

## HISTORICAL BACKGROUND OF JUSTICE SYSTEM, ITS EVOLUTION AND STATE INSTITUTIONS

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**ABSTRACT:** *A man is thought to be as a social animal. Humans like to live collectively in towns and cities. Naturally, when people live jointly, they have difference to each other on different issues. In civilized societies, differences are settled through rules and laws. There are different sources of these laws like tradition, customs, culture and divine knowledge. To maintain peace and solve their disputes humans introduced justice system. The primary notion of justice is to safeguard the rights of all citizens. In the developed societies to secure peace and stability, rights are secured according to law irrespective of color, creed, language and race. Justice is the basic need of every human. The basic need of the justice is equality, impartiality and just dealing. This paper intends to offer the students of law a review of the historical progress that have develop the idea of the rule of law and sum up the prevalent conflicting theories that have been prevalent in different society at different times in the history.*

**Keywords:** *Justice, Legal System, Roman Laws, Alternative Dispute Resolution system, the Shariah law*

**INTRODUCTION:** “*Fiat Justitiae quia laus*” is a Latin phrase, which means “let justice be done, though the heavens fall”. This Latin term refers Justice as a “virtue”. However, Lord Denning claims that first this phrase was used by Seneca. It is reported in the history that a soldier was charged of murdering Gaius and sentenced to death by Piso. He ordered a centurion to fulfill the orders and execute the death penalty. However, when the soldier was about to be executed, Gaius returned alive in good health. The centurion reported it to Piso who rather let the soldier free, awarded the death penalty to both the centurion and Gaius with the soldier. According to Piso’s judgment, the soldier had already been sentenced to death penalty, which could not be over turned for any cause. Since the centurion disobeyed Piso’s orders, Gaius became the cause of the death of two innocent men i.e the soldier and centurion. Piso executed all the three men by following his voice that, “Let Justice be done, though the heavens fall”.<sup>1</sup> The basic idea of justice is to secure all the basic rights of all humans. In an educated and peaceful society, people’s rights are safeguarded by law regardless of color, creed, language and ethnicity. Justice is a person’s basic need. The first need of the justice system is equal status, objective attitude and fair trial. In the West, Lady Justice, a blindfolded female holding a scale in one hand and a sword in the other hand, is the traditional symbol of justice. Lady of Justice is also a common symbol of Greek and Roman mythologies. This shows that there must be equality without fear, favoritism or bias while respecting the rule of law. However, “law” and “justice” are the two separate terms to each other. As per the dictionary record, the law is a “rule imposed by authority”. More accurately, the Oxford dictionary explains “justice” as:

“The quality of being morally just or righteous; the principle of just dealing; the exhibition of this quality or principle in action; just conduct; integrity; rectitude;

conformity (of an action or thing) to moral right or to reason truth or fact; rightfulness; fairness; correctness; propriety<sup>2</sup>.”

Primarily a justice system is an evolutionary process, which has been continued to develop in the history for long time. While tracing back the historical development of the concept of justice and its accessibility in Europe, it appears that in 399 BC, Socrates was sentenced to the death by drinking hemlock on the charges of disbelieving the Gods and disseminating those thoughts to youth. Contrary to modern legal system, in Athens the accused was subject to torture and liable to prove his innocence despite having no evidence against him. Otherwise, he used to be detained, marred or expelled from his land. Unfortunately, today in the 21<sup>st</sup> century in some rural areas of Pakistan, similar old practices to ancient times are still in use. The suspects are made to walk on the burning coals in order to prove their innocence. In the recent past Federally Administered Tribal Areas in Pakistan were ruled under the legal framework of Frontier Regulation 1901. According to those regulations, the Council of Elders (Judges) could select any mode of operandi for deciphering the facts.

To establish a situation of peace and stability in the society, the Babylonian ruler Hammurabi<sup>3</sup> framed a law mechanism named as “the Code of Hammurabi” around 1700 B.C. This code consisted of all phases of life including social, economic and political spheres. Hammurabi code was based on the idea of “an eye for the eye and tooth for the tooth”. At that time, it was thought to be as divine and unaltered law conferred by the ancient God called Mardouk<sup>4</sup>. Thus, even the king Hammurabi was supposed to be under the law. Hammurabi people put those rules on the stones tablets in the market so that people could easily know about them.

