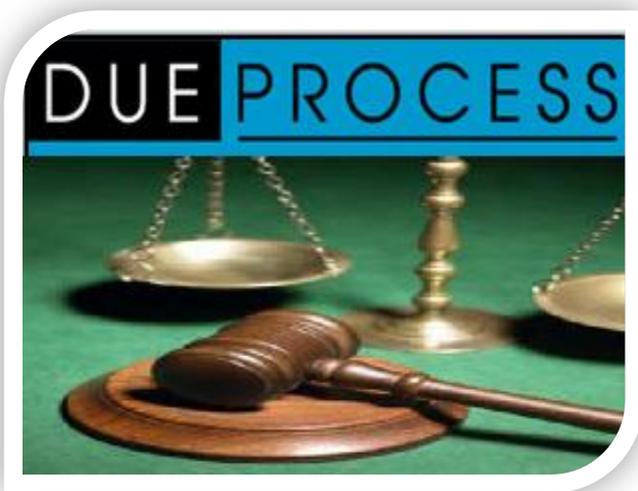


“Fair Trial and Due Process”

-Yasser Latif Hamdani, INP



“Article 10-A: For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to fair trial and due process.”

This article exists under the unceremonious heading of ‘Right to fair trial’ but is nothing less than a revolutionary concept for a country like ours where liberty has so often been the victim of expediency, state oppression and the tyranny of the permanent majority. What it does — and, unfortunately, this is not appreciated

enough by our jurists — is create within our constitution the idea of substantive due process above and beyond procedural due process that its heading seems to betray.

A Short History of Due Process

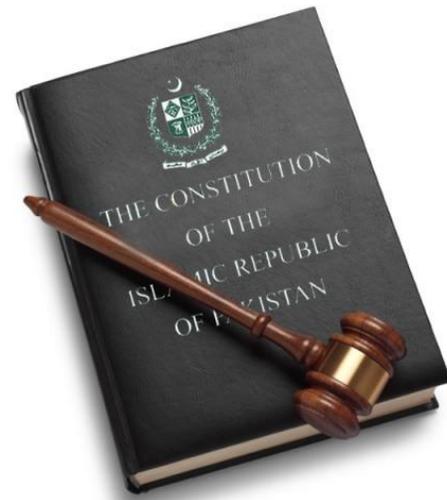
The history of due process is rooted in the Magna Carta in English jurisprudence and, subsequently, in the American jurisprudence surrounding the 5th and 14th amendments to the US constitution. The 14th Amendment, for example, states: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” The US Supreme Court has interpreted the 14th Amendment as having created a constitutional natural law that would be available as a protection against the states and

not just the federal government (which was the position under the 5th Amendment). In other cases, the due process clause has been used as a kind of residuary clause that protects all implied and rational rights to liberty, including the right to privacy, which otherwise finds no constitutional basis. For more on this see *Griswold vs. Connecticut*, 381 US 479 (1965) and *Roe vs. Wade*, 410 US 113 (1973). Substantive due process has thus emerged as the surest safeguard against totalitarianism of the state. Furthermore, in *Treatise on Constitutional Law: Substance and Procedure* (the third edition) by Ronald D Rotunda and John E Novak, on page no 2 S17, it is stated, “This substantive due process may protect certain fundamental rights or void arbitrary limitations on individual freedom of action.” This is the only interpretation of due process as standalone from fair trial that we can have in our constitution as well.

By incorporating due process in the Pakistani constitution, the framers of the 18th Amendment have further strengthened the concept of fundamental rights and have placed these above all other articles. Rationally, now a proper constitutional challenge is available against the blasphemy laws, i.e. 295-B, 295-C, 298-B and 298-C of the Pakistan Penal Code. all of which may well be deemed patently

unconstitutional if our courts apply the constitution rationally and honestly.

The Constitutional Challenge to Debt Recovery Laws under Article 10-A



Article 10-A opened the door for constitutional challenges in other more worldly statutes as well, i.e. statutes that provided for a summary procedure. Chief amongst these is the Financial Institutions (Recovery of Finances) Ordinance, 2001 (“the FIO”). The FIO is a banking recovery law that was promulgated by the martial law regime of General Musharraf, which was saved by the Seventeenth Amendment to the Constitution. The FIO requires the defendant to seek leave to defend a suit, which can be denied by the presiding judge on the basis of validly filed statements of accounts by a financial institution. It is therefore a banking-specific variant of Order XXXVII (Summary Procedure) of the Code of Civil Procedure,

1908 (“the CPC”), which Indian readers may be quite familiar with.

