement of CJS. So, an efficient procedure, in essence, is a proper function of CJS in society (New Delhi, 2003, p. 23). Without suitable and effective procedural laws, the CJS collapses.

It is absolutely true that criminal procedure is CJS in action. Although substantive criminal law and procedural criminal law are complemented each other, failure of the procedural laws, in essence, is the failure of the social goals set by the state (Karim, 2009, p.99). Without a suitable procedure, the laws and political principles fail in achieving their purpose, although they are good and just. The criminal procedure is criminal justice in action. The American chief justice Earl Warren while deciding an incredibly famous case of Criminal procedure quoted that "the quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law." (Miranda case, 1966) Even procedures are part of a process of expressing normative values and reshaping societal reality (Duff, 1991, p.35). Procedural law is also known as adjective law or remedial law (Karim, 2020, p. 991).

The governance of justice, the importance of rules of procedure and legal technicalities in Pakistan were observed by the Supreme Court of Pakistan (SCP) in *the Khuda Yar case*. According to this case, various evolutionary stages are involved in judicial history. Society went through a transition from justice without the law to justice in accordance with the law. For imparting consistency, certainty, removal of mala fide and errors of individual's judgment, legal precepts were devised by the civilized society and states. This transition was inevitable and could not be denied (*Khuda Yar case*, 1975). In common law countries, procedural laws or adjective laws are considered very important, especially because of the creative role played by the courts in such jurisdiction (Nyazee, 2020,

p.199). Much of the substantive law is found laced in with the procedure saying of Lord Denning (Karim, [2020](#), p. 185). Generally, criminal procedural rules are central to human rights and core components of modern constitutions. During the criminal charges and trial, the individual accused is confronted by the state machinery, therefore, the criminal procedure regulates the treatment of the individual accused, his human rights and rule of law during criminal proceedings (Amnesty International, [2014](#), p. XV). Generally, criminal procedure is predicated on two contrasting objectives; effectively controlling the crimes and following due process. The former emphasizes a broader social interest in the detection and prevention of crimes for efficient prosecution and convictions of the guilty by tending to somewhat limited procedural protections for the accused however, the latter by contrast, provides various protections to the accused with the object to minimize the possibility of arbitrary and unjust criminal convictions (Kamali, [2000](#), p. 249).

Criminal Procedural Models in the World

There are as many legal systems of substantive and procedural laws as national states (Zimmermann, [1996](#), p.4). There are over 200 nations in the world and each nation has its own judicial system or dispute settlement mechanism for punishing criminals (Kubicek, [2006](#), p.47). In the world, however, the famous substantive legal models are; common law, civil law, Islamic law, social and mixed laws and the famous procedural models are adversarial and inquisitorial.

The phrase 'legal model' is broader than 'system'. Three legal models/families; Romano-Germanic civil law, the Anglo-American common law and Islamic law are identified by the comparative lawyers. Islamic law is the third family or model of law being practised by one-fourth of humanity (Nyazee, [2003](#), p.66). Model refers to similar patterns, a reflection of legal traditions. The legal model is the most important and influential aspect of any system that shapes or moulds the CJS of any nation. For example, the legal systems of

the United Kingdom and the United States have a great difference, but both are grouped in the common law model (adversarial model of procedure), (Roberson & Das, [2008](#), p.5). Not only legal but also sociological and cultural differences are espoused by the different legal traditions (Cryer, Friman, Robinson & Mshurt, [2010](#), p. 426). Instead of Legal Models, the term legal tradition or legal family is used by some writers however; the use of these terms is not precise because the term legal system is being used by many writers where they actually mean legal family, legal model or legal tradition (Nyazee, [2018](#), p.13). It is important to understand basic criminal procedural concepts to appreciate any criminal procedural model of the present era (in upcoming Articles the procedural models will be discussed). Mostly the goals of a procedural system are the resolution of disputes or conflicts, making rules (particularly in common law system) and modification of behaviour, therefore, procedural systems have great relevance in the context of the quality of the decisions of the courts and the problems of chronic delays (Karim, [2020](#), p.155).

Common law countries (i.e., U.K and countries which remained its colonies) follow the adversarial model of the procedure however; civil law countries (i.e., those that derived their legal system from Roman law or the Napoleonic Code) and many Islamic law countries follow the inquisitorial model of the procedure. The majority of the countries in the world follow some version of the inquisitorial system (Sward, [1989](#), p.301). Protection of the innocent is a goal of the adversarial system whereas, in the inquisitorial system, the ultimate goal of CJS is to convict the guilty persons (Gaenegen, 1999). In the adversarial system, the accused is the favourite child of the law. The balance mostly tips in the favour of the accused as protecting the innocent is the primary value in this system. In this system, the trial stage is more important than the investigation stage as truth is supposed to emerge during trial after the presentation of the case by both parties of the case (Gaenegen, 1999). What is the most effective way of settling a dispute between two parties when the underlying facts of the case are in question? Whether the truth is

more effectively discovered during investigation or trial?

