

THE EVOLUTION OF FAIR TRIAL RIGHTS IN PAKISTAN: FROM COLONIAL LEGACY TO CONTEMPORARY CHALLENGES

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Abstract

Fair trial rights in Pakistan have undergone a complex development from a colonial criminal justice system to a constitutional rights-based system of due process and fair trial adjudication. This paper explores this evolution by tracing how colonial criminal procedure has been transmitted, how procedural rights have been progressively recognized in the Constitution, how courts have evolved their understanding of the principles of a fair trial, and the current disparity between legal protection and institutional practice. Special focus is also laid on Article 10A of the Constitution of Pakistan, which has been added through the Eighteenth Constitutional Amendment of 2010, providing express security of fair trial and due process in deciding civil rights and obligations and criminal charges. The analysis establishes that the concept of fair trial has been gradually broadening from a right within the courtroom to include the right to lawful investigation, the right to an effective defense, the right to impartial adjudication, the right to the fairness of the evidence, the right to a reasonable determination of the proceedings, and the right to procedural equality. While these constitutional and judicial developments have been achieved, significant gaps and issues still exist, including delays in court proceedings, extended pre-trial periods, deficiencies in investigation and prosecution, inadequate access to quality legal representation, procedural issues related to evidence, and new issues concerning digital evidence and technological decision-making. The paper suggests that the root issue confronting Pakistan today is not the acceptance of fairness as a constitutionally recognized value, but its proper incorporation into the system. The need for sustainable reform, therefore, is for improved case management, responsible investigation, improved legal aid, modernization of evidentiary protection, and judicial independence and digitalization. A fair trial should become a reality, not just a promise in a constitution.

1 Introduction

The right to a fair trial is one of the cornerstones of a democratic legal system and an integral safeguard against the abuse of state power. The operation of the state's power to investigate, prosecute, detain, and punish people in a criminal

justice system should be balanced against the state's duty to safeguard the dignity, liberty, and procedural rights of the accused (Pakistan Penal Code, 1860). A fair trial is not only about the formal process of proceedings in court, but it involves a larger range of guarantees that include those concerning lawful arrest, impartial adjudication, access to legal assistance,

presumption of innocence, adequate opportunity to prepare a defense, examination and cross-examination of witnesses, admissibility and reliability of evidence, reasoned judicial decisions, and determination of criminal liability in a reasonable time. The creation of these guarantees in Pakistan is the product of a combination of factors, such as the legacy of colonialism, the constitutional shift and its interpretation, and the pressures on the criminal justice system. The concept of fair trial is a product of history, and its development will not be properly understood unless the legal structures of British colonialism from which it developed are considered ("Indian Evidence Act, 1872," 1872).

On independence in 1947, Pakistan received a criminal justice system that was largely built on the foundations of colonial times, such as the Code of Criminal Procedure (1898), the Pakistan Penal Code (1860) and an administrative framework of policing, prosecution and adjudication, which had been shaped by colonial priorities. Although these laws were good in imposing procedural protections and in creating institutional means for criminal adjudication, their fundamental structure was highly shaped by the colonial interest in maintaining public order and governmental control. The challenge for the post-colonial Pakistani legal system, therefore, was to reconcile the procedural structures which they had inherited with the new conception in the constitution to respect individual rights, the need for accountability to the people, and judicial protection ("Code of Criminal Procedure, 1898," 1898). The Constitution of Pakistan has now, in its course, changed the definition of fair trial, making it a fundamental right and consideration of the individual's rights and procedural legality. In accordance with Article 4, an individual has the right to be treated in accordance with the law and to be free of actions that have a detrimental effect on his life, liberty, body, reputation, or property other than in accordance with the law (Zilka et al., 2023).

