



# PREMIER LAW JOURNAL

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A Project of Premier Law College Gujranwala



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## EDITORIAL NOTE

Premier Law Journal (PLJ) is a research Journal published by Premier Research Center, Premier Law College Gujranwala in English Language. This is a 4<sup>th</sup> volume, Issue 15, which is going to be published in SEP, 2024. It is a quarterly Journal dedicated to provide original research articles in Legal Studies as well as analysis and commentary on issues related to Legal & Social Issues. This Journal brings together many of today's distinguished scholars and thinkers, practicing lawyers, teachers and students making their research available on Current Issues need to be legislated in Pakistan.

It is an interdisciplinary Journal of peer-reviewed research and informed opinion on various intellectual and academic issues in areas of Legal & Social Studies. Its readership includes Legal practitioners, policy makers, Judges, Teachers and Students of Law. The articles published in this Research Journal undergo initial editorial scrutiny, double blind peer-review by at least two experts of the field, and further editorial review.

**Dr. Shahid Rizwan Baig's** article explores the prevention of child abuse through a comparative analysis of international law, particularly the UN Convention on the Rights of the Child, and Islamic law. He highlights the shared goals of child protection in both legal systems, while addressing the differences in their approaches. The study emphasizes the need for a harmonized legal framework, combining international and Islamic principles, to effectively protect children from abuse and ensure their well-being.

**Kashif Khan and Dr. Shahid Rizwan Baig's** article, An Analysis of Double Jeopardy and Self-Incrimination (With Special Reference to the Constitution of Pakistan 1973), examines the constitutional

safeguards under Article 13 of Pakistan's Constitution. The study highlights protections against double jeopardy, ensuring individuals cannot be tried or punished twice for the same offense, and against self-incrimination, which prohibits coercion to testify against oneself. Khan explores legal interpretations, case law, and challenges in enforcement while advocating for reforms to strengthen these fundamental rights within Pakistan's legal framework.

Dr. Muhammad Amin  
Editor in Chief

# **An Analysis of Double Jeopardy and Self-Incrimination (With Special Reference of the Constitution of Pakistan 1973)**

Kashif Khan<sup>1</sup>

Dr. Mirza Shahid Rizwan Baig<sup>2</sup>

**Abstract;** In any democratic society, fundamental rights are essential to ensuring individual freedoms and protections. These rights, enshrined in the constitution or common law, guarantee that citizens are safeguarded from unjust treatment by the state. In Pakistan, the Constitution of 1973 outlines various fundamental rights aimed at protecting citizens from exploitation and injustice. Among these rights, Article 13 stands out as it addresses two critical aspects: the protection against double jeopardy and self-incrimination. This article prohibits an individual from being tried or punished more than once for the same offence and ensures that no one can be compelled to testify against themselves in criminal proceedings. This research explores the implications of Article 13 within the framework of Pakistan's legal system, analyzing its effectiveness in protecting individuals from legal abuses. The study will examine relevant case law, legal interpretations, and comparative analyses to assess how well these protections are upheld and to explore potential reforms. The focus will be on the legal safeguards provided by the Constitution, the challenges in enforcement, and the broader implications for justice in Pakistan.

**Key words:** *Fundamental Rights, Constitution of Pakistan, Self-Incrimination, Double Jeopardy.*

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<sup>1</sup> Advocate High Court

<sup>2</sup> Assistant Professor College of Law, GCUF. [Shahidrizwan@gcuf.edu.pk](mailto:Shahidrizwan@gcuf.edu.pk)

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**Introduction;** The fight for the rule of law, respect for civil rights, and democracy in Pakistan culminated in 1973, when a constituent assembly of legislators from many political backgrounds drafted a new Constitution. It was not a perfect document, but it was drafted for the third time about 25 years after independence, and after losing half the country in a civil war, so it was the result of experience. It incorporated historical lessons and established the fundamental rights of Pakistani citizens. These rights, guaranteed to all Pakistanis, to be respected by all public officials, and enforceable through the courts of law, were not new; most had been copied from previous constitutions, but this time they were, as some would say, the heart and soul of the Constitution. Thus, despite its shortcomings, this Constitution has weathered the test of time and prevailed because its heart was established on the rights and of citizens.

The "Fundamental Rights" are fundamental human freedoms that every Pakistani citizen is entitled to in order to support the harmonious and healthy development of their character and way of life. Regardless of gender, caste, religion, color, or place of birth, all Pakistani citizens are entitled to these rights. They are legally enforceable via the courts, while being bound by the constitution and the law. Pakistan's 1973 Constitution protects civil freedoms and aims to give all of its residents a peaceful and harmonious life. Individual rights that are essential in many free societies are covered by Pakistan's Fundamental Rights. Fundamental ideals such as the freedom to speak, expression, association and a peaceful gathering, impartiality before the law, and the right to practice one's faith are all included in this list of rights. Infractions of these rights may result in legal penalties,



which are determined by the judiciary. Chief Justice Faez Isa of the Supreme Court emphasized the unique features of the Pakistani Constitution in September 2020. He made the point that it includes basic rights that are rarely discussed in many other countries. He believes that the advancement and well-being of the country depend on these rights.

However, there are numerous rights granted by the Pakistani constitution, which run from article 8 to article 28. In this article, however, I will discuss the article 13, which addresses the right against double punishment and self-incrimination. According to this article Double punishment: No one may be prosecuted or punished more than once for the identical crime and self-incrimination as When facing criminal charges, no one may be forced to testify against himself.

### **Overview on Fundamental Rights in Pakistan**

Fundamental rights are those that are protected by a nation's constitution, and the 1973 Constitution includes a thorough chapter on them. The 1973 Constitution's first chapter contains Pakistan's fundamental rights. Their purpose is to shield the populace from any capricious or unfair actions carried out by the government or its branches. The following are a few advantages of fundamental rights in Pakistan: They guarantee that all Pakistani, irrespective of their gender, caste, religion, or birth place, have equal protection under the law and equality before it. They protect individual liberty and dignity by outlawing arbitrary detention or arrest, forced labor, slavery, and torture. By enabling people to peacefully congregate, create associations, voice their ideas, and take part in elections, they advance democracy and accountability. By defending religious minority' rights and guaranteeing freedom of conscience and faith,

they promote tolerance and pluralism. They promote social fairness and progress by guaranteeing the rights to property, health care, education, and a clean environment. The rights guaranteed in the constitution were always enforceable, as long as the law didn't go too far. For instance, the bar association's implementation of certain requirements for candidates seeking various positions did not violate any fundamental rights.<sup>3</sup> Every person's basic rights were safeguarded in the constitution against abuses of power by the executive, judicial, and legislative branches of government at all levels.<sup>4</sup> Legislation that significantly impacts or violates fundamental rights is invalid. Legislative or executive actions cannot abridge fundamental rights.<sup>5</sup>

Nevertheless, despite these constitutional safeguards, Pakistan's fundamental rights continue to encounter numerous obstacles because of a number of issues, including political unrest, a poor enforcement of the law, corruption, terrorism, radicalism in religion, and prejudice. When human rights advocates, attorneys, journalists, and campaigners reveal violations, they frequently come under attack—from threats and harassment to imprisonment and even murders. In order to quell opposition and control civil society organizations, the government also employs harsh laws including those against sedition and counterterrorism. Women, people of color in religion, and transgender persons are still persecuted, discriminated against, and subjected to violence without consequence. The promotion of social

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<sup>3</sup> PLD 2014 Lahore 324

<sup>4</sup> PLD 2016 Peshawar 57

<sup>5</sup> 2015 CLC 1723

and economic well-being is one of the items included in the chapter on Principles of the Policy of Fundamental Rights Established in the 1973 Constitution. This chapter made clear that acting in conformity with the Principles of Policy is the exclusive duty of every State organ and authority. Individual and societal well-being is referred to as socio-economic well-being. Social, economic, and environmental factors all influence it. Being financially secure both now and in the future, as well as being able to manage one's finances and regularly meet one's fundamental necessities, are all components of economic well-being. People who are in good economic standing have stability, a sense of social inclusion, and equitable possibilities for growth, all of which help to.

For the past 50 years, Pakistan's social and economic conditions have remained dire for its citizens. The Pakistan Living Standard Measurement Survey 19–20 reports that the primary net enrollment rate is approximately 64%, the literacy rate is approximately 60%, and 32% of children between the ages of 5 and 16 are not in school. Just 54% of people have obtained basic hygiene facilities, while only sixty-eight percent of people have access to safe sanitation and seven percent to improved drinking water sources within premises. The majority of households—82 percent—own their homes, 48 percent have access to gas for cooking, and ninety one percent have electricity. Over the past five years, health costs have stayed at about 1% of GDP. The average lifespan is 65 years, and there are 56 baby deaths for every 1,000 live births.

The figures above paint a dire picture of our socioeconomic situation. The fundamental tenet of the Constitution, the Principle of Policy, has not yet been fully implemented by any State body or agency. To fulfil its

constitutional duties in their purest form, the State ought to concentrate more on the implementation aspect. Then and only then would we be entitled to celebrate.

### **Concept of Double Jeopardy**

The fifth Amendment of the American constitution provides that- " No one shall be repeatedly placed in danger of losing their life or limb for the same offense".

The common law is deeply ingrained with this protection against "double jeopardy." It seems to be against "fundamental canons of decency and fairness" to allow the government to use the same evidence that led to an acquittal in the past to prosecute a defendant on the same accusation. The US Supreme Court dissented in *Palko v. Connecticut*, declining to amend the 14th Amendment to include the Double Jeopardy Clause. However, this decision was overturned in *Benton v. Maryland*, and the double jeopardy clause is now included in the list of protections that are considered "essential to a scheme of ordered liberty." Still up for debate, though, is the precise definition of "double jeopardy." In essence, the clause forbids the prosecution from trying to prove the accused person guilty of a crime once it has already failed to do so. This general rule does have a few outliers, though.

In a case with three defendants, two were convicted while one was acquitted. The US Supreme Court overturned the conviction due to issues in the indictment. Following the retrials, all three were convicted. The Supreme Court overturned the conviction of an individual who had previously been found not guilty, citing the principle of "double jeopardy." Nonetheless, it asserted that the prosecution and conviction of the other two individuals who had already been deemed guilty may continue. when the court sent the case back rather than exonerating the accused despite the defendant's insanity plea. Upon

discovering ample evidence of insanity, the US Supreme Court reversed the lower court's ruling and stated that the Double Jeopardy Clause barred a second trial. The sole course of action for the appeal court was to render a judgment of acquittal.<sup>6</sup>

The US supreme court has been declared in *Kepler v. United States*;

" The rule that a person has been in peril when he is routinely charged with a crime before a tribunal that is properly constituted and competent to try him, even if the trial did not result in a judgment, has been sanctioned by the weight of authority and this court's rulings."

It was decided in *Serfass v. Jenkins*, that if the same facts are "put to trial before the triers of facts," there is a risk to the merits. The United States Supreme Court stated in *Benton v. Maryland*, that –

" The fundamental premise is that the state, with all of its resources and authority, shouldn't be permitted to repeatedly try to convict someone of a crime, subjecting him to humiliation, cost, and suffering that forces him to live in constant fear and uncertainty and increasing the likelihood that he could be found guilty even though he is innocent."

A single series of activities can lead to distinct criminal charges in both state and federal courts within the federalist legal framework of the United States. The US Supreme Court affirmed both state and federal charges for the same offense in the case of *United States v. Lanza*, notwithstanding the double jeopardy clause. In the case of *United States v. Lanza*, Chief Justice William Howard Taft (1857-1930) remarked in a court opinion: "Here, we

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<sup>6</sup> *Burks v. United States*

have two sovereignties that may address the same issue inside the same region, but they get their authority from separate sources. Each country exercises its own sovereignty, not the sovereignty of another, when deciding what constitutes an infraction against its peace and dignity.”

Consequently, an action deemed illegal by both national and state authorities is an insult to their peace and dignity and is liable to punishment from both entities. It is important to note that the Lanza ruling occurred prior to the addition of the double jeopardy clause in *Benton v. Maryland*. Nevertheless, the court has concluded that the dual sovereignty principle articulated in *United States v. Lanza* remains intact when the provision is applied to the state. In *United States v. Wheeler*, the court noted that if circumstances were altered, "One sovereign's prosecution of a relatively small violation may prevent the other from prosecuting a much more serious one, so depriving the latter of the authority to impose its own laws."

Consequently, Double Jeopardy does not prevent a different sovereignty from bringing the same case to court on two occasions. The US Supreme Court determined in *Heath v. Alabama* that a previous state prosecution for the same offense does not bar federal prosecution.

A notable example of a federal prosecution occurring after a state court acquittal is the Los Angeles police case related to the 1992 videotaped beating of African-American driver Rodney King (1965–2012). Following the California higher court's decision to acquit the police officers of any criminal wrongdoing, significant resentment erupted, leading to widespread and destructive riots in Los Angeles. The federal government has brought new charges against the officers for infringing upon King's civil rights, despite their acquittal on the state charges. The

police argued on appeal that the double jeopardy clause barred the new federal charges. The Ninth Circuit rejected this argument in *United States v. Koon*, stating that there is no evidence to suggest that the federal prosecution was a "sham" or a "cover" for the state prosecution.

Finally, a federal prison sentence was imposed upon the defendants upon their conviction.

### **Double Jeopardy in Pakistan**

Article 13(a) of the 1973 Pakistan constitution provides that-

“No one may face multiple prosecutions or punishments for the same offense.”

The term "shall be prosecuted" in article 13 (a) refer to the start of a criminal proceeding before a court of law or a judicial body in accordance with the procedure provided in the status that constitutes the offence and governs the procedure.<sup>7</sup>

The principles of *autrefois acquit* and *autrefois convict*, as stated in Section 403 of the Code of Criminal Procedure, 1898, are elevated to constitutional stature by Article 13(a). According to this section, an individual who has previously been tried by a competent court for an offense and found guilty or acquitted of that offense will not be subject to a trial for the same offense or on the same facts for any other offense for which a different charge than the one against him might have been brought under section 236 or for which he might have been found guilty under section 237 of the Code of Criminal Procedure, 1898, as long as that conviction or acquittal is still in effect.

