



RESEARCH PAPER

Articulation of the Right to Fair Trial and Forensic Science in the Criminal Justice System of Pakistan

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ABSTRACT

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Constructing a limited sense of right to fair trial as it usual safeguards rights of accused, has a possibility of miscarriage of justice in not considering the interest of victim in vindication of injustice committed. This limiting approach in application of fundamental right to fair trial operates to result in general public's distrust in state's administration of justice. The scientific knowledge can be pragmatic solution for the problem. Increasing the pieces of evidence can lead to outweigh any possibility of false evidence or forced confession or mistaken identification parade. This article suggests practical solution for the problem that instead of demanding waiting for legislation in this regard, the courts should adopt judicial policy to use Constitutional of right of fair trial to extend it all other cases of civil and criminal nature, which do not come under limited legal framework of paternity and sexual offences.

Introduction

The right to fair trial as a constitutional right guarantees procedural, substantive, and substantial rights to fair trial to both sides of litigants. Constructing the limited sense of right to fair trial as it usually happens for rights of accused has a possibility of miscarriage of justice in not considering the interest in vindication of injustice committed to victim. This limiting approach in application of fundamental right to fair trial operates to result in general public's distrust in state's administration of justice system. The technological and scientific inventions could be used as a pragmatic and realistic solution for the problem in hand whereby increasing the pieces of evidence in the courtroom has capacity to outweigh any possibility of false evidence or false or forced confession or mistaken identification parade and so on. It is noteworthy that departure from significant opportunity of considering technological and scientific knowledge in litigation and investigation, only for the reason of insufficient scientific/forensic laboratories and for the reason that forensic experts are not included in the investigation process or police is not trained in forensic processes of collection of evidence, or for lack of legal provisions in this respect, would be wastage of time that can result in perpetual injustices for one reason or the other. This article proposes the practical solution for the problem in that instead of demanding or

waiting for legal provisions in this regard, the courts should take on the judicial policy to use constitutional guarantee of right of fair trial and extend it to all other cases of civil and criminal nature, which do not come under limited legal framework of paternity and legitimacy of child and sexual offences. Judicial policy to articulate the right to fair trial in line with the concept of triangulation of interests of victim, accused and public at large and to determine court's active role in demanding for scientific and technological evidence will remove the need for waiting long for new laws to be made for effective administration of justice. This approach is also supported by the policy introduced by General Assembly's Declaration of 1985 to secure victim's interest in justice. This article suggests considering an extension of limited and narrow meanings of right of fair trial which focuses only on accused's rights rather it proposes to include victim and public in its wider sense so that court plays active role in securing the right to fair trial for all parties in litigation and demand scientific and technological evidence to effectively discover the truth.

Literature Review

The Eighteenth Amendment Act 2010 introduced right to fair trial in the Constitution of Pakistan, which has been taken and considered as guaranteeing the rights of fair trial to the accused (2021 CLC 1841 Lahore High Court) as mentioned in Universal Declaration of Human Rights (UDHR 1948), International Covenant on Civil and Political Rights (ICCPR 1966) and European Convention on Human Rights (ECHR 1950). The right to fair trial is explicitly mentioned in Article 6 of European Convention on Human Rights (ECHR 1950) with reference to criminal proceedings in the adversarial systems of common law states its impact in the investigation of a dispute and during the trial in such common law based adversarial systems of litigation. Additionally, Article 10 of the Universal Declaration of Human Rights (UDHR 1948) envisage that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights, and obligations, and of any criminal charge against him; and the same is embodied in Article 14 of the International Covenant on Civil and Political Rights (ICCPR 1966). In its usual connotation, the fair trial takes into account all the Constitutional principles and provisions for fairness, justice, and equity (2021 PCr LJ 537 Lahore High Court) including due process of law (2021 CLC 1189 Quetta High Court) and rule of law (2021 CLC 1841 Lahore High Court). In this sense, the right to fair trial has two components; the right of access to court (2021 MLD 2077 Lahore High Court), and the right to a fair process (2021 CLD 1372 Lahore High Court), which is secured by certain number of procedural safeguards based on the principles of rule of law (2021 YLRN 151 Lahore High Court). Among these procedural guarantees for fair trial includes most of the criminal procedure law providing for presumptions of innocence (2021 PLD 266 Islamabad), the principle that the burden of proof lies on prosecution (2021 PCrLJ 1420 Quetta High Court), and the accused's right to legal aid (2021 MLD 1415 Lahore High Court). Moreover, the right to fair trial seems to involve fulfilment of certain objective criteria including the right to be informed of charge (2021 CLD 1112 Lahore High Court), right to hearing (2021 CLC 2141 Quetta High Court), right to fair hearing (2021 CLC 644 Lahore High Court), right to equal treatment (2021 PLC (CS)N 19 High

