



**RESEARCH PAPER**

**The Requirements of a Fair Trial in International and Pakistani  
Legal Framework: A Critical Analysis**

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<b>Received:</b> October 15, 2021	The purpose of the present study was to analyze the requirements of a fair trial in criminal matters. The right to a fair trial has been incorporated in all the international, regional and national legal instruments which necessitate an inquiry to see whether Pakistani legal framework fulfills these requirements or not. The present study, after deploying doctrinal research methodology, found that the requirements for a fair trial in criminal cases in international instruments are similar and Pakistani legal framework incorporates these requirements with the exception to compensation. The study suggested that the statutory requirements in Pakistan must be incorporated in constitution.
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**Introduction**

The entitlement to a fair trial is widely regarded as a cornerstone of basic human rights. However, due to the numerous international legal sources that define the extent and substance of this right, it can be challenging to discern its precise scope and content (Clooney, & Webb, 2021, p. 5). The entitlement to a fair trial is considered non-derogable and, as such, is ensured by several International Human Rights agreements. The scope and expression of the right to a fair trial in the international and regional instruments vary since it is a bundle of various rights like presumption of innocence (Ohchr.org, 2018) and that has been expanded by national courts (Udombana, 2006). Due to its significance, the right to fair trial in Pakistan has been declared as the fundamental right of the citizen (Liaqat Ali Ghugtai versus Federation of Pakistan, 2012). The right to a fair trial has been given the status of constitutional rights under article 10-A of the constitution of Pakistan, 1973 (hereinafter Constitution).

However, there is scarcity of literature analyzing the requirements of a fair trial in criminal proceedings under Pakistani and international legal framework. The present study intends to fill that gap by critically analyzing the Pakistani legal framework and three international legal instruments namely ICCPR, European Convention on Human Rights (hereinafter ECHR) and African Charter on Human and Peoples' Rights (hereinafter ACHPR). The current research has the following three research questions; what are the various requirements of a fair trial in criminal matters under ICCPR, ECHR and ACHPR? What are the various requirements of a fair trial in criminal matters under Pakistani legal framework? What do the various requirements in these instruments

suggest? The present study, apart from introductory section, has four sections. The second section describes the methodology, the third section reports the results, the fourth section offers general discussion and suggestion on the results and the last section concludes the study.

### **Literature Review**

Various researchers have investigated the nature and scope of numerous requirements for a fair trial in Pakistan. For instance, Atif Uddin and Ali (2020) discuss the absence of statutory laws safeguarding the witnesses. The authors argue that it is necessary to protect the witnesses to ensure the fair trial in Pakistan. Similarly, Shah (2016) analyses the compatibility between military justice system and the constitution of Pakistan. He found that the military courts seriously violate the fundamental rights since these courts do not apply the accepted legal standards. Similarly, Umair Ghari (2018) analyzed the establishment military courts in the context of Peshawar attack. The author claimed that the military courts were established due to weak judicial system but such courts were not long term solution since these courts were a threat to human rights and fair trial. Similarly, Maryam and Naina (2019) discuss the judicial trials of mentally retarded accused and pointed out that such trials violate the international standards of fair trials. Similarly, Parveen and Ali (2016) compared the concept of fair trial in universal declaration of human rights by comparing and in the constitution of Pakistan. She argued that the fair trial was meant to secure the fundamental freedoms of citizen. She claimed that though the principles of universal declaration of human rights got the constitutional status in Pakistan; however, the right to fair trial in the said enactment could not get attention of the legislatures. Likewise, Ali (2015) explored the requirements of fair trial at investigation stage by analyzing the Fair Trial Investigation Act. Similarly, some researchers probed the international fair trial standards in the context of military justice (Ahmad, 2021) and some have compared the international and Islamic standards of fair trials (Iqbal, & Iqbal, 2020). These studies are significant since they throw light on the various aspects of fair trials. However, these study do not examine the various requirements of a fair trial in Pakistan in the context of international and regional instruments (other than Universal Declaration of Human Rights) dealing with the fair trial. The present study intends to fill the gap since the objective of the study is to critically analyze the requirements of a fair trial in Pakistan and three important legal instruments namely ICCPR, ECHR and ACHPR.