Article 9 protects life and liberty, and Article 10 safeguards a person against arrest or detention. Article 14 respects the person and expressly bans torture to obtain evidence. Equality before law and

equal protection of law are given in Article 25. Together, these ensured an important pre-constitutional basis for the right to procedural justice even before the right to fair trial was explicitly spelled out in the Constitution. In 2010, a major step was taken by the Eighteenth Constitutional Amendment, which added Article 10A to the Constitution ("Constitution of the Islamic Republic of Pakistan, 1973," 1973). Article 10A gives that person the right to a fair trial and due process in determining his civil rights and obligations or in any criminal charge brought against him. The constitutional recognition of fair trial marks a departure from the perception of procedural safeguards as parts of standard criminal process and the new recognition of fair trial as a fundamental right that is separable from criminal procedure. Article 10A, in turn, enhanced the constitutional protection for judicial review of investigative, prosecutorial, and adjudicative processes, and established a more comprehensive normative framework for the existing procedural safeguards ("Qanun-e-Shahadat Order, 1984," 1984; Usman & Ahmad, 2021).

The importance of Article 10A, however, is not only in the text of the Constitution, but also in the jurisprudence of understanding and application of Article 10A (Munir, 2020). As time passed, the superior courts of Pakistan have increasingly considered the concept of fair trial as a broad one, as it encompasses impartial adjudication, reasonable opportunity for defense, natural justice, lawful collection and assessment of evidence, and procedural equality between the prosecution and accused. The constitutional guarantee has also bolstered the link between fairness and other core rights. An illegal arrest could be a violation of due process; too long a delay in bringing the defendant to trial could be a denial of due process; failure to provide the defendant with competent legal representation could impair the defendant's ability to defend himself; and evidence obtained by an illegal arrest or detaining the defendant for an extended time may be incompetent or even tainted by the violation ("Constitution (Eighteenth Amendment) Act, 2010," 2010). This means that a fair trial needs to be a constitutional guarantee, not just a

procedural one. However, the constitutional guarantee of fairness of trial has not cured the myriads of challenges faced by the country's criminal justice system. In practical terms, if it is deemed a constitutional guarantee, it is rarely enjoyed by each and every accused person in the system (Stoykova, 2024).

Many criminal proceedings are delayed, and pre-trial detention remains heavy; police investigations are limited in effectiveness; prosecutions are under-resourced and inadequate; qualified legal representation is limited, and witnesses have been intimidated, witnesses have been insufficient, or witnesses are not present, etc., continue to impact the quality and fairness of criminal adjudication. The difficulty is especially great when procedural safeguards are formally in place but not effectively applied at the investigative and/or the trial level. The difference between what the law provides and what the law applies is the cornerstone of ensuring fair-trial rights in Pakistan. This context has become even more complex in the light of recent changes. Legislation and special judicial procedures to tackle terrorism have raised ongoing issues regarding the compromise of national security concerns and individual procedural rights. Meanwhile, technological change has created new problems relating to electronic evidence, digital surveillance, forensic technologies, artificial intelligence and digitally manipulated material. The authenticity, chain of custody, reliability, disclosure and ability to challenge technologically generated evidence are increasingly important issues in the context of a fair trial. Likewise, the hyper-detailed reporting of criminal trials can give rise to a shadow public trial that can shape perceptions of guilt in a case prior to it reaching the court, which also puts pressure on the principle of innocence.

2 Colonial Foundations and the Inheritance of Fair Trial Principles in Pakistan

2.1 Colonial Criminal Justice and the Primacy of State Authority

The current criminal justice framework of Pakistan has close linkages with the legal and institutional framework put in place during the British colonial era. The process of creating a new

state, Pakistan, in 1947 was not a clean slate; it is not as if there had been no law before the birth of the new state. Rather, it was endowed with a vast corpus of laws, courts, rules, and administration established in British India. Some of the most influential pieces of legislation were the Indian Penal Code 1860 (which later became the Pakistan Penal Code), the Code of Criminal Procedure 1898, and the Indian Evidence Act 1872, whose evidentiary structure was further modified by the Qanun-e-Shahadat Order 1984 in Pakistan. These provided the framework for much of the procedural structure of criminal investigation, prosecution and adjudication. However, the colonial criminal system was established in a political climate that was radically different from that of a constitutional democracy.

