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PROCEDURAL JUSTICE AND THE RIGHT TO A FAIR TRIAL IN PAKISTAN

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Dedication

I dedicate this thesis to the last Prophet Muhammad (peace and blessings be upon him) who Allah (SWT) describes in the Quran as "And you (stand) on an exalted standard of character" (68:4) and "You have indeed in the Messenger of Allah a beautiful pattern (of conduct) for anyone whose hope is in Allah and the Final Day, and who engages much in the praise of Allah." (33:21)

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Declaration

I declare that this thesis is my original work. Information and excerpts obtained from other sources have been duly acknowledged and cited. Some parts of this thesis have been used for conference papers and will be submitted for publication. However, this thesis or any part of it has not been submitted for an award of a degree at this or any other university.

Abstract

The study examines how the current tapestry of procedural justice in Pakistan is contrary to the principles of fair trial, as envisaged by Article 10-A of the Constitution of Pakistan, read with Article 14 of the International Covenant on Civil and Political Rights. It underlines the elements of procedural laws and the roles of their regulators that the policymakers must consider for the reforms beyond conventional and domestic settings of the legal system in Pakistan. This study has imminently been required after the United Nations Human Rights Committee has repeatedly rejected the excuse of judicial backlog and characterized procedural delays as a violation of the right to a fair trial since its inception. By ratifying the ICCPR, Pakistan has pledged to guarantee the right to a fair trial as a fundamental right under the Constitution (Eighteenth Amendment) Act 2010, which thus obligates it to revamp its legal framework to adjudicate disputes consistent with the newly incorporated Article 10-A. One of the fundamental elements of the right to a fair trial is the settlement of disputes without unreasonable delay. This meticulous discourse necessitated the analysis of how procedural justice without essential features such as a statutorily mechanized framework of the case-flow management, effective cost imposition, and supporting non-adversarial settlement etc., for dispute resolution impacts the right to a fair trial and deters those vulnerable and oppressed from access to justice, with no end of their hardships in sight. The Constitution and ICCPR envision a statutorily backed procedural scheme that ensures prompt and equal access to justice. The legal codes and court procedures of the colonial era remain largely intact despite changes in the social, legal, and economic landscape of the country. This has led to poor rankings in international human rights indices, which intensifies the desire for reform. The

thesis aims to address the issues of procedural justice that reflect on the right to a fair trial and create a socio-legal void in the given jurisdiction.

Contents

Abbreviations

ADR	Alternate Dispute Resolution
ATA	Anti-terrorism Act 1997
CCI	Council of Common Interest
CELE	Centres of Excellence for Legal Education
CJCC	Criminal Justice Coordination Committees
CJP	Chief Justice of Pakistan
CJS	Criminal Justice System
CMLA	Chief Martial Law Administrator
CPC	Code of Civil Procedure 1908
Cr.PC	Code of Criminal Procedure 1898
DNA	Deoxyribonucleic Acid
DW	Defence Witness
ECHR	European Convention on Human Rights 1950
ECtHR	European Court of Human Rights
EIC	East India Company
FIA	Federal Investigation Agency
FIR	First Information Report
FSC	Federal Shariat Court
FSL	Forensic Science Laboratory
HEC	Higher Education Commission
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights 1966
JIT	Joint Investigation Team

JJS	Juvenile Justice System
JOP	Justice of Peace
LA&JA	Legal Aid and Justice Authority
L&JCP	Law and Justice Commission of Pakistan
NAB	National Accountability Bureau
NEC	National Economic Council
NFC	National Finance Commission
NWFP	North West Frontier Province
OSD	Officer on Special Duty
PBC	Pakistan Bar Council
PBUH	Peace be upon him
PCO	Provisional Constitutional Order
PIL	Public Interest Litigation
POPA	Protection of Pakistan Act 2014
PPC	Pakistan Penal Code 1860
PW	Prosecution Witness
RPD	Reclamation and Probation Departments
SCBA	Supreme Court Bar Association
SHO	Station House Officer
SJC	Supreme Judicial Council
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCTOC	United Nation's Convention against Transnational Organized Crimes
UNDP	United Nations Development Programme

UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Committee
UNO	United Nations Organization
UNODC	United Nations Office on Drugs and Crime
USAID	United States Agency for International Aid
WGAD	Working Group on Arbitrary Detention
WP	West Pakistan

Glossary

Adalat	A Court to administer justice for disputes
Al-Fatawa al-Alamgiriyah	A Collection of *Sharia* laws created in the 1660s-70s to govern the *Mughal* Empire
Ameen	Faithful and trustworthy
Badl-i-sulh	A property, right or money payable for compromise to the victim/heirs by the offender
Baqiat-al-Salihat	Published record of the courts' judgments from the year 1550 to 1850 A.D.
Caliphate	Islamic institution with title of *caliph*, as politico-religious successor to Islamic prophet (PBUH)
Chief Qazi	Chief Justice
Darbar	A Persian term used for the court
Daroga-i-Adalat	Chief Judge of *Sadar Nizamat Adalat*
Darshan	An occasion to see a holy person or the image of a deity
Dasturul-am'l	The Ordinances and administrative manual for welfare of people issued by *Mughal* Emperor
Diwan	A powerful minister designated by the *Mughal* Emperor
Diwani	The rights of revenue collection given to the Company by *Mughal* Emperor
Diwan-i-khas	A Red Fort's hall in Delhi where *Mughal* Emperors received courtiers and state guests
Diwan-i-Khas-o'Am	A Hall of private audiences built in 1648 and used by Emperors as chamber for reception

Diyyat	The compensation to be paid by the offender to the victim for causing hurt
Fadak	A place in Saudi Arabia
Huquq-ul-ibad	The rights of human beings
Imam-i-Adil	A self assumed title of the *Mughal* Emperor Akbar which means highest rank cleric
Jharoka	A classical Indian architecture of a stone window in upper story towards the open space
Jirgas	An assembly to settle disputes by tribal leaders under traditional social codes in Pakistan
Khulafa-e-Rashidin	"Rightly guided or perfect," a term is used for the early four *caliphs* of Muslims
Kotwal	A term in *Mughal* Administration substituted by Station House Officer (SHO) in British regime
Lok Adalat	A statutory organization for ADRs in India
Mahzarnamahs	Collection of higher courts' pronouncements regarded as infallible in Aurangzeb's era
Majlis-e-Shoora	Parliament
Moffussil	A rural subordinate divisions in a district separated for farming areas
Mofussil Diwani Adalat	Courts of Collectors empowered in 1772 to decide all the civil cases
Moulvi	A teacher of religious doctrines in Islam
Muftis	Muslim experts empowered to issue religious rulings
Mughal Sultanate	*Mughal* Empire between 16th and l8th Centuries in India

Nazim	Governor of a state alternatively designated as *Subahdar* in the *Mughals* Empire
Pagods	A coin of gold then worth three of rupees used in seventeenth century in British India
Pargana	A cluster of villages or a subdivision in India
Pundits	Experts to give opinions before court in cases involving Hindus in British India
Qazi	A judge who administers Islamic law
Sadaqah	Charity in Islam as a kind and virtuous deed
Sadar Diwani Adalat.	Court of Governor-in-Council hearing appeals against *Muffosil Diwani Adalat* in British India
Sadar Nizamat Adalat	A superior court in British India assisted by a Chief *Mufti* and three *moulvis*
Salisan	Arbitrators
Shahi Farmans	The legislative commands issued by Emperors
Shariah law	Islamic legal system
Shaster	The law applicable to Hindus and substituted by the Regulations of 1793
Subahadar	Governor of a State in *Mughal* era
Sultan	Emperor
Sultanate	A state governed by a Sultan (Emperor)
Sunnah	Acts, sayings, and silent permissions by Prophet Muhammad (PBUH)
Surat	*A* city used as seaport in the *Mughal* Empire

Tazir	A discretionary punishment under Islamic Law when not prescribed by Quran or *Sunnah*
Ulemas	Islamic scholars
Ulima-e-Hind	The leading Islamic scholars in India
Vakil-e-Sarkar	Government or state lawyer
Vakil-e-Shara	*Shariah* lawyer in the sub-continent
Wali	Guardian
Wazir	A political consultant and government minister
Zabtah	Promulgation of laws/rules applicable to all inhabitants during the regime of Alamgir
Zamindari	A system of landholding for revenue collection in
Zillah judge	District Judge
Zinjir-i-adl	Chain of justice

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Punjab Civil Courts Ordinance 1962

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Punjab Criminal Prosecution Service (Constitution, Functions, and Powers) Act 2006

Punjab Government Rules of Business 2011

Punjab Judicial Service Rules 1994

Punjab Police Rules 1934

Punjab Government Rules of Business 2011

Punjab Local Government Ordinance 2022

Punjab Police Rules 1934

Punjab Witness Protection Act 2018

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Sindh Judicial Service Rules 1994

Sindh Witness Protection Act 2013

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Chapter 1 : General Introduction

1.1 Background of the Study

> The Court, as a neutral arbiter, must not lose sight of the fact that long delays in deciding matters do not sit well with the right to a fair trial and due process guaranteed as a fundamental right under Article 10-A of the Constitution.[1]

The right to a fair trial has widely been recognized by almost every jurisdiction, albeit many of them often refrain from practising it in true perspective.[2] Adherence to the principles of fair trial safeguards all the suspects and defendants against arbitrary judicial proceedings, by solidifying greater confidence of the public in a particular legal system and, in turn, ensures the rule of law. The constitutional courts of Pakistan have, therefore, held that expeditious fair trial is a fundamental right[3] and the delays in disposal of cases and imparting justice may reduce the confidence of public in the judicial system, which may eventually cause frustration and anguish.[4] The timely hearing of cases in criminal, civil, and other cases primarily refers to the duration of a trial from the institution of proceedings to their final determination and execution of the judgment.[5] The object of criminal prosecution is not to punish under-trial prisoners for the alleged offence, as the accused could not be detained for an indefinite period without remedy of trial. Excessive delays in the examination of a

[1] *Mrs Shagufta Shaheen v The State* [2019] SCMR 1106, [8]
[2] Scheinin M, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism' [2010] A/HRC/ 6/17/Add.3.
[3] Constitution of Islamic Republic of Pakistan 1973, art 10-A.
[4] *Shabbir Ahmad v the State* [2021] YLR 1392
[5] *Scopelliti v Italy* [1989] ECHR 15511/89; Legal Digest of International Fair Trial Rights, 130

civil claim also render the right of access to a court as meaningless. To uphold the fundamental requirements of Article 14 of the ICCPR, the delay ought not to be disproportionate unless justified by specific and exceptional circumstances. This thesis will examine how the multifaceted anomalies and intricacies of procedural justice in Pakistan cause delays in the courts and thereby undermine the right to a fair trial and access to the court and justice. The thesis explores the impact of procedural barriers on the right to a fair trial as guaranteed by Article 10-A of the 1973 Constitution of Pakistan, read with Article 14 sub-articles (1) and (3) (c) of the International Covenant on Civil and Political Rights (ICCPR) 1966, to erode public confidence in the justice system.

1.2 Contextualized Overview in the International Perspective

The ICCPR requires State parties to abide by the right to a fair trial.[6] Although the standards for overarching right to a fair trial are complex, they are interlinked to ensure the safe administration of justice. The right to a fair hearing by an impartial and independent tribunal is explicitly applicable to both criminal and civil proceedings.[7] The United Nations Human Rights Committee (HRC) calls upon the State parties to respect the provisions of the ICCPR regardless of their domestic legal traditions and laws. [8] Therefore, discretion should not rest with traditional domestic laws that denigrate the essential contents of the Covenant guarantees. It provides procedural guarantees concerning the right to a fair trial and assumes a pivotal role in dispensing substantive justice. Thus, it significantly underlines the need for procedural justice which ensures prompt remedy to redress the grievances of litigants and helps achieve

[6] Covenant on Civil and Political Rights (ICCPR) 1966, art 14
[7] ibid.
[8] UN Human Rights Committee General Comment 32, 2007, para 4

the objectives of fair trial. Without observing the universally recognized right to a fair trial, the administration of justice is destined to lose its credibility and effectiveness.[9] Article 14 (1) of the ICCPR reads as follows:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Article 14 (3) (c) of the ICCPR reads as follows:

> In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to the following minimum guarantee, in full equality….(c) to be tried without undue delay;

The right to the conclusion of trial "without undue delay" by a competent, independent, and impartial court of law enunciates the right to a hearing within a reasonable time. The underlying rationale of this guarantee rests on the proverbial maxim that "justice delayed is justice denied."

It is pertinent to point out that the United Nations Human Rights Committee (HRC)[10] termed the common excuse of judicial backlog of cases as flimsy, and rejected such an

[9] *H v France* [1989] ECHR 17; Bottazzi v Italy [1999] ECHR 62; UN Human Rights Committee CCPR, (2007) General Comment 32, para 35

[10] A body to monitor implementation of ICCPR by the State parties.

explanation by the transgressing state arising from undue procedural delays.[11] State parties are responsible for governing their legal systems in a manner that ensures the hearing of cases by independent and impartial courts without undue delay. This enables their domestic courts to impartially and independently comply with the requirements of Article 14 sub-articles (1) and (3) (c) of the ICCPR.[12] The only excuse for the temporary backlog would be effective measures adopted to address the issue, and the delay in adjudication of cases on account of systemic failure cannot be condoned.[13] Therefore, there are no two opinions that the growing frequency of violation of the ICCPR in this regard is a serious threat to the rule of law in a particular legal system when procedural delays occur without any effective remedy to the litigants.

The principle of a fair trial is a distinctive hallmark of the Universal Declaration of Human Rights (UDHR) 1948, which plainly delineates such a right of a speedy trial before an impartial and independent court of law.[14] It includes the right of a lawyer of one's choice, even without cost in some of the eventualities. The principle contains numerous safeguards to minimize any miscarriage of justice. The right to conclude court proceedings "without undue delay" is also of paramount importance to the European Court of Human Rights (ECtHR) 1950.[15] It also enjoins upon the State parties to ensure that the cases are heard within a reasonable time. The purpose of these provisions of international instruments is to guard against the state of uncertainty by preventing unnecessary delays in court proceedings and ensuring protection to all

[11] *Stogmuller v Austria* [1969] ECHR 25, para 5.
[12] *Nogolica v Croatia* [2006] ECHR 1050, para 27; *Horvat v Croatia* [2001]ECHR 488, para 59.
[13] *Cited in Kudła v Poland* [2000] ECHR 512, para 160
[14] The Universal Declaration of Human Rights 1948, art 10
[15] Nuala Mole, and Catharina Harby, *The Right to a Fair Trial* (2nd edn, Council of Europe 2006) 24

parties against excessive delays stemming from cumbersome procedures. The Supreme Court of Pakistan gave its endorsement to the European Convention on Human Rights (ECHR) 1950 for its persuasive value. It stressed the importance of liberally interpreting laws to extend "maximum benefits to the people" and to maintain uniformity with other nations.[16] Article 6 (1) thereof reads as under:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The Convention underlines the importance of administering justice without unreasonable delays by an independent and impartial tribunal established by law, as deviation from the above-referred principle might eventually jeopardize its credibility and effectiveness.[17] Article 6 (1) requires State parties to govern their relevant legal systems in a manner that enables the courts to comply with the requirements of a fair trial. A delay in a particular case, as a practice, inconsistent with the afore-mentioned provision contravenes such a right [18] guaranteed by Article 6 (1). It essentially requires that the litigants must have an effective judicial remedy to assert legal rights they seek to enforce.[19]

[16] *Al-Jehad Trust through Habibul Wahab Al-Khairi Advocate and 9 others v Federation of Pakistan through Secretary, Ministry of Kashmir Affairs, Islamabad and 3 others* [1990] SCMR 1379
[17] *Bottazzi v Italy* [1999] ECHR 62
[18] *Nait-Liman v Switzerland* [2018] ECHR 112
[19] *Al-Dulimi and Montana Management Inc v Switzerland* [2016] ECHR 131

The ICCPR is a primary document, and Article 14 specifies the meaning and extent of the right to a fair trial.[20] Paragraph 3 (c) of Article 14 of the ICCPR has further unequivocally envisaged that a trial without undue delay, is an essential element of a fair trial.[21] The salutary principles of fair trial also include a right for timely judgment by tribunals/courts. When the courts decline to examine the allegations of procedural safeguards culminating in delays, they considerably limit access to a fair trial.[22] The Human Rights Committee regards the right to be heard within a reasonable time by an independent tribunal as critical for the right to a fair trial.[23] A State party also cannot justify delays in the judicial process on the pretext of a lack of resources.[24] For all practical purposes, it is binding upon the State parties to bring a person before the court of law without undue delay, and all the judicial proceedings, including appeals that arise from those proceedings, must be promptly adjudicated upon and reached their logical end.[25] What qualifies as 'unjustified delay' is based on the circumstances of each specific case, taking into account complexity of the case, the conduct of the authorities, and the implications for the accused, including their custody status, health, gravity of the charges, and quantum of penalties.[26] While the ICCPR provides key guarantees to protect procedural fairness, its normative connections to legal proceedings prevent the unjust restrictions of basic freedoms such as the right to life and liberty. Article 14, in particular, prioritizes the fundamental right to a fair trial over justice itself, as the outcomes of fairness are deeply intertwined with the dispensation

[20] UN Human Rights Committee, General Comment 32, U.N. Doc. CCPR/C/GC/32 (2007), para7.
[21] Ibid, para 8.
[22] Ibid, para 27; Also cited in *Hermoza v Peru*, Communication No 203/1986, UN Doc CCPR/C/34/D/203/1986 (1988), para 11.3
[23] *Ofner and Hopfinger v Austria* [1963] ECHR 78, para 46.
[24] Former Special Rapporteur on Counter-Terrorism, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, (A/63/223), General Comment 32, para 14 and 35.
[25] UN Human Rights Committee (n 20) para 49.
[26] Ibid, para 16.

of substantive justice, which is the most basic human right.[27] Therefore, the incorporation of such rights into procedural justice of Pakistan is not just a state obligation but a significant step towards a more just society. Robinson J. was particularly concerned about adding to the minimum guarantees contemplated by Article 14 of the ICCPR, providing a strong foundation for the protection of basic freedoms, and was of the view that:

> … the 'bundle of rights' in Article 14 (3) is not an exhaustive list of those rights; it comprises 'minimum guarantees' to which 'everyone' is entitled 'in full equality. 'Other rights may be added to the list, provided they share the essential characteristics of the seven rights in the bundle, that is, they are rights designed to ensure that an individual has the right to a fair hearing guaranteed by Article 14 (1) of the Covenant.[28]

This flexibility allows the ICCPR to adapt to changing legal landscapes and evolving human rights issues. Article 9 (2) of the ICCPR requires that anyone arrested be promptly informed of the reasons for arrest. Issuing a criminal charge is a precursor to Article 14 (3), and delays in bringing a defendant to trial or lengthy pre-trial detention may breach the afore-referred ICCPR provisions. If violations of the right to detention are sufficiently egregious, they may compromise the ability to hold a fair trial.[29]

[27] Susan Trevaskes, Elisa Nesossi, Sarah Biddulph, *The Politics of Law and Stability in China*, Edward Elgar Publishing Cheltenham UK and Northampton MA, 2014) 3.
[28] *Jadhav Case, India v. Pakistan* [July 2019] ICJ 2(vi), Declaration of Robinson j.
[29] Sarah Biddulph, Elisa Nesossi, Flora Sapio and Susan Trevaskes, 'Criminal Justice Reforms in the Xi Jinping Era' (2017) China Law and Society Review 2 (1) 63–128.

The concept of a fair trial varies depending on the circumstances and cannot be outlined by a single unvarying rule.[30] International human rights bodies assess the overall fairness of the proceedings. Suppose a specific aspect of the trial "without unreasonable delay" is violated in a way that significantly impacts its fairness. In that case, the domestic court operating under the given procedural laws can assume the responsibility only after the state has determined and addressed the procedural defects.[31] Even if solitary procedural defects would not have made the proceedings unfair, the combined impact of multiple defects causing delay could still violate the right to a fair trial.[32] Article 14 of the ICCPR aimed to ensure the right to a fair trial, and recognition of such a right marked a significant milestone when the United Nations General Assembly (UNGA) finally endorsed it. It guides State parties on how to uphold human rights in a manner that ensures equitable and just treatment for everyone by the law. Consequently, after ratifying Article 14 of the Convention, Pakistan is obligated to ensure that its domestic laws comply with international legal obligations.[33] This necessitates a comprehensive review of the procedural laws enacted in the colonial era.

All three organs of the state must consider not only the standards outlined in relevant international treaties but also how these standards may be implemented in the local legal system. The practical implications of the customary status of the right to a fair trial are also significant because customary rules are obligatory for all states,

[30] Clooney A and Webb P,*The Right to a Fair Trial in International Law* (Oxford University Press Oxford 2021) 10, citing ECtHR, Guide on Article 6 of the Convention - Right to a Fair Trial (criminal limb) 30.
[31] Ibid, citing ECtHR, Celebi v. Turkey [2020] App. No. 27582/ 07, 51.
[32] Ibid.
[33] Muhammad Abdullah Fazi, Enforced Disappearances and Constitutional Guarantees in Pakistan: A Human Rights Perspective, (May, 2020) European Journal of Social Sciences, 59 (3) 288-299

irrespective of their status as parties to a treaty.[34] For instance, the UN Working Group[35] initially cited the ICCPR in all cases, even when a state had not ratified the ICCPR, based on the argument that nearly all of the provisions of the ICCPR had attained customary international law status. However, the UN Commission on Human Rights asked the Working Group in 1996 to apply the ICCPR only to states that are parties to the ICCPR, due to strong objections from certain governments particularly that of Cuba. [36] In its current opinions, the Working Group indicates whether the state is a party to the ICCPR, but it still invokes the ICCPR in cases involving non-party states and also relies on the Universal Declaration of Human Rights. The adoption of the right to a fair trial in various international treaties is strong evidence that these rights have achieved the status of customary international law on the basis that it constitutes extensive state practice as well as evidence of *opinio juris*.[37] The right appears in all the major human rights instruments concluded by the UN as well as regional organizations and features in the statutes of all international criminal courts.[38] Even states not party to the ICCPR have enshrined fair trial rights in their domestic legislation.[39] The UNHRC clarified that making a reservation about the right to a fair trial in Article 14 of the ICCPR would not be compatible with the Convention's object.[40] Domestic criminal trials may function in different ways. For instance, in many countries, investigators are often required to gather both incriminating and exculpatory evidence, pre-trial questioning of witnesses can be more extensive, and defendants may be less likely to be able to

[34] R v. Jones [2006] UKHL 16, 23 - 36 per Lord Bingham.
[35] Working Group on Arbitrary Detention (WGAD) is a body sanctioned by the United Nations to investigate the cases of arbitrary arrest and detention.
[36] Clooney (n 30) 14
[37] A legally binding custom
[38] Clooney (n 30), p. 5
[39] Ibid, p. 14. Citing examples of China (Arts 125– 126 of the Constitution on public hearing, right to defence, and judicial independence), Saudi Arabia (Arts 38 and 46 of Basic Law of Governance and Chapter 6 of the Law of Criminal Procedure (Royal Decree No M/ 39), and the UAE (Arts 25 and 28 of the Constitution on equality before the law, right to counsel and presumption of innocence)
[40] Ibid, p. 17 citing UN Human Rights Committee, General Comment No. 32 (2007) para 5.

represent themselves.[41] However, international standards for fair trials apply across all legal systems, regardless of their traditions. UNHRC clarified that State parties may, in no circumstances make exceptions to Article 14, and if they do so, it would mean an action violating fundamental principles of international human rights law.[42]

1.3 Constitutional Paradigm in Pakistan

There is no denying the fact that the observance of the principles of a fair trial in many jurisdictions cannot be characterized as foolproof for a variety of reasons. Pakistan, being no exception, became the signatory of ICCPR on 17.04.2008 and ratified the Covenant on 23.06.2010.[43] Article 10-A was incorporated[44] in the Constitution to ensure a fair trial and due process for the determination of civil rights and obligations, or any criminal charge against a person. Thus, the right to a fair trial has now become a fundamental right guaranteed to everyone in Pakistan. Although there is no definition of the right to a fair trial in the Constitution, a reference to various international human rights covenants may serve the purpose of outlining the essentials for what constitutes a 'fair trial.' Article 6 of ECHR embraces the basic standards required for a 'fair trial' which includes both civil and criminal cases to be decided within a reasonable time.[45] The jurisprudence on the meaning of a 'fair trial' is progressively developing in Pakistan, and the right to a fair trial is now constitutionally guaranteed

[41] Ibid, p. 12 citing its ch. 4 s. 6 (Right to incriminating and exculpatory material); ch. 8, s. 2 (Origins and Rationale of the Right to Examine Witnesses), ch. 7 s. 1 (Introduction), ch. 5 s. 9 (Right to Self-Representation).
[42] UN human Rights Committee, General Comment No. 29 (2001) para 1.
[43] UN, 'Reporting Status for Pakistan' [2021] <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=PAK&Lang=EN> accessed 1 December 2023.
[44] The Constitution (Eighteenth Amendment) Act 2010, s 5
[45] ICCPR 1966 (n 6) art 14

and well entrenched in the legal system of the country by the addition of Article 10-A in the Constitution which provides as follows:

> Right to fair trial: For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.

1.4 The Procedural Crisis: Myth and Reality

Although such a constitutional provision has guaranteed the 'Right to a Fair Trial' to the citizens of Pakistan, an oft-repeated concern of the people of the region is the failure of their legal system which prevented prompt dispensation of justice to them,[46] resulting in ever-increasing backlog of litigation involving human rights desecrations. The current situation has fostered widespread corruption and rampant red-tape culture, as the prevalent litigating process is excessively tedious and time-consuming.[47] It is based on complex and cumbersome procedures, preventing the enforcement of human rights as guaranteed by Article 10-A of the Constitution of Pakistan. The absence of three procedural elements, i.e., a statutorily institutionalized supplementary mechanism for non-adversarial resolution of disputes, imperatively predetermined effective cost liability system for litigation in non-competitive socio-economic divisions, and strategies of case-flow management, have rendered the procedural laws in the courts of ordinary jurisdiction as inefficient and inefficacious. The available procedural mechanism often entails dilatory tactics prompting unnecessary multiple miscellaneous and interlocutory matters while the main

[46] Upendra Baxi, 'Courage, Craft and Contention: The Indian Supreme Court in the Eighties' (NM Tripathi 1985).
[47] Mohammad Afzal Zullah, 'Human Rights in Pakistan' (Commonwealth Law Bulletin 1992) 1343.

controversial issues are put aside.[48] The affordability of the citizens in Pakistan is significantly lower compared to those in developed countries. The average age of contested litigation in Pakistan can often last for 4 to 5 years.[49] The procedural laws provide opportunities for delaying tactics to be employed through adjournments without any material progress by those with socio-economic capital. The given legal system inevitably leads to an increased cost of justice for average-income citizens and consumes a lot of their time. Thus, most people in Pakistan are unable to bear the cost of litigation for the enforcement of their basic human rights. Those who are economically exploited tend to give up their cause under litigation or compromise on less favourable terms.[50] They often succumb to victimization beyond proportion and relinquish their claims. Such a phenomenon incredibly impinges upon the constitutional safeguards[51] unambiguously calling upon the state to shield its people against socio-legal injustice.[52] It reflects poorly on the right to a fair trial, hinders equal access to justice[53] for the underprivileged, and further compounds socio-legal imbalance as a common experience.[54] The Supreme Court of Pakistan has, therefore, observed that:

> It is now over 73 years since we attained independence, with a great many sacrifices, but even the standard set by foreign rulers is not met and the betrayal of the people continues. And, it seems that with every passing day the

[48] *Hibbatul Mannan Khalid Omar and Others v District Judge, Lahore and Others* [2009] PLD 76. Also chapters 4, 5 and 6 minutely discuss the relevant provisions that can impede the progress of trials at various stages.
[49] Osama Siddique, 'Case law Management in Courts in Punjab: Frameworks, Practices and Reform Measures' (Punjab Access to Justice Project 2016) 39.
[50] Noel Semple, 'The Cost of Seeking Civil Justice in Canada' [2015] CBR 639.
[51] *Ashoka Kumar v Union of India* [2007] 4 SCC 397
[52] Constitution 1973 (n 3) art 2-A
[53] ibid, article 25 guarantees equal protection of law and equality before law.
[54] *SP Gupta v President of India* [1982] AIR (SC) 149.

> situation deteriorates further…. We are constrained to observe that this unjustifiable delay in the submission of investigation reports (challans) also vitiates the fundamental rights of 'fair trial and due process' which the Constitution of Islamic Republic of Pakistan guarantees in its Article 10-A.[55]

The Superior Courts of Pakistan have further pointed it out from time to time in the following manner:

> Miscellaneous and interlocutory matters sometimes take months and years for their decisions, leaving the main controversial issues aside. Such fragmentation of the matters and piecemeal decisions obviously result in delaying the decisions upon real controversies at the cost of inconvenience to the parties and wastage of valuable time of the Courts. Such practices and tendencies of course need to be curbed.[56]

The procedural laws to administer justice, replete with complexities, as mentioned above, militate against the expeditious and transparent dispensation of justice. The situation has undoubtedly been made worse because of the apathy and lack of concern by the other two state organs, i.e., the executive and the legislature. They breached the constitutional order in a manner that disparages their mandate to enforce the human rights enshrined in the Constitution.[57] The legislatures abdicated their duty to enact the procedural laws to simplify the existing ones fraught with complexities as pointed out by the superior courts of Pakistan. The approach of the

[55] *Amjid Khan v The State* [2021] SCMR 1458.
[56] *Hibbatul Mannan Khalid Omar* (n 48).
[57] For example, Constitution 1973 (n 3) arts 8 to 40.

executive also does not conform to the human rights recognized by the Constitution and ICCPR since there are many flaws in the discharge of their quasi-legislative mandate and procedural mechanisms for implementing the procedural codes.

The multifaceted procedural intricacies, anomalies and obscurities in procedural justice causing delays in the dispensation of justice undermine the rule of law. Such a predicament adds enormously to the distress among the oppressed when gross infringements of fundamental rights by the state itself go unchecked by the ordinary courts. The legislature plays a crucial role in improving the judicial system to ensure that justice is served to all while adhering to Article 10-A of the Constitution of Pakistan, read with Article 14 sub-articles (1) and (3)(c) of the ICCPR. Therefore, the superior courts of Pakistan also took some of the atypical measures to address grave violations of human rights. Considering the predicament emanating from the tedious procedural justice, they started to have recourse to the Public Interest Litigation (PIL) in a purposeful manner. Such a format of litigation allowed a *bona fide* representation in matters of public importance and provided some hope for relief to the oppressed. This alternate legal mechanism could not provide sufficient safeguards against all the violations of human rights[58] and is not robust enough to combat the scourge confronting impoverished strata in an all-encompassing manner. A person with bona fide representation may invoke the jurisdiction of superior courts in PIL only for the relief concerning a public injury,[59] and the legal principle would not be pressed into service when such a fundamental human right sought to be enforced turned out to be

[58] *Farooque v Government of Bangladesh* [1996] 1 BLC 189-219.
[59] *Al-Jehad Trust* (n 16).

a private one.[60] It is also noteworthy that such jurisdiction in the PIL is discretionary in nature.[61] It is not available to the courts of ordinary jurisdiction altogether. The Supreme Court[62] often declined to exercise such jurisdiction despite apparent violations of individual fundamental human rights.[63] More so, the exercise of such extraordinary jurisdiction by the superior courts may have far-reaching implications and may "choke the courts," as was observed by the Supreme Court of Pakistan in the case of *Tariq Saeed*.[64] Thus, the PIL cannot be an alternative to the prevalent adversarial legal system as it forms a patent departure from the principles of a fair trial in the courts of ordinary jurisdiction. Therefore, the situation warrants research-based drastic procedural reforms in the regulatory mechanisms of procedural justice in the adversarial system of Pakistan.

A National Judicial Policy[65] was enforced in the year 2009, when there was a tremendous amount of backlog of litigation before the courts in Pakistan. The policy was conceived with the paramount object of best possible utilization of the internal regulatory structure of the judiciary to clear such backlog deterring the enforcement of fundamental human rights of people, but without plugging loopholes of the procedural framework. The policy, therefore, did not work, nor did the agony of the poor and vulnerable subside when the volume of their litigation concerning basic human rights

[60] *S. Holicow Pictures Pvt. Ltd v M/S Prem Chandra and Ors* [2008] AIR (SC) 149.
[61] *Wukala Mahaz Barai Tahafaz Dastoor v Federation of Pakistan* [1998] PLD (SC) 1263, 1300-01.
[62] The Supreme Court of Pakistan, the Federal Shariat Court and five High Courts.
[63] *R & M Trust v Koramangala Vigilance Group and Others* [2005] AIR (SC) 894.
[64] *Tariq Saeed v Derector Anti-Corruption Establishment* [1996] MLD 1864.
[65] National Judicial Policy, 'Law and Justice Commission of Pakistan' <https://www.supremecourt.gov.pk/downloads_judgements/all_downloads/National_Judicial_Policy/NJP2009.pdf> accessed 1 December 2023.

was further inflated,[66] leading to a perception such legal system is based on procedural justice meant to hear only high profile cases while the other cases of weaker segments have been kept pending; a phenomenon that Merry characterized as low-status cases.[67] Such an outlook adds to the frustration among the downtrodden litigants who feel that they have to fight an impossible battle for a fair trial to seek enforcement of their rights. Given the situation, it appears that there is a dire need to revamp the procedural justice of Pakistan for safeguarding the fundamental right of a fair trial, in view of the concerns expressed by the Supreme Court and in light of the principles as enunciated by Article 10-A of the Constitution read with Article 14 sub-articles (1) and (3)(c) of ICCPR.

A detailed account of the above analysis clearly suggests a contextualized socio-legal gap with its fallout to exclude the possibilities of fair trials in a country with a population of 241 million approximately. The procedural obstacles, as pointed out by the Supreme Court of Pakistan,[68] call for imminent research to address the situation that is greatly contributing to creating authoritarian governance. Such a procedural justice in derogation to the principles of a fair trial is responsible to bring about a socio-legal imbalance. This academic research of practical importance will review the socio-legal vacuum to benefit the elites where the weak sections of society can barely have access to justice. It will further go on to underpin the factors responsible for the failure of such mechanism where the poor, women, and minorities hardly find the opportunity of a fair trial by the independent courts, particularly when the legal

[66] Tariq Butt, '1.87 Million Cases Pending in Pak Courts' (The News International, Islamabad 23 July 2020) <https://www.thenews.com.pk/print/268487-1-87-million-cases-pending-in-pak-courts> accessed 1 December 2023.
[67] Sally Engle Merry, *Getting Justice and Getting Even Legal Consciousness Among Working Class Americans* (UCP 1990) 14-15.
[68] *Hibbatul Mannan Khalid Omar* (n 48).

proceedings initiated by or against them are, by and large, marred by inordinate and intolerable delays. The paramount objective of the research thesis is to figure out ways and means to address the imbalance so that the courts of ordinary jurisdiction may serve as a countervailing force to the negative attributes, culminating in blatant violations of the principles of fair trials.

1.5 Normative Relativism under the Islamic Ideology

The 1973 Constitution introduced various provisions to inculcate Islamic values in Pakistani society. It declares the country as the Islamic Republic[69] and terms Islam as its state religion.[70] The Objectives Resolution was passed by the Constituent Assembly in March 1949, but it was finally made part of the Constitution in the year 1985.[71] The resolution provides that sovereignty over the universe belongs to Allah, and the chosen representatives would exercise their powers as a "sacred trust." It further provides that the principles of democracy, equity, freedom, social-economic and political justice, and tolerance, as pronounced by Islam, shall be observed. Under the "Principles of Policy," as embodied in Chapter 2 of the Constitution, the measures shall be taken to enable the population to live according to the rules of Islam and to promote it.[72] The Constitution further requires that the existing laws should be reconciled with the Islamic injunctions[73] and provides for establishing a Council of Islamic Ideology to make recommendations to the *Majlis-e-Shoora* (Parliament) as to how the existing laws can be reconciled with the commands ordained by the Islamic

[69] Constitution 1973 (n 3) art 1 (1)
[70] ibid, art 2.
[71] Inserted new Article by the Revival of the Constitution of 1973 Order 1985 (PO No. 14 of 1985).
[72] Constitution 1973 (n 3) art 31.
[73] ibid, art 227.

religion.[74] The Federal Shariat Court is empowered[75] to examine whether or not any law or provision of law is repugnant to any of the Injunctions of Islam, as laid down in the Holy Quran and the *Sunnah.*[76] Therefore, it becomes essential to analyze the comprehensive legal safeguards concerning the fundamental principles of the right to a fair trial under the Islamic legal system.

The Islamic justice system has provided all the fundamental principles of a fair trial for more than 1400 years that are available in any other most advanced legal system across the globe. It is a manifestation of humanely most civilized justice structures which is potentially cost-effective and carries more lasting effects than any other conventional legal systems.[77] The concept of justice in Islam is not limited to its followers but is meant for humanity across the world.[78] It enjoins the Islamic society not to be unjust, and no one should fear injustice. It is a fundamental obligation under Islamic law to treat everybody with fairness and justice.[79] Islamic law has recognized the principles of a fair trial, including those prohibiting arbitrary arrest, unlawful interference in the private lives of the people, self-incrimination, unwarranted spying of others, and coercion, etc. The fundamental right to a fair trial in a speedy manner by independent and impartial judges is guaranteed under Islamic jurisprudence. Aurangzeb, the famous Muslim King of India, directed to try all the criminal cases without delay and sent the prisoner for trial on a daily basis.[80] The Islamic legal

[74] ibid, art 228.
[75] ibid, art 203.
[76] The acts, sayings, traditions, practices and silent permissions by the holy prophet Muhammad (PBUH) which are followed by Muslims as a model.
[77] Carrie Menkel-Meadow, 'The Restorative Justice: What is it and Does It Work' (2007) 3 ARLSS 161.
[78] Theo Gavrielides, 'Restorative Practices: From the Early Societies to the 1970s' (2011) IJC.
[79] Syed Abul A'laMawdudi, 'Human Rights in Islam' (Islamic Foundation, 1977) 19.
[80] Muhammad Munir, 'The Administration of Justice in the Reign of Akbar and Awrangzeb: An Overview' (Journal of Social Sciences 2012) 7

principles include the right to '*Diyyat*'[81] and safeguard its followers against miscarriage of justice as a basic right of every human being. God enjoins justice upon humanity without prescribing procedures and provides all-encompassing general guidelines for the purpose. The Quranic text "[a]nd when two of you commit indecency, punish them both"[82] refers to the authority of the States to prescribe the procedures for disseminating justice for all offences to be regarded as *ta'zír*. The Lord of Universe has not fixed means to obtain justice, nor does he require invalidating a particular method that may lead to speedy justice.[83] Therefore, all means, procedures, and methods that facilitate, refine, and advance the cause of justice and do not violate Islamic Law are valid. Islam has strictly prohibited detention without prima facie evidence against the accused and has discouraged arrest unless he is convicted for imprisonment by the court. Once he has been detained to answer the case against him, he has every right to get a speedy fair trial. The obligation to dispense complete justice in Islam is absolute and is not subjected to limitations. Islam has provided standards of fair trial irrespective of the status of parties, be they Muslims or non-Muslims, concerning a dispute. The Quran commands that:

> Oh ye who believe! Be steadfast in the cause of God bearing witness in equity; and let not a people's enmity incite you to act otherwise than with justice. Be always just, that is nearer to righteousness. And fear God. Surely God is aware of what you do.[84]

[81] The compensation determined by the court to be paid by the offender to the victim for causing hurt.
[82] Quran 'Surah An-Nisa - 4 Verse 16.
[83] Qaradawi, Yusuf, 'Madkhal li-Darasah al-Sharia al-Islamiyya' 177.
[84] The Quran, Surah Al-Ma'idah 5 Verse 8

It is not far-fetched to explain that Islamic teachings bring about complete integration in all the spheres and planned development in all the faculties of justice sector. It sanctions all acts and omissions of conduct which are regarded as moral and spiritual, let alone material. The primary sources of Islamic law provide a complete code of regulating all aspects of humanity and do not make any distinction at all. It treats all the human community without discrimination as envisaged in the following verse of the Quran:

> Verily, God commands you to make over the trusts to those entitled to them, and that, when you judge between men, you judge with justice. And surely excellent is that with which God admonishes you! God is All-Hearing, All-Seeing.[85]

The afore-quoted emphatic verse makes it incumbent upon all those concerned for the determination of disputes to ensure a fair trial in the judicial process so that there ought not to be any resentment or a sense of misery and privation.

The judges have been commanded to perform their duties impartially. There are many recorded instances when the judges adhered to complete independence, even against the heads of the Islamic Caliphate. Caliph Umar had issued strict commands to his governors for refraining from interfering with the judicial process and to ensure the independence of courts.[86] The caliphs Umar and Ali had made unstinting submissions to the verdicts of judges given against them. After the demise of Holy Prophet

[85] The Quran, Surah An-Nisa-4 Verse 16
[86] Ata ur Rehman, 'The Concept of Independence of Judiciary in Islam' (2013) 4 IJBSS 70.

Muhammad (peace be upon him),[87] the *Khulafa-e-Rashidin*[88] consistently followed his practice.[89] Caliph Abu Bakar respected supremacy of the law, and even decided a case about the garden in *Fadak*[90] against Fatima, the real beloved daughter of Muhammad (PBUH).[91] A civil dispute cropped up between the second caliph Umar and Ubayy ibn Ka'b. When the parties appeared before *Qadhi Shuraih* and he adjudged the matter against Caliph Umar, he submitted to the decision with no exception.[92] There was no change in the regimes of last two Caliphs (Usman and Ali) as they upheld supremacy and independence of the judiciary.[93] Such a dignity of the judicial officers was only a manifestation of their impartiality, which Islam fully preserved since its inception to establish, of course, the best practices for the right to a fair trial. It is worth remembering that all this was laid down, scrupulously observed, and acted upon more than fourteen hundred years ago. It is to be regretted that some of the high standards set up in Islam have not been uniformly observed during later periods, but the eagerness with which Muslims are anxious to re-establish Islamic values is a reassuring augury in this regard.

1.6 Hypothesis

Pakistan ratified ICCPR with reservations that the provisions of Articles 3, 6, 7, 18, 19 and 25 shall be so applied to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan and the *Sharia* laws." However, no reservation was expressed for the ratification of Article 14, and the right to a fair trial was enforced as a

[87] Peace be upon him.
[88] Arabic term which means the "Rightly Guided or "Perfect", such term is invariably used for the early four caliphs of the muslims.
[89] Rehman (n 86).
[90] A place in Saudi Arabia
[91] Rehman (n 86) 73.
[92] ibid.
[93] ibid, p.72

fundamental right by incorporating Article 10-A in the Constitution of Pakistan.[94] Therefore, Pakistan has now committed to enforce it in the procedural laws.[95] The Covenant recognized the right of the parties to have their trials concluded within a reasonable time by competent, impartial, and independent tribunals.[96] Such a pre-requisite of impartial trial without undue delay stands embedded as a fundamental right in the Constitution of Pakistan.[97] The Supreme Court of Pakistan has interpreted the constitutionally recognized right to a fair trial by acknowledging the intention of legislature to "give it the same meaning as is broadly recognized and embedded in jurisprudence..."[98] The term "reasonable time" colloquially known as "speedy trial" is liable to be distinctly reckoned with; in view of the circumstances from case to case.[99] The superior courts of Pakistan have declared that speedy trial is an inalienable right of every citizen"[100] yet cautioned that the "speedy trial should never be at the cost of procedure."[101] The principle of binding nature[102] so established by the apex court patently denotes that procedural justice, despite its complexities and imperfections, prevails over Article 14 of the ICCPR, which calls for speedy trials in Pakistan. The procedures are meant to help the administration of justice and not to frustrate the dispensation of substantial justice with due promptness and the right to a fair trial to the oppressed litigant public, as was recognized by the Supreme Court. Being cognizant of the critical situation, Kaikaus, J had observed that:

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[94] The Constitution (Eighteenth Amendment) Act 2010 (n 44) s 5.
[95] UN, [2022] 'UNTC' <https://treaties.un.org/Pages/ViewDetails.aspx? chapter=4&clang=en&mtdsg_no=IV-4&src=IND#EndDec> accessed 3 December 2023; Pakistan in Violation of International Human Rights Obligations. <https://defence.pk/pdf/threads/pakistan-in-violation-of-international-human-rights-obligations.169893/> accessed 3 December 2023).
[96] ICCPR 1966 (n 6) art 14
[97] The Constitution (Eighteenth Amendment) Act 2010 (n 44) s 5.
[98] *Suo Motu Case No. 4 of 2010* [2012] PLD 553(SC).
[99] Reema Umer, 'Myth of Speedy Justice' (Daily Dawn, April 1, 2019) <https://www.dawn.com/news/1473197> accessed 3 December 2023.
[100] *Himesh Khan v The National Accountability Bureau (NAB) Lahore* [2015] SCMR 1092.
[101] *Tahir Ali v The State* [2015] P.Cr.L.J 869.
[102] Constitution 1973 (n 3) art 191.

> I think that proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their right. All technicalities have to be avoided unless it is essential to comply with them on the ground of public policy.... Any system which by giving effect to the form and not to the substance defeats substantive rights … is defective to that extent.[103]

Chief Justice Haleem, in his landmark judgment in *Benazir Bhutto's case*,[104] while relying upon another case of *Bandhua Mukti Morcha*,[105] characterized the prevalent legal system as "a mimic battle" which involves rigid rules of evidence and procedure. He stood persuaded to hold that such a stringent Anglo-Saxon system, no doubt, occasioned serious miseries to the poor litigants for the redress of their grievances inasmuch as no access to justice for the oppressed, in essence, amounted to the denial of Justice.

Conversely, enacting special laws for the expeditious resolution of cases demonstrates a lack of trust in the customary procedural laws in Pakistan. For instance, the Anti-Terrorism Act of 1997 provided for a "speedy trial of heinous offences" and made it mandatory for the courts to conclude the trials within the impracticable time frame of seven days.[106] It even lost sight of mandatory safeguards for the fair trial to which the accused is entitled.[107] The special legislation mandated to overcome the phenomenon of delay in procedural justice and catered to only one dimension, but that too entailing

[103] *Imtiaz Ahmad v Ghulam Ali* [1963] PLD 382 (SC).
[104] *Benazir Bhutto v Federation of Pakistan* [1988] PLD 416 (SC).
[105] *Bandhua Mukti Morcha v Union of India* [1984] AIR 802 (SC).
[106] The Anti-Terrorism Act 1997, s 6.
[107] *Allah Din v Special Judge Anti-Terrorism Court No 1, Lahore* [2008] PLD 74 (HC).

prejudice for the other dimensions of a fair trial, which cannot be countenanced. Even the Supreme Court has held that although the sentencing of an offender is the province of judiciary, a person accused of the most gruesome and heinous offence cannot be deprived of his right to a fair trial and inherent dignity.[108] A similar situation faces the litigants in their civil cases, and a significant amount of time, as well as a big chunk of their hard-earned wealth, is squandered in the absence of some elaborate mechanism and adequate legal provisions to resolve their disputes peacefully.[109] The tedious format of the litigation involving highly complicated procedural requirements and blatant scope for delay is beyond the comprehension of ordinary people. Procedural justice without a statutorily mechanized framework of the case-flow management, effective cost imposition, and supporting non-adversarial system generates a large proportion of false and frivolous litigation by those with socio-economic capital, compared with a small quantum of genuine litigation pending adjudication.[110] It helps perpetrate treachery and injustice, and prevents access to justice for the poor.[111] Such fabricated litigation is often either entirely false or supplemental to the claims already instituted by the parties.[112]

1.7 Research Questions

For the afore-going in view, one may aptly question whether the prevalent procedural justice in Pakistan is the raison d'être to tell on the enforcement of proverbial legal maxim of "justice delayed is justice denied." Although a speedy trial is an inalienable

[108] ibid.
[109] *Ali Raza alias Peter v State* [2019] SCMR 1982.
[110] C L Aggarwal, 'Laws Delay and Accumulation of arrears in the High Courts' (1978) 7(1) JPCI 41.
[111] G M Khan, 'Speedy justice- how?' (1988) Pakistan Legal Decision, XL, 228.
[112] M S Shah, 'Peshawar Solutions to Case Flow Management' (The Law and policy reform at the Asian Development Bank: Challenges in implementing access to justice reforms, Michigan, United States, 2005).

right, it cannot be at the cost of procedure.[113] There are many such instances identifying the object of procedural laws to administer justice instead of the right of speedy disposal of a case. It may be pertinently noted that procedural laws are enacted through ordinary legislation, however, speedy justice by the independent courts has universally been given recognition as a fundamental right, as discussed above. The delays in trial often deprive the accused of liberty without getting an opportunity to defend him/her and are also inconsistent with the principle of presumption of innocence of the accused unless held guilty. It eventually fails to minimize the uncertainty confronting the accused and the probability of removing the stigma flowing from the accusation set forth against him. Hence, the foremost component of speedy trial by the independent courts serves the purpose of public interest guaranteed by the Islamic law, ICCPR, and the Constitution of Pakistan; and its breach is a notion of its abuse in the Islamic state. It, therefore, becomes imminent to examine possibilities for the simplification of legal procedures by removing their technicalities to eradicate the factors derogating from the right to a fair trial. It also requires a comprehensive review of the factors responsible for foiling the attempts to do away with the procedural complexities that culminate in the cumbersome and time-consuming judicial proceedings and deter the poor from approaching the administration of justice. Those complexities and technicalities of procedural justice, in turn, even compromised the independence of courts and created a yawning socio-legal gap in Pakistani society. Those procedural technicalities serve no other purpose than to be exploited for indefinitely continuing trials in a contumacious and unbecoming

[113] *Tahir Ali* (n 101).

manner.[114] The excessively complex and torturous procedural laws of Pakistan date back to the colonial era and are largely being misused to prolong the litigation.[115] Such complex and cumbersome procedures cultivate corrupt behaviour in society to defeat the prospects of a speedy fair trial.[116]

It, therefore, appears an opportune time to examine procedural justice through long impending research about a legal system that is replete with technicalities derogating from the right to a fair trial. Procedural vivification has become a prime consideration for the redress of grievances.[117] It calls for a comprehensive review of the procedural dimensions and the roles of key players responsible for frustrating the attempts to remove anomalies in procedural justice, which discourage the poor from benefitting from the administration of justice and create a vast socio-legal gap. The inordinate delays due to the procedural justice in the legal system of Pakistan result in the breach of the right to a fair trial under Article 10-A of the Constitution read with Article 14 sub-articles (1) and (3) (c) of the ICCPR, and renders the right of access to the court as meaningless. The proposed research study will, therefore, explore as to:

1. What factors have caused multi-faceted anomalies in procedural justice system of Pakistan?

[114] A Lone, 'Responsibility of the Bench and Bar in Dispensation of Justice' (National Judicial Conference, Islamabad, 2011).
[115] Mahmood Ahmad Ghazi, 'The Role of Judiciary in the Promotion of a Culture of Tolerance' (the International Judicial Conference, Islamabad, 2006)
[116] R Blue, H Richard, and L A Berg, 'Pakistan Rule of Law Assessment Final Report' (USAID 2008).
[117] World Bank, 'World Development Report' (World Bank Publications 2002) 7 <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fdocuments1.worldbank.org%2Fcurated%2Fen%2F228361468140407049%2Fpdf%2Fmulti0page.pdf&clen=1354358&chunk=true> accessed 3 December 2023.

2. How do these anomalies bring about delays and undermine the right to a fair trial, as recognized by the Constitution of Pakistan and the ICCPR?

3. What procedural reforms may address these anomalies of procedural justice and contribute to the enjoyment of the right to a fair trial?

1.8 Research Methodology

To guide this research thesis, I will use the comparative research methodology as a roadmap. I will use existing analytical material to develop the theory and expand discourse analysis for the research questions. This approach mainly focuses on analyzing the primary sources, i.e., statutory provisions of law, judicial statements, and the secondary sources of relevant philosophical work. This strategy will uncover all the relevant literature to ensure the consistency and uniformity of this dissertation. This research primarily relies on the functional method of comparative research, which is known for its creative and boundary-pushing approach.[118] It should define various levels of the comparison on the eve of this comparative research, in that; such elements provide a correct understanding of the subject. For instance, the study of divorce, from the intercultural perspective, requires an understanding of the role of the families and general attitudes in the societies for a broader comparison.

The present research study aims to respond to the questions that involve critique to consolidate the narratives for comprehension of "law in the context" of procedural justice in Pakistan. It will examine the historical development of procedural justice in Pakistan across different time periods and compare it with the contemporary

[118] Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing 2014) 81-82.

requirement of a fair trial. The comparative research methodology will schematize the issues by understanding their implications from a broader perspective. It is, indeed, an attempt to find a toolbox with no immutable methodological character through case-oriented approaches by applying comparative research.[119] The object of this thesis is to categorize an explicit organizational scheme by identifying various assertions free of obscurities and overlapping facets by employing both primary and secondary sources. It involves the relevant procedural statutes and statements of the judiciary in addition to those of academia, government officials, lawyers, and researchers to analyze and construct qualitative research. It will conclude with solid proposals to reform regulatory components mandated to make the domestic procedural laws coherently efficient. The comparative methodology is always instrumental in harmonizing diverging circumstances in the various legal systems. Patrick Glenn[120] has been an exponent of comparative law as a discipline for learning knowledge and information about law elsewhere and essential understanding thereof to reconcile multi-faceted legal doctrines for the improvement of domestic law. This helps address explanatory propositions from the developed legal systems, which contain procedures for controlling administrative legality, as was underlined by John Henry Merryman.[121]

When particular research of the given character by a legislator or an academic unfolds the focussed object of its project to improve a legal system, mere import of solutions from foreign jurisdictions, at times, does not work due to differences of "law in the context". Hence, a thoroughly contextual approach with comparative research may help inquire into the extent of legal evolution in the country. It will also help find some

[119] M Adams and J Bomhoff, *Practice and Theory in Comparative Law* (CUP 2012) 279-301.
[120] H Patrick Glenn, 'The Aims of Comparative Law' in J.M. Smits (ed), *Elgar Encyclopaedia of the Comparative Law*, (Edward Elgar 2006) 57.
[121] JH Merryman, 'Comparative Law and Scientific Explanation' (1999) KLI 81.

parallel comparisons of the developments experienced in other commonwealth countries in general.[122] There may be a possibility that while comparing the domestic rules of a particular country like Pakistan, a conflict between modernity and traditions between the West and major other sections of the population may follow. Therefore, the anthropological outlook for comparative research turns out to be crucial by putting the law in context for rendering explanations to find solutions by understanding this tension.

There is no hard and fast principle concerning the comparative methodology to be essentially followed. It becomes relevant in view of the doctrinal comparative research that can effectively cope with the paradox in the existing model of the legal system in Pakistan and the globalization of the legal procedures for dispensing fair trials. As such, it also becomes fundamentally significant to compare Pakistan's domestic procedural justice with some other common law countries, most notably India. This comparative research is based on the appraisal of procedural justice with the domestic laws in the local context, following the recognition and introduction of the right to a fair trial guaranteed by the Constitution of Pakistan in terms of Article 14 ICCPR. Such a study enables us to enter into discussions on the common law countries using English as their official language[123] to complete the task in a befitting manner. Although translated work of the legal texts in other non-English jurisdictions is available for comparison, it largely covers only legislations without always following the changes incorporated therein. Therefore, it may not be safe to refer to such work unless its

[122] M Antokolskaja, 'Comparative Family Law: Moving with the Times?' in E. Orucu & D. Nelken (eds), *Comparative Law. A Handbook* (Hart Publishing 2007) 241.

[123] It will help only limit the comparative research to the countries for the persuasive authority, with a caution that such comparison among the English language common Law countries may not create some false impression as to its universality.

latest well-elaborated version, along with correct interpretations and recent changes, becomes available and understandable. This work will also attempt to exclude the risk of involving those legal cultures that are not familiar with our national legal culture. It will have a bearing on customary law and religious concepts in the context of domestic procedural law, as well as international law, and the obligations of the nation at the global level. It is significant to grasp the socio-legal fabric of Pakistan for ameliorating the destiny of common citizens, and for that matter; one also needs to take stock of the socio-legal repercussions of procedural laws in the contextual perspectives. For the purpose of research based on the law in context, a comparison of the prevalent theories and their practical manifestation is liable to be minutely taken into account by identifying the problems and exploring their solutions. A broader scale of comparison that may transcend the borders of a single system may offer information that is more reliable than many others and comparable to domestic research.[124] This will be a means to the end for outlining the complexities of procedural justice in Pakistan and eventually leading to the outcomes of this scholarship.

Many associations, journals, and other academic forums were formed /initiated in the nineteenth century for the review of comparative legislation with a greater emphasis on comparing the rules in different societies. However, more attention was later given to the judicial decisions to examine the way various legal problems could be resolved in practice.[125] The comparative research shall evaluate the primary sources, i.e., relevant legislation and case law, and when no direct reference of case law on some legislative instrument is available or there are divergent views in the case law to

[124] A Meuweseand M Versteeg, 'Quantitative Methods for Comparative Constitutional Law' in M Adams and J Bomhoff, *Practice and Theory in Comparative law* (CUP 2012) 230.
[125] G Samuel, An Introduction to Comparative Law Theory and Method (Hart Publishing 2014) 81.

denigrate the doctrinal concept, the secondary sources i.e., research books and articles in the law journals on the subject will come handy. Similarly, this research work shall also explore electronic databases, including online journals and websites, to find out the relevant literature for comparison of procedures to support the thesis. The proposed research will explain the ground realities confronting the litigant public to examine how procedural justice in Pakistan impinges upon the right to a fair trial. The national and international press (newspaper articles) are also useful sources for the literature review to ferret out the historical and sociological perspectives, establish socio-legal imbalance, and find solutions to plug the loopholes, which will help curb the existing gap. This will greatly hinge upon the research focus and available sources, and will guarantee a foolproof feasibility of the research design under consideration. The comparative analysis with "law in the context" under the functional method approach does not appear risky as it will safely work for the comparison of domestic laws in terms of the legislations, case law, and research work of the other neighbouring jurisdictions in particular and other common law countries in general, for better insight and practical solutions. However, while carrying out comparative research, one cannot lose sight of basic understanding and careful examination of sociological inquiries in those countries besides comparison of legislations and case law, etc.

The proposed scholarship shall not be confined to only the black letter analytical method for the rules of procedural justice in legal systems; rather the method of law in the context will take into consideration the way law works in the domestic doctrinal theories in the legal procedure of Pakistan. It will not be isolated from other contemporary and complementary methods to grasp societal problems. "Law in the

context" approach primarily aims at the understanding of law and explains to a foreigner why the law, "as it is", exists in a particular legal system. Such an explanation of institutional context will reveal the deficiencies that may influence the underlying problems. One cannot turn a blind eye to the fact that, at times, the case law does not offer the correct analysis of the law in a particular society when such law for procedural justice becomes obsolete in modern jurisprudence. Courts serve as the hospitals of social illness; therefore, their decisions are liable to be complemented by socio-legal research offering the correct picture of a living society.

1.9 Structure of the thesis

Comparative legal analysis in the institutional contexts of different jurisdictions may be vital to explaining the differences in legal practices and, more particularly, elucidating the repercussions of procedural justice on the socio-legal plight of the nation. It is appropriate to briefly discuss the main assertions to be embodied in the various chapters of the thesis concerning the socio-legal terrain of Pakistan so that the challenges of procedural laws in the local context may explicitly present the turmoil confronting the country.

Chapter 1 has discussed the right to a fair trial as a recognized fundamental right with its meaning in the context of universally recognized connotations, now embedded in the jurisprudence of Pakistan, with its pre-requisites under Article 14 sub-articles (1) and (3) clause (c) of the ICCPR, to hold trials without unnecessary delay by the independent courts. It underlines that the delay in trial is not consistent with the rationale underlying the right to a fair trial, for it downplays the presumption of innocence of an accused along with the likelihood of delay in removing the stigma

emanating from those accusations. The institutionalized practice of delay is tantamount to the abuse of the right to a fair trial. Many special laws in Pakistan promise speedy trials, but they deny numerous other rights, including restrictions on the right to bail, etc., in derogation of the right to a fair trial. The discussion further explores how the right to a fair trial is upheld in Islamic law as against the legal system of Pakistan with its convoluted and complex methods that often result in procedural injustice. It not only jeopardizes the fair trial but also impinges upon the constitutional provisions, Islamic jurisprudence, and international law on the subject.

Chapter 2 will scrutinize the historical perspectives entailing significant obstacles to ultimately affect procedural justice. It will highlight how the sovereign authorities in the pre-colonial and colonial eras contributed to authoritarian governance and enacted procedural laws contrary to the modern concept of fair trial. This Chapter is relevant for responding to the question of the multifaceted factors that brought about anomalies and obscurities in procedural justice in Pakistan. The given study, ranging from the pre-colonial to the post-colonial periods, cannot lose sight of the forthcoming analysis since it will outline how the various dimensions of the legal system under consideration were evolved and bequeathed by colonial rule. The debate will culminate in the incompatible socio-legal milieus of the afore-referred periods, and the ensuing consequences turning upon the procedural laws which deviate from the contemporary trends as contemplated by Article 10-A of the Constitution read with Article 14 of the ICCPR. This Chapter will help move on to the analysis of how the multipurpose evolution of the legal characteristics of procedural justice, adopted by Pakistan, prejudices the fundamental right of fair trial; and how it deters full realization thereof despite constitutional recognition for dispensing justice by the independent

and impartial courts without undue delay. Such a study of the peculiar chronological events and their impact on the genesis of the present experience will establish why the legal procedures would not yield results envisaged by the Constitution and ICCPR to serve the interests of the victim, the accused, and society at large. It will further make out the patent reasons why and how procedural justice in vogue failed to ensure the right to a fair trial without undue delay by the independent courts after the creation of Pakistan. It will refer to a litany of legal procedures that violated the right to a fair trial and thereby occasioned socio-legal imbalance in Pakistan.

Constructive relationships among the three organs, i.e., legislature, judiciary, and executive, are essential for securing the independence of the judiciary and the effective enforcement of the constitutional provisions, including that of the right to a fair trial. However, the character of relationships among these organs had experienced friction in the post-colonial, chequered constitutional history of Pakistan. Chapter 3 will identify, in particular, how pervasive uncertainty, as a result of such friction, in the democratic dispensation badly reflected on the independence of judiciary, and prevented these organs from tackling the issues of procedural justice. It will review the impacts of constitutional developments on judicial independence and the right to a fair trial in Pakistan. It will further analyze the lingering uncertainties as regards the independence of judiciary, which inhibited a balanced approach and harmonious working for structural and procedural reforms to secure the right to a fair trial. Their failure to strengthen the administration of justice, notably through a fair trial system, could not ensure social legitimacy. The adverse effects of extra-constitutional and dictatorial measures, and the subsequent failure of various constitutional roles post-independence, to be detailed in Chapter 3, have severely compromised the judiciary's

independence and hindered the reform process of procedural justice for a fair trial. The study will establish that the persistent lack of social legitimacy, as a pressing issue, is a direct consequence of the poor performance and inaction of the various constitutional institutions assigned with their relevant roles by the state.

Chapter 4 will dilate on a theoretical debate on how the notions of Procedural justice involve administering justice in a fair manner that is satisfactory to all parties involved. This requires making well-informed decisions and ensuring that resources are allocated fairly during the resolution process. This study will emphasize that people's attitude toward those in authority is a fundamental component of procedural justice. When individuals have a positive outlook towards those administering justice, they are more likely to feel empowered, valued, and treated fairly. On the other hand, they may feel helpless and perceive the treatment they receive as unjust if they have a negative attitude. The research will reveal that people's perceptions of neutrality, trust, and social standing also influence their judgments about procedural justice. A legal system is seen as legitimate when it leads to greater compliance with the law. One way in which procedural justice can lead to the perception of legitimacy is by promoting the feeling of social inclusion, which can moderate the relationship between a legal system and its perceived legitimacy. The popular will can overrule the viability of the institutional justice that deprives the masses of the right to a fair trial through inordinate delays resulting from wearisome procedures. Such a phenomenon catalyzes the only rational choice to follow the utilitarian outlook for the protection of the common good. The analysis will establish that the utility of a legal system largely depends upon social legitimacy, which is currently lacking in the procedural justice inherited by Pakistan. The constitutional focus on procedural justice ensuring a fair trial can only help alleviate the

miseries of people at the grassroots level. For this purpose, procedural justice presupposes strong institutional regulatory mechanisms like non-adversarial tools to supplement the adversarial legal system, an effective case-flow management system, and the mandatory cost mechanism in a non-competitive socio-economic division. Therefore, the jurisprudential context calls for the collaboration of legislature, executive, and judiciary to effectively accomplish the aforementioned task of the fair trial under the Constitution to achieve social legitimacy.

Chapter 5 will identify the procedural anomalies in the administration of justice that consume enormously long durations and statutorily arise out of multiple discretionary powers sanctioned by the colonial rulers and adapted by the country. The authority so vested is enervated by procedural issues causing enormous judicial delays and is closely associated with the judges and lawyers, which needs immediate redress. This study will point out the foremost reasons for the delay in the justice sector, which primarily relate to its inability to ensure stringent measures and its incapacity to adhere to the principles of fair hearings. It also includes the non-attendance of witnesses at the stage of evidence and the grant of unnecessary adjournments for the miscellaneous applications in utter disregard to the constitutional provisions. In comparison, there are also other causes of some import that include a lack of judges' training and case management skills to speedily dispose of the suits and appeals, including those against preliminary decrees, etc. These procedural delays entail concerns of the public, which now reach alarming levels, and often, the situation is lamented to a magnitude that it turns out to be a source of eroding public confidence in the administration of justice in Pakistan. In this chapter, the research will spell out those principles for conflict resolution that the judiciary needs to follow for the

enforcement of the right to a fair trial by timely disposal of the cases. It becomes imperative to safeguard the poor litigants against unnecessarily protracted litigation, causing exorbitant legal costs due to the torturing procedural traps.

Chapter 6 will delve into procedural dissemination of the administration of justice at both macro and micro levels. The macro level deals with the overall structure of society and its needs, while the micro level focuses on individuals and their relationships. The lapses in procedural laws in criminal trials have rendered prosecution before criminal courts unreliable. Justice is not only delayed by the parties and their proxies; the active but imperfect roles of investigation and prosecuting agencies in gathering and assessing evidence also crucially contribute to the dilemma even before the start of the trial. They decide how to weigh the reliability of evidence before the courts assess its credibility in the final adjudicatory analysis. In the given adversarial system, following the investigation, the lawyers representing the contestants predominantly handle the creation of discourse during the trial. In this scenario, the role of trial judges is restricted to deciding whether the evidence collected by the faulty pretrial process and presented before them is legally proper, admissible, and believable. This chapter will evaluate the characteristics of procedural justice in Pakistan, which have many similarities to other common law jurisdictions but differ from modern global standards on several counts. The parties often rely on the doctored evidence, consisting of the tutored witnesses, as their primary source. Such a legal system does not promise the scope of examining the factors that lead to failed prosecutions on a case-by-case basis through an autonomous entity with legislative sanction. The lack of capacity for social integration of first offenders, the need for a well-defined coordinating role among the primary components of the criminal justice

system (investigation, prosecution, and adjudication), and the absence of proper case flow management further worsen the situation. Chapter 6 will urge revamping the employed process through legislative and quasi-legislative measures, which may ensure compliance with all the pre-requisites of the right to a 'fair trial and due process' guaranteed by the ICCPR and Constitution of Pakistan.

