



CJS: Pre-Conviction Detention and Question of Double Jeopardy. A Critical Study of the Legal Status of the Death Penalty in Pakistan

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Abstract: *The individual right to personal security in any State should include those guarantees which enable a person to live his daily life and plan his future without the threat of arrest and imprisonment or the fear of severe and unjust punishment. Due to various reasons, the People of Pakistan do not trust the Criminal Justice System of Pakistan. In the criminal cases covering the death penalty accused persons are kept in prisons for years and on completion of trial they are convicted for capital punishment which is also executed. This article discusses whether the death punishment awarded and executed to a person after keeping him for many years in custody amounts to double jeopardy.*

Key Words: Pre-conviction Detention, Death Penalty in Pakistan, Double Jeopardy

Introduction

Pakistan's Criminal Justice system has the following three main pillars of the object to deter crime, address the grievance of the complainant and convict the accused if proven guilty.

- (1) Police
- (2) Prosecution
- (3) Courts; and
- (4) Prison or corrections

However, due to various reasons, the people of Pakistan do not trust the Criminal Justice System of Pakistan. People in different cases spent years in the prisons without conviction and their trials are not completed. Consequently accused persons succeed to get relief due to flaws in the system and innocent persons are harassed. In the criminal cases covering the death penalty accused persons are arrested and kept in prisons for years and on completion of trial they are convicted for capital punishment which is also executed.

The Constitution of Pakistan guarantees protection against double punishment. It states that no

person shall be prosecuted or punished for the same offence more than once (Article 13 of the Constitution of Pakistan, 1973). The same guarantee has been provided in Criminal Procedure Code which states that a person once convicted or acquitted not to be tried for the same offence. (Section 403 of Cr. P.C).

From the perusal of the Islamic laws, State laws and principles set by the Supreme Court it is very much clear that

- i. the benefit of the doubt should always go to the accused
- ii. accused is presumed innocent until proven guilty
- iii. it is better to err in acquittal instead of err by conviction

Registration of F.I.R and Conducting Investigation

Criminal Law comes into motion when the offence is reported at the Police station (Section 154 of Cr. P.C). Once the cognizable offence takes place and is reported to the police, the officer in charge of the Police

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Station is required by law to record the same in writing, (P.Cr.L.J, P-383, 2012) irrespective of the fact that the information he had received is correct or otherwise. (P.Cr.L.J, , 2011) Failure of the concerned police Officer to register a complaint, so made would amount to failure to discharge statutory obligation. (P.Cr.L.J, P-282, 2012) The informant should have been an aggrieved person is not a condition. (P.Cr.L.J, P.2007, 1991).

The spontaneity of F.I.R. reduces the chances of fakeness in the contents and is the guarantee of truth to a greater extent. (SCMR, P.45, 2011). Also, the purpose of the F.I.R. includes providing the basis for carrying out an investigation in the right direction (MLD, P.1931, 2011).

After lodging of F.I.R. criminal investigation is conducted with the objective to address the questions aroused with regard to the commission of the offence. These include the identity of the victim; the exact place of the incident; the manner of commission of a crime and means used in its commission, time, the motive behind the crime and the identity of the culprit. The search for material witnesses able and agree to give deposition against the culprit has also remained the task of the criminal investigation. In order to get a true picture of the incident all facts relevant to the crime are reconstructed in the course of the investigation so as to present a case free from doubts (Section 156 of Cr. P.C). Investigation generally consists of the following steps.

- i. Visit of the crime scene
- ii. Determination of the facts
- iii. The arrest of the suspected culprit
- iv. Collecting evidentiary material which relates to the occurrence of the offence, it may include
 - (a) Examination and reduction in writing the statements of various persons acquainted with the facts of the case (including the accused)
 - (b) The search of place or seizure of things relevant to the offence
- v. Release of the accused if the evidence on record is not sufficient
- vi. Formation of opinion that collected material implicates the accused and he should face trial (P.Cr.L.J, Page.1357, 1999).

In every investigation, there are the following phases (SCMR, P.304, 1997).

- a. Administrative phase
- b. Judicial phase
- c. Execution phase

Police have the authority to investigate the case so many times; even they can withdraw the challan and submit fresh. (P.Cr.L.J, P.660, 2001). Collection of the

evidence is the duty and prerogative of the police, this matter is not within the domain of the Courts. (P.Cr.L.J, Page 1054, 2001). Supreme Court of Pakistan in Bahadur Khan v. Muhammad Azam has disapproved the system of re-investigation and successive investigation (SCMR, Page 373, 2006).

The credibility of a witness whose statement is recorded with delay would become highly suspicious (P.Cr.L.J, Page.1296, 2010). However, in the case of Fakhar un Nisa Khokhar reported in PLD 1969 Lah. Page 114 and again discussed in Dilshad vs State 1995 P.Cr.L.J page 248 it was held that the Court may prefer to rely upon the testimony of the witness in Court on oath and such witness should not be considered unreliable on point on which he is contradicted for the reasons that police not correctly record statement under section 161 Cr. P.C, A Police Officer is not allowed to make any inducement, threat or promise and such has been strictly prohibited under section 163 of Cr. P.C (Section 163 of Cr. P.C). Article 37 of the Qanun-e-Shahadat deals with irrelevancy of confession caused by inducement, threat or promise. (Article 37 of Qanun-e-Shahadat).

