

## Rights of Accused at Trial Stage: An Analytical Study of Intentional Rules and Legal System of Pakistan



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**Abstract:** The effectiveness of decisions is based on the quality of trials. In this respect, the role of courts, prosecution, and lawyers is very important to make the fair trial a reality, and there is also a need for a society that respects the governance of law. Each individual has the right to a fair trial in all kinds of cases. A fair trial is not a mere right rather, it is a bundle of rights. A free, independent, capable, unprejudiced judiciary is important for safeguarding rights available to any accused on trial stage. This study opens a discussion about the rights of the accused, provided by the international legal rules and legal system by Pakistan, at the trial stage. The study explains the fair trial and related rights in the light of different International documents. It also highlights any gap with respect to the rights of the accused that has to be filled in the legal system of Pakistan. A theoretical and comparative approach has been adopted to conclude the study.

**Key Words:** Rights, Rights of Accused, Human Rights, Trial, Fair Trial, International Legal Rules, Legal System of Pakistan

### Introduction

The right to a fair trial is one of the most fundamental, most frequently litigated, and globally recognized human rights, which fetches together the varied domains of international law which describe the fair trial right (Clooney & Webb, 2021). A fair trial is not a mere right. Rather, it is a bundle of rights. All the other rights may be at stake if the right to a fair trial is not available. The worldwide human rights agreements, conventions, and legal instruments contain legal text on the right to a fair trial, i.e., Article 6 of [European Convention on Human Rights, 1950](#) (ECHR), Article 14 of [International Covenant on Civil and Political Rights, 1966](#) (ICCPR), Article 8 of [American Convention on Human Right, 1969](#) (ACHR) and Article 7 of [African Charter on Human and People Right, 1981](#) (AFCHPR), etc. The trial may be called an essential feature of any justice system. Every person under accusation of a crime would have his innocence or guilt be determined under a fair and just legal process within a reasonable [time \(Sobko et al., 2021\)](#).

This study opens a discussion about the rights of the accused at the trial stage provided by international legal rules compared with the legal system of Pakistan. Some case law will also be discussed under the international legal rules related to the rights of the accused at the trial stage. The permitted length of research does not allow to discuss all the rights available for the accused at the trial stage. So, this study does not give the complete catalog of rights that are given to the accused. Rather, it will focus on some of those rights that are given to an accused during the criminal investigation as well as at the trial stage.

### Rights of Accused at the Trial Stage Right of Trial by an Independent, Competent, and Impartial Legal Forum

The ICCPR provides under Article 14 that whenever in any trial, a criminal charge or rights and obligations of the accused have to be determined; then it is the right of the accused that there should be a fair and public hearing of his case or trial by independent,

competent as well as impartial legal forum established under the law. Article 7 of AFCHPR also provides the same; however, Article 26 states the responsibility of the State parties to assure freedom of judges. ACHR provides under Article 8(1) for the independent, competent as well as impartial tribunal previously established by law. The ECHR also provides under Article 6(1) for an impartial and independent tribunal established under the law. Statutes of international criminal courts provide under Article 40 that the judges will have freedom for the performances of their duties and that they will not be involved in any activity that creates a hindrance for the performance of their duties or to have an effect on self-confidence in their self-determination.

There is no express provision in criminal law of Pakistan and Constitution of Pakistan, 1973 about the said right of a person who is under charge, but constitutional courts of Pakistan are practically applying this right of a person who is under charge in their judgments. However, it may be said that the said right is impliedly protected U/A 10-A of the Pakistan Constitution, which provides for the right of a fair trial.

### Right to Contact/Access court or Tribunal

The ECHR makes available in Article 6(1) that "*a person who is under charge, has a right to contact or access to court or tribunal for the implementation of his civil rights and obligation.*" In [Golder Case \(1976\)](#), the European Court on Human Rights declared that Article 6(1) of ECHR was dishonored when a detainee was denied by the Home Secretary of the UK to consult his legal counsel to bring the fresh suit against the prison officer. The same matter has arisen in [Campbell and Fell \(1985\)](#), where the applicant got some injuries in prison, and he wanted to have some legal advice from his lawyer, but this permission was given after some delay. The ECHR has passed the judgment that Article 6(1) was infringed. The court concluded that the speed of access to the legal suggestion was significant in cases of individual grievance, and some delay in these cases resulted in the violation of the right to approach a court/tribunal.