In several challenges before the Sindh and Lahore High Courts, petitioners have argued that Article 10-A creates a new fundamental right to fair trial and due process because of which the summary procedure under the FIO has become unconstitutional. The contention of the petitioners was that since the rights contained in Article 9 (such as the right to life) were limited to personal rights and not property rights, Article 10-A had introduced a new right. In rebuttal, the lawyers representing the banks have argued the following:

- a) Presumption of constitutionality attaches to each piece of legislation enacted by a legislature.
- b) Article 10-A is a declaratory right introduced to acknowledge and recognise existing rights afforded to citizens and persons under the Constitution of Pakistan, especially under Articles 9 and 25. For this proposition, advocates relied on the landmark SharafFaridi case, PLD 1989 Karachi 404 and the Jamaat-e-Islami case, PLD 2000 SC 111.
- c) ‘Due process’ has been recognised by precedent (Manzoor Elahi Case, PLD 1975 SC 66 and the LiaqatHussain Case, PLD 1999 SC 505 at page 652).

d) In India, the right to a fair trial was located by the Supreme Court of India within Article 14 of the Indian Constitution (which is in parimateria with Article 25 of Pakistan’s Constitution) in the judgment of Dwarka Prasad Agarwal v. B.D. Agarwal, (2003) 6 SCC 230 at pages 245 to 246.

e) Article 9 is in parimateria with Article 21 of the Indian Constitution and judgments under Article 21 of the Indian Constitution have defined ‘due process’. Therefore Article 10-A is merely a declaratory insertion into the Constitution.

Further, relying on the Chenab Cement case, PLD 1996 Lah 672 at pages 684 to 685, the lawyers representing the banks urged that it was incorrect to say that Article 9 is limited to personal and not property rights. On the other hand, the reason for the inclusion of Article 10-A was that it was better to have an enumerated right to fair trial and due process than have it reside in the penumbra of Articles 4, 9, and 25 of Pakistan’s Constitution. The petitioners rely on the judgments of the European Court of Human Rights in *DomboBeheer, Stran Greek Refineries v. Greece*, and *Ruiz Mateos v. Spain* (Application no. 12952/87). Here oral evidence was not allowed and cross-examination was not undertaken, it would be a violation of Article 10-A’s principles of fair trial and due process since

the principle of equality of arms was not respected.



The lawyers representing the banks contend that the FIO does not stop the defendant from presenting evidence, which was not the case in the impugned legislation from which the *DomboBeheer* case emerged. In the *DomboBeheer* case, the applicant company's Director was not allowed to submit evidence at par with the Bank Manager. The issue there was not as much about oral evidence but any evidence. It is wrong to say that in all civil cases, oral evidence is necessary and that there can be no trial unless there is oral evidence and cross-examination. Under the CPC, there can be a trial even prior to the recording of evidence under Order XIV, Rules 2, 6, and 7; Order XV, Rule 2; and Order VII, Rule 11. Under European jurisprudence, as it

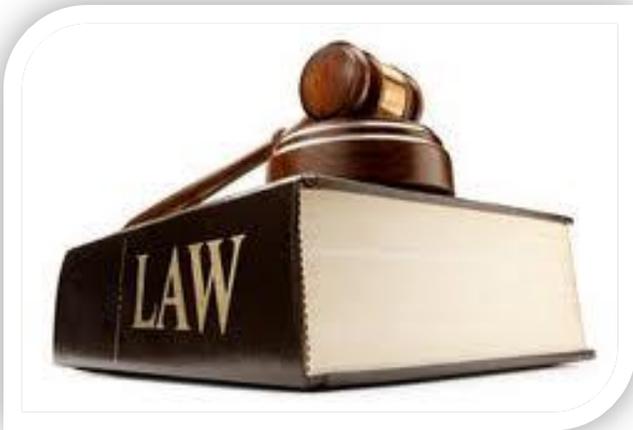
has developed since the establishment of the European Community, the right to cross-examine evidence is given specifically in criminal trials under Article 6 of the European Convention on Human Rights. It follows that there is no absolute right to cross-examine in civil cases.

- a) Banks need to file all statements of accounts since the inception of the account.
- b) Banks need to file all relevant documents, and this would include documents supporting each and every entry on a balance sheet.
- c) Details of finance granted and repaid have to be provided.
- d) A petition for leave to appear ("PLA") cannot be dismissed for non-prosecution (*Abid Aziz Khan v. BOP*, 2007 CLD 997).
- e) Failure to reply or file counter-affidavit can be a ground for grant of leave.