After completion of the investigation, the Police officer has to submit to the Magistrate having jurisdiction and empowered to take cognizance of a final report on the prescribed form, failing which an interim report is required to be submitted. All these sections contemplate a simultaneous action and are to be read together. (P.Cr.L.J, Page 223, 1993). The final report of the Police investigation in criminal cases is known as "challan" (Section 173 of Cr. P.C).

Arrest and Release of Accused Person

In cognizable offences, Police Officer is empowered Police Officer to arrest the offender. Not only can he arrest a person in the following situations (Section 54 of Cr. P.C).

- (i) Against whom a reasonable complaint has been made or
- (ii) Credible information has been received or
- (iii) There is reasonable suspicion of his involvement in the cognizable offence

Very wide powers are conferred to the Police, however, it cannot be left to caprice; arrest and detention of persons without a warrant are to be covered by the rules and principles of law. (MLD, P. 271, 2010).

If a Police Officer conducting an investigation needs detention of an accused person in police custody for more than the time period permitted under section 61 of the Cr. P.C, he has to apply under the provisions

of section 167 of the said Code by submitting an application in this regard. If Magistrate is satisfied with the grounds for continuing the detention of the accused person he can pass an order to extend the detention for a term not exceeding fifteen days. (Section 167 of Cr. P.C).

Release of Accused Person

The arrested accused person can be released on bail by the Court and also by a Police officer on certain conditions. He also can be discharged by the Police officer by executing a bond that if called by the court he will appear there. A person booked in any case can also be granted bail before arrest. Investigating officer can release an accused in his custody when sufficient evidence is lacking or there are no reasonable grounds of suspicion against the accused (Section 169 of Cr.P.C). However when there is sufficient evidence against the accused person cases shall be referred to the Magistrate (Section 170 of Cr.P.C).

Submission of the report under section 173 has no concern with this fact that what mode has been adopted by the investigation officer, whether he has acted under section 169 or 170 of Cr.P.C. (PLD, Page.243, 2007).

The police Officer will submit the report before the concerned Magistrate, and consequently accused person will have to face trial or disposal of the case in accordance with the law (SCMR, Page 1430, 2011).

When the case is true but the accused cannot be traced Police dispose of it in clause "A" but when the matter is false case is disposed of in clause "B" however non-cognizable cases or where evidence is not sufficient, the case is disposed of under clause "C". However such report of Police is not binding upon the court (YLR, Page. 1297, 2013).

Where the accused is placed in column 2 it is only meant that in the investigation Police have found the accused an innocent person and has been discharged under section 63 but this is not binding on the court and it may summon him. (SCMR, Page. 1428, 1988).

It has been held by Lahore High Court that to summon an accused person discharged by the Police trial court is required to record evidence of an eye witness and if any sufficient material is found from such evidence accused person can be summoned (YLR, Page. 836, 2003). Three propositions can be evolved

- i. At least one eyewitness is recorded
- ii. He must have been cross-examined
- iii. There comes sufficient material on the basis of which the court must be convinced about the involvement of the accused.

Cancellation and Quashment of Case

Cancellation of case and quashing of F.I.R are two different things. There is no power for the cancellation of a case in the Code of Criminal Procedure. Such power of cancellation however may be treated as inherent in section 173 read with section 190 of the code, though the language of subsection 3 of section 173 does not directly refer to the matter. The cancellation of the case is sought on the ground that the information u/s 154 of the Code has been found to be false or that the accused are not involved in the offence imputed to them or that the case is one which is non-cognizable and cannot be investigated without the permission of a Magistrate or that the matter is of a civil nature. In such a case the F.I.R and other papers are sent with a final report to the Magistrate, where the sole accused or all the accused are not only discharged from their bond, in accordance with the procedure prescribed under section 173(3) but the case is also cancelled by the Magistrate, by virtue of Rule 24.7 of the Police Rules volume III, chapter XXIV. Magistrate has the prerogative to disagree with the report but such order of disagreement should reflect that the material placed with the report under section 173(3) Cr. P.C has been considered and there are reasons to disagree with it (P.Cr.L.J, Page 732, 2011). There is no role of the Sessions Judge on the report under this section (PLD, Page. 433, 2003).

For exercising inherent powers (Section 561-A Cr. P.C) it is not necessary for High Court to wait for the orders of the trial court. It may pass orders whenever necessary. (P.Cr.L.J, P. 897, 2014). Registration of the subsequent F.I.R. on the same facts and circumstances being not permissible registration of impugned first information reports was held of no legal effect (PLD 1994, 1994).

Role of Prosecution

The function of evaluating evidence collected by the Police and after filtering the quality and quantity of cases sent for trial is done by the Prosecution. Prosecutors are appointed by the Provincial Government. Inspector legal is a public prosecutor within the meaning of sections 492 and 494 of Cr.P.C. (P.Cr.L.J, Page. 565, 2001). A Public Prosecutor has not to act as counsel of any party but his duty is to assist the Court. (P.Cr.L.J, Page. 440, 1986).