The means of discovery of truth are different in both systems of the procedure; adversarial and inquisitorial. In the inquisitorial system, the investigation stage is more important, and the truth is supposed to be discovered during this stage therefore, the judiciary involves in a criminal case from its inception, however, in the adversarial, the trial stage has more importance and considered the heart of the case as truth is supposed to be discovered during this stage and judge is expected to be neutral. The judiciary could not interfere in the investigation. In the adversarial system, the judge has a passive role, however, in the inquisitorial system the judge has an active role throughout the criminal case, and he is expected to discover the truth (Reichel, 2013, p.133). In Islamic criminal procedure, the judge has an active role in the case for the discovery of truth and in most cases he is expected to settle the dispute between the parties. So, in Islamic criminal law, the Settlement of disputes is more desired. The dominant feature of Islamic criminal procedure is that it has various types of procedures which are determined according to the right violated as discussed below in some detail.

Criminal Procedure in Pakistan

The Criminal Procedure of Pakistan can be divided into two kinds; Constitutional Criminal Procedure and Ordinary Criminal Procedure. The former is a new creature in the legal landscape and academics of Pakistan, however; it was initially developed by the courts of the USA, well established in the legal literature of Anglo-Americans and in the literature of academicians of America and the United Kingdom (Karim, 2020, p.148). The former has its roots in the written constitution and was developed by the higher and superior judiciary of Pakistan during the interpretation of Fundamental Rights guaranteed by the Constitution of Pakistan. However, the latter is an ordinary legislative enactment made by the competent legislative authority while exercising its power derived from the Constitution. The Code of Criminal

Procedure 1898 (Cr. P.C) - which was made by British Colonial Rulers for their needs, colonial designs and especially for keeping the natives on a tight leash, which was adopted by Pakistan, and is the principal criminal procedure of Pakistan - is an example of Ordinary legislation. The underlying theory of a written constitution is that "an act of the legislature repugnant to the constitution is void" as said by John Marshall the great Chief Justice of America (Marbury case, 1803, p.137). So, any inconsistency or repugnancy in Cr. P.C or any other criminal procedural enactment to the Constitution will be void as expressly stated by Art. 8 of the Constitution of Pakistan and is a well-established principle of the Constitutional law (Constitution, 1973). In the hierarchy of law, the Constitution is supreme and where the ordinary law or statute collides with the Constitution, the ordinary law must yield.

Code of Criminal Procedure of Pakistan

The Cr. P.C was inherited and adopted by Pakistan at its independence. The rules of procedure incorporated in Cr. P.C are inadequate as they were devised to control the subjects and govern the colonies. The CJS of Pakistan has become ineffective due to inbuilt inadequacies, particularly in Cr. P.C and generally in the judicial system which is accumulating the grievances of aggrieved persons. Non-satisfaction of the aggrieved persons and frustration of the people from the system due to the non-delivery of justice are posing big question marks to the performance of CJS (Ali, 2015, p.18).

The Cr. P.C is very old, has become outdated and was devised for controlling colonial subjects; therefore, it must be replaced with a modern code with the purpose of settling the disputes of free citizens with more effective manners. It is a very valid and solid criticism of the Cr. P.C was devised by the colonial Master to effectively control its colonies however, after independence, everything changed therefore, it should be replaced with new legislation devised for governing an independent and welfare state. An effective and efficient criminal justice system not only provides a remedy to a victim but also preserve, respect

and protect the rights of an accused person without fear and favour unfortunately CJS of Pakistan has failed to deliver justice and achieve the objectives and goals that is why Supreme Court has observed that people are losing faith in the system even are frustrating from it because ordinary criminal courts acquit the accused on technical grounds or take a lenient view while giving sentences. It urges the ordinary courts to realize the grievances of the aggrieved person, to owe the duty to the victim, his legal heirs or his relatives and also to the society and award the sentences which should cause deterrence in the commission of crimes (Ali, 2015, p.18).