Chapter 7 will provide a comprehensive understanding of how to deal with the vacuum that operates to end-users' disadvantage. It will establish how a lack of institutional cooperation would de-contextualize the reform process for a fair trial. It will emphasize a consolidated review of procedural justice by involving all components of the justice sector from a socio-legal perspective. The extensive comparative research will be based on the debate for local dispute resolution and examine the ham-fisted methods of procedural justice that deter a fair trial. These logical explorations will be directed to the lopsided roles assumed by the policy-makers and operators of procedural justice, who are content with the perpetuity of injustice owing to their institutional inabilities, shallowness, and lack of cooperation. It will thrust upon the impending institutional collaboration of those policy-making institutions to initiate viable recommendations in line with the proposed framework concerning procedural reforms through primary and secondary legislation. It will induce the auxiliary roles of the statutory institutions, including those of the Law and Justice Commission of Pakistan and the Pakistan Bar Council, to remove the procedural barriers. It will also thrash out the scope of "Public Interest Litigation" for revamping procedural justice in Pakistan. It will further explore how socially relevant, high-quality legal and judicial education plays a crucial role in jurisprudential development to bring about procedural reforms that align with the fundamental right to a fair trial and due process.

Chapter 8 will conclude the analysis concerning procedural justice adversely impacting the right to a fair trial in Pakistan due to its colonial legal architecture. It will sum up the evaluation concerning its far-reaching socio-legal repercussions. It will consider the conceptual and normative legal structures and their interplay within the constitutional limitations by evaluating and comparing International law and Pakistan's Constitutional law. The analysis will work out the ways and means, with logical justifications and perceptions, to purge the procedural mechanism of those obstacles for realizing the objectives as envisaged by Article 10-A of the Constitution. The purpose of the proposed research is to distinguish those deficiencies in the procedural justice of Pakistan, which poorly reflect on the enforcement of the right to a fair trial, by conceptualizing the law in the context. This chapter will help conclude the findings and recommendations based on the analytical comparison of the theories, narratives, and perspectives derived from foreign and local sources, along with rationalities and possibilities for future directions.

Chapter 2 Procedural Justice in Pre-Colonial and Colonial Eras

2.1 Introduction

This research is based on procedural justice, which does not ensure the right to a fair trial, as incorporated in the Constitution of Pakistan,[126] and eludes speedy justice. It requires a comprehensive analysis of the given legal system since its inception. Such research cannot yield the result without taking into consideration the genesis and evolution thereof, and peculiar historical circumstances that entailed socio-legal imbalance, circumvented constitutional democracy, militated against the independence of judiciary, and thwarted the legal institutions from carrying out the task of developing procedural justice consistent with the concept of a fair trial under Article 10-A of the Constitution of Pakistan read with Article 14 of the ICCPR. This chapter will also delineate the factors that have caused multi-faceted inconsistencies and anomalies in Pakistan's procedural justice system. Such a meaningful historical analysis will identify the impact of prior events on the ensuing experience in the current legal system. The study of the country's legal history of procedural justice becomes pertinent and imperative to outline how the legal institutions came into being, operated, and changed over a period of time because of several economic, political and social factors. It will draw a comparison of those factors that influenced the formulation of existing laws, procedures, and the behaviour of legal actors. It will help determine the glaringly distinguishable present-day experiences of Pakistan from those conditions that brought about a gap in procedural justice. It will further establish why the regulatory components of an outdated

[126] Constitution 1973 (n 3) art 10-A

procedural justice need to be revamped to provide a mechanism ensuring speedy justice by the independent courts for the enforcement of the right to a fair trial in Pakistan. Before analyzing the procedural justice in vogue, it will take stock of the developments till to-date, to seriously question its efficacy in the following chapters.

Many of the procedural reforms the *Mughal* and British regimes put in place in their judicial system are intact in Pakistan. This critical analysis will, *inter alia*, examine the concept of sovereignty that was in vogue, in conjunction with the status of the *Shariah* law.[127] It will also minutely consider the other means in *Mughal* reign to address public grievances. It naturally explicates the influence of their administration of justice on the British regime. Their rule is often characterized as a despotic one to treat the subjects with iron hands, and seriously transgress the principles of a fair trial. This study will establish that some of the traits of procedural justice laid a foundation for the legal reforms, and those rules were subsequently recognized and incorporated by the succeeding British rule.

2.2 Historical Background

At the very outset of the present research on procedural justice defeating the right to a fair trial in Pakistan, it is crucial to examine the profound influence of the *Mughal* Empire on the colonial administration. This historical analysis underlines the factors that shaped procedural justice in the colonial legal system, later inherited by Pakistan. The regulatory components passed down from pre-colonial and colonial rules perpetuated the autocratic culture of *Mughal* and post-*Mughal* rules, which

[127] The Islamic legal system based on the Quran, actions and sayings of Prophet Muhammad (PBUH), consensus of Islamic scholars and rulings of the Islamic jurists.

continues to significantly impact the current procedural scheme and undermines the right to a fair trial. It is, therefore, essential to trace all those sequential events decipherably linked with the following discourse to comprehend the overall research project and the hypothetical arguments I will need to add to my thesis.

Zahiruddin Babar[128] became the founder of the Muslim *Mughal* Empire in 1526, and his dynasty ruled the Indian sub-continent unless it progressively fell to the British Crown, who formally took it over by the year 1857.[129] The principles introduced by the *Mughal*s for administering justice were a blend of Persian, Arabic, and indigenous elements.[130] The absolute legislative, executive, and judicial authority vested in the *Mughal* emperors who were once regarded as the shadow of God in the monarchy.[131] They enjoyed the sovereign authority of legislature and were regarded as a fountain of justice, without any checks on their actions. An emperor was considered to be above the law. Although there was a *Wazir* or *Diwan*[132] and also other hierarchies, including Chief *Qazi* (Chief Justice), who would attend the court of emperor in *Diwan-i-khas*,[133] none of them had the authority to control the royal commands. Their role was advisory but they could not have dissenting views against the one-man rule even when the judgments of the emperors were based on conjectures. The edicts of Emperor were conclusive and binding on all and sundry.[134] Such a scenario was absolutely in contrast with the principles of separation of powers in the three pillars of a modern state i.e. legislature, executive, and judiciary. Absolute control of civil and military

[128] Founder and first emperor of the Mughal Empire, born in Uzbekistan on 14. 02. 1483
[129] Muhammad Munir, 'The Administration of Justice in The Reign of Akbar and Awrangzeb: An Overview' (2012) 5 JSS 3.
[130] ibid.
[131] Abdul Aziz, *The Mughal Court and Its Institutions*, Vol II (Al Faisal Publishers 2002) 1
[132] A powerful minister belonged to elite family and so designated by the Mughal Emperor.
[133] A hall in the Red Fort of Delhi where Mughal Emperors received the courtiers and state guests.
[134] Munir (n 129).

affairs was altogether inconsistent with, of late, manifestation of the rule of law and democratic values in modern societies. The perceived threats to life and territory were the dictated considerations for them to evade the principles of a modern welfare state and their administration was an epitome of totalitarianism.[135] The undefined rules for succession to the throne entailed a tremendous amount of uncertainty in the hearts of those emperors, who were prone to consolidate and expand their kingdom and were also confronted with the potential threat of rebellion. The personal greed among those closer to the Emperor and their questioned loyalties to the throne deterred the king from encouraging wider public participation in his purview of absolute authority.[136] Conversely, the democratic values and canons of fair trial deprecate the concentration of power in the hands of one authority, arbitrarily proclaiming judgments without uniform procedural laws while amassing complete legislative, judicial, and executive authority. They support the devolution of powers at the grassroots level so that an individual can easily access their representatives at a domestic level. The nature of the state under the *Mughal*s was designated as a *Sultanate*[137] under the throne of Delhi, and the *Sultan*[138] was head of the state. The Sultans professed themselves as the representatives of the Muslim *Caliphate*. The legislative commands then issued by the Emperor were called *Shahi Farmans*,[139] to constitute a legal order in the Indian sub-continent and had the semblance of the legislative orders. Many modern democratic systems signify a tinge of such legislative authority when they promulgate laws

[135] Sir Jadunath Sarkar, *Mughal Administration* (3rd edn, MC Sarkar & Sons, Ltd 1935) 17.
[136] ibid.
[137] Merriam Dictionary, 'A state governed by a Sultan' (Emperor) <https://www.merriam-webster.com/dictionary/sultanate> 1 December 2023 accessed 1 December 2023.
[138] Merriam Dictionary, 'A king and Muslim sovereign' <https://www.merriam-webster.com/dictionary/sultan> accessed 1 December 2023.
[139] Mamoona Yasmeen and Muhammad Zia-Ul-Haq, 'Farman-I Shahi: A Legislative And Administrative Tool Of The Mughal Empire In India' [2019] Islamic Studies. <file:///C:/Users/malik/Desktop/Chapter%202%20material/Legislative%20Tools%20in%20Mughal%20Empire.pdf> accessed 1 December 2023.

through Ordinances for some limited period. The President of the United States often unilaterally issues such executive orders, for instance, the travel ban by Donald Trump in 2021.[140] In Pakistan, such legislative command called an Ordinance, may last for 120 days and is further extendable for another term of a similar period. The National Assembly is empowered to repeal such an Ordinance.[141] Unlike modern democracies, which divide the state functions into three pillars, i.e., the legislature to enact the laws, the judiciary to interpret the laws, and the executive to implement the laws, the *Shahi Farmans* never followed any such constitutional dispensation to formulate, abrogate, abolish and supersede a law.

2.3 Lopsided Procedures

The *Mughals*' hailed from Central Asia, a renowned seat of religious learning at the time of their arrival in India.[142] Therefore, almost all the *Mughal* emperors enforced *Shariah* Laws in the Indian subcontinent. Chief *Qazi* (Chief Justice), appointed by the emperor, was given the extraordinary task of giving unstinting and unqualified accession to the proclamation of the emperors like Akbar, on Friday's religious congregation[143] until the year 1579, when Akbar wanted to be unconditionally recognized as *Imam-i-Adil*[144] (highest rank cleric). He misinterpreted religious matters to reinforce his status as a just ruler. He assumed the uncompromising power of the supreme arbiter in the event of any conflict on religious issues.[145] He was resisted by

[140] The Guardian, 'Joe Biden Reverses Anti-Immigrant Trump Policies Hours After Swearing-In' (2021) (https://www.theguardian.com/us-news/2021/jan/20/biden-immigration-reform-trump-executive-order> accessed 1 December 2023

[141] Constitution 1973 (n 3) art 89.

[142] Davies C Colin, 'Akbar' In *the Encyclopaedia of Islam* (1st edn, E J Brill 1960) 316.

[143] ibid.

[144] A self-assumed title of the Mughal Emperor Akbar and used by his courtiers to signify him as a supreme spiritual leader to protect and interpret the religious matters as sublime authority of justice.

[145] Ishtiaq Husain Qureshi, *India Under the Mughals* (The Cambridge History of Islam 1970) 62

the *Ulima-e-Hind* (leading Islamic scholars in India)[146] and was not given countenance to his so-called infallible religious decrees.[147] The practices introduced by King Akbar were abandoned by King Aurangzeb Alamgir, who was elevated to the throne with the support of such *Ulemas* (Islamic scholars), and strictly adhered to and gave abiding sanctity to the *Shariah* Laws.[148] Although, the *Mughal*s followed *Shariah* Law in the entire judicial department, its procedural application was confined to only the Muslims insofar as civil matters were concerned.[149] The criminal law, on the other hand, had greater uniformity in its application to both the Muslims and the Hindus.

The *Mughal*s initiated steps to ensure the dispensation of fair justice, free of procedural impediments, as a primary objective of their government. Jahangir instituted *zinjir-i-adl* (chain of justice)[150] to redress the grievances of ordinary citizens who could have direct recourse to such a mechanism whenever justice was denied to them. Although the emperor was directly aware of the matters concerning the dispensation of justice, there was no codified procedural justice to ensure a fair trial.[151] Such a situation culminated in the absence of uniformity in the judicial proceedings to often utterly disregard the modern concept of a fair trial. The Ordinances called *Dasturul-am'l* ultimately became demonstrative of the procedural justice that aimed at the welfare of people, brought about a node of public-oriented reforms, and some of the like measures turned out to be handy for expeditious justice and fair trial to the

[146] A council of the leading organizations of the Muslim Scholars.
[147] Colin (n 142).
[148] Sajida S Alvi, 'Religion and State During the Reign Of Mughal Emperor Jahăngĭr (1605-27) Non-Juristical Perspectives' [1989] Studia Islamica, 95.
[149] ibid.
[150] Chain of Justice in octagonal building made of white marble inside Agra fort.
[151] Kausar Ali, *A New History of Indo-Pakistan* (25th edn, Aziz Book Depot 2008).

masses. For instance, Emperor Akbar ensured his appearance at *Jharoka*[152] by frequently providing the public audiences to facilitate his subjects. He gave *Darshan,*[153] which, although a Hindu institution, he innovated for all the communities across the board.[154] The Emperor constantly held full *Darbar*,[155] which was then the highest judicial forum. It was a place for formal discourse in *Diwan-i-Khas-o'Am*[156] about affairs of the state as well as the dispensation of even-handed justice without any procedural format or hindrances.[157] The practice of full Darbar initiated by Alamgir was continued and religiously followed by his successors in the *Mughal* dynasty.[158] The contribution of the *Mughals* to alleviate public suffering cannot be termed as a political stunt to take advantage of opponents like the ruling elite of modern politics in underdeveloped countries like Pakistan. Therefore, their thrust for speedy justice without institutionalized yet unwarranted procedural traps may not be completely discounted.

During the Colonial Era (1757-1947), the *Mughals* profoundly influenced English laws introduced in the judicial system of a demographically heterogeneous sub-continent.[159] The British started to gain control over India after the Battle of Plassey in the year 1757. After the War of 1857, they established a direct rule when the process for the codification of law enacted by Parliament was initiated in India.[160] The British

[152] A classical Indian architecture of a stone window projecting from the wall face of a building, in an upper story, overlooking a street, market, court or any other open space.
[153] An opportunity to see or an occasion of seeing a holy person or the image of a deity.
[154] Sajida S Alvi (n 148).
[155] A term for a court in Urdu from the Persian.
[156] Hall of Private Audiences, was a chamber in the Red Fort of Delhi built-in 1648 as a location for receptions.
[157] Sajida S Alvi (n 148).
[158] ibid.
[159] Muhammad Basheer Ahmad, *The Administration of Justice In Medieval India: A Study In Outline Of The Judicial System Under The Sultans And The Badshahs Of Delhi Based Mainly Upon Cases Decided By Medieval Courts In India Between 1206-1750 AD: Aligarh Historical* (1st edn, Research Institute for Aligarh University 1941).
[160] ibid.

rule incorporated some of the principles initiated in *Mughals*' criminal and civil administration into their newly evolved judicial system. They followed the good practices of the *Mughal*s[161] to blend the British laws into the naive fabric of procedural justice in the sub-continent. The functions of *Kotwal* in the *Mughal* Administration were more or less replicated by the Station House Officer (SHO) in the police stations introduced by the British regime.[162] The procedural reforms initiated by Emperor Aurangzeb in the criminal justice system were given enduring patronage by the British Regime. The concept of physical remand to regulate the custody of the defendant/accused for the investigation purpose through written permission by the *Qazi* was, inter alia, one of the key measures to ensure a fair trial.[163] Aurangzeb became so conscious of the speedy justice that he had enjoined upon the *Kotwal* to produce the accused before the court on a daily basis in the event of failure of a court, for whatever reason, to take cognizance of a case on the first hearing.[164] He had eagerly safeguarded the individual liberties of his subjects. He strictly prohibited the practice of taking anybody into custody without sufficient incriminating evidence to *prima facie* connect him/her with the alleged commission of crime. For the first time, he granted the right to information and provided general access to the public record, allowing them to examine records of rights. He was the first to introduce the representation of government through *Vakil-e-Sarkar* (Government or state lawyer) and *Vakil-e-Shara* (*Shariah* lawyer) in the sub-continent, with two prime considerations, i.e. (i) to represent the state and (ii) to ensure the provision of legal aid to those who were not possessed with the financial means to engage a private

[161] Rule on the Saltanat or empire by Mughals.
[162] Philip B Calkins, 'A Note on Lawyers in Muslim India' [1968] LSR 403-406.
[163] ibid.
[164] ibid.

counsel.[165] Therefore, he pioneered the establishment of procedural justice for the expeditious dispensation of justice with due regard to the socio-legal imbalance in India. His steps to prepare *Mahzarnamahs* (collection of jurisprudential pronouncements then regarded as infallible) based on the judgments of the courts of higher pedestal to ensure consistent and uniform decisions by the courts was the dawn of precedential law in the region. The *Mahzarnamahs* also served the purpose of guidelines to the *Muftis*.[166] It was another commendable achievement that evolved jurisprudence to help address public grievances through equal protection of law and equality before the law. As ill-luck would have it, the published record of those judgments, except *Baqiat-al-Salihat* (containing several judgments from 1550 to 1850 A.D.), could not be preserved.[167] These reforms for procedural justice secured greater sanctity of ordinary courts as well as the courts of appellate jurisdiction. The litigants were required to resort to the local court/authority for the ascertainment of their legal claim before approaching the higher judicial authorities, including the supreme judicial forum of the Emperor.[168] The pivotal role of Aurangzeb in bringing about consistency in jurisprudence and its preservation at the domestic level was followed by the later *Mughal*s'. Also, it became a hallmark of the legal principles introduced in British India.[169] The modern concepts of the prevalent criminal procedure, including habeas corpus, public prosecutors, presentation of accused before magistrates for physical remand, and filing of claim in the courts of original jurisdiction so established by the *Mughal*s, are still intact and celebrated principles of fair trial. In addition, the famous *Al-Fatawa al-Alamgiriyah*, and the promulgation of *Zabtah*, which were applicable to

[165] ibid.
[166] Sajida S Alvi (n 148).
[167] ibid.
[168] Corinne Lefevre, 'Recovering A Missing Voice from Mughal India: The Imperial Discourse of Jahangir (R. 1605-1627) In His Memoirs' (2007) 4 JESHO 452
[169] ibid.

all inhabitants of the empire, can be termed as the facade of the modern system of codification of laws.[170] *Mughal*s attempted to bring about procedural reforms for the dispensation of justice that advanced the cause of expeditious justice and significantly cast far-reaching implications for the longevity of their rule. The procedural justice so practised by *Mughals* was followed by its modified version introduced by the British, who tested its foundational principles as a legal experiment for incorporating them, to their advantage, in the other territories under their rule. Therefore, the sub-continent became "a breeding ground"[171] for the British to apply some of these laws, for ensuring that they were practicable, and incorporating them into their own legal system in the UK as well.

2.4 *Mughal* Era: A Chronicle of Autocratic Era

In the *Mughal* era, the Emperor enjoyed absolute authority to expound the law. The atypical measures they took from time to time regulated procedural justice for the provision of speedy judicial remedies to the masses. However, there was no formal system of legislation, as is in vogue in modern democracies. The absolute sovereignty of the Emperor in both civil and military affairs was not amenable to any other executive, legislative, or judicial authority. The *Mughal* history is succinctly a past story of autocratic rule with no modern concept of democratic principles like separation of powers, as there was no system of check and balance on the overwhelming executive,

[170] Sajida S Alvi (n 148).

[171] Muhammad Basheer Ahmad, 'The Administration Of Justice In Medieval India: Basheer Ahmad, Muhammad(Internet Archive, 2022) <https://archive.org/details/administrationof029109mbp> accessed 4 December 2023; Bakht Munir, Naveed Ahmed and Khan Ali Nawaz, 'Traces of Mughal Administration Of Justice In Modern Democracies: A Case Study of India and Pakistan' [2019] <file:///C:/Users/malik/Desktop/Assessment/SSS-1/legal%20issues/Chapter%202%20material/25.TRACES_OF_MUGHAL_ADMINISTRATION_OF_JUSTICE_IN_MODERN_DEMOCRACIES_A_CASE_STUDY_OF_INDIA_AND_PAKISTAN1.pdf> accessed 4 December 2023.

legislative, and judicial authority of the king. They derived a legal system purportedly from the *Shariah* law based on the Quran and *Sunnah*, and took numerous initiatives to establish direct contact with those aggrieved and seeking their grievances to be set at rest. These legal reforms they introduced would often find the distorted interpretation of *Shariah* principles made in consonance with the aspirations of the emperors by the *Ulemas* employed by them.[172] Although the supreme legislative authority of the king manifested in the *Shahi Farmans* often fostered the welfare of their subjects in the administration of justice, there was no codified scheme of procedural law unless a few reforms with uniformity were not only introduced by Akbar, Sher Shah Suri, and then Aurangzeb, rather they still find a considerable recognition and duplication in our legal system.[173]

There were several drawbacks in the *Mughal* legal system; for instance, the law of awarding punishment under *tazir*[174] providing for the discretionary punishment was vague, which bestowed overwhelming powers on *Qazi*s (judges) to often lead to gross injustice. The law of evidence was also primitive in the context of procedural justice, in that, only the direct evidence was admissible with no scope for the circumstantial evidence. Nonetheless, a few of the areas of socio-legal scholarship in the *Mughal* regime turned out to be so influential in terms of both the theory and practice of law that the concept of treatment of the people by the legal authorities became more meaningful than the ordinary perception of deterrence.

[172] Colin (n 142).
[173] Kausar Ali (n 151).
[174] A punishment under the Islamic Law, usually corporal, involving discretion of judge, when such punishment of the offence is not mentioned in Quran or Hadith (saying of Prophet Muhammad PBUH)

These findings about the shortcomings in the *Mughal* era are a manifestation of its relevance in the context of law, which influenced procedural justice in the colonial legal system inherited by Pakistan. It is a country where the role of the legislature is currently under intense criticism to provide for legislative reforms to innovate pre-colonial and colonial legal mechanisms for effective and efficient procedural justice. This study has explored the impact of instrumental factors in the *Mughal* Empire that continued to affect the colonial administration and, in turn, the administration of justice in Pakistan. They influenced procedural justice in the colonial legal system which was eventually succeeded by Pakistan. The regulatory components so inherited from pre-colonial and colonial rules followed the same autocratic culture. They did not allow the doctrine of the 'trichotomy of power' to thrive in Pakistan and, in turn, encroached upon the independence of judiciary, a pre-requisite for the right to a fair trial. They failed to ensure social legitimacy and strengthen the administration of justice by providing a fair trial system. The extra-constitutional and dictatorial measures, and the failure of various constitutional roles following the country's independence, to be minutely discussed in Chapter 3, have reflected on the judiciary's independence and prevented the reform process of procedural justice for a fair trial. The lack of social legitimacy is still prevalent due to the poor performance and/or inaction of the various constitutional institutions assigned with their relevant roles by the state. The autocratic *Mughals* and post-*Mughals* rules, entailing dictatorial culture, still permeate society and have significantly contributed to socio-legal imbalances in the current procedural justice system.

2.5 Colonial Era: Context of Legal Reforms

Tyler's oft-repeated approach[175] to ensuring more efficient and effective alternatives for practising speedy justice in the socio-legal context has increasingly been countenanced by principles of a fair trial. A large amount of research on procedural justice supports the hypothesis of a quality treatment rather than institutional legitimacy. How such fairness of treatment can be attained across the legal institutions and how far it matters to the people of Pakistan, are the open question. The pre-colonial *Mughal* era and the post-*Mughal* Colonial regime bequeathed a legal system to Pakistan. Such outdated procedural laws, so adapted, fail to respond to the fast-increasing call of the people for greater transparency in order to ensure speedy justice. It has now inevitably become a pressing requirement of the people under the long-awaited Article 10-A of the Pakistani Constitution.[176] The legal system so inherited and still intact in Pakistan; inhibits the speedy dispensation of justice and is, therefore, incompatible with the principles of a fair trial as envisaged by Article 14 sub-articles (1) and (3)(c) of ICCRP. It cannot, in essence, provide all-encompassing and metamorphosing effects of fair trial on the lives of our people. The ordinary people of Pakistan no longer believe in the judicial doctrines that delay the process of justice through the procedural complexities they fail to understand. The independent and impartial judiciary assumes a vital role in modern democracies as it enforces fundamental rights and becomes the focus of people for its performance based on laws enacted by the legislature. The legislature should be (and as a matter of fact, has become) under serious challenge to review and simplify the laws enacted and given

[175] Tom R Tyler 'Procedural Justice and the Courts' (2007) 44 Court Review New York University <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1254&context=ajacourtreview> accessed 5 December 2023.
[176] UN, 'Reporting Status for Pakistan (n 43).

effect hundreds of years ago when the socio-legal dynamics of the given society were poles apart and altogether distinguishable from the current trends of society. The analysis hereinafter underpins how procedural justice so evolved and put in place by the British rulers, but still intact, brings about socio-legal injustice in Pakistan.

This socio-legal scholarship will provide a comprehensive historical scrutiny of procedural justice in the colonial era, in view of the scarcity of literature on the subject, to establish the perceptions of the authorities who were then codifying the existing laws and administering justice. Such analysis will discuss the factors that mechanized procedural justice, which is now prevalent in Pakistan, with little promise to provide effective alternatives to be reflected later in this thesis. The concept of speedy dispensation of justice in the socio-legal context, by means of transparent procedural justice, is badly lacking. The concerns of the superior courts of Pakistan about the delay in the disposal of cases reducing the confidence of the public in the judicial system[177] have a bearing on the authenticity and efficacy of procedural justice regulating legal institutions. This research supports the hypothesis that the curative behaviour of legal system to the litigants and the fairness of procedural justice matter more than the outcomes to confirm institutional legitimacy. This research further substantiates that the British influence of institutional factors in the colonial era, to the contrary, was more focused on revenue collection. The performance of procedural justice for the masses, that too, seeking quality treatment for the litigants of modern times, was neither foreseen by nor a priority for them. The organizational evolution of the legal institution suggests more a primacy of the economic transition in the contexts of operationally efficient revenue collection mechanisms than procedurally fair legal

[177] *Shabbir Ahmad* (n 4).

institutions for the resolution of disputes. It was tailored to legitimize the authorities rather than strengthen the rule of law. Therefore, the colonial legacy of passing such procedural justice on to the current society lacks social legitimacy.

The *Mughal* rule lasted till 1857, yet it started crumbling with the demise of Aurangzeb in the year 1707 A.D. It was long before taking over the *Mughal* crown that the British East India Company (EIC) had completed its spadework for colonizing the subcontinent. It entailed further evolution of the current procedural justice resting on the English doctrines and statutes in India.[178] "The Governor and Company of Merchants of London Trading into the East Indies,"[179] known as the East India Company (hereinafter referred to as "the Company") was granted its first Charter by Queen Elizabeth – I on December 31, 1600 and ultimately it became responsible for the establishment of British Empire in India. The Charter empowered the Company to ensure its good governance by making laws, issuing orders, and formulating constitutions meant to expand its trade and trafficking.[180] It was, however, enjoined upon the company to ensure that the laws so made must not be inconsistent with any of the statutory provisions or common law already enforced in England. The Company was further authorized to inflict punishments and impose penalties including those of fines and imprisonment, yet had to forebear from awarding capital punishment even in cases of a serious criminal nature, including murder.[181] The Emperor King James I, further solicited the indulgence of Emperor Jahangir in 1615 AD for the provision of greater trading facilities to the British Company and succeeded in managing the

[178] Muhammad Munir, 'The Judicial System of The East India Company: Precursor to the Present Pakistani Legal System' (2006) 13 (14) AJIIU 53-68.
[179] ibid.
[180] 'Queen Elizabeth's Charter 1600' In Constitutional Documents (Pakistan)' (Vol - 1 of 1964) 1-20.
[181] Munir (n 178).

issuance of *Shahi Farman* in this regard.[182] The *Shahi Farman* ruled that all trading disputes between Englishmen and Indian citizens would be settled by native authorities according to the norms of justice.[183] The charter of the Company did not provide for making laws concerning a particular territory, in that, it was not initially meant for territorial acquisition, nor was it contemplated for the acquisition of foreign territories; rather its sole purpose was the commercial enterprise.[184] However, it somehow enlarged its legislative authority by securing the Royals prerogative to empower the commander-in-chief of every voyage to award capital punishment to those found guilty of mutiny and murder.[185] Gregory Lillington, who was accused of the alleged killing of Henry Barton on board, was served with a sentence of death by the company for the first time on the basis of confession following his trial by the commander of a ship called Charles, under the Royal Commission.[186] On 14th December 1615, the King conferred such power on a jury of no less than twelve servants of the Company for the issuance of commissions to its Captains.[187] The most important Charter, which mandated the President and the Council of each factory under the Company to adjudge cases of all people employed by the Company or living there under English law, was awarded by Charles II on 13th April 1661. The Charter instituted a judicial system that was purposeful in safeguarding the territorial possessions of the Company.[188] Although, the charter had contemplated the exercise of jurisdiction under the English procedures, the Governors and the Council were not conversant with the English law. The situation, therefore, warranted the establishment

[182] William Foster, *The Embassy of Sir Thomas Roe to India 1615 – 1619* (First Indian Edition 1990)
[183] William Foster, English in India – 1618-1621 (1906) 38.
[184] ibid.
[185] John William Kaye, *Administration of The East India Company: A History of Indian Progress* (1853) 66
[186] ibid.
[187] B M Phiroze, Malabari, *Bombay in The Making*, 1661-1726 (TF Unwin 1910) 49.
[188] Stephen Meredyth Edwards, *The Rise of Bombay; A Retrospect* (Times of India Press 1902, revised by CUP) 20.

of a High Court of Judicature in March 1678 by the Company to resolve all the civil and criminal cases with the assistance of a jury consisting of twelve persons. The courts so established necessitated the appointment of the judges 'learned in civil law' for exercising jurisdiction vested in them to hear all the mercantile cases. Thus, the court consisting of two merchants was substituted by an English professional lawyer, Sir John Biggs, who was tasked by the Company to adjudge those cases.[189] Such an event marked the beginning of the transitional phase for developing procedural justice in vogue in the subcontinent. After the appointment of a qualified English lawyer Sir John Biggs, as a judge of the Admiralty Court, the Governor and the council had renounced the judicial functions. After the death of Sir Biggs in 1689, another judge-advocate, namely John Dolbon, was appointed by the Company, who was dismissed in the year 1694 and was succeeded by a civil servant Mr. William Fraser. Later, in 1684 AD, a professional lawyer Dr. John St. John was appointed judge of another Admiralty Court established in Madras, but his relations with the Governor Chiled worsened, and his powers to try civil and criminal cases were resumed by the latter, and were subsequently transferred to Mr. Vaux, who was lacking the legal knowledge and training. Dr. John was also dismissed by the then Governor for judicial independence, and the Company, deterred by their independence, became reluctant to appoint even English professional lawyers as judges on farcical premises despite the mandatory provision of the Charters[190] in this regard.

In 1718, the Company established another court in Bombay, which consisted of the Chief Justice and nine judges, including the four Indians then termed black judges. The

[189] Foster (n 183) 328-345.
[190] Edwards (n 188) 153-157.

court was vested with jurisdiction to hear all cases without using the jury and it functioned without being bound by the law of precedents until 1726, resulting in gross injustices glaringly perpetrated by such court against the innocent Indians.[191] The Governor and the council banned the death sentence for the Englishmen in Madras, yet it continued to be administered to the native people. The justice administered under these charters was branded as "trader's justice" and was governed exclusively by English traders.[192] The judiciary developed its own separate/distinct procedural justice in all three presidency towns of Madras, Bombay, and Calcutta without following any legal principle of uniformity till 1726.[193] Thereafter, it was the Charter of 1726 that brought about uniformity in all the courts established at afore-referred three places, derived their authority from the King instead of the Company, and it was the origin of the application of English common law by introducing the statutory provisions of the law of England in the sub-continent.[194]

An *adalat* system[195] was established to administer justice in the *mofussil*. The first Governor-General of Bengal, namely Warren Hasting, preferred to divide all three *Diwanis* into districts to appoint English Collectors in each of such districts. They were also to assume the powers of judges to conduct judicial work in *Mofussil Diwani Adalat* by 1772 AD to decide all the civil cases, including those of natives.[196] The Collector solicited and relied on the advice of *Qazi* in the cases in which the parties involved

[191] Phiroze (n 187) 453
[192] ibid, 328-345; Edwards (n 188) 155
[193] ibid.
[194] David Pearl and Werner Menski, *Muslim Family Law* (Sweet & Maxwell 1998) 37.
[195] It was a system of courts at the district level, introduced by Warren Hastings to deal with small cause matters of petty nature up to the value of ten rupees. Under this legal system, the head farmer was assigned the adjudication and administration of justice for all such disputes.
[196] Tahir Mahmood, *The Muslim Family Law of India* (3rd edn, Lexis Nexis Butterworths 2002) 4-7.

were Muslims and that of Pundit in the cases involving the Hindus.[197] All the criminal cases were tried by the *Mofussil Fojdari Adalat* in every district. The appeals against their judgments were preferred to the *Sadar Adalat*. There were two kinds of superior courts, namely, *Sadar Nizamat Adalat* and *Sadar Diwani Adalat*.[198] A Supreme Court was established at Calcutta under the Regulating Act 1773, consisting of a Chief Justice and three other judges. The Pitt's India Bill of 1784 and the Charter Act of 1793 resulted in tangible changes for procedural justice of the legal institutions in the territories under the Company's administration. The Act was instrumental in establishing a relatively independent and efficient system of the courts. However, the jurisdiction of these courts was barred against the British citizens whose matters involving some criminality were referred to only the Supreme Court at Calcutta.

The Courts of Circuit were abolished, and the criminal powers were bestowed upon the *Zillah* judge in 1827 AD. The Provincial Court of Appeal was also abolished in the year 1843 AD. The *Sadar Nizamat Adalat*[199] became the Supreme appellate court, and its decisions were final. However, the Governor General and council were given the prerogative to commute or pardon the punishments of the convicts.[200] The Supreme Courts of Madras and Bombay were established in 1801 and 1823 respectively. On 3rd December 1790, the criminal justice system was transferred to the Company's English servants.[201] Under this newly evolved criminal legal system, the magistrates were

[197] Pearl & Menski (n 194)
[198] The decisions made by *Nizamat Adalat* were final, however, the Governor General and the Council were empowered to pardon or commute punishments of the convicts.
[199] The apex court to be presided over by the Governor General and the other judges were the members of to act as judges of the *Sadar Nizamat Adalat*.
[200] The apex court to be presided over by the Governor General and the other judges were the members of to act as judges of the *Sadar Nizamat Adalat*.
[201] V D Kulshreshta, *Landmarks in Indian Legal and Constitutional History* (B M Gandhi ed, Estern Book Co 2005) 475.

subordinated to the Circuit Courts in every district, and the *Sadar Nizamat Adalat* became the ultimate Court.[202] The Regulation Act of 1773 authorized the Supreme Court of Calcutta to consider and "approve, admit and enrol as many advocates and attorneys at law" as it "shall deem fit." The apex courts of Madras and Bombay were empowered to enroll the Attorneys on the same pattern.[203] So, the induction of locals was initiated in addition to those English, Scottish, and Irish attorneys and solicitors.[204] The Governor General and the members of the Council used to sit as the judges of *Sadar Nizamat Adalat*. The 1793's Cornwallis reforms institutionalized the regular profession of pleaders and *vakeels* by enrolling both the Hindus and the Muslims through the *Sadar Diwani Adalat* to assist the courts of the company.[205]

The Company played a pivotal role in the establishment of the British Empire in the subcontinent, as it was assigned by the British Crown to manage their commercial interests overseas. However, the Company's officials dispensed justice without knowledge of the law, resulting in an arbitrary judicial system. Later, the procedural justice that developed in the sub-continent lacked uniformity and consistency in decision-making, and it was contrary to the principles of an independent judiciary, fair trial, and natural justice. Despite these challenges, the system underwent significant reforms over a period of time. It is worth noting that the justice system developed through the afore-referred charters was criticized for being biased towards English traders. It suggests that there was ample room for procedural improvements to ensure a fair trial in a speedy manner and impartial administration of justice for all individuals, regardless of their backgrounds or affiliations. Unfortunately, a colonial model of

[202] ibid.
[203] ibid.
[204] The same practice was followed by the Company in the Civil Justice System in the year 1772 AD.
[205] Kulshreshta (n 201).

adversarial procedural justice inherited by Pakistan was bereft of supplementary non-adversarial provisions, effective predetermined cost mechanisms, and case-flow management systems that left millions feeling exploited in the current legal system. The British regime was prone to give special treatment to classified cases based on discriminatory treatment that deviated from contemporary procedural norms and compromised judicial independence. To ensure true equality, it is crucial that procedural justice allows alike opportunities for a fair trial for everyone. In the absence of the aforementioned three essential elements, the procedural justice inherited by Pakistan is not consistent with the modern concept of the right to a fair trial. It is fundamentally important to work towards a more equitable model that fulfils the formal promise of equal justice based on procedural reforms focussing on supplementary non-adversarial provisions, effective predetermined cost systems, and case-flow management systems. It can help discount the phenomenon of socio-legal imbalance and prevent the motives for inflicting financial harm on the opponent litigants. Such procedural justice often leads to duress, especially for those with a fragile bargaining position. With a planned intervention by the government, an effective and efficient procedural justice system can be established, which will contribute to social harmony and the economic growth of the country. The courts of ordinary jurisdiction, with the present scheme of procedural settings evolved and influenced by the then British rulers and so inherited by the country, face limitations that will be discussed in the following chapters in addressing procedural issues of unequal distribution.

2.6 The War of Independence and Creation of Privy Council

The War of Independence (termed as War of Mutiny by the British) in 1857 AD assumed greater significance in changing the futuristic legal developments in India. Following the massive massacre and success of the British over the local forces, all the territories under the possession and governance of the Company stood vested in the Crown through a Bill passed by the British Parliament.[206] The creation of the Judicial Committee of the Privy Council in 1833 AD was a landmark in the history of procedural justice in India as it was assigned the task of hearing appeals arising out of the decision of *Sadar Dewani Adalat*.[207] The High Courts of Madras, Calcutta, and Bombay were created under the Judicature Act of 1861, followed by the establishment of Allahabad High Court in 1866. Consequently, the Supreme Court and *Sadar Diwani Adalats* were abolished permanently. The 1866's Regulation led to the creation of a Chief Court in Punjab.[208] The India High Court Act, 1911 increased the numerical strength of judges in High Courts and provided for the establishment of new High Courts.[209] The Federal Court of India came into existence in 1937 AD and was later on replaced by the Supreme Court of Pakistan on 24th March 1956.[210]

2.7 Evolution of the Doctrine of Precedent

The paradigm of the given procedural justice became a phenomenon that had repercussions on the judicial precedents to derive and consolidate its legitimacy. Consequently, the people distrusting the current legal procedures tend also to

[206] William Arthur Jobson Archbold, *Outline of Indian Constitutional History* (Curzon Press Ltd 1973) 38.
[207] ibid, 145.
[208] This court had the powers of a High Court and similar functions.
[209] It is noteworthy that the Judicature Acts were passed in England itself (1881 – 83) to create a High Court with five divisions.
[210] Martin Lau, 'Islam and Constitutional Development in Pakistan' (1999) 6 Yearbook of Islamic and Middle Eastern Law Online 45; Martin Lau, 'Introduction to The Pakistani Legal System, with Special Reference To The Law Of Contract' (1994) 1 Yearbook of Islamic and Middle Eastern Law Online, 6.

question the social legitimacy of the judicial precedents, which started to develop in the colonial era following the creation of the Privy Council. Therefore, this aspect is liable to be taken into consideration as one of the elements of far-reaching impact on procedural justice in Pakistan for its relevance to further discussions for critical evaluation of the prevalent legal procedures in the following chapters.

The Privy Council was the highest appellate court, and it had a pivotal role in the evolution of precedential law.[211] Each of the High Courts consisted of a Chief Justice and the judges not exceeding fifteen. The judges started applying the English Law to their subjects. With the establishment of the Privy Council and High Courts, the judicial system in the subcontinent started to consolidate the law reporting at a negligible scale, yet the doctrine of precedents had started to progressively evolve both in the Indian as well as English territories. In 1831 AD, Judge Dorin, who presided over the *Sadar Diwani Adalat* of Calcutta, strongly advocated for giving a statutory force to legal precedents, making the judgments of a particular court binding on it and those subordinate to it in the hierarchical order.[212] In 1824, Sir Francis Macnaughten, a Supreme Court Judge of Calcutta, decided a case on Hindu law to settle principles on the points under his judicial considerations, which were published, and the transition of law reporting starting from private enterprise became institutionalized. Thereafter, Sir William Macnaughten published his dissertations in 1825 AD, followed by several law reports of many other judges until 1850.[213] Likewise, the reported cases of the other High Courts and those of *Sadar Diwani Adalat* and *SadarFawjdari Adalat* marked the beginning of the spectacular publication of law as a revolutionary introduction to

[211] Kulshreshta (n 201).
[212] A Lakshminath, *Precedent in Indian Law* (Eastern Book Co 1990) 11.
[213] M P Jain, *Outlines of Indian Legal History* (4th edn, NM Tripathi (P) Ltd 1990) 729.

the precedents in the Indian Legal System.[214] A series of authentic law reporting had regularly started in Calcutta in the form of Indian Law Reports (I.L.R.) by 1875 to ensure the indispensable requirements to apply the precedents in terms of the judicial hierarchy, which later on became a regular feature of every High Court by 1876. A landmark judgment in *Beamish's*[215] case to establish the rule that the higher courts shall be bound by the legal principles settled in their own earlier decisions became a forerunner to optimize the precedent law, followed by the judgment of the Privy Council in the case of *Mata Prasad*[216] to the effect that:

> It is not open to the courts in India to question any principle enunciated by this Board, although they have a right of examining the facts of any case before them to see whether and how far the principle on which stress is laid applied to the facts of the particular case. Nor is it open to them, whether on account of 'Judicial dignity' or otherwise, to question its decision on any particular issue of fact.

The Indian High Courts later held in numerous cases that the judgments they passed were binding on the lower courts even if they did not agree with the correctness of the principles enunciated in them.[217] The Government of India Act, 1935 gave statutory recognition to the legal precedent by laying down that the decision of the Privy Council and the Federal Court would be binding upon the courts in India,[218] yet it did not bind

[214] ibid, 731 – 733.
[215] *Beamish v Beamish* [1861] 9 HLC 274.
[216] *Mata Prasad v Nageshwar Sahai* [1925] AIR 272-279 (PC)
[217] *P Ramaswami and Ors v Chandra Kotayya* [1925] AIR 261 (HC); *DhondoYeshvant Kulkarni v Mishrilal Surajmal* [1936] AIR 59 (HC)
[218] The Government of India Act 1935, s 212

the Privy Council of its own prior decisions. In the case of *Read v. Bishop of Lincoln,*[219] the position asserted by the Judicial Committee to consider its earlier decision conflicted with the rule articulated in the case of *Beamish v. Beamish*[220] by the House of Lords as follows:

> Whilst fully sensible of the weight to be attached to such decisions, their lordships are at the same time bound to examine the reasons upon which the decisions rest and to give effect to their own view of the law.

In another case of the Civil Servants' compensation, while replicating the position of the House of Lords, the Privy Council held that "it is bound in law, and without independent examination on merits, to follow a prior ruling in an appeal irrespective of whether it is right or wrong."[221]

It is necessary to acknowledge, given the binding effect of those judicial precedents in the current legal system,[222] that judges with their different approaches and various judicial notions, may sometimes reason with mystification. Such situations occur due to procedural issues that may arise from the ambiguities in the legislative language while interpreting procedural rights under the colonial legal system to impinge upon a fair trial. This may result in an equivocal interpretation of procedural aspects that cannot provide direct remedies, leading to a lack of clarity, fairness, quality, and

[219] *Read v Bishop of Lincoln* [1890] The Court of the Archbishop of Canterbury 644 (AC).
[220] Jain (n 213) citing The Government of India Act 1935, s 212
[221] Re Ceatain Questions Relating to The Payment Of Compensation To Civil Servants Under Article X Of The Articles Of Agreement For A Treaty Between Great Britain And Ireland In Re Ceatain Questions Relating to the Payment of Compensation to Civil Servants Under Article X of the Articles of Agreement for a Treaty Between Great Britain and Ireland [1929] Privy Council, AIR 1929 PC 84.
[222] Constitution 1973 (n 3) art 189 & 201.

promptness in providing justice. Therefore, the anomalies of procedural justice stemming from those interpretations can only be remedied through legislative intervention for the procedural laws. It is essential to purge those legislative provisions and interpretations of fallacious approaches based on the outdated procedural laws that lack the notion of a fair trial in terms of Article 14 sub-articles (1) and (3)(c) of the ICCPR and Article 10-A of the Constitution of Pakistan. Those procedural interpretations rest on the procedural laws inherited and acceded by Pakistan and badly lack an analytical legislative framework to ensure procedural efficacy and promote social harmony. There is a pressing need for legislative focus on judicial interpretations as to procedural approaches based on fairness and equity, and the introduction of supplemental provisions in procedural justice for the distribution of even-handed prompt justice ensuring a fair trial.

2.8 Codification of Laws Applicable to the Indian Territories

The massive population of India consisted of the followers of Hinduism and Islam, who proclaimed their allegiance to the laws contained in their own beliefs. It was, therefore, decided on the same premise to enact laws applicable to the Indian territories. However, it was decided that the personal laws of both Hindus and Muslims would not be abrogated but rather would be restricted in their personal domain, yet all the rest of laws shall have their application to all the inhabitants. A commission was appointed soon after the Charter Act of 1853. The Commission's second report, submitted in December of 1855 AD, by the members including Sir John Romilly, Edward Ryan, and Messrs Cameron and Macleod and T.F.Ellis, emphasized

"the wants of India in respect of substantive civil law."[223] The Commission, making such recommendations in a short span of three years' life, was not able to even attempt the laying of the actual edifice they recommended. Still, they had phenomenally chalked out the scheme for preparing the body of substantive laws for India. Consequently, a commission issued on 14th December 1861 was directed to set on drafting the Indian Civil Code.[224]

2.8.1 Code of Civil Procedure

The Charter issued by Charles II directed the enactment of laws by the Company "consonant to reason, and not repugnant or contrary to" and "as near as may be agreeable to" the English laws. The charter further required that the court and legal procedure should also be "like unto those that are established and used in this our realm of England."[225] These laws to be enacted were divided into six broad areas, which included "Establishing a Method for Due Proceedings" as one of its areas. A court of Judicature was established for adjudication of all the suits and criminal trials by a judge appointed by the Governor and the Council. There was also a jury of twelve persons, and provisions were made for the court's regular sittings, recording of proceedings in the registers, fixing court fees, and right of appeal against the decisions of the said court to the office of Governor or the Deputy Governor and Council.[226]

The serious bid of the second Law Commission appointed under the 1853's Charter Act culminated in the first Indian Code of Civil Procedure and Limitation Act of India in 1859. This Commission proposed the amalgamation of both the *Sadar Adalats,* which

[223] George Claus Rankin, *Background to Indian Law* (Cambridge University Press 2016) 35-45.
[224] ibid.
[225] Sir Charles Fawcett, *The First Century of British Justice in India* (Clarendon Press, 1934) xix.
[226] ibid, 13-16.

was the principal court to hear appeals from the *mofussil*, and the then Supreme Courts of the Presidency Towns. As a result of such proposal, High Courts in each of the presidency towns were declared as the highest courts for *mofussils* and the Presidency Towns. Third Law Commission, appointed in 1861, initiated proposals for the law of succession, codification of those of contracts law and the evidence in 1872, and finally, a law for the specific relief in 1877 to embody principles of equity practised in the English courts. The efforts of the fourth Law Commission appointed in 1879 resulted in the enactment of Negotiable Instruments Act in 1881, and the Trusts Act, Transfer of Property Act, and Easements Act, in 1882. The toil of such Commissions, which consisted of the English jurists of eminence, spread over almost half a century, had given the Indian people a series of codes to deal with various aspects of the substantive and the procedural civil and criminal laws, with some of the variations in English laws which, in their opinions, were required by Indian conditions. These codes, in essence, explained the meanings of rules enunciated in the English decisions by illustrations.[227] Both the Codes of Civil and Criminal Procedures of India and the law of evidence enacted in the second half of the nineteenth century, were in conformity with the Common Law in India doctrine. The system was evolved to allow two adversaries to ask questions to their witnesses, and the opposite parties had the right to test the testimony by questioning the witness. The judges had to perform an impartial role of holding the adversaries in the balance by ensuring that they properly followed a prescribed procedure, and then eventually rendering a decision at the conclusion of civil proceedings. The Civil Procedure Code of 1859 was firstly a codified version for the civil court in India, which, after some successive codes, was followed by the Civil Procedure Code of 1908, and now regulates the proceedings in civil cases. The

[227] Frederick, Sir Pollock, *The Expansion of Common Law* (Steven and Son London, 1904)16, 17.

main features of this Code are reflected by its division into two parts on the pattern of the Judicature Acts. Again, a modified English procedural system to suit the subjugated Indian conditions by the British rulers was enforced there. To upshot, the very foundation of all the civil laws in the subcontinent is based on the English common and statutory laws. Notwithstanding, the reared exotic structure of civil procedure adapted to the Indian conditions is often falsely premised to be peculiarly Indian.

2.8.2 Criminal Law (Penal Code of British India)

The Indian Penal Code was a simplified version of the criminal law of England, arranged in a systematic manner to suit the circumstances then prevalent in the subcontinent.[228] It is not far-fetched to examine how the Code was, in effect, derived from the basic principles of criminal law in England. It has already been discussed that the Company had started administering criminal justice soon after assuming *Dewani* in 1765 AD, and continued to apply the *Mohammadan* Law, which was then applied by the *Nazims*.[229] Thereafter, the Company progressively started to alter the criminal law of India. The first reforms for criminal justice were proposed in 1773 by Hastings. Lord Cornwallis, who succeeded Hasting, recorded that "The general state of the administration of criminal justice throughout the provinces is exceedingly and notoriously defective"[230] and initiated draft proposals for enactment of the Regulations to reform the criminal law. The first Criminal Procedure Code, known as the Cornwallis Code, was enacted in 1793 and was meant to include some of the amendments in the prevailing *Muhammadon* law.[231] A large territory of Bombay had not been under the Muslim regime for a long period before its acquisition by the

[228] ibid.
[229] George Claus Rankin, *Background to Indian Law* (CUP 1946) 164.
[230] Sir T B Colebrooke, Life of Elphinstone (1882) II, 125 quoted in Rankin, ibid 185.
[231] Regulation IX of 1793 quoted in Rankin, ibid 171.

Company, and the criminal justice system in Madras and Bengal was distinguishable on many counts. According to Elphinstone, "We do not as in Bengal profess to adopt the Mohammedan code. We profess to apply that code to Mohammedan persons, the *Hindoo* code to *Hindoos*, who form by far the greatest part of the subjects. The Mohammedan law is almost as much a dead letter in practice with us as it is in Bengal, and the *Hindoo* law generally gives the Raja, on all occasions, the choice of all possible punishments…. The consequence is that the judge has to make a new law for each case."[232] Thus, the series of three Regulations, frequently called ill-drawn for having been drafted by inexperienced persons, with little or no skilled advice, frequently conflicted due to the varying conditions.[233] The stupendous labour of Sir William Anderson, the colleague of Macaulay in the first Indian Law Commission, for reforming the Criminal Justice in India resulted in Regulation XIV of 1827 to include a penal code, which Fitz James Stephen termed as " a body of substantial criminal law which remained in force until it was superseded by the Criminal Code (that is, the Indian Penal Code) and which had very considerable merits."[234] It was Macaulay who made a decision that penal law for India should be codified. His speech for the Bill resulting in the Charter Act of 1833 " and his work in India as the first legal member of Council had effects both lasting and extensive."[235] The erudition and incisive English of the minutes that he recorded as a legal member are still part of the archives of the Law Ministry of India and were quoted in the Indian Law Commission of 1955. The draft of Indian Penal Code was attributed to him by his colleagues, although distinguished statures like Charles Hay Cameron, John Macpherson Macleod, and George William Anderson had

[232] Rankin (n 229).
[233] H H Dodwell, *Cambridge History of the British Empire, Volume V: The Indian Empire, 1858-1918*(CUP 2022) 5.
[234] Rankin (n 229) quoted in Rankin. ibid, 195
[235] ibid.

assisted Macaulay in drafting this Code. The delay in enactment of the Code till 1860, in the words of Stephen, was caused by "… the Mutiny which in its essence was the breakdown of an old system …. The effect of the Mutiny on the Statute Book was unmistakable. The Code of Civil Procedure was enacted in 1859. The Penal Code was enacted in 1860 and came into operation on January 1, 1862. The credit for passing the Penal Code into law and giving to every part of it the improvements that practical skill and technical knowledge could bestow is due to Sir Barnes Peacock, who held Macaulay's place during the most anxious years through which the Indian Empire has passed."[236]

2.8.3 Code of Criminal Procedure

The jury system for criminal trials dating back to 1672 AD started in Bombay concerning the alleged mutiny. The enactment of the Criminal Procedure Code gave statutory recognition to the jury of criminal trials in three Presidency Towns whereas, outside those towns, the government of the relevant province had the option to decide whether the criminal offences were to be conducted either by the jury or judge himself in that province, yet the practice varied in the different provinces as the jury system was neither practised nor remained in vogue and its application was also restricted to only certain offences. Some parts of the country adopted it but later discontinued it. The Commission had expressed that "trial by jury in India to the extent it exists today is but a transplantation of a practice prevailing in England which has failed to grow and take root in this country."[237] They had recommended its abolition.

[236] Trevelyan, and Sir George Otto, *The Life and Letters of Lord Macaulay* (Longmans, Green and Co 1876) 1, 417.

[237] Sir Alfred Denning, Freedom under the Law (Hamlyn Lectures) 59; TELFreedom under the Law. The Hamlyn Lectures (Stevens &Amp; Sons, Ltd 1949)

In the long history of the development of common law in India, the jury trial failed to take its root owing to differences between the English and Indian conditions. The jury system being practised in England was earlier tried in France for over a century. It did not work even in Latin countries where the mobile temperament easily turns to the pity or the hate."[238] It is, therefore, not surprising that its peculiar growth with English temperament failed to acclimatize in India. Nonetheless, the procedural format for the criminal trial in the subcontinent bears a glimpse of broad similarities of the criminal justice system in England. The institution of criminal cases may take place on the police reports or complaints by private persons. The police were entrusted with massive powers by the colonial rulers in the guise of preventing and investigating crimes divided into two broad categories, i.e. cognizable and non-cognizable. The distinction between the two classes of such offences is made on the premise that the police may commence the investigation and make arrests on receipt of information about the commission of a crime, whereas it is not so empowered in the non-cognizable offences unless authorized by the competent magistrate. The police may make searches, direct the production of documents and articles, seize suspicious property, summon witness, and even arrest those suspected of committing an offence without a warrant. In such eventualities, the investigation follows a police report to initiate the judicial proceedings before the court of a magistrate. However, police cannot exercise such powers in non-cognizable offences without seeking permission in writing of the Magistrate. The magistrate may also take cognizance “if he is satisfied that there is a case for inquiry and may direct the police for preliminary investigation before allowing the proceedings on such complaint. The police also have power to take steps for

<https://socialsciences.exeter.ac.uk/media/universityofexeter/schoolofhumanitiesandsocialsciences/law/pdfs/Freedom_Under_the_Law_1.pdf> accessed 1 December 2023.

[238] ibid.

preventing the anticipated commission of offences.[239] The right to initiate criminal proceedings is restricted to the aggrieved for the alleged commission of certain offences like defamation, offences against marriage, and adultery.[240] No proceeding relating to the contempt of public servant's authority or offences committed against public justice can be started unless the person in authority lodged a complaint or sanction of specified authority has been obtained.

2.9 Indian Independence Act of 1947 and Adaptation of Laws

The British Parliament enacted the Indian Independence Act of 1947 to provide for the partition of India and the establishment of independent dominions known as India and Pakistan, with effect from August 15, 1947. The laws existing at the time of the partition of India were made applicable to and remained in force in both India and Pakistan. Under such an arrangement, the adaptation of those laws was given effect through the Pakistan (Adaptation of Existing Laws) Order of 1947 and the Adaptation of Central Acts and Ordinances Order of 1949. All three Constitutions promulgated in Pakistan starting from1956 to 1973 AD provided protection to such laws.[241] The 1973's Constitution has also provided a safeguard to all the existing laws by unequivocally laying down that they shall continue to be in force until altered, repealed, or amended by the appropriate Legislature.[242] Such Continuation also applies to the existing laws made during the Martial Law regimes of 1958, 1969, 1977, and 1999 respectively.

[239] Code of Criminal Procedure 1898, s 149-153.
[240] ibid, s 195, 196, 197, 198-199A.
[241] Article 224 (a) of the Constitution of 1956, Article 225(1) of Constitution of 1962 and Article 280 (1) of the Interim Constitution of 1972 provided for protection, adaptation and continuation of the pre-existing laws.
[242] Constitution 1973 (n 3) art 268 (1).

2.10 Ongoing Regression of Procedural Justice

The above analysis highlights how procedural justice evolved in the socio-legal dynamics of pre-colonial and colonial rules. The transformation so effected is still pervading and has left indelible marks on Pakistan's legal system. The legislature is currently facing a serious challenge to carefully review the procedural justice system in Pakistan, which was introduced by the *Mughal* and British rulers when the societal norms were vastly incongruent with what they are today. Such a legislative review becomes imperative to ensure that the given procedural justice system is compatible with the current requirements of a fair trial, as recognized by the Constitution of Pakistan and the ICCPR. The above critique will eventually be vitally significant to establish how the arbitrary procedural justice evolving through the *Mughal* and British regimes was bequeathed to Pakistan, and the later events following its post-colonial validation inhibited the legal actors from purging it of those capricious anomalies. This study represents important and clear evidence about those legal settings to demonstrate that the British were more focused on the autocratic legal mechanism to safeguard their economic interests and the *Mughal*s to fortify monarchy than the significance of the right to a fair trial in the institutional context. The analysis of the origin and evolution of the complex and cumbersome procedural laws, ratified by and still intact in Pakistan, confirms that it has no social legitimacy in the absence of essential components of a fair trial *inter alia* speedy justice by the independent courts since its inception. It has been subjected to oft-repeated criticism and ongoing regression in terms of the perception of its people concerning the substantive outcomes related to procedural delays. The following chapters will identify how such procedural justice, without prompt and performance-based instrumental factors and without identifying the underlying reasons thereof, is not passable. Such a situation

further leads to poor international indicators of organizational performance. This research will further establish in the following chapters that the country's population yearns for greater efficiency of the procedural aspects for transparent and speedy justice than any other factor bearing on the substantial justice in the post-colonial socio-legal scenario. Since this research is heavily focused on a country with uniquely unstable political and legal institutions, the importance of removing uncertainties and anomalies in procedural justice and prompt remedies in the common legal experience cannot be diminished. The testing of procedural justice and its process-based model of institutional legitimacy is a widely acknowledged concern in Pakistan. There is a consistent debate around the patches emanating from colonial procedural settings, which glaringly manifest a lack of efficacy and distributive fairness. That is why it predicts a catastrophic dwindling of the human rights index in both the social and political context. The instrumental motivations of the pre-colonial and colonial rulers arbitrarily influenced the given phenomenon of procedural justice inasmuch as the rule of law was never a priority of those despots. It will, therefore, become distinctly evident, based on the analysis in the following chapters, that the multi-faceted anomalies in the afore-referred procedural justice so inherited by Pakistan undermine the right to a fair trial, as recognized by the Constitution of Pakistan and human rights law. The pressing situation indicates a conspicuous room calling for reforms to ensure Procedural justice in terms of Article 10-A of the Constitution, read with Article 14 of the ICCPR. More research about a post-transitional and post-colonial Pakistan with multiple legal dimensions as to the power separation doctrine with a particular focus on the independence of judiciary in Chapter 3 will help further clarify the situation.

Chapter 3 Fair Trial and Current Legal Tapestry in Pakistan

3.1 Introduction

This chapter will scrutinize how the legal system that evolved from the pre-colonial and colonial rules and was inherited by Pakistan failed to ensure an effective, efficient, and transparent procedural justice after its independence. It will further examine how it continues to be affected by the same autocratic culture to influence judicial independence. The extra-constitutional and dictatorial measures, and the failure of various constitutional roles following the country's independence, have not only prevented the reform process but also reflected on the independence of judiciary to violate Article 14 (1) of the ICCPR ensuring fair trial.

It goes without saying that there has always been an intrinsic quest on the part of human beings to secure certain guarantees essential for their mutual co-existence in the global society. Therefore, they devised a state mechanism to persistently and undauntedly enforce the recognized fundamental rights for safeguarding such guarantees and promoting good governance. The institution of the judiciary is meant to assure them of their protection against the breach of any of such rights by a private individual or public authority. The government spearheads the executive in implementing the policies and enforcement of those fundamental rights. The first and foremost characteristic of social organization and development is the efficient administration of justice in all societies.[243] The structure of good governance hinges upon constitutional principles of proverbial doctrine called separation of power among

[243] Mustafa Hyder and Khalid Iraqi, 'The Role of Judiciary In Good Governance' (Seventh International Conference on Advances in Social Science, Management and Human Behaviour, Institute of Research Engineers and Doctors, USA 2018) 74.

three main pillars of a state known as the legislature, executive, and judiciary. The Constitution of Pakistan provides that "the independence of the judiciary shall be fully secured."[244] All these three pillars derive their legitimate mandate from the constitution to exercise their authority. Such a document provides guidelines to determine the domain of their authority. The independence of each of the three organs has always been extensively debated, in that, their *inter se* dependence also ensures a system of accountability and attains transparency of decision-making by them. An independent judiciary plays a key role in the nation-building process and operates as the backbone to give impetus to social justice,[245] which is indispensable for promoting the social legitimacy of procedural justice consistent with the principles of a fair trial.

Article 14 (1) of the ICCPR safeguards the financial and institutional autonomy of the courts and guarantees that they conduct all civil and criminal trials impartially and independently. The most fundamental and universally recognized right to a fair trial has been affirmed and given utmost importance by the universally recognized ICCPR and other international instruments like UDHR,[246] ECHR,[247] and ACHR.[248] They liberally emphasize the doctrine of separation of power and the independence of judiciary. The interpretation of a fair trial by the HRC,[249] ECHR,[250] and various committees within the UN framework thus provides substantial jurisprudence. Article 14 (1) provides that "…

[244] Constitution 1973 (n 3) art 2A
[245] Kanyinke Sena, 'The Role of The Judiciary in Nation Building: Lessons From Rebuilding Native Nations In The United States Of America' (2022) 1 <https://www.academia.edu/9755931/The_Role_of_the_Judiciary_in_nation_building_Lessons_from_rebuilding_Native_Nations_in_the_United_States_of_America>accessed 7 December 2023.
[246] UDHR 1948 (n 14) art 10
[247] Convention for the Protection of Human Rights and Fundamental Freedoms 1950, art 6 (1)
[248] American Convention on Human Rights 1969, art 8
[249] Human Rights Committee, General Comment 32, para 27; Hermoza v Peru, Communication No 203/1986, UN Doc CCPR/C/34/D/203/1986 (1988), para 11.3
[250] *Nogolica v Croatia* [2006] ECHR 1050, para 27; *Horvat v Croatia* [2001]ECHR 488, para 59.

everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law….” Unfortunately, in Pakistan, the doctrine of power separation and the concept of the independence of judiciary has not been fully realized, leading to serious violations of Article 14 (1) of ICCPR mainly due to repetitive military rules. It is worth noting that military courts have often presided over cases involving civilians during periods of both martial law and civilian rule. This situation underscores how procedural justice in Pakistan is failing to respond to the international obligations for fair and just adjudication.

> Two human rights instruments are relevant for the discussion of the right to a fair trial in the legal context of Pakistan: the Universal Declaration of Human Rights 1948 (UDHR) and the International Covenant on Civil and Political Rights 1966 (ICCPR). They are relevant because Pakistan voted in favour of the UDHR and acceded to ICCPR on 23 June 2010. The Supreme Court of Pakistan has also recognized the customary and binding nature of UDHR in Pakistani courts.[251]

International Covenant on Civil and Political Rights (ICCPR) has inextricably linked greater regard with the right of fair trial by the independent judiciary than the domestic laws so that the discretion of the courts based on the traditional laws might not trample upon the Covenant guarantees by the member states.[252] Such guarantees assume a pivotal role in the transparency of procedural justice to ensure prompt remedies by independent and impartial courts for realizing the underlying objectives of a fair trial. Since no definition for such a right was incorporated in the Constitution of

[251] Niaz A Shah, ‘The Right to A Fair Trial and the Military Justice System in Pakistan’ (2016) 7(2) JIHLS 330-362.
[252] UN Human Rights Committee CCPR, (2007) General Comment 32, para 4

Pakistan,[253] a reference to the international human rights covenants like the observations of ICCPR, UDHR, HRC, and ECHR may outline its universally recognized essentials. Article 14 sub-articles (1) and (3)(c) of ICCPR call upon the member states to conclude both the civil and criminal trials within a reasonable time by independent and impartial courts,[254] failing which the effectiveness and credibility of administration of justice is bound to be seriously questioned.[255] This chapter delineates how judicial independence, being an essential element of a fair trial in a constitutional democracy, [256] is lacking in Pakistan and why procedural justice is failing to discharge such a mandatory function to protect human rights.

The Supreme Court of Pakistan recognized application of the UDHR and the ICCPR and also referred to the ECHR and the ACHR for their persuasive value. It made an observation in the case of *Al-Jehad Trust*[257] to the effect that "… the Universal Declaration of Human Rights, to which Pakistan is a signatory … have some basic fundamental rights irrespective of their origin or status…." It was further observed that:

> 16. The Fundamental Rights enshrined in our Constitution in fact reflect what has been provided in some of the above quoted Universal Declaration of Human Rights. It may be observed that this Court while construing the former may refer to the latter if there is no inconsistency between the two with the

[253] Neither any provision including article 10-A of the 1973's Constitution nor sec. 5 of the Constitution (Eighteenth Amendment) Act, 2010 to insert the right to "Fair Trial", has provide its definition.
[254] ICCPR 1966 (n 6) art 14
[255] *H v France* [1989] ECHR 17; *Bottazzi v Italy* [1999] ECHR 62; UN Human Rights Committee CCPR, (2007) General Comment 32, para 35.
[256] Democracy Reporting International (DRI), Report on International Consensus: Essential Elements 0f Democracy (October 2011) 10.
[257] *Al-Jehad Trust* (n 16).

> object to place liberal construction as to extend maximum benefits to the people and to have uniformity with the comity of nations.[258]

The same approach was also adopted in the famous case of *Sardar Farooq Ahmed Khan Leghari,*[259] wherein the following observations by the Supreme Court were made:

> It may also be pointed out that the above views run counter to the Fundamental Rights guaranteed by the Constitution and the aforesaid International Covenants of Civil and Political rights, the European Convention on Human Rights and the American Convention on Human Rights … the rule of proportionality is to be followed as propounded by some of the eminent authors and adopted under above Article 4 of the International Covenants of Civil and Political Rights.