The public Prosecutor could also make a request for withdrawal of a case, pending trial being representative of the Provincial Government. The prosecutor is also empowered to choose which witnesses were to be produced in a trial and which to

be given up being unnecessary. His request for giving up a witness is always subject to the discretion of the Court as it is always the Court which decides the matter keeping in view the ends of justice (P.Cr.L.J, Page 151, 2010). Public Prosecutor under section 494 of Cr. P.C is empowered to withdraw from the prosecution of any person however this withdrawal is subject to the consent of the Court. Before allowing withdrawal the Court has to apply its mind to determine whether the request for withdrawal of the case is not made to give favour to an accused person_(YLR, Page. 1669, 2005). The Public Prosecutor on the direction of the Provincial Government will file an appeal_(YLR, Page. 816, 2011)

Court and Trial

Jurisdiction to conduct a trial of any particular offence has been conferred by the Statute which creates the court or defines the offence. As prescribed in section 28 of Cr.P.C trial of the offences under PPC can be conducted by the following courts.

- a. High Court
- b. Court of Sessions, or
- c. Any other Court by which such offence is shown triable.

Trials of the offences prescribed in other laws are to be conducted in the Court specified on that behalf in such law.

Trial in criminal court starts with framing of charge. The examination of a case by a competent court is called a "trial". The precise accusation against a person charged for the commission of an offence having the right of its knowledge at an earlier stage is called a charge. The charge sheet is the gist of the whole prosecution case by which it has been shown which of the accused has been implicated and what evidence is available against him_(MLD, Page. 1709, 2008). Trial Court on the basis of the material before it may alter charge_(YLR, Page. 2795, 2007).

Section 265-A to section 265-K covers the procedure of the Session Court trial. In Session Court trial charge is framed under section 265-D. Under section 265-H Court shall pronounce judgment either of acquittal or conviction. However under section 265-K Court may acquit an accused at any stage of the case, if it considers that there is no probability of the accused being convicted of any offence (Section 265-K of Cr.P.C). In a Magistrate trial charge is framed under section 242 of Cr.P.C. Section 241 to 249-A relates to the trial of cases by a Magistrate. The accused as a matter of right is entitled to get copies of all the statements of witnesses examined and other relevant documents seven days before framing of charge.

On the day fixed a formal charge regarding the commission of an offence shall be framed by Magistrate on the accused (Section 242 of Cr.P.C). If an accused person admits the charge and states that he has committed the offence alleged in the charge sheet; after recording his admission a show cause notice shall be given to him that why he should not be convicted, the Magistrate may convict him accordingly (Section 243 of Cr.P.C).

A plea of guilt refers not to any section of the criminal statute but to acts alleged against the accused. Therefore if the facts alleged against an accused person do not themselves constitute an offence, even if they are proven or admitted, the plea of guilty in relation to those facts would not convert the acts alleged into a penal offence_(PLD, Page. 574, 1979). If during the course of the trial, the accused pleads guilty with the additional plea, Court is required to take independent evidence (P.Cr.L.J, Page. 352, 2012).

Judgment of Acquittal or Conviction

Under section 265-H Court shall pronounce judgment either of acquittal or conviction. As required in section 244 after taking evidence including such further evidence produced before Magistrate on his own motion and examining the accused if he finds that the accused is not guilty, Magistrate will pass an acquittal order. But if the findings results affirmative that the accused is guilty the Magistrate will convict him and pass a sentence according to law. Section 245 Cr.P.C describes the passing of an acquittal or conviction order.

Execution of the Punishment

When a person has committed two more offences and has faced a charge of both in one trial and has been found guilty, the court may pass several punishments described for such offences which such a court is competent to pass. As provided in section 35 in awarding such sentences provisions of section 71 of the Pakistan Penal Code will apply. Unless the Court direct otherwise if such punishments consist of run consecutively in such order as may be directed by the Court. A perusal of both section 35 and section 397 of the Code of Criminal Procedure would show that the general rule is that sentences of imprisonment or imprisonment for life in each offence are to run consecutively and concurrent running of sentence is an exception.

In the case of Jumma Khan (SCMR 1986 page 1573), the Supreme Court clarified the judgment imposing in a double murder, sentenced to death on

each count that the sentence of imprisonment for life on each account imposed upon them under section 302 P.P.C to run concurrently and not consecutively. Similarly in the case of Muhammad Ittefaq (SCMR 1986, page 1627) and in the case of Khan Zaman and others (SCMR 1987, page 1382) reliance was placed on the case of Javed Shaikh and direction was issued by the Supreme Court that all sentences of imprisonment should run concurrently (P.Cr.L.J, Page. 1905, 1999). It is a violation of a mandatory provision of section 35 for a trial Court while convicting the accused under section 302, 34 P.P.C on two counts to direct the substantive sentence of life imprisonment on each count to run consecutively (P.Cr.L.J, Page. 1945, 1990). High Court in exercise of its inherent jurisdiction under section 561-A Cr.P.C is vested with plenary powers to direct that the subsequent sentence of the accused shall run concurrently with his previous sentence of imprisonment already imposed on him (P.Cr.L.J, Page. 1185, 1997).

