DOI: https://doi.org/10.52131/pjhss.2022.1004.0322

Pakistan Journal of Humanities and Social Sciences

Volume 10, Number 4, 2022, Pages 1651–1656
Journal Homepage:
https://journals.internationalrasd.org/index.php/pjhss

Extrinsic and Intrinsic Aspects of The Adversarial System of Pakistan: Fact Finding Through Evidence

Faiz Bakhsh[1], Naveed Ejaz[2], Fakharuddin Khattak[3], Jibran Jamshed[4]

[1] Assistant Professor, University Gillani Law College, Bahauddin Zakariya University Multan, Pakistan. E-mail: faizmalik@bzu.edu.pk
[2] Ph.D. Scholar, The Islamia University of Bahawalpur, Pakistan. Email: nidoojaz@gmail.com
[3] M.Phil. Scholar, Department of Criminology, University of Sindh, Jamshoro, Pakistan. E-mail: gunlord24@gmail.com
[4] Associate Professor, The Islamia University of Bahawalpur, Pakistan. E-mail: jibran.jamshed@iub.edu.pk

ARTICLE INFO

Article History:
Received: November 10, 2022
Revised: December 25, 2022
Accepted: December 29, 2022
Available Online: December 31, 2022

Keywords:
Adversarial System
Fair Trial
Extrinsic Approach
Intrinsic Approach
Pakistan

Funding:
This research received no specific grant from any funding agency in the public, commercial, or not-for-profit sectors.

ABSTRACT

Due to its foundations in the English and Magna Carta legal systems, Pakistan's legal system is fundamentally adversarial. The dominant idea that runs through Pakistani law is the adversarial paradigm. For the purpose of establishing facts, this method primarily relies on numerous types of evidence. However, the disadvantages of Pakistan's adversarial system to its socio-political and religious-economic environment outweigh its advantages. This paper explores Pakistan's adversarial judicial system in terms of its extrinsic and inherent characteristics, as well as its advantages and disadvantages for the country's legal system. This study discusses the adversarial legal system of Pakistan the extrinsic and intrinsic components of an adversarial system by in the light of constraints and benefits to the Pakistani legal system. The fact finding with the help of evidence and extrinsic and intrinsic aspects of the adversarial system of Pakistan are discussed in this study. There lacks an effective legal framework as well non enforcement of existing laws without proper checks and balances on the concerned departments and offices. There is a dire need to reform and update the existing legal framework in line with the modern world systems.

Corresponding Author's Email: jibran.jamshed@iub.edu.pk

1. Introduction

Treason Trials Act (1696), ushering in the modern adversarial system. For the first time, persons accused of treason were granted full access to attorneys under this Act in order to plan and carry out their defense. Despite being referred to as a "charter of defensive precaution," this right was refused to be given to regular criminals. The Prisoner's Counsel Act (1836) marked a significant step towards formalizing access of being represented legally, but during 18th century there were observed gradual improvements, such as the introduction of lawyers and other legal professionals, that helped shape the adversarial system we have today.

While having deep roots in various legal systems around the world, Pakistan's legal system has made the adversarial system its pillar. The adversarial common law system of England has greatly influenced how the law is applied and comprehended. Although the origins of the adversarial system can be traced to the Greeks and Romans, whose trial of Socrates was the first instance of a public trial with adversarial features, this fundamental form has undergone numerous transformations, and the two most well-known adversarial systems in the world, the English and American systems, have developed a significant number of distinguishing features. When examining the elements of an adversarial system, it becomes clear that the process of discovering the truth consists of two parties under contest debating the same facts surrounding only a single happening in front of a 'decision maker' (a judge in Pakistan's case) who, after considering the evidence presented and the applicable law, renders a decision regarding the accused's guilt or innocence. As the majority of the twelve assessors were elders from the same region where the crime was committed and had significant power and say in the case, they were

not required to have legal backgrounds throughout the trial. Due to the adversarial nature of the British and American legal systems, jurists who are situation assessors play a crucial part in determining the truth of an incident and leave little to chance in doing so. Law changes passed in 1972 eliminated the jury system and gave judges a more focused role in decision-making. Despite the fact that there are numerous theories regarding fair trials under the widely used adversarial system that is popular in International Law, many theorists still view these theories as being in a "embryonic stage." Furthermore, Goodpaster (1987) contends that while these theories may clarify some aspects of a fair trial, they fall short of providing a thorough and in-depth analysis of the right to a fair trial and all of its components.