A revised version of this principle can be found in section 26 of the General Clauses Act 1897, which states that an

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<sup>7</sup> 1986 P.CR.L.J. 2218

offender may be prosecuted and punished under either or both of the enactments where their act or omission constitutes an offense. However, they will not be punished twice for the same offense.

However, as stated in subsections (2) and (3) of the Criminal Procedure Law of 1898, these provisions do not exclude further trials for a "different" or "other's offence." This idea, known in the US as the "rule against double jeopardy," comes from the English legal adage *Nemo debet bis vexari pro una et eadem causa*, which means "a person should not be tried twice for the same cause." This idea serves as the foundation for the special defenses of *autrefois acquit* and *autrefois convict*. When a criminal charge has been decided by a court with the necessary authority, that decision is conclusive, irrespective of whether it leads to an acquittal or a conviction. This decision may also serve to bar the prosecution of a case involving the same offence again, irrespective of whether the charge encompasses mere aggravation or pertains to the consequences of the offence or the intent behind it.

Article 13(a) of the Pakistani constitution also adheres to the American and common law rules.

In *Alamdard Hussain Shah v. Abdul Bashir Qureshi*, Justice Dr. Nasim Hasan Shah (1929-2015) of the Supreme Court of Pakistan, in alignment with the relevant provision of the Indian Constitution, determined that the term "prosecution" in Article 13(a) of the Pakistani Constitution pertains to "punishment." This interpretation implies that new charges for the same offense cannot be introduced unless the prior case has been successfully concluded, resulting in either an acquittal or a conviction.<sup>8</sup>

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<sup>8</sup> PLD 1978 S.C.121



In the constitution of Pakistan, the terms prosecution and punishment are used in a disjunctive manner. Article 13(a) clearly states that if a man has been prosecuted once, he cannot be prosecuted again, and if a person has been punished once, he cannot face prosecution or punishment again. Consequently, according to the Pakistan constitution, a second prosecution is prohibited regardless of the outcome of the initial prosecution, meaning it does not matter whether the accused was convicted or acquitted in the first instance. If the prosecution encompasses 'punishment', there was no need to include the phrase 'or punished'. The constitution of Pakistan recognizes the principles of *autrefois acquit* and *autrefois convict*, and it should be regarded on the same level as the constitution of the United States and the common law principles of England.

The constitutional protection outlined in Article 13(a) of the 1973 constitution applies solely when the accused has been convicted and punished. If the initial prosecution leads to an acquittal, a subsequent prosecution is permissible. If an accused is tried again, at the same time, for the same offence and the judgment of conviction is delivered first, followed by the judgment of acquittal, the judgment of conviction will prevail. The provision of section 26 of the General Clauses Act 1897 does not prevent 'duplicate trial'; it merely forbids 'duplicate punishment'. These three propositions were established by Justice Muhammad Afzal Lone (1928-2020), with the concurrence of the other two esteemed judges, Justice Dr. Nasim Hasan Shah (1929-2015), who later became the 12th Chief Justice of Pakistan, and Justice Rustam S. Sidhwa (1927-1994), in the case of *Muhammad Ashraf v. The State*. All three propositions are of considerable uncertainty regarding their validity.

According to Muhammad Munir,<sup>9</sup> Article 13(a) will elevate the rule of *autrefois convict* and *autrefois acquit* to a constitutional status, as incorporated in section 132 of the Evidence Act, 1972, and section 403 of the Code of Criminal Procedure, 1898. He asserted that, "the current Article forbids both double prosecution and punishment for the offense".

The principle of "double jeopardy" is based on the maxim, '*nemo bis debet puniri pro uno delicto*,' which translates to "no person shall be prosecuted or punished for the same offence more than once." This principle encompasses the following three situations:

A person who has faced prosecution for an offence cannot be prosecuted again for that same offence, even if the first trial did not result in a final judgement of conviction or acquittal. A person who has been prosecuted and subsequently punished for an offence cannot face prosecution again for that same offence. Thirdly, an individual who has been prosecuted and subsequently acquitted for an offence cannot face prosecution again for that same offence. If a person who has been prosecuted once cannot be prosecuted again for the same offence irrespective of the result of the first prosecution, there is no reason why under article 13 (a), second prosecution should not be a bar, if the person has been prosecuted and consequently acquitted in the first trial.

The ruling by Justice Muhammad Afzal Lone suggests that without section 403(1) of the criminal procedure code, an accused could face repeated prosecution and trial for the same offence, potentially until a conviction is achieved, thereby preventing the state from pursuing

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<sup>9</sup> PLD 1975 128

further charges against him. Was this the aim of the constitution's creator? The ruling of Justice Lone in *Muhammad Ashraf v. The State* states that "under section 26 of the General Clauses Act 1897, there is no prohibition on simultaneous prosecution; what is restricted is duplicate punishment, not duplicate trial." This interpretation of the section can be considered misguided at best.<sup>10</sup>

The section simply stated that, when a transaction involves crimes under multiple enactments, the accused may be charged under one or more of those enactments; however, the punishment can only be imposed under one of them. It neither authorizes nor explicitly or implicitly envisions multiple trials for the same offense. If the facts constituting the offence fall under ten different enactments, can the accused be tried separately ten times? In instances where a case remains in the investigation phase, it cannot be asserted that the second prosecution has commenced. If a non-bailable warrant was issued by a magistrate during the investigation stage, it served solely as an aid to the investigation, and Article 13 was not applicable.<sup>11</sup>

### **Historical Background of Self-Incrimination**

It merely exists in the context of English history that the protection against "self-incrimination" can be comprehended. England was a Roman Catholic nation in the early 16th century, under the era of Henry rule (1491–1547). Protestants faced severe persecution. The British Parliament founded the Church of England when Henry severed connections with the Roman Catholic church. The

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<sup>10</sup> 1995 SCMR 626

<sup>11</sup> PLD 1980 S.C.6

protestants then turned the tables and started persecuting the Catholics. This state of affairs persisted until Mary I of England's reign (1516–1588), dubbed Bloody Mary by her opponents, the protestants, were once more persecuted by the Catholic Church. Following the demise of her siblings Mary I of England in 1558, Elizabeth I (1533-1603) ascended to the position of monarch and renounced Roman Catholicism. Elizabeth's church started punishing dissident protestants referred to as Puritans in 1560, in addition to Catholics.

This persisted under James I (1566–1625) and Charles I (1601–49) and contributed to the (1642–1651) revolt, which was won by the Puritans and their supporters. Following the success of the puritans, the government persecuted not only the Catholics but also the Anglican clergy for being less reform-minded than themselves and the dissenters who belonged to the "left wing" and separated from the main puritan group. Then, following Oliver Cromwell's (1599–1658) ascent to power, the core of the puritan establishment shifted to the left and started its own campaigns against the "ungodly," prosecuting right-wing puritans, Catholics, and high Anglicans. By the time Charles II restored the monarchy in 1630–1685, religious persecution had become unbearable throughout England and had mostly stopped.

This is a really amazing history. Every major religious organization in England has experienced both initiation and persecution over the course of roughly 150 years, and the roles have shifted with startling rapidity. One important tool employed in these persecutions was the oath. Puritan clergy were called before the high commission and questioned about their beliefs under oath during the puritan persecution by the church of England under Elizabeth I and James I, for example. As men of

God, they were unable to lie, and they risked harsh punishment if they confessed to holding unconventional and deviant beliefs. They consequently asserted their right to be silent more and more, and in the 17th century, England saw a significant debate over whether or not this right existed. 'Freeborn John', or John Lilburne, (1614–567), was one of the most well-known cases involving the right.

Lilburne was hauled before the court of star chamber in 1637 as a puritan dissenter. He was accused of bringing "unethical and factitious books" back to England after his recent return from Holland. Lilburne maintained on several occasions that he was entitled to notice, an indictment, and a court trial in accordance with English law: That he could not be forced to testify against himself, that he had the right to be represented by counsel, that he had the right to have witnesses called on his favor and to face witnesses testifying against him.

for declining to answer the inquiries. Lilburne received a fine, was chained to a waggon, and was thrashed through the streets of London with his body exposed. He was put in a pillory at Westminster, his back lacerated to the midday heat, his torso bowed, and his neck in a hole. He remained there for two hours, urging everyone who would listen to oppose the bishops' despotic rule. He was so viciously strangled that his mouth bled because he refused to be silent. Following all of this, he was held in fleet jail 9's solitary confinement for ten days without food and with irons on his hands and legs. Lilburne's audacious resistance and severe punishment had two aftereffects upon his release.

The first was the lengthy Parliament's decision declaring that his punishment was invalid and ordering restitution for him. The second was the same Parliament's

abolishment of the Star Chamber and the High Commission Court. This was by no means the end of the privilege's growth. It has been noted that the opposition to mandatory self-incrimination, however, was directed towards the way the star chamber and the high commission implemented the practice, not every day criminal court. Following the dissolution of the High Commission and Star Chamber courts, the person charged was interrogated during his trial without interruption for about twenty years, and the act of magistrate questioned the prisoner for up to two centuries.

Still, there was a slow creeping disgust with forced self-incrimination. Upon the complaint of a defendant or evidence, this privilege was acknowledged in all courts before the end of Charles II's reign (1630–85).

### **Protection Against Self-Incrimination in Pakistan**

This provision embodies the concept of protection from coercion, a fundamental principle of British criminal law that has been adopted by the American legal system and is enshrined in the federal constitution. Sections 5 and 6 of the Oaths Act of 1873 and Section 342 of the Code of Criminal Procedure of 1898 both include it, further illustrating its broad acceptance in Pakistan's criminal justice system. Article 44 of the Qanun-e-Shahadat 1984 and Subsection (2) of Section 340, as amended effective February 22, 1982, by the Code of Criminal Procedure (Amendment) Ordinance, XII of 1982, position the accused as both a compellable and competent witness.

Subsection (2) of Section 340 stated that unless—first—the evidence proving he has either committed or been determined guilty of an offence different from the one he is charged with or is on trial is admissible in evidence to demonstrate his guilt of the offence for which he is being tried; he will not be questioned about, or compelled to

respond to, any information that would suggest he is of poor character or that he has committed or been found guilty of an offence other than the one for which he is on trial; secondly, he has either directly or through his plea agreement questioned any prosecution witness in an effort to establish his own integrity or provided evidence of it; thirdly, he has testified against any other individual accused of or convicted of the same crime.

Article 44 of qanun-e-shahadut, 1984 states that "all accused, including an accomplice, shall be liable to cross-examination."

Both of these provisions impose mandatory cross-examination on the accused and render them compellable witnesses, thereby violating Article 13 of the Pakistani Constitution. If a law mandates that an accused individual must testify, and that testimony could potentially be used against them in a manner that might result in self-incrimination, it would be deemed unconstitutional in that jurisdiction.<sup>12</sup>

It is important to observe that article 15 of qanun-e-shahdat 1984 states that 'A witness cannot be exempted from replying if doing so will implicate him. According to the article, a witness cannot refuse to answer a question about any issue at hand in a lawsuit, civil proceeding, or criminal proceeding on the grounds that the answer could implicate them, or could potentially implicate them, or that it could subject them to any kind of penalty or forfeiture. This provision comes with the important stipulation that any answer a witness is compelled to provide cannot be utilized against them in a criminal prosecution or result in their detention, except in cases where the witness is being

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<sup>12</sup> A.G. Chaudhry, 1994

prosecuted for giving false testimony. An accused person is now a competent, though not compellable, witness. If he chooses to testify on his own behalf, he may be subject to cross-examination by the prosecutor, in accordance with the provisions of article 15 of qanun-e-shahadat 1984.

Section 340(2) CR.P.C has been determined by the federal shariat court not to be ultra vires of article 13(b). Subsection 2 merely provides an opportunity for an accused to make a statement on oath in refutation of the accusations or complaints made against them.<sup>13</sup>

Subsection 2 of section 340 CR.P.C. should be read as merely giving the court the authority or duty to notify the accused that he is legally entitled to give a statement on oath, with no risk associated with his decision to making so or not making.<sup>14</sup>

In *mehran Ali v. State of Pakistan*, section 26 of the anti-terrorism act 1997, which made a confession of guilt made before a police officer admissible was held to be against Article 13(b).<sup>15</sup> The opinion proceeds on the basis that a confession before police, considering the unique circumstances obtaining in this country, cannot be a voluntary confession; it must have been processed by compelling the accused to be a testimony against oneself.

### **Person accused of an offence**

In *F.B. Ali v. The State*, the Pakistani Supreme Court determined that the safeguards provided by Article 13 of the Constitution apply solely to an accused individual—specifically, someone against whom formal charges of committing an offence have been brought, potentially

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<sup>13</sup> PLD 1983 FSC 173

<sup>14</sup> PLD 1991 S.C. 787

<sup>15</sup> PLD 1988 S.C. 1445



resulting in legal proceedings.<sup>16</sup> An individual's position does not shift to that of an accused person just because the police initiate an investigation or file an information request. It's important to distinguish *Muhammad Ilyas v. Ijaz Ahmad Butt*, where the Lahore High Court's full bench ruled that an accused individual named in police challan column number two is eligible to be charged under section 3 of the West Pakistan Criminal Law (Amendment) Act 1963.<sup>17</sup> According to section 497 of the Code of Criminal Procedure 1898, the whole bench decided that the person identified in column no. 2 of the police challan is not an accused person. According to the ruling in *Noor Muhammad v. Commissioner, Sargodha division*, a person who has been the subject of a formal complaint is regarded as an accused person.<sup>18</sup> In *Muhammad Ilyas v. Ijaz Butt*, it has been determined that the individual listed in column no. 2 of the challan does not qualify as an accused person, as defined by section 497 of the 1898 Code of Criminal Procedure.<sup>19</sup> Article 13 of the Pakistani constitution defines "to be a witness" as the act of providing information regarding relevant facts via oral or written testimony presented in a court of law or in an alternative setting. These remarks encompass statements that could be seen as incriminating, which are assertions that reasonably imply the accused's guilt. They extend beyond mere confessions.