CJS: Pre-Conviction Detention and Question of Double Jeopardy. An Islamic Perspective

Islamic law provides the organizational framework for society and thereby appoints and maintains the legal relationship between individuals and protects the interest of one person from being attacked by another. By defining the relationship between State and the individual personal security has been guaranteed. In this regard by protecting fundamental rights, a balance has been created between the interest of the State in enforcing the criminal law and individual interest. For this, Islamic law embodies basic principles of justice. However, due to various reasons, the individual is increasingly vulnerable to the power of the State. (Sami Sadiq Al-Mulla)

Personal Security under Islamic Theories of Incrimination and Penology

Islamic Jurisprudence is unique in guaranteeing the right of individual security. Without the benefit of security and discipline, social order and individual development would be impossible.

The following five essentials have been guaranteed by Islam to all persons and unwarranted infringement of them by the State has been prevented. These guarantees are mentioned below.

- i. Religion
- ii. Life
- iii. Mind
- iv. Posterity and
- v. Property

The Effect of the Legality Principle on the Crimes of Taazir

Taazir encompasses all offences for which the Sharia does not prescribe a penalty. In this regard, discretion has been delegated to the judge. However, the decision must contribute to the preservation of the five essential guarantees of Islam given below.

- i. The practice of religion
- ii. The development of the mind
- iii. The right to have offspring and
- iv. The right to possess wealth

Islamic law prohibits all judicial conduct which is contrary to those ends, such as inflicting torture or humiliating the accused. It also excludes all punishment, which may cause unnecessary harassment. The judge must be certain that when a penalty is imposed, the offender is not punished in excess of the punishment legally imposed on his equals. Thus Abu Hanifa's approach was to apply the most lenient penalties to the crimes of Taazir, and this practice developed into a tradition which is exemplified by the maxim that "it is better that the Imam be wrong in his forgiving than to err in imposing the penalty".

The Indictment, Investigation and Principle of Innocence

Based on a quantum of evidence as prescribed by law a person is being suspected that he has committed a crime. Unless a procedural required function of the indictment is carried out by a specific agency suspension alone is inconsequential. The indictment consists of charging a person with a crime either by confronting him with the accusation thereof or by subjecting him to certain steps taken only against suspects, such as apprehension and preventive detention.

In principle, the indictment limits the rights and freedoms of the accused. This is common to all inquisitorial systems although they differ in the degree of limitation placed on the rights and freedoms of the accused. Under Islamic law, the reason for this difference stems from the conflict between the following principles.

- i. The first is that since every man is innocent until proven guilty, so until such proof is established his rights should not be forfeited. Just by accusation this principle of innocence doesn't becomes invalid. Prior innocence of the accused is a certainty which cannot be negated by doubt whereas accusation by nature is not devoid of doubt.

- ii. The second principle results from the necessity to ascertain the truth. Bringing an indictment against the suspect may lead to placing restraints on his liberty and other rights. Since every case seeks to do justice, this principle justifies the proper official's infringement of the suspect's liberty and other rights.

The rights which are acknowledged and protected by Islam are many, the most important of which are the rights to life, bodily safety, the honour of self and women, individual freedom, the right to own property and home, and the right to privacy. Quranic verses and Hadiths provide overwhelming proof of the existence of these basic rights. Safeguards for these rights are thus fundamental to the Sharia, and the State is responsible for protecting them through the implementation of the Sharia.

The conflict between the two principles in the sphere of criminal justice results in limiting the rights and freedoms of the accused to the extent that such limitations are necessary in the interest of truth and justice. To uncover truth and do justice if it is necessary to limit some or all these rights of an accused person subject to the condition of following the dictates of necessity an exception will be recognized to the principle.

It can be argued that from the perspective of the Sharia, the two above-mentioned principles are not in conflict; instead harmonizing between them is a matter of criminal justice administration and policy in such a manner that neither principle is totally abrogated.

It is the requirement of legal justice and social interest that no one other than criminal is punished, hence if the accused is required to be presumed innocent until proven guilty so he has the right not to be judged guilty and society has no less of a right.

Preventive Detention and Rights of the Accused

No man shall be deprived of his liberty except for the enforcement of a lawful sentence is a general principle and preventive detention order is an exception. In the interest of law enforcement and in order to promote social order preventive detention can be allowed during the investigation stage on the basis of available evidence and keeping in mind other relevant principles to protect the witnesses or evidence from being manipulated or to avoid the escape of the accused.

There is however some disagreement among Islamic jurists concerning the function of preventive detention. Some have labelled it detention for proving

innocence, while others call it confinement for accusation.

Opponents of preventive detention contend that detention amounts to Taazir punishment which cannot be imposed on a person against whom a crime has not been proven yet.

From above it appears that one school of Islamic jurists deems preventive detention to be unlawful per se, which is a position favouring protection and safeguarding personal liberties and the right to individual security. Another school considers the measure, permissible, but with conditions restrictions and safeguards which aim at the realization of the necessary balance between the individual right to freedom and security on the one hand and the interest of society in effective law enforcement on the other.