In another case, the European Court held that if the secretarial officer decided the secretarial charges, that became criminal charges like the charges of speeding on Motorways and the administrative authorities do not satisfy themselves that they have fulfilled the requirements laid down in Article 6(1) of

ECHR, then the decision of mentioned authorities would be subject to judicial control of those judicial bodies which had full jurisdiction ([Palaoro v. Austria, 1995](#)) to quash the decisions on the questions of law and fact and if these judicial bodies or constitutional courts have only jurisdiction to quash the decision of lower authorities on the question of law then they were not fulfilling the requirement of Article 6(1) of ECHR. Likewise, if the administrative authorities or courts did not have the authority to quash the decision of lower authorities on the question of law and fact, then they were also not meeting the requirement of Article 6(1) of ECHR.

This right is also not expressly provided in the Constitution of Pakistan, but superior courts of Pakistan are consistently giving views in their judgments about this particular right, for example, in a case the supreme court has given this view that right to a trial based on fairness was a fundamental right of the person who is under charge ([Liaqat Ali Chughtai case, 2012](#)), and this right should be considered as a provision in every statute unless this right has been expressly excluded by the statute. It cannot be denied that the above stated right is supposed to be included U/A 10-A of the Constitution.

### Right to have equality of arms and adversarial Proceedings

Equality of arms is a necessary attribute of a fair trial, and it means that a balance should exist between the prosecution and defense during the proceeding of the trial ([Campbell case, 1992](#)). The Human Rights Committee has given details of the idea of a fair trial, which is mentioned in Article 14(1) of ICCPR, that means that equality of arms should be present among the prosecution and defense and the principle of adversary proceedings should be respected during the trial proceedings. There is a violation of the above principle "*when the accused is not allowed to personally hear or attend the trial, or when he is not allowed to give instructions to his lawyer.*" When the accused is not properly informed about the indictment, then it means that there is an infringement of the rule of equality of arms ([D. Wolf case, 1992](#)).

AFCHPR provides that the fair trial right engages the fulfillment of a definite principle that includes "Right of equal treatment" and "Right of defense by an attorney," particularly when it is necessary in the interest of justice and when it is the duty of the courts and tribunals to obey the rules described by

international human rights instrument as an assurance of the fair process to all.

AFCHPR also describes that “right to equality of treatment by a State” in criminal issues has two meaning; firstly, the public prosecutor and defense counsel has an equivalent chance to file their petition along with reply when the trial is continuing, and secondly, when the facts of the case of two or more accused are same then they should have equal treatment in respect of jurisdiction. This point of view was given in a Case of ([Avocats Sans Frontiers 2000](#)) in which the court of appeal refused to accept the request of the accused of adjournment in the absence of his lawyer, whereas this court had already accepted the request of adjournment from prosecution side which was the violation of the right of equal treatment.

The European Court also emphasized on the “*right to have adversarial proceedings both in criminal as well as civil matters*,” which means that in a Criminal or in a Civil trial, both the parties should be aware about all the evidence and the observations and comments which are filed by the independent member of the national legal service. In the [Lobo Machado case \(1996\)](#), the issue regarding the social rights was *sub judice*, and the Deputy Attorney General gave some opinion about the case in the Supreme Court due to which the case of the applicant was dismissed, and the applicant did not have access to this opinion of the Deputy Attorney General, the European Court has passed the judgment that it was the breach of Article 6(1) of ECHR.

Although the legal system of Pakistan does not expressly provide this right, however, Article 25 of the Constitution talks about this right under the heading of equality of citizens, Article 25(1) necessitates that “*There will be equal law for the people of the country and all the people of the country enjoy equal protection of the law*” and Article 25(2) provides that “*There must be no unfairness based on sex*” while Article 25 (3) states that “*there will be no bar on the State for making legislation intended for the security of women and children*.” The meaning of this Article is that all the person who is placed under similar circumstances should be treated in a similar way, and they should have identical protection of the law; differentiation between prosecution and defense during the proceedings of the trial should be avoided. It may be again stated that the same right is (impliedly) provided U/A 10-A of the Constitution.

## Right to Present during the Trial

The right to present during the trial has been recognized by international law with reference to the fair trial right ([Wheeler, 2018](#)). Article 14(3)(d) of ICCPR, the relevant Statute of International Criminal Tribunals for Rwanda and former Yugoslavia, 1993 (ICTY), i.e., 20(4)(d) and 21(4)(d) provide that everybody has the right to have his trial be conducted in his presence. The ECHR, U/A 6(1) does not clearly provide the right of an individual to be present at the time of his trial. The European Court, in this respect, held that the subsistence of this right could be publicized by considering the aim as well as the use of Article in a complete way ([Brozicek case, 1989](#)). In the said case, the Savona Regional court did not send the summons to the accused to appear before the court, and there was no evidence that the accused had given up his right to be present in person, there there was a defilement of the Article 6(1) of convention.

The Pakistani law does not clearly provide a similar right to a person who is under charge to appear at the time of his trial, while Section 205 of the Criminal Procedure Code of 1898 (Cr P C) gives discretion to the trial judge to allow the attendance of the accused.