In Cr. P.C. some amendments were made during the British era and many amendments were also introduced from 1947 till 2001 (Mehmood, 2018, p.441-42) but a large number of amendments were introduced under the devolution plan wherein the judiciary was completely separated from the executive (Ordinance, 2001) which caused an imbalance between the role of executive and judiciary in the administration of the criminal case. Many executive powers, particularly supervision during the administrative phase of a criminal case were given to the judicial magistrate who is not effectively playing his role with the simple argument that the judiciary could not interfere in the investigation. Due to this reason, the administrative phase of a criminal case has become ineffective and most of the criminal cases are being destroyed. After 2001, today many amendments were introduced especially in 2016 but they were not in the roots of the code that no big change occurred.

Serious Crisis of CJS in Pakistan

The CJS of Pakistan is facing a serious crisis due to which the public is losing its trust and confidence in CJS. Inefficiency, slowness of CJS and low conviction rate are posing adverse impacts on all citizens. Due to inefficiency, the poor are more subject to exploitation, harm and abuse because they lack financial resources, therefore unable to effectively vindicate their claims from the judicial system. An effective and efficient system is not only beneficial to the rich only but also for the poor. An efficient court

system would be beneficial for all citizens; rich or poor (Siddique, 2011, p.29). The pendency and inordinate delay in criminal cases and a very low conviction rate are major problems in the dispensation of CJS (Rajan & Khan, 1982). There are many other major problems in CJS such as; huge pendency of criminal cases, inordinate delay in disposal of the cases, an incompatible system of procedure, inefficient prosecution, very weak investigation and very low rate of conviction in criminal cases. There is a need to stop the inflow of cases by providing different methods of dispute resolution; *the panchayat* system, road accidents committees, and the miner's offences court. Discovery of truth should be the prime object of all the proceedings of the criminal case.

Chaudhry Nisar, the then Interior Minister stated after approval of revamping of CJS that consensus is found for logical and speedy reformation of CJS. The reform must be taken in all branches and departments of CJS including courts, prosecution, police and corrections (prisons, probation & parole (Dawn, 2016). Former Senator and well-known jurist *S.M. Zafar* pointed out the inefficiency of the system as the main cause of delay in the dispensation of justice and recommended surgical operation of the existing CJS of Pakistan (Senate, 2015). According to *Dr Shoaib Suddle* policing system of Pakistan has almost collapsed due to the colonial mindset. He stated that there is a common blame that the breakdown of law machinery is due to a poor policing system (Senate, 2015). Some of the main causes behind high crime rates in Pakistan are inefficient, faulty, exploitive and inequitable CJS especially criminal procedure (Hameed & Jamshed, 2013). *Dr Mehmood Ahmad Ghazi* pointed out that Criminal Procedural Law which is based on an adversarial system of procedure is so lengthy, inefficient and inadequate for our legal system where many laws and provisions of laws based on the Islamic Criminal Justice System such as *Qisas-o Diyat* and *Hudud* laws. This procedural system is one of the causes of the failure of *the Hudud* and *Qisas-o-Diyat* Laws in Pakistan. He stated that Islamic Criminal Justice System was enforced during the second *Hijri* till the 18th century through a

procedural law which resembles with Inquisitorial System of France and courts were empowered with those powers which are available to the criminal courts in France and Germany (Sham, [2005](#), p.27). He also suggested to *Mian Nawaz Sharif* (the then Prime Minister) to change the existing Criminal Procedure for speedy, inexpensive and efficient CJS in Pakistan and also prepared a draft of the Criminal Procedure for him. *Dr Ghazi* also consulted with *Irshad Hassan Khan* (the then Chief Justice of Pakistan) during the preparation of that draft (Sham, [2005](#), 30-31).

The SCP gave its observation in *the Liaquat Hussain* case, that if the requisite legal and judicial remedial measures are not in a timely taken, the situation will be worse, and it further deteriorates. So, the court warned the parliament and demanded the introduction of remedial measures for the improvement of the health of the legal and judicial system of the country (*PLD 1999 SC 504*). *Mr Afzal Ali Shigni* (former IG Police) also observed that Pakistan has failed to improve its CJS according to International Standards. According to him, there are more than 40 specializations of police in developed countries, but this concept is not found in Pakistan. He also pointed out that the low salary of the police was one of the causes of the failure (Senate, [2015](#)). In 2010 the Chief Justice of Pakistan while giving concluding remarks pledged that the judiciary would take every step and will leave no stone unturned for reforming the CJS and particularly the delivery of justice to all the citizens, especially to the victims of the crime (Commission Report, [2019](#)).

The report of the Law & Justice Commission of Pakistan (L&JCP) highlighted that it is well-nigh impossible to make fragmented CJS effective and efficient without introducing undated and uniform laws related to police, prosecution, courts and to evidence, procedure and penal. According to this Report, a variety of CJS is in vogue in different parts of Pakistan which is affecting him. For fighting organized crimes and terrorism, it is necessary the CJS should operate under standard criminal laws and procedures (Commission Report, [2019](#)).