### **The purpose of the privilege against self- incrimination**

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<sup>16</sup> PLD 1975 S.C. 506

<sup>17</sup> 1992 SCMR 1857

<sup>18</sup> PLD 1968 Lahore 1441

<sup>19</sup> 1992 SCMR 1857

One can question if the privilege against self-incrimination still has any relevance in the present era, notwithstanding its respectable history. After all, the US Constitution's first amendment currently forbids the majority of the actions that gave rise to privilege. However, there are many arguments in favor of preserving the privilege as a crucial protection for the individual. The right to privacy has been protected by defending the privilege. It makes sure that the most coercive form of state action—the criminal process—cannot be used by the government to coerce someone under investigation to give up their privacy. Undoubtedly, there are also other ways in which a citizen's privacy may be violated. Furthermore, the privilege only safeguards the type of privacy that results from being coerced into disclosing personal information. However, the privilege at least places one significant means of violating people's privacy outside the purview of the state. If the person is granted immunity from criminal prosecution, they may be compelled to respond to questions. But it disproves the main justification for the government's investigation—the involuntary witness's punishment. The privilege is also defended on the grounds that it keeps law enforcement from becoming somewhat weaker. It would seem that the privilege against self-incrimination presents a major obstacle to law enforcement, and in many respects, it does. However, some have defended the privilege by pointing out that the British government's disregard for it in India led to the well-known remark made by one British officer that "It's filled with a lot of laziness. Sitting comfortably in the shade and applying red pepper to some poor devil's eyes is far more enjoyable than walking around in the sun looking

for proof. ".<sup>20</sup> What he was trying to say is that a police department that frequently depends on extracting every detail from criminal suspects' months of imprisonment eventually loses the ability to generate information and hints in other ways. Thus, the privilege keeps law enforcement from being weakened in this way. The privilege shields citizens' welfare and dignity from some types of attacks is another argument in favor of it. Because torture has an adverse effect on the victim, the government is not permitted to employ it to coerce information concerning the citizen's criminal history. It is true that historically, the privilege has covered far more ground than just forbidding coercing an accused person into making a painful confession. However, the privilege guards against the government torturing citizens. Using an accused person to establish evidence against herself is essentially unsightly, which is a similar defense for the privilege. Justice Felix Frankfurter (1882–1965) stated that " a prisoner is not be made' the deluded instrument of his own conviction".<sup>21</sup> The comparison presented here is that a man is not forced to dig his own grave when he is put to death. The privilege has been defended as a barrier to this kind of infringement on human dignity, which involves pushing people to harm them and utilizing men as means rather than ends. The privilege's defense as a barrier to "total" law enforcement may be the most compelling. Considering armed robberies, muggings, rapes, and murders, it makes sense that a society where everyone followed the law would be desired. There are many different types of laws in a society, though, and this

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<sup>20</sup> Stephen, 1883

<sup>21</sup> *Culombe v. Connecticut*

point of view holds that the legislature is unsure of its ability to impose new laws or even the ones it already has, which is why there aren't many more than there are. This suggests that human governance is avaricious and will try to intrude as much as possible into the private lives of its people. One author has commented "if we had a method of perfect law enforcement we would still have prohibition and we probably would have laws against masturbation, smoking in bed, and 150 other things the legislature would decide were not good for people. It is no coincidence that the countries which come closest to being able to enforce their criminal laws completely are also those which most regiment their citizens, most restrict their behavior and interfere most with their private lives".

### **Case law related to protection against double punishment and self-incrimination**

When an offence involves both imprisonment and a fine penalty, the accused is entitled to receive bail as a matter of law. If the accused is found guilty solely of a fine during the trial, this will constitute a case of double jeopardy while he is imprisoned awaiting trial. Furthermore, denying bail would contravene S.403, Cr.P.C, and Art. 13(a) of the Constitution of the Islamic Republic of Pakistan, 1973, which asserts that "no person should be twice disturbed for the same cause." The denial of bail would likewise contravene this clause.<sup>22</sup> One cannot be tried twice for the charge based on the same allegation and evidence in the same transaction.<sup>23</sup> In another instance, the petitioner sought an order directing the Provincial Government to free his brothers. As per Section 3 of the

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<sup>22</sup> 2022 Y L R 185

<sup>23</sup> 2021 P T D 699

Punjab Maintenance of Public Order Ordinance, 1960, the competent authority is required to possess reasonable suspicion that, within its territorial jurisdiction, the individual subject to the detention order has acted, is currently acting, or is likely to act in a manner that endangers public safety or disrupts public order. Nevertheless, a review of the relevant record revealed that the allegations. In addition to the District Police Officer's recommendations, there was a lack of evidence against the detainees indicating that they were acting or were about to act in a manner that would threaten public safety or disrupt public order. The report from the District Police Officer lacked adequate information to support the invocation of subsection (1) of S. 3 of the Punjab Maintenance of Public Order Ordinance, 1960, aside from mere apprehensions. Concerns lacking substantial justification or proof cannot form the basis for limiting a citizen's constitutionally guaranteed rights, liberty, or freedom. Concerning the filing of the First Information Report (FIR) against the detainees, it is important to note that the allegations presented in this case must be substantiated during the trial following their establishment in the investigation. Detainees would undergo distinct legal proceedings as mandated by law; however, in this context, the issuance of the disputed detention orders could not be justified on its own, and Article 13(a) of the Constitution could be effectively referenced in this matter. Under specific circumstances, the constitutional petition received approval, leading to the order for the release of the detainees.<sup>24</sup> The petitioners sought the dismissal of the respondent's complaint submitted to the Ombudsperson

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<sup>24</sup> 2023 Y L R 2525

for Protection against Harassment of Women at Work, pointing out that they were already facing a formal complaint on similar allegations. Reliability---The Protection against Harassment of Women in the Workplace Act, 2010, Section 4(4), allows the Ombudsperson to impose either minor or significant penalties when addressing a complaint. If the charges brought by the petitioners are substantiated in the ongoing trial before the Additional Sessions Judge, the Trial Court possesses the authority to declare them guilty of offenses under sections 376, 509, and 511 of the P.P.C. The potential sentences for the petitioners from the criminal court varied from the lesser or greater penalties that the Ombudsperson might impose if the charges brought against them by the respondent were established as valid. Moreover, S. 12 of the Protection against Harassment of Women at the Workplace Act, 2010 clearly indicates that the provisions of the Act will apply "in addition to" and not in conflict with any other laws that are currently in effect. The constitutional petition was rejected. When an offence involves both a jail sentence and a fine, the accused possesses a legal right to obtain bail. If the accused is found guilty of only a fine at trial, this constitutes a case of double jeopardy. In similar situations, denying bail would also contravene Article 13(a) of the Constitution of Pakistan, 1973, which supports Section 403 of the Criminal Procedure Code, along with the principle that no one should be troubled twice for the same cause.<sup>25</sup> After the trial court acquitted the respondents, the complainant submitted a private complaint against them. This was rejected by the contested order. The respondents

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<sup>25</sup> 2022 Y L R 185

were tried in the FIR case following the registration of the FIR, and the identical allegations were presented in the private complaint. Consequently, Section 403 of the Criminal Procedure Code and Article 13 of the Constitution were cited. A court of competent jurisdiction had previously handled the issue in a registered case involving the identical parties, leading the magistrate to appropriately dismiss the private complaint. The constitutional petition was rejected.<sup>26</sup> The accused, along with the other offenders, took the victim's life by discharging firearms to achieve their common objective. The trial court had previously exonerated the accused through a compromise. This indicated that no individual could face trial again for the same offense. The admission of guilt by the accused necessitated further investigation. In specific circumstances, the accused received post-arrest bail.<sup>27</sup>

### **Conclusion**

After a valid acquittal or conviction, a procedural defense known as double jeopardy forbids a person from being tried again for the same (or comparable) charges. Defendants can enter a peremptory plea of *autrefois acquit* or *autrefois convict* in common law countries; the phrase *autrefois* means "in the past." This shows that the defendant has previously undergone a trial and was acquitted of the same offense, meaning they cannot face trial again due to the principle of double jeopardy. The prohibition against double jeopardy is widely recognized for safeguarding various principles within the criminal justice system. It serves multiple purposes, such as

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<sup>26</sup> 2020 M L D 1651

<sup>27</sup> 2020 Y L R Note 31

preventing the state from acting capriciously against its subjects and ensuring the conclusion of legal proceedings, all of which are essential for safeguarding the human rights of the accused. This concept has its roots in history, persisting over the centuries for numerous legitimate reasons rather than mere chance. Consequently, the overall integrity of the criminal justice system relies on the existence of such a norm. The legal doctrine of self-incrimination states that an individual cannot be compelled to reveal facts or provide testimony against themselves in a criminal prosecution. The individual facing charges is protected from self-incrimination under Article 13(B) of the constitution, which also ensures his right to remain silent regarding any matter that may be used to his detriment. Law enforcement can take a person into custody through the legal process of arrest. It is important to keep in mind that the choice to remain silent and avoid self-incrimination does not protect individuals from being detained or facing legal charges. The individual cannot be compelled to reveal information that would directly incriminate them.



## **Critical Analysis of the Right to Life, Human Dignity, and the Right to Education**

Waqar Azim<sup>28</sup>

Dr. Mirza Shahid Rizwan Baig<sup>29</sup>

**Abstract;** In 1973, a significant milestone was attained in Pakistan's quest for the establishment of the rule of law, civil rights, and democracy. At that time, a constituent assembly consisting of legislators from various party affiliations came together to draft a new Constitution. Although not flawless, the document was being composed for the third time, almost 25 years after gaining independence, and following the loss of half the nation in a civil war. Consequently, it was a result of accumulated knowledge and expertise. Part II of Chapter 1 of the Pakistani constitution incorporated the fundamental rights of its inhabitants, drawing upon valuable insights gained from historical experiences. The rights, which are ensured for all citizens of Pakistan, must be upheld by all government officials and can be enforced through the judicial system. While many of these rights have been adopted from previous constitutions, they are considered to be the fundamental principles of the Constitution. Therefore, despite its shortcomings, this Constitution has endured and succeeded over time due to its core foundation of the rights and liberties of the citizens.

**Keywords:** *Constitution of Pakistan, Fundamental rights, Superior Court Decision, Human Dignity.*

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**Introduction;** The fundamental principles of constitutional law establish the connection between

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<sup>28</sup> Advocate High Court

<sup>29</sup> Assistant Professor College of Law, GCUF. [Shahidrizwan@gcuf.edu.pk](mailto:Shahidrizwan@gcuf.edu.pk)

various state entities as well as the relationship between the state and its citizens.<sup>30</sup> Pakistan's existence as a sovereign nation has led to the erosion of these constitutional principles.<sup>31</sup> A dominant executive further strengthens the perception that the legislature just approves executive activities without question and that the autonomy of the court is repeatedly undermined. The existence of a parliamentary system in Pakistan implies that a complete and distinct division of power is impossible. The effective operation of such a system depends on and appeals to the fundamental and guiding principles of the constitution on which it is based. The essence of these constitutional principles is well recognized but has been disregarded due to the dominance of power politics in the country's political arena. The fundamental law of the land encompasses both the literal wording and the underlying principles of the legislation. Ignoring the essence of a text and solely focusing on its literal meaning is as nonsensical as envisioning a living being without a soul.<sup>32</sup>

There are numerous reasons why Pakistan's political culture prioritizes the literal interpretation of the law over its underlying principles. Pakistan's societal development has progressed in a way that would have remained consistent even in the absence of a formal written constitution. What, then, is the objective of possessing codified legislation? A law prohibiting corruption entails

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<sup>30</sup> Smith, John. *Constitutional Law and Society: The Role of Legal Principles in Shaping Political Culture*. New York: Oxford University Press, 2007.

<sup>31</sup> Ahmed, Zafar. "Pakistan's Constitutional History: 1947-1999." In *Pakistan: Nationalism without a Nation?*, edited by Christophe Jaffrelot, 43-67. London: Zed Books, 2002.

<sup>32</sup> Nawaz, Ali. "Literal Interpretation vs. Essence of Laws: A Critical Analysis." *Journal of Legal Studies*, vol. 28, no. 4, 2018, pp. 412-429.

more than just punishing those involved in corrupt activities, although it is necessary to do so. Corruption is considered a serious offense and significant wrongdoing that is subject to legal punishment.<sup>33</sup> Therefore, individuals should refrain from engaging in it under all circumstances. This embodies the genuine essence of any legislation pertaining to corruption within the nation.<sup>34</sup> The incorporation of fundamental rights into the Constitution and the state's endorsement of numerous human rights treaties and conventions serve a purpose beyond mere cosmetic enhancement of the Constitution and the desire to appear civilized in the global arena.<sup>35</sup> The act of including and officially approving signifies our sincere belief in the inherent and essential rights of individuals and our unwavering dedication to safeguarding them.<sup>36</sup> This encapsulates the fundamental essence of such laws, treaties, and conventions. How often have we seen the legislative, judiciary, or executive affirm and give priority to such rights? In recent times, a single act of unjust homicide in France served as the catalyst for widespread protests throughout the country. Every day in Pakistan, we flagrantly disregard the basic rights of our

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<sup>33</sup> Rashid, Aisha. "Corruption and Legal Measures in Pakistan." *International Journal of Comparative Law*, vol. 19, no. 2, 2016, pp. 201-218.

<sup>34</sup> Khan, Muhammad. "Power Politics and Constitutional Decay in Pakistan." *Journal of Political Science and International Relations*, vol. 39, no. 3, 2018, pp. 278-295.

<sup>35</sup> Gul, Asma. "The Incorporation of Fundamental Rights in Pakistan's Constitution: A Comparative Analysis." *Pakistan Law Review*, vol. 34, no. 4, 2020, pp. 432-449.