### **Material and Methods**

These three research questions were addressed by deploying the doctrinal research methodology. The researchers of the present study collected data from primary and secondary sources including international instruments, codified laws and judicial decisions. The relevant texts of the instruments and the judicial decisions were analyzed while deriving insights from the qualitative content analyses on how to accommodate codes in various categories.

### **Results**

This section addresses the first two research questions of the present study by describing the numerous requirements of the right to a fair trial under three international instruments and Pakistani legal framework.

### **Requirements under International Instruments**

## **Before Trial**

This sub-section describes the various requirements of fair trials which must be satisfied before the commencement of a criminal trial and these includes right to legal assistance, trial by competent and independent court, public hearing, presumption of innocence, provision of adequate time, double jeopardy and protection from retrospective punishment.

The right to legal assistance has been recognized in all three international instruments. For instance, article 14 (3) (d) of ICCPR provides that the accused must be given the liberty to choose any advocate of his own choice. Similarly, article 6(3) (c) of ECHR provides that the accused will have the right to defend himself in person or through advocate of his own choice. Likewise, article 7(1) (c) of ACHPR requires that the accused will have the right to defend by himself or, by counsel of his choice. It is significant to mention that the right to have an advocate of his own choice requires that the accused must have been the right since from the starting of the proceedings as was held in *Campbell vs. Jamaica* (Communication No. 248/1987, *G. Campbell v. Jamaica*).

Similarly, it is necessary that the court trying a criminal case must be independent, competent, impartial and established by law. Broadly speaking, the independence of the tribunal requires two things; first, independence of a tribunal must be protected and declared in the constitution (UN Basic Principles on the Independence of the Judiciary Principle 1). Second, independence means the decisions on the basis of the proved facts (*Chocrón Chocrón v. Venezuela, 2011*). Similarly, the competence refers to intellectual competence and jurisdictional competence. The intellectual competence of a tribunal includes individual competence (integrity, qualification and judicial training) and collective competency (their decisions are binding and cannot be altered by executive authorities). The jurisdictional competence refers to the legal authority of a tribunal to proceed with the case. Likewise, the impartiality refers to absence of bias and prejudice. The establishment of a tribunal by law refers to legal justification of basis, working and the composition of the tribunal (*Pandjikidzé v Georgia, 2009*).

Article 14(1) of ICCPR and 6 (1) of ECHR state that in the determination of any criminal charge, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Similarly, article 7 (b) of ACHPR provides that every individual has the right to be tried by a competent court or tribunal. In addition, article 26 states that the members countries shall have the duty to guarantee the independence of the courts. The various judicial decisions, commentaries and guidelines have explained the requirement and the following three points are worth noticing. Firstly, the requirement of competence, independence and impartiality of a tribunal is an absolute right (HRC, General Comment No. 32, 2007). Second, the right is available to an accused at all stages of trial (Clooney, & Webb, 2021, p. 74). Third, it is necessary that forum must be competent (*Lavents v Latvia, 2002*).

The public hearing means that the public will be allowed to witness the trial proceedings (*Obi v. Nigeria, 2016*). Article 14(1) of ICCPR and 6 (1) of the ECHR states that in the determination of any criminal charge, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. However, the right is not absolute since article 14 of the ICCPR provides that trial may not be public on the grounds of morality, public order, national security, interest of parties and justice require.