The Permitted Extent of Preventive Detention

Sharia jurists hold that in principle man has the liberty to move anywhere. By forbidding arrest except when necessary; violation of this principle has been condemned by Islamic Jurists.

Jurists have condemned the violation of this principle by forbidding arrest except when necessary. When they speak for *habs* (imprisonment), they intend its wider meaning which includes both arrest and preventive detention, according to the terminology of positive law.

Preventive detention is recognized by Islamic Jurists as a legitimate State function.

Preventive detention is called "precautionary arrest" (*habs ihtiyati*), "trial (or examination) arrest" (*ikhtibar*) and "discovery and acquittal arrest" (*kashf wa istibrah*) and is recognized by Islamic Jurists as a legitimate State function.

In his *al-Mabsut*, Sarakhsi, a Hanafi jurist, suggests that when witnesses accuse a person of adultery, the judge, if unfamiliar with the suspect should keep him under arrest until the truth of the testimony is established. Otherwise, the accused may escape the jurisdiction of the courts. The precautionary arrest is not limited to cases of adultery but applies to all cases where it is necessary to detain the accused in order to guarantee that the doer not escapes or in order to execute the judgment as soon as it is handed down. It appears that in the Sharia generally preventive detention is permissible with limitations.

Corporal Punishment: The Death Penalty

In *Hudud's* crimes, Islamic law imposed fixed penalties which also include the death penalty. The death penalty

is also reserved for crimes of blood, and related to the classification of Qisas. However, jurists have suggested that criminal acts which also seriously harm the public interest ought to be similarly punishable in order to protect society against dangerous and incorrigible individuals. For example, acts which incur the death penalty in Taazir could be espionage and could also be imposed on habitual criminals who pose a serious danger to society.

Islamic penal law has adopted an intermediate position with regard to the interests of society vis a vis the death penalty and it has determined that crimes punishable by death can be inflicted only with great restraint.

Can Taazir be Abrogated in Case of Doubt?

Islamic jurists have expressed three views concerning Abu Hanifa's analysis of the extent of the delay required to invalidate the evidence or render it doubtful. Taazir crimes are in effect conduct viewed as harmful or dangerous by society, and the principles of Sharia impose certain penalties therewith. Such penalties aim at inflicting harm upon the offender to deter him from further crime and to deter others from committing similar violations. Therefore punishment which inflicts injury on a person may not be imposed by a judge unless he is convinced of that person's guilt. Consequently, it can be suggested that founding the principle of nullification of Had in case of doubt upon the presumption of innocence and the principle of indubitable evidence, requires the application of this principle to Taazir crimes in addition to the crimes of Hudud and Qisas. When one considers the vast number of Taazir convictions, it becomes clear that the interests of justice and the rights of the accused cannot be secured unless these basic principles apply to all categories of crimes. The failure to extend them to Taazir offences is also inconsistent with the principle of equality of all persons before the law.

Protection of the Rights of the Condemned

It is most important to protect the rights of the condemned persons, particularly in a situation when there is a likelihood that a convicted person may be deprived of liberty for more time period than that specified sentence. As Qisas and Hudud punishments are mostly corporal in nature it has been more emphasized to take care in awarding and executing such punishments. Islamic jurists in their directions have sought to establish such rules for insurance that the convicted should not bear more pain than required to be applied by the sentence awarded. It is not enough

to apply this care only to Qisas and Hudud punishment but such rules of care must also be applied to Taazir punishments. In Islamic Law, the legal guardian of the victim has the right to demand retaliation for murder but in order to avoid torture on the convict as revenge; execution of such punishment as retaliation (Qisas) is subject to the condition that it is to be carried out under the supervision of the ruler or his representative.

Execution of punishment by the guardian without official permission incurs Taazir upon him. It has been suggested that the ruler should not allow the victim's guardian to inflict punishment without the following assurance.

- i. That the executor possesses the appropriate qualification.
- ii. In inflicting Qisas proper instruments must be used,
- iii. The convicted should not be tortured
- iv. That the execution should be swift

Failure to do so incurs Taazir, for the principles of retaliation stipulate that torture cannot be involved and that execution should be swift.

The Responsibility for Error in Execution

The question of compensating the condemned for a judicial error has remained a subject of intense discussion. Contemporary legal systems are far from agreement, and few compensate the accused or condemned who is found innocent for the time he spends in detention. Jurists apply the principle of judicial liability to Taazir's penalties. Some believe that the Imam is liable to pay compensation for the death of a convict during the infliction of a Taazir penalty since the purpose of Taazir is discipline and not death. Therefore, its application is subject to the safety of the convict. In summary, the principles of Islamic law provide for compensation of the convict for every unjust injury caused to him that results from an error in the execution of punishment. It is also agreed that the death penalty supersedes and encompasses other penalties. If a certain convict is sentenced to undergo penalties, one of which is the death penalty, then the latter is the only one imposed.