Therefore, it can be safely inferred that the above-referred international instruments have been given abiding recognition in Pakistan. Judicial independence is an essential element of procedural justice in constitutional democracy for discharging the mandatory function of protecting human rights.[260] The judiciary has to always secure the rule of law by putting the executive in check and ensuring that the conduct of the government's administrative branches is consistent with the Constitution and the enacted laws. Article 14 (1) of the ICCPR provides that all persons are equal before courts and tribunals, and that all persons are entitled to a fair and public hearing

[258] ibid.
[259] *Sardar Farooq Ahmed Khan Leghari and others v Federation of Pakistan and others* [1999] PLD 57, 91 (SC).
[260] Democracy Reporting International (DRI), Report on International Consensus: Essential Elements of Democracy (October 2011) 10.

before a competent, independent, and impartial tribunal.[261] The United Nations Human Rights Committee (UNHRC) provides the definition of judicial independence to include treating all the parties impartially and without discrimination, and the courts to be "politically independent and must not be beholden to, or subject to manipulation or influence."[262]

Chapter 2 of this thesis scrutinized the chronological lacunae in procedural justice antecedent to the establishment of Pakistan. This chapter examines the persistence of an autocratic culture in procedural justice of the country, following pre-colonial and colonial replicas, to impact the right to a fair trial. An imperative overhaul of procedural laws is needed to ensure expeditious justice but compromising the independent judiciary cannot confer social legitimacy. This chapter presents an analysis of the challenges that the administration of justice has been facing due to the failure of various constitutional roles assigned by the state, including those assumed through extra-constitutional and dictatorial measures. It will identify the factors that worsened the independence of Judiciary and the operational mechanism of the given procedural justice and even exacerbated it more than in the pre-independence era under autocratic rulers, including those of the *Mughals* and British. It will also ferret out the coherent reasons for the delay in long-awaited procedural reforms. The study will underpin how the regulatory and instrumental factors adversely affected the independence of judiciary and prevented the evolution of procedural justice, which is not consistent with the modern concept of a fair trial as contemplated by Article 10-A of the Constitution read with Article 14 (1) of the ICCPR.

[261] DRI and The Carter Center, Strengthening International Law to Support Democratic Government and Genuine Elections (2012) 13
[262] UN Human Rights Committee, General Comment No. 32, CCPR/C/GC/32, 23 August 2007.

Pakistan, as a democratic country, is grappling with a weak political structure, security concerns, and mounting debts[263] that have entailed a significant institutional weakness, resulting in less effective systems of checks and balances. As a consequence, there is a pervasive risk of abuse of authority and corruption in the country. The political elite has influenced the legislature as they, by and large, hold *Jagirs*[264] bestowed on them by the British rulers. They often served only their vested interests by retaining the political power to clinch the policies[265] and also did not hesitate to support the military dictators for half the life of the country. Therefore, the democratic process could not thrive at a level where democratic values and trichotomy of power could be adhered to. Even the independent and impartial judiciary, the most important component of procedural justice, could not flourish because of dictatorial constitutional amendments by the civilian and military despots. The given constitutional crisis had far-reaching ramifications on procedural justice to elude the prospects of the right to a fair trial and even enforcement of fundamental rights under Articles 184 and 199 of the Constitution,[266] which will stand established through the critique in this chapter. The legislature, under the influence of corrupt and inefficient political leadership, either maintained its unwarranted control on the legislative policies and/or supported the military regimes to also strangle the bureaucratic top brass, which progressively lost its autonomy, fell prey to the corrupt practices, and

[263] Ahmed Saeed Minhas, 'Pakistan's Security Challenges and Political Instability' (2019) <https://tribune.com.pk/story/2098987/6-pakistans-security-challenges-political-instability>accessed 7 December 2023.

[264] A grant of land to the person holding power, as a reward for assistance in administering the affairs of British government. Holder of such land is called as Jagirdar in Northern India and Pakistan.

[265] Hassan Javid, 'Class, Power, And Patronage: The Landed Elite and Politics In Pakistani Punjab' (PhD, London School of Economics 2012) iii

[266] Some of those laws that curtailed powers of the courts include the Laws (Continuance in Force) Order 1958; The Jurisdiction of Courts (Removal of Doubts) Order 1969; and the Laws (Continuance in Force) Order 1977.

played only second fiddle. However, the judiciary had to struggle considerably for its evolution to become an independent and impartial institution. The country had witnessed the unconstitutional suspension of the legislative bodies and unlawful control of the executive to be followed by the removal of the then Chief Justice and judges by a military dictator even on the eve of this new millennium.[267] The executive strangulated the administrative and financial autonomy of the judiciary to impact the independence of judiciary, which is an essential component of fair trial and efficient procedural justice. The authoritarian military and civilian rules not only encroached upon the independence of judiciary but also prevented the reform process of procedural fairness for speedy justice. This debate also reflects on the factors that entailed encroachment upon the constitutional mandate of the principle of power separation arrangements to compromise procedural fairness, transparency, and impartiality in the post-colonial context.

3.2 Rhetoric of Judicial Development

The Indian Independence Act of 1947 contemplated the partition of India and laid the foundation for Pakistan as an independent dominion on 14th August 1947. The provisions of the Act provided that all the laws that were enforceable before such partition would remain in effect subject to their adaptation and amendments, if any, according to the requirements of both countries.[268] The Government of India Act 1935 was adopted as a Provisional Constitution by Pakistan.[269] The government machinery replicated the working framework of the judicial setup inherited from British rule. The

[267] The Frontier Post, the NEWS, the Nation, the Daily Times and Dawn (Mar. 10, 2007)
[268] Indian Independence Act, 1947, s 8.
[269] The Pakistan (Provisional Constitution) Order, 1947.

Federal Court of Pakistan was re-constituted to replace the Indian Federal Court.[270] Later on, such a forum was reconstituted in 1949 as having been deemed to be established under the Government of India Act 1935. The words "Governor-General" and "Pakistan" substituted those of "His Majesty" and "India" respectively, to establish the constitutional status of the country. However, the Federal Court's jurisdiction remained intact in the territories of Pakistan. The country readily found the existence of the Lahore High Court and Karachi Chief Court for the provinces of Punjab and Sindh respectively, whereas a newly established High Court[271] was constituted in Dacca for the East Bengal. The North West Frontier Province (NWFP)[272] and Baluchistan Province had their Judicial Commissioners. The appellate jurisdiction of the Privy Council was abolished,[273] and the Federal Court became the apex body to take cognizance of all the cases pending adjudication at such appellate level. It further retained the original and advisory jurisdictions dating back to the British era. After nine years, Pakistan was able to enforce its first Constitution on 23rd March 1956.[274]

Although the 1956 Constitution predominantly replicated provisions of the Act of 1935, it introduced some of the marked distinctions between the two statutory instruments. It turned the status of the Federal Court into the Supreme Court at the apex level, provided for a High Court in each of the provinces of East and West Pakistan respectively, and no substantial jurisdictional changes in the powers of the courts then prevalent in the inherited judicial system of Pakistan. This Constitution of

[270] Federal Court Order, 1947
[271] The High Court of Bengal functioning in Calcutta became a part of India. Therefore, another High Court was constituted under the High Court (Bengal) Order 1947.
[272] The Constitution (Eighteenth Amendment) Act, art 3. The name of the North-West Frontier Province (NWFP) was substituted by another name as Khyber Pakhtunkhwa
[273] The Privy Council (Abolition of Jurisdiction) Act, 1950
[274] Constitution of Islamic Republic of Pakistan 1956

a federal character,[275] however, conferred the powers of judicial review of administrative action upon the superior courts in a departure from the notion of absolute parliamentary supremacy, which marked the dawn of a changed complexion in procedural justice of Pakistan. It gave an unequivocal mandate to the Supreme Court to adjudicate upon and interpret the Constitution and also to enforce fundamental rights. The judiciary, therefore, latched onto the role of guardian of the Constitution, i.e., the supreme law of the land. Such a power of the judicial review, along with already available original, appellate, and advisory jurisdictions, made the administrative and legislative actions contravening the provisions of the Constitution amenable to the judiciary. Soon after the birth of Pakistan, a High Court of East Pakistan was constituted;[276] however, another new High Court of West Pakistan[277] was created in 1955 by unifying provinces of West Pakistan into one unit.[278] The jurisdictions of both High Courts under existing laws, including "Letters Patent of High Court," were preserved.[279] There were some other hallmarks of the said Constitution insofar as procedural justice is concerned. It conferred two additional powers to issue writs[280]and to transfer the cases of subordinate courts, which involved any substantial question of law concerning the interpretation of the Constitution, to them.[281] Another crucial aspect of procedural justice was to confer superintendence and control of all district courts to the High Courts' subject to their appellate and revisional jurisdiction and empower them to make rules and prescribing forms "for regulating the practices

[275] ibid, art 1
[276] The High Court (Bengal) Order 1947
[277] The Establishment of West Pakistan High Court Order 1955.
[278] The Establishment of West Pakistan Act 1955.
[279] Constitution of Islamic Republic of Pakistan 1956, art 224.
[280] ibid, art 170
[281] ibid, art 171

and procedure of such courts."[282] Thus, the High Courts virtually assumed a role of fundamental significance. The provisions of the *Act of 1935* for the independence of the judiciary were incorporated in this Constitution, as it fixed the salary of the Supreme Court and High Court Judges, which was not alterable to their disadvantage after their appointment, nor could their conduct be discussed in the legislatures.[283] The removal of a judge of the Supreme Court was only possible through a motion in the Parliament on the basis of established misconduct or mental or physical infirmity, and a two-thirds majority was required to approve such removal.[284] The removal of a judge of the High Court could take place on similar grounds following an inquiry report by the Supreme Court to be ensued by a reference to the President.[285] Unlike the Act of 1935,[286] there was no special provision for judicial officers in the cadres of the district judiciary. Consequently, ordinary legislation was required to deal with their matters of service, and until the enactment of relevant laws, the provisions of the pre-constitutional legislation were applied to regulate such judicial service.[287] The 1956 Constitution was abrogated in less than three years.

3.3 Spectrum of Proclivity: Trichotomy of Power and Judicial Independence

On 7th October 1958, the President issued a proclamation to abrogate the Constitution,[288] which entailed dissolution of the legislatures at the national and provincial levels, a ban on political activities across the country, and appointment of a

[282] ibid, Third Schedule
[283] ibid, art 175.
[284] ibid, art 151.
[285] ibid, art 175.
[286] The Government of India Act 1935, s 253, 254, 255 and 254.
[287] Constitution of Islamic Republic of Pakistan 1956, art 232.
[288] Mazhar Aziz, *Military Control in Pakistan: The Parallel State* (Routledge & CRC Press 2007) 66–69.

Chief Martial Law Administrator (hereinafter referred to as CMLA). He Promulgated another Order,[289] three days later, to restore jurisdictions of the constitutional courts subject to Martial Law Regulations and Orders, to enable all courts to exercise their jurisdiction with the same powers as available to them under the law in vogue prior to the Martial Law except they were barred from challenging martial law,[290] therefore, they could not take action against any order of the military courts.[291] The Martial Law Regulation No. 1-A introduced a novel set-up of military courts in the criminal jurisdiction parallel to one already existing in the country. Those courts were empowered through elaborate provisions of Martial Law Regulations and Orders to try and punish martial law violations together with offences under ordinary law. The appellate jurisdiction of all other courts, including those of superior courts in this respect, was ousted, and they were completely barred from calling in question any of the proceedings initiated or concluded by the military courts as such.[292] Another Provisional Constitution was promulgated by the CMLA on 1st March of 1962, to enable the general elections, which came into force on 8th June of 1962 on the first session of the National Assembly at Rawalpindi. The Martial Law so enforced also ceased to exist on that very day.

The 1962 Constitution curtailed the powers of the then-existing courts. For instance, the jurisdiction of Supreme Court was not co-extensive with that of 1956's Constitution, as it lost the original jurisdiction for issuing writs to safeguard fundamental rights. Although the fundamental rights under 1956's Constitution were incorporated in the one enforced in 1962 as "Principles of Law-Making" and termed as

[289] The Laws (Continuance in Force) Order 1958.
[290] ibid, para 1.
[291] ibid, para 3.
[292] Martial Law Regulation 61.

"merely pious declaration" by G.W. Chaudhry,[293] such "Principles of Law-making" could not be characterized as justiciable.[294] The Supreme Court was vested with the appellate jurisdiction for some matters, yet it lost its original jurisdiction except only for settling disputes between governments. The powers of "judicial review" were denied, and the courts were divested of jurisdiction to question any law on the premise that only legislature possessed such necessary powers.[295] The constitutional mechanism so devised reiterated the UK's form of parliamentary supremacy and the legal system so evolved was not consistent with the judicial review available to the Supreme Court of the USA.

Under the 1962's Provisional Constitution, like those of 1956's Constitution; judicial powers to adjudicate upon legislative vires rested with the constitutional courts. The significant development to amend the 1962's Constitution in the year 1963 AD[296] reinstated the judicial review with the changed texture of fundamental rights as justiciable; and such jurisdiction also encompassed the power to declare any law repugnant to the given fundamental rights as nullity. Thus, the courts again resumed the role of custodian of the Constitution, and thereby, a check was placed on the legislature. Since then, the judiciary wielded authority to examine the vires of virtually all the legislative and administrative actions on the given parameters. However, there was a marked difference in the procedure for removal of the judges of constitutional courts in both the Constitutions inasmuch as under the one of 1962, the President was to appoint a Supreme Judicial Council (hereinafter referred to as SJC) comprising the

[293] GW Chaudhry, *Constitutional Development in Pakistan* (UBC Publications Centre 1926) 240 <https://archive.org/details/constitutionalde00chou>accessed 7 December 2023.
[294] Capable of being taken cognizance of, by the court of law and decided in terms of settled legal norms and principles.
[295] The Constitution of Islamic Republic of Pakistan 1962, art 133.
[296] The Constitution (First Amendment) Act 1963.

Chief Justice along with two other most senior judges of the Supreme Courts and Chief Justice of each of the High Court.[297] The SJC was competent to recommend the removal of a judge falling in the purview of any of the grounds of physical or mental incapacity and/or gross misconduct.[298]

The 1962's Constitution vested the High Courts with a jurisdiction to issue writs to a person or/and authority in the relevant territorial jurisdictions to prohibit from "doing, commanding to do; or for calling in question acts done or intended to be done by such person or authority in specified circumstances."[299] The emerging constitutional scenario of issuing writs under the 1956 Constitution[300] was given abiding patronage by the courts as a critical measure for prompt justice. The relevant provisions, without any express reference to the traditional Latin names of these writs as habeas corpus, quo warranto, mandamus, prohibition, and certiorari, further enlarged their scope to issue directions without bounds of inflexible principles of these prerogative writs. Other provisions relating to the judiciary regarding the appointment of the judges, including Chief Justices of the superior courts, their qualifications, retirement age, transfer, and remuneration, were identical to the provisions of the 1956 Constitution. Nevertheless, the independence of judiciary was seriously compromised when CMLA assisted by the WP Governor General and Federal Minister for Law, arbitrarily and unconstitutionally mechanized appointments by interviewing prospective judges of High Courts.[301] The seven-year period of 1962's Constitution ended in its fiasco following the nationwide strikes and agitations and forced President Ayub to step

[297] Constitution of Islamic Republic of Pakistan 1962, art 128
[298] ibid, art 145.
[299] ibid, art 98.
[300] ibid, art 170.
[301] Hamid Khan, 'Judicial Appointments in the Perspective of Independence of Judiciary' (Sixth SAARC Law Conference Pakistan Bar Council, 3-5 October 1997).

down on the 25th of March, 1969. Another military General, Yahya Khan, held the reins of state power by placing the unfortunate country under the densely black shadow of martial law.

The Martial Law's proclamation on the 25th of March 1969 had the effect to abrogate the 1962's Constitution. Consequently, the National and Provincial Assemblies stood dissolved, and governments at central and provincial levels were deposed. Immediately after another six days, the CMLA took over the office of President. The Provisional Constitution Order (PCO) 1969 envisaged that the constitutional affairs shall be carried out in a manner as nearly as the provisions of the abrogated Constitution subject to any of the regulations and/or orders made by CMLA. The basic fundamental rights, along with all the proceedings then pending adjudications, were abated. The PCO and actions/orders by martial law authorities became unquestionable by any court. However, these unconstitutional measures kept all the other jurisdictional powers conferred by any law intact. Another parallel jurisdiction of military courts deriving their powers under the PCO instead of the1962's Constitution dealt yet another blow to the procedural justice in Pakistan, and the powers of the constitutional and ordinary courts judges were significantly curtailed[302] to undermine their judicial authority and prejudice the right to a fair trial. Another Presidential Order[303] required them to declare/submit assets to the SJC on a prescribed form to be followed by the full-fledged enquires held under that Presidential Order by the SJC,

[302] The Jurisdiction of Courts (Removal of Doubts) Order 1969.
[303] Judges (Declaration of Assets) Order 1969.

which culminated in the resignation by one of the judges and the removal of another.[304]

The above critique provides substantial evidence to bear out that the dominant executive, whether operating within or beyond the constitutional boundaries, has always been a significant obstacle in achieving an independent judiciary. The impact of these events has hindered the reform process of procedural laws for speedy justice and curbed the judiciary's autonomy. Judges were appointed and removed based on considerations other than merit, their powers and jurisdictions were arbitrarily interfered with, their decisions were influenced, and the enforcement of fundamental rights was recurrently suspended or even abrogated. Moreover, the judges were made to validate the executive's abuse of legal and constitutional powers, especially in the context of military rules. The consequences of these actions have had a detrimental effect on the right to a fair trial and the rule of law, significantly undermining public trust in the judicial system.

3.4 Authoritarian Governance: Dogmatic and Semantic Rules

Following the General Elections of 1970 and the dismemberment of East Pakistan, a civilian CMLA assumed office as the President. He convened a National Assembly's session to pass an Interim Constitution on 21st April 1972 to put an end to the martial law in Pakistan. This Interim Constitution, largely replicating model of the judicature that was established under the 1962's Constitution, had split West Pakistan into its four provinces on the pattern that existed before 1955. It enabled each or any two

[304] Justice Fazle Ghani resigned, and Justice Shaukat Ali was removed on the charges of misconduct; *President V Shaukat Ali* [1971] PLD 585 (SC).

provinces to have a joint High Court. Resultantly, a High Court for two provinces of Sindh and Baluchistan was established at Karachi, and the other two provinces of Punjab and NWFP fell under the jurisdictions of their High Courts established in Lahore and Peshawar, respectively. The National Assembly unanimously passed the prevalent Constitution of Pakistan on the 10th of April 1973, which was enforced with effect from August 14, 1973.

The Constitution so enforced witnessed two noteworthy provisions, one to curtail powers and the jurisdiction of the superior courts, while the second was considered a milestone for independence of the judiciary. The former articulates that "No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law."[305] Hence, the courts were precluded from assuming a jurisdiction not expressly vested in them under the Constitution or any other law. This very provision limits the inherent powers of natural justice in the courts. The latter provision stipulated that "The judiciary shall be separated progressively from the executive within three years from the commencing day".[306] The Fifth Constitutional Amendment extended such a period of three years, originally meant for the given separation, up to five years in 1976. Another substitution of the word "four" by the "fourteen" years by Presidential Order No.14 of 1985 further undermined judicial independence. Thus, it became obligatory for the government to separate the judiciary from the executive by 1987 AD to comply with Article 175 (3) of the Constitution.

The superior judiciary already stood separated from the Executive, yet the affairs at the magisterial level were particularly being controlled by the Executive under a

[305] Constitution 1973 (n 3) art 175 (2)
[306] ibid, art 175 (3)

supervisory role assigned to the Home department at the Provincial level. The government lacked the will to separate the judiciary with a view to retain its executive authority and took no step in the matter despite lapse of the period contemplated by the Constitution. It seriously compromised the independence of judiciary as well. The Sindh High Court Bar, through its President, took the plea that such a failure of the government was a flagrant contravention of Article 175 (3) of the Constitution. It sought a direction to the Federal Government to take steps for separating the Judiciary from control of the Executive, and requested the court to call upon such Government to realize the mandate as ordained by Article 175 (3). A petition with a similar prayer filed by the Balochistan High Court Bar also sought indulgence from the Baluchistan High Court[307]. The Sindh High Court examined the matter and noted that Article 203 was also germane to the supervisory control of each High Court over the courts subordinate to it. The judgment of Sindh High Court,[308] after meticulously examining the issue, held that the constitutional obligation, as embodied in Article 175 (3), was disregarded by the government and issued appropriate directions to the Federal Government to initiate legislative and administrative measures to bring existing laws in conformity with Articles 175 and 203 of the Constitution, within six months. Appeals against this judgment by the Federal and Provincial governments were dismissed by the Supreme Court of Pakistan, with some clarifications to carry into effect the judgment of Sindh High Court without any administrative chaos.[309] Thus, the foregoing landmark judgment gave another orientation to procedural justice in Pakistan and separated the judiciary from the executive at the gross root level in the year 1996.

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[307] *President Baluchistan Bar Association and others v Government of Baluchistan through the Chief Secretary* [1991] PLD Quetta 7.
[308] *Sharaf Faridi v Federation of Pakistan and others* [1989] PLD 404 (Karachi).
[309] *Government of Sindh v Sharaf Faridi* [1994] PLD 105(SC).

Mr. Bhutto's civilian government significantly undermined independence of the judiciary through several amendments to provide for the "transfer of a judge from one High Court to another without his consent"[310] and curtailed jurisdiction of the High Courts for granting bail in some detention cases.[311] Another amendment was incorporated to limit the tenures of Chief Justices of the Supreme Court and High Courts to five and four years, respectively, to further control the judiciary. In the given scenario, they had the only option either to retire themselves from their offices or continue in office as the senior most judge of the particular court. The Fifth Amendment was actually contemplated to remove an eminent Chief Justice Sardar Muhammad Iqbal from Lahore High Court as he had declined his consent to be appointed as a judge in the Supreme Court.[312] The Sixth Amendment dealt another blow to judicial independence as it was introduced to allow one Chief Justice to continue when he had even attained 65 years of age[313] and thereby was allowed to complete the term to stay in office for up to five years. The Seventh Constitutional Amendment was meant to deprive the High Courts of their jurisdiction under Article 199 concerning Pakistan's Armed Forces acting in the aid of civilian government.

The agitations in the aftermath of 1977's General Election led to another military coup, and the Martial Law regime, unlike previous ones, did not abrogate; rather it held the Constitution in abeyance primarily due to its provision of Article 6, which read as follows:

[310] The Constitution (First Amendment) Act 1974.
[311] ibid.
[312] Justice (Retd) Javid Iqbal, 'The Judiciary and Constitutional Crisis in Pakistan' in Hafeez Malik (ed), *Pakistan: Founders Aspirations and Today's Realities* (OUP2001) 69.
[313] The retiring age of a Judge of the Supreme Court is 65 years.

> Any person who abrogates or attempts or conspires to abrogate, subverts or attempts or conspires to subvert the Constitution by use of force or show of force or by other unconstitutional means shall be guilty of high treason.[314]

The high treason was made punishable "with death or life imprisonment."[315] It has been a bleak part of the procedural justice in the Constitutional history of Pakistan that despite recurring violations of the above constitutional provision, no proceedings under Article 6 could reach the fate prescribed as its logical end, and the extra-constitutional measures of the given regime were subsequently ratified by the PCO judges and the Parliament. But it does not mean that no such treason was ever perpetrated.[316] The several episodes of aborted conspiracies to topple the elected governments and abrogation or holding in abeyance the Constitution and fundamental rights were followed by the PCOs to depose independent judges[317] like that of the Laws (Continuance in Force) Order 1977; with the repeated expression that were earlier used for the "Laws (Continuance in Force) Order 1958" and "the Provisional Constitution Order 1969" to the effect that:

> Pakistan shall subject to this order and any order made by the President and any regulation made by Chief Martial law Administrator (CMLA) be governed as nearly as may be, in accordance with the Constitution.[318]

[314] Constitution 1973 (n 3) art 6
[315] High Treason Punishment Act 1973, s 2.
[316] Faqir Hussain, 'Review of Begum *Nusrat Case*' (1989) VIII JLS 13.
[317] ibid.
[318] Chief Martial Law Administrator Order 1 1977, also PLD 1977 Central Statutes 327

The courts, tribunals, and any other authority could not call the martial law's proclamation in question, nor could a judgment, order, decree, process, or writ be passed or issued against the Martial law's regulations. The proclamation also suspended fundamental rights available under the Constitution and proceedings already pending adjudication there-under.[319] The Martial Law regime of 1977 prioritized administering fresh oaths to the judges of High Courts under the President's Order No. 1 by omitting the words "preserve, protect and defend the Constitution"[320] yet there was no mention of judges of the Supreme Court.[321] The novel practice of calling upon the judges of superior courts to take fresh oaths intensified inroads into the independence of judiciary. CMLA's Order No. 6 withdrew the Fifth and Sixth amendments earlier incorporated for a term of the office of Chief Justice, which consequently came to naught,[322] and those offices became vacant. The order for a new oath to the High Court Judges was also amended, and it was made obligatory for those yet without an oath to either accede to it within twenty-four hours or they would cease to hold office.[323] Another such President's Order with the omission of the words "preserve, protect and defend the Constitution"[324] was also administered to the Supreme Court's judges. After having removed the independent but unwanted judges, another President's Order for scrutiny of the High Court's Judges appointed between January to July 1977[325] made three judges from Lahore High Court and two from Sindh High Court resign, whereas one judge was relegated to Sessions judge. The case of

[319] The Laws (Continuance in Force) Order 1977.
[320] High Court Judges (Oath of office) Order 1977.
[321] Chief Justice (Retd) Sajjad Ali Shah, Law Courts in A Glass House (OUP 2001)102.
[322] Both such amendments got incorporated by Mr. Bhutto's government were detrimental to independence of judiciary.
[323] High Court Judges (Oath of Office) (amendment) Order 1977.
[324] High Court Judges (Oath of office) Order, 1977, PLD 1977 Central Status P-325.
[325] High Court Judges (Scrutiny of Appointment) Order 1977.

Begum Nusrat Bhutto[326] was heard by a full court consisting of nine judges. The Supreme Court delivered its judgment on November 10, 1977. The PCO judges of the Supreme Court, in their unanimous judgment, coined the doctrine of state necessity to not only validate martial law but also empower the CMLA to amend the Constitution. The PCO judges abstained from touching the Martial law regulations/orders and generally did not interfere with detentions under those regulations[327] to check arbitrary powers. The validity of a constitutional amendment to ban the political parties was challenged before the Lahore High Court in *Asghar Khan*'s case, but another draconian constitutional amendment crippled the powers of judiciary to review the martial law decisions and also those of the military courts. The Chief Justice heading the bench of *Asghar Khan'*s case was made as Acting Judge of the Supreme Court.[328]

The constitution of Federal Shariat Court (hereinafter referred to as "FSC") was another significant development primarily aimed at the Islamization of laws.[329] It had substituted the jurisdiction of Shariat Benches in High Courts[330] and was made competent to declare a provision of any law found repugnant to injunctions of Islam as unconstitutional. The Shariat Appellate Bench of the Supreme Court was made an appellate forum against the verdicts by the FSC. The CMLA proclaimed on 24th March 1981 that the Provisional Constitution Order (PCO) 1981 was to be regarded as the Constitution of Pakistan with immediate effect.

[326] *Begum Nusrat Bhutto v Chief of Army Staff* [1977] PLD 657 (SC).
[327] Hamid Khan, Constitutional and Political History of Pakistan (OUP 2001) 622.
[328] ibid, 637.
[329] Constitution (Amendment) Order 1980.
[330] Such jurisdiction of High Courts was earlier exercised under Constitution (Amendment) Order, 1979.

Some of the features of the given PCO in derogation to the right of a fair trial *inter alia* may be enumerated as under:

i. Fundamental rights available under 1973's Constitution were no longer enforceable;
ii. Supreme Court became competent to transfer the cases from one High Court to another;
iii. Orders and acts of military courts and authorities were made beyond the purview of Article 199 and no writ was available to question them;
iv. The transfer of Judges for two years from the High Court of one province to that of another could be made even without seeking his/her consent or consultation with the Chief Justices concerned;
v. Since the President assumed authority not to give oath to any one or more of the judges of superior courts, such choice of taking the fresh oath under this PCO was no longer available with them inasmuch it became the sole discretion of the CMLA; and
vi. Judges taking PCO oath were restrained to question its validity and such provision drastically crippled their jurisdictions.

The Chief Justice, along with a few others, declined such an oath under the PCO, and one of them was refused such oath.[331] No less than four Supreme Court judges and thirteen judges of High Courts, including Chief Justice Baluchistan, either refused or were denied such an oath and deprived of their judicial service by a despot. The CMLA

[331] Chief Justice Anwer-ul-Haq along with Mr. Justice Dorab Pate, and Mr. Justice Fakhruddin G. Ibrahim refused to take oath whereas Mr. Justice Moulvi Mushtaq Hussain was not invited to take oath.

restored the Constitution with comprehensive amendments following a General Election on a non-party basis in 1985[332] after ensuring judicial endorsement by the PCO judges, of all the constitutional amendments made by him. All the unconstitutional measures taken by him were validated by moving the Constitution (Eight Amendment) Bill in Parliament.

Pakistan has been ruled by the military for more than three decades. The judiciary, despite showing remarkable resilience, has been one of the institutions that have suffered the most under military dictators, with each martial law regime curtailing its jurisdiction and assaulting its independence by removing impartial and independent judges arbitrarily. This phenomenon has also impacted the dignity of the court proceedings, with interference being observed openly to further deteriorate the social legitimacy of the given procedural justice. The above-referred civilian and military regimes governed Pakistan by following the same approach in dealing with the judiciary and adopting already-tested methods of subjugation and control. Moreover, each of the successive governments added new and more harmful trends to gain greater control over the judiciary. They clipped the wings of the judiciary by limiting its powers and authority and took measures to ensure that the judiciary remained under their control. This has been a major setback for all tiers of Pakistan's judiciary. The judiciary's ability to act as a check on the other branches of government, including the military, is critical to ensuring that Pakistan remains a democracy. However, the repeated interference of the military in the judiciary has undermined its independence and its ability to act as a check on the government's power.

[332] President's Order No: 14 on March 02, 1985, also known as Revival of the Constitution of 1973 Order 1985 (RCO)

3.5 Disenchantment for Judicial Independence during Civilian Rule

The military regime was followed by the four successive political governments from 1988 to 1999. Those civilian governments also encroached upon the independence of judiciary to make it their subservient. Some of them were *inter alia* non-confirmation of judges of the High Court by the then government (1993-96), which was premised on political reasons with a flimsy excuse that such appointments were not merit-based. Another step of removing the Chief Justices of Sindh and Lahore High Courts for their appointment to the FSC in 1994, in a humiliating manner, entailed refusal of and resignation by the Chief Justice, Lahore. The government replaced them by two of the newly appointed Supreme Court's Judges as acting Chief Justices of those High Courts. The third High Court at Peshawar was also being headed by the Acting Chief Justice. The then government deviated from a solemn convention to appoint senior most Supreme Court judge and arbitrarily dispensed with forty years of practice by denying oath to him, apparently due to his independent outlook in both the judicial and administrative matters.[333] Three out of four High courts headed by acting Chief Justices, provided ease to the then government to execute its plan for attempting to pack these High Courts through political appointments. In the absence of the effective role of actual judicial consultees, twenty-nine additional judges in the High Courts of Lahore and Sindh were appointed in 1994 contrary to the advice of the then Chief Justice of Pakistan (CJP),[334] who had opposed many controversial nominations and pointed out the names who never appeared even in the High Court but all fell flat on

[333] Ajmal Mian (Chief Judge, Rtd), *A Judge Speaks Out* (OUP 2004) 163.
[334] Shah (n 321) 215.

the then Chief Executive.[335] The screaming plight of the affairs was narrated by then CJP himself as under:

> I then received a copy of the letter from the Chief Justice of the Sindh High Court (Justice Memon) with the revised proposal for appointment of judges. I found that Agha Rafiq Ahmed and Shah Nawaz Awan had been recommended besides some members of the Bar, whose recommendation were equally controversial. I spoke to justice Memon on telephone, who expressed his helplessness and said that he made those recommendations because of the pressure that was brought to bear upon him …. I felt terribly disappointed and wrote a letter in which I opposed the recommendations of Agha Rafiq Ahmed, Shah Nawaz Awan and some other members of the Bar. Finally a summary was prepared which was placed before the Prime Minister, and after she had made her recommendations, it was sent to the President, who signed it. No weight was attached to the recommendations of the Chief Justice of the Supreme Court.[336]

Another pressing situation confronting the CJP was that the Supreme Court itself was fraught with acting and ad hoc judges, seven in number against ten permanent seats, including himself. It was an opportune time when an important constitutional petition of *Al-Jehad* Trust sought the interpretation of relevant constitutional provisions. Another constitutional petition was filed in the Supreme Court against a judgment of the High Court to dismiss constitutional petitions challenging appointments of the

[335] ibid, 231.
[336] ibid, 232

afore-referred additional judges in the Lahore High Court together with the non-confirmation of six additional judges. A larger bench of five judges headed by the Chief Justice was constituted for the hearing of the stated petitions. The judgment[337] of Supreme Court, while interpreting relevant constitutional provisions, laid down the following principles:

i. The ad-hoc appointments of judges for permanent vacancies contravenes the Constitution;

ii. No appointment for acting Chief Justices, as a stop-gap, exceeding ninety days was to be validated;

iii. No nomination by or consultation of the acting Chief Justice was valid for appointing judges;

iv. Reasonable expectancy of Additional Judge so appointed was to be considered for confirmation;

v. Additional judges were to be essentially appointed on the recommendations of the CJP, in the absence of any strong and justiciable reasons.

vi. All permanent vacancies particularly the one of CJP to be filled in anticipation of his/her retirement; and in case of such vacancy occurring on death or due to unforeseen cause, within 90 days.

vii. Legitimate expectancy of the senior most judge in a High Court for consideration and appointment as the Chief Justice, in the absence of justiciable reasons to be recorded by the President/Executive;

[337] *Al-Jehad Trust v Federation of Pakistan* [2021] PLD 324 (SC).

viii. No appointment of Supreme Court's judge as acting Chief Justice in a High Court;

ix. Declaration of "consultation" as contained in Article 177 and 193 to be "effective, meaningful, purposive, and consensus oriented, and leaving no room for complaint of arbitrariness or unfair play".

x. Recommendations by the Chief Justices; as consultees, held as binding on Executive, in absence of justiciable reasoning;

xi. No transfer of judges from one to another High Court without consultation with the Chief Justice of Pakistan.

Although this landmark judgment was a step towards the independent judiciary, the then Federal Government was prone to denounce it. One of the members of the Cabinet went on to describe this judgment as an act of treason. They issued harsh statements from inside as well as outside the parliament.[338]

Another succeeding political government (1997-99) crossed swords with the same Chief Justice on some of the provisions of Anti-Terrorist Law enacted by the Parliament, in that, a special appellate court other than the High Court was constituted, yet it consisted of Judges' of High Court. The mechanism so provided was alien to the constitutional provisions and firmly resisted by CJP. The fuel was further added when procedural justice was strangulated by non-provision of appeal by the aggrieved to the High Courts and Supreme Court. The special courts for such classified cases, by deviating from the settled procedural norms, also ran "counter to the

[338] Mian (n 333) 184.

independence of the judiciary".[339] The CJP was diametrically opposed to "a parallel judicial system".[340]

The crisis was further worsened in 1997 when the CJP recommended names of judges for elevation against vacant seats of the Supreme Court, which were binding on the Executive under the *judges'* case.[341] However, a notification was issued by the Federal government on August 21st August 1997, to reduce the strength of seventeen permanent seats to twelve in the Supreme Court.[342] Although the government withdrew notification of its suspension by a three-members Bench on the petition of the Supreme Court Bar Association, it employed delaying tactics to implement those recommendations. Meanwhile, on the motion by the government, a constitutional amendment[343] to incorporate Article 63-A on defection to entail disqualification of parliament's members was incorporated. The amendment so added was challenged by "*Wukala Mahaz Barai Tahfuz-i-Dastoor*"[344] and suspended by a Bench headed by CJP in the Supreme Court. The judicial process was extremely criticized in intemperate language by the Chief Executive along with his cabinet members, and all their allied parties termed the Supreme Court's order as 'illegal' and 'unconstitutional.'[345] On 28th November 1997, a petition[346] to challenge the appointment of the then CJP was moved. The then President resigned on what he termed the government demand to de-notify the then CJP as 'unconstitutional demands'. The appointment of Chief Justice

[339] Shah (n 321) 338
[340] ibid.
[341] *Al-Jehad Trust* (n 337).
[342] Shah (n 321).
[343] The Constitution (Fourteenth Amendment) Act 1997, art 2.
[344] This was a lawyers' front, then meant to advance the cause of protecting the Constitution.
[345] The Muslim (English Daily) Islamabad, 30 October1997.
[346] Such petition was filed under Article 184 (3) of the Constitution which culminated in the judgment titled as *Malik Asad Ali v Federation of Pakistan* [1998] SCMR 119.

was later held by a ten-members Bench of the Supreme Court as unconstitutional, in that, three senior judges were thereby superseded without cogent reasons.[347]

From the above analysis, it transpires that judicial independence in Pakistan has consistently been undermined despite a significant international convergence that has emerged over the past decades and is compulsorily binding on the State parties. The principle of judicial independence is a vital component of a fair trial, like those of the right to defence and the presumption of innocence. It has crucially gained widespread acceptance across the globe and become a fundamental principle of procedural justice that plays a vital role in ensuring the proper functioning of the judiciary. The constitutional provision of Article 10-A is based on the fundamental principle of a fair trial and has a pivotal role in shaping procedural justice that adheres to the basic tenets of judicial independence. The success of this concept has to be ensured by Pakistan following its obligatory nature, which was evolved by the United Nations through a consensus of State parties ratifying the ICCPR. Today, judicial independence is considered a pre-requisite for ensuring a fair trial for virtually all legal systems. In Pakistan, the right to a fair trial is a critical component of the country's Constitution and is closely linked with the mandatory provision of the independence of judiciary. The Constitution explicitly guarantees that the judiciary shall remain free from any form of interference or influence from governmental or any other external source. The significance of judicial independence in procedural justice at both the levels of constitutional and ordinary courts of Pakistan cannot be downplayed, as it is crucial for the enforcement of fundamental rights under the relevant constitutional provisions

[347] *Malik Asad Ali v Federation of Pakistan* [1998] SCMR 119; *Malik Asad Ali v Federation of Pakistan* [1998] PLD 161 (SC).

and the statutory instruments for ensuring equal access to justice for all citizens. The judiciary in Pakistan has to play a vital role in protecting the fundamental rights of citizens, upholding the Constitution, and ensuring that justice is served fairly and impartially. Achieving judicial independence in Pakistan is essential for ensuring a fair trial under the constitution and ICCPR. The Constitution imputes to courts a special responsibility for ensuring a fair trial so that individuals do not suffer from unlawful or unfair treatment at the hands of the government or other tyrannous segments. Therefore, the government must work towards empowering the judiciary and abstaining from manipulating judicial decisions and invading judicial independence.

3.6 Existing Framework and Authoritarian Governance

There can hardly be a debate on the significance of judicial independence in a constitutional democracy that guarantees the right to a fair trial as a hallmark of its procedural justice system. Although Pakistan is a constitutional democracy, its judiciary had to struggle for attaining the independence so guaranteed by the Constitution. Even the constitutional courts had to come forward to safeguard the autonomy of the lower cadres of the District Judiciary.[348] The three organs, i.e., Executive, Legislature, and Judiciary, are required to operate within bounds as specified by the Constitution of federal republic. It provides for the Jurisdiction of Supreme Court, a High Court for each Province, and a High Court for the Federal Capital Territory and "such other Courts as may be established by law."[349] The judiciary "as a guardian of the Constitution ensures that none of the organs or government functionary acts in violation of any provisions of the Constitution or any other law; and because of the

[348] For example, the judgment ensuring separation of executive from judiciary, see *Government of Sindh v Sharaf Faridi* [1994] PLD 105 (SC)
[349] Constitution 1973 (n 3) art 175

above nature of work entrusted to the judiciary, Constitution envisaged an independent Judiciary."[350] However, following another military coup in 1999, the judiciary could not safeguard its independence and was administered one more PCO oath, an added wedge to its independence and expulsion of many of the independent judges. During the military regime, some of the verdicts by the then CJP in cases like the privatization of Pakistan Steel Mills,[351] and many others, including those of the New Murree Project,[352] and the cancellation of Golf Club on a public park in Islamabad, etc. were distasteful to the business deals of those closer to ruling clique of military government. There were also various judicial orders against the intelligence agencies for the release of missing persons allegedly in their custody. While challenging reference initiated against him by the government, the then deposed CJP had asserted vindictiveness on the part of the military dictator against him for the exercise of his jurisdiction in the cases of almost six thousand (6000) human rights abuses, including the illegal allotment of the state land to influential people, transforming public parks into commercial enterprises, the disappearance of many people by the intelligence agencies, and the environmental degradation; which had invited the intense displeasure against him.[353] The then President termed his judicial independence as an attempt aimed at destabilizing the system[354] and asked the CJP to resign on the pretext of various grounds of misconduct. On his refusal, the CJP was detained and put under suspension while the acting CJP was sworn in.[355] The government referred the matter of his alleged misconduct to the SJC under the

[350] *Amanullah khan yousufzai and others v. Federation of Pakistan through law secretary and others* [2011] PLD 451.
[351] *Watan Party v Federation of Pakistan* [2011] PLD 997 (SC).
[352] *Suo Motu Case No.10 of 2005* [2010] S C M R 361 (SC).
[353] International Bar Association, *The Struggle to Maintain an Independent Judiciary: A Report on the Attempt to Remove the Chief Justice of Pakistan* (London W1T 1AT United Kingdom, July 2007)
[354] Syed Talat Hussain, 'Justice Courageous Dated' News line, Karachi (20 March 2007).
[355] The Frontier Post, the NEWS, the Nation, the Daily Times and Dawn (Mar. 10, 2007)

relevant constitutional provision.[356] The unity of lawyers, civil society, and politicians in the movement to fight for the noble cause of restoration of the independent judiciary was an inspiring element to manifest that Pakistan was never so outraged.[357] The success of this movement was no mean feat when the objective of restoration of the CJP was achieved on 27th July 2007 by the Supreme Court. A large number of Constitutional Petitions, twenty-three in number, were instituted against the reference instituted by the government in SJC, including those filed by all the forums of lawyers, i.e., Pakistan Bar Council (PBC), Supreme Court Bar Association (SCBS), High Court Bar Associations; and the CJP himself. The lawyers' movement culminated in success, and they termed the military dictator as an unconstitutional President. He was not elected through a procedure recognized by the constitution, nor was he eligible to be elected as President by contesting the Presidential Election in 2007. The petition to challenge his eligibility was dismissed by the Chief Election Commissioner. Several petitions were filed to challenge his eligibility as such, but the Supreme Court allowed the Presidential election to be held on the given schedule. However, the Election Commission was barred from notifying the result till a decision on those petitions.[358] The President apprehended a judgment to disqualify him when the hearing of all the petitions was near completion.[359] He took an extra-constitutional step to declare an emergency by promulgating the Provisional Constitution Order (PCO) in the year 2007,[360] to pre-empt the verdict against him and suspend the Constitution. The chosen and picked superior court judges were given a new oath under such PCO. The emergency so enforced was firmly resisted by phenomenal domestic and global pressure resulting from agitation

[356] Constitution 1973 (n 3) art 209
[357] Shafqat Mahmood, 'A Storm Is Brewing' The NEWS (16 March 2007).
[358] The daily Dawn & The News (6 October 2007) 1.
[359] General Musharraf had claimed during press conference on 11 December 2007 about alleged attempt by the CJP to illegally remove him, the NEWS, 12 December 2007.
[360] The Provisional Constitution Order No. 1 of 2007.

by the lawyers, civil society, media, and political parties. It had brought together the "critics and detractors together from across the social and political spectrum."[361] The constitutional crisis came to an end when the newly elected Chief Executive announced the restoration of the deposed CJP Mr. Chaudhry, along with other judges on the 16th of March 2009.

The above analysis has reinforced the point that the high incidence of recurring abrogation and annulments of the constitutions to be followed by arbitrary amendments dictated by the civilian chief executives and military dictators was aimed at perpetuating their autocratic rules. Such a grim scenario could not serve any other purpose than to compromise the very essence of a fair trial, i.e., independence of the judiciary, let alone the reform process of procedural justice. The aforementioned situation virtually obliterated the system of checks and balances, which became next to naught, and the executive was practically accountable to none for playing havoc with the constitutional norms. The military despots and bigot civilian chief executives whimsically amended the constitution and ordinary legislation, respectively. They were to enjoy the "absolute power"[362] and abused such power for the satisfaction of their individual and collective vested interests. The courts resisted the encroachments on its independence, but their attempts to safeguard constitutional guarantees were strangulated. The outdated procedural laws, making the investigating and prosecution agencies absolutely subservient to the executive, provided the phenomenal potential for law violators and criminals to benefit from the ills of such procedural justice. The situation brought the nation to factionalism, turning upon societal stratification

[361] Muhammad Sher Abbas, 'Lawyers' Movement for The Renaissance of The Independent Judiciary In Pakistan' (2021) PLJ <https://www.pljlawsite.com/html/2020art19.htm> accessed 7 December 2023.
[362] Aqil Shah, 'Constraining Consolidation: Military Politics and Democracy in Pakistan (2007–2013)' (2013) 21 Democratization 3-25.

between those with influential backgrounds and those deprived of bare means of subsistence, to be discussed in the following chapter 4.

3.7 Mechanism Gap of the Regulatory Components

The above critique manifests that the lack of trichotomy of power had seriously deterred judicial independence in Pakistan, which is utterly opposed to the right of a fair trial under Article 10-A of the Constitution and the rationale underlying Article 14 (1) of the ICCPR. The judiciary has been falling prey to the authoritative might of the other two branches of the legislature and executive and was drastically prevented from independently and impartially discharging its constitutional role,[363] a pre-requisite for the right to a fair trial and efficient procedural justice. The state institutions of the legislature and executive responsible for ensuring the power separation and bringing about legislative reforms to evolve procedural justice compatible with the principles articulated by the ICCPR failed to discharge their constitutional roles, respectively. The executive controlled the affairs even at the magisterial level, and the judiciary was not separate from the executive until the judgment in *Sharf Faridi's* case was passed.[364] The direction issued in the given case to initiate legislative and administrative measures to bring existing laws in conformity with the relevant provisions of the Constitution has not been given effect in a true perspective. The government has not initiated appropriate legislation for the District Judiciary's comprehensive financial and administrative autonomy. It has not been completely separated from the executive branch since the terms and conditions of their judicial service are still governed by the judicial service rules framed under the

[363] Tasneem Sultana, 'Montesquieu's Doctrine of Separation of Powers: A Case Study of Pakistan' (2012) 2 JES 60-67.
[364] *Sharaf Faridi v Federation of Pakistan and others* [1989] PLD 404 (Karachi).

Civil Servant Act.[365] There have been instances where the government has resisted giving effect to the lawful financial benefits, including salaries and allowances, to members of the District Judiciary and its establishment, despite recommendations by the relevant High Courts.[366] The Supreme Court has authoritatively held in the *District Bar Association Rawalpindi's case*, *Sh. Riaz-Ul-Haq' Case* and *Sharaf Faridi's case* [367] that "independence of the judiciary in Constitutional parlance meant an institutional independence, i.e., the judiciary, as an institution, was independent; the reference was not to personalities but to the office held by members of the judiciary; an independence, above all, from the Executive, and an independence also from the Legislature." The Objectives Resolution, which has been made part of the Constitution of the Islamic Republic of Pakistan 1973 under Article 2A, provides that the independence of the judiciary shall be fully secured. Article 175 (3) of the Constitution commands that the Judiciary shall be separated progressively from the Executive within fourteen years from the commencing day, while Article 203 enjoins each High Court to supervise and control all courts subordinate to it. Therefore, it becomes imperative under all the afore-referred relevant constitutional provisions and that of the ICCPR to secure full independence of the Judiciary for the enforcement of the right to a fair trial in Pakistan's procedural justice system. It is also indispensable to give effect to the complete separation of the judiciary from the executive, and recognize the services of judges and employees in all the courts subordinate to High Courts as a

[365] The appointments of judicial officers in the District Judiciary are governed under the Sindh Judicial Service Rules 1994 framed under section 26 of Sindh Civil Servants Act 1973, and the Punjab Judicial Service Rules 1994 framed under section 23 of Punjab Civil Servants Act 1974.

[366] For instance, *Khan Toti and Others v Government of NWFP through Secretary Finance* [2016] SCMR 1206 (SC); *Muhammad Sher Shah, Sessions Judge and 18 others v Government Of N.W.F.P. through Chief Secretary and another* [2011] PLD 131 (Peshawar); *Muhammad Akram and 180 Others V Government of Pakistan Through Secretary Ministry Of Law And Justice, Islamabad and 4 Others* [2013] P L C (C.S.) 717

[367] *District Bar Association, Rawalpindi v Federation of Pakistan* [2015] PLD 401(SC); *Sh. Riaz-Ul-Haq v Federation of Pakistan* [2013] PLD 501 (SC); & *Government of Sindh v Sharaf Faridi* [1994] PLD 105 (SC)

service distinct from that of other civil services. The executive always lacked the will to separate the judiciary and transfer magisterial powers, maintaining its authoritative dominance at the grassroots level, mimicking colonial rule. Therefore, the government took no steps to separate the judiciary from the executive until the Sindh High Court pointed out the blatant violation of Article 175 (3), read with Article 203 of the Constitution.[368] The autocracy in the procedural justice system of the pre-colonial and colonial eras resonates even to-date to deter the inbuilt constitutional mechanism to allow independence of the judiciary. There has never been a focus of any political or military government on revamping procedural justice for the right to a fair trial and ensuring the independence of judiciary as a key player in the state. In addition, there has hardly been any sincere effort to simplify the complex procedures for speedy justice by the independent courts per raison d'être outlined by the ICCPR and the Constitution of Pakistan. The legislature under the ruling civilian and military elites was manipulated to carry out constitutional amendments, either to curtail the independence of the judiciary or to perpetuate military regimes, all in a bid to enhance their economic and political might.[369] The post-colonial history of Pakistan is marred by severe and frequent violations of fundamental human rights, civil liberties, and the rule of law.[370] The State has failed to provide efficient procedural justice to guarantee the right to a fair trial without undue delay by the competent, impartial, and independent judiciary.

[368] *Sharaf Faridi v Federation of Pakistan and others* [1989] PLD 404 (Karachi)
[369] Hassan Javid, 'Class, Power, And Patronage: The Landed Elite and Politics In Pakistani Punjab' (PhD, London School of Economics 2012) iii
[370] Ilhan Niaz, *The Culture of Power and Governance of Pakistan 1947-2008* (OUP 2010) 175-177.

Chapter 4 A Non-Adversarial Framework and Supplemental Procedural Syndrome

4.1 Introduction

The previous critique of this thesis has established how the arbitrary procedural justice that developed during the *Mughal* and British regimes was passed down to Pakistan. The post-colonial validation of procedural laws has had a significant impact on the current dispensation of justice resulting in disproportionate delays due to the state's failure to address anomalies and complexities, with far-reaching implications. This thesis provides clear evidence that the British focused on an autocratic legal mechanism to protect their economic interests, while the *Mughals* aimed to fortify their monarchy. The analysis of the origin and evolution of procedural justice, as currently enforced in Pakistan, confirms that both regimes neglected the essential components of the right to a fair trial in the institutional context. The absence of separation of powers doctrine during pre-colonial and colonial rule became a norm of legal culture in Pakistan, hindering the independence of the judiciary guaranteed by the Constitution's preamble itself. It eventually reflected on the judicial independence and impartial discharge of constitutional role by the judiciary as a prerequisite for the right to a fair trial and efficient procedural justice. The state institutions, namely the legislature, and executive, responsible for ensuring power separation and bringing about legislative reforms to evolve procedural justice for easy and prompt access to speedy justice, failed to discharge their respective constitutional roles. The intrinsic quest on part of the nation for a state mechanism to effectively secure and enforce the recognized fundamental right to a fair trial essential for promoting good governance continues unabated. This chapter is focused on the contemporary debate for awaited

law reforms and key missing elements in the colonial model of legal system inherited by Pakistan to effectively achieve the aims and objectives of procedural justice, complying with the right to a fair trial. The pressing situation calls for theoretical analysis to identify those factors in procedural laws that are lacking to hamper compliance with Article 10-A of the Constitution, read with Article 14 sub-articles (1) and (3) (c) of ICCPR, in our legal system.

The seminal work of Robert Hale marks another essential element for the social legitimacy of procedural justice. He provides us with insight that "… the rules of property, contract, and tort law … are "rules of the game of economic struggle"[371] meant to "… differentially and asymmetrically empower groups bargaining over the fruits of cooperation in production."[372] His work in Law and Economics is a manifestation of the notion that the protection of property rights by the government essentially safeguards against violent and non-violent interference by the parties in rights of their ownership. Therefore, the role of government is vital to employ coercion whenever so necessary for keeping peace. It helps protect owners from violence and shields them against even peaceful infringement of their exclusive rights on what they own.[373] This debate signifies that only the analytical tool of relative power plays its role, which depends not on the "fallacy of liberty"[374] but rather the relative power that procedural justice hands down to the state through the "power of coercion."[375] So the state cannot assume the role of a benign onlooker or disinterested protector, rather the state is actually the custodian of legal arrangements in society. Therefore, it

[371] Robert Hale, 'Coercion and Distribution in A Supposedly Non-Coercive State' (1923) 38 PSQ 481
[372] ibid.
[373] ibid, 472-73
[374] ibid, 471
[375] ibid, 478

becomes essential to recognize the given dimension of procedural justice that hinges upon the state's role against violence in providing just economic bargains under legal arrangements, ensuring fair treatment for its social legitimacy, as propounded by Hale.

4.2 Social Legitimacy and Notions of Procedural Justice

Procedural justice refers to the process of administering justice in a fair manner that is satisfactory to all the parties involved. This adverts to not only making well-informed decisions but also ensuring that resources are allocated fairly during the resolution process. Hoyle has empirically established that a fundamental component of procedural justice is the people's attitude toward those wielding authority.[376] If individuals have a favourable outlook towards those administering justice, they are more likely to feel empowered, valued, and treated equitably throughout the process. Conversely, they may experience a sense of helplessness and perceive the treatment they receive as unjust. Tom Tyler's research has shown that people's perceptions of neutrality, trust, and social standing also influence their judgments about procedural justice. A legal system is perceived as legitimate when it leads to greater compliance with the law. [377] One way in which procedural justice can result in the perception of legitimacy is by promoting the feeling of social inclusion, a phenomenon that can moderate the relationship between a legal system and its perceived legitimacy. This means that such a relationship becomes more critical for those who already feel excluded from society for its perceived legitimacy. The concept of procedural justice is crucial in establishing the social legitimacy of legal institutions and promoting

[376]Carolyn Hoyle and Diana Batchelor, 'Making room for procedural justice in restorative justice theory' (2018) IJRJ 175

[377] Tyler T. R, *Why people obey the law* (Princeton University Press 1990) 104–06

compliance with the law.[378] The Constitution and ICCPR mandate a procedural framework to safeguard the right to a fair trial, ensuring efficient and equal access to justice. However, when the State parties fail to address concerns about procedural safeguards for adjudication within a reasonable time, it impedes the exercising of an essential fundamental right. As a result, those facing economic exploitation often have no other option than to abandon their legal claims or settle them for less favourable terms, which entails their social exclusion and perpetuates socio-legal injustice. Thus, procedural justice that hampers the right to a fair trial, in turn, hinders equal access to justice for the underprivileged, impacting the social legitimacy that is all too common.

Our study in the previous chapters has established the perspective that the given procedural arrangements in Pakistan are not consistent with the concept of the right to a fair trial. The dilapidated situation of procedural justice cannot absolve the three organs of the state. The role of government in parliamentary democracy becomes significant in the present research. The influence of the executive branch often having the majority in the legislature paradoxically coincides with the projects of social contentment and harmony. Its role becomes particularly momentous in the context of this discussion to recuperate the confidence of the masses in procedural justice and the right to a fair trial. Therefore, Hale's analysis of the assumption of vital role of government to shield its people against infringements of their rights of economic bargains becomes relevant. Hale is also of the staunch view that the judges adhering to different approaches and various judicial notions of both the socio-legal and socio-economic philosophies may bring to bear their judicial attempts to occasion greater

[378] Ben Bradford, 'Policing and social identity: procedural justice, inclusion and cooperation between police and public' [2014] Policing and Society, 22.

confusion between different communities of society.[379] It is difficult to disagree with the notion that procedural rights related to a fair trial may give rise to interpretative problems due to the use of question-begging legislative language.[380] Many procedural aspects involving equivocal inquiries and the inability to provide direct and explicit answers by the procedural laws can impact the fairness, quality, and promptness of justice administration. To further illustrate, the economic motive to inflict harm to the litigants is a normal bargain in the adversarial legal system. It lends support to the notion that fair and efficient procedural justice supported by supplemental non-adversarial provisions together with an effective cost mechanism and case-flow management system may furnish means to discount the phenomenon of socio-legal imbalance. The existence of choice with a fragile bargaining position leads to duress in such a legal system.[381] Pakistan's legal system, inherited from colonial rule, lacks the afore-going three critical elements of efficient procedural justice, together with complex laws, and compromised judicial independence derogating from the power separation principle. The limitations confronting courts of ordinary adversarial jurisdiction to address procedural issues of unequal distribution, without planned intervention by the government for procedural efficacy, can only weaken social harmony. [382] The procedural reforms with approaches based on glaring obliviousness prevent the social theory of law from taking its roots. Duncan Kennedy articulated that "[T]he invisibility of legal ground rules comes from the fact when lawmakers do nothing, they appear to have nothing to do with the outcome."[383] The seeming inaction is destined to beget a legalized injury by the distributive outcomes of

[379] Robert Hale, 'Prima Facie Torts, Combination, and Non-Feasance' [1946] CLW 196
[380] ibid, 197
[381] Robert Hale, 'Force and The State' (1935) CLR 286
[382] Robert Hale, 'Bargaining, Duress, and Economic Liberty' (1943) 43 CLR 628.
[383] Duncan Kennedy, *The Stakes of Law, Or Hale andFoucault! In Sexy Dressing etc. Essays On the Power and Politics of Cultural Identity* (HUP Press 1993) 89-90

procedural justice. Thus, such a colonial legal system available to the nation, despite its ostensible neutrality, perpetuates the unequal dispensation of justice. It hardly changes the fundamentally important adversarial procedural facade and brings about no visibly superficial and/or tangible changes to improve distributive patterns for possible shifts to advance equitable non-adversarial dispensation of justice based on fair trial.

Given the above analysis, it has become inevitable to move beyond obsolete colonial procedural justice which rests on approaches emanating from the vested interest of monarchy's despotic perpetuity, British trade interest, Political empowerment by the ruling elite, breaching the power separation doctrine, and eroding the independence of the judiciary by the military dictators, as discussed in the previous chapters. Besides assessing the current discourse of reforms for the justice sector in Pakistan, this study is relevant to examine how those fallacious approaches drastically debilitated the process of procedural reforms. The given approaches may encompass some complex debates but cannot provide an analytical framework to evaluate legal reforms in the justice sector, nor would such approaches attempt to engage with procedural and structural reforms in conformity with the societal dimension prevalent in Pakistan. The prime focus of such approaches per se was not legal reforms for procedural justice. In contrast, those reforms were aimed at the cognition of socio-political and economic context, and their analytical framework was significantly limited.[384]

[384] USAID, 'Pakistan Rule of Law Assessment – Final Report' (USAID Pakistan 2008) <https://docslib.org/doc/4219858/pakistan-rule-of-law-assessment-final_report>accessed 7 December 2023.

A mechanism for effectively delivering justice presupposes a permanent condition of civilization, maintenance of order, and good governance.[385] The way the pollution is an environmental hazard, the procedural justice without non-adversarial scope in conformity with the principles of fair trial and due process, pollutes and poisons the social environment. Justice Brennan rightly outlined that "Democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in and benefit by its impartiality and fairness."[386] The task of rendering even-handed justice to the rich or poor is a question of fundamental character.[387] Therefore, it is a sacred task for the state to provide its people with a legal system where they are enabled to vindicate their rights without delay and distinction. The principle of equality embodied in the constitution makes it obligatory for the state not to deny any person "equality before the law or the equal protection of the law".[388] In fact, such equality can only be meaningful when procedural justice provides admission of opportunities at par and without distinction to all people. The lopsided model of colonial adversarial procedural justice bequeathed to Pakistan, thus, exploits millions of people, losing trust in the existing model of legal procedures. For them, there is no equal justice in reality but only an unrealized formal promise.[389] The Supreme Court of India, while dilating upon the screaming identical situation, made observations [390] to the following effect:

[385] S C Singh, 'Criminal Justice: An Overview' (1999) CrLJ 44.
[386] S. Rao, 'Legal Aid and Under Trials' Cr.LJ (1993) 37.
[387] Fourteenth Report of Law Commission of India on Reforms of Judicial Administration 1958, 587
[388] Constitution 1973 (n 3) art 25
[389] Sarfaraz Ahmed Khan, *Lok Adalat: An Effective Alternative Dispute Resolution Mechanism* (1st edn, APH Publishing Corporation 2006) 41
[390] People's Union for Democratic Rights v Union of India [1982] AIR 1473 (SC).

> The rule of law does not mean that the protection of laws must be available only to a fortunate few or that the law should be allowed to be prostituted by the vested interests for protecting and upholding the status quo under the guise of enforcement of their civil and political rights. The poor too have civil and political rights and the rule of law is meant for them also, though today it exists only on paper and not in reality.... So far the Courts have been used only for the purpose of vindicating the rights of the wealthy and the affluent. It is only those privileged classes which have been able to approach the Courts for protecting their vested interests. It is only the moneyed who have so far had the golden key to unlock the doors of justice.... They have been crying for justice but their cries have so far been in the wilderness. They have been suffering injustice silently.... But time has now come when the Courts must become the Courts for the poor and struggling masses of this country.... It is true that there are large arrears pending in the Courts, but that cannot be any reason for denying access to justice to the poor and weaker section of the community. No State has right to tell its citizens that because a number of cases of the rich and the well-to-do are pending in our courts, we will not help the poor to come to the courts for seeking justice until the staggering load of cases of people who can afford, is disposed of.

The Supreme Court of Pakistan reiterated the pressing situation for inexpensive and expeditious justice to ensure a fair trial in the following manner:

> The object of criminal law is to ensure availability of the accused to face trial and not to punish him for offence allegedly pending final determination by a

> competent Court of law. It is well settled principle of law that … accused is entitled to expeditious and inexpensive access to justice, which includes a right to fair and speedy trial in a transparent manner without any unreasonable delay.[391]

Many of the poor rural disputants fall prey to such a procedural adversarial justice and are divested of availing cheaper and speedy supplementary forums of non-adversarial modes for settling disputes[392] that can be made easily enforceable in Pakistan.

4.3 Institutional Requirements for Non-Adversarial Resolution of Disputes

The significance of mediation and other alternative non-adversarial dispute resolution mechanisms (hereinafter referred to as ADR) of informal procedural justice like *panchayats*, *jirga,*[393] etc., cannot be downplayed in a society like Pakistan. Procedural justice involves conducting the process to administer justice in a fair manner to the satisfaction of both parties. It is, therefore, not only focused on elaborate decision-making, but it also calls for the fairness of resource allocation in the conflict resolution. The cornerstone of procedural justice is the way people perceive those in authority to administer justice.[394] The ADR, as a neutral component of procedural justice, allows those people to have contextualized assurance by the decision-makers for just and accurate conclusions. The Black's Law Dictionary has recognized "Alternative Dispute

[391] *Muhammad Nadeem Anwar v National Accountability Bureau* [2008] All Pakistan Legal Decisions, PLD 2008 SC 645.
[392] NC Jain, 'Legal Aid, Its Scope and Effectiveness of the Legal Aid Rules' [1996] AIR 185.
[393] Assembly of chosen by and/or accepted to the local people/community to settle disputes between the individuals in the villages of South-Asian sub-continent.
[394] Carolyn Hoyle and Diana Batchelor, 'Making room for procedural justice in restorative justice theory' (2018) IJRJ 175

Resolution as a procedure for settling dispute … such as arbitration or mediation."[395] Several statutes already refer to ADR as part of procedural justice.[396]

The poor prefer to have recourse to such modes of dispute resolution despite their perceptions that in the absence of any institutionalized statutory framework, neither such dispute resolution methods are completely fairer than the formal adversarial adjudication by courts nor would it be emancipating them from the influence of the upper strata in the rural areas. They are, by and large, not possessed with means that they can possibly offer to have easy access to justice at a lower cost. Although the ADR has been recognized by the superior courts of Pakistan as an integral part of procedural justice in a number of procedural laws, the adversarial legal procedures in vogue do not provide a semblance of any solid mechanism for the modern concepts contemplating informal and non-adversarial dispute resolutions systems. The constitutional courts have laid emphasis on its significance as the procedural justice in their judgments as below:

> Civil laws dealt with properties (either moveable or immoveable) and rights in which, at each and every stage, parties could enter into a compromise/settlement and Courts had vast powers to decide the *lis* on the basis of settlement, so arrived between the parties …. Only exception to a compromise could be that the same might not be made with ill-will or connivance between the parties, so that a third party should not suffer or his right might not be adversely affected…. Compromise was the best solution for

[395] *Black's Law Dictionary*, 8th edn, Thomson Reuters 637.
[396] Family Courts Act 1964; The Code of Civil Procedure, 1908; The Arbitration Act 1940.

> removal of differences and it was always appreciated by the Courts of law, for which certain specific provisions were also inserted in the Civil Procedure Code, 1908, such as Alternate Dispute Resolution (ADR), conferencing and reconciliation; and that was the reason the provisions of O.XII, R.6, C.P.C, were made part of the statute.[397]

It has further been held that:

> The provision for costs should be an incentive for each litigant to adopt alternative dispute resolution (ADR) processes and arrive at a settlement before the trial commences in most of the cases.[398]

It may be aptly mentioned that both the adversarial and non-adversarial proceedings are not mutually exclusive, but rather complementary to each other.[399] The inadequacy, non-effectiveness, and non-existence of institutionalized framework for these forms of dispute resolution often provide no other choice to the litigants than either face economic exploitation costing their fundamental human rights or have to opt for the expensive but formal mechanism of dispute resolution in the courts. Such a choice of expensive, tardy, complex, and cumbersome mechanism, at times, only serves as a tool to vindicate or reclaim prestige by the influential magnates.[400] The final report of the United States Agency for International Aid (USAID) delineated that the delay in decisions of courts perpetuates hierarchical social order, which protects

[397] *Said-Ur-Rehman v Raj Muhammad and another* [2021] C L C 1206.
[398] *Mehr Ashraf and another v Station House Officer and others* [2022] PLD Lahore 328.
[399] Jain (n 392)
[400] Foqia Sadiq Khan, *Quest for Justice in Pakistan: Judicial System in Pakistan* (Network Publications 2004) 5-7.

vested interests and is "better served by lengthy, drawn out processes rather than the efficient and fair resolution of disputes …. Other factors that come to play in these negotiations are the class, ethnicity, wealth, gender, religion/sect, social hierarchy, and social networks of the parties."[401] These important insights are meant to sensitize that a legal system with efficient mandatory non-adversarial procedural tools to complement conventional adversarial litigation is essential. It will also help to determine the cost for each stage of the trials in anticipation to rid the exploited in the given socio-economic imbalance. It is a uniform and overwhelming demand by the disputing litigant public to serve the optimal solution to their grievances.[402] There is an imminent requirement for a wide agreement supported and cherished by both the state and the public to also simplify adversarial procedural justice for easy and cost-effective access to justice. To proliferate the constitutional order for a fair trial, the measure to enable the ordinary people to seek prompt remedies and protection of law through such procedural reforms, is all the more crucial to emancipate the ordinary litigant public of the rigours of a legal system beset with problems like massive delays and high magnitude of cost. Such problems of the adversarial legal system render it virtually ineffective as even the potential users often avoid the prevalent system.