<sup>36</sup> Akhtar, Imran. "Human Rights in Pakistan: Historical Context and Contemporary Challenges." *Journal of Human Rights*, vol. 18, no. 3, 2019, pp. 301-320.

citizens, choosing to ignore the situation. In such cases, the absence of the essence of the law is evident once again.<sup>37</sup> Quaid-i-Azam Mohammad Ali Jinnah placed great emphasis on the essence of constitutional ideas.<sup>38</sup> Throughout his arduous campaign for the creation of Pakistan, he advocated for the adherence to constitutional norms that govern the interactions between various religious and ethnic communities, as well as with the British authorities.<sup>39</sup> Throughout his political career, the fundamental concept of whether a law was just or unjust guided his support or opposition. There is a lot we can learn from him in this aspect, as well as in many other ways. Emphasizing the essence of constitutional ideas could resolve ongoing and repetitive political instability, guarantee court autonomy, and safeguard individual rights.

### **Enforcement of Fundamental Rights**

The rights guaranteed in the constitution were always enforceable, as long as the law didn't go too far. For instance, the bar association's implementation of certain requirements for candidates seeking various positions did not violate any fundamental rights.<sup>40</sup> All person's basic rights were safeguarded in the constitution against abuses of power by the executive, judicial, and legislative branches of government at all levels.<sup>41</sup> Article 8 of the Constitution guarantees fundamental rights. These

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<sup>37</sup> Javed, Saima. "Violation of Human Rights in Pakistan: A Case Study." *Journal of South Asian Studies*, vol. 42, no. 4, 2018, pp. 423-440.

<sup>38</sup> Khalid, Ayesha. "Jinnah's Vision of Constitutionalism: Lessons for Modern Pakistan." *Journal of Asian Legal Studies*, vol. 24, no. 1, 2017, pp. 56-73.

<sup>39</sup> Mahmood, Saba. "Constitutional Norms and Ethnic Relations in Pakistan." *Ethnic Studies Review*, vol. 33, no. 2, 2016, pp. 189-206.

<sup>40</sup> PLD 2014 Lahore 324

<sup>41</sup> PLD 2016 Peshawar 57

constitutional rights go beyond the mere declarations of specific ideas that form the basis of the constitution. The superiority of a fundamental right over conventional state-made legislation distinguishes it. Fundamental rights are beyond the scope of legislative and executive activities. Through specific constitutional provisions, nations' deliberate wisdom establishes a permanent and supreme law that governs the transient will of the majority. Article 8 of the constitution safeguards the sanctity of basic rights by prohibiting the state, including the legislature, from enacting any legislation that restricts or eliminates any fundamental right. Legislation that significantly impacts or violates fundamental rights is invalid. Legislative or executive actions cannot abridge fundamental rights.<sup>42</sup>

#### **Inconsistency between two Provisions of Constitution**

There is a discrepancy between two clauses of the constitution. The resolution of such contradictions can only be achieved via the intervention of the Parliament.<sup>43</sup>

We always regard the Constitution, as a fundamental document, as superior to other statutes. The parliament or any other competent authority can declare a law unconstitutional to the extent of its conflict or inconsistency with the Constitution.<sup>44</sup>

#### **Liberty of Citizens**

If the right to life, as guaranteed by Article 9 of the Constitution, and other related human rights had remained hidden and unknown, we would not have fully appreciated their significance. Nevertheless, during the era of constitutional supremacy, the Pakistan Supreme Court and the four High Courts broadened the restricted use of the

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<sup>42</sup> 2015 CLC 1723

<sup>43</sup> PLD 2014 Peshawar

<sup>44</sup> PLD 2006 SC 697

term 'life'. The Courts, rather than seeing it just as a vegetative existence, implicitly identified and acknowledged many rights within the realm of the right to life, thus augmenting its overall nature. The Courts expanded the scope of the right to life to include all associated rights, whether explicit or implicit, pertaining to many aspects of human life quality. The study specifically highlights that Pakistan's courts were not hesitant to interpret the constitutional provisions on the right to life, particularly in terms of its quality, in a broad and generous manner. The study also highlights the significant role of the courts in safeguarding underprivileged members of society from corrupt and ineffective public officials.<sup>45</sup>

This role contributes to bringing about social, economic, and legal reforms, addressing the various problems associated with poor governance prevalent in such systems. The current article also emphasizes the peripheral components of the right to life, which essentially improve its quality. These features have arisen due to judicial activism but do not include environmental rights, which need a distinct and independent examination. Ultimately, the recognition of all rights did not occur simultaneously. Initially, the government granted the right to life to a small number of individuals but later revoked this privilege. On the other hand, certain penumbra rights initially faced rejection before receiving recognition. The constitution ensures the protection and assurance of the liberty of every citizen, as stated in Articles 4, 9, 10, and 15. The state must diligently protect the freedom of every individual, regardless of their location. The Constitution

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<sup>45</sup> PLD 2010 Lahore 468

ensures protection against the infringement of the basic rights of all individuals to life and liberty by any government power or individual via unlawful or malicious actions of omission or conduct. The constitution of the country does not allow any action that deprives or restricts the liberty of a citizen without sufficient cause. Any such action taken by the government or its officials can be reviewed by the high court under Article 199 of the constitution.

The right to life is a basic entitlement guaranteed by Article 9 of the constitution, which encompasses the right to breathe clean air in order to fully enjoy one's life. If any factor poses a threat or diminishes the overall standard of living in violation of regulations, an individual has the right to seek relief under Article 199 of the constitution to address and eliminate that specific factor. Polluted air is one such factor since it is harmful to the overall quality of life.<sup>46</sup> The right to preservation of the environment has originated from the rights to life, liberty, and dignity as stated in Article 9 and 14 of the constitution. The environment, including both natural and constructed elements, served as the overarching habitat that was essential for survival and had a crucial role in determining the quality of life. The protection of the environment is an inherent and essential right, maybe more basic than other rights. The PLD 2015 Lahore case number is 522. The flood damage in the nation resulted in a violation of the rights of the victims, as stipulated by Article 14 of the constitution, and undermined their dignity. The government's primary role was to save the lives and possessions of its citizens and alleviate the hardships they

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<sup>46</sup> 2015 YLR 2349

endured as a result of the flood. Despite the natural disaster, citizens in all four provinces experienced severe suffering, with their lives and property at risk. However, the executives cannot be exempted from their responsibility to ensure the fundamental rights of life and liberty for the citizens. This is supported by the findings and recommendations of the commission established by the supreme court. The government was instructed to promptly pay the outstanding balance, which amounted to around eighty thousand per family, for the reconstruction and restoration of their homes.<sup>47</sup>

The lives of fishermen have been impacted by the deterioration of Manchar Lake, leading many of them to relocate. The government's inability to safeguard the lake, the livelihoods of fishermen, the lake's aesthetic appeal, and the lands belonging to the Abadgars has been evident. The Chairman of the Water and Power Development Authority informed the Supreme Court that both the provincial and federal governments are making significant efforts to ensure the timely completion of the project. This is crucial due to the importance of Manchar lake and the need to safeguard the lives, property, and livelihoods of its long-standing inhabitants. In response to the Supreme Court's inquiry, the chairman affirmed that Manchar lake also served as a source of revenue for fisherman. Significant measures had already been taken and it was acknowledged that the basic rights of the residents were being safeguarded, as guaranteed by the constitution. After the concerned authorities took necessary steps, there was no need for any further proceedings. The Supreme Court has instructed the Chairman of the Water and Power

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<sup>47</sup> PLD 2011 SC 854



Development Authority and the Provincial Government to provide a joint report on the status of the issue on a quarterly basis. The suo motu matter was resolved.<sup>48</sup>

### **Ensuring Access to Legal Assistance**

The constitutional courts of Pakistan have acknowledged the right to legal assistance as a basic right protected by Article 9 of the Constitution of Pakistan. Article 10(1) of the Constitution states that individuals who are arrested must be promptly notified of the reasons for their arrest and must not be denied the right to seek legal counsel and be represented by a lawyer of their choosing. However, it has also been acknowledged under Article 9. Article 10 originally grants a negative right, but it has since been expanded to include a positive right. This implies that the state is not only prohibited from denying access to legal representation but is also obligated to offer the services of a legal practitioner at its own cost. The enhanced protection is the result of the judiciary actively interpreting and applying the law. In this scenario, the appellants were deprived of a just opportunity to protect themselves due to the insufficient time granted to the defense counsels, who were appointed by the state and therefore limited in resources, to adequately prepare the defense. This resulted in significant harm to the appellants, who were hastily convicted of a capital offense. The Lahore High Court invalidated the trial, deeming it a breach of the right to life. Additionally, it was determined that the "right to counsel of the accused's choosing" is an essential condition for the safeguarding of Articles 9 and 4 of the Constitution. A fair trial cannot be imagined without the accused being represented by a lawyer of their choosing or by a lawyer

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<sup>48</sup> 2011 SCMR 73

provided by the state at no cost to the accused. Consequently, conducting a trial and legal processes without legal representation for the accused would be in violation of Article 9 of the Constitution.

### **Minorities and Person with Disabilities**

In accordance with the principles enshrined in Pakistan's constitution, which guarantee "equality of status, of opportunity," each and every citizen has the same inherent value as another and has the same opportunities to advance in life. Possibilities free from prejudice stemming from factors like as religion, ethnicity, gender, national origin, etc. Without a doubt, the ability to work and earn a living wage is an essential component of status and opportunity equality. Fundamental rights implement the values enshrined in the Constitution. Article 9 affirms the entitlement of all individuals to life and liberty, subject to certain limitations. The term "life" encompasses all the qualities of a meaningful and healthy existence, whereas the right to "liberty" grants an individual the autonomy, freedom, and selection to plan his or her life as they see fit. The Constitution protects every individual's life and liberty without discrimination based on religion, sex, or creed. Article 14 upholds the inviolability of human dignity, while Article 18 guarantees every individual the right to pursue a lawful profession or occupation. The Constitution additionally protects minority groups under Articles 20, 22, 26, and 27.

The fundamental rights crown the right to dignity like a resplendent gem. This is due to the fact that the right to dignity is absolute, non-negotiable, and not governed by any legislation. Consequently, minorities and persons with disabilities enjoy the same right to dignity as the majority of Muslims and individuals with greater capabilities. As there are no exceptions in the Constitution, these

fundamental rights are equally applicable to minorities and persons with disabilities in Pakistan, just as they are to all other citizens of the nation. Article 36 of the Constitution's Principles of Policy mandates the state to safeguard the lawful rights and interests of minority groups, including their adequate representation in federal and provincial services. Article 37(a) mandates the state to give priority to the economic and educational advancement of disadvantaged groups. Article 38(b) of the Constitution guarantees employment facilities and a sufficient means of subsistence to all citizens, including minorities and persons with disabilities, within the country's resource limits. Article 38(d) mandates the state to provide the basic necessities of life to all citizens, including those with disabilities, who are unable to earn a livelihood due to illness or infirmity. Examining the aforementioned constitutional framework reveals that the Constitution empowers individuals with disabilities by providing supplementary safeguards and mandating reasonable accommodations to equalize them with fully abled individuals. Similarly, the Constitution guarantees minority groups the same protection against all forms of discrimination as full citizens of Pakistan. Hence, in addition to treating minorities and persons with disabilities as equal citizens of Pakistan entitled to equal protection and rights, the Constitution provides them with additional safeguards.

### **Right to Life and Education**

The right to education is a basic right since it has a direct impact on the quality of life, which is closely connected to other fundamental rights guaranteed by Article 4 and 9 of the constitution. The quality of education has a significant role in fostering awareness of rights and obligations, promoting civic consciousness in society, enabling

individuals to enjoy their fundamental rights as protected by the constitution, and empowering people via legal means. True freedom can only be achieved via adequate education. (2012 SCMR 6). The purpose of the sports complex was to provide athletes access to sport facilities and training in order to enhance their ability to compete. The sports complex's potential was not being fully realized due to underutilization. A valuable resource was being squandered, and individuals were being denied the opportunity to develop their athletic abilities and potential. The land of the sports facility has been illegally occupied and is being improperly used. Land that is leased by the Government for a public purpose cannot be considered an unlawful intrusion. The right to life extends beyond simple existence and encompasses the provision of a healthy environment for citizens. A sports facility was established using public funds, and it is important to ensure that this investment is not squandered. It is important for athletes of all genders and ages to have access to facilities that allow them to develop their athletic abilities. The right to education for every child until the age of sixteen was a basic entitlement.

Education should not be confined only to the acquisition of academic information. The right to education includes the provision of sports facilities as well. The government has an obligation to provide students with athletic facilities. The provision of sport and leisure facilities would foster the development of more robust, healthier, more content, and safer communities. Investing in sports and leisure facilities would also result in economic advantages. The sports facility must not succumb to apathy and neglect. Individuals were granted the right to get the whole advantage of the Sports complex, which was

funded by their taxes. The constitutional petition was resolved by giving specific instructions.<sup>49</sup>

### **Federal Government and its Functionaries**

The inclusion of the term "life" in the constitution was very important since it included all aspects of human existence and included provisions for safeguarding and defending it. The state has a responsibility to assist in the enforcement and protection of the fundamental right to life, as guaranteed by Article 9 of the constitution. Public functionaries, such as the police, Ministry of Interior, and Cabinet Division, should actively support and facilitate the enforcement of these constitutional provisions. It is crucial that these provisions are upheld and not compromised by any individual or institution, whether through malicious intent or careless behavior.<sup>50</sup> The right to life encompasses the right to a legitimate and significant means of earning a living.<sup>51</sup> The right to life encompasses the right to earn a living, the right to own and manage property, and the right to obtain suitable housing. These rights are not subject to the whims of those in power and encompass all the elements that contribute to a person's meaningful, fulfilling, and worthwhile existence. The right to life encompasses the entitlement to access basic necessities such as food, water, a suitable environment, education, medical treatment, and shelter.