The presumption of innocence applies to mutual legal assistance in criminal matters (Harris and others, 2014, 460). The ICCPR recognizes the presumption of

innocence as a requirement for fair trial. Article 14 (2) and 6 (2) of ECHR states that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. Likewise, article 7 (1) (b) of ACHR provides that the right to be presumed innocent until proved guilty by a competent court or tribunal. The presumption of innocence covers both procedural and substantive dimensions of fair trial. From procedural perspective, it shifts the burden of proof on the prosecution (*Bikas v Germany*, 2018 and *Barberà v. Spain*, 1988). In addition, the prosecution will establish all the ingredients of offence beyond reasonable doubt (ICTR, *Prosecutor v. Ntagerura et al.* (ICTR-99-46-A), 2006). If the burden of proof is wrongly shifted on the accused, it will amount to infringement of the rule (*Telfner v. Austria*, 2001). Likewise, from substantive perspective; it requires giving benefit of doubt to accused (HRC, General Comment No. 32, 2007). The presumption of innocence means that nobody shall be declared guilty of committing any offence until it is established beyond reasonable doubt (*Bikas v Germany*, 2018). The presumption of innocence is available to accused even before framing of charge (*Prosecutor v. Norman*, 2005). The presumption of innocence is available at the appellate stage (*Konstas v Greece* 2011).

It is also necessary that accused must be given adequate time to prepare his defense. Article 14(3) (b) of the ICCPR and 6 (3) (b) and 7 (1) of ACHPR provide that in the determination of any criminal charge against him or her everyone is entitled to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing.

The double jeopardy doctrine is complicate since it may be used to resolve the opposing assertions regarding enforcement of national laws (Colangelo, 2008). Article 14(7) of ICCPR, article 4 (1) of ECHR provide that no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country. The various judicial decisions at international level reflect that the requirement is available when the final judgment has gone through all the legal requirements (*Bluefold vs. Arkansas* cited in *Sheppard*, 2014).

Another requirement for a fair trial is the protection from retrospective punishment. Article 15 (1) of ICCPR and 7 of ECHR require that a person will not be punished for acts or omissions which did not constitute a criminal offence when these acts were committed. It also prohibits imposing heavier penalty however, if a lighter penalty was provided for the same acts or omission, the courts will impose lighter penalty. On the other hand, article 7 (2) of ACHPR provides that a person can only be convicted for acts or omissions which were declared offence at the time when these acts or omissions were committed.

### **During Trial**

This section contains the requirements which must be fulfilled during the trial and these include communication of charges, provision of adequate time, right to examine witnesses, inhuman treatment or punishment, and public judgments.

Article 6 (3) of ECHR requires that anyone charged with a criminal offence must be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him. The right commences when it was first officially framed (*Rabinowitz*, 2004). This is also a requirement of fair trial that accused must be given sufficient time to prepare his defense. Article 14(3) (b) of the ICCPR, article 6 (3) (b) of ECHR and 7 (1) of ACHPR provide that in the determination of any criminal charge

against an accused, he will have the right to have adequate time and facilities for the preparation of his defense. Similarly, accused's right to examine witnesses is another requirement of a fair trial. Article 14 (3) (e) of ICCPR and 6 (3) of ECHR require that an accused will have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. ACHPR does not contain any provision giving the right to examine witnesses however; the courts have provided the right (*Umuhoza v. Rwanda*, 2017).

Likewise, a fair trial requires that an accused will not be subjected to inhuman punishment. Article 6 (2) of ICCPR provides that penalty (death) can only be carried out pursuant to a final judgment rendered by a competent court. Similarly, article 7 also requires that no one will be awarded inhuman or degrading punishment. Article 3 of the ECHR imposes restriction on courts and tribunals to inflict such punishment on the accused which is inhuman or degrading. Similarly, article 5 of ACHPR requires that no individual shall be subjected to inhuman or degrading punishment. The requirement that the tribunals shall announce their judgments publically is also a significant requirement of fair trial and is included in the various instruments. Article 14 (1) of the ICCPR and 6 (1) require that a judgment given in a criminal case (or in a suit) shall be made public. However, the requirement may be dispensed with when an accused is juvenile or the proceedings relate to matrimonial or guardianship.

### **After the Trial**

This section discusses the requirements which must be fulfilled after the completion of first trial and it includes the right to appeal and compensation.

The analysts have maintained that mechanism of appeals in domestic and international legal frameworks ensure that the decisions of the trials courts are free from legal errors (Langbein, Lerner, & Smith, 2009). Article 14(5) of ICCPR provides the right to appeal to accused and it states that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. Similarly Article 7(1)(a) of the ACHPR provides that "every individual shall have the right to have his cause heard", which also contains "the right to an appeal to competent national organs against acts violating his fundamental rights. Similarly, article 2 of the 7<sup>th</sup> protocol to ECHR states that everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal.