In 621, King Draco codified his own legal system from which the term ‘draconian’ is coined. According to Draco’s laws, minor crimes such as stealing vegetables etc were subject to the death penalty.<sup>5</sup> Soon after Draco rein, the next lawmaker Solon<sup>6</sup> introduced a Code in 594 B.C. He threw away all of Draco’s laws except those concerning to homicide. He had to strike a balance between the concerns of the aristocracy and those of the poor. They were quite displeased with previous inhuman laws, which allowed the rulers to sell the poor’s families to slavery if they failed to pay the debts to aristocrats. Under this code, jury trial was established and the accused obtained the right to hire a lawyer in his defense.

In contrast to previous ancient laws, the Roman Laws<sup>7</sup> were much detailed and inclusive which enclosed all social, political and financial issues. The basic rights of women, children and slaves were clearly mentioned in those laws. The Roman judicial system separated facts from the laws. Although, under those laws women were deemed as servants because Roman society was based on a male dominated culture. The Roman Judicial system contains a Jury, trial procedure, prosecutors, defense attorneys and impartial Judges. In Roman culture, legal laws not only reflected power of the state but they served as means through which individuals could protect their rights. Although Romans produced a remarkable collection of laws, the Roman Emperors had authority to give the death penalty to any individual without a

legal accountability; slaves' trade was common and they were sold for less than the price of a good horse. In addition, the accused person had to face harsh punishments, as they were forced to fight the hungry lions bare handed or beheaded in a cruel fashion. During 1086 in England, the Domesday Book<sup>8</sup> was written which provided the names of landowners and their properties to control the property owners. In 1215, "King John"<sup>9</sup> of England signed the charter of "Magna Carta"<sup>10</sup> He introduced the Jury trial and law which gave protection to private property. Under the famous Revolution<sup>11</sup> of 1688 AD in Great Britain, the King's powers were curtailed his power to influence the cases of legal court. The <sup>12</sup>revolutions of 1830 and 1848 in France made the rulers answerable before the law. All those developments made everyone equal under the supremacy of law<sup>13</sup>. At the same time, the French revolutions of 1830 and 1848 made the rulers answerable before the law. Conclusively, all those developments in Europe introduced the notion of equality before law.

**THE CONCEPT OF JUSTICE IN ISLAM:** According to Islamic interpretation, Justice means to set things at the right place with right treatment.<sup>14</sup> Islam considers the idea of law as a character of human identity. Under the Islamic legal system all humans are equal without having any preferring their cast, color, race, language and creed. Allah says in the Quran: *"Indeed, Allah orders Justice and good conduct and giving to relatives and forbids and bad conduct and oppression. He admonishes you that you perhaps will be reminded."*<sup>15</sup>

At another place the Quran narrates: *"O you who believed, be persistently standing firm for Allah, witnesses in justice, and do not let the hatred of a people prevent you from being just. Be just; that is nearer to righteousness. And fear Allah; indeed Allah is acquainted with what you do."*<sup>16</sup>

Injustice is strictly prohibited and Justice is considered as an obligation in Islam. In Quran Allah says: *"We sent Our Messengers with clear signs and sent down with them the Book and the Measure in order to establish justice among the people..."*<sup>17</sup>

Islamic legal system provides all the fundamental guarantees that may exist in the modern criminal justice system in the world. It considers every individual as innocent unless the accused is proven as guilty. The presumption of innocence is that it is better to pardon the accused rather than to punish him erroneously. Therefore, in the following situations the accused would be considered as not guilty in the Islamic legal system such as "suspicions or doubt concerning proscription and criminalization, and the evidence thereto suspicions or doubt concerning criminal intent and the ignorance thereof; suspicious or doubts concerning the evidence of the commission of the crime or the material element of the crime; or suspicious or doubts concerning the application of criminal laws to the details of the facts of the situation."<sup>18</sup> Islam supplies all the guide lines to achieve justice. Hence all the means, procedures and methods that are meant to facilitate justice without violating the Islamic laws enshrined under the Quran and Sunnah, are established as valid under the Islamic jurisprudence. In Sub-continent, the Mughal Empire continued its reign from 1526 to 1857 and set up a sophisticated legal mechanism consisted of Islamic standards.<sup>19</sup> The