The nature of criminal law, criminal procedure, the law of evidence, the law of prosecution services and police law are intertwined and overlapping. Close linkages exist between criminal law, criminal procedure, the law of evidence, the law of prosecution services and police laws therefore, reforms of criminal laws mean reforming all these laws contingently and together. The main reason for the failure is that the present procedural system of Criminal law is inadequate and incompatible with the sociology of our country, those who are the founder of the adversarial justice system amended their system and borrowed some good features from the inquisitorial system of procedure as to expedite the process of criminal cases, but we still not produce any such changes in our CJS. Although some positive changes were introduced, however, these are not being exercised by the stakeholders concerned. Due to the procedural system, criminals have not received punishment and are mostly acquitted from charges either under sec. 249-A or 265-K of the Cr. P.C or at the end of the trial and the innocent faces the agony of a trial. Quality of justice suffers not only when an innocent person is punished, or a guilty person is exonerated but when there is an enormous delay in deciding the criminal cases.

Revamping of the CJS of Pakistan

For providing inexpensive and speedy justice at the doorstep of common people, there are growing calls to revamp the dysfunctional CJS of the Country facing several lacunae and flaws causing delay and expense. In 2015, the National Action Plan (NAP) was formulated and reform of the CJS placed among the 20 points. *Ch Saqib Nisar* (the then chief justice of Pakistan) during his address to lawyers in Karachi categorically stated the blame for the delay in the delivery of justice could not be wholly attributed to the judiciary alone. Without replacing centuries-old laws with updated laws of parliament, the dispensation of speedy justice is not possible. According to him, legislation is the domain of the parliament and the judiciary could not make any legislation and even could not encroach

on the domain of legislatures (Gul, 2020). It is a fact that present state of CJS is facing enormous challenges which required to critically examine the constitutional and ordinary principles of criminal procedure as to bring out reforms for quickening the quality of justice by streamlining the procedure, enhancing the level of professional competency, credibility, reliability and impartiality of investigation agency, improving the role of prosecutors and their level of professional competence by ensuring their co-ordination with investigation agency, emphasizing on supervisory and pro-active role of the judges by focusing on safeguards of innocence of accused and justice to the victims, improving sense of professionalism, commitment, efficiency, expedition, accountability and transparency in all the functionaries of the CJS by inspiring ideal and a common purpose for all of them, tackling the problem of false and frivolous litigation and perjury, ensuring protection and better treatment to witnesses and restoring the confidence of the people in the CJS of the country. A thorough and comprehensive review of the entire CJS is the need of the hour so that necessary and effective systematic reforms can be made to improve the health of the system. The colonial legacy and colonial culture of coercive enforcement of criminal law and the hierarchical bureaucratic notion of actors are also major problems and root causes for the failure of the system.

Islamization of Laws in Pakistan

Pakistan is neither a secular state nor a theocracy, but it is an Ideological state. It came into existence on Islamic Ideology with the slogan "*Pakistan ka Matlab Kia, Lahilaha il Allah.*" From the very beginning day of the independence of Pakistan, people started demanding the enforcement of Islamic law. The objective resolution of 1949 and all the constitutions i.e., 1956, 1962 and 1973 of Pakistan ordain this demand. Reflection of this demand can be vitalized from the preamble and other Islamic provisions of the constitutions (Nyazee, 2020, p.20). The preamble of its present Constitution recognizes and declares the principle of

'sovereignty' and the doctrine of 'sacred trust'. According to the Constitution of Pakistan, Sovereignty belongs to Almighty Allah Alone upon the whole universe however; the people of Pakistan will exercise authority as a 'sacred trust' with the prescribed limits (Constitution, 1973). In the preamble of its Constitution and Objective Resolution, it is clearly mentioned that "the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed" and it is also clearly mentioned that an enabling environment for Muslims should be created where they can manage their daily affairs individually and collectively in accordance with the teachings of Islam. The state should provide facilities to Muslims so they can order their lives in accordance with the requirements of Islam. Article 227 requires bringing all existing laws in compliance with the commands of Islam as ordained in the Qur'an and traditions of the prophet. It also requires from the state authorities not to enact any law contrary to the commands and teachings of Islam. Hence, the process of Islamization was started in Pakistan as the constitutional requirement and Criminal law faced many changes and now major crimes are governed by the provisions of Islamic law. Theoretically, the entire criminal law stands Islamized in Pakistan (Nyazee, 2007, p.7). Courts in Pakistan derive their authority from the Constitution and laws made under it. The Constitution categorically requires bringing all existing laws in agreement with the commands of Islam and prohibits making laws contrary to the Injunctions of Islam therefore; no common law offence exists in Pakistan (Karim, 2020, p.145). Although during the movement of Islamization, mostly substantive laws got Islamized, however, no initiative got started for bringing procedural laws in conformity with the objectives and spirits of Islam. Therefore, there is a dire need to transition from English criminal procedure to Islamic Criminal Procedure.