Similarly, the right to compensation in case of wrongful convictions has been acknowledged in various instruments. Article 14 (6) of ICCPR and 7<sup>th</sup> protocol to ECHR state that when a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, he shall be compensated. However, ACPR does not contain such provision.

### **Others**

This category contains all the rights which are available to an accused through the judicial which include right to present, right to interpreters, right to silence, trial without delay and equality before courts.

The article 14(3) (d) of the ICCPR states that everyone is entitled to be tried in his presence while determining any criminal charge against him. However, both ECHR

and ACHPR are silent on the point. Nevertheless, the various judicial decisions of European courts have expanded the scope of article dealing with the right to fair hearing and included this right in the said article (Sejdovic v. Italy, 2006).

Article 14 (3) (f) of ICCPR and 6 (3) (e) require that an accused person has the right to avail the free assistance of an interpreter if he is not able to understand or speak the language of the court. The right to remain silent under ICCPR is indirect since the article 14 (3) (g) requires that while determining the guilt of any person, he is not to be compelled to testify against himself or to confess guilt. However, ECHR and ACHPR do not contain any requirement concerning the right to remain silent. Nevertheless various judicial decisions given in these jurisdictions have included this right in the requirements of a fair trial (Saunders v. United Kingdom, 1996, and African Commission v. Libya, 2016). Article 14(3) of the ICCPR and 5 of ECHR provide that everyone shall be entitled to be tried without undue delay while determining his guilt. Similarly, article 7 (1) of ACHPR requires that an accused has the right to be tried within a reasonable time. The rule of law requires that every individual should be equally treated, must have access to all legal forums and must have the equal protection of law. Article 14 (1) of ICCPR and 12<sup>th</sup> protocol to ECHR state that everybody shall be equal before the courts. Similarly, article 3 of ACHPR states that every individual shall be equal before the law and shall be entitled to equal protection of the law.

### **Requirements For a Fair Trial in Pakistan**

This section addresses the second research question of the present study by describing the various requirements of a fair trial in four groups namely before trial, during trial, after trial and others.

#### **Before Trial**

This section describes the requirements which need to be satisfied before the commencement of a criminal trial and these include independent and open courts, protection from retrospective punishment, equality before courts and protection from double jeopardy.

Article 2-A and the objective resolution require independence of all courts. Accordingly, it is the constitutional requirements that all the criminal courts established by law must be independent. Similarly, the code of criminal procedure, 1898 (section 352) requires that the place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open court with some exceptions. Similarly, article 12 of the constitution prevents the imposition of retrospective punishment. The article states that a person will not be punished for an act or omission that was not punishable by law at the time of the doing act or omission. In addition, a person will not be subjected to penalty greater than or of different kind from the penalty prescribed by law for that offence at the time the offence was committed (Aftab Ahmed Sherpao versus NAB, 2005).

The equal treatment of citizen in the court is deduced from article 25 of the constitution of Pakistan which requires that all person will deserve equal treatment before all the courts in Pakistan. Similarly, the requirement of double jeopardy has been provided in the constitution, code of criminal procedure and the general clauses act. The code of criminal procedure restricts the second trial of an accused who has been convicted or acquitted for the same offence (section 403) and the general clauses act restricts the conviction of an accused when the criminal act was offence under two

provisions and the has been convicted or acquitted in the trial under one enactment (section 26). On the other hand, article 13 of the constitution restricts both trial and conviction of a person. However, accused can be prosecuted or convicted under two different enactments if his acts fall under two enactments (PLD 1979 SE 121).

### **During Trial**

This category includes the requirements which must be satisfied when the trial of an accused has been commenced. These requirements include provision of counsel, presence of accused, right to bail and interpreters, copy of the judgment, provision of adequate time, right to examine witnesses, framing of charge and protection against self-incrimination.