Basic rights cannot be forcibly taken away or voluntarily relinquished as a result of any agreement.<sup>52</sup> The right to enjoy personal rights and be safeguarded against any infringement upon such rights, as well as the freedom and

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<sup>49</sup> 2015 YLR 58

<sup>50</sup> 2014 CLC 451 Islamabad

<sup>51</sup> 2010 PLC 961

<sup>52</sup> PLD 2011 SC 619

liberty associated with them, is included within the right to life. The term "life" as used in the constitution should not be interpreted narrowly, but rather should be given a broader definition that encompasses not only the preservation of life, but also the ability to fully enjoy it.<sup>53</sup> Human rights lawsuit involving Articles 9 and 184(3) of the law pertaining to the arts. Right to life The Supreme Court is exercising its jurisdiction under Article 184(3) of the Constitution to review media clippings related to the unprecedented load-shedding in the nation and the spike in power rates. Right to life Power outages for electricity and gas supply disruptions The provision of electricity is guaranteed as a fundamental right to life, as stated in Article 9 of the Constitution. Any country without energy was a country paralyzed. Pakistan was constantly faced with massive load-shedding, particularly of electricity in the summer season and of gas in the winter season Thriving industries of the country were presently reduced to a state of non-functionality Everyday life of the common man was hampered by massive load-shedding Economic sector could not be expected to run without the provision of energy Present matter was thus one of public importance concerning the fundamental rights of the people Supreme Court had jurisdiction to adjudicate on the provision of energy to the people Human rights case was held to be maintainable accordingly.<sup>54</sup>

### **Duty of Courts in Protection of Rights**

The courts are responsible for ensuring the protection of the basic rights of all citizens and safeguarding their life and liberty from any unlawful, unauthorized, or malicious

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<sup>53</sup> PLD 2010 Karachi 119

<sup>54</sup> 2014 SCMR 220

actions committed by an authority or individual. When the police's actions are deemed to be mala fide, the Court should not hesitate to intervene and provide remedy to the citizen, especially when their liberty is at stake.<sup>55</sup> Article 37(d) of the Constitution of Pakistan mandates the state to ensure affordable and efficient justice. Hence, the state bears the principal obligation of ensuring cost-effective and timely justice. Article 7 defines "the state" as comprising the Federal and Provincial Governments, Provincial Assemblies, and local and other governmental bodies authorized by legislation to levie taxes. In the event of a breach of this mandate, the Constitution obligates these bodies and authorities to establish and maintain institutions that ensure public civic and social justice, along with a judicial system that the public can swiftly and affordably access for redress. There is a widespread belief that the judiciary bears the primary responsibility for dispensing justice to the populace via the judicial system, in addition to serving as the guardian and advocate of the Constitution. However, in the absence of complete backing from the legislature, and particularly the executive branch, the judiciary cannot fulfill its duty of delivering affordable and timely justice to the public.

### **Life with Dignity**

Every citizen, regardless of their standing, is legally obligated to be loyal to the State, the Constitution, and the law. Furthermore, the Constitution mandates that citizens maintain a respected position within the international community. The act of endangering the dignity of individuals or the collective, with regards to the independence, sovereignty, and security of their nation,

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<sup>55</sup> 2009 SCMR 141

poses a significant issue about their basic rights.<sup>56</sup> Human dignity encompasses the entitlement to advocate for a political system that upholds democracy, where the rule of law is paramount and no one is exempt from its authority. The political system, not elected by the people, was oppressive, despotic, and tyrannical, while also contradicting self-esteem, liberty, and human dignity.<sup>57</sup> The concept of sanctity and inviolability of human dignity. The "Surah Bani Israeel" of the Holy Quran explicitly affirms and supports the concept of human dignity. According to this Islamic Injunction, every individual born in this world, regardless of their color, caste, or creed, is inherently dignified. This dignity is bestowed upon them by Allah Almighty and cannot be taken away by any human being. It is a fundamental right that does not require approval from human legislation. The foundation of social interaction is built upon this principle, and it is the responsibility of those in positions of power to uphold the concept of human dignity. Enforcing a Divine Injunction is equivalent to establishing such a right.<sup>58</sup> Articles 4, 9, and 14 The right of persons to be treated in conformity with the law, Personal security, The inviolability of human dignity. Freedom from restraint Ensuring the preservation of human dignity and adherence to legal protections. Among the several legal rights, the right to liberty has a superior position and is expected to be respected by everyone.

Courts serve as protectors of the freedoms and rights of the population. Every individual, even the most heinous offender in society, has the right to legal protections, and

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<sup>56</sup> PLD 2012 SC 292

<sup>57</sup> PLD 2014 Lahore 221

<sup>58</sup> 2010 P Cr. L J 1824



these rights cannot be revoked under any circumstances. Article 4 of the Constitution ensures that individuals are treated in accordance with the law and are entitled to legal protection. It explicitly states that no action that harms a person's life, freedom, physical well-being, reputation, or property can be taken unless it is authorized by the law. Article 14 of the Constitution, among other things, protects the inherent worth of individuals and upholds the right to privacy in one's home and workplace.

Within this particular framework, an assurance has been given that no individual would be subjected to torture or degradation in order to get evidence or coerce them into revealing information or confessing. Human dignity is a highly valued and calm condition in a person's social and personal existence. It involves receiving respectful treatment and avoiding any kind of harsh or demeaning behavior, regardless of whether it occurs in public or private settings. When an individual experiences hostility, mockery, disrespect, or scorn, their dignity is undermined. Every person has an intrinsic sense of worthiness, which is granted by a divine entity as an inviolable entitlement that necessitates safeguarding and advancement by the governing body and its representatives. It is the fundamental basis of society, dating back to the beginning of human civilization, and is the driving force and objective underlying all social organizations. Therefore, the notion of human dignity or personhood is the root of all social institutions, governments, states, laws, human rights, and respect for individuals. Any endeavor to diminish the inherent worth of an individual likewise

diminishes the inherent worth of humanity and the foundation upon which a typical society is built.<sup>59</sup>

### **NAB Cases and Human Dignity**

Article 14 of the Constitution is the only assurance that is not bound by legislation and is an absolute guarantee. When a citizen's basic right is infringed and they file a complaint, the Court has the duty to intervene and examine the constitutional authority. The Court will then issue an order that is fair, lawful, and equitable. The right to life extends beyond simple existence and encompasses a purposeful existence that may be experienced with dignity. It is prohibited for any anyone, regardless of their role, to criticize, slander, or shame another individual, resulting in the reduction, decline, and degradation of their dignity, respect, reputation, and the overall worth of life. This applies specifically to the officials of the NAB, who have been given the important responsibility of investigating financial crimes. The NAB victim has been subjected to treatment that is inhumane, which is a violation of the Convention Against Torture and other forms of cruel, inhuman, or degrading treatment or punishment that has been ratified by the Government of Pakistan. Additionally, this treatment also goes against Article 14 of the Constitution and the repeated directives issued by the superior courts of the country. (2023 P Cr. L J 78)

### **Right to Monetary Compensation**

The Pakistani courts imposed financial obligations on those who violated the rights protected by Article 9 of the Constitution. They levied damages and instructed authorities to pursue breaches of Article 9 of the

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<sup>59</sup> 2024 P Cr. L J 190

Constitution in several instances. The Sindh High Court stated that it is within their power to provide monetary compensation to a victim whose fundamental rights have been violated. This compensation serves to make the court's decision effective and meaningful. The court directed that the compensation should be paid to the victim, and emphasized that this compensation is a duty of the state and its officers, separate from any private rights that a citizen may pursue through regular legal proceedings. The Sindh High Court reinforced the idea of financial compensation when a government driver, via his carelessness, caused a fatality in a traffic accident. The Court determined that the State has an obligation, as outlined in Article 9, to refrain from taking the life of any individual unless authorized by law. Consequently, both the government and the driver were collectively and individually responsible for paying the compensation amount of rupees. 37,90,000 to the plaintiff. The Lahore High Court resolved the ongoing problem of pollution from traffic caused by vehicle emissions by stating that individuals have the right to seek compensation if their property, health, or right of easement is negatively impacted by the actions of others. This right is protected by both common law and constitutional law, with constitutional rights being superior to legal rights granted by municipal or common law.

If an area is impacted by a flood, according to Article 9, the government was obligated to construct a barrier but did not fulfill this duty. Hence, the impacted inhabitants were eligible for reparation and restoration from the government in the event of any harm, loss, or devastation resulting from floods or similar incidents. The Provincial Government was legally obligated to offer compensation to the heirs of those who were murdered in an act of

terrorism, as well as support for the relatives of those individuals. In a pension lawsuit, the petitioner was granted additional remuneration in addition to their pension. Case law clearly demonstrates that in Pakistan, monetary compensation, which is often a responsibility for wrongful acts, is granted in circumstances when the right to life, as provided by Article 9 of the Constitution, has been violated.

### **Right to Education**

There was no guarantee of a "right to education" in Pakistan's constitutional document. However, the document only codified Principles of Policy, which the legislative or executive branch can only implement based on available resources and cannot enforce in court. Abolish illiteracy and provide free and compulsory education within the shortest possible time; make technical and professional education generally available; and ensure that higher education is equally accessible to all on the basis of merit. The first three clauses of Article 37 of the Constitution of Pakistan, namely (a), (b), and (c), imposed these obligations on the state. Judicial activism has long held that Article 9 of the Constitution, which guarantees a person the right to life, implicitly includes the right to an education. The Lahore High Court's decision in *Headmaster v. Chairman* granted the state a writ of possession of educational resources to an educational institution.

The court reasoned that the term "life" as used in Article 9 of the Constitution encompasses all the rights that are essential to a dignified and comfortable existence, including the right to receive an education. Similarly, the Lahore High Court reiterated that the right to education is a fundamental right, interpreting Article 9 of the Constitution to include the right to education as a right to

life. In *Sikandar Hayat Khan*, the Peshawar High Court overturned a decision that had placed the petitioners' names on the exit control list due to their relatives' involvement in cases under the Accountability Courts. The petitioners want to continue their studies overseas, and the court granted their request under Article 9 and other constitutional requirements, among other things, so that they may do so. This was also true in another instance. The Lahore High Court ruled that the right to study is fundamentally equivalent to the right to life while considering the matter of discriminatory fee rates in medical institutions.

A breach of Article 9 of the Constitution would occur if there was an arbitrary imbalance in the tuition schedule of medical institutions. Once again, the Lahore High Court noted that, in relation to the tuition fee for self-financing medical college students, the right to education could be derived from the right to life, expanding its scope even though it was not explicitly listed as a fundamental right in the Constitution. Even after accounting for this exception, the Court did not find that the disparity in tuition fees violated equality before the law test. In his case, the Sindh High Court addressed a violation of *Imdad Hussain's* right to education under Article 9, requiring him to present proof of payment for a five-year tuition fee upon admission. The Court reaffirmed the right to education as a basic human right, asserting that no legislative act, rule, or executive decree can curtail a candidate's right to an education.

It went on to say that the phrase "life" in Article 9 of the Constitution encompasses all the rights that people need to live a dignified existence, not only those that pertain to plants and animals. The Constitution deemed the freedom to travel to any location on the globe, including

educational and commercial hubs, essential to the full realization of the following rights: the right to an education, the right to a means of subsistence, and the ability to engage in a particular profession. The Supreme Court expanded its scope to include the right to education. The Supreme Court arrived at this conclusion because of a link between quality of life and other fundamentals guaranteed under Articles 4 and 9 of the Constitution. The author asserts that proper education is a prerequisite for real freedom. Everyone, regardless of gender, including eunuchs, has the right to an education. The court explicitly stated that denying them access to an education was not acceptable.

Another example highlights the need for governments to enhance their funding for education. According to the teachings of the Holy Prophet (P.B.U.H.) and the Qur'an, it is mandatory for Muslims (male and female) to acquire knowledge as part of their right to life. The Lahore High Court emphasized Islam's importance for societal advancement and individual flourishing. The addition of sporting facilities was a later expansion. The Court deemed a policy to improve educational quality reasonable, ensuring it did not violate anyone's right to life. Article 25-A of the Constitution mandates that all children, as a basic human right, must attend public elementary and secondary schools by a specified age. This change was driven by a growing consensus on the significance of this issue.

Article 25A of the Constitution establishes the right to education as a fundamental right. Said provision makes education accessible to all children between the ages of 5 and 16, but it is important to note that the state is responsible for providing educational facilities from primary to higher levels. It is widely acknowledged that

human resource development is a crucial factor for success and to keep up with the modern world, the youth of the nation must have the skills for self-employability. Therefore, the government should establish institutes or universities for research, technical training, professional development and special studies. Higher education and industrialization are core functions of the state.<sup>60</sup>

Education may be classified into two categories: formal and informal. Formal education is delivered via educational institutions such as schools and colleges, which are established in both the public and private sectors. Informal education refers to any type of education that occurs outside of the traditional school system. It encompasses several types of alternative education, such as non-schooling or homeschooling. As the Constitution has defined the right to education as a basic right, the Courts are obligated to safeguard this right. The right to education is considered a basic right since it has a direct impact on the overall quality of life. This right is closely connected to other fundamental rights that are protected by Articles 4 and 9 of the Constitution. The quality of education has a significant role in fostering awareness of rights and obligations, promoting civic consciousness in society, ensuring the enjoyment of Fundamental Rights provided by the Constitution, and empowering individuals legally. True freedom may only be attained by those who have received a comprehensive education.<sup>61</sup> Over the past twenty years, retaliation and corruption have permeated the political culture of Pakistan. Successive governments enacted legislative measures in response to the ardent

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<sup>60</sup> 2023 P L C (C.S.) 866

<sup>61</sup> 2023 P L C (C.S.) 1526

public demand for the accountability of crooked politicians, administrators, industrialists, and feudal landowners. Despite the implementation of institutions, the creation of Special Accountability Courts, and the enforcement of such laws, it appeared that these measures were merely superficial, intended to appease the public and the media. The incumbent administrations' incompetence or political motivations effectively exploited these laws, causing harm to innocent or irresponsible individuals. Once again, within that context, the victims looked to the judiciary as their only ray of hope. In the majority of cases where petitioners challenged restrictions on travel abroad under Article 9 of the Constitution, the courts appropriately granted relief to them on the grounds of their right to life and other fundamental rights.