It is pertinent to mention here that during the process of Islamization, General *Zia-ul-Haq* emphasized bringing the law of evidence (adjective law which is considered part of procedural law) strictly in conformity with the Commands of Islam ordained in Quran

and traditions of Profits and wrote a letter to Council of Islamic Ideology (CII) to expedite work on the preparation of a draft (Draft of Islamic Law of Evidence, [1982](#), p. IX). The CII, in compliance with the directives of Chief Martial, prepared a draft of the Law of Evidence. This draft was sent to the L&JCP for its views through Interior Ministry and the Commission proposed not to enforce this Drat and recommend certain amendments for bringing the existing Law of Evidence in accordance with the tenets of Islam. An important question was raised by the Commission regarding the replacement of the existing Law of Evidence with the new Islamic Law of Evidence or bringing the existing Law of Evidence in conformity with the Commands of Islam after its thorough examination. The CII preferred the stance of complete replacement however; the Commission preferred the stance of bringing existing Law in conformity with the Injections of Islam (Views of Commission, 1982). Both advanced their own arguments. The researcher has the same opinion advanced by the CII. The researcher is in views that enforcement of Islamic Criminal Law without accompanying its rules of procedure is to practice Islamic Law inaccurately, incompletely and indeed un-Islamically. As the Islamic substantive law is different in its form and substance, its procedural system is also different. The system of Islamic procedure has many salient features which could not be found in other systems of procedures known as adversarial and inquisitorial.

Salient Features of Islamic Criminal Procedure

The Islamic Legal system comprises two parts; fixed and flexible/changeable. The former part is ordained explicitly in the texts of the *Qurān* and the *Sunnah* or derived through *qiyas* (analogy). It includes rules regarding *hudūd*, rituals (*Ibadat*), marriage & divorce and inheritance, however, the latter part, is not explicitly stated in the text of primary sources as mentioned above and is left for the rulers to make laws and regulations or change according to the needs of time and place in conformity with the Commands of Islam through fresh *ijtihad*.

some examples of this part are laws related to traffic, income tax, and new forms of crimes. The jurists and rulers divided the work among them as jurists concentrated on the fixed part of the legal system however, the ruler concentrated on its flexible part (Nyazee, [2016](#), p-52-55). The relationship between fixed and flexible parts of Islamic law is explained by Nyazee with an ever-growing tree that has a trunk (fixed) and branches & leaves (flexible). The leaves and branches of a tree change in every season, similarly the flexible part of Islamic law changes in shape and colour in every coming generation (Nyazee, [2016](#), p-53).

Throughout history, the Islamic legal system was carried out through two cooperating spheres; the state and the jurists. The former was responsible for military, crimes and fiscal matters, whereas; the latter dealt with the matters of personal law, commerce, *waqfs* and *hudūd* penalties (Nyazee, [2020](#), p.265). In Islamic criminal law, there are two sets of punishments; one under *Shariah* principles and the other under statutory laws/royal decrees, therefore, throughout Muslim history, two sets of criminal courts -*Qadis* Courts and *Mazalim courts*- are found. In the enforcement of criminal law, dual jurisdictions have existed; pure judicial and quasi-judicial. The *qadis'* courts functioned as pure judicial however courts of rulers and their agents functioned as quasi-judicial. Quasi-judicial courts were the *mazalim* courts, the institution of the *Muhtasib*, the institution of the *amil al-suq* and other administrative courts. These quasi-judicial courts were granted adjudicatory powers and were distinct from the *qadis'* courts (Reza, [2009](#), p.712). The *qadis* had their own courts and were more or less autonomous (Nyazee, [2020](#), p.265). In the Ottoman Empire, criminal procedural matters were governed by executive authorities and the rules they promulgated were under the authority of *Qadis* - who were the guardians of classical jurisprudence. The procedural matters were under administrative tribunals of executive authorities; governors, police officers and other quasi-judicial authorities. There are many indications which show that criminal law is largely enforced by the executive authorities unconstrained by the

jurisprudential doctrine that bound *qadis*. The record of the *qadis* courts is available but the record of the executive/administrative courts of executive authorities; rulers, governors, police officers or other quasi-judicial authorities are few or nonexistent. (Reza, 2013, p.6). The record of proceedings of such executive authorities is either few or non-existent therefore, the complete templates of a criminal procedure similar to the substantive criminal law or rules of evidence are not articulated in the legal literature of Islamic Criminal law.