The right to have assistance of the council of accused's own choice has been incorporated in section 340 (1) of the code of criminal procedure. The section states that any person accused of an offence before a criminal court or against whom proceedings are initiated under this code in a criminal court, may have right to be defended by a pleader (Syed Waris Khan versus State, 2018). This is also a requirement of a fair trial that the evidence will be recorded in the presence of accused. The code of criminal procedure, 1898 (section 353) requires that evidence shall be taken in the presence of the accused, or, his pleader when accused is not required to attend the court proceedings. However, the court may record the evidence in the absence of accused if he is fugitive (section 512 of CrPC). This is also requirement of a fair trial that accused will be released on bail in bailable offences if he provides the required legal surety for the bail (section 496 of the Code of Criminal Procedure). The courts take this as their responsibility to keep the scale of justice balanced for both the parties (Abid Usman versus The State, 2013). Similarly, the code of criminal procedure (section 361) requires that the courts must interpret the evidence to the accused or his pleader in open court if evidence was recorded in the language which accused does not understand.

Section 371 (CrPC) imposes duty on the courts to provide copy of judgment to the accused at the time of pronouncing the judgment, or, when the accused so desires without delay and free of cost. Similarly, the code of criminal procedure requires that an accused will be given the copies of first information report, the police report, the statements of witnesses recorded during investigation, inspection note taken by investigating officer and the recoveries made by before seven days from the commencement of trial (section 265-C). Similarly, every accused person has right to get due process of law and fair opportunity of hearing in all criminal cases and if a court does not call the defense witnesses, the appellate courts remanded the case for recalling the prosecution witnesses for cross-examination (Akram versus State, 2015).

It is also a requirement of fair trial that the accused must be formally informed of the accusation against him. Section 221 states that the charge sheet will state (in English or in the language of court) the name of the offence, and applicable section. Likewise, an accused person will not be compelled to become a witness against himself. According to article 13 of the constitution, no one will compel an accused to become witness against himself. However, an accused may confess which can be sued against him if it is voluntary and true. In addition, the confessional statement must be recorded in accordance with the given procedure (Muhammad Naseem vs. State, 2018). Furthermore, the various judicial decisions reflect that the constitutional courts declared the statutory law unconstitutional if it required accused to become witness against himself (Khalid Hussain vs. Naveed alias Qalb Ali and 2 others (2007).

## **After Trial**

This category discusses the requirements which need to be fulfilled after the completion of first trial and it includes the right to appeal. The right to appeal is also a requirement of fair trial; however, the right is not inherent instead it is statutory right (section 404 of CrPC). The accused may appeal against the decisions of lower courts to session courts (408 of CrPC) and against the decisions of session courts to high court (410 of CrPC) and against the decisions of high courts to the Supreme Court (411-A of CrPC).

## **Others**

This section describes the requirements of a fair trial which are to be satisfied at all the stages of a criminal trial and these include speedy trials, onus of proof and right to be dealt in accordance with law.

The various judicial decisions reflect that the requirement related to speedy trial is considered important by declaring that justice should be administered as soon as possible (Jalal Shah versus Niaz Akber, 2018) and requiring that a criminal trial must be concluded within reasonable time (State versus Aijaz, 2013). The courts have repeatedly maintained that unnecessary delay in concluding trials will reduce people's confidence in the criminal administration of justice, so, a criminal trial must be concluded as soon as possible (Dr. Asim Hussain versus State 2017). In addition, the apex court is not ready to tolerate the unnecessary delay in concluding the investigation (Adnan Prince versus State, 2017). The fundamental requirement as to the burden of proof in criminal cases is that the prosecution will prove all the elements of an offence beyond reasonable doubt. The constitutional courts have also recognized and implemented this requirement in criminal trials. For instance, in Niaz Ahmad versus Hasrat Mahood (2015), the court observed that the criminal administration of justice in Pakistan is adversarial and it requires the prosecution to prove the charge against accused. However, the onus of proof may be shifted on accused when he takes pleas provided in Pakistan Penal Code (article 121 of QSO) or a fact is within his knowledge (article 119 and 122 of QSO). Another requirement of a fair trial is that an accused will be deprived of his life and liberty after observing all the legal formalities and requirements. This requirement can be deduced from the various constitutional provisions of the constitution of Pakistan. For instance, article 9 imposes general restriction on all the authorities including the courts to deprive any person of his life and liberty after observing legal formalities. Similarly, article 4 and 25 of the constitution are also of general application and they requires that everyone including an accused will be treated equally and in accordance with law. The specific provision dealing with observing the legal formalities and due process of law is article 10-A of the constitution.

