

Trial *in Absentia*: A Violation of the Right to a Fair Trial

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Abstract

In an adversarial system, the case is pegged between two opponents who fight to prove their arguments in their favour. For this, systems of justice introduced doctrines to ensure that the processes of courts remained fair and just. One such doctrine was that of the right to a fair trial which has always stood in direct contradiction to the idea of trials in absentia. By judging defendants in their absence, trials in absentia were labelled to violate the right to a fair trial. These trials are carried out globally and have faced criticisms of being unjust and violative of fundamental rights. This article will be looking at this process to see if it violates the right to a fair trial while operating within the limits demarcated by the current justice system in Pakistan.

Introduction

It is a duty of the judicial system to resolve and adjudicate legal disputes as fast as possible. Many important matters are implicated in this essential requirement. These include the speedy administration of the punishment awarded by the court and the effective delivery of this punishment as it would lack effect if it was administered long after the convict's conduct. Delays not only disrupt the due process of court but also erode the public's faith in the justice system. While there are many reasons which can cause delays, the absence of the defendant is one such reason, to which trials *in absentia* offer a working solution.

Trial *in absentia* is a trial which is conducted in the absence of a party. It generally refers to criminal proceedings and is interpreted to refer to the defendant's right to be present in a courtroom while being tried. In such proceedings, where the accused is not available to rebut and respond to the charges levelled against him, the trial is criticised to be a violation of the principles of natural justice and the concept of equality before the law.

This right hails from the primordial days of Anglo-Saxon Law when no court would pronounce on a case unless the defendant was present.¹ Trials over the years have taken various forms; trial by ordeal² (which included submersion in boiling hot water³) and trial by battle.⁴ The latter mode of trial persisted for a longer period of time and it ensured that the defendant was actually present for the

¹ William Holdsworth, *A History of the English Law* (4th edn, 1936) 105.

² Where the innocence of the accused was determined by subjecting them to a painful, or at least an unpleasant, usually dangerous experience.

³ William Blackstone, *Commentaries on the Laws of England* (15th ed., London, 1809) 342-43.

⁴ Trial by battle was a method of Germanic law to settle accusations in the absence of witnesses or a confession in which two parties in dispute fought in single combat; the winner of the fight was proclaimed to be right.

trial which made absent defendants not to be tried but rather declared guilty by default.

A judicial system's decision to go ahead with the trial, despite the absence of the accused, signifies repulsion for those cases where, for whatever reason, the accused failed to respect the process of the court by showing up for their trial. This would also result in consequences like the accused being labelled an outlaw, a practice which was termed to be 'outlawry'. Here, professor Plucknett⁵ reports how the defendant was put beyond the protections of the law as all his possessions were liable to be confiscated and this was followed by a summary execution.⁶

With the formalisation of legal processes and the growing importance of human rights, such practices became redundant. Doctrines like right to a fair trial and the right to be treated equally before the law were given precedence and this made trials *in absentia*, technically unlawful. However, necessity stands to take credit for the revival of trials *in absentia* on important legal platforms. Pakistan is one of the countries where trials *in absentia* can happen for criminal cases as well.

The trial *in absentia* is a trial which is presided over, regulated and conducted in the absence of a party, especially the accused/defendant in any criminal case. It generally refers to criminal proceedings in a court of law where one party, usually the defendant, is not physically available to present a defence, rebuttal or denial to the allegations against him. Usually, such trials are carried out when the defendant is an absconder from the law.

⁵ Theodore Plucknett, *A Concise History of the Common law* (5th ed., 1956) 430-31.

⁶ Summary execution refers an execution in which a person is accused of a crime and immediately killed without benefit of a full and fair trial.

The process of trials *in absentia* is a highly controversial issue for concerns of violations of the principles of natural justice and fair play in court. This paper will be analysing the causes and the need for such trials and will debate the legality of this process within the legal system of Pakistan.

A. The Problems of ‘Trials *in Absentia*’

A trial *in absentia* entails that the defendant, the one who is accused of illegal action, is not present during the trial. No argument against him is heard by him and he is unable to respond adequately to any of these arguments or to present an effective defence for himself. A legally binding decision, ignorant of the position of the defendant, seems unfair in the least.

A criminal trial in a court of law where the accused is not physically able to respond to the charges levelled against, is held to be in defiance of natural justice. On that account, specifically, it contravenes with the second postulate of natural justice i.e. *audi alteram partem*, which translates to ‘let the other side be heard as well’. It is a principle which demands that nobody be judged without an autonomous and fair hearing.