The other salient feature is that the classification of offences in the Islamic penal code is divided on the basis of rights violated. There are three kinds of rights; of Allah, of the Individual and of society or ruler corresponding to three types of offences *hudūd*, *ta'zī*, and *siyāsah* respectively. Some offences have mixed rights of Allah and individual however, either right of Allah dominates or the right of the individual such as the offence of *qhadf* and *qisās* respectively. The classification of these offences is directly linked with the procedure. The procedure of criminal cases and standard of evidence change according to the right violated. The procedure and standard of *hudūd* cases are higher than the *ta'zī* cases however the procedure and standard of the testimony of *siyāsah* offences are lower than other above-mentioned categories and these offences can be proved more easily even through circumstances, pieces of evidence or testimony of a single male witness or single female witness (Nyazee, 2007, p.63-71). So, In Islamic criminal law, three kinds of procedures are found, and each procedure has its legal consequences regarding minimum and maximum limits of the punishment, initiation of penal proceedings, *nisab* (quantity) and standard (quality) of evidence, operation of *shubhah*, compromise, pardon and authority to execute.

The Islamic criminal procedure has more resemblance with the inquisitorial model of the procedure. The judge has an active role throughout the proceedings, and he is under the duty to discover the truth while remaining impartial. The investigative stage is more important than the trial and the judge

involves throughout the investigation with the purpose of discovering the truth. All the public functionaries involved in the administration of criminal justice should remain impartial and work jointly for the discovery of truth. Joined working for the discovery of truth is another salient feature of Islamic Criminal procedure (Sham, 2005, p.27).

The Transition from Adversarial to an Islamic System of Procedure

Although there is no specific provision that indicates that the criminal procedure of Pakistan is adversarial in nature, however, the practice of criminal trial is based on an adversarial system. Professor *Mirjan Damaska* pointed out the demerits of the adversarial system while commenting on guilty-plea settlement (Plea-bargaining) in the American criminal justice system. According to him, acceptance of the plea-bargaining or guilty-plea settlement is the final refuge from the adversarial system. In an adversarial system, the full flagged trial is so lengthy and much expensive, therefore, be employed sparingly. In America, only five to ten per cent of cases are being admitted for fully flagged adversarial trials and almost ninety per cent of cases are being disposed of through guilty-plea settlement or plea-bargaining (Gaemegen 1999, p.397). It is clear that the adversarial mode of proceedings results in inexcusable and unjustifiable delays and many expenses which offends public opinion and diminishes respect for the law and the legal system. However, the inquisitorial system is somehow better for Pakistan as it aims to get the truth of the matter through extensive investigation, and active participation of judges from start to end for speedy and expeditious disposal of cases and it is closer to Islamic Criminal Procedure. Certain provisions of PPC and Cr. P.C was declared to be repugnant to the Injunctions of Islam and accordingly changes were made in both the Codes in the light of *the Gul Hassan* case (PLD 1989 SC 633) in which Judge *Shafi-ur-Rahman* pointed out that; under the Islamic Penal Code, in most of the case, the victim or his legal heirs control the proceedings of a criminal case from beginning to the end. They have the right to or

not to report crimes to the public authorities. They have the right to or not to prosecute the offenders. They have the right to abandon prosecution at any stage of their free will. They have the right to pardon the offenders at any stage prior to the execution of the sentence. They have the right to accept monetary compensation or other financial benefits to waive the crime or forgive the offenders. They have the right to enter compromise with the offenders. They have the right to demand *qisas* from criminals. The government authorities must assist them in appropriately exercising their rights and in achieving their objectives and should not impede them in exercising their rights (*Gul Hassan case, 1989*).

Judge *Shafi-ur-Rahman* has raised important questions that have the introduction of the Islamic concept of Crime and Criminal Procedure in offences against the human body and *Hudud* law made any difference in the investigation, prosecution and trial in Pakistan? Under Islamic criminal procedure, the initiation of criminal proceedings and prosecution of criminal cases varies according to the right affected. True Islamization can take place only when procedural laws will change in accordance with the Commands ordained in the *Qur'an* and *Sunnah* and the overall aims and objectives of *Shariah*. Criminal procedural laws have a big impact on judicial decision-making. Lack of literature, lack of codification of Islamic Criminal Procedure and lack of knowledge and training of the judges about Islamic legal process and how proceedings in criminal cases take place in Islamic criminal procedure are the main reasons that prevent the judges to apply Islamic Principles of Procedure. The transition from one legal system to the other is not as difficult as it is supposed to be, and the merger of ideas is easily possible. Theoretically, all criminal law stands Islamized therefore, the transition from an adversarial system of procedure to Islamic criminal procedure can bring positive change and make the system efficient and effective.