## Trials not to be held in Absentia

Even though no theory has been developed by international monitoring organs about trials in absentia, these monitoring organs have accepted that there are particular circumstances in which these trials may be conducted. The explanation has been given in Article 14 of ICCPR and Comment No. 13 of HRC, which states that “*when due to exceptional circumstances the trials in absentia are held then it is necessary that strict observance of rights of defense of the accused should be ensured*.” The requirement of a fair trial will only be fulfilled when trials in absentia are compatible with Article 14 of the covenant that means “*a person who is under charge is informed in time about the trial which is not in favor of him*.” It is the responsibility of the State party to ensure that ingredients of the doctrine of a fair trial are respected ([Maleki case, 1999](#)).

In Pakistan, the Cr P C allows the trial in absentia U/S 205, which gives discretion to the trial judge to conduct the trial in the absence of the accused, but this Section also gives powers to the trial judge that he can assure the personal attendance of the accused at any stage of the trial.

## **Right to abstain from giving Evidence against oneself or Confess Guilt**

This right of the accused in which the accused cannot be compelled to give evidence against himself or to plead guilty is one of the important rights. ICCPR, U/A 14(3)(g) provides that during the process of ascertaining of any criminal charge against him, no accused is required to give evidence against himself. ACHR, U/A 8(2)(g) provides that everybody has the right that he would not be forced to become a witness against himself or to take the plea of guilty, while Article 8(3) further states specifically that a declaration as to confession by the accused will be valuable only if it would be made without any kind of coercion, whereas the AFCHPR and ECHR are silent on this point. On the other side, the statute of international criminal court U/A 55(1)(a) and the respective statutes of ICTY U/A 20(4)(g) and 21(4)(g) protect against self-incrimination.

The Human Rights Committee (HRC) has highlighted that investigation authorities so as to force the accused to confess or to give evidence against himself use different ways that breach these Articles. And the law clearly states that all kinds of evidence obtained in these ways are unacceptable. The committee has the authority to consider the allegation of the accused when evidence is obtained by above mentioned methods. Moreover, the prosecutor should straight away refuse all kinds of evidence that are obtained by illegal means. There would be no physical and psychological pressure on the accused to acquire a declaration of guilt (Berry case, 1994). Hence, the committee has noted the violation of Article 14(3)(g) in the cases where investigating authorities have forced the accused to sign the declarations that incriminates him ([Sergio Euben Lopez Burgos case, 1981](#)) or where the authorities committed torture or duress for the purpose of obtaining the confession of the guilt ([Estrella case, 1983](#)).

The Pakistan Constitution provides this guarantee U/A 13, which states that nobody can be compelled or penalized for the same criminal activity more than once. No person who is under the charge of the offense is required to give evidence, which is not in his favour. Cr P C provides this guarantee U/S 340(2). The meaning of both provisions is that it is the cardinal principle of criminal law that every person, even the accused, is innocent in the eye of law until his guilt is proved beyond a shadow of any reasonable doubt. An accused person is not supposed to answer such a

question, which shows to renders him a criminal. Hence, this international guarantee is provided not only in the Constitution but also in the criminal legal system of Pakistan.

## **Prevention of using evidence extracted through illegal methods**

The Guidelines 16 on the Role of Prosecutors (1990) offer that the prosecutors should reject to use the evidence which they identify or consider on a logical basis that such evidence was got through illegal methods, especially when this measure involves torture and degrading human treatment. Other prominent international provisions were set up in Article 15 of the [Convention against Torture \(1984\)](#) or in Article 10 of the ACHR to avoid and penalize torture. The CAT says that every country which signs the treaty would make sure that every evidence that has been recognized or obtained under torture would not be admissible in evidence, and ACHR also declares such evidence as inadmissible in legal proceedings. [The Rome Statute of the International Criminal Court \(1998\)](#) provides U/A 69(7) that the evidence obtained that violates the international human rights instruments shall be disallowed if:

- a) That infringement creates considerable distrust on the consistency of the testimony, or
- b) the acceptance of the testimony would be negating to and would badly harm the truthfulness of the trials.

Article 14(2) of the Pakistan Constitution expressly provides that no human being can be tortured for obtaining proof or testimony, i.e., that there is a constitutional safeguard against the evidence which is obtained through torture.

## **The Principle of Double Jeopardy**

The ICCPR, U/A14(7), provides the bar on double jeopardy, according to which one cannot be tried or penalized again, for the offense for which he already has faced the trial and got conviction or acquittal according to national law. The ACHR, U/A 8, states that no person who is acquitted in a non-appealable decision must not be made to face a fresh trial for the same offense. The ECHR, in its Article 4(1), provides that nobody should be allowed to face a new criminal trial, or be punished for the same offence again, i.e., if a person is tried by the military courts on the allegation of treason and such person is acquitted, then he cannot

be tried again on the same charges by the civil courts of the country, though Article 4(2) does not prohibit the reopening of the case when evidence is available that a new fact has been discovered related to the case or there was a serious fault during the proceedings of the case that can change the outcome of the case.