Court Azad Kashmir), right to defence (2021 SCMR 1834 Supreme Court) ,right to be treated justly, fairly and honestly (2021 CLD 1112 Lhaore High Court). This right also includes the right to presumption of innocence (Karim, Fazal 2003) until proved guilty by a competent court, and a right to be tried speedily (2021 YLR 1517 Peshawar High Court) by an impartial tribunal or court (2021 PCr LJ 537 Lahore High Court Lahore) and not to be compelled to give testimony or to confess the guilt (Matloob Hussain vs. State 2005 MLD 1101).

This paper, however, tends to highlight a wider and substantial perspective of this Constitutional right to fair trial which underpins importance of technological and scientific evidence in all the cases where legal framework (Cheema 2016) does not limit introduction of such an evidence. This paper also suggests that despite the limitation of adversarial system (Mateen, 2018), securing right to fair trial can be a good reason for the courts to ask for scientific and technological evidence among all other evidence such as confession, oral evidence, circumstantial evidence that can be used to prove or disprove any of the fact in issue or a relevant fact or even result of an identification parade (Article 22 QSO 1984).

It is significant to consider this concept of right to fair trial, in triangulation of interests of accused, victim, and judicial policy, which is expected to ensure substantial right to fair trial (Ishaq, 2014), which can be used by the courts to consider scientific evidence as an important aspect of administration of justice. For this purpose, this article looks into possibility for considering scientific evidence to identify the real accused or acquitting wrongly accused person, by establishing a link of suspect to the crime and to provide justice to the victim. The right to fair trial could be another lens to see and ensure that the administration of justice is not a sole effort of either court, lawyer, or the investigation officer instead these are three streams of government's resolve to achieve a goal of administration of justice in a society as a whole (Suddle, 1995). It is to highlight the need to reconstruct the right to fair trial on the line of 'to discover, vindicate, and establish the truth' (Ishaq, 2014) by considering possible pieces of evidence, reports, and opinions from science and technology as well (Munir, 2021). It is noteworthy that the right to fair trial is not a single dimensional right rather it has a multidimensional nature that can support the triangulation of interests (Ishaq, 2014) of the court, lawyer, and the investigation team with a purpose to reveal the truth before and during the trial (Wemmers, 1964). It is also to emphasize that if failure to hear material witness is a denial of right to fair trial (2021 CLC Lahore High Court), then failure to arrange scientific evidence to consider link of accused or suspect to the crime, or to avoid acquittal of a guilty criminal for lack of proper investigation can also be a denial of right to fair trial.

It is pertinent to mention here that UN General Assembly's 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power' in 1985 (GA 1985), which relates to the discussion of this article in that the declaration emphasizes national and international measures to secure and respect for the rights of victims of crime, and of abuse of power, without prejudice to the rights of the accused. This Declaration also supports the argument presented in this paper that the judicial policy should consider the right to fair trial and extend the substantial meanings of the right

to fair trial to securing the rights of the victims without prejudice to the rights of accused (2021 SCMR 342 Supreme Court) which are already confirmed and adopted rights of the accused under Article 10 of UNDHR, Article 14 of ICCPR, and Article 6 of EUCHR. In that respect it appears that the court's inactive role to stress on production of scientific and technological evidence, which can support the discovery of the truth about the dispute (Strasser, 2014) will eventually lead to deny the opportunities of justice to the parties and lose the ultimate goal of administration of justice for vindication of crime committed against the victim. It is therefore significant to underscore the need to realize that fair trial can be achieved by focusing on creating a balance of the rights of both victim and accused and the rights of the society as well in order to avoid any prejudice to any one of them. The role of scientific and technological advancement in this respect should not be denied, or overlooked by the courts and reports, opinions, and evidences could be collected from scientific, technological, and forensic experts to eliminate the possibility of prejudice in the discovery of truth in a legal dispute (Munir, 2021).