The major problem is that, while these theories explain many aspects of the legal system that is currently in use in Pakistan, they do not give a complete and all-encompassing picture of it. In the field of law, there are numerous theories that explain and provide reasons for various aspects of legal procedures and trial customs. It remains to be observed whether these ideas provide legally solid findings and how much of them is founded on incident facts, as the major objective of a trial is to ascertain the truth.

"The Universal Declaration of Human Rights (1948)," which the UN ratified in 1948, was the first worldwide statement to defend human rights. The UDHR, hailed as the "common standard of achievement for all peoples and all nations," was the precursor to the creation of a complete "International Bill of Human Rights," which was later followed by the International Covenant on Civil and Political Rights (1966) and numerous other laws and agreements. The right to a fair trial is covered in depth in articles 10 of the The Universal Declaration of Human Rights (1948) and 14 and 15 of the International Covenant on Civil and Political Rights (1966).

Pakistan's criminal justice system is widely branded as a flawed and unjust system and is notorious for problems: before the law was enacted, during investigations and eventually lengthy trials and court appeals. Among the many additional causes, a few stand out: insufficient training, a lack of contemporary investigative tools, outdated and antiquated legislation, notably procedural laws, the number and pendingness of cases, and large court backlogs.

Finding the truth about the incidents happening in the context of the background of historical nature of the events is the goal of a criminal trial. Since there is no established term for the adversarial system as a whole, it is essentially known by several names in various societies. It is the "CrPC, PPC, and other codified laws in Pakistan". In Pakistan, the civil and criminal legal systems coexist side by side. This dissertation intends to explore the criminal component of Pakistan's adversarial system, which is more rigid and limited in terms of its applicability.

The adversarial system used in Pakistan has various distinguishing characteristics in the search for the truth, much like any other adversarial system used throughout the world. A decision maker who is largely passive attributes criminal liability and consequently convicts or acquits the accused after "evaluating" the evidence and the facts given by both sides. Facts are established through discourse between two opposing parties. In an adversarial system, both parties unintentionally tend to privilege their position over the opposite party's morally good pursuit of truth or righteousness. The defence will have the chance to evaluate the facts and respond appropriately once the prosecution presents its case in person and presents evidence to support it. In all adversarial systems, the rules governing how to present evidence in court are intricate and difficult.

2. Fact Finding Through Evidence.

2.1. Direct Evidence

Direct evidence is evidence that the witness has seen, heard, touched, or experienced it firsthand. Oral evidence can be used to prove all facts, except the contents of documents. It goes straight to the heart of the matter. The evidence to be presented in a trial includes testimony from eyewitnesses, as well as evidence that was produced in the original document. Direct evidence has a very high probative value.

"Oral evidence must, in all cases whatever be direct, that is to say—If it refers to a fact, which could be seen, it must be the evidence of a witness who says he saw it; If it refers to a

fact, which could be heard, it must be the evidence of a witness who say she heard it; If it refers to a fact, which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner; If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds".

2.2. Circumstantial Evidence

A conclusion can be reached from a group of facts or information using circumstantial evidence. The judge and jury must accept the evidence presented to them to reach this conclusion, for instance: C is accused of stealing from a superstore, and D is a witness who saw C fleeing with a box. "Here, witness' observation is considered as direct evidence where the conclusion drawn based on witness' observation that the accused shoplifted is considered as circumstantial evidence".