Research Methodology

For the purpose of collecting data, this researcher has chosen a qualitative research methodology. In this regard, judicial officers, lawyers, Police officers, law teachers, and other law professionals were the population and random formula was applied to the sample. As the topic involve a very important point

hence in order to get a comprehensive response this researcher thought it necessary to have the input of above mentioned law professionals. On the basis of primary and secondary data conclusions and recommendations have been given at the end of this article.

Research Objects

- i. To determine the defects in the criminal justice system and its effect specifically in the murder case
- ii. To compare the criminal justice system with Islamic Criminal Justice System
- iii. To determine the legal status of pre-conviction detention
- iv. To determine whether pre-conviction detention amounts to double jeopardy specifically in the murder case
- v. To suggest recommendations to meet ends of the justice and to avoid injustice

Research Questions

Following were the research question relating to the topic asked by the respondents.

1. *What is your opinion about the exercise of powers by the Police regarding the discharge/bail of the accused?*
2. *Do you think arrest in cognizable offence is conducted fairly*
3. *Do you think an accused person should be arrested before the completion of the investigation?*
4. *What is your general observation about the challan/final report submitted by Police Officer to the Prosecutor?*
5. *Is there any compensation for the acquitted person for the period he remained in prison?*
6. *In cases covering death punishment if an accused person is arrested and kept in jail for a certain time period, later he was awarded capital punishment which after the dismissal of the appeal was executed, do you think this amount to double jeopardy as he also remained in jail?*
7. *Are you agree that in the cases covering death sentences, during trial persons detained in prison should not be awarded death sentences?*
8. *Prosecutors receive threats in conducting the trial/proceeding of the case?*

9. *Whether experienced persons appointed as judicial officers?*
10. *Normally how much time a criminal trial takes?*
11. *Whether judicial officers are given a time frame for the disposal of cases?*
12. *Whether judicial officers are given training in forensic and other scientific evidence?*
13. *Whether judicial officers face local and political influence and threats in the proceeding of the case?*
14. *Are you agree that people do not have trust in our criminal justice system*
15. *Persons who declined bail in crimes covering capital punishment should not be awarded death punishment.*

Research and Discussion

Do you Think Arrest in Cognizable Offence is Conducted Fairly

It is admitted position that the Police has wide powers and often these powers are exercised beyond the law. Due to corruption, political influence and other various reasons Police arrest innocent persons and release culprits.

In this regard answering the question "Do you think arrest in cognizable offence is conducted fairly"? 43% of responders were of the opinion that "some innocent persons are also arrested" 42% of responders were of the view that "no, Police do not arrest fairly, however, 11% of responders were of the opinion that "yes, Police do arrests fairly and in accordance with law".

Do you Agree that People do not have Trust in our Criminal Justice System?

However, due to various reasons, the people of Pakistan are not satisfied with the criminal justice system of the country, the same can be inferred from the above graph. On the question that "are you agree that people do not have trust in our criminal justice system"? 47% of responders strongly agreed with this statement, however, 42% of responders partly agree with it, and only 8% of responders were strongly disagree. Less than 5% of responders were not clear in their opinion and they said "no idea". From the above graph, it appears that only 8% of people are satisfied with the current criminal justice system of the country, whereas 89% of people fully or partly are not satisfied.

Do you think Accused Person Should be Arrested before the Completion of the Investigation?

Though it is not mandatory to arrest a person before the completion of an investigation however law gives authority to the Police in this regard to arrest a person before the completion of the investigation. The object of this authority is that the accused should not be in a position to use his influence against the witnesses and damage the evidence. However often this power is misused.

In this regard responding to the question "Do you think an accused person should be arrested before the completion of the investigation"? 56 % of responders are of the view that arrest should be based on the availability of evidence, whereas 34% of responders are of the opinion that the accused should be arrested before completion of investigation in severe offences. Respondents are also of the view that it should vary from case to case. From this graph, it appears that respondents are of the view that arrest before completion of investigation should be made on the basis of available evidence and in the severe offence.

in Cases Covering Death Punishment if an Accused Person is Arrested and Kept in Jail for a Certain Time Period, Later he was awarded Capital Punishment which after Dismissal of Appeal was Executed, do you think this Amounts to Double Jeopardy as he also Remained in Jail?

Responding to the question that "in the case covering death punishment if an accused person is arrested and kept in jail for a certain time period, later he was awarded capital punishment which after the dismissal of the appeal was executed, do you think does this amounts double jeopardy as he also remained in jail"? 54% responders did not agree with this statement and responded as "no", however, 22% responders agreed with the statement and were of the opinion that it amounts to double jeopardy. 12% responders in the survey were divided in their opinion and their response was "maybe". 10% responders were not clear in their opinion and they responded "no idea".

Do you agree that in the Cases Covering Death Sentences, during Trial Persons Detained in Prison should not be awarded Death Sentences?

In response to the statement that "are you agree that in the cases covering death sentences, during trial

persons detained in prison should not be awarded death sentences?" 42% of responders disagreed with this statement and were of the view that the accused should be awarded a death sentence. However, 25% of responders agreed with this statement that such an accused should not be awarded a death sentence. 22% of responders were divided in their opinion and their response was "maybe". 5% of responders were not clear in their opinion and they responded with no idea. If the accused committed a severe crime like rape, then he should be liable to death punishment.