core principles of those laws taken from ‘the Quran and Sunnah of the Prophet (peace be upon him)’. After 1857, the British colonial government established a judicial system based on common laws; however, they preferred the judicial officers who belonged to British origin. On one hand, they reserved certain privileged rights for themselves in that system and on the other side; they put in strict laws for common masses to curb the effects of mutiny of 1857. However, to strengthen their control in British India the colonial rulers kept flouting the basic rights of general masses.<sup>20</sup> In 1919 after “World War 1”<sup>21</sup> “the Rowllat Act”<sup>22</sup> was approved that allowed the colonial rulers to precede the political cases without the Jury. It also allowed the imprisonment of accused without any trial in order to change the brutal provisos of “Defense of India Act 1915.”<sup>23</sup>

In the history, laws have been molded under certain conditions and circumstances. For example, despite the existing conventional judicial system and trial courts, in most of countries military courts have their own laws to prosecute the accused persons. However, contrary to manmade laws, the Islamic Criminal Law guarantees the rights of an accused with excellent procedural requirements. Therefore, any legal system based upon the Islamic principles evades miscarriage of justice.

In the given context of historical evolution of justice system in Indo Pak, the British rulers agreed to divide India and declared Pakistan as an independent state on 14<sup>th</sup> of August 1947. Pakistan emerged as an autonomous country based on Islamic principles. Since 98% of the population is Muslim, in the beginning Islam was declared as an official religion of Pakistan. In 1948 the first constituent assembly of Pakistan passed the Objective Resolution which affirmed that the Quran and Sunnah of the Prophet Mohammad peace be upon him shall be the supreme law of newly established state. This Objective Resolution has remained effective in all the subsequent constitutions enacted in Pakistan from the start. Finally, the national assembly of Islamic Republic of Pakistan adopted the same resolution as its preamble in the last constitution of 1973. However, later in order to keep it as a part of the constitution, an amendment was added as Article 2-A in the constitution of Pakistan.

**ACCESS TO JUSTICE AND STATE INSTITUTIONS:** Legal remedies are provided under the laws promulgated by the state, customs and traditions as well as. They qualify the test of human rights and values. According to Goldsmith<sup>24</sup>, “the criminal justice system has served two purposes. The first one is instrumental and utilitarian: the state is responsible for crime prevention and reduction to secure the society from chaos. Second is symbolic or non-utilitarian: the state must redress imbalances caused by those people who take illegal advantage of others or diminish their human dignity.” While talking about “access to justice”, people do not necessarily consider a particular judicial system but all accepted norms and attributes relating to the concept of justice. The idea of “access to justice” has been described by the United Nations’ Development Project<sup>25</sup> in the following words: “Access to justice is a basic human right as well as an indispensable means to combat poverty, prevent and resolve conflicts.”

The phrase judicial system refers to formal state institutions i.e. judiciary, prosecution and public defense. Thus, in the context of access to justice, other informal institutions such as the Mediations centers, Arbitration and customary *panchayats* also play a key role. In the area of Asia-Pacific, the mechanism of ADR and other conventional justice structures like “quasi-judicial institutions”, “office of ombudsman” and tribunals perform in many cases, which cannot be overlooked. The civil society also plays an important role to support the accountability process of the institutions. The police and prison system play a key mechanism in the process of access to justice. The Ministry of Law and Justice develop policies and procedures for the management and administration of judicial system. In order to curb inhuman sentencing by the feudal lords the *panchayat* system could not successfully flourish at village or town level. Usually in rural areas of Pakistan the *Jirga* (panchayat) do not hesitate to declare the death punishment and execute the same without the fear of state intervention. The case of Wadero Muhabat Khan Khoso may be presented here as an example in this connection. However, the Sindh High Court has declared holding of *Jirga* as illegal and further held that it is the absolute and exclusive responsibility of the state through its forces to ensure people’s safety and enforcement of their fundamental rights.<sup>26</sup>