Its primary focus was on maintaining public order, safeguarding colonial rule and good administration, not creating a rights-based relationship between the individual and the state. Often criminal law, therefore, was a means of governance. Police and administrative bodies had extensive powers of investigation, arrest and detention, and procedures were in place, but in a context where the government's interests of control were often predominant. It is significant that this history is important as some of the institutional features of the current Pakistani criminal justice system can be specifically linked to it. The fact that the law of the colonial era continues to be in use today is a testament to its strength and flexibility. Despite such changes in the laws and their interpretation in the light of constitutional principles, the institutional bases of these laws were not developed with the modern notion of fundamental rights.

2.2 Procedural Safeguards under the Colonial Legal Framework

The colonial legal system should not be said to be altogether without fair-trial protection, however. Important procedural principles were introduced into the criminal law and the work of the court, such as the rule of investigation, the framing of charges, examining witnesses, the production of evidence, the examination of the accused, and the judicial determination of criminal responsibility.

The Code of Criminal Procedure 1898 is an organized code of criminal procedure, and the legislation pertaining to evidence aimed to control evidence and its evaluation. These procedural mechanisms set the constitutional framework on which subsequent constitutional fair trial case law is based. The importance of this inheritance is based on a different understanding of what it means to be legally entitled to do, as opposed to being substantively entitled to do. A procedure can be under the law but still fails to offer protection from arbitrary State action. In Pakistan, the concept of due process was not yet established as it was in colonial criminal procedure, in which the procedures were legally defined, and criminal cases could be investigated and adjudicated by the criminal courts (Charvi & Rath, 2022).

It was, therefore, impossible to take it for granted that concepts, which are now considered as part and parcel of the fair trial principle, such as equality of arms, effective defense, proportionality, dignity, judicial independence and meaningful appellate court review, would follow from the existence of the procedural rules. The evidentiary framework is another good example. Indian Evidence Act 1872 gave systematic rules relating to relevancy, admissibility, and proof. This influence is still felt in the present-day evidence law in Pakistan. However, current evidence analysis of a fair trial is more than establishing the presence or absence of evidence in a formal category. Issues about the admissibility of forensic evidence, the voluntariness of confessions, authenticity of electronic evidence, disclosure to the defense, and the ability to question the authenticity of prosecution evidence are more prevalent (Daly & Conway, 2021).

2.3 Post-Independence Continuity and Constitutional Transformation

One of the most unique aspects of the law in Pakistan has been the consistency of colonial law with the transformation of the Constitution. When the colonies became independent, it was crucial to maintain the previous legal systems to avoid the disruption of criminal justice administration from the very beginning. But these inherited laws went on to function within a

constitutional system which edged individual rights away from the arbitrary powers of government (Munir, Cheema, & Riaz, 2020). Over time, the guarantees of liberty, dignity, arrest and detention, equality, and lawful treatment in the Constitution changed the legal landscape in which the colonial-era procedural statutes would be interpreted. An important constitutional achievement was the addition of Article 10A to the Constitution via the 18th Amendment in 2010. The Constitution made it explicit that a fair trial and due process were fundamental rights, creating a direct normative standard to evaluate criminal procedures.

The relevance of Article 10A in terms of colonial inheritance is especially great in the context of how older laws can be interpreted considering newer rights interpretations. The inherited procedural framework can therefore no longer be understood from a colonial perspective alone but has to be understood in accordance with constitutional supremacy and fundamental rights. But it's a transformation that hasn't been completed. Colonial institutional patterns are still in play when it comes to policing, investigation, prosecution, and criminal adjudication, and constitutional guarantees are still dependent on the functioning of the institutions that are tasked with implementing them. The historical trajectory of the rights to fair trial in Pakistan thus marks a shift from a colonial criminal justice system to a constitutional, rights-based system of justice. The focus of the challenge has been to maintain useful institutional structures while eliminating or restructuring institutional practices that have impacted on dignity, liberty, equality and due process (Dung, 2021).