Conclusion

Criminal law is a social and public policy issue

which requires a balance between the rights of the accused on one hand and the rights of the victim and society on other hand. As a matter of public policy, the balance should not tip in favour of the accused but the fairness should be for the accused, society and victims alike. Therefore, the state is under obligation to apprehend those who invade their rights and punish them if they are found guilty after conducting a fair trial. However, in the adversarial system, balance mostly tips in favour of the accused as his rights are protected by the constitution and he is considered the favourite child of the law. By the virtue of public policy, the CJS should be fair to the accused but in the process, it should not forget to be fair to the victim and of course to society, therefore, it should maintain balance and should not be one-sided. During the last few years, voices for reforms in criminal procedure including investigation, prosecution, and adjudication increased. A dire need for such reforms has also become very evident due to expensive and prolonged trials much beyond a reasonable time which are inconvenient not only to contending parties and state but even to the witnesses. The technicalities of the procedure have become the biggest reasons for the escape of guilty persons from legal punishment. The complexity of the procedure has become a shield and cloak for the guilty. The present complexity is justifiable to the extent to protect innocent persons and is not acceptable as a shield and cloak for escaping the guilty persons from legal punishments. The complexity causes a miscarriage of justice which causes frustration among the masses. To avoid such miscarriage and frustration, the procedure should be simple as possible. The transition from adversarial procedure to the Islamic criminal procedure is a practical solution for the ailment of the system and can make the system simpler, more efficient, effective and expeditious. Islamic criminal procedure is a balance system which provides active involvement to the victim, protects the fundamental rights of the accused and also looks after the welfare of society. It requires the judge and other public functionaries to remain impartial during the whole procedure including investigation and trial, to work jointly & actively participate in the discovery

of truth, to try to settle the disputes, to inhale the grievances of the victim and to reintegrate the offenders. Many salient features distinguish Islamic criminal procedure from other procedural systems; adversarial and inquisitorial.

References

- Alim, S. H. (2015). "An Analytical Study of Criminal Justice System of Pakistan, (with special reference to the Province of Punjab)", *Journal of Political Studies*, 22(1), 1-42.
<http://www.pu.edu.pk/polsc/jops/index.html>
- Amnesty International, Fair Trial manual. (2014).
<https://www.amnesty.org/download/Documents/8000/pol300022014en.pdf>
- Bandes, S. A. (2012). Protecting the innocent as the Primary Value of the Criminal Justice System available at <http://moritzlaw.osu.edu/students/groups/osjcl/files/2012/05/Bandes-FinalPDF.pdf>
- Caenegem, W. V. (1999). "Advantages and disadvantages of the adversarial system in Criminal Proceedings", Bond University e-publications@bound, http://epublications.bond.edu.au/law_pubs/224
- Constitution of Islamic Republic of Pakistan, 1973.
- Cryer, R, Friman, H., Robinson, D., & Mshurst, E. W. (2010), *An introduction to International Criminal Law and Procedure*, 2nd Ed. New York, Cambridge University Press.
- Duff, A. (1991). *Trials and Punishment*, Cambridge, Cambridge University Press.
- Draft of Islamic Law of evidence Ordinance*. (1982). (Islamabad: Council of Islamic Ideology, 2nd edition 2012), IX.
- Friendly, H. J. (1965) "The Bill of Rights as a Code of Criminal Procedure", *California Law Review*, 53(4), 929-956.
<https://doi.org/10.2307/3478984>
- Gul, I. (2022). "Pakistan's Urgent Need for Criminal Justice Sector Reform?".
<https://crssblog.com/pakistans-urgent-need-for-criminal-justice-sector-reform-imiiaz-gul/>
- Hameed, H., & Jamshed, M. K. (2013). "A Study of the Criminal Law and Prosecution System in Pakistan" Manzil Pakistan.
<http://manzilpakistan.org/pdf/Law-and-Justice-Study-on-Criminal-Prosecution.pdf>
- Iqbal, J. J. (2015). "The Role of the Judiciary as a Catalyst of Change: Challenge of Delayed Justice",
<http://supremecourt.gov.pk/ijc/Articles/9/1.pdf> (last accessed on 29-05-2020).
- Karim, J. F. (2020). *Access to Justice in Pakistan*, 2nd Edition, Karachi: Pakistan Law House.
- Karim, J. F. (2020). *Judicial Review of Public Actions*, Karachi, Pakistan Law House.
- Karim, J. F. (2019). *Change is the only Constant*, Karachi, Pakistan Law House.
- Kubicek, T. L. (2006). *Adversarial Justice: America's Court System on Trial*, New York: Algora Publishing.
- Kamali, M. H. (2000). "The Right to Personal Safety and the Principle of Legality in the Shariah", *Islamic Studies*, 39(2), 249-289.
- Liaquat Hussain Vs Federation of Pakistan*, PLD 1999 SC 504.
- Law of Evidence, (1982). *The Proposed Draft "Law of Evidence Ordinance" Prepared by the Council of Islamic ideology*.
- Mehmood, M. (2018). *The Law of Crimes, Major Acts*, Lahore: Al-Qanoon Publishers,
- Miranda v. Arizon*, (1966), 384 US 436.
- Marbury v. Madison* -5 US (1 Cranch) 137 (1803).
- New Delhi. (2003). *Volume-1, Report of "Committee on Reforms of Criminal Justice System"*, Government of India, Ministry of Home Affairs, New Delhi, Ministry of Home Affairs.
- Nyazee, I. A. K. (2007). *Jurisprudence*, Rawalpindi: Federal Law House.
- Nyazee, I. A. K. (2020). *Introduction to Law*, (for Pakistan), Rawalpindi: Federal Law House.
- Nyazee, I. A. K. (2007). *General Principles of Criminal Law*: Islamic and western, Islamabad, Shariah Academy.
- Nyazee, I. A. K. (2016). *Theories of Islamic Law, The Methodolgy of Ijtihad*, Islamabad, Advance Legal Studies Institute.
- Nyazee, I. A. K. (2003). "Islamic Law and the CRC (Convention on the Rights of the Child)", *Islamabad Law Review*, 1(1&2), 69-120.
- Ordinance XXXVII of 2001 of Pakistan.
- Parmelee, M. (1913). "A New System of Criminal Procedure," *Journal of the American Institute of Criminal Law and Criminology*, 4(3), 359-367.