### **Conclusion**

Both the federal and provincial governments must declare the fundamental rights of citizens, including the right to nutritious food, the right to proper development (to maximize benefit from education), and the right to education, as an unqualified right and further expand the said rights in light of the provisions of Articles 9, 14, and 25A of the Constitution. We can assert that these articles are unrestricted; the court can interpret them based on the prevailing circumstances. However, the Pakistani constitution embodies all fundamental rights in such a way that a violation of one may lead to an infringement of others. We can ensure the protection of these rights by establishing a separation of power among the institutions. This is because the essence of the constitution is to run the state not only blindly but also smoothly, ensuring prosperity and stability in all spheres for the citizens.



## **A Critical Analysis on the Article 13 of the Constitution of Pakistan 1973**

Fatimah Khan<sup>62</sup>

Dr. Mirza Shahid Rizwan Baig<sup>63</sup>

**Abstract;** Constitution of Islamic Republic of Pakistan, envisages some definite principles to chalk out a set pattern that guarantees the fundamental rights to all public entities. A set of rule in this regard is provided to draw an impression of responsibility as well as ultimate privileges in order to safe guard the constitutional rights and interests of whole nation. This article actually deals with the fundamental human right to enlighten the constitutional rights of persons regarding their safeguard of undue litigation, ambiguities of trial and saving the accused from the concept of double punishment by hinting at the necessary provisions of Article 13 of constitution along with the concept of confessional retract and provisions of section 403 of Criminal Procedure Code. Furthermore, this article contemplates the necessary and integral concepts that are followed by Western societies especially in US to protect the privilege against self-incrimination of a person. Finally, this article will also point the hint on illegal searches and seizure while promoting the concept building in order to inculcate this important scenario of constitutional provisions.

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**Introduction;** Article 13 of constitution of Pakistan architects the definite line in establishing the safe approach against the concept of double jeopardize as well

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<sup>62</sup> Advocate High Court

<sup>63</sup> Assistant Professor College of Law, GCUF. [Shahidrizwan@gcuf.edu.pk](mailto:Shahidrizwan@gcuf.edu.pk)

as it puts bar on the heinousness of self-criminate stance against the accused by calling it an unconditional way for the observance of law and order situation in a society. Furthermore, the concept of confessional statement, that is sometimes wrongfully administered against an accused under section 342(2), can be proved against the fair ends of justice by taking plea of above said article in this context. In support of article 13 as fundamental right of constitution, section 403 of code of criminal procedure 1896 also contemplates the necessary outlook to save a person from repetitive trials of same offence, after once he had been tried. As far as the accused is concerned article 13 protect and preserve his prerogatives of concealment for every information that goes against him. According to the Constitution of UNITED STATES, fifteenth and fourteenth amendments are very obvious in this regard as a core of fundamental human rights and elaborate that it is illegal and unconstitutional to put a person or compel him by use of threat or force, to be his own witness, uttering a statement that goes against him in any situation or at any stage of trial. So, as a mark of test this principle is introduced in 1930s and became a full matter of right in all cases after the land mark judgements that came across the legal framework in 1960s.

### **Concept of Double Jeopardy and Self-Incrimination**

Article 13 of constitution of 1973 of Islamic Republic of Pakistan, Protection against double punishment and self-incrimination:

No person

- (a) Shall be prosecuted or punished for the same offence more than once; or
- (b) Shall, when accused of offence, be compelled to be a witness against himself.

To self-criminate a person, is a defensive mode on the part of accused that can be operated under the light of constitution as article 13 clearly retains all such approaches as unconstitutional. Along with the special reference to code of criminal procedure 1898, section 403, 340, and 342 also play supportive role to highlight this important privilege of accused that is entrusted to him by constitution and law. Section 11 of the code of civil procedure 1908 and section 26 of general clause act are also important probations of the said article. *Mst. Naushad Bibi v. Sher Khan and others*, it was decided that under the expressed provisions of Article 13a of constitution of 1973 and 403 of code of criminal procedure, any court which is competent to try a case can never be lodged the repetitive trials for the same offence, if once he had been held responsible and makeover his punishment of the offence.

Actually the term double jeopardy and the harm of self-incrimination are interlinked to the violation of all human rights related to accused person. In the term of double jeopardy it is envisaged that no one is entitled to double punishment for the same offence that he did once in his life.<sup>64</sup> While the concept as per the article 13b of constitution is that, it is illegal as well as unconstitutional to draw out any statement from a person which proves him guilty. In broader concept of discussion, it is forbade by law to put a person under a fear or immediate threat of his life, liberty, interest or property, that holds him responsible in any criminal litigation and proves him wrong or guilty at any stage of trial against him.<sup>65</sup>

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<sup>64</sup> "Double Jeopardy," September 25, 2024,

<https://dictionary.cambridge.org/dictionary/english/double-jeopardy>

<sup>65</sup> "Double Jeopardy Noun - Definition, Pictures, Pronunciation and Usage Notes | Oxford Advanced American Dictionary at OxfordLearnersDictionaries.com,"

### **Components and Essential Requirements of Article 13 in Compliance to Section 403 of CRPC**

NEMO DEBET BIS VEXARI PRO UNA ET EADEM CAUSA, is actually the basis of the article 13 of constitution that depicts the legality of procedure by specifying the fact that no person be punished second time for the same offence if once he is punished. The important point is that , besides the competence of jurisdiction or the court which is competent to try a case , it is well established fact that no person can be held responsible for the same offence, on the same grounds once , that grounds were decided and case was disposed of.<sup>66</sup> It is important to set that a person against whom a criminal litigation has been initiated once, he is by lawful meaning if confess , the responsibility of prosecution can never be vanished merely on the fact that such person has voluntarily confessed himself as an offender. It is still the responsibility of prosecution to prove the case against the accused.<sup>67</sup> Rule in the line of autrefois acquit, and autrefois convict also resides under the provisions of section 403 of crpc as well as it is mentioned under the legalities of article 13 of constitution.<sup>68</sup>

AUTREFOIS ACQUIT actually means that once an acquittal for an offence during the criminal trial will always be a proved and absolute acquittal that exempt the future responsibilities which put him exonerated and a free

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[https://www.oxfordlearnersdictionaries.com/definition/american\\_english/double-jeopardy](https://www.oxfordlearnersdictionaries.com/definition/american_english/double-jeopardy)

<sup>66</sup> Asanga 2019: 10 and Asanga 2019: 11

<sup>67</sup> Tariq, F. (2020). Double Jeopardy Under Code of Criminal Procedure (Section 403). Available at SSRN 3717020.

<sup>68</sup> Lau, M. (2006). Islam and Fundamental Rights. In *The Role of Islam in the Legal System of Pakistan* (pp. 95-119). Brill Nijhoff.

person, with regard to the punishment of that offence, that had been disposed of, a no new trial on that same points could be initiated. Meanwhile AUTREFOIS CONVICT, can never be hold any accused to undergo the process of litigation again and again. Actually, it is a bar to the double punishment of an offence which have been tried once in the court of competent jurisdiction to try it.<sup>69</sup> But the essential element to seek and obtain the constitutional guarantee of being safe from double punishment is that

1. parties must be same<sup>70</sup>
2. thier cause of action would be same
3. previous litigation as followed by the trial must be identical to the fresh agitation of trial
4. no new ground is taken up
5. trial is previously concluded and the accused is awarded with acquittal or conviction.

But there are certain exceptions to the general rule of double jeopardy;

That if session judge finds the misuse of article 13 or any ambiguity of estoppel regarding.

1. Concealment of facts
2. Withdrawal of private complaint under threat
3. Facts, charge and accused person is not the same
4. Acquittal is taken by fraud or misrepresentation

### **Application of Article 13 and Nexus of it with Miscellaneous Provisions of Law**

Applicability of article 13 of constitution with miscellaneous provisions of various acts, legislation and laws also attracts the absolute pillars of its strong footing

<sup>69</sup> Mahboob Usman, D. F. D., Khan, I. A., Abdullah, K., Sheraz, M. M., Ahmad, G., & Khan, M. H. (2021). Authentication Of Digital Evidence With Reference To USA And Pakistani Courts. *Webology (ISSN: 1735-188X)*, 18(5).

<sup>70</sup> PLJ 2005 Lah 881

in legal framework of Pakistan,<sup>71</sup> such as in NAB ordinance, clause act, specific relief act as well as in limitation law. Section 26 of the clause Act enforces methodology and enforcement of it via procedural footings. It clearly mentions that conviction on the second time is expressed violation of article 13 of the Constitution.<sup>72</sup> Where any accused is undergone the criminal trial and by the Vale of authority under procedural evidence, acquittal of him is made, he, thus can never be tried again and again under the same obligations or offence. As a matter of fact double jeopardy principle could be instituted as the supplement reference especially in the enforcement of section 16A of NAB ordinance, where there is further plea for inquiry and investigation is existed to expose the core matter of any factual context.<sup>73</sup> In the special reference to the just approach of law as a matter of right , it is established principle that no one can be vexed twice, no matter how and what new circumstances of the case have been put forward before the court by learned council.<sup>74</sup> The importance of this principle can be best comprehend by the maxim, i.e, “nemo debet bis vexari.”<sup>75</sup> Alongside the importance of article 13 of constitution, there are several important

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<sup>71</sup> Khan, A. H., Larkana, P., Khan, A. W., Malik, A. R., Niazi, A. S. K., Khan, A. M. R. M. A., ... & Khadim, A. M. Abdul Ghafoor v. Crown, PLD 1949 Lahore 55 Abdul Hameed v. Province of Punjab, 1991 CLC 1666 Abdul Hameed v. Settlement and Rehabilitation Commissioner, 1971 SCMR 711 Abdul Hameed Dogar v. Federation of Pakistan, 2010 SCMR 312.

<sup>72</sup> Bari, M. E., & Dey, P. (2019). The enactment of digital security laws in Bangladesh: No place for dissent. *Geo. Wash. Int'l L. Rev.*, 51, 595.

<sup>73</sup> Lau, M. (2006). Islam and Fundamental Rights. In *The Role of Islam in the Legal System of Pakistan* (pp. 95-119). Brill Nijhoff.

<sup>74</sup> KLR 1993 Cr C 44

<sup>75</sup> National Accountability Bureau Ordinance 1999

conditions that make the compliance of this above said article with the section 403 of CrPc, so following restrictions should be estimated during the enforcement of above said scenarios,

1. accused must be tried before the court of competent jurisdiction
2. the court is competent to try it
3. there must be conviction or acquittal in written via any judgement or order

### **Volunteer Confessions under Article 13 with Special Reference to sec 342(2) of CRPC**

So, in order to clearly evaluate the scope of article 13 it is a clear phenomenon to be understood that if there any violation or ambiguity of procedure exists in law as per the enforceability of provision or procedure, it would be considered null and void. It is the flaw of procedural framework under Pakistan Penal code where the statement of section 342, somehow could be used as in any proceedings, where there is the question of confessional statement of accused is concerned. At the same time conflict arises when any consideration is made by clubbing the above said article with 403, as in this article, it is clear that no one shall be compelled against his own witness. The same is also mentioned under qanoon e shahadat ordinance. But code of criminal procedure although provide the relaxation of voluntary confession, yet permits the court or judge to use that statement of an accused against his own cause also.<sup>76</sup> Nothing in any law time being enforced at any cost permit any fact in issue or relevant by which any person is compelled to present any

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<sup>76</sup> Code of criminal procedure 1898, criminal major act 2022

statement against his own cause or interest in any case.<sup>77</sup> Human right watch, Asia watch, Africa watch , preserved the right of accused on humanitarian grounds to build the establishment of all those necessary rescue which undergoes in favor of accused persons especially in case of their lunacy or insanity, that they should not be compelled to any worst approach of volunteering confession.

### **Test for Voluntary Confession and Bar on the Rule of Self-Incrimination, a Historical Notch**

Voluntary confession test, is a definite set point to evaluate the confession of an accused before any competent court of law. This test was introduced in mid of 1930s at local level in few states to check the validity of a confession. In this test, it was the duty of court to check the coercion or undue influence on the accused before recording of his statement. It was used to check the validity of confession and put a bar on it prior to the trial. In this test it is up to the satisfaction of court to check and confirm the fact that accused is free from all threats, fear and influence before recording his confession and he is not under the compulsion to reveal or disclose any information that may prove him guilty in that trial or at any stage before conclusion of trial. Later on this principle incorporated in fourteenth and fifteenth amendments of constitution. And in landscape of legal perspective same was advised in the case of Marinda, where it is stressed that, before custody and during investigation while accused in police custody, it should be made possible at any cost that accused should not be pressurized to divulge any information under the

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<sup>77</sup> Rules of prisoners under international court of justice articles on right of prisoners



threat which on later stage may prove lethal for him. Court named it public safety and matter of right for everyone to do so.

### **Conclusion**

Article 13 of the Constitution is the absolute provision of law that stipulates the countless footings and tests to check the validity of confessional statement along with the prevalence of double jeopardy in every criminal proceeding before any court of law in Pakistan. It establishes the fundamental right of any person regardless the gender or religion or any obligation to protect his secrecy according to his own ease, otherwise which will prove a guilt against him. No coercion or undue influence can be put to any person in order to reveal any information from him. The other important clause of this Article is about the concept of double punishment. No one shall be vexed twice or whatsoever in the offence which he had been earlier done and also had faced the trial of the same. Section 403 of code of criminal procedure also mends its ways in the compliance of above said article by putting an absolute bar and protects the rights of accused in this regard. Furthermore, the concept double jeopardy and self-crimination must be observed after the presentation of fourteenth and fifteenth amendments of US constitution in mid of 1930s. Test of voluntary confession is an important key while taking in the consideration of the complete mechanism and procedural framework of criminal justice system of Pakistan coupled with Article 13 of constitution of Islamic Republic of Pakistan 1973, section 403, 342(2) of code of criminal procedure, section 26 of general clause act and section 16A of the National accountability bureau ordinance 1999.