4.4 A Comparative Indigenous Approach

India has been acclaimed for a flourished ADR model with the support of the state and proficient bar, leading to the evidence that the litigant public in India is now availing themselves of remedies by invoking courts at lower costs, which appears to be further

[401] USAID, *Pakistan Rule of Law Assessment – Final Report* (USAID Pakistan 2008) <http://pdf.usaid.gov/pdf_docs/PNADO130.pdf >&<https://docslib.org/doc/4219858/pakistan-rule-of-law-assessment-final-report>accessed on 7 December 2023.
[402] ibid.

diminishing. In the post-independence movement, they succeeded to establish a key method of village-based courts, which significantly enlarged the access of the poor to justice. The politicians and judges progressively became captivated by the idea to settle disputes at the indigenous grassroots level in the traditional manner. The *Lok Adalat*[403] concept gained momentum and was given abiding support to expand it as an alternative dispute institution across India, a country that has a fair resemblance to the socio-legal fabric prevalent in Pakistan. This promising form of the dispute-settling procedural mechanism, as a state creature, offered the participants fair, speedy, and deliberative justice. The legal procedures in Pakistan require serious reconsideration to provide identical support for ADR as a non-adversarial tool to supplement and be formalized in adversarial procedural justice.

The movement for restoration of such an indigenous legal system took its root soon after Indian Independence when the socialists of the ruling party of the Indian National Congress stressed that the inherited colonial adversarial system was unsuitable for reconstructing India. A faction of public representatives on the treasury gave unstinting support to the hypothesis that conflict bred colonial oppression was liable to be substituted by reconciliation and harmony. Their proposal met with almost unanimous disdain by the legal fraternity in general and a scornful outlook by Dr. B.R. Ambedkar, who then chaired the Constitution's Drafting Committee, in particular.[404] Nevertheless, the idea of *"panchayat system"* continued to fascinate legal scholars.

[403] The literal meaning of Lok Adalat is "People's Court" which was created as a statutory organization under Legal Services Authorities Act, 1987 and is used as an alternate dispute resolution mechanism in India.

[404] Article 40 of the Indian Constitution provides for taking steps to organize village panchayats and endow them with such authority and powers to enable them to function as units of self-government. The classic work on appeal for "traditional" institutions, Lloyd I. Hoeber and Rudolph Susanne Rudolph, The Modernity of Tradition: Political Development in India (UCP 1967).

The 1973's report of the Expert Committee on Legal Aid chaired by Justice Krishna Iyer viewed the radical critique and spoke glowingly about *Nyaya panchayats* as a great scheme to be brought within the purview of the organized procedural justice system in India. This form of legal aid method was endorsed for incorporation thereof in the formal administration of justice.'[405] *Panchayats* are commended as inexpensive, accessible, expeditious, and suitable to preside over conciliatory proceedings." The *panches* purportedly were not village notables' but rather superannuated judges and retired lawyers.[406] The scheme implies that the non-adversarial justice in their minds remained somewhat a "legal justice," the law of the land, and not that of the villagers or their spiritual advisors.'[407] However, a follow-up report by the said Committee endorsed a concrete conciliatory methodology to be manned by the people well conversant with local customs, values, legal norms, and cultural patterns to help remove the defects of colonial procedural justice.[408] It contemplated that the *panchayats* would not depart from the recognized notions of justice and law. The proposed scheme envisaged the presiding judge with legal knowledge, and the members to be given rudimentary training. The proceedings without lawyers and tribunals would be informal, non-adversarial, and conciliatory but involving small claims. The exceptionable decision would be open to review by the district courts. Although the said forum was independent of formal procedures and official law, it did not bear normatively traditional institutions. The local system of non-adversarial procedural justice, in conjunction with conciliation through local responsiveness by educated paternalistic outsiders, provided a foundation for future developments. It

[405] R Kushawaha*, Working of Nyaya Panchayats in India: A Case Study of Varanasi District* (YAP 1977) 31-63.
[406] Khan (n 400) 99.
[407] Robert M Hayden, *Disputes and Arguments Amongst Nomads: A Caste Council in India* (OUP 1999).
[408] PN Bhagwati, *Report on National Juridicare Equal Justice, Social Justice* (Ministry of Law, Justice & Company Affairs, 1976).

inspired a hope among the powerless that the institutions so fashioned could protect them. The *Panchayati Raj* [local self-government] policy of the late 1950s[409] established the *Nyaya panchayats* to exercise jurisdiction on specific categories of petty cases. Those *Nyaya panchayats* derived indigenous support through symbolic and sentimental virtues, with an appeal system altogether different from the traditional *panchayats*. They primarily applied statutory laws instead of indigenous norms, and their decisions were based on the majority view and not on unanimity. Their membership comprised the members chosen by election from constituencies rather than the leading influential elite by caste or wealth.[410] Such a focus of "*village panchayat*" indeed focused on a represented ADR which created an idealized version that turned upon the democratic fellowship of the traditional society by ignoring caste-based society.

The various categories of disputes/cases, including those pending adjudication in any of the courts of law; would be taken up or referred to the *Lok Adalat* involving:

- Compoundable criminal offences,
- Disputed matters relating to the Negotiable Instruments.
- The disputes concerning the recovery of money.
- The labour disputes.
- The matters of utility bills except for non-compoundable offences.
- Matrimonial/family matters.

[409] A committee was constituted by the National Development Council which submitted report in 1958 to recommend a three-tier structure level and Gram Panchayat at the village level.
[410] Khan (n 400).

The following disputes/matters would be filed in the *Lok-Adalat* even prior to filing the cases in regular courts:

- The disputes concerning the recovery of money.
- Disputed matters relating to the Negotiable Instruments.
- The labour disputes
- The matters of utility bills except for non-compoundable offences.
- Matrimonial/family matters,
- Maintenance-related disputes.
- Other cases of miscellaneous nature like civil disputes,
- Compoundable criminal disputes.

A legal issue of a non-compoundable nature would not be taken up by the *Lok-Adalat* in the given legal system. The *Lok-Adalat,* to be presided over by their members, would assume a statutory role of only conciliators and have no veneer of judicial responsibility. They would only persuade the litigating parties to reach a settlement and hold counselling sessions between the opposing sides.[411] *Lok Adalat* brings about an amicable settlement between the parties as a paramount feature of this forum.[412] The court fee would not be chargeable for the matter under reference in the *Lok Adalat* and even if settled subsequent to the filing of the suit, the original court fee so paid on the petition before the court was liable to be refunded to the litigating parties. It sounds like a very captivating and viable framework to statutorily incorporate such a

[411] Hindustan Times, 'Lok Adalat Disposes of 8.5 Lakh Cases in A Day Across Maharashtra (2021) <https://www.hindustantimes.com/cities/mumbai-news/lok-adalat-disposes-of-8-5-lakh-cases-in-a-day-across-maharashtra-101632673899685.html> accessed 8 December 2023.

[412] R Rajashekar Rao, 'Lok Adalat Confined Only to Passing of Award Based on Compromise' The Indian Express (2018). <https://www.newindianexpress.com/states/telangana/2018/nov/05/lok-adalat-confined-only-to-passing-of-award-based-on-compromise-1894483.html>accessed on 8 December 2023.

flexible procedural framework with some suitable modifications to be discussed later in this thesis and without strict application of the law of evidence. The decisions so made by *Lok Adalat* became binding on disputing parties[413] and capable of being executed through the legal process.

The replication of *Lok Adalat* with certain alterations in Pakistan may equally turn out to be very effective for the non-adversarial settlement of matters involving disputes like the partition of property, damages, other miscellaneous civil litigation, etc. It may enlarge the scope of non-adversarial claims through compromise by a win-win approach of giving and taking. Since the *Lok Adalat* is to be presided over by a retired judge or lawyers with adequate legal acumen and familiarity with equitable procedural dimensions, it is to be composed of democratically elected members. It may assume a predominant role as a forum for reconciliation, arbitration, and other relevant modes of amicable settlement in all civil cases. In the event of failure of the ADR, such a forum may also assess and propose the anticipated cost to be borne as an obligation by the parties. For ascertaining the compulsory cost, factors like initiating or opting for the formal litigation or the one maliciously contesting the valid and lawful claim may be taken into consideration, at the outset of the civil litigation. Such cost to be mandatorily disbursed by the party failing in its cause in the formal adjudication by the court may be ensured through sureties, if so deemed appropriate by the court. Such a forum may also play a pivotal role in settling compoundable criminal disputes through monetary compensations. The mediatory settlement so evolved by the *Lok Adalat* becomes an agreement between the parties that is enforceable like a valid agreement.

[413] The Times of India, 'Lok Adalats Can Pass Decree in Criminal Cases: SC' (2011) <https://timesofindia.indiatimes.com/india/lok-adalats-can-pass-decree-in-criminal-cases-sc/articleshow/10911746.cms> accessed 8 December 2023.

Similarly, the parties signing a settlement by the intervention of the mediator provide it with the status of a binding arbitral award.[414] Hence, it is clearly evident that the disputes so settled between the parties may be given a legally binding status on the pattern of an "Award" of the *Lok Adalat* and its decision may be deemed as final and enforceable against and between the competing parties.[415] Additionally, the discretionary power to recall and/or review a decision on numerous grounds may also be made permissible. Furthermore, the financial incentive for each successful ADR settlement out of court may be given to the members of *Lok Adalat* to accelerate their performance. The Indian Supreme Court has already ruled that the *Lok Adalat* was formed to arrive at compromise and amicable solutions between the parties on the matters in dispute and has no jurisdiction to examine such matters on merit.[416] The Indian working model with some of the modifications, to be mechanized at the local level by formally incorporating it into the procedural justice of Pakistan, will be further discussed in detail in the following chapters while considering the final proposals for procedural and structural reforms in the civil and criminal administration of justice in the country.

4.5 Islamic Provisions for Non-adversarial (ADR) Model

Islam is the state religion of Pakistan[417] and has consistently encouraged its followers to solve their disputes amicably without creating enmity. Hence, the Islamic teachings

[414] The Arbitration and Conciliation Act 1996, s 74 & 30

[415] Mustafa Plumber, 'Case Closed Via Lok Adalat Amounts to Decree/ Award; Courts Can't Recall The Said Order, Bar Under S 362 CrPC Will Apply: Karnataka High Court' (2021) <https://www.livelaw.in/news-updates/karnataka-hc-decree-award-by-lok-adalat-cant-be-recalled-by-courts-bar-under-362-crpc-183755>accessed 8 December 2023.

[416] Paras Diwan, 'Justice at the Door-Step of The People, The Lok Adalat System' [1991] AIR 85-86.

[417] Constitution 1973 (n 3) art 2

exhort for using the non-adversarial process of ADR through *sulh,*[418] *tahkim,*[419] and *muhtasib,*[420] as established hereafter through the Quranic verses *and* sayings *of* Prophet Muhammad (SWA). To briefly examine how Islam justifies the inclusion of the ADR process, we may analyze the precedence attached to non-adversarial procedural justice and the following features of ADR mechanisms:

4.5.1 Sulh (Reconciliation)

It literally means "to bury a dispute." Such a burial of dispute may take place either directly by the parties or with the support of a third neutral. This concept of *sulh* primarily originated from the two verses of the Holy Quran to the effect:

> The believers are but a single Brotherhood: So make peace and reconciliation between your two (contending) brothers: And fear Allah that ye may receive Mercy."[421] and 'If two parties among the Believers fall into a quarrel make ye peace between them: but if one of them transgresses beyond bounds against the other then fight ye (all) against the one that transgresses until it complies with the command of Allah; but if it complies then make peace between them with justice and be fair: for Allah loves those who are fair (and just)'.[422]

[418] Peace, ceasefire, end of the conflict or trouble. It is an Arabic term used for the problem solving through negotiation, mediation/conciliation, and compromise)
[419] Tahkim signifies settling of a dispute between two or more contending parties through an arbitrator. It is Arabic term employed for the Arbitration.
[420] A muḥtasib is responsible for the "accountability" in traditional Islamic administrations (called ombudsman in the modern jurisprudence), who provides informal justice by the wali al-mazalim or chancellor
[421] Quran, 'Surah Al-Hujurat (49) Verse10.
[422] ibid, 9

There is another Quranic verse that strappingly vindicates the amicable settlements with equity and fairness, which in the Quranic words reflect as follows:

> In most of their secret talks there is no good: but if one exhorts to a deed of charity or justice or conciliation between men (secrecy is permissible): to him who does this seeking the good pleasure of Allah. We shall soon give a reward of the highest (value).[423]

Prophet Muhammad (SWA) also encouraged *sulh* and stated in the *hadith* that:

> There is a *sadaqah*[424] to be given for every joint of the human body and for every day on which the sun rises there is a reward for the *sadaqah* for the one who establishes *sulh* and justice among the people.[425]

As a sequel of the above Quranic verses and sayings of the Prophet Mohammad (PBUH) it transpires that the conciliation and non-adversarial modes of dispute resolution for *"huquq-ul-ibad"* (rights of human beings) are liable to be preferred in the Islamic procedural justice so long as they are just, equitable and consistent with the provisions of *shariah* laws. The *qazi* is under obligation to make a bid for settlement through compromise when the dispute is pending adjudication in the court.

[423] Quran 'Surah Al-Nisa -4 Verse114.
[424] A wide-reaching charity in Islam as a kind and virtuous deed for the sake of Allah (SWT).
[425] Chapter 34 Hadith 1 (Sahih Al Bukhari 3862) <https://www.prophetmuhammad.com/bukhari/3862> accessed 8 December 2023.

However, on failure to bring about a compromise, he has to judicially determine the matter in a becoming manner.[426]

4.5.2 *Tahkim* (Arbitration)

In the pre-Islamic era, Arabs practised *tahkim* (arbitration) to settle their various commercial disputes.[427] Islamic law has allowed its followers to seek arbitration when they become unable to resolve their private matters. *Tahkim* is as simple as any other modern concept of ADR. *Tahkim* was long recognized as a mechanism of alternative dispute resolution before Islam and its principles became part of the Islamic procedural justice as is evident from the following verses of Quran as well as the practice of Prophet Muhammad (SWA) and his companions.[428] The arbitration concerning family disputes is explicitly mentioned in the Quran as follows:

> If you fear a breach between them (the man and his wife), appoint (two) arbitrators, one from his family and the other from her's; if they both wish for peace, Allah will cause their reconciliation. Indeed Allah is Ever All Knower, Well Acquainted with all things.[429]

Prophet Mohamed (PBUH) not only practised arbitration rather acted as an arbitrator on numerous occasions between individuals and also between tribes, including the one among several tribes for placing *Hajr-e-Aswad* (black stone) while rebuilding the

[426] Syed Khalid Rashid, 'Alternative Dispute Resolution in the Context of Islamic Law' (2nd International Conference on Law and Commerce-Law, Commerce and Ethics, School of Law, Victoria University 2003).
[427] S H Amin, *Commercial Arbitration in Islamic And Iranian Law* (Vahid Tehran & Royston Glasgow 1988).
[428] M Zahraa, & Hak, N A 'Taḥkīm (Arbitration) in Islamic Law within the Context of Family Disputes' (2006) ALQ 20(1), 2.
[429] Quran, Surah al-Nisa-4 Verse 35.

Ka'aba. Another view establishes the commands to the arbitrators (judging is distinguishable from returning the trusts as arbitrators) to be just to render back the trusts to those whom they are due with justice, and already found its manifestation as a part of procedural justice through the following divine verse of the Quran:

> Verily! Allah commands that you should render back the trusts to those, to whom they are due; and that when you judge between men, you judge with justice.[430]

The afore-referred evidence would suffice to prove that the principles of Islamic *tahkim* (arbitration), as a mandatory procedural justice in Pakistan, shall be the renaissance of the combination of *sulh* and *tahkim*. Allah, the Almighty, has already ordained, as is clearly manifested by the above Quranic verse, that it is firstly incumbent upon the judges (*Qazis*) to employ ADRs for procedural justice through mediators and arbitrators and then may finally start arbitrating the case only after the mediation fails.

4.5.3 *Muhtasib* (ombudsman)

The concept of *Muhtasib* emanates from the Quran, which enjoins what is right and forbids what is wrong. It is meant to regulate community affairs like the accuracy of the weight and measures together with integrity in business and trade, and also transparency of municipal affairs.[431] Such an office was established following the verse of the Quran, i.e., "Let there arise out of you a band of people inviting to all that is good enjoining what is right and forbidding what is wrong; they are the ones to attain

[430] Quran, Surah al-Nisa-4 Verse 58
[431] Syed Khalid Rashid, *Alternative Dispute Resolution in Malaysia* (Kulliyyah of Laws, IIUM 2000) 36.

felicity."[432] The Prophet Mohammad (PBUH) appointed Sa'ad ibn Al'aasIbn Umayyah as a *Muhtasib* for *Mecca* and Umar bin al-Khattab for *Madina*. [433] It is an office of informal justice that checks maladministration and poor governance, which breach the rights of citizens through a fusion of quasi-judicial administrative powers. The process of dispute resolution seeks to utilize both forms of public and private Ombudsmen, in that, the socializing patterns and attitudes are inextricably connected with informal justice in our local jurisdiction to the expectations of justice. The term informal procedural justice has been used here to draw a distinction between state-administered formal and informal justice.[434] In Pakistan, the office of the Ombudsman has specifically provided the legal procedure to conciliate and amicably settle any grievance.[435] The Ombudsman is a public officer under Islamic law who sets both the coercive and non-coercive authority into motion for expeditious, just, and cheaper quasi-adjudicative functions.

The above discussion clearly divulges that the ADR process is part of Islamic procedural justice and potentially has the ability/capacity to cope with the inadequacies and deficiencies of the adversarial regulatory mechanisms of procedural justice, presently culminating in heavy backlogs to chock the courts in Pakistan.

4.6 Assessment of Reasonability in Pakistan

The glaring demerits of adversarial procedural justice, without a mutually inclusive non-adversarial format, are grossly invasive to privacy, paralyzing productive activities,

[432] ibid, 51.
[433] ibid.
[434] C Hodges, 'Consumer-to-business dispute resolution: The Power of Cadr, ERA Forum'(2012)<https://www.researchgate.net/publication/257765720_Consumer-to-business_dispute_resolution_The_power_of_CADR> accessed 9 December 2023.
[435] The Punjab Office of the Ombudsman Act 1997, s 33.

corrupting litigants by tempting them to cause harassment to each other, and damaging their reputation. It can only bring acrimonies and resentments among those who otherwise may find some occasion to cooperate. The procedural laws in Pakistan encourage twisting, stretching, and hiding the facts apart from being costly as well as wasteful of time and energy.

The phenomenon of ADR may not be termed as novel in Pakistan, particularly when the inherited colonial procedural laws succeeded the widely respected system of *Jirgas*[436] , *Panchayats* and *Qazis'* etc. The need for such ADRs, as was then recognized, is progressively gaining importance due to the `nerve-racking, costly, and prolonged litigation process. The various methods of ADR, i.e., conciliation, negotiation, and arbitration, are being practised in modern democracies constantly to innovate their procedures for dispensing expeditious and inexpensive justice.

4.7 The Non-Adversarial Statutory Framework

Pakistan had adopted colonial criminal and civil procedural laws. Then, litigation was considered to be the only form of resolving disputes, and those procedural laws invariably leaned towards the lengthy process of recording evidence. The non-adversarial means to deal with the matters under litigation were also not unequivocally envisaged by the 1973's Constitution. It does not find explicit scope or even mention of the ADR except an implicit reference for the matter relevant to the Council of Common Interest (CCI),[437] the National Economic Council (NEC),[438] the

[436] An assembly to settle the disputes by the tribal leaders making decisions with consensus which is a traditional social code in Pashtun tribes of Pakistan who often resort to such mechanism.
[437] Constitution 1973 (n 3) art 153.
[438] ibid, art 156.

National Finance Commission (NFC),[439] and the original jurisdiction to the Supreme Court of Pakistan in "any dispute between two or more Governments."[440] There is very limited and spineless statutory backing for non-adversarial resolution of disputes. The ordinary legislation initiating those methods was only confined to the small claims not exceeding PKR 100000/- (GBP 370/- only) in the cases of a civil nature under the Small Claims and Minor Offences Court Ordinance, 2002.[441] It provided an expeditious and simple procedure for the service of the process together with the ADR process, and the failure of such informal resolution of dispute entailed a summary procedure to determine the suit.[442] Similarly, at the dawn of new millennium, the amendment in the Code of Civil Procedure[443] in 2002 provided the courts with discretion for initiating the ADR procedure of mediation and conciliation by incorporating section 89-A, which was followed by Order X Rule 1-A, in the Code of Civil Procedure of 1908. However, the consumer protection laws also envisaged mandatory provision of ADR mechanism for resolving consumer disputes before courts.[444] The Local Government laws further provided to constitute "*Mosalehat Anjuman*" and "*Insaf* Committees" to facilitate amicable resolution of local disputes.[445] The 1940's Arbitration Act enacted in the colonial regime was adopted by Pakistan for expeditious ADR relief and continues to be applicable in the country to date.[446] It allows the parties to seek arbitration without the intervention of a court[447] but does not highlight all the important aspects of

[439] ibid, art 160.
[440] ibid, art 184.
[441] The Small Claims and Minor Offences Court Ordinance 2002, s 5
[442] ibid, s 6,11,14,26,32
[443] The Code of Civil Procedure (Amendment) Ordinance 2002, XXXIV.
[444] The Punjab Consumers Protection Act (II of 2005), s 29.
[445] The Punjab Local Government Ordinance (XIII of 2001), s 102-196
[446] The Arbitration Act 1940.
[447] ibid, Chapter II.

arbitration proceedings for dispute resolution.[448] Thus, it was substituted by the Arbitration and Conciliation Act 1996 in India.[449] The Conciliation Courts were mandated under the Ordinance of 1961 to adjudicate upon some of the specified minor offences and civil disputes.[450] Some other special laws, including Family Laws and Labour Laws, made it incumbent for the courts to strive for reconciliation to settle the disputes between litigating parties. These laws failed to mechanize the institutionalized backing and were only a euphemistic recognition of the pressing need for the expeditious resolution of disputes involving either very small monetary claims or non-monetary claims, mostly like labour and family matters.

The alternate dispute resolution, referring to a procedural justice alternative to the traditional litigating methods for resolving disputes, whether inside or outside the courts, finds some informal and unrecognized methods of traditional ADR in Pakistan. These methods are based on the primitive, outmoded, and old-fashioned systems of *Panchayat* and *Jirga*.[451] The other one, which is very limited in its application, refers to a formal system of ADR as discussed above, to be administered by public bodies like Arbitration Councils, *Musalihat Anjuman*, Union Councils, etc. However, the decisions made by these traditional forums of *Panchayat* and *Jirga* are neither institutionalized nor legally binding. They are often made applicable only to family disputes. The people opt for these forums of ADR when there are no other alternatives to effectively curb the costly and lengthy proceedings. Currently, the dire need for incorporating an effective ADR mechanism for providing a useful model of non-adversarial procedural

[448] Mayank Shrivastava & Shailesh Hadli, 'Flaws in the Law: An Analysis of the Shortcomings in the Arbitration Act 1996' VI (JCIL 2020) 30
[449] ibid.
[450] The Conciliation Courts ordinance 1961
[451] An assembly of the respected elders traditionally accepted or chosen by the rural community to settle inter se disputes between those individuals and villages.

justice has become increasingly imperative. Such a situation has erupted due to the cost and time considerations stemming from the complex and cumbersome legal procedures, which are also liable to be simplified and revamped for conventional litigation in the manner discussed in the upcoming chapters 5 and 6. It is not so required only for its ever-increasing and oft-repeated demand by the stakeholders but also for an operational framework to help avoid adversarial processes leaving wounds to destroy social relationships. It is also required to allay miseries of the poor facing a costly, unwieldy, lengthy, and complex adversarial system marred by socio-legal imbalance. Although the judiciary took a lead to encourage such a model of procedural justice for dispute resolution by instituting the National Judicial Policy in 2009[452] and revising it from time to time, such a coveted measure devised to reduce the backlog could not gain ground without amending and enacting the compatible procedural laws to facilitate formal ADR mechanisms. It denotes the abdication of authority on part of the executive and legislature to include viable statutory provisions of mediation, reconciliation, arbitration, and all other established and recognized modes of alternative dispute resolution in the procedural justice of Pakistan to ensure a fair trial. Such an ADR mechanism may be started through pilot projects in some of the districts under the supervisory jurisdiction of the High Courts and can eventually be given effect across the board in the country. A provision of the additional tool of non-adversarial character formally incorporated in procedural justice will significantly save average time and cost by reducing the age of ordinary litigation in trial courts. The process of ADR in Pakistan is not common; therefore, the litigants are constrained to resort to conventional litigation. It is primarily due to the fact that they cannot opt for the

[452] National Judicial Policy, 'Law and Justice Commission of Pakistan' available at <https://www.supremecourt.gov.pk/downloads_judgements/all_downloads/National_Judicial_Policy/NJP2009.pdf> accessed 9 December 2023.

traditional *panchayat/jirga* system, which has no binding effect against the mighty and is ordinarily not formally recognized under procedural laws.

The proposed mechanism will further call for imminently required compulsory and institutionalized training of the judges and lawyers registered with the various Bars, and chosen representatives, along with all other stakeholders. The Law and Justice Commission of Pakistan (L&JCP) and the Pakistan Bar Council (PBC) may take urgent measures to introduce the ADR as a compulsory subject in the LL.B. degree. Similarly, an official institute of arbitrators should be established at the district level to train the lawyers, elected representatives, and other persons from the relevant fields for ADRs[453] to manage and regulate such proceedings in a proficient and transparent manner. The proposed training will make them capable of rendering their services in the proposed model to statutorily form part of procedural justice in Pakistan. Even the trade bodies/unions in Pakistan, being the end-users and already claiming to give enduring patronage to the ADR, are often incorporating mediation and arbitration clauses in their contracts to avoid unpopular protracted, and long drawn-out adversarial procedures. They feel handicapped, in the absence of an effective statutory and institutionalized non-adversarial framework of procedural justice, to pursue informal methods of alternate mechanisms for the release of their assets already caught up / frozen in the litigation. Their outlook on the inbuilt mediation or arbitration by the intervention of their representative bodies into the contracts is, by and large, occurring due to the trust deficit in conventional adversarial procedural justice. They are more prone to arrange self-coined in-house informal mediations and

[453] Islamabad Declaration of International Judicial Conference 2013, International judicial conference (Supreme Court of Pakistan 19-21 April 2013) <https://apsnewsagency.blogspot.com/2013/04/declaration-of-international-judicial.html> accessed 9 December 2023.

arbitration, which is an eye opener for the legislators and imminently calls for the establishment of formal statutory and institutionalized ADR system in Pakistan to provide the litigating parties with pre-litigation opportunities to invoke mandatory non-adversarial procedural options. Such a prospect may also be available for pending adversarial proceedings at both the trial and appellate levels. Since there is an inception level of the ADR mechanism at the official and professional levels, there are no significant or conspicuous publications of case laws and precedents on this count. However, a few cases at the international level, by and against the state of Pakistan as a party, may be found readily available.[454]

The critically impending move to formalize the non-adversarial forums of procedural justice to complement the existing adversarial ones is the pressing need of the hour. The proposed framework has the potential to attract and increase both foreign and local investments in an underdeveloped country like Pakistan besides discouraging the costly and cumbersome process of adversarial litigation. The legislature has not been able so far to devise comprehensive statutory instruments for inserting the relevant mandatory provisions in the procedural laws of Pakistan. The judiciary is afoot to assume a noteworthy role in practically encouraging, adopting, executing, and applying the ADR process for the adjudication of litigation in a cost-effective and speedy manner. There is no other option for the legal profession than to readily accept the modern trends of prompt remedial alternate resolution systems for disputes, which have the genuine prospects to provide them promising opportunities to flourish, financially and socially, in their dual career as mediators and lawyers, respectively. It

[454] Jacob Grierson and Mireille Taok, 'Comment On Dallah v Pakistan: Refusal Of Enforcement Of An ICC Arbitration Award Against A Non-Signatory' (2009) 26 JIA 903.

will further potentially cater to the needs of the oppressed strata. This non-adversarial initiative of an all-encompassing framework in the procedural justice of Pakistan will also raise the canvas of marketing and business. The acquisition of the knowledge and development of requisite skills of the non-adversarial ADR system, like mediation, etc., will become a pre-requisite as it will be an essential tool to be applied for resorting prior to the adversarial litigation. Their developed capacity of ADR as one of the primary requirements of the legal profession compatible with the modern-day requirements of procedural justice will enhance the scope to explore further opportunities to excel and grow as experts in the proposed area.

4.8 The Constitutional Limitations and Scope

The Constitution of the Islamic Republic of Pakistan mandates the State to ensure inexpensive and expeditious justice.[455] The proposed model of ADR may be one of the superlative possible options of inexpensive and expeditious justice to restore confidence of the downtrodden public in a formalized non-adversarial regulatory mechanism. It will provide a robust institutionalized working model under the aegis of the prevalent judicial system for providing a binding and executable character to amicable settlements. This will serve to provide alternative choices to the litigants to make peace and set their disputes at rest by avoiding multiple, lengthy, and cost-oriented adversarial proceedings to access justice. The ADR is a proven best method for resolving disputes in a speedy and economical fashion. Hence the legislature is obligated to give effect to the rationale underlying the constitution by inserting the binding statutory non-adversarial provisions for regulating the institutionalize ADR. It is also incumbent upon the various Bar Associations to turn over

[455] Constitution 1973 (n 3) art 37.

the new leaf and provide optimal support as their religious and constitutional obligation, for the enactment and enforcement of speedy and inexpensive non-adversarial procedural justice at the preliminary stage of adversarial litigation. Such an alternative and efficacious facility was not available in the colonial procedural justice bequeathed to Pakistan nor could it take some meaningful uplift as yet. The proposed model to be statutorily envisaged and inserted in the procedural codes, together with the establishment of the ADR system, will assist and supplement the conventional justice delivery methods. It will not only be appreciated by the litigants who have been trying to access speedy justice since the birth of their country, but rather will also fulfil the requirements of Article 14 of the ICCPR, read with Article 10-A of the Constitution for ensuring a fair trial and due process. At present, the poor are circumscribed to abide by a procedural justice devised by the British rulers, with altogether different historical perspectives. It does not open up new horizons in our legal firmament. The first real task is to bring about meaningful amendments in the legal procedures for the expansion of the non-adversarial ADRs in the legal system and the second crucial milestone is to effectively put this system into practice and implement it with its pervasive benefits at the grassroots levels.

The constitution of Pakistan contains important provisions[456] enjoining the State to strive its best to minimize and eventually eliminate inequalities amongst individuals, various groups, and classes of people. Any proposed model of procedural justice encompassing ADR as one of its key components will have the capacity to advance the solemn objective of a fair trial with equal protection of the law and equality before the

[456] ibid, Preamble, art 37 and 38

law[457] for its citizens, as the parties will end up with a win-win situation. This approach may offer them easy access to justice at a lower cost, without hostilities between them, and without wasting their precious time and resources. The afore-referred provisions underline the intention of the framers of the Constitution, who certainly desired to secure institutionalized informal means of dispute resolutions as an essential component of its procedural justice for a speedy and cost-effective mode of dispensing justice. It is crystal clear that the procedural reforms, to be discussed in the later chapters, will not be effectively consequential given the adversarial system's lethargy without such supplemental non-adversarial means of amicable settlement, which is one of the essential components conspicuously missing in Pakistan's procedural justice.[458] Another imperative constitutional directive concerning the decentralization of powers at the village level[459] in juxtaposition with the mandatory procedure for referral, at the very outset, will empower the local governments for dispute resolution of pending judicial matters to the ADR forums like the ones as discussed above, i.e., a model of *Lok Adalat*. It will not only help discharge the obligatory functions of the state under the Constitution but will also fortify the constitutional role of the State to support the weak sections of society for equal justice.[460]

4.9 Cost of Justice in Non-Competitive Socio-Economic Division

The prime and principal objective of a legal system is to fairly resolve disputes of the people. It safeguards their individual liberties and economic freedoms as a pre-requisite for the enforcement of fundamental human rights and satisfying the basic

[457] ibid, art 25
[458] KS Rao, *Law and Social Justice* (Institute of Constitutional and Parliamentary Studies 1974) 7
[459] Constitution 1973 (n 3) art 140-A
[460] ibid, art 37 and 38

necessities of life. However, there is a socio-economic division among those people in every society inasmuch as some of them have easy access, with their affluence, to those necessities (including the one to justice) and facilities that are required for life, whereas the other section is excluded from having even the bare minimum. This grim scenario calls for testing the role of procedural laws the judicial system is operating with, particularly in underdeveloped countries like Pakistan. Based on such a socio-legal approach, the current procedural mechanism of the judicial system appears to be exclusive in character. Its exclusive nature may not become inclusive until the philosophy under consideration makes the adjudication in our judicial system conform to the economic realities facing the country. The said philosophy propounds that the colonial system of procedural justice, currently in vogue, safeguards the interest of wealthy people, and all its politically motivated sub-systems under the domain of subservient executive agencies also promote the welfare of the rich. Those with a high intercept of wealth and social capital (links with influential people like politicians and bureaucrats) can influence various components of procedural justice.[461] Such a phenomenon eventually inhibits those components, like investigation and prosecution in criminal law, from getting a transparent support mechanism to dispense justice. The institutional framework of the judiciary, therefore, lacks support for the outcome in the absence of their independent and self-governing character free of such influence, being essential components of procedural justice. This thesis will also provide a comprehensive analysis, in the chapters to follow, of how the independent and self-governing operational working model free of such influence is to be presupposed for effective and efficient delivery of justice in addition to the cost

[461] James D Wallis, 'A Critical Evaluation of Delay in An Ohio Criminal Trial Court' in Institute for Court Management, Court Executive Development Program 2008-2009 Phase III Project (Court Executive Development Program 2008-2009 Phase III Project 2009) 44, 86-87.

mechanism for both the civil and criminal litigations that may prevent people of average income from having access to justice and the right to a fair trial. This study will suggest how the reforms in procedural justice for non-adversarial regulations, together with effective cost management, may safeguard the right to a fair trial. It becomes particularly relevant when the cost of ordinary litigation is far higher than the average family income for the poor with no or very little social capital, as discussed above, in the given legal system. It further underpins how the current scenario serves no other purpose than to exclude the underprivileged from the judicial structure of Pakistan. The study goes on to suggest that the proposed judicial procedures will inevitably require the intervention of the judicial and non-judicial independent agents/components (free of political and bureaucratic influence). Those elements should not only focus on the primary objective of settling the disputes through a non-adversarial ADR mechanism but also indispensably determine the anticipated cost to be paid by a party initiating false, frivolous, malicious and/or vexatious litigation. It becomes essential when the existing colonial system of procedural justice, so inherited by Pakistan, involves economic exploitation. The current procedural structure is flawed and links earnings along with social capital with disputes. There is a pressing need to evolve procedural justice, which must prevent ills of economic weakness from becoming a source of exploitation or earning in the course of adjudication. The right to a fair trial will remain an unrealized dream for those virtually excluded until procedural justice is so developed as to provide them with a mechanism for tortuous cost at the conclusion of the trial to make their access to justice free of economic abuse. A strong system of revamped and reformed procedural justice is necessary for economic development as well. Such a revamped and reformed procedural justice cannot be dispensed with for realizing a fair trial in the true sense.

The neoclassical school of thought[462] puts forth the assumption that the private interest of the individual(s) is enough to efficiently resolve the problems confronting them, even at times without support from others. This theory advanced the perception that beneficial interaction between individuals serves as a motive to exchange surplus benefits to be mutually enjoyed by both sides. Regardless of its import in a modern democratic society, many other problems, like a higher cost for dispute resolution, unabated horrifying delays, and exploitation by those with social capital, along with effluent outlook, are often complained of.[463] Therefore, it is the bounden duty of a State to mechanize possibly early settlements of the conflicts to avoid a negative-sum game.[464] All the well-organized societies in the global village have invariably assigned this task to the judiciary. Such a philosophy of neoclassical school based on socio-economic access to justice may have, in particular, a pivotal role in developing the procedural justice of Pakistan. The British law[465] with its constituents was enforced subject to some amendments in the post-independence era. The organizational structure of the given legal dispensation involved the solutions that turned upon the market forces instead of the private interest of the individual(s) in the attainment of justice, as was designed by the colonial rulers and discussed in the previous chapter 2 of this thesis. The attributes of procedural justice, including the fiduciary relationship, were made akin to the market goods to make justice like any other commodity that only the rich can afford. The global dimensions of clogged dockets, delays in disposal of

[462] Herbert Hovenkamp, 'Knowledge About Welfare: Legal Realism and The Separation of Law and Economics, (2000)84 MLR 805, 823.

[463] James D Wallis, 'A Critical Evaluation of Delay in An Ohio Criminal Trial Court' in Institute for Court Management, Court Executive Development Program 2008-2009 Phase III Project (Court Executive Development Program 2008-2009 Phase III Project 2009) 44, 86-87.

[464] A situation in which one party is directly benefitted at the expense of another by maintaining the status quo.

[465] Government of India Act, 1935.

cases, and higher costs for dispute resolution are the problems of legal procedures to make the increased exclusion ratio a moral certainty, to minimize access to justice and prospects of the right to a fair trial.[466]

A failed state, in the true sense, is one that fails to effectively discharge its obligation as regards the provision of efficient administration of justice.[467] Such a function is indispensable as no rule of law, property rights, and enforcement of contracts can be assured and no abuse of power by the regulatory components of governmental hierarchy can efficiently be put in check.[468] Its absence further indicates the ubiquitous procedural justice in derogation to the global dimensions of the right to a fair trial. Among all these problems, the problem of delay in justice becomes the most horrifying and frequently complained about.[469] The unbearable cost and delay to remedy the breach of rights enjoined by the legal rules, together with the congestion manifested by court dockets[470] deteriorate not only the evidence by fading memory or unforeseen demise of the witnesses, tampering with evidence, harassment to the witness together with other incidental and identical factors to culminate in loss of the relevant and admissible evidence.[471] The cost of litigation and delay in dispensing justice primarily becomes responsible for cultivating intolerance as a cultural norm, to compel the people to resort to extra-judicial means to settle their scores.[472] It facilitates the

[466] Maja Micevska and Arnab K Hazra, 'The Problem of Court Congestion: Evidence from The Indian Lower Courts. (Royal Economic Society Annual Conference Swansea 2004).
[467] Iftikhar Muhammad Chaudhry, 'Keynote Address' (The International Judicial Conference, Islamabad, 2012).
[468] World Bank, *World Development Report 2002: Building Institutions for Markets* (World Bank Publications, 2002).
[469] Vandana Ajay Kumar, 'Judicial Delays in India: Causes and Remedies' [2012] JLPG.
[470] Dory Reiling, *Linn Hammergren and Adrian Di Giovanni, Justice Sector Assessments: A Handbook* (World Bank 2007).
[471] ibid.
[472] Anil Xavier, 'A Mission: A Responsibility Towards Creating A Loving And Caring World' (2009) 1 The Indian Arbitrator 2.

magnates with clout to manipulate and tamper with evidence by using nefarious tactics including harassment and inducements to the witnesses and victims.[473] The courts, being cognizant of the fact, while referring to inadequate provisions of costs, have often reiterated and underlined its importance in the following manner:

> Provision of costs is intended to achieve the following goals; (a) it should act as a deterrent to vexatious, frivolous and speculative litigations or defences …. Specter of being made liable to pay actual costs should be such as to make every litigant think twice before putting forth a vexatious, frivolous or speculative claim or defence; (b) costs should ensure that the provisions of C.P.C., the Qanun-e-Shahadat, 1984 or other laws governing procedure are scrupulously and strictly complied with and that parties do not adopt delaying tactics or mislead the court; (c) costs should provide adequate indemnity to the successful litigant for the expenditure incurred by him for the litigation, which necessitates the award of actual costs of litigation as contrasted from nominal or fixed or unrealistic costs; and (d) the provision of costs should be an incentive for each litigant to adopt alternate dispute resolution (ADR) processes and arrive at a settlement before the trial commences in most of the cases.[474]

Lawyers owe their clients timely professional advice and representation. The fee of lawyers is a vital factor and must be compensated as a cost of litigation by the defaulting party which constrains the aggrieved one to get a favourable verdict by

[473] Reiling (n 470).
[474] *Mehr Ashraf* (n 398).

initiating or defending. A study conducted by Worthington and Baker in Australia[475] identified that the cost of the lawyer's fee is always the prime focus of all the parties. They calculated an average cost borne by the litigants on the basis of their collected data involving 100 firms in Victoria and New South Wales. They gave analysis resting on such data to substantiate that the maiden fee for the lawyers ranged from $ 4,700 to $ 8,000 in both afore-referred states, respectively. The lawyers charged a mean fee[476] from the litigant at varying rates between $7,500 and $11,450 as such. This phenomenon confronting the litigants in a country like Australia makes us sense how difficult it is even for the citizens of developed countries to legitimately pay higher fees than their average income let alone the economic miseries of the poor in underdeveloped country like Pakistan. The unique feature of the above data provides statistics for litigants as plaintiffs and defendants separately. The comparative cost of the former was 29% and the latter 26% of the benefits in return for them respectively. However, the principle of higher the interest/benefit, higher the cost (in absolute terms, what they incurred and what they inferred)[477] is of universal application, including the socio-legal culture of Pakistan. It may be calculated in relative terms that the increase in the amount of benefit so recovered also increases the cost of litigation. The lawyers' fee is undoubtedly the major cost but, of course, some other costs are also associated with the litigation, which was focused on by the research of Kakalik and Pace, who opted to estimate the cost of the tort litigation in the courts of the USA.[478] They considered the operation cost of the courts by using two distinct methods. One was based on "starting with insurance industry aggregate data on direct losses and

[475] Deborah Worthington and Joanne Baker, *The Costs of Civil Litigation: Current Charging Practices, New South Wales and Victoria* (Law Foundation of New South Wales 1993) 9-11.
[476] Ibid, 64
[477] ibid.
[478] James S Kakalik and Nicholas M. Pace, *Costs and Compensation Paid in Tort Litigation* (Institute for Civil Justice 1986) 37.

expenses paid in 1985, adding self-insurance, and then separating out payments for claims that were not lawsuits." The second one estimated "from the bottom up, starting with data from surveys of individual tort lawsuits, appropriately adjusting the numbers to 1985, and then multiplying it by the number of tort lawsuits terminated." Adding accounts for the time cost of the plaintiffs to bring the lawsuit besides contextual legal expenses for the claim, it was found that the plaintiff receives approximately 56% of the total expenses associated with the litigation and borne by all the parties. Such cost turned out to be higher than one that occurred to the litigants in Australia for the identical cases in the study of Worthington and Baker.[479] The findings so given appear to be consistent with those of previous ones as to the cost-benefit analysis (29% and 26%). The ratio of public expenditure in proportion to the overall private expenditure is far lesser for tortuous litigation.[480]

The non-monetary cost is also significant for this research, adding to the colossal monetary costs. Semple preferred to examine private costs on the civil justice of varying natures, including the one to cost health and time, which differed from case to case as well.[481] He had conducted interviews with 250 litigants involved in numerous types of cases from British Columbia, Ontario, and Alberta. It appeared that 23% of the cases related to land/house and 55% out of all cases related to personal injuries were prolonged for more than three years. He found that the litigants were often faced with some psychological issues, and the sentiments of 79.9% were absolutely negative due to factors like anger, stress, hopelessness, humiliation, frustration, and damage to relations. The non-adversarial mechanism, and in the eventual failure of ADR, the

[479] ibid.
[480] Ahmad Sohaib, Muhammad Shafique and Hafiz Fawad Ali, 'Cost of Justice and Exclusion' (2019) 15(11) ESJ 3.
[481] Noel Semple, 'The Cost of Seeking Civil Justice in Canada' [2015] CBR 639-.

mandatory process of ascertaining the cost of litigation in the civil procedure for both the public and private individuals and entities not only reduces the age and eventual cost of litigation to be borne by the parties rather it curtails incidental multiplications thereof. It also gives another avenue, with increased competition and reputation, of earning through learning and then applying the ADR techniques with or without initiating a reference or suit to advance the non-adversarial cause of the litigants.

The average age of litigation in Pakistan is higher, and a litigant is often constrained to wait for the final outcome of a civil or criminal trial in the court of the first instance for a period that, at times, may even exceed 4 to 5 years.[482] During such a period, he is required to appear before the court several dozens of times on the dates of hearings of his/her case. It is often experienced that the litigation so pending decision is adjourned without material proceeding due to a variety of reasons, including absence or strikes of the lawyers or non-presence of the opposite party, leave and/or preoccupation of the judge[483] due to volume of cause list, or a lot many other shortcomings of the procedural justice in vogue providing the scope for employing the delaying tactics to the benefit of those with socio-economic capital. The affordability and purchasing power of ordinary citizens in Pakistan are far lesser than those in developed countries, as discussed above. Also, the adversarial legal system bequeathed by the British rule provides procedural laws that are too tardy, complex, and cumbersome and consume far greater time together with the enhanced comparative price of justice for average-income citizens than ones in advanced countries. Resultantly, those under economic exploitation either give up their cause

[482] Osama Siddique, 'Case law Management in Courts in Punjab: Frameworks, Practices and Reform Measures' (Punjab Access to Justice Project 2016) 39.
[483] Semple (n 481) 8.

under litigation or often enter into a compromise with less favourable terms. They succumb to victimization beyond proportion to even relinquish their claims.[484] Irrespective of their rural or urban background, the greater proportion of the population is unable to bear the cost of agitating their legal issues involving even basic human rights, that too, before the ordinary courts of local jurisdictions. Therefore, one cannot turn a blind eye to comprehend from the given literature review that access to justice is genuinely hard, even if not next to impossible, for the average Pakistani citizen. The situation manifestly articulates that such a citizen, with average income, has either to borrow some amount or liquidate his assets to bring or defend a suit in court.[485] Thus, the apparent calculation of cast to result in the exclusion of the poor by procedural justice is not solely hypothetical but rather clearly demonstrative of the fact that the prevalent adversarial format neither compensates the victim nor provides an alternative non-adversarial forum to get their disputes resolved.

The foremost determinant to involve the monetary or non-monetary cost leans on the number of adjournments as the accused has to ensure his/her appearance before the presiding officer on every hearing while the parties have to produce their evidence many a time due to such adjournments in both the civil and criminal cases. The parties have to invariably bear not only their own expenses for travel, refreshments, and food but also for the witnesses, besides the loss of their business or work as well. Likewise, they often have to pay additional costs/compensations to the witnesses. The monetary cost of litigation in the superior courts is higher than in the trial and first appellate courts. The increased excludability of the poor or average-income citizens thus

[484] ibid, 9.
[485] ibid, 10.

becomes greatly inevitable. This over-exclusion in the procedural justice of Pakistan underlines the predominance of the neoclassical framework, which is liable to be rectified through the proposed theoretical framework for initiating non-adversarial ADR measures, indispensable cost liability by the defaulting party to the aggrieved, and the case flow management to contain the number of adjournment through time limits of each stage of the civil and criminal trials. The state of affairs calls for appropriate amendments in the relevant areas of procedural laws to be discussed in the following Chapters 5 and 6.

It is incumbent upon the state to ensure prompt justice through the cost-effective procedure to be supplemented by the non-adversarial settlements with or without the intervention of courts, as discussed above. The provisions for minimizing the age of litigation through statutory provisions, together with ascertainment of the cost at the preliminary stage of the litigation, to be paid by the losing party, will discourage false and vexatious litigation. The trial courts should be given the mandate to initially appoint mediators either with the mutual consent of the parties or, if the parties fail to evolve the consensus, by the judges themselves to settle their disputes through non-adversarial provisions. The awareness of public is also liable to be mobilized to overcome the phenomenon of exclusion. The formal incorporation of non-adversarial ADR in procedural justice and mandatory imposition of properly calculated costs against the losing party, be it the plaintiff or the defendant, will significantly reduce the time and cost of litigation. It will also serve the purpose of inclusion of those underprivileged who have been victims of exclusion from the legal structure of Pakistan. The fee of the lawyers shall be substituted by the predetermined and officially declared asset in addition to the monetary incentives on each of the

successful mediations or/and arbitrations etc. to be conducted or facilitated as recognized mediators, and it will also be a befitting discharge of their religious and constitutional role to support the state in realizing the constitutional objectives.

4.10 Regulatory Framework and Case-Flow Management

This research is primarily focused on the procedural justice reforms to increase the Pakistan legal system's capacity to ensure fair trial as globally recognized under the ICCPR. Any scheme without a predictable timeframe of litigation will not help manage the backlog nor will it process the future judicial workload by tracking each case to measure the delay. Such procedural reforms, designed to make procedural justice consistent with the requirements of the right to a fair trial under Article 14 of the ICCPR, will respond to the growing recognition of the necessity of a cost-effective and time-efficient legal system. It may include primary sources to promptly identify and then control those barriers for competent case processing following the mandatory non-adversarial proceedings and cost determination at the very outset of conventional adversarial proceedings. Such emerging knowledge for effective case processing is ordinarily termed as Case Flow Management[486] (hereinafter may also be termed as Case Management). "Case flow management" is the actions that a court has to take for monitoring and controlling the progress of the trials from the start to completion of litigation, including all post-disposition court work, to ensure prompt justice.[487] The concept of Case Management lays emphasis on the approaches, procedures, and

[486] Coordination of the processes and resources of courts for the timely adjudication of cases by creating environment assuring procedural justice in a fair and time efficient manner, providing equal access to the courts, and enhancing public confidence through effective and quality litigation process.

[487] David C Steelman, John Goerdt and James McMillan, 'Case flow Management: The Heart of Court Management in The New Millennium' (2000) xi <https://www.academia.edu/35024342/CASEFLOW_MANAGEMENT_THE_HEART_OF_COURT_MANAGEMENT_IN_THE_NEW_MILLENNIUM> accessed 7 December 2023.

systems that are employed to manage legal cases within the court's system.[488] It is meant to provide and amend the procedural codes with paramount objectives to enable the courts dealing with the cases to conclude their final outcomes within a reasonable time and with just and proportionate costs. The given concept of the management of cases is essentially liable to be incorporated in the procedural laws of Pakistan to treat the parties at par irrespective of their socio-economic status. It will be instrumental for saving expenses of the parties in the terms proportionate to their financial positions and will appropriately provide for the allocation of the court's resources to all the cases pending disposal. It will take the complexity and importance of each case into account by enforcing those rules of procedural justice and their compliance with the practice directions.

Case-flow Management in procedural justice appears to be imperative for the active operational management of legal cases,[489] and aims to realize the broad-based constitutional objectives of Article 10-A. It may help the parties with the progress of pending cases under fixed timetables from one stage to another; with benefits of compensation through mandatory costs. The ascertained progress of trial from stage to stage, since inception, will rule out the unwarranted delay at any of the stages when the trial becomes inevitable on the failure of the parties to get the matters in controversy amicably resolved under the aegis of institutionalized ADR methods. The legislative proposals for case management and calculation of cost for each stage of the trial at the very outset may also further encompass various miscellaneous proceedings of the cases to proceed simultaneously and mandatory statutory instructions to

[488] ibid, 26.
[489] ibid.

guarantee that the trial proceeds rapidly, efficiently, resourcefully, and proficiently through its various stages. The proposed strategy will statutorily sanction a procedural justice to reassure, in both adversarial and non-adversarial forms, the court's solemn commitment to manage and decide individual cases promptly, fairly, and economically. The proposed scheme will encourage the parties to remedy and redress their grievance through non-adversarial ADRs if they consider it appropriate for the prompt and cost-saving resolution of their disputes under the auspices of the court. It will facilitate them through procedures so evolved to co-operate with each other for identifying and settling the issues, wholly or partly, at the earliest possible stage, without full investigation or trial. It will guarantee protection to the poor against the arbitrary use of social capital and affluence, fair and equal treatment to all the litigants, and their greater cooperation in conducting the judicial proceedings.

As of the principle, efficient procedural justice plays a vitally important role within its imperative parameters of accuracy, propriety, and consistency to overcome neoclassical theory.[490] Since this hypothesis would calculate and strike a balance between time and resource constraints in juxtaposition with the objective of justice, the critique of this thesis would outline smart procedural management along with efficient, well-organized, and proficient court processes. The proposed strategy, with a dynamic and proactive management approach, will consider the application thereof in a particular case, groups of cases in various categories, and also handle the entire pending and future litigation. This will be required to be adopted as a thinking pattern for the legislature, judicial leadership, court administrators, lawyers, prosecutors, investigating agencies, and other regulatory components operating the legal system of

[490] Siddique (n 482) 14.

the country. Zuckerman has outlined the importance of accurate time management, speedy resolution of disputes, and the proportionate use of resources, in the following words:

> ... an adequate system of adjudication of civil disputes must meet [the said] three basic requirements, all of which are as integral as each other to the enforcement of civil rights… [C]ourt adjudication involves inevitable compromises arising from the need to balance competing imperatives or desired goals. Striking such balance is the peculiar business of management…. The need for managing competing demands is not peculiar to court adjudication but is a constant in any public service … [as] in reality there is no such thing as a management free service; there are only well managed services and poorly managed services and many shades in between.[491]

Lord Woolf, being conscious of reducing costs and time that the courts consumed in civil proceedings, became inspired by the French inquisitorial system where the judge, and not the parties, controls the litigation. He had identified three core issues facing litigants in the civil justice system, i.e., delays, costs, and complexity.[492] According to his final report, "Litigation must be conducted not for the convenience of the lawyers, but for the convenience of the parties."[493] Prior to Woolf's reforms, the preparation for conducting a trial by the lawyers included the preliminary objections, precise

[491] Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (4th edn, Sweet & Maxwell 2022) 4.
[492] Harry Woolf, 'Access to Justice, Final Report to the Lord Chancellor on the Civil Justice System in England and Wales' (HMSO 1996) <https://webarchive.nationalarchives.gov.uk/ukgwa/20060214041452/http://www.dca.gov.uk/civil/final/overview.htm>accessed 9 December 2023
[493] ibid.

selection of the facts disclosed, possible interlocutory remedies, and the witness sought to be summoned or produced. Once the parties control adversarial litigation, the lawyers and the litigants assume the dominant role in controlling the various stages of the progress of the trial. The new procedural laws known as the Civil Procedure Rules 1998 (CPR)[494] made it incumbent upon the courts to actively command the proceedings as an overriding objective. CPR 1.4 (2) makes it obligatory for the courts to actively utilize case management which includes encouragement of the parties for greater cooperation; identification of the issues at the preliminary stage; decision as to which of the issues to be summarily disposed of, and which of them may call for full trial; ascertainment of the sequence/ order for their resolution, encouragement of parties for employing ADRs and facilitating its appropriate use by the court; support the parties for settlement, in whole or a part, of outstanding dispute; fixation of timetables meant to control the case progress; consideration of taking possible benefits accruing from a particular step to examine whether the cost thereof would justify it; dealing with many aspects of miscellaneous matters incidental to the case simultaneously without enforcing the attendance of the parties; making best possible use of the technology; and issuing necessary directions for quick and efficient proceedings of the trials. The envisaged time management scheme operated as a strategy with its cumulative effect that the courts assumed a proactive role in dealing with material aspects of all the cases with the prime aim of resolving matters in controversy as quickly and accurately as possible.[495] Apart from the above multifaceted mandatory framework, CPR also invested the courts with other powers for the principal objective, as contained in CPR 1.1 (2), to be achieved.

[494] The Civil Procedure Rules 1998.
[495] ibid, rule 2.8

The procedural code[496] in Pakistan does not provide for an effective managerial role by the courts, nor does it provide explicit statutory directions codified by the legislature itself in this regard. One of the provincial high courts (Peshawar High Court), however, amended the rules of the procedural code to incorporate some directions on case management with their limited scope of application.[497] Such an introduction to case management through subordinate legislation suggests that although some efforts are afoot to enable courts to provide active case management, a mechanized framework to manage the cases actively is undoubtedly missing. Case management for time scheduling on each of the essential facets of a trial is badly lacking in this adversarial system, which deprives the courts of greater control over the proceedings before them. However, there are some of the statutory provisions[498] which, although not so plain in the statutory terms, may be used as a tool to somewhat check the delay, inefficiency, or abuse of the process. For instance, the courts may pass an order "for the ends of justice and prevent abuse of the process."[499] Procedural justice in vogue hardly enables the courts to effectively check the abuse of process, as is evident from past experience. The phrase "case flow management" is not confined to the powers to manage cases rather it signifies to specify the measures that the courts must adopt to achieve the overriding objectives of fair trial in a speedy fashion. It should provide a clear policy underlying the statutory provisions through principal legislation instead of issuing temporary and short-lived policies calling upon the courts to accomplish the tasks of case management without clear statutory backing, binding upon them. In the chapters to follow, the critique on how the generalized and open-ended procedural

[496] Code of Civil Procedure (CPC) 1908
[497] ibid, Order IX-A (Case Management and Scheduling Conference).
[498] ibid, s 151.
[499] ibid.

codes have become ineffective, will also unveil the proposed reforms for statutorily precise, definitive, and binding principles to contain legal consequences for non-compliance, to be incorporated for the efficient procedural justice, ensuring right to a fair trial as contemplated by Article 14 (1) (c) of ICCPR read with Article 10-A of the Constitution.

4.11 Conclusion

To sum up, the non-adversarial framework as a supplemental procedure to complement the existing adversarial ones by means of the proposed theoretical framework together with indispensable cost liability by the defaulting party to the aggrieved and the case flow management to contain the number of adjournments through time limits of each stage of the civil and criminal trials is immediately required to revamp the procedural justice in Pakistan. The proposed framework has the potential to discourage the inherited model of costly, lengthy, and cumbersome process of adversarial litigation. It is, no doubt, upon the legislature to formulate all-inclusive statutory proposals for incorporating the mandatory provisions in the procedural instruments. The process shall be followed by the crucial role of the judiciary to inevitably adopt, execute, and apply those statutory reforms for the adjudication of litigation in a cost-effective and speedy manner.

Chapter 5 Procedural Thwack of Civil Justice and Fair Trial

5.1 Introduction

The key to a fair trial is a well-functioning legal system with effective procedural laws that ensure speedy justice while upholding substantive laws. It is worth mentioning that access to justice is distinguishable from justice itself. The longevity of civil litigation marred by the procedural complexities may only provide forums of injustice in utter derogation to the ICCPR. "Justice delayed is justice denied" and "Justice hurried is justice buried" are two proverbial maxims. Justice is often not hurried in Pakistan, with only a few exceptions. However, it is usually delayed, with a natural corollary of being denied. A major chunk of the massive backlog consists of cases in the civil justice system. The primary reasons for such delays are the multifarious intricacies, to be investigated in this chapter, that provide scope for miscellaneous applications and the exercise of unbridled discretionary adjournments without precise timeframes for each of the stages of civil suits. Therefore, this chapter will examine how the Code of Civil Procedure 1908 (hereinafter referred to as "CPC") enables the parties to employ dilatory tactics before the trial courts in derogation to the right of fair trial and due process, as envisaged in the Constitution of Pakistan and ICCPR. The analysis in this chapter will provide insight into the importance of devising procedural time frames for each and every stage of civil litigation, which is a *sine qua non* for ensuring speedy civil trials. It will further examine why mandatory penal consequences and strictly adhering to them are imperative for efficient case flow management. Such a procedural framework may serve as a good solution to essentially curb the delay in civil cases. This will dispel the disillusionment and despondency among the litigants

particularly when the influx of cases has been amplified manifold with the increased population and greater awareness of legal rights.

5.2 The Predicament of Unreasonable Delay and Civil Justice

The CPC and the delay had born together. No doubt, a reasonable time is required to fairly decide the lawsuits, which is manifestly not problematic. The delay, however, becomes a serious dilemma when it is classified as unreasonable. It becomes a grave concern when it is tangibly perceived that the time elapsed between the institution and the ultimate decision is 'too long.' It is difficult to determine the amount of time to classify the delay as "unreasonable" because the phenomenon of such delay may differ from one country to another. However, the situation concerning unreasonable delay in Pakistan becomes evidently comprehensible when we examine the CPC in its contextual perspective. Many of the designated groups of cases can be more quickly decided through summary and non-adversarial procedures to strike a clear balance between efficient administration of justice and acceptable adversarial end results (timely judgments).[500]

It may be aptly pointed out that the delay in dispensing civil justice has not only been restricted to colonized states like Pakistan. It remained without a definitive solution in the various other jurisdictions of common law. This is also apparent from some of the literary sources; for instance, Shakespeare complained about such a phenomenon in his renowned play Hamlet and termed it as "the law's delay."[501] Those familiar with the novels of Charles Dickens would know how long the problem of delay has

[500] B Van Norris, 'No End in Sight' (2001) NLJ A1.
[501] William Shakespeare,Hamlet; C H Van Rhee, *The Law's Delay. Essays on Undue Delay in Civil Litigation* (Intersentia 2004) 1

persisted.[502] Dickens' novels such as "Bleak House" and "The Pickwick Papers" criticized the slowness of adjudicatory process in English courts.[503] The tardy litigation process, with its enhanced expediency, was not confined to civil systems then prevalent in the European Continent, but the given situation was raging through the other common law jurisdictions as well. The proposals initiated by the Commission under the chair of Lord Woolf[504] were also meant to bring about reforms and curb delays in English procedural justice. However, it is true that the extent of undue delay and duration of litigation in Pakistan outweighed those developed legal systems beyond proportion. The current problems in the civil procedure of Pakistan are unique, and a lack of their in-depth knowledge about past experiences, as discussed in the previous chapters, might lead to inaccurate findings. The socio-legal yawning gap in Pakistan is more or less akin to the "Explanatory Memorandum" on the Dutch legislative proposals, dating back to the 1990s for the civil procedure,[505] the following quote whereof becomes relevant here:

> [c]urrently [my emphasis] [...] civil matters [should] in the first place proceed quickly if we wish to comply with the societal demands of the time and with the requirements of the proper administration of justice.

[502] Charles Dickens, David Copperfield (Bradbury & Evans London 1850) Ch. 23, cited by Waddams S, 'Evidence of Witnesses In The English Ecclesiastical Courts (1830-1857)' *Essays on Undue Delay in Civil Litigation*(Intersentia 2004).
[503] ibid.
[504] Harry Woolf, 'Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales' (HMSO 1996) <https://webarchive.nationalarchives.gov.uk/ukgwa/20060214041452/http://www.dca.gov.uk/civil/final/overview.htm> accessed 9 December 2023.
[505] Van Norris, 'No End in Sight' (2001) NLJ 3.

The recommendations formulated by the Committee of Ministers of the Council of Europe on February 28, 1984, as an attempt to improve procedural justice, added nine principles. Principle 3 thereof provided that:

> The court should, at least during the preliminary hearing but if possible throughout the proceedings, play an active part in ensuring rapid progress of the proceedings, while respecting the rights of the parties, including the right to equal treatment.[506]

The European Convention of Human Rights 1950 (ECHR) has urged the State parties to ensure that the principle of 'reasonable time' becomes conspicuously evident in their procedural justice system.[507] It has contemplated their obligation to ascertain a 'reasonable time' for conclusion of the trials in their procedural codes to satisfactorily guarantee the prompt administration of justice and efficient working of their court systems.[508] It may also have persuasive value insofar as Pakistan is concerned,[509] as it vindicates that the breach of human rights must be combated by providing effective and proper remedies without unreasonable delay. It goes without saying that the delay in providing justice is indicative of a flawed administration, and only the concerned state is always to be held responsible for the given sorry state. Despite the considerable importance of reasonable time for adjudication of civil trials in all the international instruments, particularly ICCPR[510] and UDHR,[511] the prevalent

[506] ibid, iv.
[507] The European Convention of Human Rights, art 6.
[508] Van Norris, 'No End in Sight' (2001) NLJ A1
[509] *Al-Jehad Trust* (n 16); Sardar Farooq Ahmed Khan Leghari and others v Federation of Pakistan and others [1999] PLD 57 (SC).
[510] ICCPR 1966 (n 6) art 14
[511] UNHR 1948 (n 14) art 10

procedural justice in Pakistan, with exceptions, is not able to cope with these pre-requisite standards of the fair trial. It becomes fundamentally responsible for the deteriorating situation due to lack of essential elements of procedural justice to be explored in this chapter, and affects the litigant public in the following manner:

a. Many of the litigants, driven by their financial considerations, prefer to prolong litigation and exploit the lopsided procedures. For instance, a debtor may not dream of letting the debt be dragged on for years together due to high-level interest rates but would opt for a different course if they could make a deal at a lower rate of interest by taking advantage of the room for delay in the procedural law.

b. Under pressure to ensure maximum safeguards for defence rights, procedural justice in vogue has created rules and legal principles that can easily be abused. The clever litigants, pleaders, and/or indolent judges may provide an undue advantage, contrary to fair trial and due process, against the distressed presenting cogently demonstrable and verifiable evidence.

c. The procedural flaws that cause delays profoundly impact low-income litigants, making it significantly more challenging for them to access justice. They are virtually excluded against the rich from a legal system marred by lengthy proceedings involving time, energy, and extravagant expenditures proportionate to their financial positions. Such a situation inevitably lead us to a straight inference that those interactively

> involved in the dawdling and lethargy court proceedings and prone to benefit from the faulty procedural justice would manipulatively become major actors to clinch the detestable socio-economic outcomes conceded by the given dispensation.

The above-referred situations of the Civil Justice System would frustrate the rationale underlying the speedy justice for a fair trial as envisaged by Article 14 of the ICCPR, read with Article 10-A of the Constitution of Pakistan. State parties to the ICCPR are enjoined to structure their procedural laws for enabling the judiciary to consciously ensure the trials within a reasonable time as envisaged by Article 14 (3) (c) thereof. Although we have discussed the diachronic background of Pakistan's procedural justice evolution, this critique would suggest that empowering the courts to play a more active part for rapid progress in the proceedings will considerably provide deliverance and speed up the provision of justice. Such analysis brings home that any illusion concerning the demonstration of diligence on the part of lawyers needs to be dispelled because they have to be ordinarily dependent on their clients in the contextual procedural measures. Their natural stand is often directed to protect the interests of the party they represent and the tasks they are entrusted with by those parties respectively. The finite human life puts us on the course to grapple with time and explains why we should not protract litigation in a needless manner. There is a pressing need to examine how a framework of procedural justice for civil suits may be constructed, with whatever risk of trial and error involved but without costing substantive rights guaranteed by the Constitution, which may afford the provision of justice with the least cost and delay for the enforcement of human rights guaranteed as such. The procedural safeguards for civil justice to advance the fair trial, in the

manner contemplated by the ICCPR, shall manifest the commitment of Pakistan to abide by the ratified provision of Article 14 thereof, together with the spirit of the constitutional provision of Article 10-A.