The petitioners, on the other hand, also argued that that the procedure under the CPC ensures a fair trial and that it should be made applicable. To this, the lawyers for the banks argued that the summary procedure is nothing new, especially vis-a-vis the CPC. Order XXXVII is also part of the CPC, and it provides for a summary procedure for negotiable instruments. The West Pakistan Family Courts Act, 1964 excludes the CPC and the *Qanun-e-Shahadat Order*, 1984 in Section 17. Other

examples include the Arbitration Act, 1940 (Section 33), the Punjab Rented Premises Act, 2009 (Section 22), the Companies Ordinance, 1984 (Section 9(3) and Section 424), the Contempt of Court Act, 1976 and even in criminal trials under Sections 260 to 265 of the Criminal Procedure Code. They also point to the fact that summary procedure has been held constitutional in all major democracies of the world including India, the U.S.A., and the U.K. The FIO does not exclude the CPC wholly, but the usual procedure of the CPC is not required given the emphasis on claims being established through documentation.

Equality of Arms?



The Petitioners argue that case law under the FIO does not allow for amendments to a PLA, and therefore, the FIO and the jurisprudence developing from it is unconstitutional since it then deprives places plaintiffs and defendants on different grounds. Banks' lawyers had in

response to this argument an amendment to the PLA had been allowed in *Habib Bank Limited v. BelaAutomotives Limited*, 2010 CLD 1243 at pages 1261 to 1265.

The petitioners then argued that no application by the defendant is allowed before the grant of leave, and therefore, the FIO and the jurisprudence under it violate Article 10-A. The lawyers for the banks contended that applications under Section 12(2) of the CPC were held to be maintainable in *Muhammad Yaqoob v. United Bank Limited*, 2007 CLD 683. Leave is required only to defend. No leave is required to appear. Defendants can appear as a matter of right.

Whither counterclaims?

The petitioners also argued that the findings of the court while deciding the PLA operate as res judicata and therefore affect rights to counterclaim and set off. The lawyers for the banks argued that only if the points raised by the borrower in its suit are finally decided or adjudicated by the court at that state would it apply as res judicata. The borrower's suit will be decided on its own merits, relying on the *Industrial Development Bank Pakistan* case, 2002 CLD 369 at page 375. The same approach was also taken under Order XXXVII of the CPC. To the argument that a set off

cannot be claimed after the PLA has been dismissed, the lawyers for the banks contended that a borrower's counter-claim was not germane to the question of leave to defend and will proceed separately. Even otherwise, a set off can only be claimed where the claim is for an ascertained amount. In response to the argument that the consolidation of suits by parties is hit by res judicata of the decision on the PLA, the lawyers for the banks argued that under the FIO, consolidation is possible if there is a basis for it, relying on *United Dairy Farms v. United Bank Limited*, 2005 CLD 569 at pages 578, 579, and 580 and on *M.L. Traders v. Judge Banking Court No. IV Lahore*, 2007 CLD 634 at pages 636 and 637. Stay orders and attachments are given which affect the defendants even before a case has been decided against them. These are obtained on separate applications and defendants can file separate replies. These can be argued before the PLA and, in any event, courts usually pass time bound orders in these, such as "till the next date of hearing".

The future of Banking Law hangs in the balance. The judgment, if and when it comes, on these cases will determine the fate of Pakistan's banking industry. If history is any guide - for example in *UBL v. Farooq Brothers*, where the Supreme Court overturned a Shariat

Appellate decision that sought to undo interest banking in Pakistan - it is unlikely that the High Courts of Pakistan will strike down legislation that has been pivotal in settling bad debts and helping the banking industry recover amounts due to them. Perhaps the idea of due process might have operation in fields outside commercial litigation. Pakistan's marginalised minority communities especially could use the notion of substantive due process to further their rights as citizens of the republic. To this end, it would be instructive for Pakistani judges to follow U.S. precedents, where the application of due process has been applied varyingly and with disparate impact. In other words, strict standards of due process, and especially substantive due process, can be used to address questions that affect religious and ethnic minorities as well as women, but a less rigorous and more laissez faire attitude can be taken in economic matters. That would ensure that we do not throw the baby out with the bath water. Whatever the judgments, the effects of the decisions in these cases will be far-reaching and unprecedented in South Asian legal tradition.

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