**THE COURT JUSTICE SYSTEM:** The traditional legal courts consist of judges appointed from the state. They have the power to decide the cases and provide justice according to law. These legal courts provide an arena to the petitioner where all the disputants are equal before the law and their legal rights are protected under the state governed laws. Initially the trial courts start their procedure by evaluating facts and recording evidence in contentious matter. Legal system acknowledges that human can make error. Therefore, the process of re-appraisal of case record through another senior officer having legal understanding is considered as appeal and revision. It is a well-known statement which the Honorable apex court used in different cases that “the courts must not shatter the trust reposed to them by the general public by involving themselves in procedural technicalities”. The prime duty of the courts is to administer substantial justice, which should not only be done but must be seen to have done at the earliest.<sup>27</sup> Consequently, the strategy to restructure the court mechanism is mainly suggested to improve their operational competence.

**TRADITIONAL JUSTICE SYSTEM** Apart from the traditional legal system, there exists another informal justice system to resolve the conflicts. This consists of Alternate Dispute Resolution (ADR); a method devised to overcome the back-log of courts at one hand and ensure prompt, easier and acceptable resolution of disputes. Besides the ADR mechanism, there also exist other traditional and indigenous judicial mechanisms to deal with the complaints of people in the societies. The government is obligated to support some positive features of these mechanisms and to make sure that these conventional and local systems can operate in accordance with law and human rights standards. Undoubtedly the ADR system cannot be considered as an alternate for the traditional legal system; although, it offers a substitute forum and different



methodology to solve the grievances of masses by offering a win-win position to both the sides in a contest. Public courts may be required to verify the validity of ADR methods, but they rarely revoke ADR decisions and award if the disputed parties form a valid contract to be respected by them. Arbitration and Mediation are the two major types of ADR methodology.<sup>28</sup> The ADR helps the poor and oppressed segments of the community to get 'access to justice' easily.

The primary features of ADR are as under: -

1. This is much faster than the formal courts' litigation process;
2. Relatively, ADR procedure incurs fewer costs than traditional court legal procedure requires which needs expert lawyers and hefty legal fees.
3. Due to its informal setting people do not hesitate to contact to this forum than the formal courts' system which are full of formalities;
4. In ADR mechanism most of the mediators belong to the community and well-known to the conflicting sides; for this reason, the disputants think it comfortable to share their issues and trust on them wholeheartedly;
5. The most important is that ADR mechanism helps to reduce back-log created due to excessive conflicts occurring in the society;

**THE LAW ENFORCEMENT DEPARTMENT:** As any modern state cannot function without the justice system, the police department works as a long arm of judiciary to maintain law and order situation in general. In an event of any cognizable offense, police intervene to lodge report and investigate to arrest the offender. Thus, the primary responsibility of the enforcement agencies like police is to create peace and stability in the society. Basically the right of every citizen to access to justice system lies within the police functionaries. The function of the police and its responsibility is to monitor the state of law and order, with a view to accessing justice. It is not just limited to combat crime and act as a security agency. The police department also has a significant role in protecting and preserving basic human rights. The police in Pakistan have been condemned for their leniency in preventing human rights violations and using unrestricted oversight to create abuse of power.

The police department warrants availability of discretionary powers, which are to be exercised at judicial level but in proper manner. However, the absence of effective control on these discretionary powers results in the transformation of the abuse of power. Necessary measures must be taken to reform the police structure and regulate their discretionary powers that could lead to human rights violations otherwise. Such measures would help to monitor the police 's performance and restrict the abusive use of power. The prison system is another important mechanism in providing "access to justice". It is a protected area where accused are confined. This is the duty of the state government to establish prisons, which are the major component of any state's criminal justice system. Every country has its own different prison structure. The prisoners are usually kept under confinement according to their sex, age, and previous criminal record. The legal reasons for their detention and the provisions of their treatment are also kept in consideration under the rules. The basic principle of

"Standard Minimum Rules for the Treatment of Prisoners (8) says" The safety and security of prisoners, jail staff, and visitors shall be made sure at all times".<sup>29</sup> According to jail manuals, the female prisoners must be detained separately from the male prisoners. Correspondingly, under trial prisoners should be separated from the offenders and the prisoners accused in civil cases be kept away from the ones who are charged with criminal offences. Under the traditional criminal justice system, the courts order the imprisonment of the offenders who are found guilty of any offence as well as those accused ones whose trial is processed before the court. If there is a risk that the accused would abscond at any stage before or during the trial, the court may order for his incarceration in the prison.