From the combined perusal of the above two questions it appears that though the response in the above graph is mixed, however, it is apparent that doubt is created in the mind that whether such punishment amount to double jeopardy or not. From the result of the graph, it appears that the majority do not consider it as double jeopardy or oppose the death sentence but if we look otherwise in the response to the question that whether awarding and executing the death sentence in the case when the accused already has remained under custody 37% respondents directly or indirectly consider it as double jeopardy. In the other question, 47% of responders are directly or indirectly of the view that in such a case accused should have not been awarded a death sentence. Such a response against the death sentence cannot be ignored. For extending the benefit of doubt to the accused it is not necessary that there should have been a major dent but a minor doubt is sufficient for the application of the benefit of the doubt.

If an accused person is awarded imprisonment he can get benefit under section 382 of Cr.P.C. Under this section period of detention shall be taken into account. However, this benefit cannot be given if the accused is awarded a death punishment.

Persons who Declined Bail in Crimes Covering Capital Punishment should not be awarded Death Punishment.

In the survey answering the question that "persons declined from bail in crimes covering capital punishment should not be awarded death punishment"? 39% of responders agreed with this statement to some extent and were of the opinion that in heinous crimes offenders should be awarded a death sentence. In other crimes, they may not be awarded a death sentence. However, 30% of responders were strongly disagreeing with this statement and they were of the view that they should be awarded a death sentence so it becomes an example for society. 20% of responders strongly agreed with this statement and

they were of the opinion that they should be awarded a sentence of imprisonment. 9% of responders were not clear in their opinion and they said "no idea".

Is there any Compensation for the Acquitted Person for the Period he Remained in Prison?

Answering the question that "Is there any compensation for the acquitted person for the period he remained in prison"? 46% of responders have stated "yes, if in the judgment case is declared false", however, 28% responses were of the view that "no compensation is provided if the accused person is acquitted on the benefit of the doubt". In the survey, 13% of people were not clear in their opinion and their response was "maybe". There is only one provision in the Cr.P.C i-e section 250 which states that while acquitting an accused person if the Magistrate is of the opinion that the accusation was false and either frivolous or vexatious the Magistrate may pass an order for compensation. Besides this compensation order, such informant or complainant can be subjected to civil or criminal liability. There is no such provision regarding Sessions trial. Generally, the accused persons if acquitted are given the benefit of the doubt to avoid legal complications.

Whether Judicial Officers Face Local and Political Influence and Threats in Proceeding of the Case?

Answering to question "whether judicial officers face local and political influence and threats in the proceeding of the case"? 47% response was "in some cases", 27% response was "yes" and 20% response was "no". Less than 6% of responders were not clear in their opinion and they responded "no idea".

The response shows that judicial officers face local and political influence directly or indirectly. Though it may not be in all cases, however, in cases which are either delayed due to such influence or disposed of under influence or threat, its fairness is questionable.

Whether Judicial officers given Time Frame for the Disposal of Cases?

In response to the question "whether judicial officers are given a time frame for the disposal of the case"? 43% of responders said "yes", 31% of responders said "sometimes" whereas 18% of responders said "no". Less than 10% of responders were not clear in their opinion and they said "no idea". In very recent past model courts have been created with a time frame for the

disposal of the criminal case, however, other courts are not given a time frame for the disposal of the cases.

Normally how much Time a Criminal Trial Takes?

In response to the answer "Normally how much time a criminal trial takes"? 71% of responders were of the view that it depends upon the nature of the case, 15% of responders were of the opinion that below three years and 10% of the responders were of the opinion that above three years. Less than 5% of responders were not clear in their opinion and they answered "no idea". From the result of this graph, it appears that though it depends upon the nature of the case a criminal case triable by Magistrate takes approximately three years. However a criminal case triable by Session Court takes much more time.

What is your Opinion about the Exercise of Powers by Police Regarding Discharged/bail of the Accused?

Though the Police have been given the power to release the accused person or discharge him on bail in certain situations mainly for the reason that evidence against him is not sufficient or the offence is non-cognizable but this power is also not exercised fairly. Often due to various reasons which mainly include political influence and corruption arrested persons get relief under this power but those poor persons face procedures.

"What is your opinion about the exercise of powers by Police regarding the discharge/bail of the accused"? 39% of responders were of the opinion that "Police due to influence/corruption release/discharge accused person involved in the offence", and 30% of responders were of the view that "discharge/release should be subject to the supervision of Prosecutor/Court". However, 25% of responders were of the opinion that "Police discharge/release arrested person if he is not involved in the offence".

According to respondents ultimately the court will decide whom to discharge but the police do put the accused in column 2 under political influence or corruption.

Police use this power according to section 169 Cr.P.C during the time of investigation when no incriminating material is found against the accused release the accused normally says Police bail and when the challan produce before the court then in column 2 the name of the released person mentioned

However, from the above graph, it is clear that respondents believe that release/discharge is not conducted fairly and it should be under the supervision of a court.

Arrested Accused Person should be Released on Bail in all Cases?