5.3 Administration of Procedural Justice: A Critique of CPC

The historical perspective of procedural laws in this thesis has already underlined the circumstances that prevented their simplification, and the CPC is no exception. The available adversarial procedural justice is so exploitable as to entail protracted civil trials, and it particularly makes the poor litigants its victims even for enforcement of their basic human rights. Considering civil litigation, abnormal delays are confronting the trial courts in contested matters due to the flaws that will be delineated in this chapter, culminating in the increased arrears/backlog of cases. Some of the inbuilt causes of backlog owing to the proverbial procedural delays shake the credibility of any legal system. The delay in adjudication preventing access to justice, caused by the defects in procedural laws, signifies the absence of will on the part of legislature to address the germane issues of procedural justice. The procedural laws in vogue, enacted by the colonial rulers, were adopted by the legislature. These laws after being duly assented to by the President, as is mandatory under the 1973 constitution,[512] take precedence over the ICCPR. The courts of ordinary jurisdictions cannot recognize and enforce mandatory provisions of the ICCPR ratified by the state unless they are given a binding effect in the procedural laws. There has been a constant failure of the legislature due to a variety of reasons, as discussed in the previous chapters, to address the issues of procedural justice and remove the anomalies, obscurities, and imperfections it inherited from the colonial regime. It inevitably entailed abundant

[512] Constitution 1973 (n 3) art 70

perplexities in the litigant public for the enforcement of the fundamental right of a fair trial as guaranteed by their Constitution and ICCPR. The procedural laws in Pakistan lack case flow management and fail to prescribe a mandatory timeframe to curb the delay at various stages of civil suits. Such a phenomenon leaves the litigants to grope in oblivion as they don't know the time required for the completion of proceedings. It fails to provide for effective intervention by the court in the given adversarial system, particularly when the proceedings progress slowly. The non-prescription of time-limit for every stage; absence of stringent measures and non-imposition of mandatory cost for each adjournment; no exemplary costs to be compulsorily imposed on failure to comply with orders on more than one occasion at a particular stage of trial; and no mandatory costs for filing frivolous miscellaneous application one after another at whims, are the factors that prevent the courts from bringing the parties to the timely resolution of their disputes. A few of the glaring procedural stumbling blocks at various stages of the civil suits have been enumerated into two parts, i.e., (a) pre-trial and (b) trial stages:

5.3.1 Pre-Trial Stage

The paramount object of the fair trial requires bringing the disputing parties to a definitive conclusion with reasonable notice as to what issue those opponents have got in a case against each other. It helps the court ascertain the questions of the facts and the law on which the parties are at variance with each other, at the preliminary stage of the suit. The parties have to state the material facts to determine the issues[513] concerning their substantive rights to be finally adjudicated upon between them so

[513] Code of Civil Procedure 1908, Order XIV rule 1. When a particular proposition of the material fact or the law is affirmed by one party denied by the other, it constitutes an issue. Each of the material propositions so affirmed and denied by the either party give rise to distinct issue(s).

that they may not be taken by surprise as to what they will be required to prove at the trial. Therefore, they have to comply with some of the procedural requirements at the preliminary stage of the trial, but the absence of some safeguards occasions unnecessary delays at various stages of pre-trial stages i.e. before the recording of evidence, in the following manner:

(i) Deposit of Process Fee

Although the CPC has contemplated the dismissal of suit when the plaintiff fails to deposit the process fee,[514] it has not provided a precise timeframe for paying it for the service of summons.[515] Even otherwise, the mere dismissal of any suit for non-deposit of the process fee[516] serves no other purpose than to unnecessarily delay the adjudication of a particular suit. The cause of action continues to exist, and the parties may seek restoration of the suit and further opportunities for depositing the process fee as well. It may adversely affect the substantive rights of the parties, and also such abuse by and against the state departments often causes pecuniary loss to the public exchequer, as is evidenced in the case of *Commissioner Income Tax, Faisalabad*.[517] It was held therein that the applicant, being a state organ, must demonstrate higher vigilance for compliance with the court's orders. The provision for depositing process fee occasions unnecessary delay and also corrupts the officials serving in the process serving agency[518] who often privately charge extra money from the parties in addition

[514] ibid, Order IX rule 1 & 2 This rule provides for the Dismissal of suit where summons not served in consequence of plaintiff`s failure to pay costs or diet money for the appearance of the witnesses.
[515] ibid.
[516] CPC 1908 (n 513) Order-IX rule 4.
[517] Commissioner of Income Tax/Wealth Tax, Companies Zone, Faisalabad v M/S J K Tek Ltd [2006] YLR 907.
[518] An agency consisting of several process servers with a Civil Nazir, appointed under the Punjab Civil and Sessions Courts Establishment (Miscellaneous Posts) Service Rules, 2005, as their Incharge and operating under supervision of Senior Civil Judges to effect the service of summons/notices on the parties and summoned witnesses.

to the process fee statutorily so prescribed.[519] The deposit of process fee is prohibited unless the court requires it by fixing the date of appearance for those sought to be summoned, and that too without explicitly stipulating time and penalty for non-compliance therewith.[520] The courts are, therefore, constrained to allow "a reasonable time."[521] What is reasonable time may vary from individual to individual, and so is liable to be interpreted by the courts. Since it is the discretion of the courts to allow as many opportunities as appear reasonable to them, the relevant provision is often abused. Eventually, the parties often end up with the dismissal of suit when there is a non-deposit of the process fee either for the appearance of any of the parties or their summoned witnesses,[522] as the case may be. Such a situation at times leads to repulsive outlook on the part of parties and their counsels when procedural defects obviate the enforcement of their rights on the premise of technical knockout.

The parties are generally aware in anticipation, i.e., at the time of the institution of suit or completing their pleadings, about the persons liable to be summoned as defendants or witnesses. Therefore, it should be obligatory for them to deposit a fixed process fee and other necessary expenses for the summoning[523]of each of the persons sought to be present before the court, either as defendants or as witnesses separately, at the time of institution of civil suit and/or filing their pleadings respectively. The process fee should be so determined by keeping in view all the eventualities of direct and substituted service, including those to be given effect through IT-based modern

[519] Being Senior Civil Judge in Lahore, I was reported about some of such instances. I had, therefore, evolved a strict monitoring system along with the measure for capacity building of the process serving agencies.
[520] *Muhammad Ghaus v Nur Muhammad and Others* [1965] PLD 685 (WP).
[521] ibid.
[522] CPC 1908 (n 513)
[523] The provision is liable to be incorporated in the Code of Civil Procedure 1908, Order XVI rule 1.

devices, etc., simultaneously. The procedural law must ensure the deposit of an annually fixed and reviewable blanket amount of reasonable process fee for each of those to be summoned by the respective High Courts, for a suit from its commencement to culmination. There should be a mandatory penal consequence for non-compliance therewith to avoid unreasonable delays as such.

(ii) Service of Summons

The effective and prompt service of process for appearance of the parties[524] is a fundamental characteristic of a fair trial. The process serving agency is supervised by Senior Civil Judges.[525] There is no allocation of the Process Servers[526] with each and every court separately in any of the district courts. The reports submitted by them are often perfunctorily monitored by the Civil Nazir (a kind of manager).[527] The mechanism so made available requires close monitoring with a hawkish eye by the trial courts themselves, and leaving this sensitive task of service of process at the mercy of ministerial staff goes to the root of delay in adjudication. Every Process Server must appear in person before the court issuing the summons for the inspection of the reports on the process already served or/and returned without direct service thereof on the defendants or witnesses by him. The process servers often report overleaf the summons that the date of hearing was very close when they received the process; therefore, the possibility of serving summons by them was ruled out. Should they be

[524] CPC 1908 (n 513) Order III rule 1 to 6

[525] Punjab Civil Courts Ordinance 1962, s 21. The senior most civil judge has to perform duties delegated to him for the filing of suits; receiving pleadings, and execution of process and the like, as Incharge of the District.

[526] The official appointed under the Punjab Civil and Sessions Courts Establishment (Miscellaneous Posts) Service Rules, 2005 and deputed to serve the court's summons/notices on the parties and witnesses.

[527] The Incharge of process serving agency (Nazarit Branch) appointed under the Punjab Civil and Sessions Courts Establishment (Miscellaneous Posts) Service Rules 2005 and entrusted the task for service of summons/ notices and civil warrants through the process servers and bailiffs.

attached to the courts, they will receive the summons on a daily basis immediately after the courts issues them. It is also noted that they often report that the defendant was not available and had gone to another city for any of his important work, and therefore, the service of summons could not take place.[528] There are several instances that the trial courts directed substituted service[529] without taking into consideration the genuineness of the report and/or the possibility of service through ordinary and conventional modes.[530] There were also instances that sometimes the addresses of the parties were wrongly reflected in the process with malice, and the postal certificates were not made available to establish the posting of proclamation in the newspaper to the given addresses of the parties concerned.[531] It was observed in the case of *Muhammad Hussain*[532] that its ultimate result is delays defeating the fair trial; the victims whereof are ordinarily the poor, who are often illiterate and rustic villagers even without access to newspapers. The right to a fair trial is violated by resorting to the substituted service[533] following the sketchy, erroneous, and malicious reports submitted by those Process Servers. In such cases, the court must examine the process serving official on oath touching their proceedings so reported on the summons, and then they should pass an unequivocally speaking and appropriate order as to whether summons had been duly served or a direction for fresh and/or substituted service was proper and

[528] Some of such fake/defective reports often stem from the lack of facilities to the process servers and the expenses to be incurred on their travelling, which also entails corruption among their cadres. Pursuant to my request initiated by me as Senior Civil Judge Lahore, the then Chief Justice ensured the provision of all possible facilities including motorcycles to them, for the first time, for effective discharge of their duties and prevent them from such fake and malicious reports.
[529] CPC 1908 (n 513) Order V rule 20
[530] ibid, Order V rules 9 to 19.
[531] *Muhammad Hussain v Rana Sohail Anjum and 8 others* [2022] CLC 1529**.**In the cited case, the court observed that name of the petitioner was wrongly reflected on the newspaper and postal certificate was also not available on the file about posting of the newspaper at the address of petitioner.
[532] ibid.
[533] CPC 1908 (n 513) Order V rule 17, 19 and 20.

suitable or otherwise. The satisfaction of the court on oath as to the fact that the defendant was deliberately eluding the service of summons is a pre-requisite for directing substituted mode of service[534] and any fake, negligent, connived or malicious report must follow a disciplinary action against the delinquent official together with adverse entry as to his conduct in the annual performance report without fail, directly by the concerned court he/she is attached with, instead of the supervisory role delegated to the Senior Civil Judges or their Civil Nazir, who are neither cognizant of the matter in issue nor conversant with the sensitivity involved in the matter under litigation before the court. The trial courts often fail to record those reasons and statements on oath by the serving officials concerning proper knowledge about the date of hearing by (or availability of) those summoned before passing the directions for substituted service. The declaration by the court that the summons has been duly served and/or that the defendant was intentionally avoiding its service, without examination of the process server on oath, is not a proper course and constitutes a despicable element of procedural justice[535] particularly when even the relevant officials fail to take some constructive steps for service in person and content themselves with the perfunctory reports. The ex-parte proceedings resting on such malpractices and appalling procedures are eventually set aside, and the proceeding recommences from scratch.[536] It is also a common experience that the service of summons is assigned to the different Process servers on the succeeding date, or they are given undue benefits by allocating circles of

[534] ibid, Order V rule 20.
[535] *Muhammad Hussain* (n 531)
[536] *Raja Azhar Hayat v Additional District Judge/Gas Utility Court and Others* [2021] CLC 2109.

their duty closer to their home by the Civil Nazirs due to nepotism and bribery, which makes it difficult to take the delinquents to the account.[537]

The process service should administratively be directly amenable to the concerned trial courts separately instead of their managerial control with the Senior Civil Judge or the Civil Nazir assisting him/her. The courts should be empowered to direct the service of copies of summons through registered post, urgent postal service, courier service, and/or any of the modern electronic devices. It should further include mobile and telephone calls, phonogram, telex, telegram, email, radio, television, fax, etc., and necessarily made available for their service of process by the plaintiffs. Any recognized, duly verifiable, and established means of acknowledgement about the receipt of such telephonic/electronic/ IT-based communication or/and endorsement by postal service and courier messenger to the effect that the defendant has either received or refused to receive the delivery of that summons, should be deemed to be sufficient proof for the service of process so issued by the court unless the court records reasons for not following the afore-referred proposed course. The process server directly attached to the relevant court must be obligated to assist only that court and be held individually responsible for giving effect to both the direct and substituted recourse for the service of summons.

(iii) Attendance of the Parties

The deliberate belated appearance or non-appearance following the service of summons is also one of the reasons for the delay.

[537] I found such lopsided allocation on assumption of charge as Senior Civil Judge, and being a competent administrative forum to recall it, strictly abandoned such malpractice forthwith.

> If the court fails to consider for the competing interest of litigating parties by absolving a party who is delinquent from its obligation to show cause for non-appearance before the court, the court could inadvertently end up facilitating abuse of process of Court by enabling a party to delay adjudication of claims before it.[538]

There are procedural safeguards allowing adjournments for the defendant to engage his/her counsel (Advocate), and even further extensions of time are often sought for their appearance to provide power of attorney (*Vakalatnama*).[539] "Where appearance was entered in pending matter, it would be reasonable to expect that party and its counsel would apprise themselves of proceedings that had taken place in that matter prior to such date."[540] The cases are ordinarily adjourned for the appearance of the Advocates on the next dates sought as such, and even further adjournments are requested for inspections of original documents and filing of written statements by the defendant(s). It has often been experienced that alike repeated requests are made unless the presiding judicial officer loses patience or/and the party concerned anticipates invocation of discretionary penal consequence for such wanton delay. The defendants adopt delaying tactics and file constitutional petitions, etc. "to harass the plaintiff and prolong the litigation unnecessarily, which course could be deprecated by discouraging such uncalled for litigation."[541] The default in appearance by the defendant and his counsel, even after appearance, is a common experience, which is

[538] *Muhammad Khalid Munir v Nazar Sadiq* [2022] MLD 831.
[539] Vakalatnama is the Power of Attorney file by an advocate on behalf of the party he represents before the court of law.
[540] *Hasseena Begum v Muhammad Nawaz Khan* [1998] PLD Karachi 65.
[541] *Manzoor Elahi Vs Zulaikhan Bibi* [2009] PLD 4.

followed by the ex-parte proceedings. After some time, the applications for setting aside the proceedings in absentia are instituted, which often takes months together for their replies and arguments, and are finally disposed of subject to showing "good cause" which is not so difficult to find and come up with, for the defaulting party. The malice and manipulation by means of such tactics are liable to be effectively curbed. Even if such an application is to be allowed, it must follow exemplary costs, in that, the absence of defendant and his counsel simultaneously, despite the early appearance in the suit, is hardly justifiable. The trial courts have been liberal in allowing such relief, and at times, mere appearance and statements of the defaulting party or his/her counsels are deemed sufficient for recalling the ex-parte proceedings.[542] It is also a general practice of the parties prone to such mischievousness to file fresh power of attorney by other lawyers in order to seek adjournments and delay the trial. It particularly happens when the evidence of the opposite party is made available before the court and/or the application of temporary injunction and various other miscellaneous applications are closer to the stage of their decision. "Discretion vesting in Court to grant adjournment under provisions of O. XVII R. 1 & 2, C.P.C. was not meant to be exercised very liberally, as main object of such discretion was not to enable a party to improperly delay proceedings, but discretion was to be exercised on sound reasons and for a sufficient cause; for which reasons were to be recorded by the court." [543]

Various pretexts are employed for the extension of time by seeking adjournments for preparations by the new lawyers so engaged. Nonetheless, the future and subsequent

[542] *Messrs Riazur Rahman & co v Province of Punjab and another* [1987] MLD 2355.
[543] *Abdul Habib Durrani v Toriali* [1999] CLC 232.

material proceedings, including the arguments thereafter, are often conducted by the lawyer whose prior power of attorney was earlier filed and already available on the record. Such a tactic is resorted to prolong the judicial proceedings by those affluent and worthy of paying additional fees to those lawyers without revoking the earlier *Vakalatnama* (power of attorney). These tactics put the weaker ones to the procedural hassles. It, therefore, may be aptly proposed that no such adjournment on the pretext of fresh *vakalatnamas* should be granted unless the earlier ones are revoked by the party concerned.

(iv) Filing of the Written Statement

Although a time limit of thirty (30) days has been provided for filing of the written statement,[544] the procedural justice did not provide for any penal consequence in case the time limit so provided has not been strictly adhered to by the defendants, and the given provision is treated as a directory but not a mandatory one. Consequently, the provision of time limitation is not absolute rather the trial courts have discretion to extend the time.[545] It has further been a common experience that the parties often file frivolous applications before submitting the written statement without being deterred by any penal consequence and thereby trample upon the right of opposite side to speedy justice. The provision has often been used as a tool of delaying tactics inasmuch as the defendants, forfeiting such right by the trial courts, are often given further opportunities by the appellate forums subject to some costs which never commensurate with the agony of the plaintiffs and wastage of public time. The defendants are often allowed such opportunity even when "he failed [to file written

[544] CPC 1908 (n 513) Order VIII rule 10.
[545] *Basharat Hussain v Mst. Irum Tahir* [2019] YLR 2883.

statement] despite availing opportunities for a period exceeding 30 days."[546] The absence of an explicit penal consequence and precise time limit prevents the closure or forfeiture of their right to file a written statement, and the courts are constrained to treat it in the following manner:

> "Defendant got an opportunity to submit written statement as a right and was not "required" to submit the same, thus, provision of O. VIII, R. 10, C.P.C., would not attract thereto despite expiry of period of 30 days as provided in first proviso thereto …. Right of defendant to file written statement could not be closed in such circumstances …. Defendant's conduct to have raised contradictory pleas in revision petition and constitutional petition regarding non-filing of written statement, even though contumacious, would itself be not sufficient to non-suit him….[547]

The incorporation of a specific mandatory provision to effect service of summons at least seven days earlier than the due date for appearance may serve a greater purpose for efficient procedural justice. Such a document of the summons should also contain a specific direction of 'no further adjournment for filing *vakalatnama*.' The CPC must prescribe a mandatory penal consequence to necessarily follow the default in submitting the written statement as such. Such provisions are essentially liable to be incorporated in the CPC to provide specific timeframes for completing various stages of the suits, ensuring speedy trials under Article 14 (3) (c).

[546] *Shafique Ali v Muhammad Ramzan and others* [2012] YLR 214.
[547] ibid.

(v) Production of documents

The CPC makes it incumbent upon the plaintiff to produce the relevant documents within his/her possession, control, and relied upon by him/her when the plaint is presented.[548] When the summons is served upon the defendants, the copies of those documents seldom accompany the process so issued by the court. Consequently, a lot more time is consumed when the defendant seeks adjournments on the premise of inspecting the record and getting copies of those documents to file a written statement. In *Ghulam Qadir's* case,[549] it was held that:

> When plaintiffs were relying on the documents they should have filed the same along with the plaint as per requirement of O.VII, R.14, C.P.C. otherwise they should have produced all the documentary evidence at the first hearing of the suit as required under OXIII, R.1, C.P.C…. Case of the plaintiffs relating to mutation entries they should have obtained copies of the mutation in question before the date of hearing and filed the same in Court…. Plaintiffs failed to produce the copies for about fifteen years as the suit was filed in 1971 and decided in 1986…. Civil Court had the discretion to allow the plaintiffs further time, but as the High Court on remand had directed to decide the case within a specified time, it could not be deemed that the Court had exercised its discretion in any arbitrary or capricious manner in closing the plaintiffs' evidence.

[548] CPC 1908 (n 513) Order VII rule 14 & Order VIII rule 1.
[549] *Ghulam Qadir and another v Mst Kundan Bibi and another* [1991] SCMR 1935.

The discretion of court for an extension of time has been contributing to the delay in the trial to drastically transgress upon the right to a fair trial in Pakistan. The afore-referred case law gave a semblance of the sufferings of the litigant public to surface when the relevant documents so relied upon were not produced and/or made available to the courts for their provision to the adversary.

The afore-referred delaying circumstance would seriously prejudice the adjudicatory process of a civil suit with promptness and negatively impact the requirements of a fair trial. It is, therefore, imperative that civil procedure must enjoin upon the parties to produce and file all the documents they rely on, along with the pleadings, or at least not later than the first hearing of the suit thereafter.

(vi) Amendments in the Pleadings

The adjudication of a civil dispute commences with the institution of a suit, which requires a plaint with self-contained information about all the material facts necessary for the adjudication of a civil dispute.[550] It is enjoined upon the plaintiff to incorporate *inter alia* the essential particulars, i.e., name of court and nature of suit, parties' name and their addresses, a description of the subject matter, and the facts giving rise to a breach of any legal right and constituting a *prima facie* cause of action, the value of the claim for jurisdiction, the relief sought for, etc.[551] The court also has to examine whether any of the parties is minor or suffers from other mental disability like an unsound mind to preclude his/her legal capacity for making a valid claim without representation through a person with no adverse interest, it is a common experience

[550] CPC 1908 (n 513) Order VI rule 2.
[551] ibid, Order VII rule 1.

that a slight mistake in the pleadings empowers the court to obligate the parties for filing the amended ones,[552] and the procedural law also provides for the parties to seek permission when they prefer to request such a relief on their own initiative in this behalf.[553] The courts often allow such amendments without taking into consideration the consequences that may follow inasmuch as there is no limitation prescribed. Even such direction of or permission by the court for the amendments to be incorporated in the averments is not proof of correctness or truthfulness thereof. The courts seldom examine whether the facts to be added or omitted were existing or foreseeable at the time of filing the suit and intentionally excluded, or otherwise. In the *case of Muhammad Akram*,[554] it was held that:

> Court cannot shut its eyes to a glaring fact that the amendment itself was sought more than seven years after the institution of first written statement. The delay in making such plea cannot, of course, be barred by any limitation but the factual aspect thereof cannot be ignored and the factual inferences which are very strong in the present case cannot be avoided.

The permission to amend the pleadings is discretionary in nature and, at times, sought before the appellate forums.[555] The introduction of facts and/or amendments in the pleadings may also entail recording additional evidence in the post-remand judicial proceedings. This delay often adds greatly to the distress of parties feeling aggrieved as the cumbersome exercise already undertaken comes to naught. The trial courts generally have no other option except to resume the proceedings from the preliminary

[552] ibid, Order VI rule 16.
[553] ibid, Order VI rule 17.
[554] *Muhammad Akram And Another v Altaf Ahmad* [2003] PLD 688 (SC).
[555] ibid.

stage to cost a lot more public time and exchequer. Therefore, there should be a mandatory provision in the procedural law that a party responsible for amendment sought in the pleadings after framing of issues shall deposit all the cost of proceedings to be summarily determined by the court. The cost so imposed must be paid to each of the defendants, as a pre-requisite, before filing the amended pleadings.

(vii) *Limini* Contorl

The word "*Limine*" originates from Latin noun '*Limen*' which means 'the threshold'.[556] The Black's Law Dictionary has defined the term as "on or at the threshold; at the very beginning; preliminary".[557] Hence, the phrase 'In *Limine*' or '*Limine* Control Doctrine' signifies the disposal of a case 'at the threshold'. In *Malik Gul Hassan*'s case,[558] it was held that:

> When the Court does not find it appropriate to admit for regular hearing a petition and before issuing a notice to the respondent -party, dismisses the petition after summary hearing it is said to be dismissed in *limine*.

The *limine* control doctrine is not generally practised in the procedural justice of Pakistan. The trial courts often issue summons/notices to the respondents and/or defendants without dismissing the suits/petitions in *limine* even when the circumstances so called for. Such a tendency puts the general public to face untold inconvenience, suffer from monetary loss, and consume their time and energy.

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[556] D P Simpson, Cassell's Latin Dictionary: Latin-English English Latin (2023) <https://www.online-latin-dictionary.com/latin-english-dictionary.php?parola=limine> accessed 7 December 2023.
[557] Black's Law Dictionary, (11th Edn) https://www.amazon.com/Blacks-Dictionary-BLACKS-DICTIONARY-STANDARD/dp/1539229750 accessed 7 December 2023
[558] *Gul Hassan and Co v Federation of Pakistan* [1995] CLC 1662.

> General practice of Courts was that instead of dismissing the petition at *limine* stage, notices were issued to the respondents who not only faced inconvenience but also suffered monetary loss…. In appropriate circumstances for early and expeditious disposal of petitions and other cases pending in the Courts all over the country and in order to strengthen the perception of general public about the rule of law, there was an urgent need to adopt the *'limine* control doctrine'.[559]

The institutionalized '*limine control doctrine'* in the procedural justice of Pakistan may contain false, malicious, and frivolous litigation to curtail undue harassment of the poor and may enhance the public confidence for an expeditious and equitable fair trial before the Courts. Although some of the statutory provisions,[560] when effectively put into operation, may nip the frivolous and false litigation in the bud with a view to advance effective case management plans and public policy in order to retain the dockets and time of the courts for the claims of more serious nature. The failure to incorporate *limine* control doctrine for all categories of suits when they are barred for any of the grounds under the law renders procedural justice in vogue to lack the requirements of a fair trial.

The effective enforcement of the doctrine of *Limine Control*, therefore, essentially requires the procedural law in Pakistan to provide for the courts to carefully examine the plaint with a precisely given but self-contained checklist of statutorily

[559] *Asif Saleem v Chairman Bog University Of Lahore and others* [2019] PLD Lahore 407.
[560] CPC 1908 (n 513) Order VII Rule 11, Order VII, Rule 10, Order XV, Rules 1 to 4, Order XLI Rule 11, and Specific Relief Act 1877, s 56 of etc.

binding character. There should also be an explicit penal consequence of the obligatory nature under the prospective checklist to expound rejection of the plaint/petition and/or dismissal of suits and appeals at the *limine* stage by the court[561]. The proposed measure will curtail the reprehensible delay and prevent harassment of the litigants through such unnecessarily prolonged court proceedings.

(viii) Temporary Injunctions

The civil courts may grant a temporary injunction to restrain a party from repeating or continuing the breach of any civil rights of the claimant and a court has to decide such application with notice to the other party within six months.[562] The courts are empowered to discharge, vary, or set aside those injunctive orders. Where the court becomes satisfied that (i) there is *prima facie* apprehension for damage to, alienation, or waste of any property; (ii) threat of the removal, disposal of some property to defraud the creditors, or some threat of dispossession of, or injury to the property; the courts may grant a temporary injunction to restrain the apprehended act for preventing such wastage, damage, alienation, removal, dispossession or sale of the property until the further orders or the disposal of the suit. Should there be a breach of the injunctive order, the court issuing such order may further "order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release."[563]

[561] ibid.
[562] CPC 1908 (n 513) Order XXXIX rule 4A.
[563] ibid, Order XXXIX rule 2(3).

The afore-referred provision of procedural law is employed as a delaying tactic by the beneficiaries of the breach of a particular transaction. They often become guilty of contumacious conduct for their clandestine interest in the transaction about the property under dispute. Although it has been ruled by the apex court that "If the applicant/vendee was guilty of contumacious conduct or was beneficiary of a covert transaction or a transaction made by the owner of the suit property in violation of a restraint order passed by the court or the application was unduly delayed then the court would be fully justified in declining the prayer….;"[564] yet the absence of due assiduousness together with no stringent penal consequence for the delaying tactics, the abuse of such provision continues unabated in the trial courts. For instance, even Government Officers often remain in illegal occupation of officers' residences beyond their entitlements, try to manipulate their possessions by filing civil suits to obtain temporary injunctions, and manipulate the stay orders by delaying them for years. These matters are further dragged in appeals to compound the situation. The courts, in a similar matter, were even constrained to declare that "directives issued by Chief Minister or any other Government functionary in that behalf were void *ab initio*, illegal and without jurisdiction.[565] Such a provision becomes instrumental to cause delay to the benefit of the parties showing a lack of bona fide, and there is hardly any quest for aiding the disposal of the applications under the afore-referred provision. In the case of *Rasool Bibi*,[566] it was held that "the delay of seven years casts an aspersion on the conduct of the petitioners. It is a settled principle of law that in order to seek an injunction, a party has to be vigilant and should approach the court without loss of

[564] *Vidur Impex And Traders Pvt Ltd. And Others vTosh Apartments Pvt Ltd and other* [2013] SCMR 602.
[565] *Shahid Javed v Government of the Punjab and others* [1998] P L C 122 (CS).
[566] *Rasool Bibi and Others v Zenab Bibi and Others* [2013] YLR 1121.

time to show it's bona fide. The delay in such matters normally disentitles the party from seeking relief of injunction."

It is, therefore, imperative to enjoin upon the civil courts to decide the applications for temporary injunctions within six months from the date of institution of the suit or within two months of the appearance of the parties, whichever is earlier, without any exception. Similarly, the interim injunction granted before the appearance of the aggrieved defendant should not operate beyond his/her attendance before the court unless such extension thereof would be allowed after hearing both parties on the date of his/her appearance.

(ix) Settlement of issues

The CPC provides for the settlement of issues whenever there appear propositions of facts and law, which have been affirmed by one of the parties and denied by the other.[567] Whenever some amendment touching any of the facts material to the settlement of issues is involved or any of the parties feel aggrieved due to such omission, it inexorably leads to the filing of applications for amendment in the issues already framed or for additional issues. Any of the parties may object to the issues already framed, and at times, such an application may be filed as a delaying tactic.[568] In such eventualities, any application at a belated stage of the trial or soon after framing of those issues by the court has to be ensued by the objections from the opposite side and to be decided by the court after the opportunity of hearing arguments by both parties. Even if the court itself moves to direct such amendments, the delay so caused

[567] CPC 1908 (n 513) Order XIV rule 1.
[568] *Zubair Ahmad v Saima Anwar* [2022] YLR 1678; *Abdul Sattar v Muhammad Refique* [2016] CLCN 111.

adversely affects the timely disposal of the suit and defeats the concept of a fair trial under the ICCPR.[569] The amendments in the issues already framed are amenable to revision by the aggrieved party,[570] which may often take time beyond proportion and may delay the final adjudication, even at times, from four to five years. In a similar case of *Roazi Khan*,[571] the plaintiffs had asserted title due to their adverse possession for a period beyond sixty years, and the matter was remanded for the decision afresh after framing additional issue thereon at a very belated stage, costing extra time, energy and resources of the parties for many years. In another case,[572] the revisional court had to remand a matter for the execution of a decree by directing the executing court to frame the issues and record evidence, and such matter went up to the apex court.

It is, therefore, advisable that the prevalent procedures should provide for the issues to be initially proposed by the parties on the due date and essentially framed in their presence as a preliminary draft. It should provide the parties with an opportunity to seek amendments therein, then and there, for any of the facts omitted or wrongly incorporated. Any subsequent motion on their part for such purpose must necessitate exemplary costs to avoid the delay at the later stage of the trial. The provision of issues to be proposed by the parties and instantaneous exception, if any, by the aggrieved before the trial court on the scheduled date will operate as estoppels on the parties. It will also put the court to the caution for carefully examining the pleadings in presence of the parties to avert unnecessary delay at some later stage of the trial for further amendments in the pleadings as well as the issues already framed.

[569] ICCPR 1966 (n 6) art 14
[570] CPC 1908 (n 513) s 115.
[571] *Roazi Khan and others vNasir and others* [1997] SCMR 1849.
[572] *Irshad Masih Arid and others v Ammanual Masih and others* [2004] SCMR 574.

The afore-going analysis divulges how important it is for the legislature to curtail the substantially enormous delays at the preliminary stages of the civil suit. It is also imperative to provide precise timeframes and limitation periods for each stage of the pre-trial proceedings. Further, it must be obligatory for the courts to strictly implement proposed limitation for each of those stages to ensure effective case flow management.

5.3.2 Trial Stage:

The delay occasioned by various procedural issues at the trial and post-trial stages has been causing great despair for the litigants in the civil justice system. It frustrates the ultimate objective to resolve their dispute in a timely manner by concluding the trial within a reasonable time, and denies justice by precipitating delay. It may aptly be pointed out that the delay is an inbuilt feature of procedural laws at the trial stage in Pakistan. The word “may” has often been used in the CPC to provide conspicuous discretion for granting adjournments. Even the plain language of the most stringent provision of Order XVII rule 3 of the CPC to compel the parties to produce evidence or perform any other act for which the time was allowed, has been couched in a permissive manner. The relevant provision envisaged that "the Court may, notwithstanding such default, proceed to decide the suit forthwith."[573] It means that these provisions do not entail essential penal consequences in all the circumstances and are merely directory in nature. Some of the procedural anomalies at the trial stage are discussed below.

[573] CPC 1908 (n 513) Order XVII rule 3.

(i) Production and Cross-Examination of the Witnesses

After framing the issues, the court has to schedule effective dates of hearing for recording the depositions of the testifying witnesses coming to the courts. However, adjournments are frequently sought for the production and cross-examination of the witnesses on one after the other pretexts. There is a widespread practice that the judicial officers either fail to record evidence to be so adduced by the parties on the adjourned dates or often record it in piecemeal. For instance, in the case of *Mian Abdul Karim*,[574] the trial court granted liberal adjournments to the plaintiff for evidence but he failed to produce his witnesses. In the said case, the plaintiff had not shown any plausible explanation or a good cause for the indulgence of granting so many adjournments by the court, nor was a valid reason put forth for his failure to procure the attendance of the witnesses on the day when the same was closed. It was held that the law helps only those who are vigilant, and not those who are indolent.[575] The parties and witnesses have to bear colossal monetary loss due to their absence from business, transportation charges, and diet money. The litigants often use delaying tactics either to procure the attendance of witnesses, or if the plaintiff brings those witnesses on a number of dates, the defendants become prone to seek adjournments without getting their depositions recorded. In such situations, it is likely that a witness may forget what he/she had stated on previous occasions. The given procedural leniency is confronting the litigants and the courts, due to the absence of a clog on the number of adjournments for the purpose, cannot help deliver expeditious justice and results in sheer wastage of time. "The cases cannot be kept pending for an

[574] *Mian Abdul Karim v Province 0f Punjab through District Officer (Revenue) Lodhran and 5 Others* [2014] PLD 158 (HC).
[575] ibid.

indefinite period."[576] At the stage of examination of witnesses, the examination-in-chief[577] is done on several occasions and not at regular intervals. Then, cross-examination is done not on one occasion but in several prolonged instalments and in a piecemeal manner for a sufficiently long time.[578] There are occasions when the parties failed to complete evidence despite availing approximately thirty-five adjournments and dragging the matter up to the apex court.[579] The Supreme Court had observed in the case of *Ghulam Qadir*[580] that "Petitioner, in the present case, admittedly failed to cause attendance of his witnesses from 3-1-1995 to 14-7-1999 without any valid reason….Neither the petitioner nor his witnesses or his counsel was present even on the last date of hearing." The case of *Ferozuddin*[581] had also remained pending for more than five (5) years, and it was observed that it showed delaying conduct of the plaintiff. In another case,[582] the Supreme Court observed that the plaintiff completed the evidence of official witnesses with an extraordinary delay of almost six years and was granted a further adjournment of more than two months for production of the entire evidence.[583]

The procedural laxity often lending countenance to such conduct of the parties at the trial stage may not serve any other purpose than delaying the final adjudication of the pending litigation and thereby undoubtedly defeats the principles of a fair trial. The existing procedural laws may not yield the result of ensuring effective

[576] *Zakia Begum v Mushtaq Ahmad [2017] MLD 724; Muhammad Aslam v Muhammad Shareef* [2010] CLC 77.
[577] The Qanun-e-Shahadat Order 1984, art 132. The examination of the witness by the party calling him/her.
[578] *Haji Muhammad Riaz ul Hassan v WAPDA through its Chairman* [2011] CLC 1916.
[579] *Zahoor v Election Tribunal, Vehari and Others* [2008] SCMR 322.
[580] *Ghulam Qadir Alias Qadir Bakhsh v Haji Muhammad Suleman And 6 Others* [2003] PLD 180 (SC).
[581] *Ferozuddin v Asher Hafiz Ghummen and Another* [2022] MLD 719.
[582] ibid.
[583] *Tasleem Khan v Sher Ghulam and others* [2010] SCMR 1422.

implementation of an opportunity granting an order for evidence without legislative reforms for a reasonably assessed mandatory cost to be imposed. It must be followed by another punitive cost for any subsequent default. It may not be the responsibility of the innocent party to bear the cost due to the lapse of defaulting one, be it due to his/her reasonable explanation or otherwise. The procedural law must provide the maximum number of opportunities not exceeding three to either side for adducing evidence and cross-examination, and the trial courts must not allow further adjournments for any reason whatsoever. They must enforce their orders and honour their promise, failing which they ought to face the administrative consequences under their service laws. They should manage their daily cause list of judicial work by following the principles of efficient case flow management. The judicial officer lacking such skill should be given proper training and it should also be made part of practical training for law students as well.

(ii) Miscellaneous Application and Interlocutory Orders

It is a common perception that the technicalities and complexities of the procedural laws are ordinarily exploited to such a level that a suit may be continued for an indefinite period, as is desirable by either party. "Every party had a right to be heard and represented by a counsel, but at the same time, it could not be permitted to defeat the cause of justice by indefinite procrastination."[584] The party having a week case may, apart from seeking adjournment on numerous frivolous grounds, file several applications statutorily admissible under the procedural laws. The worst part of procedural justice is that it enables the parties to handle the litigation in bit-by-bit

[584] *Fayyaz Haider v Malik Ishtiaq Hussain* [2018] CLC 1981.

dealings and allows room to unnecessarily seek adjournments as they have to be given opportunities to be heard before disposal of those applications and the case on merit,[585] which may take years for decisions thereon because the orders passed on those applications are either appealable[586] or revisable[587], and where no such remedy is forthcoming, may be assailed in the writ jurisdiction[588] before the High Courts. For instance, in the case of *Mian Aurangzeb Noor,*[589] the tenant had sought repeated adjournments like changing the counsel, filing miscellaneous applications, and failed to produce his evidence despite having availed numerous opportunities, but the court disapproved such dilatory tactics.[590] The matter of tenancy was required to be settled quickly, but the failure of the tenant to wilfully delay the matter would manifest the scope of unwarranted adjournments in the absence of mandatory provisions to statutorily curtail the number of adjournments to a limit. Some of the provisions of CPC [591] conceding these miscellaneous applications, which may be filed at any stage of the suit, may include:

[585] *Mrs. Shamim Akhtar v Industrial Development Bank of Pakistan* [2006] CLD 1400.
[586] CPC 1908 (n 513) s 104 & Order XLIII rule 1
[587] ibid, s 115.
[588] *Board of Intermediate and Secondary Education v The Presiding Officer* [2002] PLC 207.
[589] *Mian Aurangzeb Noor v Rent Controller Lahore and another* [2012] CLC 1729.
[590] ibid.
[591] A few of the provisions of Code of Civil Procedure 1908 that concede miscellaneous application comprises the following: Order-VI Rule-16 & 17, Order-I Rule-13, Order-I Rule-10, Sec. 95, Sec. 22, Sec. 24, Sec. 21, Order-V Rule-20, Order-VII Rule-11, Order-VII Rule-10, Order-IX Rule-13, Order-IX rule-4, Sec. 144, Order-IX Rule-9, Order-XI Rule-6, Order-XI Rule-12, Sec. 10, Sec. 39, Sec. 74, Sec. 151, Sec. 152, Order-XI Rule-18, Order-XIII Rule-9, Order XIII Rule-10, Order XVI Rule-1, Order-XVI Rule-10, Order-XXI Rule-1, Order-XXI Rule-21, Order-XXI Rule-13, Order-XXI Rule-46, Order-XXI, Rule-46 (A), Order-XXI Rule-58, Order-XXI Rule-89, Order-XXI Rule-90, Order-XXI Rule-91, Order-XXI Rule-97, Order-XXI Rule-98, Order-XXI Rule-100, Order-XXII Rule-3, Order- XXII Rule-4, Order- XXII Rule-9, Order- XXII Rule-10, Order-XXIII Rule-1 (I), Order- XXIII Rule-1 (2), Order- XXIII Rule-3, Order-XXVI Rule-1, Order- XXVI Rule-9, Order-XXVI Rule-11, Order-XXXII Rule-3, Order- XXXII Rule-7, Order-XXXVII Rule-3, Order- XXXVIII Rule-5, Order-XXXIX Rule-1, Application for punishment for disobedience or breach of injunction, Order- XXXIX-Rule-2 (3), Order-XXXIX Rule-4,Order-XVII Rule-1, Order-XXXVIII, Rule-1, Order- XXXIX, Rule-7, Order-XL Rule-1, Order-XLI Rule-5, Order-XLI Rule-19, Order-XLI Rule-21, Order- XLI, Rule-27, Order- XLIV, Rule-1, Order-XLVI Rule-7, etc.

applications for raising objection on non-joinder or mis-joinder of the parties; applications for striking out pleadings; applications seeking amendments in the pleadings; applications for addition, deletion or substitution of necessary or proper parties or addition/amendment in the prayer clause; applications to obtain arrest, attachment or injunction on insufficient grounds; applications for the transfer the suits which may or may not be instituted in more than one Court; applications for transferring the suit *inter alia* on various other grounds, applications to raise objections as to the jurisdictions; applications for sending summons through post or other substituted modes of service on the defendants/witnesses; applications for rejection of plaint, applications for restoration of the suit earlier dismissed for default in appearance; applications for restitution; applications to set aside order dismissing suit for default to deposit the process fee; applications to seek leaves for delivering the interrogatories; application for the discovery of documents; applications for stay of suit; applications for setting aside the decrees passed ex parte; applications for the inspection of documents/records etc.; applications for the return of documents; applications to summoning the record; applications to summon witnesses; applications to issue warrants of arrest against the absentee witnesses; applications for withdrawal of a case with liberty to bring a fresh suit; applications for attachment of movable property not in judgment debtor's possession; applications for attachment of movable property; applications for attachment of debt, share and other property not in possession of judgment-debtor; applications for garnishee order; applications for release from attachment; applications for setting aside sale on deposit; applications for setting aside sale on the grounds of fraud; applications to set aside the sale for judgment-debtor having no saleable interests; applications by decree-holder against resistance or obstruction by any person in the possession of immovable property;

applications by the decree-holder against resistance or obstruction occasioned by the judgment-debtor in possession of property; applications for substitution of legal representative of the parties; applications for setting aside abatement of suit; applications for leave to substitute new plaintiff with the old ones losing interest in the suit; application for a decree on compromise; applications to examine the witnesses by commission; applications for issue of a commission to make local investigations; applications for commission to examine or adjust accounts; applications for appointment of a guardian of a minor defendant; applications for refusing leaves to defend in a suit Under Order-XXXVII; applications by next friend or guardian for leaves to compromise; applications for arrest before judgment; applications for attachment before judgment; applications for temporary Injunctions; applications for discharging, varying or setting aside the order of injunction; applications for local inspection; applications for appointment of a receiver in a suit; applications for staying of execution pending appeal; applications for re-admission of appeal dismissed for default; applications for re-hearing on applications of respondent against whom appeal was heard ex parte; applications for production of additional evidence in appellate court; applications for admission of appeal as pauper; applications for expert opinion regarding signature of the executor of deeds; and applications for revision proceedings made under mistake as to jurisdiction in small causes, etc.

The various miscellaneous applications so filed by either party allow discretion for extension of the time period and thereby cause inordinate delays for leading the evidence and deciding the suits. Some of them, being of indispensable nature, also result in various ancillary proceedings. Therefore, it must be imperative for the parties to file all those miscellaneous applications of an interim nature within fifteen (15) days

soon after the day the pleadings of both parties are presented and completed before the court. All those applications must be decided simultaneously by the court before framing the issues. Any miscellaneous application to be filed thereafter must be accompanied by a security amount to be annually fixed by the High Courts, to be deposited in anticipation and if such application would be dismissed by the trial or appellate courts, the security amount must be forfeited as a punitive cost to be paid to the opposite party. Only such a mechanism in procedural justice may contain the delay in civil suits.

(iii) Frequent Adjournments

The trial courts have been given discretion by CPC to allow adjournments,[592] and they are often too liberal to grant time to any of the parties at every stage of the proceedings. Such discretion of granting adjournments is liable to be exercised only when the parties show a "sufficient cause."[593] A liberal procedural approach to exercise discretionary power unnecessarily allowing adjournments one after another can neither stem from "sufficient cause" nor be justifiable by the trial courts on any other premise. The given phenomenon is predominantly responsible for the litigation coming to the sorry pass and not only causes inordinate delays rather results in enormous arrears of pending cases. Such adjournments must be curtailed "... where counsel or party had already availed of numerous adjournments or the case was an old one, and its disposal should not be delayed…"[594] The culture of readiness of the courts to generously allow adjournments at the stages of trial for their own comfort or the convenience of either party or to the advantage of lawyers, is the core reason for

[592] CPC 1908 (n 513) Order-XVII Rule-1
[593] ibid.
[594] *Inamur Rehman Gillani v Jalal Din* [1992] SCMR 1895.

delay defeating the right to a fair trial. For instance, in the case of *Ahmed Khan*,[595] the plaintiff frequently moved the applications to seek opportunities after the application under section 12(2) of C.P.C.,[596] whereupon it was observed by the court that the "conduct of the plaintiff revealed through dairy sheets proved that there could not be a second opinion about the fact that the plaintiff was avoiding proceedings before trial Court, and trial Court had granted enough adjournments to him" In *Ghulam Qadir*'s case,[597] it was noted that the applicant, after issuance of the injunctive order, "got adjournments after adjournments including many last chances to argue his case." He engaged six counsels and withdrew the power of attorneys one after another. Such adjournments sought and perfunctorily allowed, without assigning good cause duly authenticated on the record, may at times take months for the further proceeding in the case. The procedural law should not allow the courts to adjourn the cases at any stage for an indefinite period, nor can the adjournments be granted without sufficient reasons, and procedural laws should make it obligatory for the courts to impose cost without fail for those adjournments when there is no fault of the party opposite to the one seeking those adjournments.

The trial courts should "discourage practice and tactics of procrastination which would result into miscarriage of justice."[598] There is a dire need to statutorily curtail the discretions of courts which will, in essence, empower them to consciously put a check on multiple adjournments based on frivolous grounds and meant to prolong the proceedings. The Court granting a last opportunity made a promise that no further adjournment was to be allowed and "must enforce its order and honour its

[595] *Ahmed khan v Mst Bilqees begum and 2 others* [2013] YLR 1545.
[596] ibid.
[597] *Ghulam Qadir v Shrimati Sadori Bai and 3 Others* [2011] MLD 1739.
[598] *Zakia Begum v Mushtaq Khan and 5 others* [2017] MLD 724.

promise."[599] Such order must be followed by closing the right of the party defaulting to produce evidence.[600]

(iv) Substitution of the Parties

Since delay is so conspicuous in the procedural justice of Pakistan, any of the parties may die at any of the stages of the proceedings, and the court proceedings often become stale unless the legal representatives of the deceased are impleaded in the suit. The decision on such application for substitution of parties requires the proof of death of the concerned party along with the names and addresses of the legal representatives. It follows the process for summoning the newly inducted/substituted parties. On many occasions, the parties so substituted turn out to be the minors, ensued by another application for appointment of their guardians and inquiry that the guardian to be so appointed has no interest adverse to that of the minors, and objections are invited in the given situation.[601] No doubt, the substitution so effected provides a source of the delay in disposal of those cases. Although the non-compliance of the relevant provision[602] of the C.P.C. empowers the court "to proceed with suit notwithstanding the death of defendant even if legal representatives of the dead party are not impleaded, and the same is not fatal to proceedings;"[603]

The above-mentioned procedural impediment is always foreseeable in civil litigation. Therefore, the filing of the pleadings without the lists of legal heirs along with their addresses by the parties must not be entertained. Such a mandatory requirement of

[599] *Moon Enterpriser CNG Station, Rawalpindi v Sui Northern Gas Pipelines Limited through General Manager, Rawalpindi and another* [2020] SCMR 300.
[600] CPC 1908 (n 513) Order XXXII rule 5.
[601] ibid, Order XXXII rule 5.
[602] ibid, O VIII, R 13, CPC.
[603] *Abdul Sattar vZarai Taraqiati Bank Ltd. And 4 Others* [2015] CLD 1338.

impleading them at the relevant stage and service of process on those newly inducted legal heirs must not halt the speedy adjudication of the civil suits.

(v) Pronouncing Judgment and Drawing the Decree

The judgments delivered with a delay not only tell on the fair trial but also do not inspire greater confidence as to their correctness and precision because many of the submissions made by the lawyers are sometimes forgotten, overlooked, or disregarded by the courts. "Term 'future day' as used in O.XLI, R.30, C.P.C. could not mean that judgment would be announced after unreasonable delay."[604] Therefore, a timely judgment (within a reasonable time) assumes enormous significance, and its delay beyond proportion suggests either a poor grasp of the facts a judicial officer is supposed to have, even in anticipation of the arguments, or a lack of his/her legal knowledge and acumen. The judgments are ordinarily based on the notes following the arguments advanced by the parties as to the evidentiary value of the facts asserted and proven by the parties for application of law thereon, but the judgments with delay do not assure the parties of reference to all the detailed notes taken by the court. The apex court remanded the matter on similar grounds in the case of *Muhammad Ovais*[605] wherein it was held that the unreasonable delay of ten months for pronouncing the judgment had caused prejudice as a bulk of documentary evidence was not discussed in the judgment.

Even after the pronouncement of judgment, there are often unnecessary delays to prepare decree sheets in certain categories of cases, particularly those of preliminary

[604] *Syed Iftikhar-Ud-Din Haidar Gardezi and 9 others v Central Bank of India Ltd Lahore and 2 others* [1996] SCMR 669.
[605] *Muhammad Ovais and Another Vs Federation of Pakistan through Ministry of Works and Housing Pakistan, Islamabad and others* [2007] SCMR 1587.

decrees, which may include suits for the rendition of accounts or partition, etc. In such cases, the courts have to appoint a commissioner to settle accounts or effect partition by metes and bounds,[606] and after passing the preliminary decree, such matters linger on for a considerable time with no good cause. Such a soaring situation also prevents the timely provision of certified copies, and the aggrieved parties often feel handicapped in the preparation and filing of appeals before the appropriate appellate forums.

To upshot the above analysis, it would suffice to conclude that the inordinate delays in pronouncing judgments "would lack precision and exactitude as to what propositions of law and facts were argued before them…, may be questioned as not being meaningful, purposive and rather illusionary……nor shall it meet the rule of the proper dispensation of justice."[607] Therefore, the procedural law must provide a mandatory command for the trial Courts to render their judgments within the prescribed period. The judgments delivered after a lapse of the statutory period should be treated as impaired in their value and must be followed by an appropriate administrative consequence against the delinquent judicial officer. Procedural law must also keep track of the number of adjournments for final arguments to ensure the timely pronouncement of the judgments by the courts.

[606] CPC 1908 (n 513) Order XXVI rules 13 & 14.
[607] *MFMY Industries Ltd and others v Federation of Pakistan through Ministry of Commerce and other* [2015] SCMR 1550.

5.3.3 Post-Trial Stage:

The built-in delay caused by procedural issues in the post-trial stages is also a significant problem in the civil justice system. It frustrates the fair trial's objective of speedy justice for resolving disputes in the following manner:

(i) Remand of cases

The CPC provides various stages of appeal;[608] the bare reading whereof suggests that delay is a common phenomenon at the appellate level as well. The delay in appeals/revisions against interlocutory orders,[609] particularly in the matters where injunctive orders are issued in contentious matters, may befall the parties and the stalemate situation following the scrutiny, registration, and presentation, and the preliminary hearing of the appeal/revision, not only holds up the progress of trials in lower courts, it equally affects the proceedings on the appellate levels. The process of preparing the notices of appeals/revisions and service thereof in the matters of injunctions bring the parties to a standoff, and the hindrance so caused knows no bounds of frustration amongst them. The jurisdiction of appellate and revisional courts may remand the case,[610] which means that the case may be remitted back to the trial court for a *de novo* trial. The Supreme Court observed that "remand of a case under O.XLI, R.23 C.P.C. could only be ordered when court from whose decree an appeal was preferred had disposed of the suit upon a preliminary point and the decree was reversed."[611] "The appellate court could retain file…. and bear in mind that an order of remand could re-open another chain of litigation, which not only entailed wastage of

[608] CPC 1908 (n 513) s 96 to 112 & Order-XLI.
[609] ibid, Sec 104 & Order XLIII
[610] ibid, Order- XLI Rule-23 & 25.
[611] *Habib Ullah v Azmat Ullah* [2007] PLD 271 (SC).

public time but also delay disposal of cases, involved unnecessary expense of parties and such vices were seriously detrimental to the justice system"[612]

"Remand of the case, not being routine matter, it should be adopted only when compelling circumstances exist."[613] It should be confined only when the court from whose decree the appeal was preferred had disposed of the suit upon a preliminary point, or some necessary party was not impleaded. However, the party responsible for the remand must pay the punitive cost, summarily determined by the appellate court. The remand of a case for recording additional evidence should be curbed. Such a function of recording additional evidence may be discharged by the appellate court itself or by appointing a local commission. Otherwise, the time consumed during such exercise following the remand results in untold agony caused by the delay to defeat the right to a fair trial, as expounded by the ICCPR.

(ii) Execution of Decree

The term "execution" of a decree has not been defined in the CPC. It connotes carrying the judgment or orders of the court into effect. It simply denotes the process for enforcing a judgment and decree whereby the judgment debtor[614] is compelled to give effect to the directions of the court as contained in the judgment and decree. In simple words, "execution" means the process of enforcing or giving effect to the decree or judgment of the court by compelling the judgment-debtor to perform or refrain from the act under the direction issued or declaration made by the court in favour of the

[612] ibid.
[613] *Roazi Khan and others v Nasir and others* [1997] SCMR 1849.
[614] The party against whom unsatisfied decree/decision of the court has been awarded, which obligates him/ to satisfy that court decree/decision.

decree-holder.[615] The various modes of executing the decree may include "delivery of the possession of any property, partition and/or sale of the property with or without the attachment; payment of money, etc. arrest and detention of the judgment debtor, and appointment of a receiver, etc."[616] The delay in executions of the decree is a common phenomenon which often leads to the issuance of directions by the superior courts to constructively curb the given menace for the enforcement of directions following the protracted litigating process. "The execution proceedings which are supposed to be the handmaid of justice and sub-serve the cause of justice are, in effect, becoming tools which are being easily misused to obstruct justice."[617]It is a common experience that the third party is often planted by the judgment debtor to claim some interest in the suit property and delay the execution of decree despite it has been held by the Supreme Court that "even some mutual understanding, consent or compromise between the decree-holder and the judgment debtor or any third party would not affect the rights of the auction purchaser, which the court was bound to honour and protect in order to maintain the sanctity of such transaction."[618] It is also a settled principle of law that "The Judgment-debtor could not be allowed to do nothing and then after the passage of many years in which third party interests had been created to rely on a technical objection to delay the course of justice." [619] It is worth mentioning that "The third party, despite being no party in the case, was also liable to be ejected and to face the consequences arising out of ex parte

[615] The party in favour whom an unsatisfied and executable decree/decision by the court has been passed; which obligates the judgment debtor to satisfy that decree/decision.
[616] CPC 1908 (n 513) Order XXI.
[617] *Rahul S Shah v Jinendra Kumar Gandhi and Others* [2021] SCC OnLine SC 341 [Civil Appeals No. 1659-1660 of 2021] <https://indiankanoon.org/doc/93073896/> also cited by Legal Talks Desikanoonhttps://www.desikanoon.co.in/2021/06/cpc-code-civil-procedure-rahul-shah-directions-supreme.html accessed 7 December 2023.
[618] *Messrs Lanvin Traders, Karachi v Presiding Officer, Banking Court No 2, Karachi and Others* [2013] SCMR 1419.
[619] *Zakaria Ghani and 4 Others v Muhammad Ikhlaq Memon and 8 others* [2016] CLD 480.

decree."[620] *Mohammad Karim Durrani's* case[621] manifests the phenomenon when judgments of the courts below were assailed before the High Court, allowed on 15.01.1985, and the suit was decreed; the decree-holder had filed an execution petition which was resisted by the opposite party raising objections concerning the construction on and improvements in the suit land and despite hectic efforts, the judgment debtor delayed the execution of valid decree after long and protracted litigation prevailing approximately over a half-century. The court observed that "it is further evident from the available record that the petitioner is using delay tactics or in other words, he is harbouring assumptions that his efforts to drag the other party will succeed and they will be restrained from enjoying usufructs of the lawful decree." Therefore, there should be strict monitoring that no execution of any decree takes time beyond six months and it must be completely giving effect as such.

The above analysis signifies the pressing call of the day to amend the procedural laws to safeguard the litigants against unreasonable delays to contravene the right to a fair trial in civil cases. In the suits for possessions, the courts must be obliged to examine the parties on oath for disclosure that there was no third-party interest whatsoever in the suit-property to avert impleading another party that may spring up to delay the execution as such. A commissioner should be appointed at the very outset to ascertain the accurate status and description of the property under litigation to avoid delay. The party responsible for parting with interest without knowledge of the court or prior to the suit and/or failing to disclose such interest, should be subjected to pay an exemplary cost so that the cases do not get delayed on account of these petty issues.

[620] *Ziaullah v Muhammad Hussain Afzal* [2003] CLC 1321.
[621] *Mohammad Karim Durrani Through Legal Heir v Ghulam Rasool through L.Rs. and another* [2018] YLR 183.

All the necessary parties must be impleaded in the suit to avoid the multiplicity of litigation. When there is a genuine apprehension that a party may change the status of property or cause some damage or injury to the rights of other parties, the court must pass an unambiguous order about the description and status of the parties, and in such cases, the procedural law must provide for an immediate appointment of the receiver to preserve the status of the property. The defendant must be made to declare his/her assets on oath for discharging his/her liability for the immediate execution of the money decree. The court executing the decree must not issue the notice in the application by a third party for a question of fact or law that has already been taken up or ought to have been taken up unless it determines the party liable for such default and imposes a punitive cost for the indolence or malice of the party so2 responsible. Finally, the phrase "…in name of the judgment-debtor or by another person in trust for him or on his behalf" [622] must be liberally applied to incorporate third-party deriving any interest in the property which is a subject matter of the suit.

The Supreme Court of Pakistan has already perceived such an invaluable guaranteed right of speedy trial by holding that "… delays in deciding matters does not sit well with the right to fair trial and due process guaranteed as a fundamental right under Article 10-A of the Constitution." [623]

The above analysis unfolds that the conclusion of a civil trial within a reasonable time requires guaranteed statutory parameters for procedural law, i.e., the CPC, to ensure proficient case flow management. The time limitation to be contemplated for each

[622] CPC 1908 (n 513) s 60.
[623] *Mrs. Shagufta Shaheen v The State* [2019] SCMR 1106.

stage of the civil trials, as discussed above, must be accompanied by mandatory penal consequences binding on the parties as well as the court. The monitoring for implementation of the proposed scheme for case-flow management shall be discussed in the later chapters.

5.4 Implementation Elasticity and Ambivalence

The above critique establishes that the CPC does not guarantee speedy justice despite incorporating the right to a fair trial in the constitution following the ratification of Article 14 of the ICCPR. The resolution of disputes within a reasonable time is a pre-requisite of a fair trial as enunciated by the afore-referred provision of ratified international instrument and given effect through Article 10-A of the constitution. The oft-recurring concern and general perception of the downtrodden people voluminously speak of the legislative failure to carry out procedural reforms for removing the procedural anomalies and improving the overall efficiency of the increasingly deteriorating justice sector.[624] This predicament will further be compounded to worsen the phenomenon of an already prevalent inundated backlog of litigation involving human rights. The implementation elasticity and ambivalence of tedious procedural laws of Pakistan can serve no other purpose than to foster the massive socio-legal imbalance,[625] corruption, and lack of accountability for those usurping civil rights. These vicious and exploitative conditions phenomenally signify how the passé legal system bequeathed by the pre-colonial and colonial eras failed to provide procedural justice, ensuring a fair trial consistent with ICCPR. A comprehensive evaluation in the previous chapters implies why the prime consideration for reviewing

[624] Upendra Baxi, Courage, Craft and Contention: The Indian Supreme Court in the Eighties (N M Tripathi 1985)
[625] *Ashoka Kumar v Union of India* [2007] 4 SCC 397.

the procedural dimensions was placed on the back burner, and how the failure of key players responsible for removing those procedural lapses precipitated the socio-legal yawning gap. The process obviously could not take its course due to multiple factors, including the thrust of political empowerment by the executive and apathy of the legislature. Their role not only compromised the independence of the judiciary rather thwarted the process of legal reforms, as already discussed in detail in the previous chapters. The post-colonial role of legislature and executive to undermine the independence of judiciary, their failure to separate it from the executive, and their inaction to integrate the long-impending procedural reforms were the factors that inhibited the state form responding to the demands of those poor aspirants in quest of greater efficiency and transparency. The failure to ensure compatibility of the procedural safeguards with the fair trial as envisaged by Article 14 of the ICCPR prevents their access to a court.[626] The afore-referred critique has explicitly been vindicated by observation of the Supreme Court to the effect that the nation that laid gigantic sacrifices for its independence has not been able to meet the standards even set by the foreign rulers as if the people have been betrayed. The court raised its concern that the situation was further worsening and the unjustifiable delays were vitiating the "right of fair trial and due process" despite a guaranteed constitutional right.[627] Such analysis suggests that the civil justice mechanism prevalent in Pakistan is not consonant with the principles of a fair trial as contemplated by Article 14 of the ICCRP. Even judicial doctrines cannot suffice unless the legislature takes on this serious challenge of reviewing and simplifying the procedural laws to govern the proceedings of civil courts. The proposed procedural reforms may help realize the paramount

[626] Human Rights Committee (2007) General Comment 32 (n 20)
[627] *Amjid Khan v The State* [2021] SCMR 1458.

objective of curtailing "too much delay" for adjudication of civil litigation. The research process for procedural reform is long impending particularly when the current socio-legal dynamics are quite distinguishable from those existing at the time when these procedural laws were contemplated and enacted.

5.5 Policy Framework and Evaluation System to Measure Performance

The above analysis dilating upon the poor performance of procedural justice is the raison d'être to examine and evaluate the regulatory framework of the CPC meant to provide civil justice. Although administering civil justice does not essentially include only the speedy disposal of a case,[628] it also cannot wane the maxim "justice delayed is justice denied." The afore-going maxim may characterize the focus of this thesis for a fair trial and is always an essential component of procedural justice. It encompasses a wider concept that includes the agonies of participating societal members in formulating the rules governing civil procedures. Although this chapter is confined to civil justice, the given phrase may also be relevant to criminal matters, which will be analyzed in the next chapter. It establishes how the delay in civil trials amounts to depriving the parties of exercising their personal or property rights without even getting an opportunity to properly defend them. It has become evident that the regulatory measures and policy framework, including the judicial policy[629] discussed earlier in Chapter 1, are inconsistent with the concept of a fair trial. The policy framework and performance evaluation of civil justice, as contemplated in CPC, may

[628] ICCPR 1966 (n 6) art 14, the provision also refers to the prompt information of the charges to the person concerned, time and facilities for preparing his/her defence, access to the counsel, and examination witnesses against him/her etc.

[629] National Judicial Policy, 'Law and Justice Commission of Pakistan' <https://www.supremecourt.gov.pk/downloads_judgements/all_downloads/National_Judicial_Policy/NJP2009.pdf> accessed 9 December 2023.

not achieve the underlying objectives of the constitutional provision of Article 10-A read with Article 14 of the ICCPR despite the optimum use of existing structure and regulatory framework to foil the impending backlog. The procedural complexities, intricacies, and laxities, as discussed hereinabove, are deterring the state from enforcement of the locally and internationally recognized fundamental right to a fair trial. Such failure created barriers detrimental to the vulnerable drifting for access to justice and fair trial in low-status ordinary cases.[630] The statutory provisions to contain duration on each of the afore-referred stages with annually reviewable minimum to maximum costs for the adjournments at those stages are crucial to measure performance and set the serious concerns referring to procedural justice at rest. The cost to follow the final outcome of the civil suit, failing the non-adversarial settlement, must be determined at the very outset of the trial in terms of the cost of litigation, loss of business and energy to be consumed. The procedural laws to award special costs against those delaying any of the above-referred proceedings for a period beyond the one to be statutorily prescribed for each of such stages of the civil litigation, respectively; may only contain the delay. The cost so imposed on the final outcome by the defaulting/ losing party shall dampen the delay and curb the vexatious litigation. The rationale underlying the relevant constitutional provision implicitly and utterly enjoins upon state organs to guarantee cost-effective procedural justice, an institutionalized mechanism for determination of cost for each of the stages of civil trial when the litigation is in limbo, and supplementing the adversarial system with non-adversarial settlements, as an essential component of the procedural justice for a speedy burial of the disputes. The case flow management system, as discussed in the

[630] S E Merry, *Getting Justice and Getting Even Legal Consciousness Among Working Class Americans* (UCP 1990) 14-15.

previous chapter, for both the trial and appellate stages can ensure the effective monitoring of delays in the trials of civil cases. The imposition of cost on the delaying / defaulting party will daunt him/her from any similar designs. The role of trial courts is to either take the task of mediation onto themselves or appoint mediators/arbitrators with the consent of the parties and/or, in the absence of their consensus, without their mutual approval for settlement of the disputes. This may also give a sense of inclusion to the underprivileged and vulnerable segments. The poor are often victims of the existing procedural justice without mandatory non-adversarial proceedings, virtually excluding them from the legal structure prevalent in Pakistan. This phenomenon was pointed out by Hale's analysis turning upon the various judicial notions of "economic justice."[631] Any judicial policy without institutionalized procedural reforms for civil justice can neither lessen the agony of those segments nor address the concerns regarding the ever-inflating volume of frivolous litigation. Given the situation, it appears that there is a dire need to revamp the procedural safeguards for civil trials in the colonial legal system inherited by and still intact in Pakistan. The uncertainty and inordinate delays render procedural justice a mockery of a fair trial and point towards imminently required procedural reforms consistent with Article 14 by empowering the courts to curtail the delay. The proposed regulatory framework of procedural justice will inhibit the courts from allowing unnecessary adjournments, and enable them to play their mandatory active role at every stage of the civil trials for rapid proceedings as such. It will also make the regulatory components ensure efficiency by complying with the principles of fair trial and equal treatment by the law.

[631] Robert Hale, 'Prima Facie Torts, Combination, and Non-Feasance' [1946] CLR 196

5.6 Conclusion

A procedural mechanism to radically minimize delay in achieving the goal of a fair trial is all the more essential. The above critique has evaluated the procedural barriers for the civil trials and identified various provisions under the CPC preventing efficient case flow management in the absence of time limitation for each stage of the civil suits. The procedural laws that evolved in the colonial age lack essential elements of speedy justice, i.e., the non-adversarial supplementary mechanism, pre-determined cost system, case-flow management, mandatory timeframes for each of the stages of civil suits, and penal consequences for breaching the time so contemplated, if any, under the relevant provisions of the CPC. They also confer extensively unwarranted discretionary powers to allow adjournments liberally, along with many other procedural anomalies allowing scope for several miscellaneous applications and ancillary proceedings, as discussed above. These intricacies frustrate the enforcement of fundamental right to a fair trial as guaranteed by both the Constitution and ICCPR. Pakistan is bound to enforce them in its domestic procedural laws through a long-awaited reform process. The above study augments the perception that the dream of final adjudication of rights with a minimal cost and without undue delay cannot be realized without vesting the civil courts with the jurisdiction to mandatorily restrict the time limit with a certainty of the timeframe at every stage of the civil suits for resolution of the disputes between litigating parties. These intricacies leave the litigants uncertain about how long their suits may last, particularly when the proceedings often progress slowly but with no demonstrable effective intervention by courts to expedite them. The binding penal consequences can ensure that unreasonable delays are avoided. All these provisions entailing exploitation that springs from significant delays and expenses need to be reviewed/revamped. While it

is essential to consider the reasons for a defendant's absence, it is equally vital to ensure that such tactics are not used to manipulate the legal system. The provisions, such as filing the written statements within 30 days but lacking any penal consequence, should be revisited, as they are often disregarded by parties who file frivolous miscellaneous applications. The courts should impose exemplary costs and penal consequences to discourage such behaviour. The miscellaneous applications of an interim nature should be filed within 15 days of the completion of pleadings. The court must decide these applications before framing the issues. Any application filed later must be accompanied by a security amount, which should be forfeited if such application is dismissed and must be paid to the opposite party. The objective of speedy access to justice can be achieved by limiting the maximum number of opportunities, for instance, at most three, to either side for adducing evidence and cross-examination. While the court has discretion to grant adjournments, it should do so only for sound reasons, genuinely limited to the sufficient cause, which must be effectively recorded as such. Additionally, the CPC must prescribe separate mandatory costs and penal consequences for each stage of the civil trial to be summarily determined against the defaulting party causing the delay. The present approach of the procedural laws in place since independence of the country cannot be conducive to the fair trial principles, as it does not allow efficient case flow management. Additionally, the trial judges must be given proper training, and law students should be taught efficient case flow management as part of their practical training. The given course of legislative reforms will help contain delays in civil suits and ensure that the proceedings are conducted efficiently for completing various stages of the suits and promoting speedy trials under Article 14 (3) (c).