3 Constitutionalizing the Right to Fair Trial and Its Judicial Evolution

3.1 From Implied Constitutional Protection to the Express Guarantee of Article 10A

In Pakistan, the right to a fair trial evolved from scattered procedural rights into a fundamental right in the Constitution over time. The original 1973 Constitution did not have a specific 'Right to a fair trial' clause. However, fair-trial principles could be extracted from a number of existing

fundamental rights, such as Article 4, providing protection against dealing with individuals in an arbitrary way in violation of the law; Article 9, which guarantees life and liberty; Article 10, which guarantees protection against arbitrary arrest and detention; Article 14, guaranteeing human dignity; and Article 25, which guarantees equality before the law. The Supreme Court has, thereafter, accepted that the right to a fair trial and due process had already been part of the Pakistani constitutional jurisprudence prior to the enactment of Article 10A. The most significant constitutional change took place in 2010 when the Constitution (Eighteenth Amendment) Act, 2010, was enacted. The amendment added Article 10A with a proviso immediately after Article 10 and explicitly added that a person has the right to a fair trial and due process in determining the civil rights and obligations or in any criminal charge. This was of importance because of two factors.

First, it made the principle of fair trial a fundamental right that is explicitly enforceable by the courts, rather than a judicially created principle. Firstly, it moved the concept of fair trial from being a principle of judicial interpretation to one that is explicitly enforceable by courts. Second, it was not only used in criminal proceedings, and the language of Article 10A also applies to civil rights and obligations. The principle of fair trial was then transformed into a constitutional rule, which is applicable at all stages of legal proceedings affecting the rights and liabilities of any person. The passage of the right to have a fair trial into the Constitution also reinforced the connection between fair trial and natural justice. The right to have a fair trial was also enshrined in the Constitution, which linked fair trial with natural justice. The Supreme Court has made it clear that the right of hearing is an integral part of the fundamental right to a fair trial and due process and, now that Article 10A has been inserted, that it can be considered when reading into the legislation the fundamental right of the individual. The concept of '*audi alteram partem*' (the right to be listened to by others) thus became more entrenched in the constitution. Article 10A thus does not just function as a rule of

fairness at the final trial phase, but as a constitutional principle that applies to the overall fairness of the law-making process.

The importance of this shift is clearly apparent if Article 10A is read in conjunction with Article 4, Article 9, Article 10, Article 14 and Article 25. Fair trial is more than just the accused standing in front of the judge. Denial of due process of law can be caused by an unlawful arrest; prolonged detention can be a violation of the presumption of innocence; a denial of meaningful legal representation can be a denial of the ability to defend oneself, and an adjudication without an effective opportunity to challenge evidence can be a compromise of the integrity of the trial. In this way, Article 10A gave Pakistani courts a constitutional structure to enable them to interpret the individual procedural guarantees collectively and not as separate technical requirements.

4 Fair Trial in Practice: Criminal Justice Institutions, Evidence and Judicial Process

The realization of the right to fair trial in Pakistan cannot be done just through the words of Article 10A; it also requires the working of the investigation, prosecution, adjudication, and correctional institutions. Article 10A provides a person with a fair trial and due process when deciding on civil rights and obligations or when being charged with a criminal offense. Therefore, in criminal proceedings, justice must start before the accused comes into court. The next judicial process will be truly fair if the police investigation, arrest, remand, assembly of the prosecution case, conservation of evidence and access to counsel have a significant influence. In the Pakistani legal system, this greater notion of a fair trial is gaining currency as a principle which applies to the pre-trial, trial and post-trial stages of a case, not just the final trial. The police investigation is the first and perhaps most significant step of this process. The quality of the evidence that is finally presented before the court is directly affected by the quality, neutrality and legality of the investigation (Kasuri, Abbas, et al., 2024).