## **Protection of Child Rights in Islamic Law: A Comparative Study with International Law**

Dr. Shahid Rizwan Baig<sup>78</sup>

**Abstract;** Child abuse is one of the universal problems that transcend cultural and religious boundaries. The prevention of child abuse is also a global responsibility. This paper, therefore, seeks to look into child abuse prevention approaches in international law and Islamic law, highlighting similarities, differences, areas of possible tension, and potential areas of collaboration. But a comparison clearly shows that the two legal systems are bound by common commitments to the protection of the rights and interests of children, condemning as such practices of infanticide, child labor, sexual exploitation, and physical and emotional abuses. The points of divergence that arose between the two legal frameworks were mostly specific provisions and interpretations, as often these came from differing cultural contexts and legal sources. It highlights a study of the principles regarding the rights and welfare of children in the perspective of Islamic law, provisions for the prevention of abuse of children in the Quran and the Sunnah, and, further. Essentially, the research points to a mutual moral and ethical responsibility in the protection of children from abuse, one that requires unceasing effort, dedication, and cooperation across cultures and legal traditions in creating a more just and merciful world for each child.

**Keywords:** *Protection of Child Rights, Islamic Law, Comparative Study, International Law*

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<sup>78</sup> Assistant Professor, GC University Faisalabad. [shahidrizwan@gcuf.edu.pk](mailto:shahidrizwan@gcuf.edu.pk)

## **Introduction**

### **I. Islamic Law and Child Protection**

#### **A. Principles of Child Rights and Welfare in Islamic Jurisprudence**

Islamic law is based on the Quran and teachings of Prophet Muhammad (peace be upon him), which upholds the protection and welfare of children. Islamic teachings have firmly painted the principles regarding children's rights and welfare in Islamic jurisprudence, which recognizes the intrinsic dignity and worth of every human being, including children. The Quran and Sunnah provide guidance on the rights and responsibilities of parents, guardians, and the community vis-à-vis children.<sup>79</sup>

One of the basic principles in Islamic law is the principle of "fitrah," which means the natural state of cleanliness and purity in which every child is born. It is also one of the key principles behind the importance of children—that they are in need of protection and to be safeguarded physically, emotionally, and spiritually. The Islamic law also contains the principle of "kafala," which relates to the obligation of the community to care for and protect the orphans and any other vulnerable children. In addition to that, the principle of "huquq al-walad" or the rights of the child provides that parents or guardians are obliged to perform certain duties to a child, among them being the right nurturing, education, and proper protection of the child from the evil elements of society.<sup>80</sup>

#### **B. Provisions related to Child Abuse Prevention in Islamic Legal Texts (Quran and Sunnah)**

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<sup>79</sup> HafsaH HafsaH, *The Protection of children's right based on Islamic law* (Lambert Academic Publishing, 2016).

<sup>80</sup> Ali Muhammad Bhat, "Human psychology (fitrah) from Islamic perspective," *International Journal of Nusantara Islam* 4, no. 2 (2016).

The Quran and Sunnah have replete overt provisions and teachings that lament and prohibit all sorts of child abuse and mistreatment. It prohibits infanticide, which was commonly practiced in pre-Islamic Arabia, and reiterates the sanctity of human life. It also forbids the neglect of children and points to the need for providing for children both physically and emotionally. "And do not kill your children for fear of poverty; We provide for them and for you. Indeed, their killing is ever a great sin".<sup>81</sup>

The Sunnah of Prophet Muhammad (peace be upon him) even goes on to confirm the safeguarding of children from any kind of harm and injury. The Prophet did, in fact, condemn acts that are likely to cause some kind of physical or mental injury to the children. He stressed the way children should be treated, that is, with kindness and mercy. He is quoted saying, "Whoever is not merciful to others will not be treated mercifully by Allah".<sup>82</sup> Also, Sunnah prohibits actions that may lead to the exploitation of children or children's sexual abuse and emphasizes that their chastity and dignity be guarded.

### **C. Historical Perspectives and Scholarly Views on Child Protection in Islamic Law**

Child protection and children's rights have presented the case of child care and protection in different ways and forms in the history of Islam. Classic Islamic scholars like Al-Ghazali and Ibn Khaldun have really articulated great importance of rearing children with love, care, and education. They have put a lot of pressure on the parents and the community to make sure that their children live and develop morally. These academicians also discussed

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<sup>81</sup> Al-Quran (17:31)

<sup>82</sup> Sahih al-Bukhari (5997)

the legality and morality of child abuse and neglect, thus barring the results of such heinous acts.<sup>83</sup>

This has also brought modern Muslim scholars and organizations into the mainstream discourse on child protection within the Islamic legal framework. The Organization of Islamic Cooperation and the Islamic Fiqh Academy have come up with resolutions and fatwas condemning child abuse, emphasizing the need for adopting effective measures in protecting children from all forms of abuse and exploitation. These scholars and organizations try to harmonize the principles of Islam with the international standards of human rights, while at the same time realizing that a regime to protect children cannot be implemented in a Muslim community with the same cultural and social obstacles as in the Western world.<sup>84</sup>

## **II. Comparative Analysis**

### **A. Similarities between International Law and Islamic Law in Child Abuse Prevention**

International and Islamic laws share, at the root, a commitment to the protection of children and to supporting their development. Both focus on inherent dignity and rights. They protect children from any kind of abuse, neglect, or exploitation. The two legal frameworks have the recognition that children are vulnerable beings, thus necessitating special safeguards.<sup>85</sup>

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<sup>83</sup> Abdullah Sahin, "Love of Learning as a Humanizing Pedagogic Vocation: Perspectives from Traditions of Higher Education in Islam," *Higher Education and Love: Institutional, Pedagogical and Personal Trajectories* (2021).

<sup>84</sup> Naz K Modirzadeh, "Taking Islamic law seriously: INGOs and the battle for Muslim hearts and minds," *Harv. Hum Rts. J.* 19 (2006).

<sup>85</sup> Jason Morgan-Foster, "Third generation rights: what Islamic law can teach the international human rights movement," *Yale Hum. Rts. & Dev. LJ* 8 (2005).

There are deep similarities in the values and the rules related to the prevention of child abuse. Not only practices of infanticide, child labor, child prostitution, physical and emotional abuse are denounced by international law, but so is Islamic law. They mention that children shall be properly taken care of, nurtured, and educated and that parents, guardians, and community are responsible for the lives of their children.<sup>86</sup>

### **B. Differences in Approaches and Specific Provisions**

While the goal is one and mutual, which is child protection, it is the scope, approach, and specific provisions that differ. International law, as seen from the position given by treaties like the CRC, is more right-based, spelling out the rights of the child and obligations of the state in securing and promoting these rights. Islamic law, in this respect, is the textual and jurisprudential material through which principles and provisions are posited with moral and ethical obligations toward the children.<sup>87</sup>

In other instances, there are particular provisions under the Islamic law that might not be in line with the international standards or might be in the grey area. For instance, while it does not sanction the abuse and neglect of children, it does not give a direct definition of majority or a good legal setting to protect children. On the other hand, it permits the use of corporal punishment on children, while international law discourages such a practice.<sup>88</sup>

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<sup>86</sup> Stephen G Gilles, "On educating children: A parental manifesto," *U. chi. L. rev.* 63 (1996).

<sup>87</sup> Keith Walker, "Jurisprudential and Ethical Perspectives on" The Best Interests of Children", *Interchange* 29 (1998).

<sup>88</sup> Elizabeth T Gershoff and Susan H Bitensky, "The case against corporal punishment of children: Converging evidence from social science research and

### **C. Potential Areas of Conflict or Tension**

There have been points of conflict or tension, areas where international legal norms contradict Islamic legal interpretations over some specific issues. For instance, on the issue of some of the articles of CRC, some Muslim-majority countries have entered reservations to them, referring to the probable contradiction with the Islamic law or with cultural norms. These would most commonly regard questions like adoption, child custody, or gender equality, which can be read differently under Islamic jurisprudence.<sup>89</sup>

This area of contention may arise from the sources of laws governing them and, in effect, their interpretations. International law is based on the consensus of states and, therefore, subject to periodic review and change, but the authority of Islamic law comes from the religious texts and interpretations of scholars, which could be school- or region-specific. These could bring out challenges in reconciling Islamic legal interpretations in the view of evolving international human rights standards and norms.<sup>90</sup>

## **III. Challenges in Implementation**

### **A. Reservations and objections by Muslim Countries to International Conventions**

The Convention on the Rights of the Child (CRC), which is the most widely ratified international convention, has nevertheless met some exceptions by some Muslim countries, whereas probable contradiction with Islamic

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international human rights law and implications for US public policy," *Psychology, Public Policy, and Law* 13, no. 4 (2007).

<sup>89</sup> Anver M Emon, Mark Ellis, and Benjamin Glahn, *Islamic law and international human rights law* (OUP Oxford, 2012).

<sup>90</sup> Ann Elizabeth Mayer, "Universal versus Islamic human rights: A clash of cultures or clash with a construct," *Mich. J. Int'l L.* 15 (1993).

law or cultural norms leads to objections to some of its clauses. Such reservations mainly touch on the issues of adoption, child custody, and gender equality, which under many circumstances may be interpreted differently in light of Islamic law.<sup>91</sup>

For example, several Muslim states have objected to Article 14 of CRC, which mentions the guarantee on the right to freedom of thought, conscience, and religion on the ground that it may run against the teachings of Islam. Similarly, reservations are noted in Articles 20 and 21 that respectively talk about adoption, since in Islamic law, child custody and guardianship are a different affair altogether.<sup>92</sup>

### **B. Reconciling Domestic Laws with International and Islamic Legal Frameworks**

One of the major challenges in the area of child protection is the harmonization of local law with the international and Islamic legal framework. One common predicament for most Muslim-majority countries is that they find themselves compelled to bring their national legislation into line with the principles and provisions of both international conventions and Islamic law.<sup>93</sup>

This process can be quite complex, involving a close consideration of the many sources and interpretations of

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<sup>91</sup> Shaheen Sardar Ali and Sajila Sohail Khan, "Evolving Conceptions of Children's Rights: Some Reflections on Muslim States' Engagement with the UN Convention on the Rights of the Child," *Parental Care and the Best Interests of the Child in Muslim Countries* (2017).

<sup>92</sup> Eva Brems, "A commentary on the United Nations Convention on the Rights of the Child, Article 14: The right to freedom of thought, conscience and religion" (paper presented at the A Commentary on the United Nations Convention on the Rights of the Child, Article 14: The Right to Freedom of Thought, Conscience and Religion, 2005).

<sup>93</sup> Danial Murdani, "Globalization and the Paradigm of Islamic Law Implementation in Aceh," *Mazahib* 21, no. 1 (2022).



the law within their various cultural contexts. This might frequently require the amending of existing laws, the making of new statutes, or the issuing of interpretation to render them compatible with the international standards and with the Islamic principles. Reconciliation of potential contradictions or ambiguities between different legal frameworks must be avoided to ensure legal uncertainty is avoided and a consistent and effective application of the law is realized.<sup>94</sup>

### **C. Cultural and Societal Barriers to Effective Implementation**

Some Muslim communities may have cultural and societal obstacles that obstruct the proper and needful implementation of child protection strategies. Some principles or provisions that touch on child rights or child protection may conflict with strongly rooted cultural practices, social norms, or traditional beliefs.<sup>95</sup>

For instance, some types of child labor and even corporal punishment are culturally acceptable or are part of what is believed to be normal, which can prove to be a difficulty in discouraging or changing such practices. Furthermore, stigma, shame, or fear of the consequences could leave some cases of child abuse unreported, particularly in close communities. Such cultural and social barriers can only be overcome with comprehensive awareness campaigns and

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<sup>94</sup> Alexander V Demin, "Certainty and Uncertainty in Tax Law: Do Opposites Attract?," *Laws* 9, no. 4 (2020).

<sup>95</sup> Md Fakrul Islam, "In quest for indigenization of social work education and practice in Bangladesh: Complexities and prospects," *Journal of Social Science* 1, no. 1 (2017).

the full involvement of religious and community leaders in the change process.<sup>96</sup>

#### **IV. Towards a Comprehensive Framework**

##### **A. Integrating Principles from International Law and Islamic Law**

Since both have the same objective that is to protect children's rights and welfare in a way that comports with the principles and values of Islamic, a combination of the two laws is imperative in establishing a model.

Identifying areas where the two legal frameworks meet, therefore, offers the possibility of a more comprehensive approach, whereby the strengths and insights of each tradition come to the fore. For example, the ethical and moral imperatives underlined in Islamic teachings can reiterate the rights-based approach and specific provisions in international conventions. At the same time, rich tradition and interpretations in the field of Islamic jurisprudence offer very practical guidance on how the practices of child protection should be considered and applied in a culturally sensitive way.<sup>97</sup>

##### **B. Strategies for Harmonization and Effective Implementation**

It is an all-inclusive approach that seeks to obtain harmonization while still trying to obtain effective implementation through various ways of engaging stakeholders. The first strategy to this effect would be dialogue with Muslim scholars, jurists, and local leaders

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<sup>96</sup> Elizabeth Thompson Gershoff, "Corporal punishment by parents and associated child behaviors and experiences: a meta-analytic and theoretical review," *Psychological bulletin* 128, no. 4 (2002).

<sup>97</sup> Shabina Arfat, "Islamic perspective of children's right: An overview," *Asian journal of social sciences and humanities* 2, no. 1 (2013); Abdullahi Ahmed An Na'im, *Toward an Islamic reformation: Civil liberties, human rights, and international law* (Syracuse University Press, 1996).

in the convergence areas to relieve possible conflict and come up with shared interpretations that would be compliant to both international standards and Islamic principles.<sup>98</sup>

To deliver on the promise of this, capacity-building programs will be necessary through, for example, training staff in law enforcement, the judiciary, and social services, so that they appreciate how the international and Islamic legal systems complement one another. Governments can work in partnership with civil society and religious bodies to develop appropriate awareness and social mobilization messages, through culturally sensitive campaigns and training, toward better parenting and debunking the negative societal perceptions.<sup>99</sup>

### **C. Role of Legislation, Judicial Interpretation, and Public Awareness**

Legislation is the backbone of a child abuse prevention framework and the link that brings together all international and Islamic principles. It is recommended that governments review and amend existing laws or even introduce new legislation to harmonize both with the international conventions and Islamic jurisprudence so as to address the gaps or contradictions.<sup>100</sup>

Here, the judicial interpretation of the law is also paramount in reconciling the different legal orders to secure consistent application in the measures for child protection. It is to this effect that judges and legal scholars

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<sup>98</sup> Heather L Keough and Dale J Blahna, "Achieving integrative, collaborative ecosystem management," *Conservation biology* 20, no. 5 (2006).