Chapter 6 Micro (Individual-Based) and Macro (Societal-Based) Criminal Justice System

6.1 Introduction

Defective investigations and lopsided prosecutions can hardly earn conviction in the adversarial criminal trial, particularly when trial court in the common law jurisdictions has to heavily place reliance on the deficient, defective, or inadmissible evidence collected by the investigation agencies and tendered by the prosecutors. In the inquisitorial legal system prevalent in several other European countries, the trial judge actively participates in fact-finding inquiries, as against procedural laws in the adversarial system of Pakistan. Apart from no easy access to justice for the poor, lapses in procedural justice for criminal investigations and prosecutions make criminal trials faulty and ultimately lead to grave violations of the right to a fair trial. Justice is considerably delayed due to the imperfect roles of investigation and prosecuting agencies in gathering and assessing evidence, contributing to the dilemma even before the start of the trial. This Chapter will focus on how the afore-referred lapses of procedural justice in criminal trials purport to transgress upon Article 14 of the ICCPR in Pakistan and identify the grey areas to be reformed in the criminal justice system. These lapses of procedural justice in criminal trials often render investigations and prosecutions before criminal courts unreliable. This chapter will establish why the parties are constrained to rely on the doctored evidence, consisting of the tutored witnesses, as their primary source, particularly when the procedural justice regards even the credible forensic evidence as secondary and not enough to establish the guilt of an accused. It will further delve into the systematic failure of the legal system to address such factors that contribute to delayed and failed prosecutions on a case-by-case basis. It will further substantiate that the lack of capacity for social integration of

first offenders, the need for a well-defined coordinating role among the primary components of the criminal justice system (investigation, prosecution, and adjudication), and the absence of proper case flow management further worsen the situation. It will urge revamping the employed process through legislative and quasi-legislative measures, which may ensure compliance with all the prerequisites of the right to a 'fair trial and due process' guaranteed by the ICCPR and Constitution of Pakistan.

The adversarial legal system contemplates an equally balanced contest between the two parties, with a symbolic game of equally situated parties in the playing field called 'the courtroom'. Such a system lays greater emphasis on equality during dispute resolution without an advantage given to one side over the other. The live testimony of the witnesses is generally preferred when presenting evidence and the process is regulated by the law of evidence. During the examination, the parties and their lawyers ask multiple questions that the testifying witnesses have to answer. The party calling the witness asks a series of questions in sequence, which is called "Examination-in-chief,"[632] and then the opposing side conducts an examination of such witness, called his/her "cross-examination."[633] The cross-examination allows the adverse party to elicit additional answers. It is often designed to impeach the credit of a witness by extracting contradictions, disqualifications, and implausibilities, if any. The noteworthy key element of such a process is to limit the witness only to providing the relevant answers to the questions put by the lawyers instead of giving free narratives.[634] This process makes them refrain from commenting on or arguing the factual questions.

[632] Qanun-e-Shahadat Order 1984, art 132 (1)
[633] ibid, art 132 (2)
[634] ibid, arts 144 to 148

"Investigation of a criminal case falls within the exclusive domain of the police, and if on the one hand independence of the judiciary is a hallmark of a democratic dispensation, then on the other hand independence of the investigating agency is equally important to the concept of rule of law. Undue interference in each others' roles destroys the concept of separation of powers and works a long way towards defeating justice …."[635] In the adversarial criminal trial model of procedural justice in Pakistan, the role of a trial judge is further limited, with virtually no involvement in the investigative process of gathering evidence to be processed, presented, and developed by those witnesses in the pre-trial phase. They come into contact when the matter becomes ripe for trial.[636] The given role is confined only to making rulings on whether a particular question and the answer given by the witness are legally proper under the law of evidence.[637] There is seldom any opportunity to decide which evidence the parties have to call and are required to provide.[638] They hardly interact directly with those witnesses, which is why, metaphorically the criminal trial has patent semblance with a game, in which the opposing lawyers control the action, whereas the judges have to limit themselves as referees. Finally, such resolutions of disputes culminate in a conviction or acquittal. In contrast, the inquisitive role of conducting the factual investigation of a crime is assumed by the investigating officials, who are often part of various executive agencies.[639] They collect evidence and establish the relevant facts concerning the incident. The investigating and prosecuting agencies[640] decide the order and purpose of adducing the evidence in terms of its propriety and admissibility.

[635] *Muhammad Hanif v The State* [2019] SCMR 2029
[636] Code of Criminal Procedure 1898, Sec 190
[637] Qanun-e-Shahadat Order 1984, arts 18 to 69
[638] ibid, S 117. The one, who asserts the existence of facts, must prove that those facts exist.
[639] The investigating agencies comprise those established under sec. 3 of the Federal Investigation Agency Act 1974, under Article 6 of the Police Order 2002, under Article 28 of the National Accountability Ordinance 1999, and sec. 3 of the Anti-Corruption Establishment Ordinance 1961.
[640] The Punjab Criminal Prosecution Service (Constitution, Functions, and Powers) Act 2006, S 3

They are not independent but subservient to the executive organ of the state.[641] Apart from the lapses of procedural laws for the live testimony in a criminal trial; this chapter will also establish that the procedural justice for the prosecution before criminal courts is not so reliable in Pakistan. Justice is not only virtually delayed by the parties but rather the imperfect roles of investigation and prosecuting agencies in garnering and assessing the evidence are also far more crucial even before the start of the trial. They strive to ensure the relevance and admissibility of evidence to guarantee its reliability and credibility before the court for the final adjudicatory analysis. In the given adversarial system following the investigation, the creation of discourse during the trial is further predominantly controlled by the lawyers representing the contestants.[642] In this scenario, the role of the trial judges is restricted to deciding whether the evidence so collected by the faulty pre-trial process of investigation and presented before them is legally proper and admissible and whether it is believable.[643]

Although Pakistan's procedural law has features identical to those of other common law jurisdictions, it fails to keep abreast of the evolving global standards of a fair trial on several counts. Procedural justice has to assure a transparent procedure for factually correct verdicts by the courts, which can happen only when there is accuracy in the determination of facts, together with accurate application of the law for the dispensation of substantive justice. The former has to address the aspect tied directly to the process to guarantee the satisfaction of litigants that the system to provide

[641] The Police Order 2002, art 11, the afore-referred provision empowers the Provincial Government to post the Provincial Police Office.
[642] Janet Ainsworth, 'Procedural Justice and the Discursive Construction of Narratives at Trial' (2017) 4 LCM Journal 79
[643] ibid.

justice fundamentally operates in a fair manner.[644] This might evoke the feeling of why procedural justice in criminal matters is to be so cared about, and whether it is not enough if the judicial verdict is correct on both the factual and legal aspects. The answer to this question is available in the lifelong study by Tom Tyler, a social psychologist, to analyze why people obey the law. He discovered a well-grounded theory based on surveys consisting of thousands of questionnaires[645] that the people, who were fearful of being punished if they violated the law, felt that the legal process that was attending to their grievances was fair. The legal order for criminal justice in Pakistan is marked by so many anomalies, including but not confined to the delays, to be discussed in this chapter and is, therefore, unfair. When the working legal system is fair, the people exhibit respect for and obey the law even when they don't agree with the substance thereof.[646] The notoriety garnered by procedural justice in criminal matters in Pakistan is attributed to the delays primarily arising from inefficient case management at both trial and appellate levels. The report of United Nations Development Programme (UNDP) unveils a delay of five to ten years in the adjudication of 43% of criminal cases filed in the Sindh province.[647] The bleak situation is primarily reflected by the agony facing the under-trial prisoners languishing for years together in the overpopulated jails for hearing of their cases. The studies clearly indicate that under trial prisoners overwhelmingly occupy these jails who are charged with some crime and not proven guilty as yet. Many of them are undergoing imprisonment for their delayed trials pending adjudications in the courts and will

[644] Tom Tyler, T R and Lind, E A, 'A relational model of authority in groups' Advances in Experimental Social Psychology (Solum 2004) 25, 115.
[645] Tom Tyler, *Why People Obey the Law* (Princeton University Press 1990)
[646] ibid.
[647] UNDP, 'UNDP Annual Report 2012: United Nations Development Programme' (UNDP); cited by Angbeen Atif Mirza 'Delays and lapses in Pakistan's criminal justice system' (London School of Economics and Politics, 6 December 2016).

eventually be found innocent to be set free. In the case of *Zahida Parveen*, it was observed that:

> The petitioner is behind the bars since her arrest i.e. 24.03.2016 and she was awarded life imprisonment vide judgment dated 31.05.2017 and since her arrest she is incessantly behind the bars along with her suckling baby and as such so far she has undergone sentence more than 04 years and the disposal of instant appeal is bleak in the near future due to rush of work, hence I am constrained to observe that … her three co-accused persons have been acquitted by the learned trial court ... the petitioner is neither hardened nor desperate criminal, hence, this Court is constrained to observe that if after suffering the incarceration in jail, the petitioner is ultimately acquitted, there will be no compensation for his incarceration ….[648]

The situation is further unveiled through the following observation of the Supreme Court in the case of *Nasar Ullah*:

> The Reference was filed in the year 2018, and the respondents were arrested in the same year. However, till date after lapse of a period of almost four years, the trial has yet not even commenced and no plausible explanation has been put forth by the NAB, in this regard …. "Delay" in the conclusion of a criminal trial is antithetic to the very concept of a "fair trial"…. If an accused cannot be tried fairly for an offence, he should not be tried for it at all. Conclusion of trial within a reasonable time is an essential component of the right to a fair

[648] *Zahida Perveen v The state and others* [2021] PCLJ 53

> trial. The prolonged pre-trial detention of the accused also defies the presumption of innocence, another essential element of the right to a fair trial, for an accused is presumed innocent until he is proven guilty by proof beyond reasonable doubt.[649]

Resultantly, such a sagging procedural justice may serve no other purpose than to undermine the faith of people concerning fair trial in their legal system.

This first discovery of the afore-referred answer then raised another question for Tom Tyler as to what makes the people think their procedural system is fair and worth obeying despite their belief that flouting the law and even not being prosecuted was possible. The ordinary notion that intuitively may appeal is the one that those prevailing in the legal dispute would term it as just, while those losing would brand it as unfair. The research survey carried out by Tyler surprisingly found that even those who had lost their cases felt that the process in the criminal justice system (CJS) had treated them fairly, and they had very positive feelings. Similarly, even the winners were not positive when the process treated them unfairly.[650] Another research conducted by MacCoun based on various cultures, societies, and countries also replicated Tyler's findings in both the civil and criminal domains.[651] Hence, it may pertinently be mentioned that delay in adjudication of cases due to procedural lacunae for whatever reasons outside or inside the court and whatever extraneous social, political, or legal factors; amounts to the denial of justice. Such a phenomenon results

[649] *Chairman NAB through P.G. Accountability v Nasar Ullah and 5 others* [2022] PLD 497 (SC)
[650] Janet Ainsworth, 'Procedural Justice and the Discursive Construction of Narratives at Trial' (2017) 4 LCM Journal 79
[651] ibid.

in unrest and intolerance as to the performance of legal system as a whole.[652] The given hypothesis may lend further countenance to the established notion turning upon the proverbial maxim of "justice delayed - justice denied" which implicitly proposes that the delay is always in obvious derogation to the right of a fair trial. Therefore, the Apex Court of Pakistan held in the case of *Adnan Prince* that "It is a universal principle of law that to have a speedy trial is the right of every accused person, therefore, unnecessary delay in the trial of such cases would amount to a denial of justice."[653] The very concept of the right to a fair trial, which includes adjudication of cases without unreasonable delay, is an essential element of procedural justice to establish the social legitimacy of legal institutions and promote adherence to the law.[654]

6.2 Reflections on the Contextual Legal Construction

There is an unequivocal experience of developing urbanization, expansion of populace density, and growing ratio of youth with an auxiliary focus on esteem consciousness.[655] A Criminal Justice System (CJS) not compatible with the internationally recognized notions of procedural justice based on a fair trial becomes a key factor to denigrate the optimism of people for enforcing their basic human rights. There are many instances of ineffective procedural justice in criminal prosecution. For example, the recognition of equity framework for adolescents in procedural law has been a worldwide progress since the late 1980s.[656] Surprisingly, the developments of the adolescent equity principle remained ineffectual for a considerable time in the procedural laws of

[652] *Adnan Prince v The State through P G Punjab and another* [2007] PLD 147 (SC)
[653] ibid.
[654] Ben Bradford, 'Policing and social identity: procedural justice, inclusion and cooperation between police and public' [2014] Policing and Society, 22.
[655] Muhammad Nadeem and Naeem Ullah Khan, 'Paradigm of Criminal Justice System: Problems and Socio-Legal Reforms in Pakistan' [2017] XLVII (71) JLS University of Peshawar 66.
[656] UN Convention on the Rights of the Child 1989, resolution 44/55.

Pakistan on the pretext of its testing and dependability insofar as its relevance in the given jurisdiction was concerned.[657] The challenges highlighted about the emerging conditions qua terrorism etc., together with some imposed concepts of the *Shariah* laws in the given politico-legal spectrum, are also antonyms and starkly opposed to each other. For further explanation, a well-entrenched traditional legal structure based on customary norms in the matters of family and tribe honour was supported since the British regime. They provided statutory backing[658] to mitigate horrendous acts of honour killing[659] by a lesser sentence despite the fact that the women were deprived of their lives on unfounded allegations bereft of any cogent evidence.[660] Astonishingly, in the post-colonial era, the relevant penal provision[661] envisaged that no such death caused by the offender's grave provocation was a murder. [662] Such pleas were given abiding patronage in many of the reported cases unless in the case of *Gul Hassan Khan*, such a provision was declared as non-Islamic.[663] Pursuant to the afore-referred ruling in the *Gul Hassan*'s case,[664] *Hudood* Ordinances[665] were introduced, but they did not encompass the underlying spirit of the said judgment and unfortunately made the environment more congenial for the honour killings by characterizing it as

[657] Nadeem (n 655) 67.
[658] Indian Penal Code 1860 (Act 45 of 1860), S 304 (1); The Act was enacted by Imperial Legislative Council on the report of First Law Commission.
[659] Murder of a woman exercising the right of her choice for marriage, opposing or refusing to act upon family decisions, and/or having extramarital affair, and/or breaching the socio-cultural barriers of ethical standards as acceptable to her family/tribe.
[660] Abbas MS, 'Honour Killings and Status of Women in Islam' (2020) LXXII PLD 1.
[661] IPC 1860 (n 658).
[662] ibid.
[663] *Federation of Pakistan v Gul Hassan Khan* [2018] PLD 633 (SC).
[664] ibid.
[665] The Hudood Ordinances were enacted during the military regime in the year 1979 and comprised the Offences Against Property (Enforcement of Hudood) Ordinance 1979, Offence of Zina (Enforcement of Hudood) Ordinance 1979, Offence of Qazf (Enforcement of Hudood) Ordinance of 1979, Prohibition (Enforcement of Hadd) Order of 1979 etc; as a part of Islamization process in Pakistan to replace the parts of the British era's Penal Code process. The newly created criminal offences prescribed punishments of amputation, stoning to death, whipping etc. After great criticism the Protection of Women (Criminal Laws Amendment) Act, 2006 was promulgated to abolish many of those controversial laws.

compoundable under the Cr.P.C.[666] Meaning thereby, the murder of a woman by her husband, son, brother or father could be forgiven by the other members of her family. It is heart-rending that in the given socio-legal environment, many cases of honour killing go unnoticed and unreported,[667] and dispensing justice in those cases is either excessively delayed or the perpetrators go unpunished. This is also a significant part of the problem, indicating a failure of procedural laws to ensure a fair trial. Another provision[668] of procedural justice prevented the enforcement of human rights by protecting the afore-referred un-Islamic custom of honour killing. It enabled the offenders to pay only *"diyat"*[669] or *"badl-i-sulh",*[670] when the victim was a direct descendent and the accused was made not amenable to *"Qisas"*.[671] Many of the offences against the human body have been made compoundable[672] or punishable with *diyat* or *badl-i-sulh*. It enlarged the already existing yawning socio-legal gap to benefit the rich who would easily get impunity for any criminal liability in the absence of case flow management and an effective mechanism for the witness protection. Such procedural justice provides ample scope for harassment of the witnesses to entail either delay or coerced compensation to the impoverished victims already distressed, with no easy access to justice. The inference of this chronological account provides us with a clear inkling of how the policy formation and implementation of the procedural justice provided by the British Rulers and adapted by the country lacked the equity

[666] Code of Criminal Procedure 1898, s 345
[667] Niaz A Shah, 'Honour Killings: Islamic and Human Rights Perspectives' (2004) 55 NILQ 78.
[668] Pakistan Penal Code 1860, s 308
[669] Compensation paid to the victims or legal heirs of the victims, under Islamic law against the offences for murder, bodily harm or damage to the property. It is an alternative punishment to qisas (equal retaliation).
[670] An adult sane wali (guardian) may accept badl-i-sulh (property or a right the value which can be determined in terms of money and received as a consideration for compromise to compound his right of qisas.
[671] The term signifies the right of victim's nearest relatives to take life of the killer subject to the approval of a competent court under the Islamic penal law.
[672] Code of Criminal Procedure 1898, s 345

framework. It further expounds how the criminal justice reforms initiated in Pakistan enflamed vigilantism in society.[673] The substantive and procedural laws[674] which were so inherited, characterized the offences and indicated punishments along with their different attributes, including those of the law of evidence, yet there are striking differences in the normative socio-legal complexities and the peculiar societal norms. Those differences wildly prevail between the colonial regime of the nineteenth century and the requirements of procedural justice in the current global scenario imbued with respect for human dignity and democratic values. The innovatively changed socio-legal dynamics with data blasts and social media multilayered logical shifts have also rendered the long-awaited structural and procedural changes inescapable and imminently required.

6.3 Special Laws Terrain in Framework of Procedural Justice

The inefficacious and slothful procedural justice entailed a wide range of special laws. The natural illustrations of those laws in the criminal dispensation range from the Anti-terrorism Act 1997 (ATA) for speedy trials of heinous offences involving terrorism[675] to the Protection of Pakistan Act 2014 (POPA) to provide for preventing acts "threatening the security" of the country.[676] These special laws then come to the bottom line of the Illegal Dispossession Act 2005 "to protect the lawful owners and occupiers of immovable properties from their illegal or forcible dispossession thereof"[677] by evicting[678] and punishing[679] the land grabbers. The worst coming to the worst was not

[673] Nadeem (n 655).
[674] Pakistan Penal Code 1860 and Code of Criminal Procedure of 1898
[675] The Anti-Terrorism Act 1997, Preamble
[676] Protection of Pakistan Act 2014, Preamble
[677] Illegal Dispossession Act 2005, Preamble
[678] ibid, s 7 & 8
[679] ibid, s 3

only to enact the afore-referred special legislations, but to extend this tendency to further amend the Army Act 1952[680] and the Constitution itself for conferring the jurisdictional powers on the military courts for trying those suspects of terrorism including the ones even only "using the name of religion or a sect"[681] and that too, without creating the new offences.[682] The conferment of jurisdiction on the military courts, a departure from the procedural laws in vogue on the premise of speedy trials and their protection through amendments in the constitution, was a manifestation of the frailty of the procedural laws enacted before the country's independence and still operating in ordinary courts under the Cr.P.C. It was further vindicated, in particular, when those constitutional amendments were incorporated for speedy trials of civilians by military courts. The volatile situation of procedural justice so depicted became seriously debatable on the standards of a fair trial as set out by the UDHR[683] and ICCPR.[684] The criticism was further intensified in view of the fact that even the trials of some terror suspects were allegedly being clandestinely conducted at locations not known to their families and they were being executed promptly.[685] Equality before the law and equal protection of the law[686] contemplates that similar cases are to be dealt with in similar proceedings.[687] This discriminatory criterion may not be tenable in the face of ordinary courts, including Anti-terrorism courts, simultaneously operating

[680] Pakistan Army (Amendment) Act 2015 & Pakistan Army (Amendment) Act, 2017 to further extend the jurisdiction so vested in the military courts for another two years.
[681] Constitution (Twenty First Amendment) Act 2015 and The Constitution (Twenty-third Amendment) Act, 2017
[682] ibid; Also Pakistan Army (Amendment) Act 2015 (n 680)
[683] UDHR 1948 (n 14) art 10.
[684] ICCPR 1966 (n 6) art 14.
[685] International Commission of Jurists, 'Pakistan: military trials for civilians, questions and answers' (Geneva, April 2015) <Pakistan: trials of civilians before military tribunals a subversion of justice | International Commission of Jurists (icj.org)> accessed 10 December 2023.
[686] Constitution 1973 (n 3) art 25
[687] UN General Comment 32, article 14 'Right to Equality before Courts and Tribunals and to Fair Trial' (United Nations) https://digitallibrary.un.org/record/606075 accessed 10 December 2023.

under conventional procedural laws.[688] The lower conviction rate in those courts is attributable to the defective investigations for collecting tangible evidence and the failure of the prosecution to effectively convince the courts about the credibility of testimony so collected and made available to them by the state. It may notably be established that those ordinary courts had convicted the culprits in all the cases where the evidence produced by the prosecution established their guilt[689] in accord with the prevalent law of evidence.[690] It is paradoxical that the investigation mechanism for the cases referred to the military courts, including the composition of the joint investigation team (JIT) with military representation, was kept intact.[691] The begging question of a higher ratio of convictions under the substituted dispensation with the courts operating under the ATA for civilian trials turning upon the evidence collected by the same JIT voluminously speaks of room for improvements in fragile procedural justice. The CJS is based on a flawed investigating system with insufficient capacity to apply modern techniques for collecting admissible evidence, no well-organized witness protection program, no proficient prosecution,[692] and adjudication resting on inflexible laws of evidence to exclude the one originating from modern IT apparatus and forensic analysis, and to regard such evidence as that of secondary or corroborative nature only, are primarily the key factors responsible for the given procedural inefficiency. In the case of *Tanvir,* it has been held that:

[688] ibid, General Comment 32 read with the Constitution of Pakistan 1973, art 25.
[689] *Muhammad Farhan alias Irfan v The State* [2021] SCMR 488; *The State through P G Sindh and others v Ahmed Omar Sheikh and others* [2021] SCMR 873; *Ali Muhammad v The State* [2020] SCMR 2143; *Muhammad Yaqoob v The State* [2020] SCMR 853; are some of the examples amongst several other judgments in which conviction took place under the Anti-Terrorism Act 1997 by the ordinary courts and upheld up to the apex court.
[690] Qanun-e-Shahadat Order 1984
[691] Anti-Terrorism Act 1997, s 19
[692] *Haider Ali and another v DPO CHAKWAL and others* [2015] SCMR 1724

> … the Court may allow reception of any evidence that may become available because of modern devices and techniques. Under this regime the technician who conducts experiment to scrutinize DNA evidence is regarded as an expert whose opinion is admissible in Court …. Since DNA is reckoned as a form of expert evidence in criminal cases, it cannot be treated as primary evidence and can be relied upon only for purposes of corroboration. This implies that no case can be decided exclusively on its basis if there is no primary piece of evidence, like oral evidence.[693]

The objectives given for the constitution of such special courts for the offences already triable under Cr.P.C., and not the newly created ones, cannot, in essence, justify the requirements of a fair trial under the internationally recognized instruments in general and ICCPR in particular, duly ratified by Pakistan. It would also entail serious questions about the element of delay stemming from available mechanisms regulating the investigating and prosecuting agencies, as key players, under the procedural laws in vogue. The Supreme Court has already expressed its serious concern about the defective and deficient capacity and coordination for conducting the investigation and prosecution in the following manner:

> In our order dated 15-1-2015, we noted how at least in the Punjab more than 65% of criminal cases do not result in conviction …. These figures are indicative of weak investigation and gathering of evidence which we noted above, but are also a result of serious deficiencies in our prosecution system.[694]

[693] *Tanvir v State* [2020] PLD 774.
[694] *Haider Ali* (n 692) 1724

The following issues among others were highlighted:

(i) Lack of cooperation between the police and prosecution at the investigation stage: there appears to be no standardized SOPs which guide the relationship between prosecutors and police officers and allow them to aid each other in the fair and timely investigation of the case.

(ii) Lack of training and competent prosecutors: prosecutors are not provided proper training and facilities. In addition, competent prosecutors because of lack of incentives resign from their service for better opportunities. There also appears to be no effective quality review system in place to check underperforming prosecutors. As a result, the best prosecutors are not being retained in service.

(iii) Protection of witnesses: we have been informed that in many cases the prosecution's case is damaged as key witnesses resile from their stated position because of pressure from the accused.

(iv) Adjournment requests by lawyers and delay in fixation of cases by judiciary: the defendant's lawyer deliberately at times delays resolution of cases. Delays and injustice is also caused as a result of backlog in the judicial system and frequent transfers of presiding judicial officers.[695]

[695] ibid.

In addition, it patently arraigns the legislature and executive, responsible for creating and enforcing those exceptional and innovative criminal procedures for special treatment to a few cases, and not concurring with the one meant for the ordinary courts in another set of similar cases. Such a practice, for whatever consideration, purportedly does not comply with the treaties Pakistan is a party to and has already ratified.

The country experienced lopsided procedural justice of recent military overreach only when the civilian governments regressed to authorise military courts to address widespread and persistent domestic issues such as organised crime or terrorism.[696] Although military rule and martial law have been recurring elements in Pakistan's history, the use of military courts to prosecute civilians was deemed unconstitutional by the Supreme Court in 1999.[697] A significant terrorist attack in 2014 prompted a democratically elected civilian government to pass legislation that expanded the authority of military courts to include civilian suspects in terrorism cases.[698] This action reversed the previous limitation on the legal authority of the armed forces and shifted the country to an excessive exercise of military power. These militarily administered judicial powers were somewhat tempered by the fact that, unlike previous cases of military court usage, they were theoretically still subject to civilian judicial review. However, in reality, this did not effectively limit their use.[699] In August 2015, the Supreme Court approved the use of military courts for civilian terrorism suspects.[700]

[696] Brett J. Kyle and Andrew G. Reiter, *Military Courts, Civil-Military Relations, and the Legal Battle for Democracy: The Politics of Military Justice* (Oxford: Routledge 2021)159-160.
[697] Ibid, 160. Also *Shiekh Liaqat Hussain v Federation of Pakistan* [1999] PLD 504 (SC).
[698] Ibid.
[699] Ibid, p. 183
[700] *District Bar Association, Rawalpindi v. Federation of Pakistan* [2010] All Pakistan Legal Decisions, PLD 2015 SC 401. https://www.supremecourt.gov.pk/downloads_judgements/Const.P. 12of2010.pdf.

Although precise numbers are not known, between 2015 and 2019, military courts convicted no less than 641 individuals on terrorism charges, sentencing at least 345 of them to death.[701] The accusations, evidence, and findings were not made public, often preventing the possibility of appealing a judgment to a higher civilian court.[702] It was only in 2018 that the Peshawar High Court questioned the procedures of military courts, citing inadequate defence representation, failure to present evidence against the defendants, and the arbitrary and confidential nature of their activities.[703] As a result, the said High Court compelled military courts to release 70 defendants who were detained for trial.[704] The law passed in 2015 had a two-year sunset clause.[705] The government urged that the recourse to military justice was necessary due to the serious threat of terrorism and ineffectiveness of the justice system administered by the courts of ordinary jurisdiction in dealing with it. Military courts were meant to be a stop-gap arrangement while the government committed to work on improving the ability of civilian courts to swiftly prosecute terrorism.[706] Despite the two-year limit, the military courts remained in place when the window ended. In March 2017, the government passed the Twenty-third Amendment to the constitution, renewing the mandate for military courts and giving them retroactive legality to January 2017, when the previous amendment had already ceased to have effect.[707] When the second two-year deadline in 2019 approached, there was a political debate about whether to endorse another extension. The ruling party preferred extending the deadline but encountered difficulty in passing a new amendment to that effect without a two-thirds

[701] Brett J. Kyle (n 700) 183.
[702] Ibid.
[703] *Abdur Rashid v. Federation of Pakistan* [2018] All Pakistan Legal Decisions, PLD 2019 Peshawar 17.
[704] Brett J. Kyle (n 700) 183.
[705] The Constitution (Twenty-first Amendment) Act, 2015 (I of 2015)
[706] Brett J. Kyle (n 700) 184.
[707] The Constitution (Twenty-third Amendment) Act, 2017 (XII of 2017)

majority in the legislature.[708] The use of military courts against civilians in the recent past has led to ongoing dilemmas, and Pakistan continues to grapple with persistent issues of procedural justice and the right to a fair trial.

The above critique reveals how far the special laws transgressed upon the right to a fair trial. It also provides baseline research findings for the impending review of the procedural laws regulating the courts of ordinary jurisdiction as such and specifically indicates an obligation on the legislature to incorporate the necessary provisions for giving effect to Article 14 (3) (c) of the ICCPR in the regulatory components of procedural justice. The above analysis not only underlines a breach of international obligations but also points out the absence of state's trust in the criminal justice system. It becomes so obvious, particularly when the state prefers to create a parallel mechanism for the military courts to try a certain class of offences through amendments in the Constitution and Army Act. It further authenticates that those extraordinary measures to establish concurrent jurisdictions by the legislature were resorted due to the fact that the procedural justice employed by the courts of ordinary jurisdiction lost public vindication to remedy their grievances. Such a newly created dispensation of criminal justice becomes highly debatable and controversial in terms of its independence and impartiality of the judicial process, in that, those military courts are subservient to and/or part of the executive organ. The independence is not confined to the procedures only, rather it provides a wider connotation of procedural justice in terms of the qualifications and eligibility of the judges, guaranteed tenure security, mandatory retiring age or tenure expiry, and the existence of other conditions to govern their promotions, suspensions, transfers, and cessations from the office

[708] Brett J. Kyle (n 700) 184.

without intervention by the executive and/or legislature.[709] Although the objectives for empowering the military court for speedy disposal of peculiar cases were put forth in the special legislations to amend the Army Act and the Constitution, no reasonable explanation was assigned by the legislature for creating such a distinction from other similar cases being concurrently heard by the courts of ordinary jurisdiction. Therefore, it amounts to implicit acknowledgment, for whatever reason, of the failure of those regulatory components of the criminal justice system in vogue, be it the investigation, prosecution, or adjudication. It denotes the absence of confidence by all three organs of the state concerning the delay in criminal trials for such cases involving civilians despite the extraordinary special legislative measures like ATA and POPA, without analysing how it was impacting the fair trial in Pakistan.[710] Notwithstanding the foreseeable ramifications of the newly introduced temporary procedural version as to the right of a fair trial, its legitimacy was not examined and appraised in the context of ratified international instruments of ICCPR[711] and UDHR.[712] The states parties have the right to take measures to protect the rights of their citizens and may also prescribe the rules of procedures. However, the procedural mechanism for their enforcement must be fair, just, non-arbitrary, and non-discriminatory.

6.4 Indicators of Investigative Inefficiency: Barrier to the Fair Trial

A deprivation of liberty under lawful procedure requires prompt and effective investigation in a fair manner with due regard to the basic rights of human dignity and

[709] International Commission of Jurists (n 685), Human Rights Committee, General Comment No 32, article 14; Constitution of Pakistan, art 175; *Government of Sindh v Sharaf Faridi* [1994] PLD 105 (SC)
[710] ibid; Constitution 1973 (n 3) arts 10-A and 25; ICCPR 1966 (n 6) arts 2 and 14
[711] ICCPR 1966 (n 6) art 14.
[712] UDHR 1948 (n 14) art 10.

freedom of the movement conferred upon the accused/defendant by the Constitution.[713] The investigation agencies are the first responders to criminal acts or omissions. The task of administering public order and crime prevention and control is primarily cast upon the provincial governments.[714] However, the federal government is also not divested of enacting or amending criminal procedural laws.[715]

As discussed earlier, the colonial criminal justice system inherited by Pakistan had a rigid structural system with vertical hierarchical layers for command and control in the law enforcing agencies.[716] After the promulgation of Police Order 2002, the structure of the police service was drastically changed as the Investigation branch was separated from the prevention wing tasked with watch and ward. The nomenclatures and the hierarchical layers were also modified.[717] The Prosecution Service was altogether separated from the police force.[718] Now the Police Order provides a complete list of the functions and duties the police are obligated to carry out for the prevention and investigation of crime besides maintaining peace.[719] It has to protect the life, liberty, and property of the citizens.[720] It is apt to note here that the indicators of training provided to the police officials are not promising as a large number of cases remain untraced[721] and the service is often termed as the most corrupt one.[722] It may further

[713] Constitution 1973 (n 3) arts 14 & 15
[714] ibid. art 142 (b)
[715] ibid.
[716] Police Rules 1934
[717] Police Order 2002, Chapter II & III.
[718] The Punjab Criminal Prosecution Service (Constitution, Functions, and Powers) Act 2006, S 3; The [Khyber Pakhtunkhwa] Prosecution Service (Constitution, Functions and Powers) Act 2005; The Sindh Criminal Prosecution Service (Constitution, Functions and Powers) Act 2009; and The Balochistan Prosecution Service (Constitution, Function and Powers) Act 2010.
[719] The Police Order 2002, Chapter II, Clauses 3 and 4
[720] ibid, s 4 (1) (a)
[721] Fasihuddin, *Criminology and Criminal Justice System in Pakistan: Handbook of Asian Criminology* (Springer 2013) 258.

be pertinently delineated that the investigation starts following the registration of First Information Report (FIR).[723] It is mandatory for the officer-in-charge of the police station to register every FIR relating to any cognizable offence.[724] It is enjoined upon him/her to reduce every such information into writing even if given orally, and the person giving it will also sign it. Such information shall be entered into a book "kept by such officer in such form as the Provincial Government may prescribe in this behalf."[725] Despite the given mandatory provision, the concerned police officials often refuse to register FIR relating to a cognizable offence and many aggrieved invoke the forum of Justice of Peace (JOP)[726] for the redress of their grievance and the registration of FIR. Procedural law does not provide for coercive action by the JOP against the non-complying outlook and therefore, renders such a forum somewhat ineffective and tardy to implement the procedural laws. The JOP may, at best, refer the matters of non-compliance with its direction of registration of FIR to the higher police officials for administrative action.[727] The given situation was described by the Supreme Court as follows:

> It is thus clear that a number of persons suffer and are pushed into litigation because of failure of the police to register the FIR. Litigation too, it seems, does not guarantee relief. The Justice of Peace cannot issue coercive process for compliance of his orders … the Justice of Peace can refer the matter to the

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[722] Ansar Abbasi, 'Police...among Top Three Most Corrupt Institutions: Transparency International Pakistan (TIP) in its National Corruption Perception Survey (NCPS) 2022' (The News International 9 December 2022) <https://www.thenews.com.pk/print/1018307-tip-releases-ncps-2022-report-police-judiciary-among-top-three-most-corrupt-institutions> accessed 10 December 2023.

[723] Code of Criminal Procedure 1898, s 154

[724] ibid. s 4 (f), 'Cognizable offences' mean those offences in which the police officer may arrest the accused without warrant as per second Schedule of Cr.P.C., or under any other law in force.

[725] Cr. P. C. 1898 (n 723).

[726] ibid, s 22.

[727] Police Order 2002, art 155

higher officials of police for taking actions against the defaulting [Station House Officer] SHO.[728]

It thus becomes manifestly clear that lots of people are constrained to have recourse to alternative methods[729] and implicitly deprived of access to justice through state machinery. It often serves no purpose except causing them to face tremendous agony along with consumption of considerable time and resources exhausted for the relief the law has presupposed to be readily available and promptly given to them. Such an intransigent outlook on the part of the police, in all probability, is a result of another rampant culture of manipulating the registration of false, malicious, and vexatious complaints/FIRs with the obvious motive to harass or persecute innocent people.[730] However, the solution is not adamance to the registration of FIR but to deter such baseless complaints by applying the available penal provisions[731] against those lodging them. These provisions, although seldom applied, provide ample scope to punish the responsible for initiating the false complaint and are contemplated only to discourage frivolous criminal litigation. The misconduct by the police to abdicate their duties by not registering the FIR, and then no follow-up application of the afore-referred penal actions against those abusing the process of registering it under section 154, cannot be lent countenance by any stretch of the imagination. Above all, there is hardly any accountability for the failure of police to mandatorily register the FIR and/or to take action for abusing the afore-referred provisions of law against those using it as a device for their illicit considerations. It has been held by the apex court that:

[728] *Muhammad Bashir v Station House Officer, Okara Cantt. and others* [2007] PLD 539 (SC); *Haider Ali and another v DPO Chakwal and others* [2015] SCMR1724.
[729] Cr. P. C. 1898 (n 723), sec. 22, 22-A and 22-B read with sec. 190, 200, 201 and 202.
[730] *Muhammad Bashir* (n 728).
[731] Pakistan Penal Code 1860, s 182 and 211

> Another issue at this stage is the registration of false or vexatious complaints to pressurize and harass people. While, the Pakistan Penal Code provides for measures through Sections 182 and 211 to discourage and punish false complaints, it is common knowledge that very few cases involving such offences are filed and prosecuted. This must be unacceptable, especially given that section 154 of the Cr.P.C. requires mandatory registration of FIR. If the Police therefore have no discretion in registering an FIR, action must be taken against those who abuse this provision of law and use the police as an instrument for their designs.[732]

It may also appositely be underlined that although the officer-in-charge of the police station has been obligated to register the FIR in cognizable matters, it is not obligatory for him to initiate an investigation. It is his/her discretion to proceed therewith only when he/she reasonably suspects that the offence has been committed.[733] The procedural law has unequivocally envisaged that "if it appears to the officer in charge of a police station that there is no sufficient ground for entering on an investigation he shall not investigate the case."[734] However, it is a common experience that the police often fail to discharge their obligation explicitly mentioned in the law for the registration of FIR and ordinarily proceed to apprehend the accused/defendant without duly applying its mind.[735] The Supreme Court has sensitized the police many a time that they ought not to arrest the accused, even nominated in the FIR, unless

[732] *Muhammad Bashir* (n 728).
[733] Cr. P. C. 1898 (n 723) sec. 156 read with sec. 157 (1).
[734] ibid, s 157 (1) Clause (b) of the Proviso.
[735] *Haider Ali and another v DPO Chakwal and others* [2015] S C M R 1724; *Muhammad Bashir v Station House Officer, Okara Cantt and others* [2007] PLD 539 (SC).

there is sufficient incriminating material forthcoming to justify the arrest. It was observed by the Supreme Court that:

> ... the police should not move for the arrest of the accused nominated in the FIR unless sufficient evidence is available for the arrest. Yet to our dismay we have to deal with such matters on a daily basis. Perhaps, as some of the reports referred to above point out, the issue lies in the fact that there are no real guidelines available to the police which would channel their discretion and judgment. This coupled with their lack of training, makes defective investigation almost a near possibility.[736]

The afore-going situations becoming persistently evident in scores of cases, serve no other purpose than to delay adjudications and defeat the principles governing the fair trial. Such a despicable phenomenon not only leads to the defective investigation rather clearly manifests the lack of proper training of the police officials which entails serious breaches of human rights of life and liberty as guaranteed by the Constitution.

Quality investigation is always a hallmark of policing, yet there have been innumerable observations by the superior courts concerning oft-recurring deficient and defective investigation, which invariably results in the benefit of doubt to the accused/defendant. It is in my personal experience as a judge trying heinous offences that the police investigators ordinarily lack quality training even in securing the crime scene to collect evidence. The place of incident is often inundated and trampled upon by the public in the surroundings at the relevant time and place; which leads to the

[736] ibid.

loss of materially relevant and admissible evidence. The police officials are often not so well conversant in securing the incriminating material consisting of articles like cloths, blood samples, fibre, and hair, etc. from the site of occurrence, and also fail to secure fingerprints on the available articles at the crime scene for their examination and matching for collection of evidence connecting the accused/defendant with the incident.[737] There is also an apathetic outlook by the police officials to submit the police report[738] before the court within the contemplated statutory period of fourteen days,[739] for enabling it to charge sheet the accused in terms of incriminating evidence collected by them, which is one of the key factors for delay in dispensing justice. Supreme Court was, therefore, constrained to observe that:

> 6. … The Prosecution Institution is required to ensure that the police properly investigate cases and the investigation report is comprehensive and accords with the law. The object of the Prosecution Institution is not to create hurdles in the timely submission of investigation reports (*challans*).
>
> 7. The British colonial rulers had enacted the Code in 1898 and had bound themselves to submit investigation reports (*challans*)[740] promptly. In 1992 the Code was amended and a proviso specifying certain time periods was inserted after section 173 (1) to ensure further expeditious submission of the reports, but these time periods are mostly observed in the breach.[741]

[737] ibid, Haris K (Civil Petition No 1282 of 2014, decided on 4th September, 2015)
[738] *Adnan Prince v The State through P.G., Punjab and another* [2017] PLD 147 (SC).
[739] Cr. P. C. 1898 (n 723) s 173.
[740] ibid, the term 'Challan' is final report under sec. 173 Cr.P.C. submitted by the police to the magistrate containing description of allegations and the evidence collected during the investigations.
[741] *Amjid Khan v The State through A G Khyber Pakhtunkhwa and others* [2021] SCMR 1458.

It is also a common experience that the investigating agencies often do not take the necessary safeguards to rule out the prospect of tampering with the samples and fail to provide foolproof arrangements for their preservation. Consequently, the courts, at times, take extra measures to either get those articles re-examined or seek reports as to whether those articles collected from the spot were kept intact in safe custody and delivered promptly to the forensic science laboratory for analysis, without being tampered with. The Supreme Court, for instance, in *Ishaq's* case[742] noticed that:

> Neither the safe custody nor the safe transmission of the sealed sample parcels to the concerned laboratory was established by the prosecution … Sample parcels were received in the forensic laboratory three days after the recovery of narcotics and prosecution was silent as to where these sample parcels remained during this period, meaning thereby that the element of tampering was quite apparent in the present case … in a case containing the above mentioned defect on the part of the prosecution it cannot be held with any degree of certainty the prosecution had succeeded in establishing its case ….

The essential requisite training of the Investigative agencies including the Police, National Accountability Bureau (NAB), Federal Investigation Agency (FIA), etc., along with the adequate provision of appropriate scientific equipment to conduct the highest standard investigation in each and every case is the call of the day for the prompt registration, investigation, prosecution, and adjudication of a criminal case. The Investigative branch in the police department should, in particular, be properly

[742] *Ishaq v The State* [2022] SCMR 1422

trained for investigating the crimes emanating from technological advancements. The adequate number of investigating officers in all the police stations proportionate to the increased population should also be taken into account, especially in those cities that are overpopulated. The Supreme Court was conscious of these all facts and, therefore, observed that:

> The lack of training and emphasis on the development of specialized investigation officers and facilities is perhaps indicative of the wider issue in policing: the police it appears is still largely used to secure the interests of the dominant political regime and affluent members of society, rather than furthering the rule of law. As a result, where even in this debilitating environment, an honest and competent investigation officer is found; his work is thwarted at one juncture or another.[743]

The above analysis reveals that procedural laws incapable of enforcing compliance with the directions of JOP render the legal system ineffective, and many people are deprived of access to justice through state machinery. Such a phenomenon often causes them to suffer considerably. It consumes a lot of time and resources to receive the relief that Article 14 of the ICCPR read with Article 10-A of the Constitution promised them. The rampant culture of manipulating the registration of false, malicious, and vexatious complaints/FIRs to harass or persecute innocent people also entails an obstinate attitude on the part of the police. There is hardly any accountability for the failure of the police to register FIRs or to take action against

[743] *Haider Ali* (n 692); *Muhammad Bashir v Station House Officer, Okara Cantt and others* [2007] PLD 539 (SC).

those using it as a device for their illicit considerations. It must be obligatory for police officers to apply the penal provisions against those initiating false complaints. The mandatory initiative so designed will discourage frivolous criminal litigation. The misconduct of the police in failing to register FIRs, in a cognizable offence, is also a sheer violation of the procedural law and cannot be tolerated. The scope for the non-compliance of the directions issued by the JOP needs to be curbed through amendment in the procedural law, and the penal action on the judicial side against the delinquent investigating official is only the remedy to eliminate undue influence on the police for non-registration of FIRs in genuine cases or non-compliance of directions issued by the JOP. Otherwise, the given procedural laws can be used to protect the abuse of authority by the police instead of protecting the right to a fair trial. The investigative branch of the police department should also be adequately trained to investigate crimes based on technological advancements, which is essential for procedural justice.

6.5 Prosecutorial Scrutiny: as a Subjective Objectivity

An effective and proficient prosecution service is a pre-requisite for realizing the principal objectives of a fair trial. The criminal prosecution was separated from and made independent of the police in 2006[744] by the provincial government of Punjab to avowedly establish and ensure prosecutorial independence and for improving coordination among various components of the criminal justice system.[745] Previously, the prosecutorial role in the criminal case rested with the police.[746] The CJS that

[744] The Punjab Criminal Prosecution Service (Constitution, Functions, and Powers) Act 2006
[745] ibid, Preamble.
[746] Fasihuddin, *Criminology and Criminal Justice System in Pakistan' Handbook of Asian Criminology* (Springer 2013) 247; Punjab Police Rules 1934, Chapter 27 provides for the prosecution and court duties.

Pakistan inherited from British rule was established under Cr.P.C. allowing a police officer not taking part in the investigation of a case to conduct the prosecution.[747] The provincial government earlier also concurrently appointed officers of the Law Department including the Assistant and Deputy District Attorneys for prosecuting the cases before Sessions Courts, and the Legal Inspectors as Public Prosecutors before the Magisterial Courts, whereas the prosecutions before superior courts were conducted by Advocate General Office and/or the State Counsels. The inadequacy of training and procedural guidelines for coordination between both the police and prosecution departments entail a lesser conviction rate.[748] Such deficiencies of procedural justice outline the prime factors to obviate fair and timely investigation and prosecution of criminal cases.

Once a crime takes place, the process of investigation and prosecution sets in, which is primarily aimed at collecting and adducing evidence to establish the guilt of the accused/defendant connected therewith. It is meant to institutionalize the legal process for efficient and just adjudication by the Court and does not always clinch the conviction; rather it may also result in the cancellation of the case or acquittal of the accused together with the consignment of the 'untraced' cases as well.[749] Following the registration of FIR and police investigation, a police report[750] is liable to be submitted through the Public Prosecutor. Even under the prosecution law, the prosecutor's duty begins at a belated stage when a police report under section 173 Cr.P.C. is submitted for prosecutorial scrutiny as a pre-trial measure to address the defects of investigation that may compromise the integrity of already collected

[747] Cr. P. C. 1898 (n 723) s 492 to 495.
[748] *Haider Ali* (n 692).
[749] The Police Order 2002, Chapter II, Clauses 3 and 4.
[750] Cr. P. C. 1898 (n 723) s 173.

evidence.[751] If the court, taking cognizance, finds adequate incriminating evidence, it will charge sheet the defendant/accused and record evidence; to be followed by a statement consisting of certain questions[752] for his/her explanation of incriminating evidence adduced against him/her and also the defence evidence, if so opted.[753] Thereafter, the trial court pronounces its judgment and the prosecution may consider sending recommendations for filing an appeal by the provincial government or otherwise.[754] The procedural laws are given precedence by the courts to determine the roles of various components of CJS, but the Cr.P.C. does not set forth an elaborate role of the prosecutors vis-à-vis the police and the courts, except forwarding the report under section 173 Cr.P.C. and representing the state case in the court proceedings. An effective and well-defined coordinating role of prosecutors for expediting the criminal trials, from investigation to all the stages till its logical conclusion, is imperatively required to be worked out in the procedural laws. Such a lack of concord is militating against the convictions of the offenders genuinely involved in heinous crimes. No comprehensive guidelines are available for both the police and prosecution departments in this regard despite both of them being governed by provincial governments, i.e., the executive. Thus, the lesser conviction rate as indicated by the apex court and the admission of the Prosecutor General as to the high rate of acquittals before the apex court in *Haider Ali's* case is "indicative of weak investigation and gathering of evidence"[755] together with "a result of serious deficiencies in our

[751] Punjab Criminal Prosecution Service (Constitution, Functions, and Powers) Act 2006, s 9.
[752] Cr. P. C. 1898 (n 723) s 342, these questions are very crucial as the presiding judge gives an opportunity to an alleged offender to explain the incriminating evidence adduced by the prosecution against him/her.
[753] ibid, s 340.
[754] ibid, s 417.
[755] *Haider Ali* (n 692) 1724.

prosecution system."[756] It was, therefore, suitably underlined in the afore-referred case that the cooperation of both the investigating and prosecuting wings of CJS to aid each other would only allow fair and timely investigation and prosecution of criminal cases.

It is also a common experience that all the three core aspects of these departments meant for investigation, prosecution, and adjudication are potentially working in isolation from each other in their work despite being part of a criminal justice system designed to work with a single aim. These key issues could be effectively addressed instantly, in some cases through administrative and legislative measures but "no effective steps have been taken to enhance the efficiency and competence of the concerned government departments."[757] A fair trial becomes a hard nut to crack when the investigation is carried out without serious consultation by the prosecutor, who belatedly interacts with the investigation officer after receiving the police report. Therefore, the lacunas of investigation taking effect without guidance by the prosecutors often become incurable. After that, the prosecutorial remedial steps unnecessarily delay the trial and make the accused defendant languish in judicial lockup without trial. Such procedural justice cannot ensure a fair trial within a reasonable time, particularly when it is also a known fact that the settled legal principles in judicial precedents excessively rely upon the ocular evidence. They do not allow convictions solely resting on forensic evidence etc. which is virtually treated as corroborative or secondary evidence and not that of a substantive or primary character. "The corroborative evidence is meant to test the veracity of ocular

[756] ibid.
[757] ibid.

evidence."[758] It is a settled principle that a conviction cannot turn upon the forensic analysis by an expert without ocular/substantive evidence, in that, a report of the Forensic Science Laboratory (FSL) is only a corroborative one. In the case of *Riaz Ahmad*, the Supreme Court had observed that:

> The prosecution also produced the positive FSL report, meaning thereby, the crime empty secured from place of incident, matched with the gun recovered from the possession of the appellant. This being a corroborative piece of evidence, which by itself is insufficient to convict the appellant in absence of substantive piece of evidence ….It was held in the case of "*Asadullah v. Muhammad Ali*" (PLD 1971 SC 5412)", that corroborative evidence is meant to test the veracity of ocular evidence. Both corroborative and ocular testimony is to be read together and not in isolation. In the case of "*Saifullah v. The State* (1985 SCMR 410)", it was held that when there is no eye-witness to be relied upon then there is nothing, which can be corroborated by the recovery.[759]

In the case of *Salman Akram Raja*, the Supreme Court has held that:

> In Pakistan the courts also consider the DNA test results while awarding conviction, however, the same cannot be considered as conclusive proof and require corroboration/support from other pieces of evidence.[760]

[758] *Asadullah v Muhammad Ali* [1971] PLD 541 (SC).
[759] *Riaz Ahmad v State* [2010] SCMR 846.
[760] *Salman Akram Raja and another v Government of Punjab through Chief Secretary, and others* [2013] SCMR 203.

The phenomenon of treating forensic evidence or other modern devices generated by expert witnesses as corroborative and excluding it for the sole purpose of conviction in the absence of any other direct/substantive evidence termed as ocular/primary evidence, opens up the influx of tutored witnesses by the investigation and prosecution, as the parties often rely upon doctored evidence of ocular account as direct/primary nature, which becomes the mainstay of the given CJS. The situation is further worsened due to a lack of coordination between the investigation and prosecution branches. There is an urgent need for a well-defined coordinating role of prosecutors in the Cr.P.C. to expedite criminal trials from investigation to the final stages. Due to the need for such agility, the conviction rate in cases involving heinous crimes is comparatively lower. To address this issue, procedural guidelines need to be developed for both departments. The isolated work of the police and prosecutors often leads to incurable gaps in the collection of primary and secondary admissible evidence. It entails the prosecutor's belated remedial steps, which unnecessarily delay the trial and cause the accused/defendant to languish in judicial custody without trial. It is crucial to establish a procedural system where prosecutors play a more proactive role in coordinating with investigating officers to ensure a fair trial for all parties involved. By working together, they can ensure that all aspects of the criminal justice system are integrated and working towards a common goal. This will help expedite criminal trials and ensure that justice is served in a timely manner.

6.6 Lack of Systematic Accountability: Impact on Fair Trial

The Supreme Court of Pakistan, while referring to reports of the Inspector General of Police Punjab relating to administrative action recommended by the prosecution department against the police officials for their delinquency, noted that the figures

provided by the police were variable and kept changing.[761] Based on the fudging of the police department on those figures, the court assumed that even if those changes were made in good faith, the exercise unveiled very least attention of the police officials towards those cases of misconduct. There was no ready reference to the accurate collation of the complaints against the crook police officials, including those involved in the defective investigation, and causing delays in submission of police reports and attendance of witnesses before the trial courts. There was a serious question mark by the court as to whether sufficient measures were being taken to deter atypical misconduct by the police officials.[762] It was noted by the court that the systematic accountability through the Public Safety Commissions[763] at the national and provincial levels was either not operational or kept inactive. There was a lack of transparency with no records of annual performance reports, police plans, and allocation of public funds. The actions taken by the relevant provincial governments under the Police Order 2002 meant to transform the police, for expeditious, efficient, and transparent investigations, were few and far between and regarded as insufficient for public service.[764] It was further observed that with the Eighteenth Constitutional Amendment in place,[765] the provincial governments of Sindh and Balochistan had abandoned the afore-referred Police Order and their shifting to the policing regime reminiscent of the colonial times was meant to put the natives on a tight leash.[766] Such a repeal of the Police Order 2002 was aimed at retaining political interference and

[761] *Haider Ali* (n 692) para 7.
[762] ibid.
[763] The Police Order 2002, Chapter V
[764] *Haider Ali* (n 692) para 8.
[765] The Constitution (Eighteenth Amendment) Act, 2010
[766] *Haider Ali* (n 692).

influence by the legislators.[767] The report of Law and Justice Commission of Pakistan (L&JCP) emphasized that the redress of individual grievances has a bearing on the right to a fair trial, and the above-mentioned failures deter the police from its realization. As a result, "the nation suffers" as a whole.[768]

Given the above analysis, it becomes abundantly clear that there is an apathetic outlook for accountability against defective and delayed investigations and the absence of sufficient procedural safeguards against the lopsided prosecution. There is no effective mechanism to analyze and account for any of the omissions, failures, negligence, or delinquency for causing delays in the investigations, and securing the convictions. Procedural justice neither provides efficient follow-up for the remedial methods nor is it instrumental for appraisal of the delinquent's role on a case-to-case basis. The inadequacy of such procedural safeguards of accountability makes those vulnerable and poor more exposed to grim situations when the available deficient ones are not efficiently utilized to ensure effective coordination and cooperation between the investigating and prosecuting bodies. There is hardly any sophisticated procedural apparatus for identifying the reason for a high rate of acquittals and lowest conviction rates. There is no inbuilt or parallel system for carrying out a simultaneous assessment of the failure of both the investigating and prosecuting agencies for securing the conviction of culprits despite the fact that those incidents so investigated and prosecuted without convictions, had taken place. Both the legislature and

[767] Tasneem Ur Rehman, 'Reforms in Balochistan police' Daily Times (23 January 2023) <https://dailytimes.com.pk/716006/reforms-in-balochistan-police/> accessed on 11 December 2023).
[768] Law and Justice Commission, Police Reforms: Way Forward, <http://ljcp.gov.pk/nljcp/assets/dist/Publication/b1896-title-brochure-final-14-01-2019-pdf.pdf>accessed 7 December 2023

executive are indifferent to the final outcomes of failed prosecutions, and so are the officials associated with investigating and prosecuting the trials despite being paid by the public exchequer. Such a loathsome approach either deprives the aggrieved litigants of speedy justice or denies justice to them altogether. Therefore, there should be an independent parallel statutory body composed of the officials of both the departments at the district and provincial levels headed by the co-opted independent experts with relevant experience to monitor the efficacious functioning of both the departments operating under the provincial executives. They must ferret out the reasons for delay in the investigations and the failure of both departments to secure the convictions when the alleged incident was irrefutable. They must also examine the shortcomings of their proficiency, defects in the procedural laws, and factors responsible for delay in adjudication of cases on account of inefficiency by the officials of these departments on a case-to-case basis. The proposed forum may also provide insight into their increased capacity to achieve the goals of an efficient criminal justice system. It will not only prevent the delay rather will also ensure all the requirements of a fair trial as well.

6.7 Absence of Witness Protection: a Serious Procedural Obstacle

A criminal justice system without effective witness cooperation or adequate provision of security against the probability of victimization to him/her is fatal for the transparent judicial process and right to a fair trial. There are many instances when the prosecution witness (PW) witnesses are scared and become reluctant to testify against the desperate and hardened criminals owing to the looming threats or intimidation.

Therefore, they become indisposed to testify in the courts, invariably leading to delayed adjudications or acquittals of the genuine culprits. It often happens in organized crimes where those PWs are vulnerable to their influence and intimidation. There have been many instances of the killing of PWs, even on the court premises.[769] Such a phenomenon becomes a serious obstacle to render procedural justice at stake, as was observed by the Supreme Court to the following effect:

> Absence of a witness from the public, despite possible availability is not a new story; it is reminiscent of a long drawn apathy depicting public reluctance to come forward in assistance of law, exasperating legal procedures and lack of witness protection being the prime reasons.[770]

The contribution of witnesses for a speedy and fair trial is vital. The most effective CJS with coherent laws but with intimidated and vulnerable witnesses not only delays the justice rather renders the procedural justice as void. Even those appearing as PWs against political leaders, philanthropists, and public figures lack such protection to bring the criminal justice system to a halt in those high-profile cases.[771] These oft-recurring discriminatory situations eventually result in failure of the prosecution due to lack of evidence, as the procedural treatment violates equality before the law. This phenomenon has stigmatized the CJS in general.[772] Therefore, the practical measures for witness protection are liable to be seriously considered to ensure fair trials. It is obligatory for the prosecution to adduce evidence consisting of incredible and

[769] Samina Bashir, 'Witness Protection and Judicial System of Pakistan in the Light of International Legislations and Best Practices' (2019) 8(11) IJAC 23.
[770] *Shabbir Hussain v The State* [2021] SCMR 198.
[771] Samina Bashir (n 769) 24.
[772] ibid.

undeterred witnesses to make it qualify for the standards of credibility and trustworthiness. Although Pakistan has enacted legislation,[773] but like Police Order 2002, its operational failure[774] to curb the potential threats to the PWs prevents the effective prosecutorial liability to provide a fear-free environment to those PWs. Even the officials witnessed under the hierarchical setup of both the investigating and prosecuting agencies are subservient to the executive and often influenced by political manipulations in their service matters. A report of Secretary Establishment submitted to the Supreme Court unearths the situation in the following manner:

> … such officers invariably are hindered not to follow the rules and regulations by the high-ups on account of their administrative or political influence which results in their arbitrary frequent transfers from one place to another or at times posting them as OSDs or without caring about the merit-cum-seniority they are not awarded due posting … which is always heartburning and for so many other reasons instead of performing independently Civil Servants start looking for some favour in the administration as well as in the political arena as a result whereof good governance badly suffers.[775]

A witness has been defined as one "who has given or agreed to give, or may be required to give evidence in relation to the commission or possible commission of [serious] offence ... a person who either possesses or provides information to an officer of law enforcing agency and has agreed to give evidence or requires protection

[773] The Punjab Witness Protection Act 2018; the Sindh Witness Protection Act 2013
[774] ibid, The Witness Protection Board under sec. 3, and the Witness Protection Units under sec. 4 have not yet been established.
[775] *Syed Mehmood Akhtar Naqvi and others v Federation of Pakistan and others* [2013] SCMR 1

or assistance under the law or for any other reason ... a person related to such witness may also require protection"[776] It may be noted that the expert witnesses and victims testifying before the court also fall under the given category. The UN Convention against Transnational Organized Crimes (UNCTOC) and its Protocols call upon the member states for initiating effective measures meant to bring witness intimidation or injury to an end. The United Nations Office on Drugs and Crime (UNODC, Vienna) published "Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crimes"[777] to aid the member states in designing their own protection programs accordingly. The Witness Protection Program was progressively established and became an integral part of many jurisdictions.

The scope of a fair trial is not confined to the accused for 'a fair chance of dealing with the allegations against him'[778] rather it also includes shielding the PWs and their families from wrath of the accused/defendants by receiving their testimony through the video link, concealing the identity, avoiding their direct contact when cross-examined, and/or other similar modes. It may further include long-term support and protection etc.[779] Although procedural justice in Pakistan had throughout been bereft of those safeguards, of late, legislative measures[780] have been instituted but not put into practice despite the lapse of many years. No Advisory Board or Protection Unit as envisaged by the law could be set up, nor were any steps taken by the provincial

[776] The Sindh Witness Protection Act 2013, s 2 (n)
[777] United Nations Office on Drugs and Crime, 'Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime' (UN 2008) <https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/Good_Practices_for_the_Protection_of_Witnesses_in_Criminal_Proceedings_Involving_Organized_Crime.pdf> accessed on 11 December 2023.
[778] Patrick Robinson, 'The Right to a Fair Trial in International Law: With Specific Reference to the Work of the ICTY' (2009) 3 Berkeley J.L Int'l L 1.
[779] Samina Bashir (n 769) 29.
[780] The Punjab Witness Protection Act 2018 (n 773).

governments to make rules for giving effect to the legislative scheme so devised.[781] The long-awaited protection program for vulnerable witnesses is extremely critical in view of the depleting criminal justice system. The lack of political will on the premise of budgetary constraints is belied as a flimsy excuse, particularly when the government becomes afoot to take measures like amending the Constitution and Army Act to establish military courts for the trials of civilians. Neither there can be a significant vindication of procedural justice nor can the transparency of judicial process be preserved without giving protection to the public and private PWs against coercion, intimidation, risk of employment, and susceptibilities to their lives and those of their families. There is an imminent procedural requirement to enforce the institutionalized witness protection program consistent with the international standards of a fair trial as a pre-requisite for dispensing speedy justice. These witness protection laws should also be made part of the curriculum for legal education so that the future legal fraternity may play its role in facilitating such protection of the PWs as an integral part of procedural justice. The proposed scheme should be managed by a separate statutory body independent of the Police and Prosecution departments to safeguard the confidentiality required for those PWs along with the preservation of their database. Witness Protection should equally be available to the defence witnesses (DWs) as and when required. The absence of the proposed measure would invariably jeopardize the right to a fair trial.

[781] Ibid, s 3, 4 & 17, The Government has been vested with the power to establish a Witness Protection Board, and the Witness Protection Units, and also notify the rules for carrying out purposes of the Act.

6.8 Assessment of Pre-sentencing Treatment

The procedural laws of Pakistan provide two alternatives to imprisonment prior to sentencing. Those two modes are in the form of bail under the Cr.P.C. and release of the accused/defendant on probation under the Probation of offenders Ordinance 1960. Since its independence, Pakistan reinforced British India's legacy of procedural justice, and the probationer's aspect of CJS was also no exception. It adapted the colonial law of the Good Conduct Prisoners Probational Release Act 1926 and the relevant provisions of the Indian Code of Criminal Procedure,[782] which was later renamed as the Criminal Procedure Code. The prisoners released on parole were looked after by the Reclamation and Probation Departments (RPD) established in 1927 and the afore-referred Act of 1926 enabled an early release of those prisoners who would demonstrate good conduct compatible with social reintegration. However, its ambit for conditional release was confined only to those imprisoned for a short term. A newly drafted Probation Bill was circulated for the comments of all the state governments in 1931 AD but it could not be passed primarily due to the independence movement and political crisis. The Government replaced the Act of 1926 with the Probation of Offenders Ordinance of 1960 and also framed Rules there-under in 1961. The newly established procedural framework of the probation law was the 1931's version of the draft Bill to mandate the RPDs for appointing Probation Officers in the cases before courts. The government also enacted an Ordinance for the Juvenile Justice System (JJSO) in 2000,[783] which provides for the release of juvenile offenders on probation,[784] to comply with its international obligations.

[782] Indian Code of Criminal Procedure 1898, s 380, and 562 to 564.
[783] The Juvenile Justice System (XXII of 2000).
[784] ibid, s 11

In Pakistan, the lack of an institutionalized pre-sentencing system in procedural justice means that offenders have no choice but to undergo adversarial criminal trials, which can be both retributive and preventive. Such an approach by the state delays resolving criminal trials in contravention of the relevant provisions of the Constitution and ICCPR.[785] The prisoners are ordinarily given the option of bail, which they are also mostly conversant with, in procedural settings. The release of prisoners on probation is the least practised option in Pakistan. It is worth considering that the various retributive theories of punishment by depriving the accused of his/her right to freedom have lost ground and have been progressively replaced by reformative theory or rehabilitative justice.[786] The release of prisoners with a humane model has been found to be more successful for the community reintegration of the accused and also safeguards them against the negative effects of imprisonment. The evidence suggests that it also minimizes public expenditure to value the money of taxpayers. There is an ample scope for the release of the prisoners under the probation laws where a male is convicted for "an offence not being an offence under chapter VI or Chapter VII of the Pakistan Penal Code (Act XLV of 1860), or under section 216-A, 328, 386, 387, 388, 389, 392,393, 397, 398, 399, 401, 402, 455 or 458 of that code, or an offence punishable with death or transportation for life"[787] or, female convicted of any "offence other than an offence punishable with death is of opinion that, having regard to the circumstances including the nature of the offence and the character of the offender, it is expedient to do so, the court may, for reasons to be recorded in writing, instead of sentencing the person at once, make a probation order."[788] Such probation order may

[785] Constitution 1973 (n 3) art 10-A and 25, and ICCPR 1966 (n 6), art 2 and 14.
[786] Carissa Byrne Hessick, 'Why are Only Bad Acts Good Sentencing Factors?' (2008) 88 BULR 1109, 1127-29.
[787] Probation of offenders Ordinance 1960, s 5 (1) (a)
[788] ibid, s 5 (1) (b)

require him/her "to be under the supervision of a probation officer for such period not being less than one year or more than three years as may be specified in the order."[789] It may be noted that "the court shall not pass a probation order unless the offender enters into a bond, with or without sureties, to commit no offence and to keep the peace and be of good behaviour during the period of the bond and to appear…"[790]

The probation officer has to monitor, supervise, and facilitate the rehabilitation of the accused on probation.[791] However, there is acute inadequacy of the personal and institutional capacity, which renders the role of probation officers as ineffective.[792] They are assigned a crucial role of preparing the Social Investigation Reports (SIR) for submission to the courts. The SIR contains the antecedents relating to the offenders' character, surroundings, background, nature of the offence he allegedly committed, and all other relevant circumstances.[793] The courts often release the offenders on probation without such formal SIR primarily due to the lesser strength of probation officers, lack of their credibility, consumption of unmeasured time, and also due to no confidence in their professional skills and abilities.[794] Those offenders are mostly released on confessions without seeking SIRs from the probation officers.[795] The failure of the probation officers to assist the courts to gauge the rehabilitative potential is contrary to the requirements of a fair trial. There is often non-compliance with the relevant provisions qua duties enjoined upon the probation officers as to the terms of

[789] ibid.
[790] ibid, Proviso of s 5
[791] ibid, s 13
[792] Samina Bashir, 'Witness Protection and Judicial System of Pakistan in the Light of International Legislations and Best Practices' (2019) 8(11) IJAC 29.
[793] ibid, 9.
[794] ibid.
[795] ibid.

conditional release for rehabilitation of the offenders.[796] The role of Case Committees[797] under the rules is non-functional and the presence of probation officers in the Criminal Justice Coordination Committees (CJCC)[798] is either non-existent or symbolic only. The CJCC is a robust forum and may provide for very effective monitoring of the probation officers. The concerned administrative [Home] Departments at the provincial level are responsible for such procedural constraints.[799] They failed to effectively put in place the mechanism for the recruitment, training, and capacity building of this institution for its proactive role as an important component of CJS. The procedural justice providing for the rehabilitation and social integration of the offenders under the reformative theory of punishment provides a great scope for virtually all the offences of PPC as mentioned in the Ordinance, except a very few of heinous nature[800] having due regard to the SIRs report. In contrast, female offenders may be released on a probation order for "all offences except those punishable with the death."[801] The positive aspects of procedural justice not only ensure fair trial but also help restrict the numerical growth of prisoners, reduce public expenditure, save the families of the offenders, and combat alienation of the offenders who voluntarily perform constructive works for the community, repatriate them to the society as a cooperative member with intrinsic moral value; and thereby help the offender to pay

[796] Probation of offenders Ordinance 1960, s 5 (2), this provision is meant to rehabilitate the offender as an honest, industrious and law abiding citizen.
[797] Probation of Offenders Rules 1961, rule 16.
[798] Police Order 2002, s 109 to 111.
[799] Punjab Government Rules of Business 2011
[800] Pakistan Penal Code 1860, s 311, 328, 346, 386 - 389, 392 – 402, 413, 460 -216; Chapters VI & VII; the exceptions include Offence of Zina Ordinance 1979, Offence of Qazf Ordinance 1979, and offence of false accusation of zina (rape).
[801] Probation of offenders Ordinance 1960, s 5 (1) (b).

back for his/her wrongdoing. Their conduct under constant supervision provides them with an opportunity to rehabilitate with an improved sense of social responsibility.[802]

Probation, being the supervision of the offender, with a suspended sentence, on the direction of a court, is the mandate given by law and has to become active once the trial begins. The release of such prisoners, who may claim relief under the Ordinance, ought to be given abiding patronage to serve the purpose of a fair trial and provide a rehabilitating environment to the first offenders who are not desperate or hardened criminals. The initiatives like allocation of funds for establishing the district-level Directorates of Human Rights for parole and probation, including their office accommodations' and sufficient probation officers with proper training and monitoring, and a mandatory application of probation laws as a first non-adversarial option instead of or in addition to adversarial trial to supplement the procedural justice, may save the stigma of conviction,[803] serve the cause of efficient access to justice, and will help conduct expeditious trials. It also becomes obligatory for prison management to utilize the probation and parole laws to reduce overcrowding in prisons. The existing law is silent on many of such aspects and is liable to be amended to enlarge its scope for formally incorporating community service under the notion of rehabilitation of the offenders without keeping them in detention, as a part of procedural justice.