An investigation that starts from a 'presumption of guilt' and from there is overly dependent on

confessional evidence, does not account for potentially exculpatory evidence or does not adequately preserve evidence, physical or digital, can taint the fairness of the entire investigation. The protection of liberty guaranteed by Article 9 and the fair trial guaranteed under Article 10A of the Constitution are therefore protections from arbitrary and coercive exercise of investigative powers. The issue of institutional accountability is reflected in ongoing worries about police abuse and shortcomings in investigations. From a fair trial perspective, such incidents are of particular importance as they are often the first contact with the criminal justice system for the complainant and/or accused (Kasuri, Mahmood, et al., 2024). The second key institutional element is the prosecution service. To say a prosecution has presented evidence objectively and responsibly is an essential element of a fair judicial process and is not a hallmark of a competent court. The prosecutor's job is not about winning convictions; it's about securing them. The roots of a proper prosecution lie in the correct assessment of the charges, disclosure and presentation of evidence, the avoidance of suppression of evidence, and following the directions of the judge. Inadequate coordination between investigators and prosecutors can lead to poor case files, faulty charges, lack of witnesses, and delays. These shortfalls have a negative impact on the defendant's rights to court representation, or on the court's capacity to handle the case efficiently and ultimately put the burden on courts and defendants. That the institutional nature of fair trial is clear to see in this regard is evident: judicial fairness can be undermined long before the judge has begun her/his assessment of the evidence (Khan & Bhatti, 2023). The Supreme Court has thus linked reasonable duration of trial with Article 10A and considered 'prolonged' pre-trial detention to be antithetical to the presumption of innocence in the constitution (Khan & Bhatti, 2023).

The essence of judicial independence, impartiality and meaningful participation of defense is now at the trial stage. A fair hearing must be given to the accused, so that he is informed of the case against him, is given a real chance to respond, and can be

assisted by a lawyer and cross-examine the prosecution evidence. Cross-examination of prosecution witnesses is significant because often the major evidence used in convicting a defendant is through the testimony of witnesses. The law of evidence (QSO, 1984) plays a pivotal role in the actual protection of fair trials with the aid of the latest technologies of forensic evidence, DNA profiling, CCTV footage, mobile phone information, electronic communications and other digital evidence. Whilst modern evidence can be a powerful tool for the court, it has to be authentic, properly gathered, preserved, and have a proper chain of custody; otherwise, it will be of little use to the court unless the defense can prove it unreliable (Stoykova, 2023). However, as the volume of digital evidence grows, courts need to apply the rules of evidence to this new form of evidence in a manner that is consistent with Article 10A, not as some kind of conclusive evidence.

5 Contemporary Challenges to Fair Trial Rights in Pakistan

5.1 Judicial Backlog, Delay and Prolonged Criminal Proceedings

A major challenge to the right to fair trial in Pakistan is delay in courts to reach decisions in a timely manner. Procedural complications can significantly delay trial proceedings, particularly in juvenile cases where additional safeguards and restrictions may extend the process. Such delays can cause reputational harm, financial loss, and unnecessary hardship for the accused.

This is especially a problem when the process of substantive hearings is stalled due to a series of adjournments, unfinished investigations, non-appearance of witnesses, changes in judges and court facilities. What results is a paradox in which procedure is supposed to safeguard a defendant but may not do so because the trial lasts for years. The delay also impacts prosecution witnesses and victims; their memories may become blurred, and it may be harder for them to keep coming to court. It follows, therefore, that judicial backlog is not merely an administrative inefficiency; rather, it is a constitutional inefficiency in criminal adjudication.