Circumstantial evidence is not always weaker than direct evidence when many situations are gathered to guide a court or jury in a conviction. In combination, several factors may not be sufficient proof of guilt on their own, but when taken together they may be enough to prove guilt. This means cases can be solved based on circumstantial evidence.

"All statements which the court permits or requires to be made before it by witnesses in relation to matters of facts under inquiry; such statements are called oral evidence and, all documents produced for the inspection of the court; such documents are called documentary evidence."

2.3. Primary Evidence and Secondary Evidence

Primary evidence is an original document and a statement about its contents. "The contents of documents may be proved either by primary or by secondary evidence". Primary evidence is usually required to prove the contents of a document.

"Primary evidence means the document itself produced for the inspection of the Court. Where a document is executed in several parts, each part is primary evidence of the document. Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, counterpart is primary evidence as against the parties executing it. Where several documents are all made by one uniform process, as in the case of printing, Lithography or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original"
Secondary evidence means what you can submit in the absence of primary evidence. Secondary evidence refers to any document that is offered as proof of something else. If an original is lost or destroyed, and a party has tried to find and produce it using all possible means, then its secondary evidence can be used.

"Secondary evidence is a copy of a document and verbal evidence about its contents. "Secondary evidence means and includes— (1) certified copies given under the provisions hereinafter contained; (2) copies made from the original by mechanical process which is themselves ensure the accuracy of the copy, and copies compared with such copies; (3) copies made from or compared with the original. (4) counterparts of documents as against the parties who did not execute them; (5) oral accounts of the contents of a document given by some person who has himself seen it".

2.4. Documentary Evidence

Document as defined in Article 2 (B) of Qanun-e-Shahadat Order (1984) means "any matter expressed or described upon any substance utilizing letters, figures or marks or by more than one of those means intended to be used, or which may be used, to record that matter". Evidence presented in the form of a document to support a contentious claim is referred to as documentary evidence.

2.5. Oral Evidence

All the statements that witnesses have made concerning the issues being investigated constitute oral evidence. Additionally, oral testimony only consists of spoken words or gestures, as if the witnesses are deaf and illiterate. The requesting party's cross-examination of the

principal witness is included in oral evidence, as is the other party's questioning of witnesses If oral testimony is credible, it suffices to establish the truth of a claim without the need for supporting documentation. Article 71 of the QSO specifies that oral testimony must be direct (Qanun-e-Shahadat Order, 1984).

2.6. Electronic Evidence

Nowadays, practically everyone has a mobile phone, tablet, PC, iPod, iPad, Pen Drive, Hard Disk Drive, etc. thanks to improvements in electronic devices. There are numerous surveillance cameras, monitors, and other recording devices installed in homes and businesses. "Production of evidence that has become available because of modern devices, etc. In such cases as the court may consider appropriate, the court may allow to be produced any evidence that may have become available because of modern devices or techniques". Clause (e) of Article 2 (Interpretation) of the Qanun-e-Shahadat Order (1984) is also noteworthy to a certain degree under which the expression "automated", "electronic", "information", "information system", "electronic document", "electronic signature", "advanced electronic signature", and "security procedure" means the meanings given in the Electronic Transactions Ordinance.

2.7. Medical Evidence

Only those who have received the appropriate education and training can access certain types of knowledge, including medical knowledge. Medical experts are recognised as a vital part of the criminal justice system, as they can help to ensure that justice is served. Medical experts have testified extensively in court cases, helping to make determinations about time of death, causes of death, weapon used, and other factors. Their testimony is especially important in cases involving death. It is possible to obtain evidence from postmortem report examination and Autopsy.

2.8. Expert Evidence

The law of evidence is intended to assist the Court in coming to a trustworthy decision by limiting its consideration to pertinent and useful evidence. It is necessary to hear the expert's testimony for it to be admissible, which is the first condition. Whether the subject is beyond the knowledge and experience of the layperson will be put to the test. This indicates that when a medical issue needs to be resolved, it is necessary to hear an expert's viewpoint. The question of the scientific accuracy of the plaintiffs' claims is outside of the Court's expertise. Experts in science typically have a central role in cases where the science involved is specialized and difficult to understand.