[802] Basharat Hussain, 'Social Reintegration of Offenders: The Role of the Probation Service in Northwest Frontier Province Pakistan' (Thesis 2009, University of Hull) 198.

[803] Probation of offenders Ordinance 1960, S 11 The order to place on probation '...shall be deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made ….'

The effective criminal justice system inevitably makes the accused stand a speedy trial and also provides an optimum opportunity for the prosecution to prove the charge against him/her. The trial of a person incarcerated without being proven guilty assumes rather a greater significance. Based on the gravity of the alleged perpetration of a crime, the police empowered to detain the criminals for twenty-four hours,[804] has to seek authorization for their further custody for any length of time not exceeding fourteen (14) days. Thereafter, the accused becomes entitled to bail save only a few situations.[805] The Code of Criminal Procedure 1898 (Cr.P.C.) has not defined "bail" despite classifying the offences as bailable and/or non-bailable. Those categorized as bailable offences are often less serious, and the procedural law entitles the one committing any of them to be released on furnishing the bail bonds.[806] Otherwise, the right of an accused for securing release from unnecessary detention is provided in the Cr.P.C.[807] The court has to examine and become satisfied that the person seeking bail shall attend the court proceedings to stand trial without obstructing the investigation, tampering with evidence, or/and any of other considerations under the relevant provisions of bail.

It is a well-known phenomenon that the poor would hardly find the requisite surety bonds in an underdeveloped country like Pakistan, therefore, some of the evils of procedural justice under the law of bail further affect them as they are often constrained to falling back on the worst practice of touts (professional sureties) or to suffer prolonged pre-trial detention. Both the possible options of release for them prior to the sentencing are replete with tremendous hardships as those touts fleece

[804] Constitution 1973 (n 3) art 10 (2); Code of Criminal Procedure 1898, s 167
[805] Cr. P. C. 1898 (n 723) Chapter XXXIX.
[806] ibid, Schedule II.
[807] Cr. P. C. 1898 (n 723).

them of their bottom penny and they have to often incur debts.[808] Section 436 of the Indian Cr.P.C. dealing with bailable offences was amended[809] to mandate the police for essentially releasing indigent persons on personal surety bonds executed to ensure their presence before the courts for standing criminal trials. The procedural law in Pakistan may also allow such provision for the indigent who is the first offender and involved in the cases not exceeding imprisonment for three years. Similarly, those first offenders with no previous criminal record who are involved in the offences admissible for release on probation should also be given bail in non-bailable offences alleged against them so that they may prepare their defence and diligently pursue litigation against them. A provision like the one in Indian Cr.P.C. directing the court for the release of indigents in non-bailable offences[810] within seven days when he/she is unable to furnish the bail bonds may also be incorporated. Such provision may preferably encompass only those offences where the conviction concedes release of the offenders on probation. Similarly, the execution of sentences awarded to those involved in similar offences[811] (falling within the purview of probation laws) should also be suspended under the relevant provision by allowing bail to the convicts.[812] A lot many prisoners have to languish in jail for non-completed investigations and non-filing of the final police reports, to enable the courts to charge sheet them. It implies that they don't even precisely have an inkling of the charges that the police may come up with. The Unjustifiable delay in submission of the investigation reports/*challans* vitiates the fundamental rights of the 'fair trial and due process' as guaranteed by

[808] Bhagwati PN, *Report of the Legal Aid Committee* (Government of Gujarat 1971) 185.
[809] Indian Code of Criminal Procedure (I.C.Cr.P.) 1898, Proviso to s 436.
[810] ibid, Explanation added to the proviso in s 436.
[811] I.C.Cr.P. 1898 (n 809).
[812] Cr. P. C. 1898 (n 723) s 426, The provision empowers the appellate court to suspend the sentence pending appeal.

the constitutional provision of Article 10-A.[813] There have also been instances, like *Nasar Ullah's* case,[814] that the prisoners had to remain in prolonged incarceration without commencement of trial and/or determining guilt of the accused. Such a protracted detention amounts to the abuse right to a fair trial. There are also cases where the accused underwent imprisonment for a greater period of the prescribed sentence of imprisonment in an exceedingly gross manner. *Nadeem's* case[815] would reveal that he had already undergone a greater period of imprisonment when he was released on the premise that "… possibility cannot be ruled out that the petitioner may serve out his remaining sentence before the decision of his main criminal appeal on merits. It will amount to awarding the petitioner punishment in advance." In many of such cases, the offences they were charged with were not those of serious nature and only triable by the Magistrates. Therefore, it also becomes imperative for the legislature to prescribe the time limitation for each of the stages of a trial to be mandatorily complied with by the trial courts in all non-bailable offences. Also, the relevant provision of both physical and judicial remand should empower the magistrate to take legal action, and direct administrative action for the delinquent police officials not abiding by the statutory period for submission of the police report after completing the investigation. The provisions of allowing bail[816] must be exercised, at both the trial and appellate levels, in the cases where (i) the police reports are unnecessarily delayed beyond the statutory period, which in the opinion of the court is not tenable, and (ii) the trial before magistrates is not concluded for a period exceeding one fourth (1/4) of the prescribed period of the sentence for whatever reason. The bail in such cases should not be contingent upon the faults on part of the

[813] *Chairman NAB through PG Accountability v Nasar Ullah and 5 others* [2022] PLD 497(SC).
[814] ibid, *Adnan Prince v The State through P G Punjab and another* [2017] PLD 147 (SC).
[815] *Muhammad Nadeem v The State and another* (2020) YLRN 104.
[816] Cr. P. C. 1898 (n 723) s 426 and 497.

prosecution only, in that, the trial or appellate courts cannot attribute the lapses of procedural justice and their own laxity by exercising undue discretionary power to allow adjournments to the accused already imprisoned. Such overture may only operate as a flimsy excuse for the failure of the relevant courts and their inabilities to wind up the trial within a reasonable time, in utter derogation to the presumption of innocence of the accused unless held guilty, and therefore, transgress upon the principles of a fair trial.

6.9 Constitutional Guarantee and Legal Aid Crisis

The Constitution of Pakistan provides that "The State shall ensure the speedy and inexpensive justice."[817] However, the given study of procedural justice represents the opposite revelation in Pakistan. Adversarial litigation involves the onerous task of sifting the genuineness of evidence ordinarily for retributive action, as envisaged by the colonial regime. Also, the abominable trend of employing dilatory tactics, more often than not, in cumbersome litigation often stems from the quest for settling scores primarily due to a very small ratio of the malicious prosecutions being tried by the state. For instance, in *Ishtiaq Hussain's* case, the apex court found as under:

> Adverting to the prosecution case vis-à-vis the deceased, en bloc nomination of the appellant with his entire clan, each armed lethally, nonetheless, settling the score with a solitary fire shot accompanied by a trivial incised wound on the forehead, unlikely to be outcome of a butt blow, clearly indicates a reckless

[817] Constitution 1973 (n 3) art 37 (d).

> desire to see all the heads rolling down the street, unambiguously suggesting presence of innocent proxies.[818]

The prolonged litigation further becomes another means to be used as a bargaining tool. Historically, the colonial administration used the police force to implement its policies; it is still notorious as a bullying force to control instead of protecting the people, and without reforming procedural justice, its independent working is not possible.[819] The victims of its brutality are often without financial patronage against the influential magnates. Their economic restrictions for adversarial litigation virtually alienate them from the legal system. The poor and vulnerable cannot even have their voice heard in many cases. The low awareness about the legal procedures and absence of legal aid create a trust deficit among them. In such a situation, procedural justice attuned to delaying the criminal matters without edifice of free legal aid is destined to frustrate the right to a fair trial. The legal aid crisis for the poor in Pakistan makes access to justice for them a near impossibility. If an accused, who was too poor to afford a lawyer, was to go through the trial without legal assistance, such a trial could not be regarded as reasonable, fair, and just.[820] In the case of *Shafqat Masih,* it was held that:

> Our Constitution guarantees legal aid to an arrested person as his fundamental right. Article 10 (1) ordains that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall be denied the right to consult and be defended by a legal

[818] *Ishtiaq Hussain and another v The State and others* [2021] SCMR 159
[819] Rehman (n 767).
[820] *Muhammad Hussain alias Julfikar Ali v State Govt of NCT* [2012] SCMR 1610.

> practitioner of his choice. This is reinforced by Article 10-A which declares the right to a fair trial itself a fundamental right … when a confessional statement is recorded after court hours the accused may not be able to engage an advocate and seek legal advice which may prejudice him. In our opinion, it also violates his fundamental rights.[821]

The Constitution has recognized the right to a fair trial, which cannot be realized without statutorily providing free legal aid to the downtrodden. The ICCPR has been concerned about such legal aid and treats it as a human right for efficacious access to justice, which is not possible without proper legal representation.[822] It provides that:

> In the determination of any criminal charge against him, everyone shall be entitled to [...] be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.[823]

The right to legal aid was available under the Destitute Litigant Fund Rules, 1974 only in the constitutional matter to the persons with no means to pay the court fee or other charges, and the "Deputy Registrar (Judicial)" was authorized to make investigation in such application.[824] Later a fund was created for the "financial and legal support to the

[821] *Shafqat Masih and others v The State and others* [2021] MLD 1415
[822] Asher Flynn, Jacqueline Hodgson, McCulloch, J and Naylor, B (2016) 'Legal Aid and access to legal representation: redefining the right to a fair trial' (2016 40 (1) MULR 207.
[823] ICCPR 1966 (n 6) art 14, paragraph 3 (d).
[824] Destitute Litigant Fund Rules 1974, Rule 4.

women in distress and detention"[825] under the Women in Distress and Detention Fund Act, 1996. The Pakistan Bar Council Free Legal Aid Rules, 1999 was also an initiative for providing legal aid to the "poor, destitute, orphan, widow, and indigent."[826] The Public Defender and Legal Aid Office Ordinance, 2009 was another statutory instrument to offer legal aid to those convicted but lacked financial resources for representing them through advocates in the court or during the police investigation. Although there were provisions available in procedural justice, neither they were commensurate with the requirements of a fair trial nor were sufficient lawyers willing to take up *pro bono*[827] litigation before the courts. The schedule appended with the 1999's rules provided only a negligible fee payable to the lawyers for providing legal aid. For instance, only PKRs 10000/- (approximately GBP 30/-) were payable to the advocates for each of such cases in the Supreme Court, and only PKRs 4000/- (approximately GBP 12/-) in the lower courts at the district level respectively. No advocate would be willing to provide legal aid to the poor with the commitment and due diligence beyond two or three hearings on the given pittance under those rules. Such legal aid did not provide adequate relief to the deserving litigants and they were wary of ineffective and inefficient legal assistance. Procedural justice without the provision of legal aid to poor litigants cannot ensure the right to a fair trial. Considering the sensitivity of the matter under international obligations, the Legal Aid and Justice Authority Act 2020 was enacted for the purpose of safeguarding the rights of vulnerable and poor litigants by enabling them to have access to justice. It pledged financial and legal assistance to them through the Legal Aid and Justice Authority (LA&JA)[828] in criminal cases. However, such a significant legislative measure has not turned out to be free of many

[825] Women in Distress and Detention Fund Act 1996, s 3
[826] Pakistan Bar Council Free Legal Aid Rules 1999, Rule 3 (a).
[827] Legal work without charge for representing a low-income person or group of persons.
[828] Legal Aid and Justice Authority Act 2020, Preamble and s 9

serious anomalies. It has defined legal aid as the "provision of assistance, to a person who is unable to afford legal assistance, representation and access to justice."[829] Despite the mechanism provided under the latest enactment of 2020, there are serious matters to be reconsidered for the effective provisions of such legal aid. There is no mention of the timeframe for providing legal aid in the Act. The lengthy review process by the Board[830] is bound to delay legal aid and hinder access to justice in the most critical situations. The Act also does not provide for accountability of Board members. In the absence of such a mechanism, there can be no guarantee of the provision of legal aid to those genuinely deserving. There is no coherent procedure for evaluation to consider the merit of the applications; therefore, its vagueness may not essentially address the misfortunes of the poor. The eligibility criterion for the volunteering advocates has not been adequately specified. The Board members from the upper strata may not necessarily recognize the complexities and miseries of those from the lower one, in the given socio-economic dynamics. The Act provides for sensitizing people about the available legal assistance, but no palpable dissemination of the available mechanism has been instituted through publications, seminars, and/or other available electronic and social media, etc. Above all, the procedure to obtain such legal assistance involves bureaucratic red-tape culture and renders it a difficult one for the poor. The given system is absurd and may not serve the efficient provision of legal aid as a pre-requisite of procedural justice in a meaningful manner unless its implementation through a definite timeframe and easy execution by a genuinely collaborative and supportive regulatory mechanism is assured.

[829] ibid, s 2 (1) (i)
[830] Ibid, s 4.

6.10 Conclusion

The above critique would suffice to establish how procedural justice for prosecuting criminal cases in Pakistan is marred by the imperfect roles of investigating and prosecuting agencies. The procedural anomalies allowing a delay in the criminal trials, together with a perception that those violating the law may get away with impunity, render the justice system almost inaccessible for the poor. The investigation without serious consultation and coordination with the prosecution, absence of mechanisms for systematic accountability, no witness protection, and prompt legal aid, etc., leads to a lower conviction rate.[831] Such a legal system based on colonial patterns tends to lessen the respect for the law and the tendency to obey the law. The repulsive trend by those wielding political power and score-settling by the rich also undermines the fairness of procedural justice. The analysis further elucidates how undomesticated procedural justice necessitating special laws in plenty damages procedural fairness. It arraigns the legislature and executive for discriminatory treatment to a set of cases in a departure from the internationally recognized notions of fair trials. The study lends countenance to the recognition by the state of the lack of public support and trust in the fairness of procedural justice.

The afore-going analysis underlines how essential the role of forensic science is and why it should be essentially incorporated. The exclusion of unimpeachable findings in the absence of an ocular account needs to be statutorily rationalized in conformity with international standards. It will help prevent the influx of doctored evidence consisting of tutored witnesses as core primary evidence. Procedural justice is further liable to be reformed to employ remedial methods by examining the factors

[831] International Commission of Jurists (n 685).

responsible for the failed prosecutions, on case to case basis, through an autonomous entity with legislative sanction. The practical measures for witness protection, as discussed above, must be provided for the production of undaunted and undeterred witnesses. The scope for social integration of the first offenders should be enlarged to provide a rehabilitating environment to those offenders who are not desperate or hardened criminals. Such a reformatory procedure will have the potential to best serve the purpose of fair trials in an expeditious manner. A well-defined coordinating role of all the three primary components, i.e., investigation, prosecution, and adjudication of CJS for effectively expediting the criminal trials, from investigation to all the stages till its logical conclusion, i.e. conviction or acquittal; along with proper case flow management, is imperatively required. The afore-referred, well-entrenched, statutorily binding scheme to curtail stage-wise unjustified delay during the trial will ensure efficient case flow management. It will further revamp procedural justice to fundamentally comply with all the pre-requisites of the right to ‘fair trial and due process' as guaranteed by the ICCPR and Constitutional provision of Article 10-A.

Chapter 7 De-contextualized Reform Process and Institutional Collaboration

7.1 Introduction

The discourse of procedural justice, with its historical analysis relating to the colonial and post-colonial evolution, brings home how the wide-scale socio-legal displacement was embedded in the current tapestry of the justice sector. The scholarly literature, as discussed in Chapter 2, would smack how pre-colonial and colonial law-making emanated from the exigencies of monarchy protection and the politico-economic imperative of British rule. The legal codes and court procedures enacted by them are primarily intact as yet despite marked changes in the socio-legal and socio-economic milieus. The dictatorial framework of procedural justice for governance was not revisited and/or redesigned despite institutional challenges necessitating the popular aspirations. The context of this debate based on the international obligation to incorporate the right to a fair trial in procedural justice is, therefore, critical. The mere introduction of a constitutional provision of Article 10-A without reforming the domestic procedural laws, not complying with the requirements of a fair trial, appears to be only a symbolic compliance with Article 14 of the ICCPR. Such an obligation of Pakistan is much more important than it was ostensibly conceived by the legislators and cannot be realized without reforming the procedural laws. The increasingly complex and multifarious issues, as evaluated in the preceding stages of this thesis, would meaningfully assess the risk underlying procedural justice to debilitate the legal system further progressively in the absence of institutional collaboration under the imperatives of the Constitution and ICCPR. By taking satisfactory cognizance of the delineated problems, such ubiquitous reforms are essential and must be prioritized by

the coordinated actions of policy-making institutions. This critique has significantly and purposely pursued such an agenda through strident advocacy and identified why the insipid menu of numerically increasing judges and staff and providing better infrastructure will not address the vitally important issues preventing speedy justice. Technical facilities and higher remuneration cannot serve the purpose without paying attention to removing procedural constraints. The current legal remedies under the procedural codes are exceedingly exclusionary to delay and inhibit access to justice. Therefore, this chapter is focused on how such a vacuum, to the disadvantage of the end-users, may be dealt with. Any narrow perspective lacking institutional cooperation is always superficial to limit the scope of policy-making in the entire justice sector and may de-contextualize the reform process. This study, therefore, aims to identify the extent and scope of coordinated institutional support and prospective roles to address the anomalies of procedural justice that cause delays and undermine the constitutional imperative of the right to a fair trial. It is crucial to ensure compliance with Article 14 of the ICCPR. A historically contextualized, practically insightful, socially cognizant, operationally transparent, and institutionally participatory approach is a pre-requisite for the procedural reforms to ensure a larger impact of the globally recognized constitutional right to a fair trial. Therefore, this fundamental right is liable to be tangibly and comprehensively consolidated in an all-embracing manner in procedural justice catering to all the components of justice sector for the enforcement of human rights from a sociological perspective. It is vitally important to shift the gaze of rural population disputants, who are far less likely to approach the appellate forums of the superior judiciary, and initiate a reform process to induce their confidence in the legal system. That is why; the bulk of this research laid thrust on the reform discourse for local dispute resolution with lower rungs, and

scrutinized the inept methods of procedural justice that deter a fair trial. These logical explorations enjoin upon the policy-makers and operators of procedural justice to answer whether they can be content with the a-historicity and perpetuity of injustice owing to the institutional inabilities and lack of cooperation. Without taking stock of the de-contextualized theories and investigations about the lack of coordination and insufficient capacity of those key institutions, the reform process will be rendered superficial and shallow. Apart from the institutional collaboration by the policy-making institution for initiating recommendations concerning procedural reforms through primary[832] (or principle) and secondary[833] (or delegated) legislation, the auxiliary roles of the statutory institutions including those of the Law and Justice Commission of Pakistan, and Pakistan Bar Council, etc., cannot be downplayed.

7.2 Constitutional Imperatives and Institutional Collaboration

The written constitutional jurisdictions are the reservoirs of the powers to be essentially exercised by various organs of the state. The mandated institutions have to fundamentally use those powers to fortify the scheme of the Constitution. The competent forums of the law-making process are obliged to enact procedural laws strictly consonant with the constitutional provisions. They must be cognizant of the international obligation beyond the confines of domestic laws and conversant with the factors entailing incorporation of Article 10-A in the Constitution. The process of law-making is amenable to judicial scrutiny as regards its validity in view of the given

[832] Primary legislation refers to those laws which the legislative bodies ordinarily passed.
[833] Secondary legislation is made by a body other than the legislatures under the powers delegated by the Act of Parliament.

constitutional requirements.[834] There is no gainsaying that a particular statute may constitute a good law or a bad law. However, the wisdom of the legislature is indomitable. Hence, it may be true that "a thing is constitutional is not to say that it is desirable."[835] Nobody can avoid the law so enacted by the competent forum unless the constitutional courts strike it down on account of its constitutional validity.[836] The courts also have further jurisdiction to interpret the law.[837] The internal legislative proceedings are beyond challenge.[838] The presumption of constitutional validity is also attached to the enactments unless so struck down. The dilemma to question the legislative wisdom while carrying out its judicial review in this age of modern democracy calls for a judicial caution to avert frictions among three organs of the state. The judicial intervention to rectify the umpteen anomalies of given procedural justice historically evolved and ratified through the adoption of colonial laws[839] would be best described in the words of Shakespeare, “When sorrows come, they come not single spies, but in battalions.”[840] How to avoid this dilemma without throwing a challenge of reforming procedural justice to the wisdom of the legislature in the modern age of democracy is a serious question. The Supreme Court has, therefore, already observed that:

[834] Constitution 1973 (n 3) arts 199 and 184 (3); Samuel R Olken, ‘The Ironies of Marbury v Madison and John Marshal’s Judicial Statesmanship’ [2004] TJMLR 391.
[835] Jeremy Bentham, *A Fragment on Government* (CUP 1988) 10.
[836] Constitution 1973 (n 3) arts 199 and 184 (3).
[837] ibid, art 185.
[838] ibid, art 69.
[839] ibid, art 268 (1); Earlier to the Constitution of 1973 those laws were adopted under Pakistan (Adaptation of Existing Laws) Order of 1947, and the Adaptation of Central Acts and Ordinances Order of 1949; art 224 (a) of the Constitution of 1956, Article 225(1) of Constitution of 1962 and Article 280(1) of the Interim Constitution of 1972 provided for protection, adaptation and continuation of the pre-existing laws.
[840] William Shakespeare, *Hamlet* (Simon and Schuster 2012) 78.

> The law should be saved rather than be destroyed and the Court must lean in favour of upholding the constitutionality of legislation, keeping in view that the rule of constitutional interpretation is that there is a presumption in favour of the constitutionality of the legislative enactments unless ex facie it is violative of a constitutional provision.[841]

The only way out embedded in the Constitution mandates checks and balances under the principles of trichotomy of power. The legalism of a statutory provision is not impervious to judicial review when any of the constitutional stipulations is transgressed upon. Thus, all those provisions of procedural laws operating in Pakistan that derogate from the essence underlying Article 14 of the ICCPR to regulate the principles of a fair trial in conjunction with Article 10-A of the Constitution are liable to be cast aside. Procedural justice flouting the right to a fair trial, therefore, enjoins a foremost challenge upon the legislature to promptly take remedial measures. Otherwise, those provisions of procedural laws conflicting with the afore-referred constitutional requirement in juxtaposition with that of ICCPR will constantly damage the right to a fair trial.

The reasonableness of the provisions of the procedural laws is yet another aspect. There are various provisions of the Constitution which oblige the Parliament to legislate "subject to the Constitution"[842] and/or "subject to reasonable restrictions imposed by law."[843] The term "reasonable" does not precisely underline the requisite

[841] Elahi Cotton Mills Ltd v Federation of Pakistan [1997] PLD (SC) 582.
[842] Constitution 1973 (n 3) arts 55, 66, 67, 72, 83, & 141.
[843] ibid, arts 15, 16, 17, 19, 19-A, 23.

standard of reasonableness yet it cannot be something ethereal. Cicero, a Roman jurist, had philosophically pointed out three components the natural law possessed:

> True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting.... It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely.... [God] is the author of this law, its promulgator, and its enforcing judge.[844]

The test of 'reasonableness' represents collective deliberations of diversified strata of the nation to guarantee fairness in terms of constitutional provisions. The Constitution provides that the legislative proceedings of the Parliament shall be impervious to the challenge; however, the ethical behaviour of its members conducting the internal legislative proceedings has been contemplated by such 'reasonableness.' The blanket immunity to whimsically enact or fancifully ratify the colonial procedural laws, without having due regard to the mandatory requirements of the right to a fair trial as envisaged by Article 10-A read with Article 14 of the ICCPR, goes beyond the test of 'reasonability and constitutionality'. It is so because "the science of legislation (or of positive law as it ought to be) is not the science of jurisprudence (or of positive law as it is), still the sciences are connected by numerous and indissoluble ties."[845] In this age of constitutionalism, rule of law, and democratic values, domestic legislation cannot be capriciously enacted, modified, or ratified by the ruling elite so as to distract from the constitutionally recognized and well-entrenched mandate under imperative

[844] Raymond Wacks, *Philosophy of Law: A Very Short Introduction* (OUP 2006) 3.
[845] John Austin, *The Province of Jurisprudence Determined* (Universal Law Publishing 2012) 6.

international compulsion. A Bill, once originated, is to be enacted in the given constitutional manner. Since the "people who like sausages and respect the law should never watch either being made"[846] and the law-making process is not similarly immune,[847] the test of 'reasonableness' necessitates the question of how far such procedural compliance with mandatory provisions may be ensured in the given procedural laws. It becomes crucial for all the colonial procedural laws liable to be either re-enacted or modified under the international obligation and constitutional duty to achieve the objectives of fair trial and good governance in the justice sector at the gross root level. The earlier critique has established that those procedural laws were either bequeathed by the colonial regime or marred by special legislations. They were enacted without observing the guiding principle of the 'reasonableness' for the current requirements of procedural justice viz-a-viz the right to a fair trial, as enshrined in the Constitution, for law-making. Manto has rightly exhorted the pinching situation in the terms that "What are you shouting about… What new laws and rights are you shouting about … the laws are the same old ones…"[848] It is also worth taking note that the parliamentary decisions are made by a majority vote in Pakistan [849] and so are the cases of the Constitutional courts yet the process of both the constitutional forums are distinguishable in terms of 'reasonableness.' The dissenting views in the courts are decipherable following the reasons recorded in the judgment.[850] However, the minority views of the legislators are seldom forthcoming in an institutionalized manner unless partly or fully revealed in the minutes or publication. The trichotomy of power

[846] Jeremy Waldron, 'Legislating with Integrity' (2003) 72 FLR 373.
[847] Constitution 1973 (n 3) arts 199, 184.
[848] Saadat Hasan Manto, 'New Constitution' in Khalid Hasan, Bitter Fruit: The Very Best of Saadat Hasan Manto (Penguin Books 2008) 206, 114.
[849] Constitution 1973 (n 3) art 55.
[850] ibid, art 191 Supreme Court Rules 1980, Order X rule 2 to 6.

has been recognized by the Constitution,[851] and the judicial review of the legislative instruments is permissible,[852] albeit the parliamentary supremacy and sovereignty. The revisiting of procedural laws in line with the test of 'reasonableness' can only turn upon the legislations based on comprehensive and meaningful parliamentary readings and debates along with judicial scrutiny thereof in a constitutional manner, to address the anomalies as underlined hitherto. Such all-inclusive and wide-ranging institutional coordination based on the given analysis will not infringe upon the trichotomy of power but rather will add to the respect and support for the synchronized efforts by all branches of the State, i.e., legislature, executive, and judiciary.

7.3 Lingering uncertainties and unchecked quasi-legislative actions

Delegated legislation is yet another most debated phenomenon that has attained its status as an accepted legislative norm and posed a challenge to procedural justice in Pakistan. The prime consideration of delegated legislation, a term referring to the process by which the Parliament delegates its lawmaking authority to other bodies, is expert assistance in the matter of technicalities. It becomes relevant because of the peculiar role of the institutions tasked with such quasi-legislative functions in Pakistan has been lopsided under the given concept of procedural justice and, in turn, greatly impacted the enforcement of the right to a fair trial. The Parliament's members may be good politicians to bear out the rhythm for social-legal changes but they are not always experts to address the complexities, or intricacies of procedural justice without specialized input. Hence, the legislative authority may require technocratic care about highly sophisticated, technical, and practical issues. The legislature customarily

[851] *Mehram Ali v Federation of Pakistan* [1998] PLD 1445 (SC).
[852] Waldron (n 846).

formulates general policy and provides a skeleton for filling in the details as flesh and blood to such skeleton. The Parliament may also not, at times, anticipate the contingencies and unforeseen situations entailing interpretations by the courts. The delegated legislation further becomes particularly critical in procedural exigencies in Pakistan when the cumbersome process of amendments is often slow. It is evident that the current system of procedural justice is facing several problems, including issues with its content, form, structure, and process, due to inadequate assistance by the delegate. Despite the identification of the procedural issues discussed in this thesis, there has been a lack of coordination for such input within institutions since the end of colonialism.

The quasi-legislative actions of the executive branch are often termed as rules, regulations, bye-laws, etc. The given recourse ordinarily helps reduce the bulk of legislative business to reassure that the Parliament may not be a grind to a halt. 'Delegation' is the "act of entrusting another with authority, or empowering another to act as an agent or representative.'[853] 'Doctrine of Delegation' is a "Principle (based on the Separation of Powers Concept) limiting Legislature's ability to transfer its legislative power to another governmental branch, especially the executive Branch."[854] The act of legislature entrusting the function of legislation to an organ of the state other than the legislature itself is regarded as delegated legislation,[855] and the quasi-legislative instrument so made by the delegate becomes law for all intents and purposes. The expressions "subject to the Constitution" or "Subject to the law" mean that any of the

[853] Halsbury's Laws of England, 4th Ed, Vol 44, 981-984.
[854] ibid.
[855] Takwani CK, *Lectures on Administrative Law* (Eastern Book Company 2007) 59.

statutory provisions will not conflict with the Constitutional provisions[856] and the subordinate legislative instrument will not be inconsistent with the primary legislation containing the enabling clause of such delegation of quasi-legislative power.[857] Such expressions create a constitutional and statutory bar of jurisdiction bestowed upon the delegate.[858] A statutory rule cannot be modified or amended by administrative instructions.[859] The power of subordinate legislation has to be derived from an authority not exercising sovereign power and is always dependent on the supreme authority for its validity and existence. Many scholars like Cooley were staunchly critical to explain that:

> The power conferred upon the legislature to make laws cannot be delegated … to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone must be made the laws until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been entrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust.[860]

The importance of delegated or subordinate legislation, in the given analysis, cannot lose sight of the present research. It signifies the corollary of limited legislative power

[856] *Miss Asma Jillani v Government of the Punjab* [1972] PLD 139 (SC) 139, 198; *Government v Begum Agha Shorish Kashmiri* [1969] PLD 14 (SC); *Mehr Din v Border Area Committee* [1970] PLD 311 (SC).
[857] *Shaheen Cotton Mills v Federation of Pakistan, Ministry of Commerce* [2011] PLD 120, 130 (SC).
[858] *Muhammad Khan v Border Area Committee* [1965] PLD 623 (SC) 623, 633.
[859] *Muhammad Riaz Akhtar v Sub-Registrar* [1996] PLD 180, 187.
[860] Thomas M Cooley, *A Treatise on the Constitutional Limitations*, (Volume I) 224.

of the executive and judiciary to supplement the procedural laws strictly within the authority conferred on these branches by the legislature.[861] The well-established principles presuppose that such quasi-legislative actions by a delegate always have to be subservient to the policy guidelines of the legislature while delegating its powers.[862]

The Constitution has empowered High Courts to devise delegated legislation to expeditiously regulate the internal functioning of the Establishments of their employees.[863] It empowers them to "make rules to regulate the practice and procedure of the court or any court subordinate to it."[864] The 'removal of difficulty' clause in many other statutes also empowers the executive to exercise the legislative authority to overcome such situations.[865] The Code of Civil Procedure itself provides a framework of only 158 sections and delegates such authority of the procedural rule-making to the provincial High Courts, respectively.[866] The realistic magnitude of the procedural inconsistencies enjoins the judiciary to rapidly utilize their experience and diligently incorporate the necessary implementing mechanisms of procedural justice through delegated legislation carried out for compliance with the constitutional intent and international obligations. Such quasi-legislative authority allows them an opportunity to make experiments, and then incorporate the best possible amendments in the rules in coordination with the legislature and executive. Such a constitutional and statutory scheme provides ample scope to immediately cure the defects of procedural justice so discovered.

[861] *Ajoy Kumar Banerjee &Ors v Union of India &Ors* [1984] AIR 1130 (SC).
[862] *Muhammad Aslam v Punjab Government* [1995] MLD 685.
[863] For instance, Lahore High Court Establishment (Appointment and Conditions of Service) Rules, 1973
[864] Constitution 1973 (n 3) art 202
[865] National Accountability Bureau Ordinance 1999, s 37
[866] Code of Civil Procedure 1908, s 121 to 124, 126 to 129 and 131

It may aptly be mentioned that "the Legislature cannot delegate 'uncanalized and uncontrolled power', the power delegated must not be unconfined and vagrant, but must be canalized within banks that keep it from overflowing."[867] Thus, whatever is permitted is ancillary to the legislature and a subordinate legislative function, as was observed about the rule-making powers in *Khan Muhammad's* case:[868]

> The rules though have statutory force yet cannot be interpreted to be limiting or restricting the meaning or operation of the provisions contained in the body of the Code.[869] The arrangement of the Code into "the body of the Code" and "Rules" is for the purpose of giving the much needed elasticity to judicial procedure and to enable minor defects to be remedied as they arise, without resort to the Legislature. The Legislature by enacting rules has supplied the details of procedure so as to achieve the scheme contained in the body of the Code.

The delegated legislation so repugnant to the statute is liable to be reviewed/struck down.[870] The legislature is supposed to examine and review whether any or all of the intents and purposes of the delegated legislative authority are being carried out by the delegate. Such a review, be it legislative or judicial, must have due regard to the scheme, subject matter, provisions of the constitution, and circumstances in the background as envisaged by the legislative policy of the principle statute and legislative

[867] *Panama Sugar Refining Co v Ryan*, 293 US 388.
[868] *Khan Muhammad v Barkat Ali and another* [1984] CLC 582.
[869] Code of Civil Procedure 1908.
[870] *Commissioner Inland Revenue, Lahore v Coca Cola Pakistan* [2022] PTD 1400.

scheme.[871] The procedural rules have to be framed under C.P.C "not to place any insurmountable obstacles before the Court but to advance the ends of justice."[872] The rules so made under civil procedure are required to be approved by the Government.[873] There is also a similar provision in the Cr.P.C. empowering the High Court to make rules.[874]

The discharge of constitutional imperative to realize the goal of a fair trial in the warp and woof of the given procedural justice without institutional coordination is next to impossible. The evolution of socio-legal imbalance, in many ways, continues to resonate with the complexity of the artificially imposed legal culture of resilience. Its resulting terrain of adversarial struggle acknowledges the need for meaningful engagement of institutions to complete the unfinished colonial/post-colonial transitions of reforming the procedural laws in Pakistan. The present critique and discourse, skirted around statutes, subordinate legislative instruments, and judicial interpretations, provide essential insights into how the missing institutional harmony might adversely affect the reform process of procedural justice for a fair trial. The emerging vast taxonomy of literature review further depicts the colonial displacement of procedural justice contrary to the modern concept of a fair trial consequently being practised in Pakistan. It is palpably manifest that the content, form, structure, and process of the current procedural justice have ills but the failure to undergo changes despite the diagnosed ailments is substantiated by sufficient evidence apropos lack of institutional coordination since the fall of colonialism. Such exposition of historical

[871] ibid, *Khan Muhammad v Barkat Ali and another* [1984] CLC 582; *Bhatnagar & Co v Union of India* [1957] AIR (SC) 478.
[872] *Muhammad Yousuf v Mst Sabira A Muhammad and others* [1990] CLC 1127.
[873] Code of Civil Procedure 1908, s 126.
[874] Code of Criminal Procedure 1898, s 554.

ethos obviously links the present constitutional scheme devised under international obligation with the legal procedures and their underlying policy. The post-colonial account of this thesis further explained the amnesia and/or problematic impact of the lopsided legislative engagement among various institutions of the state. The reform process of procedural justice lacking institutional unison entailed intellectually isolated, sociologically aloof, narrowly compartmentalized critique concerning indigenous legal methods. The convolution for access to justice and wide-scale legal disempowerment, differential treatment, and abuse of legal process excluding the fair treatment in the justice sector necessitates a statutory mechanism based on institutional coordination to constantly scrutinize the statutory instruments catering to the procedural laws and originating from delegated legislation. It will help identify underlying issues and provide insight into multiple incongruity levels in the legal system within the current societal norms and aspirations. It is demonstrably essential for those institutions to examine in the light of present research how far the procedural codes[875] and rules made there-under are not consistent with the constitutional provision of Article 10-A read with Article 14 of the ICCPR and if not, to what extent the procedural matters, as discussed hereinabove, are required to be reviewed and redesigned.

The legislative leadership in parliamentary democracy lies with the executive authorities (cabinet), and their majority support in the legislature assumes a significant role to reduce the possibility of potential criticism of the policies formulated under the bureaucratic influence. Therefore, quasi-legislative actions are often sporadic and without living continuity. The constitutional democracy does not support absolute

[875] Code of Civil Procedure 1908; Code of Criminal Procedure 1898.

power inasmuch as "[a]ny excuse will serve tyrant."[876] Despotism "[a] government by a ruler with absolute, unchecked power"[877] is, no doubt, alien to the constitutional scheme in Pakistan. The analysis contained in Chapter 3 has comprehensively sketched out how the constructive relationships of the three organs and their institutional handiness were lacking and how such a trend prevented the harmonized discharge of constitutional mandate essential for the effective enforcement of the constitutional provisions including that of the right to a fair trial in the procedural justice. The critique in the preceding paragraphs further establishes that there has usually been a theoretical legislative control rather than practical over delegated legislation in the given parliamentary dispensation, and it mainly becomes raison d'être for mislaid institutional coordination. It further indicates the pressing call for a permanent statutory body for coordination between the delegating and delegated authorities to effectively ensure institutional adroitness for compliance with the constitutional imperative of a fair trial in the procedural justice of Pakistan. Such an institutionalized body should review and redesign the procedural laws through principle and delegated legislation by means of amendments in the statutes and/or statutory instruments. It becomes essential to comply with the international obligations under ICCPR based on the legislative and judicial process coordinated through a statutory body so constituted and mandated. The procedural laws adopted by the nascent state since 1947's independence,[878] are no longer compatible with the modern concept of fair trial, nor do they realize aspirations of the people. The lingering uncertainties of quasi-legislative actions, which further inhibited a balanced approach and harmonious

[876] Aesops Fables, 'The Wolf and the Lamb' <http://history-world.org/Aesops_Fables_NT.pdf> accessed 7 December 2023.
[877] *Black's Law Dictionary,* 8th ed (West Publishing Co 2004) 479.
[878] The Pakistan (Provisional Constitution Order) 1947; Adaptation of Existing Pakistan Laws Order, 1947.

working for the purpose, should be effectively controlled by such a body of experts for giving effect to the process of long-awaited procedural reform.

7.4 Role of the Law and Justice Commission

The analysis in the preceding paragraphs suggests the presence of a statutory forum for effective institutional coordination to comply with the constitutional imperative of fair trial in the procedural justice of Pakistan. Such a statutory body should minutely review the procedural laws and the delegated legislation to initiate a comprehensive package of legislative amendments in both the statutes (principal legislation) and/or the statutory instruments (subordinate/delegated legislation). The body so constituted and statutorily mandated must provide a coordinating mechanism to essentially comply with the international obligations under ICCPR based on the legislative and judicial process. This thesis has already established further that subsequent to the departure of British rule, there was non-compliance with the constitutional mandate to incorporate effective procedural reforms for speedy justice by the relevant state institutions. The outcome of such inaction resulted in the unintelligibility of procedural laws, lack of access to justice for the down-trodden, wide-scale legal disempowerment, discriminatory treatment and abuse of the procedural laws, and coercion by and through the law itself, extensively practised in the country. The scrutiny of evidence providing deep insight into the problems makes the following critique on the statutory role of the Law and Justice Commission of Pakistan (hereinafter referred to as “the Commission”) relevant. It dilates upon how the given role of the Commission can be instrumental, as a beacon of hope, in making procedural justice compatible with international standards, social norms, public aspirations, and the constitutional mandate. This thesis has furnished extensive evidence as to the major procedural

barriers, proposing viable solutions to minimize consequent public alienation insofar as Pakistan is concerned.

As has earlier been extensively discussed in this thesis, during the rule of the East India Company, there were two sets of laws; one applicable to the British citizens of the Company and the other to local inhabitants.[879] Those conflicting laws became a major stumbling block for the effective administration of justice. The origin of Law Commission in India was necessitated by the aim of British rulers to comprehensively remove the conflicts of laws that the East India Company administered with those already prevailing there. The British government examined various options in the year 1833 A.D. and decided through a Charter Act[880] to look for uniformity of laws by examining the then prevailing procedural mechanisms in the sub-continent and preferred to institute the overhauling of procedural justice.[881] By that time, the British Government had passed various enactments including the prohibition of *Sati*.[882] The pre-independence First Law Commission was established in 1834 under the chairmanship of Lord Macaulay which submitted a recommendation for enacting the Penal Code. Sir John Romilly chaired the second and third ones in 1853 and 1861 respectively, to report on enacting the Codes of Civil and Criminal Procedures, Law of Evidence, Law of Limitation, Contract Law, and the Negotiable instruments. The report of Fourth Law Commission headed by Dr. Whitly Stokes entailed the laws for the Transfer of Property and Laws of Easement, etc. Presently, the Law Commission in

[879] George Claus Rankin, *Background to Indian Law* (CUP 2016) 35, 46.
[880] The Charter Act of 1833.
[881] George Claus Rankin, *Background to Indian Law* (CUP 1946)164; Cambridge History of the British Empire (2022)5 <https://www.amazon.com/Cambridge-History-British-Empire-1858-1918/dp/B000H0SI3E> accessed 1 December 2023.
[882] The Bengal Sati Regulation 1829. It was enforced to declare the custom of sati punishable as it involved an inhumane practice to sit atop of husband's funeral pyre and sacrifice by a widow.

post-colonial India is a non-statutory executive body that was established by the Indian government for legal reforms, and its membership comprising a bunch of legal experts operates under the auspices of the Ministry of Law and Justice as an advisory body.[883] The Indian Law Commission has discharged a dynamic task for law reforms in both its critical and advisory roles. The Indian Supreme Court and the academia have acclaimed a pioneering role of the Commission for legal reforms based on the Commission's recommendations.[884] The said pre-eminence of the Commission is largely attributable to its chair often held by Supreme Court's retired judges. The Ministry of Law is responsible for following up on the recommendations of the Commission in its reports, seeking opinions from various ministries on their relevance, finalizing them by seeking approval of the Cabinet, and drafting the Bill for presenting before the Parliament.[885] Since its establishment, the Commission has initiated and got approved approximately 277 legislative proposals following a review of the statutes and statutory instruments.[886] The Commission ensured its responsiveness for eliminating delays and clearing backlogs and arrears of cases for speedy and cost-effective disposal of cases, which are fundamental pre-requisites of a fair trial. The reports of the commission seek to curb the delays by simplifying the procedures for easy access to justice. The Law and Justice Commission of Pakistan was established[887] "for a systematic development and reform of the laws and to provide matters connected therewith and incidental thereto."[888] It was assigned the task of studying and keeping all the statutes

[883] 'Centre Constitutes 22nd Law Commission: What Role Does This Body Play?' *The Daily Indian Express* (16 June 2023) <https://indianexpress.com/article/explained/everyday-explainers/law-commission-of-india-rituraj-awasthi-constitution-role-powers-explained-8256040/> accessed 7 December 2023.
[884] ibid.
[885] ibid.
[886] ibid.
[887] Law and Justice Commission of Pakistan Ordinance, 1979, s 3
[888] ibid, Preamble.

under review for making recommendations to the Federal and Provincial governments for improving, modernizing, and reforming the laws. It was mandated to particularly bring the existing laws in conformity with the changing societal needs and Islamic social justice by "(ii) adopting of simple and effective procedure for the administration of laws to ensure substantial, inexpensive and speedy justice; … (iv) removing anomalies of the laws; (v) repealing obsolete or unnecessary provisions in the laws; (vi) simplifying laws for easy comprehension and devising steps to make the society law-conscious; (vii) introducing reforms in the administration of justice; (viii) and removing inconsistencies between the law within the legislative competence of Parliament and those within the legislative competence of a Provincial Assembly."[889] The Ordinance further enjoins upon the Commission to "take appropriate measure for (a) efficient court administration and case management; (b) co-ordination of judiciary and executive; and (c) preparing schemes for access to justice, legal aid and protection of human rights."[890] The Commission "may make rules for carrying out the purposes of this Ordinance."[891] The Commission has not been able to match up with the role performed by the Indian Law Commission, and the Chief Justice, being the Chairman of the Commission, has already observed for prioritizing the restructuring of its Secretariat and constituting a committee for reviewing its process.[892]

There has been a popular demand for a vibrant forum to effectively discharge the task of reforms in procedural justice through the collaboration of all the relevant

[889] ibid, s 6 (1).
[890] ibid, s 6 (2).
[891] ibid, s 9.
[892] Nasir Iqbal, 'CJ Concerned at Slow Implementation of Law Body's Reports' Daily Dawn (26 December 2020).

institutions[893] for a befitting response to the constitutional demand, which now becomes a mandatory international call for fair trial and due process. It is worth mentioning that the majority of members of the Commission are judges of the top-brass superior judiciary with no representation or role of the provincial governments. The judiciary is a key player in adapting to change; however, the law limits the sphere of what they can do. Therefore, the Commission might not be able to effectively discharge its mandate without greater representation of the federal and provincial governments. The judges evolve case law as they tend to disentangle the legal principles slowly and may not effectively cater to social changes. However, the legislature can efficiently make those changes in the law. Paradoxically, a law with a lesser degree of change absorption may not be able to cope with societal aspirations and undermine the stability of socio-legal dynamics. Judges assume their role as key players to cope with the task of such adaptation. The legislative measure enables the judiciary to play its role and give effect to the change by interpreting such legislation, and thereby, they can make it effectively work to respond to the given social change. Their greater representation in the Commission should also be supplemented by the executive committees constituted under the aegis of the Commission for institutional coordination. They should examine the judicially settled principles and existing delegated legislations involving procedural justice, work out and initiate legislative proposals, and ensure their implementation after due contemplation by the executive and legislature. An amendment in the Law and Justice Commission of Pakistan Ordinance, 1979 would be required to further assign a vibrant role to the Commission for mandatory review of the procedural laws in terms of Article 10-A of the

[893] Abdul Qayyum, 'Law Reforms' The News International (23 November 2021) <https://www.thenews.com.pk/print/919015-law-reforms> accessed 11 December 2023.

Constitution read with Article 14 of the ICCPR. It would obligate the commission to make recommendations after a minute examination of all the procedural laws for incorporating statutory amendments to make those laws consistent with the afore-referred provisions of binding character. It should further provide for the Federal and Provincial Governments to essentially assume their coordinating role and liaise with the Commission to ensure that the recommendations made by the Commission are given serious consideration; for the discharge of their role in a befitting manner. The committees constituted by the Commission should further examine the rules framed under the Constitution and the Statutes and assist it in ensuring strict compliance with the constitutional mandate to bring those laws in conformity with the constitutional mandate and international obligations of a fair trial as envisaged under ICCPR.

It may be aptly mentioned that the stimulus to change often springs from social needs and necessitates a judgment by the Parliament to adapt to that change. The judges become conscious of legislative intention, considering it to be based on social thinking. However, the legislatures have to inevitably initiate new legislation or amend/substitute the existing ones in terms of those social needs. The legislative proposals may follow the recommendations of a specialized body like the Law and Justice Commission. For instance, the Law Commission of England and Wales has been tasked to review the existing laws and make recommendations for law reforms.[894] Although the judiciary may explore the issues for sound legislative proposals in view of the emerging socio-legal changes, the removal of socio-legal imbalance in the procedural justice is not realizable without legislative measures, subordinate quasi-

[894] The Law Commission Act 1965 provides for a statutory body to propose reforms and ensure the laws to be fair, simple, modern and cost effective.

legislative instruments based on the institutional collaboration, and constant review of the existing procedural laws by the Commission in the light of their review by itself and/or outlined by the judicial interpretations. The present legal system is not well-functioning[895] and requires in-depth analysis for optimal procedural reforms conforming to the changing societal needs through institutional cooperation of all the three organs of the state in the manner discussed above. The Commission needs to be clearly mandated to help formulate recommendations concerning the initial scrutiny of cases, resolution of disputes through ADRs, determination of mandatory cost at the early stage of litigation, and mechanism of realizing such a compensatory cost for the parties following the outcomes of any litigation, scheduling the cause list, curtailment of unnecessary adjournments through deadlines, and prompt execution of orders and decrees. Also, the areas of efficient and effective stage-wise case management with clear deadlines, measures to clear the backlog of cases, online record of the automated court proceedings, and discouragement of frivolous civil and criminal litigations at the preliminary stage are imperative procedural requirements for the fair trial. The legislature duly supported by the statutory bodies in the executive and judicial institutions is responsible for curtailing enormous delays. It may require an all-encompassing strategy in consultation with the relevant state institutions, including the Law Commission, for afore-referred imperative legislative and quasi-legislative measures, as exhaustively discussed in Chapters 4 to 6. Such a constitutional requirement is potentially doable by providing precise time limitations for each stage of the pre-trial and post-trial civil and criminal proceedings. The role of the Commission should statutorily be mandated to examine possibilities for the simplification of legal procedures by removing its technicalities in order to eradicate

[895] Qayyum (n 893).

the factors derogating from the right to a fair trial by preventing speedy and accessible dispensation of justice. Many of the decolonized countries have made their mark by successfully achieving the given task. The Commission must be further required to comprehensively review the subordinate legislations under the procedural laws and recommend amendments for purging the legal system of unwarranted procedural technicalities, complexities, and anomalies responsible for foiling the right to fair trial contrary to the rationale underlying Article 10-A read with Article 14 of the ICCPR. The recommendations about quasi-legislative actions should make sure that such exercise of delegated legislative authority carries into effect the state obligation under both the constitutional and international law of binding character. This will help the state to get away with the malfunctioning of colonial procedural laws that culminate in the cumbersome and time-consuming court proceedings deterring the poor from accessing justice due to a cavernous socio-legal gap in society. It has already been discussed at length how those excessively complex and torturous procedural laws are exploited for indefinitely continuing trials in a stubbornly unbecoming manner.[896]The prevalent procedural justice helping those with financial might to vex the poor and vulnerable will continue to serve further their purpose of unnecessarily dragging litigation for many years without losing anything except the lawyer's fee. Therefore, the role of all the relevant institutions mandated by the constitution and the law is imminently required. The absence of such institutional collaboration will certainly frustrate the ultimate objective of the reform process, which calls for a fair trial and the resolution of disputes in a timely manner. Such a trigger-happy approach, providing ample scope for false allegation without a foolproof "law of mandatory cost

[896] A Lone, Responsibility of the Bench and Bar in Dispensation of Justice (National Judicial Conference Islamabad, 2011).

and penalty" is asymmetrical and would transgress the constitutional intent besides trampling upon international obligations.

7.5 Frailty and Ongoing Regression in the Institutionalized Training

Although several factors are causing inner fissures in procedural justice, the decline of institutional collaboration and incapacitated legal institutions are the most prominent. The socially relevant legal and judicial education of high standards inspires quality research based on analysis and critique. Thus, it becomes germane to the "judicial law-making" activity for jurisprudential evolution, which is a key area for the judges' participation and provision of quality assistance by the lawyers, to bring about procedural reforms attuned to the fundamental right of fair trial and due process. The professionalism of the lawyers and judges originates from being conversant with the values of procedural fairness and righteousness resting on quality legal and judicial education. There is a universally recognized fundamental nexus between the quality of legal education and the quality of justice.[897] The next failure of the statutory institutions and state organs is compromising the quality of legal and judicial education as its vital constituents. The excellence of legal and judicial education serves to address everything from leadership competence to the review of substantive and procedural laws involving human rights for effective client service, negotiating skills, docket management, alternative dispute resolution, case management, etc. It inexorably increases the professionalism among the legislators and other legal institutions, particularly the investigators, prosecutors, lawyers, and judges. Legally well-trained

[897] Cheryl Thomas, *Review of Judicial Training and Education in Other Jurisdictions* (University of Birmingham School of Law, 2006) 13.

lawyers and judges assume critical roles in the transformation of procedural justice, and proactive members of civil society strive for socio-legal justice.

The less well-known extent to which the judges interact internationally for scholarly attention of global juristocracy has also been overlooked in the transitional transformation of court structures, legal procedures, and court administration. Conventional judicial education ordinarily denotes the teaching and training of judges that involve instruction on the "judge craft"— court procedure or skills for leadership and judging.[898] It is notable that international funding by various organizations also provides some opportunities for judges to educate their peers and share the innovative knowledge and experience they acquired in their relevant jurisdictions.[899] The experiences of the Judges with internationally recognized judicial educators highlight their tendency to assume roles in the projects of procedural reforms, turning upon the standards set by ICCPR and laid down in the Constitution.[900] As scholars, their instinct to resolve the differences and explain contradictions in the procedural laws may become an inherent feature of procedural instrumentalism. The visible sketch of a judge is his/her work that involves the procedural laws to regulate public relations within and outside his/her court. His/her conduct to turn upon those legal procedures is instrumental in upholding or improving the reputation of the judiciary.[901] The quality legal education and professional training will encompass a scholarship on procedural

[898] Clifford Wallace, 'Globalization of Judicial Education' (2003) 28 YJIL 355.
[899] I had the opportunity to attend various courses organized and funded by internationally recognized institutions of judicial education like the Singapore Judicial College and National Judges College China to share knowledge and experience. Those included 'End-to-End Court Technology Course' conducted by the Singapore Judicial College 10-14 July 2017, and Bilateral Seminar for Judges from Pakistan, June 18th to July 2nd, 2019" at National Judges College,(Beijing) China.
[900] Marilyn Strathern, *Partial Connections* (AltaMira Press 1991) 35.
[901] Shai Dothan, 'Reputation and Judicial Tactics: A Theory of National and International Courts' (2015) 15 HRLR 391.

justice, eventually to ensure research-based instructions for the fair process of their judicial functioning. It will, in due course, culminate in the court's written judgments to depict the judges as their "official portrait."[902] The administrative matters concerning the assignment of cases, processing those cases, streamlining their judicial rotations, etc., also require the invocation of procedural aspects to shape the structure of dispute processing. It primarily affects the legal actors to channel the facts for application of the substantive law.[903] The institutional reforms in legal and judicial education and meaningful collaboration with international experience may appropriately provide greater insight into legal and judicial functioning. The leaf may be taken from the judicial education provided by the University of Hull for a greater international experience of such judicial education.[904] The Law and Justice Commission should allocate funding to enable judicial officers to obtain postgraduate research degrees from reputed international Universities under a meaningful criterion. It may further encourage alike academics already collaborating with the judiciary in Pakistan to arrange such opportunities by allocating funding and may also seek international funding through them already contributing in a selfless manner. This scholarly experience will provide the institutional capacity to build an understanding of procedural issues and make recommendations, enabling the Law Commission to initiate a reform process that corresponds with the contemporary legal and judicial institutions in foreign jurisdictions. Similar scholarships will analytically and philosophically explore procedural dimensions far beyond obsolete procedural laws

[902] Mitchel de S-O-l'E Lasser, 'Judicial (Self-) Portraits: Judicial Discourse in the French Legal System' (1995) 104 YLJ 1325.
[903] Lon L Fuller, 'Consideration and Form' (1941) 41 CLR 799.
[904] 'UNDP Pakistan Builds Gilgit Baltistan Judiciary's Capacity with Human Rights and Rule of Law Trainings: United Nations Development Programme' (UNDP, 17 March 2021); Training courses of dynamic nature were led by Prof. Niaz A. Shah concerning the co-relation of various mechanisms of the litigation (procedural justice) with underlying rationale of regulatory parameters for adjudication. I had also the privilege to address the audience on a given topic in 2021.

and seek to incorporate modern concepts, for instance, "judicial entrepreneurship of case management."[905] Bryant Garth has acknowledged the way the innovative procedures were introduced by the U.S. Federal Court for managing their dockets. In his words "the most famous judges became not the authors of great opinions but rather the leaders of new devices for resolving dispute— early neutral evaluations, court-annexed arbitrations and mediations, summary jury trials, mini-trials, and the like."[906] Irrespective of one's capacity as a judicial officer, legal practitioner, law teacher, or student, involvement in the legal profession without research and reform process is like driving a car without its headlights. In the given situation, legal and judicial education in Pakistan falls short of scholastic hallucination to provide for impending reforms in procedural justice in vogue, which may include scientific and technological innovation in various disciplines of the justice sector. Procedural justice without methodical and systematic research, technological advancements involving electronic filing with electronic signatures, etc., and developing scholarly jurisprudence catering to the evolving socio-legal conditions through binding precedents, cannot provide easy access to justice and the right to a fair trial. It requires statutorily binding institutional coordination, providing enough room for reforms to improve legal and judicial education. It is high time to call upon the Law and Justice Commission of Pakistan to liaise with High Courts, HEC, judicial academies, and PBC to review the curriculum policy of legal and judicial education and upgrade the cognitive process of lawyers and judicial officers, as discussed above, by proposing viable statutory mechanisms.

[905] Nuno Garoupa and Tom Ginsburg, 'Judicial Roles in Non-Judicial Functions' (2013) 12 WUGSLR 755 (2013) 758.
[906] Bryant Garth, 'Observations on an Uncomfortable Relationship: Civil Procedure and Empirical Research' (1997) 49 ALR 103.

The lack of academic research to identify the real issues of procedural justice emanates from the defective teaching methodologies and deficient teaching capacity at Pakistani law schools and judicial academies, by and large, undertaken by practicing lawyers and retired judges. The institutions of legal education in Pakistan seldom examine the legal theories to give "rational and systemic treatment"[907] to procedural justice in Pakistan. The law is taught to the student "as a craft rather than as a science … in which the lawyer has displaced the law professor"[908] leading to the failure to establish a high-quality research infrastructure to propose reforms for procedural justice. The worst scenario further emerges with the role of lawyers who assume their pre-eminence for regulatory oversight and policy-making of legal education contrary to international norms.[909] The phenomenon involves accreditation, evaluation, curricular design, and standard setting of legal education.[910] The overarching intervention by non-academics is often focused on only one dimension of legal and judicial education, that is, imparting statute-based information by overlooking analytical and research skills. The system of conventional legal education hardly imparts methodical skills for academic research. Such a situation adversely affects the reform process of procedural justice and the realization of a fair trial. It provides them with limited scholarship capacity, and they are ordinarily unable to effectively address procedural concerns with a critical outlook based on the systematic research techniques to initiate or analyze those procedural issues at the trial and appellate levels. Resultantly, their professional outlook is bereft of the reform process and more likely pronged to exploit the procedural technicalities and unnecessarily prolong the litigation at the various

[907] Max Weber, *Max Weber on Law in Economy and* Society (HUP, 1954) 201.
[908] ibid.
[909] Osama Siddique, 'Legal Education in Pakistan: The Domination of Practitioners and the "Critically Endangered" Academic' (2014) 63 JLE 499.
[910] ibid.

stages of proceedings, including cross-examination, summoning of unnecessary witnesses, instituting illusory appeals, etc. The Pakistan Bar Council (PBC), being an elected statutory body of lawyers, has been mandated "to promote legal education and prescribe standards of such education."[911] Similarly, the Higher Education Commission (HEC) established for the "Improvement and promotion of higher education and promotion, research and development"[912] provides regulatory mechanisms for legal education.[913] The introduction of two statutory institutions to assign one function to both, i.e., HEC and PBC, with no serious thought as to the capacity and suitability of their respective roles and areas of their activity, and without rationalizing their overlapping domains, created jurisdictional uncertainty for both of them. Pakistan Bar Council Legal Education Rules, 2015 have been framed to regulate admissions to law colleges, course duration and syllabus, examination and evaluation, eligibility of the teaching staff, inspection, and recognition of degree awarding status by the PCB itself.[914] The afore-referred scheme of legal education, alien to the international experience, has largely restricted the meaningful role of both institutions as none of them could adequately demonstrate their faculty to check the ongoing decline of the standard of legal education. The independent evaluation of the nature of problems pertaining to such education and proposing some of the statutory reforms in this context will help remove barriers to academic research and will also constantly ameliorate the conspicuous inefficiencies of procedural justice from time to time.

[911] Legal Practitioners and Bar Councils Act 1973, S 13 (j), 15 (2), 55 (q).
[912] The Higher Education Commission Ordinance 2002, preamble.
[913] Qayyum (n 893).
[914] Pakistan Bar Council Legal Education Rules 2015, rules 4 to 20.

7.6 Public Interest Litigation: a Potential Tool for Institutional Coordination

The pervasive concern as regards access to justice for the people of Pakistan is massive procedural delays, a tremendous backlog of cases, perceived challenges to the independence of the judiciary, and red-tape culture in the bureaucracy. Such an adversarial legal system with procedural justice marred by expensive and time-consuming litigation benefits the rich and becomes a stupendous task for the poor. They often become victims in grim scenario which, at times, prevents them from seeking enforcement of basic and guaranteed human rights under the Constitution. The scourge of becoming prey to financial might has been confronting marginalized and vulnerable segments of the sub-continent since their independence from British rule.[915] The Constitution unequivocally shields those segments against such inequality and social injustice;[916] nonetheless, procedural constraints inhibit them from combating this challenge. The PIL can be instrumental in addressing such ethos[917] as it earlier did through many court judgments, with a similar approach since the 1980s. Some of those judgments in the following would authenticate the potential of PIL in facilitating effective institutional coordination and initiating the reform process for revamping procedural justice. Therefore, this analysis becomes critically relevant as it highlights how the PIL may facilitate the coordination of the three state organs for reviewing procedural laws involving complexities and hardships contrary to the rationale underlying the right to a fair trial.

[915] *S P Gupta v President of India* [1982] AIR 149 (SC).
[916] Constitution 1973 (n 3) art 2-A.
[917] Upendra Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' (1985) 4 TWLS 109, 110.

The judiciary has already realized this challenge and, despite inaction on the part of the legislature due to a variety of reasons, as discussed in Chapter 3, provided laxity to the rigid procedural laws by introducing public interest litigation (PIL). The judiciary started to realize the impact of the socio-legal imbalance immediately the political stability would gain ground and used the PIL as a substituted mechanism to provide relief in the matter that pertained to fundamental rights of public importance.[918] The study of such transformation and the scope of PIL suggest that there is ample room to set those public concerns at rest and initiate the reform process of procedural justice for the 'vulnerable groups' with little or no access to justice in Pakistan. *Darshan Masih* sought protection for his family by sending a telegram alleging that they were forcefully engaged for labour in a brick kiln and some of his family members had been abducted.[919] The Supreme Court held that the procedural impediments would not prevent the enforcement of their fundamental rights, and the judgment passed by it necessitated enactment to introduce the labour laws in Pakistan and to ban bonded labour by recognizing the rights of such workers in Pakistan.[920] Several landmark judgments of the apex Court, like the one in *Begum Nusrat Bhutto*[921] operated as catalysts to enable the aggrieved to challenge the vires of statutory provisions[922] and were given relief by enlarging the scope of the term of "aggrieved person"[923] to benefit the detenues, etc. Another example of a remedial procedural mechanism provided by the PIL is *Ghulam Ali's* case,[924] in which the Supreme Court, while treating that case as

[918] Abbas MMS, 'The Dynamics of Public Interest Litigation (PIL) in the Perspective of Adversarial Legal System of Pakistan' (2020) LXII PJALJ 32.
[919] *Darshan Masih v The State* [1990] PLD 513 (SC).
[920] The Bonded Labour System (Abolition) Act 1992
[921] *Begum Nusrat Bhutto v Chief of Army Staff* [1977] PLD 657 (SC).
[922] The Political Parties Act 1962; The Freedom of Association Order 1978. The statutory provisions of the afore-referred statutes were challenged in the petition.
[923] The aggrieved person is the one whose legal right has been infringed.
[924] *Ghulam Ali v Mst. Ghulam Sarwar Naqvi* (1990) PLD 1 (SC).

a representative petition, provided relief to a woman who was deprived of her right of inheritance under the nefarious local customs and dispensed with a limitation period for the claim of inheritance by the women. A collective relief was provided in *Fazal Jaan's* case[925] to ensure the provision of free legal aid to the poor and non-literate. The Court had taken a *suo motu* when the government considered for public hangings of a few hardened criminals, and the decision so taken was reversed by the policy-makers. The government had to provide an undertaking to the court that it would refrain from public hangings.[926] In another *suo motu* jurisdiction, the court was apprised through anonymous applications that the police had connived with the culprits involved in the murder of a woman on the pretext of honour killing and failed to investigate the case in a proper manner. Her influential uncle, who was the culprit, was shown indulgence and set free by the local police. On receiving the letter, the matter was thoroughly probed, and the culprits after being arrested, were brought to justice. Considering the findings of the inquiry report, the court further ensured that the delinquent officials of the police would also face disciplinary and penal consequences.[927] The PIL also became another procedural instrument of the prisoners like poor *Amjad Mahmood,* who was without financial resources to pay compensation (diyet) in terms of the sentence and failed to manage his release despite completing the term of imprisonment following his conviction. On a petition filed by him, he was allowed bail for making arrangements to discharge his compensatory liability in instalments.[928] Thereafter, the procedure benefitted many prisoners languishing in imprisonment for years. They were meted out the same treatment due to their lacking financial capacity. *Shiekh Liaqat's*[929] case

[925] *Fazal Jan v Roshan Din* (1990) PLD 661 (SC).
[926] Suo Motu Constitutional Petition No. 9 1994.
[927] Human Rights Case No 3062 [2006] SCMR 1780.
[928] *Amjad Mahmood v State* [2003] SCMR 1850.
[929] *Shiekh Liaqat Hussain v Federation of Pakistan* [1999] PLD 504 (SC).

becomes another instance to question the establishment of military courts. The judgment of Supreme Court declared such measure *ultra vires* the fundamental rights guaranteed by the Constitution. The Supreme Court held in such a PIL case that:

> The establishment of military courts for trial of civilian population … being against the concept of independence of judiciary are not only questions of public importance but they also relate to the enforcement of fundamental rights of the entire civil population guaranteed under the constitution.[930]

The PIL has most distinctively contributed to the enforcement of the fundamental rights to strike a socio-legal balance in developing countries with economic backwardness[931] and may further provide a greater sigh of relief by providing an opportunity for the institutions to make coordinated efforts and realizing the constitutional mandate of the fair trial. The Supreme Court is empowered to enforce the constitutional rights[932] as a last resort by calling upon the Federal and Provincial Governments to take remedial measures for revisiting the procedural justice and make it in impeccable conformity with Article 14 of ICCPR read with Article 10-A of the Constitution. The court may actively intervene in the areas where it finds the procedural laws delaying speedy justice on account of their technicalities to an intolerable level by providing constitutional insight. In *Asfand Yar Wali's* case,[933] the constitutionality of the National Accountability Ordinance 1999 was assailed, and the court found that many of the provisions thereof were not consistent with the constitutional scheme. It was ruled by the court that the questions relating to the

[930] ibid 549.
[931] *The State v M D WASA* [200] CLC 471; Burt Neuborne, 'The Supreme Court of India' (2003) 1 IJCL 476.
[932] Constitution 1973 (n 3) art 184 (3).
[933] *Khan Asfand Yar Wali v Federation of Pakistan* [2001] PLD 607 (SC).

contravention of fundamental rights adversely affecting the public-at-large were involved. Consequently, many provisions of the Ordinance were declared to be in violation of the Constitution with a direction by the Court enjoining the government to initiate proposals for necessary amendments therein before the legislature accordingly.