The prisons provide manifold services to the courts in particular and the society in general. The prison system protects the society from the destructive individuals and outfits who might pose threat to others. The prison mechanism not only helps to change the attitude of the offenders but also plays a rehabilitative role. It ensures smooth completion of the trial till the offender is proved guilty. Similarly, the mechanism of prison creates an un-conscious fear in the hearts of general public at large for accountability and simultaneously improves people's trust in rule of law.

Under the United Nations Development Program (UNDP) a framework was provided based on two objectives namely Human Rights and Capacity Development. The qualitative limits of access to justice are the core principles related to human rights. The standards of Human Rights relevant to access to justice are included independency, due process and torture free arrest and detention. Often the poor and deprived segments of the society suffer from discrimination and are subject to abuse of power. They have been victimized to human rights violations and criminal acts as well. The frailty of this section causes them to be the victim of fraud, sexual or economic exploitations, and assassinations in some cases. The use of drugs and crimes affect the lives of poor and deprived people badly and it is difficult for them to find easy redressed of their grievances. In this context, the state judicial system provides a way to control the crimes by penalizing offenders and transgressors. The legal court mechanism plays a pivotal role to compensate the grievances of deprived people and ensures the common people their right of access to justice and other social and human rights.

**CONCLUSION:** Suffice is to say that the legal systems around the world have flourished and the rights of the accused have been preserved by introducing fair trial. By giving rights to an accused based on the benefit of doubt, he is saved from unjust conviction. Under the prevailing legal system, every accused has the right to life, honor, liberty and property. An accused cannot be punished arbitrarily. He has the due rights during investigation and trial period. A legal system guarantees avoidance of arbitrarily arrest, detention or incrimination. The accused possess the right to rebut the evidence against him through his counsel. Even after the completion of the case, he has the right to appeal to change the judgment. Similarly, Islamic legal system guarantees the rights of an accused with excellent procedural requirements. It

disapproves the miscarriage of justice. Islamic jurisprudence enshrines the rule that it would be better to acquit hundreds of culprits than convicting one innocent soul. According to Islamic ideology "acquitting by error, would be better than convicting by error" the said, ruling have developed the theory of the benefit of doubt, which invariably extended to the accused for fair administration of criminal justice system. Despite above all, the access to justice is the common issue in under developed countries, where the literacy rate is very low and people are un-aware of their rights. The feudal lords use their writ against the poor and yet misuse their powers by dictating ill decisions

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<sup>2</sup>Oxford English Dictionary (unabridged) retrieved from <https://en.oxforddictionaries.com/definition/justice>

<sup>3</sup>Code of Hammurabi retrieved from <https://www.history.com/topics/ancient-history/hammurabi>

<sup>4</sup>Marduk, in Mesopotamian religion, the chief god of the city of Babylon and the national god of Babylonia; as such, he was eventually called simply Bel, or Lord retrieved from <https://www.britannica.com/topic/Marduk>.

<sup>5</sup>621 BC, Draco appointed to codify the laws unpopular move because the laws (both as they already existed and were codified by Draco, but also most especially as designed by Draco) were extremely harsh. Retrieved from <https://slideplayer.com/slide/764520/>

<sup>6</sup>Solon, the Athenian lawmaker that first established the basis of civil democracy. Retrieved from <https://slideplayer.com/slide/764520/>

<sup>7</sup>Roman law is the legal system of ancient Rome, including the legal developments spanning over a thousand years of jurisprudence, from the Twelve Tables (c. 449 BC), to the Corpus Juris Civilis (AD 529) ordered by Eastern Roman Emperor Justinian I. Roman law forms the basic framework for civil law, the most widely used. Retrieved from [https://en.wikipedia.org/wiki/Roman\\_law](https://en.wikipedia.org/wiki/Roman_law)