Responding to the question that "arrested accused person should be released on bail in all cases" 50% responded that "accused person should not be released on bail in heinous crimes", 32% responded was "accused persons should be released on bail in less heinous crimes" however 13% responders agreed with this statement. The above graph shows a mixed response, respondents' view is divided subject to the nature of the case. However, it appears that those who are of the opinion that the accused should not be granted bail in heinous crimes, it means their other opinion is that they should be granted bail in less heinous crimes, whereas 13% of respondents support the statement that bail should be granted in all cases. It can be inferred from the above graph that 82% of respondents are of the opinion that bail should be granted for less heinous crimes.

Prosecutors Receive Threats in Conducting Trial/proceeding of the Case?

Answering the question "whether prosecutors receive threats in conducting trial/proceeding of the case?" 52% of responders answered "sometimes" 27% of responders answered "yes" 13% of responders answered "no" 7% of responders were not clear in their opinion and they responded "no idea". In any criminal justice system, it is necessary that the Prosecution should have been protected, free from influence and threats and can work fairly and impartially however the result of this question is very dangerous as only 13% of respondents were of the view that Prosecutors do not receive threats but almost 79% response is that Prosecutors receive threats. In a society where Prosecutors receive threats, it can not be expected that they will be working fairly and impartially.

Whether Judicial officers are given Training in Forensic and other Scientific Evidence?

Besides other facts, one of the reasons for the delay of the trial is the Judicial Officer's lacking forensic and other scientific training, specifically Magistrates because of qualification for their appointment is simply LLB. For their appointment as Judicial Magistrate experience is not required. However, it is not limited to this but many other Judges which may include Session

Judges also lack forensic and other scientific training. As cases relating to terrorism, murder of other offences covering death penalties are triable by the Session Court, lack of such training makes the disposal of cases very delayed leaving so many defects in the trial. This is also apparent from the response to the question regarding such training. Answering the question that "whether judicial officers are given training about forensic and other scientific evidence"? 39% of responders said "yes", 32% of responders said "to some extent," 19% of responders said "no" and 10% of responders were not clear in their opinion and they answered "no idea".

Whether Experienced Persons are Appointed as Judicial Officers?

In response to the question that "whether experienced persons are appointed as judicial officers"? 46% of responders adopted all three given options which include "yes in the appointment of additional sessions judges experience is required", "in some Provinces in the appointment of Magistrate experience is required" and in the appointment of Magistrate experience is not required". However 35% responders adopted option "yes in the appointment of Additional Sessions Judge's experience is required", whereas 9% responders answered as "in the appointment of Magistrate experience is not required". Less than 10% responders answered as "in some provinces in the appointment of Magistrate experience is required".

Whether judicial officers face local and political influence and threats in the proceeding of the case?

Answering to question "whether judicial officers face local and political influence and threats in the proceeding of the case"? 47% response was "in some cases", 27% response was "yes" and 20% response was "no". Less than 6% of responders were not clear in their opinion and they responded "no idea".

The response of this graph shows that judicial officers face local and political influence directly or indirectly. Though it may not be in all cases, however, in cases which are either delayed due to such influence or disposed of under influence or threat, its fairness is questionable.

Conclusion

From the above research and discussion various flaws appears, consequently, the people of Pakistan are not satisfied with the criminal justice system of the country. Because of flaws in the prosecution, cases are decided with delay and victims/aggrieved persons do not get justice. Often innocent persons are arrested and

culprits are released. Police have the power to arrest on the basis of nomination as accused in the F.I.R. only this but Police do arrest on the basis of suspicion before the completion of the investigation. There is no fixed time frame for the disposal of criminal cases. Due to a lack of forensic and other scientific training, work burden, local and political influence and threats to judicial officers, prosecutors and witnesses criminal trial takes years to decide. Also, Police officers do not exercise their power to discharge or release an accused person on bail, consequently, such persons face undetermined pre-conviction detention. There is no compensation for the time period the accused spent in jail. There is no such law authorizing an unlimited detention period prior to conviction. Section 344 of Cr.P.C also does not speak about the time period of detention during the course of the trial.

In cases covering the death penalty accused persons are awarded and executed death punishment though they have remained in pre-conviction detention for a long period. If an accused person has been awarded a sentence of imprisonment he can be given benefit under section 382-B but there is no such provision in the case if an accused is awarded death punishment. Insertion of section 382-B shows that the

legislature intends that there should have been no injustice with the accused but the implementation of that idea is incomplete due to the non-existence of any such provision for the guidance of judicial officers though it can be inferred from certain principles and provisions.

Detention is a Taazir punishment, which cannot be imposed for a crime until proven. Sentence of capital punishment awarded to the accused that already has remained under custody amounts double jeopardy as no justification can be given regarding his detention time period.

Recommendations

- i. Death sentences for the accused persons who remained in detention should not be awarded
- ii. Those accused who have been awarded death sentences that should not be executed
- iii. Guidelines should be given to the judicial officers
- iv. Amendments should be incorporated into the relevant laws and the benefit of the time period passed in jail should also be given to the accused involved in the offences covering capital punishment

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