The afore-referred judgments effectively served the purpose of revamping procedural justice. Similar future guidance for restructuring and revamping civil and criminal procedures together with the rules made there-under may further serve a greater purpose of "transforming societies by spreading the values set out in the constitution..."[934] In the case of *Abu A'laMaudoodi*, the Supreme Court has also already further observed that there can be "no difficulty in granting relief because of any defect in the form of the prayer in the petition."[935] Following such a principle already settled, the court is empowered to recommend the procedural reforms in CPC and Cr.P.C for any admissible relief to comply with the requirements of a fair trial. A relief so admissible is always meant to set public grievances at rest. The procedural constraints for enforcement of fundamental rights may be addressed by treating the procedural matters before the Supreme Court as representative petitions and making recommendations to the relevant government for realizing the philosophy of fair trial and due process as contemplated by Article 14 of the ICCPR read with Article 10-A of the Constitution. In the case of *Benazir Bhutto*[936] the Freedom of Association Order 1978 was assailed as being repugnant to the fundamental rights guaranteed by the Constitution. The preliminary objection raised by the Federation was turned down

[934] David Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review* (Princeton University Press 2010) 1.
[935] *Abu A'laMaudoodi v Government of West Pakistan* [1964] PLD 673 (SC).
[936] *Benazir Bhutto v Federation of Pakistan* [1988] PLD 416 (SC).

when the argument that the petitioner had no *locus standi* was not concurred with, by the apex court and it was observed that:

> "The plain language of Article 184 (3)[937] shows that it is open-ended. The Article does not say as to who shall have the right to move the Supreme Court nor does it say by what proceedings the Supreme Court may be so moved or whether it is confined to the enforcement of the Fundamental Rights of an individual which are infracted or extends to the enforcement of the rights of a group or class of persons whose rights are violated."

The above-referred observation of the Supreme Court amplifies the scope of PIL for exploring procedural reforms. The sensitivity of the then Chief Justice Haleem, referring to the findings of *S. P. Gupta*'s case,[938] termed the PIL as beneficial for the people of lower economic strata. His judgment may help the state by enabling the role of the Supreme Court to achieve the goal. The given role may require it to make recommendations to the Law and Justice Commission of Pakistan for initiating legislative proposals for the necessary amendments. It may call upon the said forum to coordinate with the legislature and executive for the review of those provisions of the procedural laws involving complexities, intricacies, and hardships preventing easy, inexpensive, and speedy access to justice. The constitutional provisions[939] validate the enabling role of PIL to facilitate and oversee the simplification of procedural laws for giving effect to the spirit and liability enjoined upon the state by Article 14 of ICCPR together with Article 10-A of the Constitution. Any provision of the procedural laws in

[937] Constitution 1973 (n 3) art 184 (3)
[938] *S P Gupta v President of India* [1982] AIR 149 (SC).
[939] Constitution 1973 (n3) art 184 (3).

contravention with any of the afore-referred binding provisions of the international and constitutional law renders the state failing to discharge its solemn duty towards its own people. It also amounts to a dereliction from international commitments, duly ratified as the fundamental rights of public importance by the State. The phenomenon characterized as PIL would involve judges revisiting and then making recommendations to relax the procedural complexities by amending the relevant procedural laws and revamping the trial system. It will help all the components of procedural justice in the legal system by revamping their conventional roles. The intent to intervene actively in the areas of procedural laws that operate as a stumbling block for the fair trial to unreasonable and unacceptable levels would undoubtedly be justified in the PIL jurisdiction. The socio-economic imbalance precluding the vulnerable from accessing courts to seek justice justifies the innovative approach of the judges as "political theorists" to disseminate the values[940] enshrined by the Constitution and manifested in Darshan Masih's case.[941] The issues of procedural justice so exacerbated by the forbiddingly intricate and complex procedural requirements involving the expensive and time-consuming litigation and the traditional attitudes of those exploiting the procedural loopholes require recourse to PIL for greater institutional coordination. Such a resort will involve a meaningful consultation resting on the logical justifications when any of the procedural laws or the legislative instrument will be found in defiance of the fundamental right and due process enjoining upon the state to comply with the mandatory obligations the international community owes to it. While interpreting those statutory provisions involving procedural justice, the Supreme Court may provide an opportunity to the legislature for institutional coordination of meaningful

[940] S P *Gupta* (n 938).
[941] Abbas (n 918).

consultation, to a degree and in the manner as was elaborated in *Al-Jehad Trust*'s case,[942] when it was held that:

> Consultation in the scheme as envisaged in the constitution is supposed to be effective, meaningful, purposive, consensus oriented, and leaving no room for complaint, arbitrariness, or unfair play.

The edifice of procedural justice based on fair trial and due process becomes the bedrock of the legal system and is liable to permeate the procedural laws as a fundamental right meant to provide the legal remedies as admissible under the substantive laws. The constitutional courts have to interpret such a guaranteed right in juxtaposition with Article 14 of the ICCPR duly ratified by the State to entail the provision of Article 10-A of its Constitution. There are many judgments of the apex court to underline the significance of interpretation of the constitutional provisions in the manner obviating any attempt to curtail the fundamental rights and to expand those rights so guaranteed.[943] Although scholars like Garoupa and Ginsburg have defined judicial functions as "activity exercised by a judge inside the courtroom"[944] to simply interpret and apply the law to specific situations,"[945] those scholars, in my humble opinion, were in error. My opposite view is founded on the premise that the judges have to engage with the case-related activity occurring outside their courtrooms but have to complete their work inside their courtrooms. The judges have to compose their decisions about the activities taking place outside the courtrooms.

[942] *Al-Jehad Trust v Federation of Pakistan* [1996] PLD 324 (SC).
[943] *Government of Sindh v Dr Nadeem Rizvi* [2020] SCMR 1; *Sami Ullah Balouch v Abdul Karim Nousherwani* [2018] PLD 405(SC); *District Bar Association, Rawalpindi v Federation of Pakistan* [2015] PLD 401 (SC).
[944] Nuno Garoupaand Tom Ginsburg, 'Judicial Roles in Non-Judicial Functions' (2013) 12 WUGSLR 758.
[945] ibid.

That is why, the constitution confers jurisdiction under the constitution[946] on the courts that where they are "… satisfied that no other adequate remedy is provided by law,…"[947] they may issue "… an order giving such directions to any person or authority including any Government exercising any power or performing any function in, or in relation to any territory within the jurisdiction of that Court as may be appropriate for the enforcement of any of the Fundamental Rights…"[948] This power is in addition to writs of *mandamus*, *prohibition*, *quo warranto*, *certiorari*, and *habeas corpus*. Furthermore, the Constitution has enshrined original jurisdiction that the Supreme Court may exercise on the premise of "public importance" viz-a-viz the enforcement of the Fundamental Rights.[949] The Supreme Court may utilize such jurisdiction to issue appropriate directions for initiating the reform process of procedural justice and thereby may protect the citizens of Pakistan by calling upon the state to carry out necessary amendments in the procedural laws for the effective enforcement of Article 10-A to seek compliance of Article 14 of the ICCPR.

7.7 Conclusive Perception of the Dilemma

The afore-referred analysis of theoretical perceptions would reveal serious common fallacies in the prescriptions meant to cure the anomalies of procedural justice. The indolence of the public institutions to discharge shared responsibility, as highlighted in the preceding paragraphs, would explain that their lack of collaboration and want of scholarly and intellectual ingenuity to move onto and think beyond the self-imposed domestic constraints is the prime reason for this given dilemma. Thus, there can be no

[946] ICCPR 1966 (n 6) art 199.
[947] ibid.
[948] ibid.
[949] Constitution 1973 (n 3) art 184 (3).

two opinions that the constitutional and sub-constitutional statutory institutions must remove barriers of isolated working and distance themselves from the contextual outlier. The given experience with critical discourse and scathingly poor ranking of the country in the international index for human rights[950] reflect that they need to work out a statutorily coordinated mechanism, as discussed above. It is of utmost urgency to initiate the process of long-awaited procedural reforms in keeping with Article 14 of the ICCPR, read with Article 10-A of the Constitution.

[950] Ansar Abbasi, 'Pakistan ranks 130 out of 139 countries in adherence to rule of law 'Daily News (25 February 2023) <https://www.thenews.com.pk/print/901483-pakistan-ranks-130-out-of-139-countries-in-adherence-to-rule-of-law> accessed 12 December 2023.

Chapter 8 Conclusion: Rationalities and Limitations

8.1 Introduction

The structure of justice sector and its procedural settings have undergone revolutionary changes in many countries ratifying the international covenants.[951] The insight given by these instruments of binding character particularly encouraged the states with lesser access to justice to incorporate those changes in their procedural systems. The literature reviewed in this thesis comprehensively encompassed the implication of those changes far beyond any conventional and/or domestic settings of procedural justice in a particular jurisdiction. The critique highlighted the following elements that policymakers in Pakistan must take into consideration:

8.2 Lacunas of Procedural Justice

The present research analyzed the evolution of procedural justice and the adjudicatory process in Pakistan. It delineated how the current adversarial model of procedural laws was introduced and deployed, and how it has become contrary to the principles of the right to a fair trial as envisaged by the Constitution and the ICCPR. This critical discourse signifies that the given experience of procedural justice and its poor ranking in the international index[952] reflects common fallacies and serious flaws in the prescriptions. It further emphasizes the crucial role and collaboration of all the relevant institutions to cure them. A befitting response to the constitutional demand has now become a mandatory international call for the right to a fair trial and due

[951] For instance, Covenant on Civil and Political Rights 1966; Universal Declaration of Human Rights 1948; and European Convention on Human Rights 1950.

[952] Ansar Abbasi, 'Pakistan ranks 130 out of 139 countries in adherence to rule of law'Daily News (25 February 2023) <https://www.thenews.com.pk/print/901483-pakistan-ranks-130-out-of-139-countries-in-adherence-to-rule-of-law> accessed 12 December 2023.

process. Based on primary and secondary sources, the various legal narratives have minutely explained the existing lacunas in procedural laws in this thesis. These gaps, causing inordinate delays in dispensing justice and impacting fair trial rights, are bound to significantly impact the social legitimacy of procedural justice and require urgent measures to address them. This thesis has next carried out an extensive literature review to establish how the ICCPR[953] and the Constitution[954] make it incumbent upon the state to adhere to the solemn principles of fair trial and safeguard the citizens against arbitrary legal proceedings. It also referred to the relevant provisions of the ECHR,[955] for its persuasive value as recognized by the Supreme Court of Pakistan,[956] to establish how the delays resulting from the cumbersome procedural intricacies seriously prejudice the right to a fair trial.[957]

8.2.1 Procedural Delays Disparaging the Fair Trial

The critique of this thesis reveals that an excuse for a temporary backlog must be addressed through practical measures. However, it clearly distinguishes the delay of the adjudicatory process due to systemic failure and terms it as not condonable.[958] The Human Rights Committee (HRC)[959] has outrightly rejected the common but flimsy excuse of judicial backlog as an unacceptable explanation by the transgressing state.[960] It has characterized the procedural delays in the final adjudication of judicial cases,

[953] Covenant on Civil and Political Rights (ICCPR), art 14
[954] Universal Declaration of Human Rights 1948 (UDHR), art 10
[955] Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Known as the European Convention on Human Rights, art 6
[956] Sardar Farooq Ahmed Khan Leghari and others v Federation of Pakistan and others [1999] PLD 57 (SC).
[957] Nuala Mole, and Catharina Harby, *The Right to a Fair Trial* (2nd edn, Council of Europe 2006) 24.
[958] *Kudła v Poland* [2000] ECHR 512.
[959] A body to monitor implementation of ICCPR by the State parties.
[960] *Stogmuller v Austria* [1969] 25 ECHR 5.

which entails such a backlog, as disparaging for the guaranteed right to a fair trial.[961] Chapter 1 of this thesis concludes how procedural justice lacks the capacity to govern a legal system in a manner that averts undue delay by the relevant authorities in a particular state, amounting to compromising their independence and impartiality.[962] It prevents compliance with Article 14 of the ICCPR, read with Article 10-A of the Constitution of Pakistan, for trying the cases within a reasonable time as a core principle of the right to a fair trial. There is no denying the fact that Pakistan has acceded to and ratified the International Covenant on Civil and Political Rights (ICCPR) 1966 on June 23, 2010,[963] and guaranteed fair trial as a fundamental right by incorporating it in the constitution.[964] These actions of Pakistan confirm its pledge to abide by the ICCPR, obligate all the relevant components of the state to revamp the domestic procedural laws, and ensure that their legal frameworks provide the citizens with all minimum guarantees to which they are entitled.

8.2.2 Safeguards of ICCPR Recognized But Not Legalized

The judges conduct the judicial proceedings to adjudicate disputes by strictly adhering to procedural laws. Thus, it is enjoined upon the state to initiate a legislative process based on institutional coordination for comprehensively revisiting the procedural laws. Now, it has become obligatory for all three branches of the state, i.e., the legislature, the judiciary, and the executive, to take practical measures to make the procedural laws consistent with the Constitutional provision of Article 10-A in the context of

[961] Ibid.
[962] *Nogolica v Croatia* [2006] ECHR 1050, para 27; Horvat v Croatia [2001] ECHR 488.
[963] United Nations Treaty Collection (UNTC), 'Status of Treaties' <https://treaties.un.org/Pages/Content.aspx?path=Publication/MTDSG/Volume_en.xml> accessed 13 December 2023.
[964] International Covenant on Civil and Political Rights (ICCPR), Article 2(2) (United Nations, 16 December 1966). <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> accessed 13 December 2023.

binding international requirements under Article 14 of the ICCPR, which has already been concurred with and ratified by Pakistan. The refusal to follow the procedural safeguards so recognized by the state but not duly incorporated in the procedural laws would inhibit a fair trial.[965] Similarly, the statutory codes can only bind the relevant departments of investigation, prosecution, and adjudication to discharge their functions in the criminal cases in a 'manner' provided by the coherent procedures so enacted/modified as to make them compatible with the requirements of ICCPR. A careful examination of the literature already reviewed shows that the judicial proceedings must be concluded within a reasonable time, as envisaged by Article 14 (3) (c) of the ICCPR. It provides a guarantee embodied within the phrase "tried without undue delay." The HRC treated such a right of hearing "within a reasonable time" as critical for a fair trial[966] and discredited the explanation of lacking resources by a state.[967] Thus, it is incumbent upon the state to ensure prompt adjudication against the persons awaiting the pending investigations, prosecutions, and/or adjudication, including their appeals.[968] It is precisely clear now that the right to a fair trial includes its logical conclusion 'without delay' and settlement of the civil and criminal disputes 'within a reasonable time' by independent and impartial tribunals/courts.

8.2.3 Broad Cataloguing of Procedural Aspects

The evidence garnered through this thesis leads to the irrefutable deduction that the broad category of procedural justice, ensuring a fair trial, is not confined to the

[965] Human Rights Committee, General Comment 32, para 27; Hermoza v Peru [1988] Communication 203/1986.
[966] Ofner and Hopfinger v Austria, ECHR [1963] ECHR 78.
[967] Former Special Rapporteur on Counter-Terrorism, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, (A/63/223), General Comment 32, para 14' (para 14 & 35)
[968] UN Human Rights Committee, CCPR General Comment 32 (2007) para 49.

procedural aspect of a legal system. Its scope goes beyond filing the complaints, service of notices to the parties, production of documents, scrutinizing the evidence so adduced, and setting dates and locations for the hearings. It extends to the various other aspects, including introductions of cases based on evidence impartially and independently collected without an iota of extraneous influence, court etiquettes, properly scheduled hearings with a clear certainty of deadlines to reach final adjudications, clear methods for communication and acceptance of adjournment requests, foolproof cost mechanism supporting amicable settlements of the disputes, and constant legislative review of the procedural laws based on objective scrutiny emanating from institutional collaboration, etc. As a legal scholar, I argued that the 'minutiae' turning upon intricate, cumbersome, and complex procedural arrangements in Pakistan disproportionately cause delays and influence the fairness of the trial. Pakistan's procedural dimensions of civil and criminal trials are guided predominantly by the Civil and Criminal Procedure Codes.[969] Those Codes might be good laws to serve the purposes of erstwhile *Mughal* and British rules in the then Indian socio-legal context of the colonial era. Such evidence[970] unfolds that they have become dilatory tools for the parties to provide ample scope for the abuse of legal process and impinge upon the right to a fair trial as envisaged by ICCPR and the Constitution of Pakistan. They not only prejudice the right to a fair trial and occasion enormous delays but, at times, make even those professionally committed with optimum proficiency susceptible to the ineffectual procedural mechanism.

[969] Code of Criminal Procedure 1898 and Code of Civil Procedure 1908.
[970] Chapter 5 has extensively discussed the procedural anomalies.

8.2.4 Baneful Procedural Facade

The sacrosanct procedural laws customarily result in protracted litigation. The superior courts of Pakistan have raised concerns in various judgments[971] about the unjustifiable delays occurring in the disputed matters. It also held that such delays cannot sit well with the right of 'fair trial' and only vitiate the 'due process' that Article 10-A of the Constitution guarantees.[972] The poor and vulnerable, already burdened with their daily struggles, can hardly find the means to cope with tedious litigation that requires a tremendous amount of time, energy, and resources.[973] It becomes a daunting task for them, particularly in a country like Pakistan with a low global Human Development Index (HDI).[974] The analysis provides adequate evidence to support the claim that the afore-referred phenomenon creating a socio-legal imbalance is instrumental for the marginalized segments to often become victims of such inequity.[975] The National Judicial Policy,[976] without a reform process of procedural justice, did not yield results as the volume of backlog of pending litigation further increased.[977] It substantiated the perception that without revamping procedural mechanisms, the internal regulatory system of the judiciary cannot subside the sufferings of the weaker. The given

[971] *Mrs Shagufta Shaheen v The State* [2019] SCMR 1106; *Muhammad Hussain v Rana Sohail Anjum And 8 others* [2022] CLC 1529**;** *Muhammad Khalid Munir v Nazar Sadiq* [2022] MLD 831; *Abdul Habib Durrani v Toriali* [1999] CLC 232.

[972] *Amjid Khan v The State* [2021] SCMR 1458.

[973] Mohammad Afzal Zullah, 'Human Rights in Pakistan' [1992] 18 CLBL Vol 1343.

[974] United Nations Development Programme (UNDP),' Breaking the gridlock: Reimagining cooperation in a polarized world' (Human Development Report 2023-24) <https://hdr.undp.org/content/human-development-report-2023-24> , Pakistan is having a low global Human Development Index (HDI) with a ranking of 164 out of 196 countries.

[975] *SP Gupta v President of India* [1982] AIR 149 (SC).

[976] National Judicial Policy, 'Law and Justice Commission of Pakistan' <https://www.supremecourt.gov.pk/downloads_judgements/all_downloads/National_Judicial_Policy/NJP2009.pdf> accessed 13 December 2023.

[977] Tariq Butt, '1.87 Million Cases Pending in Pak Courts' The News International (Islamabad 23 July 2020) <https://www.thenews.com.pk/print/268487-1-87-million-cases-pending-in-pak-courts> accessed 13 December 2023.

objective cannot be realized without institutional coordination as extensively examined and its relevant evidence thrashed out in Chapter 7.

8.2.5 The Precedence of Procedure over Inalienable Right

This thesis has furnished many practical examples and observations of the country's constitutional courts to authenticate how the complexities and intricacies of the procedural laws invariably allow the parties to protract the litigation at their whims to frustrate the guaranteed right. Although the superior courts declared the speedy trial as an inalienable right of the citizen[978] yet they further observed that "it cannot be at the cost of procedure."[979] The legal principle of binding nature[980] so settled by the apex court unveils that procedural justice, with all those obscurities and anomalies, takes precedence over Article 14 of the ICCPR, calling for speedy trials in Pakistan. It further means that the trial courts are bound to follow those procedural laws even if they are not in strict conformity with the concept of a fair trial contemplated by Article 14 of the ICCPR read with Article 10-A of the Constitution. Thus, it stands established that those laws are liable to be implemented by the courts of ordinary jurisdictions unless they are revisited/modified by the legislature or struck down by the superior courts as contravening with the guaranteed fundamental rights.

8.2.6 Erratic Characteristics of Legal Processes

In such a legal system, the tools of haphazardly filing miscellaneous applications, the absence of case-flow management to ensure specific deadlines of time for completing various stages of the trial, no adequate means to provide non-adversarial means to

[978] *Himesh Khan v The National Accountability Bureau (NAB) Lahore* [2015] SCMR 1092.
[979] *Tahir Ali v the State* [2015] P.Cr.L.J 869.
[980] Constitution of Pakistan 1973, art 191.

resolve the disputes amicably, and no mechanism of the cost settlement between the parties, render the procedural justice as highly inequitable to defeat the right to a fair trial. The afore-referred situation provides the lawyers and the parties they represent with tools to employ delaying tactics and restricts the independence of trial courts to predominantly control the proceedings.[981] Such imperfect procedural laws can only hamper the autonomy of trial courts to ensure speedy justice and hardly allow the courts to independently process their proceedings in the pre-trial, trial, and post-trial stages with a certainty of timeframe for speedy trials. In the given procedural justice, the independence of all the components of justice sector contributing to the dispensation of justice is equally important. The faulty pre-trial process of investigation and then prosecution before the courts restricted to decide whether the conviction can be based on the evidence collected by them[982] also, at times, badly reflects on the fair trial. For instance, there can be no fair trial unless the prosecution of culprits in cases like honour killings is genuinely based on evidence of unimpeachable character without the connivance of police with the victim's relatives. That is why; the erratic characteristics of procedural justice in Pakistan are failing to meet the global standards of a fair trial on several counts. It is a universal truth that the procedures are meant to help the administration of justice and not to frustrate the dispensation of substantial justice with due promptness and/or the right to a fair trial to the oppressed litigant public. The Supreme Court has been sensitive to the given socio-legal situation. Therefore, being cognizant of this critical situation, Kaikaus J. observed that the procedural laws are not meant to thwart the guaranteed rights of the people but

[981] Janet Ainsworth, 'Procedural Justice and the Discursive Construction of Narratives at Trial' (2017) 4 LCM Journal 79.
[982] ibid.

rather to help them grant those rights.[983] The substantive justice based on the fair trial has a direct bearing on the process that must guarantee to the litigants that procedural justice essentially operates fairly, as was established by the study of Tom Tyler,[984] discussed in Chapter 6 of this thesis. The foremost component of a fair trial, i.e., speedy justice by independent courts, has duly been vowed by ICCPR and the Constitution of Pakistan. Those procedural technicalities serving the purpose of indefinitely continuing trials in a contumacious manner in Pakistan[985] blatantly compromise the independence of courts to dispense speedy justice. Hence, this thesis has provided sufficient evidence of unimpeachable character to testify amply, and answered research question no. 1 that the procedural justice of Pakistan is marred by multifaceted anomalies and obscurities. It poorly reflects on the right to a fair trial and prevents access to justice for the poor and vulnerable, to further compound socio-legal imbalance.[986]

8.3 Purging Procedural Mechanism of Infringements

The right to a fair trial assures an inbuilt fair treatment to the parties in a legal system by efficiently prosecuting trials. Otherwise, the parties become victims of unfair treatment if the procedural laws deny the solemn pledge of such a right guaranteed by the Constitution and ICCPR. The undertaking so promised has obligated the State to ensure that any legislative, executive, and judicial discretion in procedural justice to denigrate the essentials of the fair trial so guaranteed by the Covenant must be

[983] *Imtiaz Ahmad v Ghulam Ali* [1963] PLD 400 (SC).
[984] Tom Tyler, TR and Lind, EA 'A relational model of authority in groups' [1992] 25 Advances in Experimental Social Psychology 115.
[985] A Lone, 'Responsibility of the Bench and Bar in Dispensation of Justice' (National Judicial Conference Islamabad, 2011).
[986] The Constitution of Pakistan 1973, article 25 guarantees equal protection of law and equality before law.

foiled.[987] The evidence furnished in this thesis established that the discharge of such a pivotal role to provide the procedural guarantees for the right to a fair trial; is only a dream as long as the obsolete procedural laws, dating back hundreds of years, remain intact. The Covenant significantly underlines 'speedy justice' as a pre-requisite of a fair trial, which must be a hallmark of procedural justice in Pakistan. Without observing the universally recognized standards of the right to a fair trial, procedural justice is destined to lose its effectiveness and credibility.[988] The historical analysis of the evolution of the current procedural justice in Pakistan, in Chapter 2, has identified the impact of chronological events involving economic, political, and socio-cultural conditions. It plainly described how the legal institutions regulating procedural justice came into being, operated, and changed in the pre-colonial and colonial periods. The given analysis determines the comprehensible socio-legal yawning gap between those periods and the present experience to discern why it does not cater to the current settings. It further ascertains how such procedural laws inhibit speedy trials, which is *sine qua non* for a fair trial. It takes stock of the dictated considerations for the *Mughal* and British rulers to hedge the concept of a welfare state under the notions of totalitarianism.[989] They were prone to prevent potential threats of rebellion by discouraging public participation in their absolute authority.[990] It was altogether opposite to democratic values. The principles of fair trial deprecate the concentration of such arbitrary power without uniform procedural laws and envisage the separation of legislative, judicial, and executive functions. It supports easy access to justice at the gross root level. The procedural rules bequeathed by the colonial era to Pakistan failed

[987] Human Rights Committee CCPR, (2007) General Comment 32, para 4.
[988] *H v France* [1989] ECHR 17; Bottazzi v Italy [1999] ECHR 62; UN Human Rights Committee CCPR (2007) General Comment 32, para 35.
[989] Sir Jadunath Sarkar, *Mughal Administration* (3rd edn, MC Sarkar& Sons, Ltd 1935) 17.
[990] ibid.

to respond to the call for speedy justice as a pre-requisite to a fair trial. The legal system, so inherited and still intact, knows no bounds of delay in dispensing justice due to the procedural complexities that ordinary people often fail to understand. The challenge posed by the given situation to the legislature to review and simplify the procedural laws cannot be overcome by enacting special laws. Instead, it calls for the institutionalized process to revamp the procedural justice which was meant for the peculiar socio-legal dynamics poles apart from the current legal tapestry of the society.

8.4 Evolving Justifications and Perceptions of the Dilemma

The Supreme Court of Pakistan gave an expression of countenance to the ECHR and ACHR[991] for their persuasive value. Its observations in the case of *Al-Jehad Trust* concerning enforcement of fundamental rights irrespective of the origin or status and our position as a signatory to the international declarations; were augmented by its further analysis that the "Fundamental Rights enshrined in our Constitution in fact reflect what has been provided in some of the above quoted Universal Declaration of Human Rights."[992] It emphasized liberal construction for extending "maximum benefits to the people and to have uniformity with the comity of nations"[993] with a proviso that such construction must ensure that "there is no inconsistency between the two…."[994] The Supreme Court adopted the same approach in *Sardar Farooq Ahmed Khan Leghari*'s case while making an observation that:

[991] American Convention on Human Rights 1969.
[992] *Al-Jehad Trust through Habibul Wahab Al-Khairi Advocate and 9 others v Federation of Pakistan through Secretary, Ministry of Kashmir Affairs, Islamabad and 3 others* [1990] SCMR 1379.
[993] ibid.
[994] ibid.

> It may also be pointed out that the above views run counter to the Fundamental Rights guaranteed by the Constitution and the aforesaid International Covenants of Civil and Political rights, European Convention on Human Rights and American Convention on Human Rights … in the latter case the rule of proportionality is to be followed as propounded by some of the eminent authors and adopted under above Article 4 of the International Covenant on Civil and Political Rights. Article 15 of the European Convention of Human Rights, 1967 i.e. a public emergency permits a State to take measures in derogation of the covenants subject to the condition that the rule of proportionality is observed….[995]

The above observation, when read in conjunction with earlier observations of the superior courts to the effect that although the speedy trial is an inalienable right of the citizen, it cannot be given precedence "… at the cost of procedure;"[996] provides the evolving justification and perception of the dilemma. It reminds the legislature of its international obligations to revisit the procedural laws and make them consistent with Article 14 of the ICCPR.

8.4.1 Lopsided Pre-Trial Mechanism

The universally recognized core elements of procedural justice are neutrality and trustworthiness. The evidence provided in Chapter 4 suggests that procedural justice can attain social legitimacy only when people perceive that the process applied for making decisions is not only just, efficient, and fair, but it also treats them with respect

[995] *Sardar Farooq Ahmed Khan Leghari and others Vs Federation of Pakistan and others* [1999] PLD 57 (SC).
[996] *Tahir Ali v the State* [2015] P Cr L J 869.

and dignity. The legislators and/or the public officials cannot restrict the right to a fair trial, which the parties are entitled to, by compromising their mandate in a manner that impacts the outcomes of the decisions resting on defective and extraneously influenced investigations, and prosecution, and wearisome trials involving cumbersome and complex procedures causing unreasonable delay. The given phenomenon eventually affects the people's perceptions, which may not only be confined to the decisions but also may extend to their experience about the fairness of the applied process. Therefore, this research supports (i) purging the defective regulatory components of those deficiencies that allow the inefficient mechanisms of procedural justice in Pakistan; and (ii) employing primary and delegated legislation as earlier discussed in this thesis and precisely wrapped up in the paragraphs to follow.

8.4.2 Case-flow Management in Shreds

The ICCPR has set the standards for domestic procedural laws so that the unregulated discretionary authority of the courts might not trample upon the principles of the fair trial duly endorsed by the member states.[997] It further calls for the trials to be conducted by independent, impartial, and competent tribunals[998] and inextricably links it with the right to a fair trial. Judicial independence is mandatory for the protection of human rights and securing the rule of law by putting the executive authorities in check. The United Nations Human Rights Committee (HRC) has clearly envisaged that judicial independence includes equal, impartial, and non-discriminatory treatment to the parties to signify that the courts should not only be politically independent rather the procedural laws to regulate their proceedings must not be amenable to manipulation

[997] UN Human Rights Committee CCPR, (2007) General Comment 32, para 4.
[998] Covenant on Civil and Political Rights (ICCPR) 1966, art 14

or influence.[999] As against such a mandatory requirement of the fair trial, this thesis has established that procedural laws in Pakistan are marred by the procedural complexities to contribute to the longevity of litigation and, therefore, conflict with the requirements of the ICCPR. The procedural laws, although supposed to effectively and efficiently regulate the legal system, provide ample scope of multifarious intricacies for unbridled and uncontrolled discretionary capacity for the parties. Such a phenomenon, as examined in Chapter 5, often entails innumerable miscellaneous applications and seeking as many liberal grants of adjournments as possible, only to drag litigation for an indefinite period of time. The proverbial maxim "justice delayed, justice denied" implies that access to justice is distinguishable from justice itself. Therefore, such a delay caused by multifaceted procedural justice amounts to virtual denial of justice, which is clearly manifested by several practical examples in this thesis to outline how the Codes of Procedure enable the parties to employ dilatory tactics.[1000] It has caused a massive backlog in the civil and criminal justice system in the absence of precise timeframes for each of the stages up to the final adjudication of civil suits and criminal trials both at trial and appellate levels. Chief Justice Haleem felt constrained to characterize it as "a mimic battle" involving rigid rules of evidence and procedure to occasion serious miseries for the poor.[1001] In the given system, no easy access to justice for them amounts to glaring discrimination and denial of Justice, reflecting on the independence of courts. Therefore, this thesis has carried out an all-inclusive review of those factors which frustrate attempts to eliminate procedural complexities resulting in time-consuming judicial proceedings to deter the poor from approaching the administration of justice. The given procedural justice thus restricts the

[999] UN Human Rights Committee, General Comment No 32, CCPR/C/GC/32, 23 August 2007.
[1000] Chapter 5 has provided many practical examples of the procedural code allowing parties to employ dilatory tactics due to the procedural anomalies.
[1001] *Benazir Bhutto v Federation of Pakistan* [1988] PLD 416 (SC).

independence of courts and is exploited to prolong the trials contumaciously.[1002] It creates a vast socio-legal gap besides cultivating corrupt behaviour in society.

8.5 Prospects and Implications

The discrimination became more conspicuous when the state itself recognized the procedural issue of unreasonable delay and then, without initiating the reform process of procedural laws to eliminate the gravity of such problem in compliance with Article 14 of the ICCPR, read with Article 10-A of the Constitution, compromised the independence of courts and breached equality before the law and equal protection of the law[1003] in the following manner:

8.5.1 Breach of the Trichotomy of Power Principles

The legislature recognized the issue of delay in procedural justice, but instead of rectifying the existing model of procedural laws for the ordinary courts in Pakistan, it became prone to enact special laws like Anti-Terrorism Act (ATA) 1997, Illegal Dispossession Act 2005 etc, and incorporate constitutional amendments to empower military courts subservient to the executive authorities.[1004] To concurrently try the offences by those courts against the civilians for the offences already defined for the ordinary jurisdiction, without creating new offences, constitutes a breach of the trichotomy principles. The given discriminatory criterion would only compromise the independence of the trial courts of original jurisdiction, including Anti-Terrorism Court (ATC), as they exercise the simultaneous jurisdiction available under conventional

[1002] A ALone, 'Responsibility of the Bench and Bar in Dispensation of Justice' (National Judicial Conference Islamabad, 2011).
[1003] The Constitution of Pakistan 1973, art 25.
[1004] The Constitution (Twenty First Amendment) Act 2015 and The Constitution (Twenty-third Amendment) Act, 2017.

procedural laws, which cannot be countenanced under ICCPR.[1005] The defects of procedural justice leading to the lower conviction rate due to faulty investigations and prosecutions, and the delay in the conclusions of trials, can operate only as a flimsy and farcical excuse for encroaching upon the independence of courts by the executive and legislature. Such a breach of ICCPR assumes grave character in the absence of practical measures to statutorily cure those defects to ensure independent and efficient procedural justice.

8.5.2 Uncanny Transgressions and Atypical Accountability System

Justice delayed by the parties is further compounded by the unsatisfactory roles of the investigation agencies and their lack of coordination with the prosecuting departments. Following investigations, the legal discourse primarily controlled by their lawyers[1006] in the given adversarial system further contains the judge's role to decide only the credibility of purportedly admissible evidence collected by the faulty process of the investigating agency completely controlled by the executive under influence of the political elite. The absence of elaborate guidelines for coordination between both the police and prosecution, despite both being governed by the executive, provides further explanation for the lesser conviction rate in Pakistan. The Prosecutor General's admission before the apex court in *Haider Ali's* case, earlier discussed in Chapter 6, is "indicative of weak investigation and gathering of evidence"[1007] together with "a result of serious deficiencies in our prosecution system."[1008] Hence, it was pertinently outlined that the fairly opportune investigation and prosecution of criminal cases are

[1005] General Comment No 32 read with the Constitution of Pakistan 1973, art 25.
[1006] Janet Ainsworth, 'Procedural Justice and the Discursive Construction of Narratives at Trial' (2017) 4 LCM Journal 79.
[1007] *Haider Ali and another v DPO Chakwal and Others* [2015] SCMR 1724.
[1008] Haris K, Civil Petition No 1282 of 2014 [2015] SCMR 1724; Haider Ali and another v DPO Chakwal and others [2015] SCMR 1724.

virtually ruled out without effective aid and timely cooperation of both the afore-referred branches to each other. The accountability system and political intervention in the police department is another quandary confronting procedural justice in Pakistan. The Supreme Court of Pakistan, while taking note thereof, unveiled the very least attention of the relevant executive authorities towards insufficient measures taken to deter the cases of misconduct and atypical transgressions by police officials.[1009] The report of Law and Justice Commission of Pakistan (L&JCP) also highlighted the public grievances bearing on the right to a fair trial, making the people suffer.[1010] The systematic accountability by the Public Safety Commissions[1011] is badly lacking inasmuch as such forums are either not operational or kept inactive. The given situation suggests that the provincial governments were not serious about completely transforming the system provided by the Police Order 2002 for public service.[1012] The influential ruling class wielding executive authority by retaining the political power often misuses the police force to serve their vested interests, as it has been under their control since colonial settings. The volatile situation becomes evident from the fact that the provincial governments of Sindh and Balochistan, where they have greater political clout, practically abandoned the afore-referred Police Order 2002 soon after the Eighteenth Constitutional Amendment,[1013] and restored the policing regime which is reminiscent of the dictatorial colonial age to put the citizen on a tight leash. Such a repeal of the Police Order 2002 was aimed at retaining their influence on the police

[1009] ibid.
[1010] Law and Justice Commission of Pakistan (LJCP), 'Police Reforms: Way Forward' <http://ljcp.gov.pk/nljcp/assets/dist/Publication/b1896-title-brochure-final-14-01-2019-pdf.pdf>accessed 7 December 2023
[1011] The Police Order 2002, Chapter V.
[1012] LJCP (n 1010) para 8.
[1013] The Constitution (Eighteenth Amendment) Act, 2010 (10 of 2010).

and giving abiding patronage to political interference.[1014] As a result, "the nation suffers" as a whole.[1015] In such a situation, the police officials, at times, falter to even register FIR against the commission of cognizable offences, and those poor and aggrieved are often constrained to have recourse to the Justice of Peace (JOP)[1016] for the purpose. The absence of independence of investigation and imperfect prosecution eventually reflects on the independent discharge of the statutory functions by the judiciary.

8.5.3 Institutional Weakness against Totalitarianism

Pakistan, being politically a struggling democratic state with security issues and increasing debts,[1017]also phenomenally suffers from institutional weakness due to inefficient systems for checks and balances, ultimately fostering corruption and abuse of authority. The afore-referred political elites frequently supported unconstitutional military rules for almost half the country's life. Therefore, the process to flourish democratic values, principles of the rule of law, trichotomy of power, and the independent and impartial judiciary could not take root owing to tyrannical constitutional amendments by the civilian and military autocrats, as evaluated in Chapter 3. The constitutional crisis so emerging impacted procedural justice to elude prospects of fair trials further, particularly when even the powers conferred on superior courts, including those under Articles 184 and 199 of the Constitution, were

[1014] Tasneem Ur Rehman, 'Reforms in Balochistan police' Daily Times (23 January 2023)<https://dailytimes.com.pk/716006/reforms-in-balochistan-police/>accessed 13 December 2023.
[1015] Law and Justice Commission of Pakistan, 'Police Reforms: Way Forward' <http://ljcp.gov.pk/nljcp/assets/dist/Publication/b1896-title-brochure-final-14-01-2019-pdf.pdf>accessed 7 December 2023.
[1016] Code of Criminal Procedure 1898, S 22, 22-A and 22-B
[1017] Ahmed Saeed Minhas, 'Pakistan's Security Challenges And Political Instability' Tribune.com.pk (2019) <https://tribune.com.pk/story/2098987/6-pakistans-security-challenges-political-instability> accessed 13 December 2023.

also curtailed.[1018] The legislature and executive supporting the military regimes put the judiciary to struggle for its independence as an institution. The country witnessed the unconstitutional control of the executive operating under those military dictators to remove the judges under PCOs even after the new millennium.[1019] It has further been examined how the financial and administrative autonomy of the judiciary strangulated by the other two organs of the state wreaked havoc on independence of the judiciary. The devastating situation deprived the judiciary of its independence, i.e., an essential component for a fair trial. The analysis has abundantly explained how the legislature, having been controlled by the executive under both the military and civilian authoritarian rules, was prevented from carrying out the impending reform process concerning procedural laws to impart speedy justice by the independent judiciary. The given debate further reflected on how the principles of power separation were encroached upon to contravene the constitutional mandate and compromise not only procedural fairness and transparency but also the independence of the judiciary in the post-colonial context. The afore-referred massive evidence, analysis, and critique provide an adequate answer to research question No. 2, and demonstrate how the predicament of the multifaceted factors brought about anomalies in procedural justice to reflect on the right to a fair trial, and add to the distress of oppressed by creating socio-legal imbalance.

8.6 Rationalities and Possibilities [Recommendations]

The critique on the multifarious procedural anomalies, reflecting poorly on the right to a fair trial and creating a socio-legal imbalance, establishes how they utterly

[1018] The Laws (Continuance in Force) Order 1958; The Jurisdiction of Courts (Removal of Doubts) Order 1969; Laws (Continuance in Force) Order 1977.
[1019] The Frontier Post, the NEWS, the Nation, the Daily Times, and Dawn (10 March 2007)

contravene the fair trial to the detriment of the oppressed on account of socio-legal imbalance. It entails the pivotal question as to what regulatory measures may achieve the aims and objectives of the modern concept of procedural justice compatible with the right to a fair trial as enunciated by Article 10–A of the Constitution, read with Article 14 of the ICCPR. The current debate eventually leads to propose a regulatory framework to ensure speedy justice through vibrant, independent, and distributive procedural laws to safeguard the citizens against breaches of such fundamental rights that the constitution has already guaranteed. It will ensure the due discharge of the mandate enjoined upon all three branches of the State under the power separation principle following ratification of the ICCPR.

8.6.1 State should not be a benign onlooker

Robert Hale's work on 'Law and Economics,' as discussed in Chapter 4, provides for the role of government to protect the citizens against violent and non-violent intrusion in the ownership rights of the inhabitants. The insight given by him refers to the government's role to employ coercion when necessary for peace. It even shields against peaceful infringements of exclusive proprietary rights.[1020] His debate underlines how the relative power to curtail the "fallacy of [undue] liberty"[1021] plays its role, which depends on the relative power that procedural justice hands down which is called the "power of coercion"[1022] as custodian of the legal arrangements; instead of becoming benign onlooker to allow its subjects to stew in the juice. His analysis becomes relevant in the context that signified that the legal procedural settings in Pakistan, not being consistent with the right to a fair trial, are exploitative; and breed

[1020] Robert Hale, 'Coercion and Distribution in A Supposedly Non-Coercive State' (1923) 38 PSQ 472.
[1021] ibid, 471.
[1022] ibid, 478.

strife and discontent. Therefore, the government's role assumes significance in the given parliamentary system, particularly when it holds a majority in the legislature. Procedural justice, having originated from the colonial regime and not specifically answering many of the procedural issues of the modern age, may lead the judges to interpret the statutory provisions by adhering to the different socio-legal approaches.[1023] The glitches may also arise due to antiquate and equivocal question-begging statutory language not providing explicit remedies on procedural issues in the contextual social discontent[1024] to eventually tell on the fairness and promptness of the trials. The afore-referred discourse on dismal socio-legal imbalance further necessitated pointing out how statutorily all-lacking institutionalized provisions of (i) case flow management, (ii) effective cost imposition, and (iii) supporting non-adversarial settlement for dispute resolutions is indispensable for the efficient procedural justice ensuring a fair trial. In the absence of such a mechanized framework, the only choice with the vulnerable and oppressed litigants is the duress of adversarial litigation confronting them with no end of their hardships in sight. Their fragile financial plight put them at the mercy of the rich,[1025] having the means to perpetuate or withstand an indefinite period of litigation. The remedial measures of establishing special courts in disregard to the ICCPR, without procedural reforms based on institutional coordination to ensure procedural efficacy, results in legalized injury emanating from the restriction placed on the ordinary courts by the procedural laws. Such a phenomenon makes them fail to address discriminatory access to justice. The unequal distribution badly reflects on social harmony[1026] and is not consistent with the right to a fair trial. The scrutiny of fallacious process, involving the socio-economic

[1023] Robert Hale, 'Prima Facie Torts, Combination, And Non-Feasance' [1946] CLP 196.
[1024] ibid, 197.
[1025] Robert Hale, 'Force and The State' (1935) CLR 286.
[1026] Robert Hale, 'Bargaining, Duress, And Economic Liberty' (1943) 43 CLR 628.

context in the colonial and socio-political context in the post-colonial periods, has effectively encompassed the factors that encumbered the procedural reforms and also became a prime factor in corroding independence of the judiciary as well. The equality principle in the constitution[1027] and ICCPR cannot be meaningfully enforced unless a statutorily backed procedural scheme admits both the rich and poor of equal distribution of justice.

8.6.2 Non-Adversarial Justice

The importance of informal dispute resolution methods such as mediation and arbitration cannot be undervalued as a part of the legal system in Pakistan. The Black's Law Dictionary has termed the ADR as the amicable mode that assures dispute settling procedure.[1028] The ADR system being introduced in Pakistan makes ADR optional for the parties,[1029] separates the adjudication,[1030] excludes the scope of mediation,[1031] and involves those magnates of the society who have no institutionalized training for ADR or have no notions of legal norms.[1032] Therefore, it is not as robust a mechanism of ADR as the Indian model earlier discussed in this thesis. It may not ensure the satisfaction of the parties involved. It is not simply about employing formal decision-making processes to resolve conflicts amicably, but also guarantees that resources are allocated fairly for this purpose. Researchers like Hoyle have strongly advocated that the key element of procedural justice is the sense of trust and confidence that people

[1027] Constitution of Islamic Republic of Pakistan 1973, art 25.
[1028] *Black's Law Dictionary,* (8th edn Thomson Reuters) 637.
[1029] The Khyber Pakhtunkhwa Alternate Dispute Resolution Act, 2020, s 3; The Punjab Alternate Dispute Resolution Act 2019, s 3.
[1030] ibid, s 7.
[1031] ibid.
[1032] ibid.

have in those who are responsible for dispensing justice.[1033] The use of ADR can be a helpful tool for the parties seeking assurance that their dispute will be resolved in a fair and just manner, in that, ADR is a neutral procedure that can lead to win-win settlements. It is even recognized as a legitimate part of procedural law in several statutes.[1034] ADR can provide a speedy non-adversarial forum for dispute resolution to those disputants who may not have the resources for adversarial litigation. The current framework for addressing alternative dispute resolution in the procedural code is insufficient and ineffective. This leaves litigants with no other option but to engage in formal adversarial dispute resolution, which can lead to economic exploitation and potentially compromise their rights. After analyzing the Indian model of ADR and comparing it with the socio-legal conditions in Pakistan, it may be feasible to replicate the given scheme with some alterations, as discussed in Chapter 4. This approach is more aligned with non-adversarial justice. These forums are presided over by experienced judges and retired lawyers who are familiar with local values, customs, and legal norms, to ensure that recognized notions of law and justice are not deviated from. The presiding judge and democratically elected members are also given rudimentary legal training. Any settlement reached by such forums becomes an enforceable agreement between the parties,[1035] and the mediator's intervention creates a binding arbitral award.[1036] This means that disputes settled by the parties can be given a legally binding status similar to an "Award" and the decision, with or without interventions of courts, can be considered as final and enforceable between

[1033] Carolyn Hoyle and Diana Batchelor, 'Making room for procedural justice in restorative justice theory' (2018) IJRJ 175.

[1034] Family Courts Act 1964; The Code of Civil Procedure 1908; The Arbitration Act 1940.

[1035] Mustafa Plumber, 'Case Closed Via Lok Adalat Amounts to Decree/ Award; Courts Can't Recall The Said Order, Bar Under S 362 Crpc Will Apply: Karnataka High Court' (2021) <https://www.livelaw.in/news-updates/karnataka-hc-decree-award-by-lok-adalat-cant-be-recalled-by-courts-bar-under-362-crpc-183755> accessed 13 December 2023).

[1036] The Arbitration and Conciliation Act 1996, S 74 and 30.

the parties. In addition, the power to recall and/or review a decision on various grounds may be allowed, and any exceptional decision can be reviewed by the District Courts. The ADR forums may operate with or without intervention of the court on the pattern of Indian *Lok-Adalat* in the disputed matters pending adjudication in any of the courts of law, including the matters relating to negotiable instruments, disputes concerning the recovery of money, labour disputes, matters of utility bills (except for non-compoundable offences), matrimonial/family matters, other cases of miscellaneous nature like civil disputes, and compoundable minor offences punishable with imprisonment up to three years with or without fine. Many of the disputes may also be filed before such forums even prior to filing the cases in regular courts, to save the litigants time, money, and energy. The use of a prompt remedial ADR system has the potential to provide promising opportunities for greater financial prospects for lawyers. The additional incentives for each successful ADR settlement may enormously accelerate the performance of such forums. It is important for the legal profession to accept these trends and develop their capacity for ADR, as it is compatible with modern-day requirements of procedural justice. This will not only enhance the scope to explore further opportunities for them to excel and grow as experts in the proposed area but also cater to the needs of the oppressed strata, and will enable them to discharge an Islamic and constitutional obligation they owe to the nation. This thesis has extensively examined how Islam, being the state religion of Pakistan,[1037] promotes the peaceful resolution of disputes and discourages creating enmity. This is a positive approach to conflict resolution that can benefit everyone involved. Unfortunately, procedural laws in Pakistan encourage the twisting, stretching, and hiding of facts. It also invades privacy, hinders productivity, leads to harassment among litigants, and

[1037] Constitution of Pakistan, art 2.

damages reputations. Without a mutually inclusive, non-adversarial format, the legal system causes acrimony and resentment among people who may otherwise cooperate. Such a supplemental non-adversarial mechanism may reduce several significant drawbacks of adversarial procedural justice.

8.6.3 Imperatively Predetermined Cost Liability Mechanism

Procedural justice ensures that disputes among people are resolved fairly. However, in every society, there is a socio-economic division among people, with some having easy access to justice and other necessities due to their wealth, while others struggle to access even the bare minimum. This stark reality underscores the need to evaluate the role of procedural laws, particularly in a country like Pakistan, with the lowest Human Development Index (HDI) and global ranking of 164 out of 196.[1038] A socio-legal approach suggests that the current procedural mechanism of the judicial system is exclusive, serving the interests of the wealthy. The investigation and prosecution components of criminal law can be influenced by those with haughty wealth and social capital to inhibit the judiciary's ability to dispense transparent justice. Qualitative research in Chapter 4 has further analyzed an independent and self-governing operational model for effective and efficient delivery of justice, with cost mechanisms for both civil and criminal litigation that will enable the people of average income to access justice and, thereby, recourse to a fair trial.

[1038] UNDP (n 974).

The neoclassical school of thought[1039] assumes that the private interest of the individual(s) is enough to efficiently resolve the problems confronting them, even at times without support from others. Regardless of its import in the current democratic society, many other issues like a higher cost for dispute resolution, unabated horrifying delays, exploitation by those with social capital, and effluent outlook are often complained of. Therefore, it is the bounden duty of a State to mechanize possibly early settlements of the conflicts to avoid a negative-sum game.[1040] The British laws with their constituents were enforced subject to some amendments in the post-independence era.[1041] Therefore, an organizational structure of legal dispensation involved solutions that turned upon the market forces established by the colonial rulers, as discussed in Chapter 2. It is important to consider the private interests of individuals when resolving conflicts. It is the responsibility of the state institutions to find ways to settle the issues of procedural justice, such as high dispute resolution costs, delays, and exploitation by those with social capital, to minimize exclusion from access to justice and ensure prospects of the right to a fair trial.[1042] The provision of costs in the legal system aims to achieve several important goals. Firstly, it acts as deterrence to frivolous and vexatious litigation or defence by making litigants think twice before putting forth such claims or defences. The spectre of being made liable to pay actual costs is a powerful incentive to avoid unscrupulous actions. Secondly, costs ensure that procedures and laws governing litigation are strictly followed and that

[1039] Herbert Hovenkamp, 'Knowledge About Welfare: Legal Realism and The Separation of Law and Economics, [2000]84 MLR 805.

[1040] A situation in which one party is directly benefitted at the expense of another by maintaining the status quo.

[1041] The Pakistan (Provisional Constitution Order) 1947 and (Adaptation of Existing Pakistan Laws) Order, 1947 were supplemented by the Adaptation of Central Acts and Ordinances Order 1949 made those laws to be part of our corpus juris.

[1042] Maja Micevka and Arnab K Hazra, 'The Problem of Court Congestion: Evidence From The Indian Lower Courts' (Royal Economic Society Annual Conference Swansea 2004).

parties do not engage in delaying tactics or mislead the court. Thirdly, costs provide adequate compensation to successful litigants for the expenses they have incurred during the litigation process. Finally, the provision of costs should encourage litigants to consider alternative dispute resolution processes and aim to reach a settlement before the trial commences in most cases. These goals help to ensure fair and efficient procedural justice for all involved parties. The cost of litigation in both civil and criminal cases is very high, especially for those who are neither wealthy nor do have legal aid. They have to bear the expenses of travel, food, and accommodation for themselves and their witnesses, and they may also suffer losses to their businesses or work. This becomes particularly burdensome when there are multiple adjournments, adding to the cost and time taken to resolve the dispute. To address this issue, it is necessary to introduce a statutorily backed mandatory cost liability mechanism to encourage the imperatively predetermined calculation and imposition of such liability on the defaulting/losing party in case the ADR measures do not work in a disputed matter between the parties. The scarcity of these measures in the procedural justice of Pakistan, as extensively dilated upon in Chapter 4, cannot help reduce the time and cost of litigation, nor would it promote the inclusion of underprivileged individuals in the legal system.

8.6.4 Strategies of Case-flow Management

The analysis of case-flow management in the thesis aims to achieve a balance between time and resource constraints while ensuring the fair trial.[1043] Innovative procedural management, efficient court processes, and a proactive approach, as extensively

[1043] Chapter 4 has minutely examined how the case flow management system may be cost effective for the litigants and contain unnecessary adjournment by devising time limits for each stage of the trials.

discussed therein, are the strategies that can be applied to both pending and future litigations. The analysis would reveal that resolving disputes by adversarial adjudication, without involving necessary procedural mechanisms to balance competing goals of time and cost-effectiveness, is an exhibition of lopsided procedural justice.[1044] Such a legal system cannot guarantee a fair trial for all parties involved. The concept of case-flow management, as envisaged by this thesis, lays emphasis on how to streamline the trial process divided into various stages with mandatorily stipulated deadlines and cost imposition to curtail delays often caused by the complex nature of procedural laws; and discourage various applications and discretionary adjournments without specific timeframes for each stage; which impede the right to a fair trial and due process, as guaranteed by the Constitution of Pakistan and ICCPR.[1045] Chapter 5 has comprehensively explored how the Code of Civil Procedure 1908 (CPC) allows for dilatory tactics before trial courts,[1046] and why a procedural framework with clear timeframes and penalties for non-compliance is necessary for efficient case flow management. Implementing such a framework could help reduce delays and alleviate the frustration confronting litigants. It provides abundant evidence to support the hypothesis that the procedural scheme in vogue does not have a predictable and/or statutorily sanctioned timeframe to manage the stage-wise progress of the mandatory proceedings, nor does it provide for a systematic clearance of the backlog of pending cases and/or processing future judicial workloads. To address this issue, the proposed reforms in procedural justice will align with the requirements of a fair trial. These reforms would contribute to building a cost-effective and time-efficient legal system. In Chapter 5, it was further explained that adhering to specific time-frames for each

[1044] ibid.
[1045] Constitution of Pakistan, art 10-A read with art 14 ICCPR.
[1046] Chapter 5 has encompassed a comprehensive analysis to point out several provisions of the CPC, allowing such dilatory tactics by filing innumerable miscellaneous applications.

stage of civil and criminal litigation is crucial. It also emphasized the importance of mandatory penal consequences to ensure compliance with the case flow management system in procedural justice.

Procedural justice in Pakistan lacks the afore-referred three essential requirements that are equally crucial to meet the standards of a fair trial. The research has sufficiently identified barriers to competent case processing and has formulated proposals to control these procedural obstructions by implementing mandatory non-adversarial proceedings, cost determination at the outset of conventional adversarial proceedings, and case-flow management. This approach enables courts to conclude cases within a reasonable time frame and with just and proportionate costs. The proposed scheme to prevent unbridled miscellaneous proceedings, unwarranted adjournments, and inefficient monitoring ought to be incorporated into the procedural justice system of Pakistan to ensure that all parties are treated equally, regardless of their socio-economic status. Should such an allocation of court resources be enforced in the procedural laws, it will ensure compliance with mandatory statutory directions, considering the complexity and importance of each case. By implementing this framework, we may drastically reduce the time it takes to dispose of civil and criminal cases.

8.6.5 Addressing the Malfunctioning of Criminal Justice

The glaring flaws in the criminal justice system are further evident from the critique in Chapter 6. The procedural anomalies like (i) inadequate mandatory provisions for serious consultation and coordination of investigation agencies with the

prosecution,[1047] (ii) absence of mechanisms for systematic accountability,[1048] (iii) no witness protection,[1049] (iv) no efficient framework for prompt free legal aid,[1050] (v) precedence of tampered evidence and coached ocular evidence over scientifically generated forensic evidence,[1051] and (vi) deficient mechanism of social integration of first-time offenders through probation laws,[1052] constitute some of the procedural anomalies which are not only responsible for the failed prosecutions, but rather the afore-referred imperfect roles of these state institutions further exacerbate the problem by instilling a perception that those violating law may escape punishment. The given situation causes further delays in criminal trials, making the justice system almost inaccessible for the poor. The legal system based on colonial patterns tends to lessen respect for the law and the inclination to obey the law. Additionally, the repulsive trend by those wielding power and score-settling by the rich undermines the fairness of procedural justice. The malfunctioning of procedural justice necessitating special laws in plenty further challenges the right to a fair trial inasmuch as the discriminatory treatment to a set of cases departs from internationally recognized notions of a fair trial.[1053] The study undertaken in Chapter 6 underscores the lack of public support and trust in the fairness of the criminal justice system. It has already

[1047] *Haider Ali and another v DPO Chakwal and others* [2015] SCMR 1724. The Supreme Court dilated upon such a deficiency in the procedural justice.
[1048] *Muhammad Bashir v Station House Officer, Okara Cantt and others* [2007] PLD 539 (SC).
[1049] *Haider Ali* (n 1047); Samina Bashir, 'Witness Protection and Judicial System of Pakistan in the Light of International Legislations and Best Practices' [2019] 8(11) IJAC 29.
[1050] Chapter 6 discussed how the lengthy and defective review process frustrates such a right of free legal aid.
[1051] *Salman Akram Raja and another v Government of Punjab through Chief Secretary and others* [2013] SCMR 203.
[1052] PILDAT (Pakistan Institute of Legislative Development and Transparency), Legislative Brief, December 2015 cited by Police Reforms: Way Forward, Law and Justice Commission of Pakistan, 37 http://ljcp.gov.pk/nljcp/assets/dist/Publication/b1896-title-brochure-final-14-01-2019-pdf.pdf>accessed 7 December 2023.
[1053] Human Rights Committee, General Comment No 32, Article 14 'Right to Equality before Courts and Tribunals and to Fair Trial' (United Nations) <https://digitallibrary.un.org/record/606075> accessed 13 December 2023.

proposed all-encompassing legislative strategies, as discussed above, to imperatively address the given anomalies.

8.7 A Reiteration: Limitations and the Future Directions

This analysis in Chapter 7 contemplates how legalistic technocrats can address the vacuum that disadvantages end-users. A narrow perspective without institutional cooperation may lead to a superficial reform process by limiting policy-making that only focuses on the court system instead of the entire justice sector. These logical explorations urge policymakers and procedural justice operators to answer whether they can accept the perpetuity of injustice caused by institutional inabilities and lack of cooperation. To avoid superficial and shallow reforms, it is important to consider the lack of coordination among key institutions and their insufficient capacity, as extensively discussed in this thesis. Additionally, the Law and Justice Commission of Pakistan and the Pakistan Bar Council have auxiliary roles that should not be downplayed. Institutional collaboration and implementation of recommendations through principle and delegated legislation are crucial for long-awaited successful procedural reforms. The Constitution mandates checks and balances through the principles of the trichotomy of power. Even statutory provisions are subject to judicial review when they violate any constitutional stipulations. Therefore, any procedural laws in Pakistan that undermine Article 14 of ICCPR in conjunction with Article 10-A of the Constitution, must be discarded. The current situation of procedural justice violating this fundamental right urgently requires the legislature to take the remedial measures discussed above. Otherwise, provisions of procedural laws that conflict with the aforementioned constitutional and international requirements will continually subvert the right to a fair trial.

The test of reasonableness ensures that the diverse strata of the relevant institutions so mandated, come together to support the legislature for ensuring fairness and reasonableness according to constitutional provisions. Although the Constitution states that parliamentary proceedings cannot be challenged, ethical conduct is expected from members during these proceedings, which is part of the reasonableness test. Simply enacting or ratifying colonial procedural laws without considering the mandatory requirements for the right to a fair trial, as outlined, is beyond what is reasonable and constitutional. This blanket immunity is not completely impervious to the permissible judicial review of the statutory instruments. A legislative action qualifies to be reasonable when it is just, right, and fair, and should not be arbitrary, fanciful, and oppressive[1054] to derogate from such a guaranteed fundamental right.

8.7.1 Legislative and Quasi-legislative Measures

To address the issues of procedural justice, the procedural laws should be revisited under effective institutional coordination of legislature, executive, and judiciary, all three involved in the principle and subordinate/delegated legislation by solemnly respecting each other's purview of the constitutional mandate. This approach will not infringe upon the separation of powers, but rather will enhance it. Delegated legislation is primarily used to seek expert assistance in dealing with technicalities. The legislature typically develops a framework, such as the Code of Civil Procedure, and then often delegates the authority of procedural rule-making, for instance, to the High

[1054] *Pakistan Broadcasters Association and Others v Pakistan Electronic Media Regulatory Authority and Others* [2016] PLD 692.

Courts.[1055] Inconsistencies in procedural justice require the judiciary, under such delegated authority, to promptly utilize their experience and incorporate necessary mechanisms through delegated legislation to comply with constitutional intent and international obligations. This quasi-legislative authority allows for experimenting and then incorporating the best possible amendments in the rules in coordination with the legislature and executive. This constitutional and statutory scheme provides ample opportunities to immediately address the defects so discovered, and halting procedural justice to ensure the fair trials. The legislative body is responsible for evaluating whether the delegate is fulfilling the intended purposes of their delegated legislative authority. This evaluation should take into account the overall plan, subject matter, constitutional provisions, and circumstances surrounding the legislative policy of the principal statute and legislative scheme.

8.7.2 Role of Statutory Institutions

It is important to review the constitution and functions of the Law Commission of Pakistan to ensure that it responds effectively to propose and implement changes in procedural laws. This will enable the commission to devise such procedural methods to eliminate delays and clear backlogs, leading to a faster and more cost-effective resolution of cases; and easy access to justice. The Commission's role should be expressly mandated to remove procedural anomalies and technicalities that undermine the right to a fair trial, as stated in Article 14 of the ICCPR. Additionally, the Commission should comprehensively review subordinate legislation related to procedural laws and recommend amendments to remove unnecessary complexities that delay the provision of justice and hinder the right to a fair trial, as outlined in

[1055] Code of Civil Procedure 1908, S 121 to 124, 126 to 129 and 131.

Article 10-A and Article 14 of the ICCPR. Recommendations for quasi-legislative actions should ensure that delegated legislative authority adheres to both constitutional and international laws of binding character.

In addition to the regulatory frameworks proposed above, high-quality legal and judicial education that emphasizes social relevance and inspires rigorous scholarly research through analysis and critique is inevitable in Pakistan. The professionalism of lawyers and judges hinges on a deep understanding of procedural fairness and righteousness, which stems from quality legal education. It is widely acknowledged that the quality of legal education is closely tied to the quality of justice. In order to improve legal and judicial functioning, institutional reforms in legal and judicial education and meaningful collaboration with international experience may be necessary. This will allow for greater insight into procedural issues and enable the Law Commission to initiate a reform process that corresponds with contemporary legal and judicial institutions in foreign jurisdictions. Scholarships that explore procedural dimensions beyond obsolete procedural law and incorporate modern concepts, such as "judicial entrepreneurship of case management," will be crucial in this process. However, legal education in Pakistan currently falls short of the capacity to impart research-based scientific and technological innovation in various disciplines of the justice sector. Without methodical and systematic research, technological advancements, and developing scholarly jurisprudence catering to evolving socio-legal conditions through binding precedents, easy access to justice and the right to a fair trial cannot be ensured. It is, therefore, necessary for the Law and Justice Commission of Pakistan to liaise with High Courts, HEC, and PBC to propose viable statutory

mechanisms to upgrade such a cognitive process to constantly focus on institutional reforms for legal and judicial functioning.

8.7.3 Reform Process and Constitutional Mandate of Courts

Numerous judgments of the Supreme Court have emphasized the importance of interpreting constitutional provisions in such a way that fundamental rights are not infringed upon but rather expanded.[1056] The Constitution confers jurisdiction on the courts when no other adequate remedy is available, allowing them to issue orders to any person or authority, including the government, in order to enforce fundamental rights.[1057] The Supreme Court also has original jurisdiction in matters of public importance related to the enforcement of Fundamental Rights.[1058] As discussed in Chapter 7, various judgments have already been instrumental in revamping some procedural laws. The PIL may provide future guidance for restructuring and reviewing procedural justice and may be significantly useful in initiating the review process of both the principal and subordinate legislations. The court may utilize this power to issue appropriate directions in this regard and thereby protect the citizens of Pakistan by calling upon the state to make necessary amendments to the procedural laws for the effective enforcement of Article 10-A and to comply with Article 14 of the ICCPR.

The above regulatory measures may effectively ensure a vibrant, independent and distributive procedural justice in terms of Article 14 of the ICCPR and safeguard the guarantee for the right to a fair trial, as an answer to research question 3.

[1056] *Government of Sindh v Dr Nadeem Rizvi* [2020] SCMR 1; *Sami Ullah Balouch v Abdul Karim Nousherwani* [2018] PLD 405 (SC); *District Bar Association, Rawalpindi v Federation of Pakistan* [2015] PLD 401 (SC).
[1057] Constitution of Pakistan 1973, art 199.
[1058] ibid, 184.

8.8 Concluding remarks

Despite significant changes in the social, legal, and economic landscape, the legal codes and court procedures enacted in the colonial age remain largely intact. The colonial framework of procedural justice for governance has not been revisited or redesigned despite institutional challenges, constitutional requirements, and international obligations that have arisen over the years. This is reflected by the country's poor ranking in the international human rights index, entailing the common misconceptions surrounding the aforementioned critical discourse. Such a low ranking for the rule of law in Pakistan has intensified the unfulfilled popular aspirations for change over the years. The international obligation to incorporate the right to a fair trial in procedural justice is crucial in this debate. It is not enough for Pakistan to introduce a constitutional provision of Article 10-A without reforming the domestic procedural laws. This would only be a symbolic compliance with Article 14 of the ICCPR. It is clear that Pakistan's obligation is much more significant than what was originally conceived by the legislators, and meaningful reforms of the procedural laws, as extensively discussed in this thesis, are the only way this obligation can be realized. It has been found through experimental analysis that procedural justice in Pakistan lacks the trust of its people, particularly those who are less privileged and poor. The lack of collaboration and intellectual innovation among public institutions is a major obstacle to progress in this area. Therefore, it is essential for constitutional and sub-constitutional institutions to work together to remove barriers and create a coordinated mechanism for procedural reforms, as proposed above. The significant issues with procedural justice, as evident from the analysis in this thesis, are to be

imperatively addressed in the manner this thesis has articulated to ensure a fair trial as such.

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