Such obstacles to the pursuit of truth can also be seen in Pakistan's adversarial system. The same right is granted to the accused in accordance with 59 A CrPC, for instance, which offers the same benefits to the defense in terms of having advance knowledge of the case's specifics as addressed in this dissertation. This exemplifies the delicate balancing act that the prosecution and defense must do in order to protect the rights of the accused while also ensuring that the truth is discovered over the course of the trial.

3. Approaches in the Adversarial System

There are normally two basic strategies from which any of them is used in the pursuit of truth. The first on is extrinsic approach and the second one in intrinsic approach to an adversarial system. This can also be seen as the trial's fundamental strategy. Trials can be viewed as a method for fact-checking. On the other hand, theories create facts from evidence by fabricating them. Simply defined, a trial seeks to determine "what happened," as Goodpaster (1987) contends. Truth-finding, where facts, shape, and other materials serve as "proof" or proof to support a particular claim.

According to this viewpoint, Duff, Farmer, Marshall, and Tadros (2007) argue that it corresponds to theories of specific trial aspects rather than a general theory of trial. According to Duff et al. (2007), in the process of the development of a general theory of trial, two issues come up: first, "What the trial's epistemic aim is or should be?" and second, "What is the relationship between the epistemic aims of the trial and the process (a defendant's due process rights) through which those aims are pursued"? The question of whether "truth is the ultimate aim sought, or truth is part of a more ambitious goal that the trial may have," still needs to be

answered. A further issue with adversarial trials is that, because the parties are in charge of the proceedings, they are not motivated to actively seek the truth.

The extrinsic approach, which contends that the outcome of the trial will have social and political repercussions, is the second component of fair trial theory. Burns identifies four trial pillars while making his case from the standpoint of the rule of law. "The legitimacy of legislation to a version of popular sovereignty" comes first. The rule of law is second that serves as a safeguard against the abuse of authority by private players within the state. In order to preserve liberty," "the rule of law" places a cap on the state's authority. Last but not least, the rule of law aims to establish uniformity by applying the idea of equal regard for persons to similar instances.

Lai (2010) liberal view of criminal trial is strongly related to Burns' stance on the rule of law. According to Lai, any court that is criminal court is both a liberal state institution of liberal nature. In a liberal democracy, people over whom the state exerts power can hold it accountable (via the courts) (individual liberty). According to this viewpoint, a "criminal trial" is a component of this "type of accountability politics," according to Lai.

4. Truth-Finding Theory in Adversarial System in Pakistan

The foundation of growing convictions regarding the breadth and dependability of the fair trial process in our modern legal system may be observed in truth-finding theory. Fair decision theory is a popular legal theory, as per belief of various renowned scholars, and truth searching theory are extensions of one another and encourage the pursuit of the truth. The fundamental advantage of Pakistan's adversarial trial system is that, despite its imperfections, it is still recognized as the best truth-finding method ever established. This is true since the discovery of the "truth" as it relates to Pakistan's socio-legal environment is the adversarial system's primary precept.

The "criminal trial", as a procedure in which summons are sent to accused to answer an allegation of being involved in any activity of criminal nature, is the means via which this theory's central idea of calling to account is presented. The fundamental goal of a trial in an adversarial system is to "establish the truth." They seek to prove if the accused committed the alleged crime, whether they are eligible for a defense, and whether they are punishable. Concerning trial challenges, observers assert that they are many in the modern world of criminal trial. First, there is a growing desire for striking a balance between the interests of the crime victim and the defendant's right to due process. Second, case management strategies are challenging the idea of conducting additional scientific research throughout the trial. Because jurors have a limited involvement in trials in England and Wales, this is true.