- <https://scholarlycommons.law.northwestern.edu/jclc>
- Rajan, V. N., & Khan, M. Z. (1982). *Delay in the Disposal of Criminal Cases in the Sessions and Lower Courts in Delhi*; New Delhi, Institute of Criminology and Forensic Science.
- Roberson, G., & Das, D. K. (2008), *An Introduction to Comparative Legal Models of Criminal Justice*, New York, CRC Press, Taylor & Francis Group.
- Reichel, P. L. (2013). *Comparative Criminal Justice System: A Topical Approach*, (New York, 6th ed. Pearson, 2013), 133.
- Reza, S. (2009). "Islam's Fourth Amendment: Search and Seizure in Islamic Doctrine and Muslim Practice", *Georgetown Journal of International Law*, 40(3), 703-806.
https://digitalcommons.nyls.edu/fac_articles_chapters
- Reza, S. (2013), "Due Process in Islamic Criminal Law" *The Geo. Wash. Int'l Law. Rev.* 46, 1-27.
- Report of Law and Justice Commission of Pakistan, (2019). Police Reforms: Way Forward, p. vii.
<http://ljcp.gov.pk/nljcp/home/publication>
- Siddique, O. (2011). "Approaches to the legal and judicial reforms" *Post Colonial Inertia and the paucity of Imagination in Times of Turmoil and Change*; DPRC Working Paper-4, Development Policy Research Centre School of Humanities Social Sciences and Law Lahore University of Management Sciences.
- Salmond, S. J. (2007). *Jurisprudence*, Lahore: PLD Publishers.
- Senate of Pakistan. (December 2015). *A report "Report of the Committee of Whole, Provisions of Inexpensive and Speedy Justice in the Country."*
- Sham, S. I. (2005). *Pakistan me Hudood Qawaneen*, Islamabad, Shariah Academy, International Islamic University, Islamabad.
- Sward, E. E. (1989). "Values, Ideology, and the Evolution of the Adversary System," *Indiana Law Journal*, 64(2), 301- 313. : <https://www.repository.law.indiana.edu/ilj/vol64/iss2/4>
- The Federal Government of Pakistan v. Gul Hassan Khan*, PLD 1989 SC 633.
- Zimmermann, R. (1996), "Savigny's Legacy Legal History, Comparative Law, and the emergence of a European Legal Science", *Law Quarterly Review*, 112, 576-605. <https://hdl.handle.net/11858/00-001M-0000-0019-C469-7>