This perspective to right to fair trial underpins a wider sense of the right leading to have more secondary or corroboratory evidence in a case that can help reveal the truth. Keeping in view the fact that the courts in Pakistan accept the Scientific evidence as a secondary piece of evidence in cases relating to paternity/ legitimacy of child, and sexual offenses (Cheema, 2016); because the judicial policy and the legal framework (QSO 1984) provide a limited room for consideration of the scientific evidence in such cases. This article however, focusses on other cases regarding property and offenses other than these aforementioned in a sense that wider and substantial meanings of right to fair trial can be used by the courts to ask for and include scientific and technological evidence as an important primary source of evidence in an attempt to reveal the truth. Moreover, keeping in view the possibility of unravelling of the facts using scientific and technological evidence, the administration of justice can be the outcome of weighing the different pieces of evidence, which can explain truth or falsity of other primary evidence such as confession, oral evidence, and identification parade and so on.

For instance, the Article 22 (Qanoon-e-Shahdat order 1984) provided for "facts necessary to explain or introduced the fact in issue or relevant fact which established the identity of a person whose identity is relevant" and this provision can also be constructed to include scientific and technological evidence to ensure discovery of truth, to secure right to fair trial for both parties. Likewise, Article 164 (Qanoon-e-Shahdat order 1984) can also be taken into account that allows consideration of evidence from scientific and modern devices during the trial. The combination of right to fair trial under Article 10-A (Constitution of Pakistan 1973), Article 22 and Article 164 (Qanoon-e-Shahdat order 1984) could elevate the status of scientific and technological evidence from mere secondary, corroboratory or expert evidence (Article 59 Qanoon-e-Shahdat order 1984) to the primary evidence, which can rebut or affirm some material facts or even question primary evidences such as confessions, oral evidence, or identification of the accused before the trial starts and

the insistence of court on such an evidence along with other evidence may help deliberate the evidence for the discovery of truth to arrive at a just decision.

It is to argue that the identification parade (Article 22 of Qanoon-e-Shahdat order 1984) in the wider sense of right to fair trial should be considered by the court (2021 CLD 1112 Lahore High Court) to consider the DNA profiling as a scientific knowledge that could be useful to link crime to the accused, or to acquit a wrongly accused person by proving or disproving the presence of the accused with the crime scene (Munir, 2021). Both these concepts of identification parade and right to fair trial can corroborate or rebut the fact of identifying the accused. It is notable that both Identification parade and DNA profiling are similar in that they lose the reliability even as secondary or corroborating evidence if these are delayed. It is to argue that right to fair trial is a gateway from where the court can consider that their interest into the missing evidence is supported by the triangulation of interests of accused, victim and the court (Ishaq, 2014), whereby the court has to perform the administration of justice (Farani, 2013), therefore it will need asking for scientific and technological evidence in disputes brought before it (Munir, 2021). To adopt such a judicial policy will mean to require scientific evidence along with other evidence in both civil and criminal cases. In order to reveal the truth in the sense of fair trial for all, the scientific and technological evidence along with other evidence should be asked for, before and during the trial of the criminal case or even from the whole process of deciding on the dispute. No matter what evidentiary value will it partake, preferably in its primary evidence, secondary evidence or expert opinion and so on, but the judicial policy should include the scientific and technological evidence as part of securing right of fair trial to all parties involved in the case. In another instance, which allows wider sense of application of constitutional right to fair trial is to consider the law under Article 161 (Qanun-e-Shahadat Order, 1984) and section 540 of Criminal Procedure Code 1890 and read them jointly (2021 CLD 1112 Lahore High Court) with Article 10-A of the right to fair trial. The combined effect of these provisions is that a trial Judge may ask questions, or order production of any document or summon any witness or examine a witness, or recall and re-examine any witness in order to discover or to obtain proper proof of relevant fact, if such evidence appears to it essential to the decision of the case. It can be argued that these provisions may be used by the courts to inquire into scientific and technological evidence to discover the truth and to minimize the effect of lack of proper investigation (Munir, 2021).

Conclusion

It is to propose that a wider sense of right to fair trial as guaranteed under article 10-A will demand that in both criminal and civil matters the right extends to both parties and it will also extend to take into account court's intervention without changing the adversarial system or waiting for new law in this regard, where court can demand the scientific evidence as an essential part of investigation to ensure substantial right to fair trial to both parties without prejudice to parties to the dispute. This approach will be an extension of right of fair trial to the victim as well so that the impact of poor investigation could be removed from the process of administration of justice helping to avoid potential injustices.

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