The National Judicial Policy in Pakistan has been such a problem. With matters needing to be resolved quickly and within a certain time span, the policy provides little room for drawn-out trial processes. For instance, the recent assertion by Pakistan's top court that "12,584 murder and drug cases disposed of by model courts in 5 months" provides little room for interpretation in terms of the necessity of truth-finding to ensure the rights to a fair trial and the application of the law. Second, by limiting the defendant's due process rights, the war on terrorism has achieved significant progress around fair trials. Pakistan is also not an exception. Third, it's becoming more common for criminal cases to be decided based on guilty pleas. Instead of paving the way for clearly defined contested trials, procedural regulations designed to persuade defendants to submit guilty pleas in exchange for a lighter punishment serve expediency.

Finally, the push to use alternative approaches to restoration and reconciliation in the criminal justice system has seriously hampered the search for the truth and the right to a fair trial. By looking into ways to make amends for the harm committed during the commission of a crime, "restorative justice" aims to bring together both the parties known as offender as well as victim. There is no question that the rights to "fair trial" are not seriously violated by the adversarial system that is now in place in Pakistan. The right to a fair trial is burdened in court procedures because of the strain over the courts to reach decisions in cases in a time that is impossibly short —just days—as stated in article 10-A of Constitution of Pakistan (1973).While quick trials are currently praised, there is a grave violation of trial rights.

On the other hand, the protracted trial proceedings had negative effects on the prosecution and defense from an emotional, monetary, and social standpoint. Only when the purpose of the trial is truth discovering can the best compromise between trial time management and fair trial rights observation be made Ramsey and Frank (2007) claims that one issue is the validity of the evidence at a certain period. even if the procedural environment of the court can influence truth-finding.

5. Conclusion

How do we explain these aspects of Pakistan's judicial system? Numerous theories have been developed in the past to explain legal systems with the aforementioned characteristics, and these ideas are also applicable to Pakistan's criminal judicial system. The basic principles of criminal law are to protect the rights of citizens and uphold the principles of justice, equity, and fairness. The judiciary requires fair play and prompt disposition of the case, so society can benefit from an effective judicial system. Pakistan's criminal justice system has gone through various stages, as mentioned above. Therefore, each phase involves a separate state agency.

It is improper to hold one institution to a higher standard than the others or to assign sole responsibility to one institution. To produce a successful result, all of the participating institutions must collaborate. Since its beginning, Pakistan has struggled with political instability. The judiciary, prosecutors, and police must create a dynamic approach in their areas of responsibility for effective adjudication in criminal cases; they must cooperate to reinforce, support, and complement one another.

References

The Constitution of Islamic Republic of Pakistan (1973).

Duff, A., Farmer, L., Marshall, S., & Tadros, V. (2007). The Trial on Trial: Volume Three: Towards a Normative Theory of the Criminal Trial.

Goodpaster, G. (1987). On the theory of American adversary criminal trial. *J. Crim. L. & Criminology, 78*, 118.

International Covenant on Civil and Political Rights, I. (1966). *International Covenant on Civil and Political Rights - OHCHR*: Human Rights Instruments.

Lai, H. H. (2010). Liberalism and the criminal trial. *Sydney Law Review, 32*(2), 269-287.

The Prisoners' Counsel Act 1836, (1836).

QANUN-E-SHAHADAT ORDER, 1984 RELEVANCY OF FACTS, (1984).

Ramsey, R. J., & Frank, J. (2007). Wrongful conviction: Perceptions of criminal justice professionals regarding the frequency of wrongful conviction and the extent of system errors. *Crime & Delinquency, 53*(3), 436-470. doi:https://doi.org/10.1177/0011128706286554

The Universal Declaration of Human Rights, T. (1948). *UN human rights declaration - Fundamental human rights*. Retrieved from United Nations: https://www.ohchr.org/en/node/104455?gclid=EAIaIQobChMIgIiH87Wm_QIVEJBoCR3bZAnNEAAYASAAEgIdG_D_BwE

The Treason Trials Act of 1696: The Advent of Defense Counsel, (1696).