5.2 Pre-Trial Detention, Prison Overcrowding and the Presumption of Innocence

Another tremendous hurdle to Article 10A is the exceedingly high percentage of unconvicted prisoners. According to Pakistan's 2024 prison population statistics, there were around 108,643 inmates in prisons, and 73.41% of this population belonged to the under-trial category. It is here that the fact that approximately three-quarters of all those who were imprisoned had not yet been sentenced stands out. The figure is significant because the confinement prior to conviction is not the same as the detention after conviction. The right to presumption of innocence implies that pre-trial detention should not become a routine method of achieving a more efficient trial procedure, but that it should be exceptional, justified and proportionate. The high percentage of undertrial population is linked to problems with getting bail, lengthy investigations, multiple remands and delays in securing evidence (Mahmood et al., 2024).

It also directly leads to overcrowding in prisons that may have a negative impact on the dignity, health, security and effectiveness of the participation of detainees in their cases. The constitutional issue is at once one of freedom and accountability of institutions. If an accused has been held for months or years before a decision is reached as to his/her guilt, there is much that may be lost in a formally available fair trial. Thus, the need to eliminate unnecessary pre-trial detention is essential to make Article 10A a reality and a strong protection rather than a mere promise (Majeed et al., 2022).

5.3 Weak Investigation, Evidence, Witnesses and Access to Effective Defense

The quality of evidence created prior to the case going to court is a key factor in fair adjudication. Poor police investigation, insufficient forensic resources, missing evidence, faulty witness evidence and a lack of coordination between investigators and prosecutors may jeopardize convictions and real crime investigations. The problem is especially evident in the more serious offences where the evidence is also of a technical

nature and cannot be obtained by oral evidence. Issues of investigative integrity remain a major concern (Martufi & Peristeridou, 2022).

These events highlight the need for an independent inquiry, for lawful evidence-gathering and for robust accountability structures. Witness protection is also crucial, as in such cases witnesses may not appear, recant, or change their evidence due to fear of intimidation, threat, or social pressure from the case. The ability to obtain competent legal counsel is equally critical to the defense in questioning the evidence of the prosecution, to cross-examine and find inconsistencies in the investigative materials. Where CCTV footage, mobile phone calls and records, DNA and forensic reports, and other electronic evidence are being used, the problems become more complex, with the need to establish authenticity, chain of custody, and disclosure. Therefore, not only do evidentiary rules need to exist, but there also needs to be a practical ability for the defense to be able to examine and test the evidence on which liberty is granted under Article 10A (Mehmood et al., 2024).

Conclusion

The development of the concept of fair trial rights in Pakistan can be seen as a gradual but incomplete shift from colonial, state-centered criminal justice to a rights-based and constitutionally guaranteed criminal justice. Pakistan received a large portion of its criminal justice system from British India, such as the Code of Criminal Procedure, 1898, and other procedural institutions, which were gradually turned to the principle of individual liberty, dignity, and due process of law. This shift has most clearly materialized in Article 10A of the Constitution, added to the Constitution in 2010, which provides explicitly for the right to a fair trial and due process in determining civil rights and obligations and the imputations in a criminal charge. The issue of judicial delay, long pre-trial detention, poor investigations, evidentiary issues, poor legal representation, institutional deficiencies, and concerns with special proceedings remain as obstacles between constitutional rights and actual justice. Finally,

there is a need for clarity over authenticity, disclosure, reliability, and defense access related to contemporary forms of digital evidence and emerging technologies. Therefore, Pakistan's future reform agenda needs to be focused on operationalization of guarantees rather than just on providing guarantees in the legislation, through measurable standards in the management of cases, better investigations, providing adequate legal assistance, judicial accountability, judicial independence, modernization of evidence, and responsible digitalization. However, the real test of Article 10A is not what it says or the number of cases that have been decided on it, but whether the process that can be followed by an accused person is timely, impartial, transparent, and meaningful.

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