<sup>8</sup>Domesday Book is a manuscript record of the "Great Survey" of much of England and parts of Wales completed in 1086 by order of King William the Conqueror. The Anglo-Saxon Chronicle states: retrieved from [https://en.wikipedia.org/wiki/Domesday\\_Book](https://en.wikipedia.org/wiki/Domesday_Book)

<sup>9</sup>John (24 December 1166 – 19 October 1216), also known as John Lackland, was King of England from 1199 until his death in 1216. The baronial revolt at the end of John's reign led to the sealing of Magna Carta, a document sometimes considered an early step in the evolution of the constitution of the United Kingdom. Retrieved from [https://en.wikipedia.org/wiki/John,\\_King\\_of\\_England](https://en.wikipedia.org/wiki/John,_King_of_England)

<sup>10</sup>Magna Carta Libertatum (Medieval Latin for "the Great Charter of the Liberties"), commonly called Magna Carta (also Magna Charta; "Great Charter") is a charter of rights agreed to by King John of England at Runnymede, near Windsor, on 15 June 1215. Retrieved from [https://en.wikipedia.org/wiki/Magna\\_Carta](https://en.wikipedia.org/wiki/Magna_Carta)

<sup>11</sup>The Glorious Revolution, also called the Revolution of 1688, was the overthrow of King James II of England (James VII of Scotland) by a union of English Parliamentarians with the Dutch stadtholder William III, Prince of Orange, who was James's nephew and son-in-law. Retrieved from [https://en.wikipedia.org/wiki/Glorious\\_Revolution](https://en.wikipedia.org/wiki/Glorious_Revolution)

<sup>12</sup>European history/Age of Revolutions retrieved from <https://resources.saylor.org/wwwresources/archived/site/wpcontent/uploads/2011/03/European-History-Age-Of-Revolutions1.pdf>

<sup>13</sup>Equity is the quality of being fair and reasonable in a way that gives equaltreatment to everyone. Retrieved from <https://www.collinsdictionary.com/dictionary/english/equity>

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<sup>15</sup> Surah-e-Nahal, Ayat 90 (Al-Quran)

<sup>16</sup> Surah-e-Maida Ayat 8, (Al-Quran)

<sup>17</sup> Surah-e-Hadid, Ayat 25, (Al-Quran)

<sup>18</sup>Criminal Justice in Islamic Judicial Procedure in the Shari' ah

<sup>19</sup>Mughal dynasty, Mughal also spelled Mogul, Arabic Mongol, Muslim dynasty of Turkic-Mongol origin that ruled most of northern India from the early 16th to the mid-18th century. The Mughal dynasty was notable for its more than two centuries of effective rule over much of India, for the ability of its rulers, who through seven generations maintained a record of unusual talent, and for its administrative organization. A further distinction was the attempt of the Mughals, who were Muslims, to integrate Hindus and Muslims into a united Indian state. Retrieved from <https://www.britannica.com/topic/Mughal-dynasty>

<sup>20</sup>Indian Mutiny, also called Sepoy Mutiny, widespread but unsuccessful rebellion against British rule in India in 1857–58. It began in Meerut by Indian troops in the service of the British East India Company, it spread to Delhi, Agra, Kanpur, and Lucknow. In India it is often called the First War of Independence and other similar names. Retrieved from <https://www.britannica.com/event/Indian-Mutiny>

<sup>21</sup>World War I began in 1914, after the assassination of Archduke Franz Ferdinand, and lasted until 1918. Retrieved from [https://www.history.com/topics/world-war-i/world-war-i-history#section\\_1](https://www.history.com/topics/world-war-i/world-war-i-history#section_1)

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<sup>26</sup> State V. WaderoMuhabat Khan Khoso (2016 PLD 146 Karachi)

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<sup>29</sup> Article 8 of United Nations Minimum Rules for the Treatment of the Prisoners are retrieved from[https://en.wikipedia.org/wiki/Standard\\_Minimum\\_Rules\\_for\\_the\\_Treatment\\_of\\_Prisoners](https://en.wikipedia.org/wiki/Standard_Minimum_Rules_for_the_Treatment_of_Prisoners)