## **Conclusions**

Fair trials in criminal matters are recognized as significant by both national and international legal frameworks, which provide nearly identical requirements for ensuring a fair trial. The requirements have been enhanced and expanded by judicial rulings at both the national and international levels. These prerequisites serve the purpose of safeguarding the accused against any capricious infringement of their right to life and freedom throughout the entirety of a criminal proceeding. The adherence of fair trial standards is of utmost importance for all courts, as these standards guarantee equitable, unbiased, and logical criminal trials. The majority of the prerequisites for a fair trial in Pakistan have been assimilated into legislative enactments, which could



potentially jeopardize the impartiality of the trial as these prerequisites are susceptible to being revoked through uncomplicated legislative measures. The fair trial standards in Pakistan are consistent with international norms, albeit with the notable exception of providing financial compensation to individuals who have been wrongfully convicted.

### **Recommendations**

The deeper examination of the three international instruments, Pakistani legislation, national and international judicial decisions and the commentary of the researchers on the requirements for a fair trial reveal the following aspects of the requirements of a fair trial. First, the texts of the three international legal instruments disclose the fact that almost they contain the similar requirements for a fair trial. However, these instruments are different on a very few points which have been supplemented by the judicial decisions or relevant authorities of that countries. This practice shows that the judicial and administrative bodies of these countries endeavor to align the legal framework in accordance with universally accepted standards of a fair trial. Second, the right to get the monetary compensation in case of wrongful conviction has not been recognized universally as a requirement for a fair trial.

It is suggested that right to get compensation must be included in Pakistani legal framework. Third, the three international instruments and Pakistani law require various conditions to be fulfilled at various stages of a trial including pre-trial stage, trial stage and the appellate stage. Moreover, most of the requirements for a fair trial a general in nature and are to be satisfied at all the stages of judicial proceedings. Four, the various requirements in international and Pakistani legal framework tend to ensure impartiality, fair play and rational decision making in a criminal trial. Five, all the legal requirements for a fair trial in criminal proceedings in Pakistan have been incorporated or found in statutory and constitutional law. The various constitutional requirements are general in nature; on the other hand, the numerous requirements in statutory laws are specific for criminal trials in Pakistan. This trend poses a threat to the fair trial since the parliament may take away these requirements by passing a simple law. It is necessary that the fundamental requirements for a fair trial must be incorporated in the constitution so that these may not be taken away easily. Six, the Pakistani legal framework concerning the requirement of fair trial is comprehensive. It not only incorporates all the universally accepted requirements of a fair trial (excluding monetary compensation to wrongfully convicted individuals) but also additional requirement intending to ensure a fair play in criminal proceedings.

Seven, the requirements for a fair trial provided in national and international legal instruments are not exhaustive. The judiciary at national level in various countries has expanded the scope of these requirements either when any requirement is included in the international instrument but missing in the state legislation or when they share indispensable features of a fair trial. Eight, all the requirements for a fair trial in national and international legal framework are not of the same nature. The courts have the discretion to treat some requirements as mandatory and some requirements as discretionary. Likewise, some requirements are without exceptions whereas some requirements admit exceptions. On the same line of reasoning, some requirements are incorporated in the both constitution and statutory law and some requirements are only incorporated either in the constitution or statutory law. Nine, all the international instruments contain the provision that accused is deemed to be innocent; however, the presumption of innocence is not found in Pakistani constitution and statutory law though it has been recognized by the courts. Lastly, the requirements provided in the international instruments may be claimed in Pakistan if the same instrument has been rectified by Pakistan.

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