With reference to [Gradinger case \(1995\)](#), the European Court of Human Rights stated that where the accused was awarded two punishments for killing a person negligently was the clear infringement of Article 4 of the Convention because both punishments were based on the same act or on the same conduct of the accused. In another famous case of [Oliveira \(1998\)](#), the result was dissimilar. The accused was driving the car on the road enclosed with ice and snow, and suddenly the direction of his car was distorted, and the car entered on the other side of the road and hit a car and crashed one more car injuring its driver badly. A police magistrate finds guilty the claimant on the basis of Sections 31-32 of the Federal Road Traffic Act regarding "weakness to manage her car" as she was not driving her with speed according to the situation of the road, and she was awarded a fine of 200 Swiss Franc. Later, the District Attorney concerned the punishing order and fined her 2000 Swiss francs "for neglectfully causing hurt," which was opposing to Article 125 of the Swiss Criminal Code. The applicant filed an appeal to this decision, and the fine was abridged to 1500 Swiss franc, and after the initial deduction of 200 Swiss Franc, it was reduced to 1300 Swiss Franc. The applicant filed a complaint to the European Court of Human Rights pleading that she was convicted twice for the same offense, first for the flaw to manage her car and second causing bodily hurt to the driver, and stated that it was the violation of Article 4 of Protocol No. 7 of the ECHR. But the European court held that it was a case of a single act constituting various offences, and in these cases, the larger penalty regularly sucked up the smaller one.

The Pakistan Constitution and Cr P C both provide the safeguard against two-time Punishment for the same offense. The Constitution provides this guarantee under Article 13, which states that no person can be punished two times for the same offense. This Article provides the protection against the double Punishment in a way that nobody can be tried for an offense on the same set of facts on which he has already been acquitted or convicted subject to the following conditions:

- (1) There was a trial of the accused for an offense charged against him;
- (2) The trial was conducted by a court of competent jurisdiction;
- (3) The trial was concluded into a conviction or acquittal;
- (4) The parties in two trials must be the same; and
- (5) Fact in issue in earlier trial must be identical with what is sought to be re-agitated.

### Protection from *ex post facto* laws

The ICCPR under Article 15(1), AFCHPR under Article 7(2), the ACHR under Article 9, the ECHR under Article 7(1), and the Rome Statute under Article 22 provide for protection from *ex post facto* laws. It means that an act or omission which, when it was done, was not a crime but later it came under the definition of a crime, then punishment cannot be given on that crime to a person, and it is an established right of the accused.

The Constitution of Pakistan, 1973 provides this right of accused under Article 12(a), according to which no person can be punished for any act which, when it was done, was not considered a crime by law. Article 12(b) states that only that amount of Punishment can be given to the convicted person that was applicable when the offense was committed, and if, later on, through legislation greater penalty is introduced for the same offense, then such greater penalty cannot be given to the accused person, so this right of accused is also constitutionally protected in Pakistan as well.

### Conclusion

In the end, it can be concluded that the right to a fair trial is the mother's right with reference to judicial proceedings. In the absence of this right, the other rights would be meaningless. However, a balance must be maintained between the rights of the accused and the victims of violations of human rights. Although an out-and-out certainty of guilt is not required under the law to hold an accused a convict, yet moral certainty is needed to be established to impose criminal liability on an accused. The conviction must be built on the basis of strong prosecution rather than the weakness of defense. Because it would be better to let a criminal go rather than to hold an innocent liable for a crime.

Many international instruments like ICCPR, ECHR, ACHR, ACHP, etc., are framed *inter alia* for the protection of the rights of the accused at the trial

stage. ICTY describes the guidelines to protect against inhuman degrading treatment and Punishment. The Constitution of Pakistan 1973 and Criminal Procedure Code of 1898 also ensure a fair trial. The difference between the international and national instruments is that these international instruments provide for many features of fair trial that are available to the accused not only in criminal proceedings but also in civil cases. As far as the rights of the accused are concerned, these rights are available to the accused not only at the investigation stage but also at the trial and appellate

stage as well. On the other hand, the Pakistan Constitution merely provides Article 10-A, which is about the right to a fair trial, and there is no further detail about the features of fair trial and the rights of the accused. However, the features of the right to a fair trial have been explored in the Pakistani judgments. In this regard, it is suggested that the features of the right to a fair trial must be explored and codified in the light of international rules dealing with fair trial to provide the accused rights in conformity and equality with international standards.

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