<sup>99</sup> David M Smolin, "Overcoming Religious Objections to the Convention on the Rights of the Child," *Emory Int'l L. Rev.* 20 (2006).

<sup>100</sup> Ruth Herbert and Deborah MacKenzie, "The way forward: An integrated system for intimate partner violence and child abuse and neglect in New Zealand," *Wellington, New Zealand: The Impact Collective* (2014).

refer to Islamic law principles and, perhaps more importantly, to the international human rights standards in setting out authoritative interpretations that may inform the application of legislation and policy in the field of child protection.<sup>101</sup>

Public awareness and educational campaigns should support legal reforms and judicial efforts in establishing a child-protective culture that is hostile to the societal attitudes that have allowed, supported, or contributed to the existence of child abuse. Through religious heads, community leaders, and media outlets, such campaigns must disseminate information, encourage dialogue, and promote positive behavioral changes within their communities.<sup>102</sup>

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<sup>101</sup> Anne C Dailey and Laura A Rosenbury, "The new law of the child," *The Yale Law Journal* (2018).

<sup>102</sup> Reading et al., "Promotion of children's rights and prevention of child maltreatment."

## **Child Abuses Prevention in International Law**

Dr. Shahid Rizwan Baig<sup>103</sup>

**Abstract;** The international legal frame, among others, the United Nations Convention on the Rights of the Child and other conventions. The research is identifying some convergence areas and complementarities the legal traditions in relation to proposing a comprehensive framework reflecting principles from international law. The current study underscores the need for harmonizing and developing effective implementation strategies in view of the problems related to domestic laws, and cultural barriers. The implementation of this law is underscored to be coupled with legislation, judicial interpretation, and public awareness programs to bring in a change of culture vis-à-vis children's protection, in order to change their behavior for their rights and welfare in communities.

**Keywords:** *Child Abuses, International Law, Child well-being.*

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**Introduction;** Child well-being and protection has always remained a deep human rights issue and a matter of concern for the world community.<sup>104</sup> The very vulnerability and dependency of children have, in a way, assigned special safeguards and care to ensure their healthy development and to be secured from all types of abuse, neglect, and exploitation. Unfortunately, child

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<sup>103</sup> Assistant Professor, GC University Faisalabad.

[shahidrizwan@gcuf.edu.pk](mailto:shahidrizwan@gcuf.edu.pk)

<sup>104</sup> Annette Semanchin Jones, Traci LaLiberte, and Kristine N Piescher, "Defining and strengthening child well-being in child protection," *Children and Youth Services Review* 54 (2015).

abuse is seen to take place in the world today, transcending geographical, cultural, and socio-economic barriers.<sup>105</sup>

Child abuse is a complex constellation that may involve physical, emotional, and sexual abuse of a child, as well as neglect and exploitation. The effects of child abuse go far and wide and can have grave and long-lasting impacts on the physical, psychological, and emotional well-being of the child, most often in adult life. At a broader level than that of an individual, it also has immense social costs—from health care expenditures to loss of productivity to cycles of violence from one generation to another.<sup>106</sup>

This is a scenario that has made the global community work for years on laying down legal structures and systems for the protection of the children's rights and prevention of all forms of child abuse. The United Nations Convention on the Rights of the Child, adopted in 1989, is a model and unique treaty spelling out the wide-ranging entitlements to civil, political, economic, social, and cultural rights of children. This was ratified by nearly all the countries in the world and showed that there is a global consensus to observe the fundamental rights of children in

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<sup>105</sup> Sunday B Fakunmoju et al., "Perception and determination of child maltreatment: Exploratory comparisons across three countries," *Children and Youth Services Review* 35, no. 9 (2013).

<sup>106</sup> Cassandra Kisiel et al., "Examining child sexual abuse in relation to complex patterns of trauma exposure: Findings from the National Child Traumatic Stress Network," *Psychological Trauma: Theory, Research, Practice, and Policy* 6, no. S1 (2014).

protecting them from any form of abuse, neglect, or exploitation.<sup>107</sup>

In the wake of these global efforts, many religious and cultural traditions have also given child welfare and protection special importance. Islamic law is at the very core of such a rich tradition in safeguarding the rights and welfare of children, under the tenets of the Quran and the Sunnah (the prophetic traditions). In the Islamic religion, there is an established tradition of jurisprudence for the protection of children, which includes the rights to custody and guardianship, inheritance, and protection from any harm.<sup>108</sup>

It is undoubtedly agreed that both international law and Islamic law have the same objectives in their approach to child safety and welfare; however, the principles and practical applications differ. Comprehending these similarities and differences—and the possible areas of conflict or tension in many cases—becomes an important part of developing a coherent and effective strategy that could be used in the fight against child abuse globally.<sup>109</sup>

This article draws a comparative analysis of the prevention of child abuse according to international and Islamic law. Key provisions and principles of relevance to child abuse prevention in international conventions, treaties, and the Islamic legal framework for child protection are

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<sup>107</sup> Eileen Munro, *The Munro review of child protection: Final report, a child-centred system*, vol. 8062 (The Stationery Office, 2011).

<sup>108</sup> Jill D McLeigh and David Taylor, "The role of religious institutions in preventing, eradicating, and mitigating violence against children," *Child Abuse & Neglect* 110 (2020).

<sup>109</sup> Trevor Buck, *International child law* (Routledge, 2010).

examined. The study will compare these two systems of law in order to look at possible challenges and opportunities of harmonization for effective implementation.

The hope is for this to contribute to a comprehensive and culturally responsive stance in the prevention of child abuse, drawing from the best in international law and the Islamic legal tradition. This is so important to ensure every child, regardless of background or circumstances, is accorded the basic rights and protections they are entitled to.

### **A. Importance of Child Protection and Prevention of Child Abuse**

Protection of children and their protection from all forms of exploitation is a moral obligation, or rather, a basic human right. Children are perhaps the most vulnerable part of society; their well-being is directly interlinked with the future prosperity and progress of nations. It results in long-term development problems, mental illness, and an increase in substance abuse, criminal behavior, and the continuation of cycles of violence. All of this harms not only an individual child but their families, communities, and society as a whole.<sup>110</sup>

Child abuse prevention is pivotal to ensuring that basic children's rights to life, dignity, health, freedom from violence, and exploitation are upheld. It is central to providing children with an opportunity to grow and

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<sup>110</sup> Geraldine Van Bueren, "Child sexual abuse and exploitation: A suggested human rights approach," *Int'l J. Child. Rts.* 2 (1994).



develop in a caring and protecting environment, free from injury and trauma.<sup>111</sup>

Further, investment in child protection through the prevention of abuse contributes to a fair, just, and sustainable society. Children who are protected from violence and are guaranteed a safe and supportive environment can maximize their potentials to make positive contributions within their community contexts and to break intergenerational cycles of violence and poverty.<sup>112</sup>

A good strategy for the prevention of child abuse is to work towards minimizing the immediate harm of the abusive acts so that there are good returns yielding long-term social and economic gains. Finally, such efforts reduce child abuse's contribution to the burden on health, social services, and criminal justice systems.<sup>113</sup>

In realization of the deep effects of child abuse and the need to address it, the international community along with various religions and cultural traditions developed legal and ethical constructs designed further to child protection and prevention efforts. Only collaborative efforts taking due cognizance of these diversified views and availing their strengths to one another would ensure that better and more comprehensive efforts are made toward

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<sup>111</sup> Richard Reading et al., "Promotion of children's rights and prevention of child maltreatment," *The Lancet* 373, no. 9660 (2009).

<sup>112</sup> Dinesh Sethi et al., *European report on preventing child maltreatment* (World Health Organization. Regional Office for Europe, 2013).

<sup>113</sup> Lizette Peterson and Deborah Brown, "Integrating child injury and abuse-neglect research: common histories, etiologies, and solutions," *Psychological bulletin* 116, no. 2 (1994).

safeguarding the rights and well-being of children worldwide.<sup>114</sup>

## **I. Child Abuse and Child Rights in International Law**

### **A. Definition and forms of child abuse**

Physical, emotional, sexual, and negligence toward a child is what is generally referred to as child abuse. Further child abuse is further defined by WHO as "all forms of physical and/or emotional ill-treatment, sexual abuse, neglect or negligent treatment or commercial or other exploitation, resulting in actual or potential harm to the child's health, survival, development or dignity in the context of a relationship of responsibility, trust or power." Physical abuse is the infliction of intentional injuries either through force or the risk of harm. Emotional abuse is defined as acts or omissions that cause, or are likely to cause, severe behavioral, cognitive, emotional, or mental disorders.<sup>115</sup>

It can be defined as an act of a child being involved in sexual activities— either with any adult person who has power over the child, or another party— be it through indecent exposure, fondling, or exploitation using prostitution or pornography. Neglect is when the child's basic needs to survive and develop in a healthy manner are not availed of: food, clothing, shelter, education, and medical care. Child abuse can be found in various settings: within the family set up, in institutional set ups, and in the

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<sup>114</sup> David Landis Barnhill and Roger S Gottlieb, *Deep ecology and world religions: New essays on sacred ground* (State University of New York Press, 2010).

<sup>115</sup> World Health Organization, *Report of the consultation on child abuse prevention, 29-31 March 1999, WHO, Geneva*, World Health Organization (1999).

community. The consequences of abuse towards children are dramatic and could be long-lasting; physical, emotional, psychological development and well-being, future prospects could all be at stake.<sup>116</sup>

**B. Relevant international conventions and treaties (e.g., UN Convention on the Rights of the Child)**

In response to protecting the children's rights and with the view of preventing child abuse, much action has been taken by the international community through different conventions and treaties. The United Nations Convention on the Rights of the Child, adopted in 1989, remains the most comprehensive and widely ratified international treaty addressing the issue of children's rights. CRC defines basic rights for a child: the right to survival, protection from all forms of violence and abuse, and access to education and health services. It provides the framework for a child's best interests and calls for protection measures from all forms of physical or mental violence, injury, or abuse, neglect or negligent treatment, or maltreatment or exploitation.<sup>117</sup>

Other relevant international instruments are the Optional Protocol to the Convention on the Rights of the Child, on the sale of children, child prostitution, and child pornography, adopted in 2000, which concerns the protection of children from sexual exploitation for

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<sup>116</sup> Ben Mathews and Delphine Collin-Vézina, "Child sexual abuse: Toward a conceptual model and definition," *Trauma, Violence, & Abuse* 20, no. 2 (2019).

<sup>117</sup> Tara M Collins, "A child's right to participate: Implications for international child protection," *The International Journal of Human Rights* 21, no. 1 (2017).

commercial purposes. International Labor Organization also has Conventions that focuses on these problems: Convention (No. 182) addresses the prevention of child labor and exploitation regarding the Worst Forms of Child Labor. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) also contains some provisions for the protection of the rights of girl children.<sup>118</sup>

### **C. Key principles and provisions related to child abuse prevention**

The international legal framework highlights some of the key principles and provisions regarding the prevention of abuse against children. The CRC underscores the principle of nondiscrimination, where all children shall enjoy their rights without discrimination of any kind. The best interest of the child has it that all actions concerning children shall consider the best interest as a basic question. The CRC also acknowledges the right of children to life, survival, and development to the maximum, as well as to be free from all forms of violence, abuse, and exploitation.<sup>119</sup>

It is here that the requirements on prevention and responding to child abuse have been laid down in the international legal framework, which includes legislative, administrative, social, and educational measures. It calls

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<sup>118</sup> Marta Santos Pais, "The protection of children from sexual exploitation Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography," *The International Journal of Children's Rights* 18, no. 4 (2010).

<sup>119</sup> World Health Organization, *INSPIRE handbook: Action for implementing the seven strategies for ending violence against children* (World Health Organization, 2019).

for particular attention to issues, such as awareness, positive parenting, and children's support services. It further calls for international cooperation and assistance in the field of prevention and combating child abuse, including information exchange, technical assistance, and capacity-building activities.<sup>120</sup>

### **Conclusion**

Protection of children from abuse and their well-being is a burden that transcends all cultural and religious barriers. Regardless of differences in historical experiences, international and Islamic laws are founded upon the same basic tenets insofar as protection of rights and dignity of children, their vulnerability, and need for special measures to prevent harm and exploitation are concerned. However, in spite of the sharing of objectives and principles, these legal frameworks have differences in approaches and specific provisions that must be reconciled.

In an attempt to make a comparative analysis, it is evident that, in the prevention of child abuse, a number of salient areas of convergence emerge between international law and Islamic law. Both the frameworks condemn practices of infanticide, child labor, child prostitution, and the physical and emotional abuse of children. They both stress adequate care, nurturing, and education of children, underlining the responsibilities of parents, guardians, and members of the community in ensuring child welfare.

At the same time, admitted and accommodated have to be the differences in the approach, specific provisions, and areas of conflict or tension. For example, this happens among others through the divergent interpretation of both

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<sup>120</sup> Organization, *Report of the consultation on child abuse prevention*, 29-31 March 1999, WHO, Geneva.

cultural contexts and conflicting legal sources. For this to happen, a comprehensive framework shall be brought in with principles from both international law and Islamic law to instill harmonization and effective implementation. Such an effort would require the collective participation of governments, Islamic scholars, legal experts, and community leaders. All these parties must take part in the process to ensure that the matters are argued out and that consensus based on international norms and the norms of Islamic law can prevail. Legislation, together with the interpretation of the courts and public education campaigns, is at the core of both a sound legal framework and the consistent implementation of that framework and for nurturing a culture that protects children.

Thus, the protection of children from abuse is a legal, moral, and ethical requirement for all societies. Upholding the complementarities of international law with Islamic law and working towards their harmonization will produce a more just and caring world in which all children's rights, dignity, and welfare are guaranteed. It is a mission that is trans-cultural and trans-legal and thus needs application with commitment and perseverance.