Every state promises that if one is accused of unlawful acts, (s)he will be given an opportunity to share his/her side of the story and be heard by the court adjudicating the accusation. This principle is encapsulated in the doctrine of ‘fair trial’ which is an internationally recognised, fundamental human right⁷ and is the cornerstone for most legal systems in the world. In fact, it is the

⁷ Universal Declaration of Human Rights, art 10; International Covenant on Civil and Political Rights, art 14.

primary responsibility of a court of law to ensure a fair trial. International criminal law mandates the presence of the accused at his trial and this is also part of customary international law.⁸ *In absentia* trials are controversial and the subject of critical review by the U.N. Human Rights Committee⁹ and the European Court of Human Rights,¹⁰ two leading human rights bodies.¹¹

Violation of an idea as sacred as the ‘right to a fair trial’ casts a shadow of mistrust over the actions of the judicial system. Decline in public trust can be fatal for the respect and efficacy of the decisions and the judicial domain of a justice system.

The process of deciding *in absentia* robs the defendant the opportunity to present a valid defence. While being violative of the defendant’s right to do so, it is also based on one side of the story, which was a cause of grave injustice in the past and was exactly what the ‘trial in court’ system was enacted to address. It is particularly problematic for adversarial systems as the whole trial is based on a contest between the two sides and such a contest is futile without an opposing voice. Also, civil liberties are too precious an entity to be eliminated for a person without making sure that the facts presented are true and the decision reached is just.

The accused's presence is of major importance not only in regard to the establishment of the factual circumstances of the case but also with a view to a correct assessment of the accused's personality. There is the individual interest of the accused to be ‘able to influence the decision of the court on the criminal charges

⁸ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law- Volume I: Rules* (CUP, 2005) Rule 100.

⁹ Hereinafter ‘HRC’.

¹⁰ Hereinafter ‘ECtHR’.

¹¹ Chris Jenks, ‘Notice Otherwise Given: Will in Absentia Trials at the Special Tribunal for Lebanon Violate Human Rights?’ (2009) 33(1) *Fordham International Law Journal* 57, 61.

against him' through his or her presence. Thus, there is a public and an individual interest rationale underlying the need for the accused's presence during the hearing.¹²

B. The Need for Trials *in Absentia*

The evils of this process leave one to wonder why trials *in absentia* have ever been considered a viable option for an institution as formal as the system of adjudication in courts. There are many reasons for this.

The first most pressing issue of all calling for the need to employ trials *in absentia* is the one of absconders from the law. Not all those accused of criminal behaviour by the officers of the law cooperate with the procedure which follows. Imprisonment and the fear of the censure of civil liberties encourages many to avoid dealing with a process which might crystallise such possibilities. While the police and its associated personnel do try to discover suspects and force them to present themselves before the court, the results of this are not always positive. While the fugitive runs around hiding from the police, successfully evading them for days, weeks or even years, the court cannot wait for an indefinite period of time for the accused to show up and then decide his case. Speedy dispensation of justice is also a duty of the court and it cannot ignore this duty, even if it is not the primary reason for the delay. Therefore, when such occurrences happen, the courts have set a

¹² Thilo Marauhn, 'The Right of the Accused to be Tried in his or her Presence' (HR Library) <<http://hrlibrary.umn.edu/fairtrial/wrft-tm.htm>> accessed 15 September 2018.

period of time after which they shall proceed with the case, regardless of the presence of the defendant.

This also presents as strategic help against those who are planning to evade the consequences of their unlawful acts by not showing up. Knowing that a trial is going to happen, despite the accused's absence is likely to encourage defendants to show up and make a case defending their position. This in turn is likely to save the court's time spent adjudicating a particular case.

A theory based on the consent waiver option posits that by not showing up to his own trial, the accused has already waived his right to present his case in court. This then permits the trial to proceed without a word of defence favouring the defendant, without violating the concerns of a fair trial.

C. Trials *in Absentia* in International Law

As stated above, trials *in absentia* are not favoured by international law. Such trials have not been outlawed by international law or by institutions enforcing international law.¹³ However, time and again, international law has enforced the idea that the defendant's presence in a trial against him is imperative. The International Covenant on Civil and Political Rights¹⁴ specified the defendant's right to be tried in person and to be able to defend

¹³ International criminal tribunals and regional courts of justice such as the ECtHR.

¹⁴ Hereinafter 'ICCPR'.

himself in person.¹⁵ The Human Rights Committee further explained this provision in General Comment No. 13, which states that,

[t]he accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defences and the right to challenge the conduct of the case if they believe it to be unfair. When exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defence is all the more necessary.¹⁶

Similarly, article 6(3) of the European Convention on Human Rights and Fundamental Freedoms¹⁷ specifies that everyone charged with a criminal offense has the right ‘to defend himself in person or through legal assistance of his own choosing...’. The ECtHR interpreted article 6 of the ECHR in *Colozza v. Italy*¹⁸ where it stated, ‘Although this is not expressly mentioned in paragraph 1 of article 6, the object and purpose of the article taken as a whole show that a person ‘charged with a criminal offence’ is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 guarantee to ‘everyone charged with a criminal offence’ the right ‘to defend himself in person,’ ‘to examine or have examined witnesses’ and ‘to have the free assistance of an interpreter if he cannot understand or speak the language used in court,’ and it is difficult to see how he could exercise these rights

¹⁵ ICCPR, art 14(3)(d).

¹⁶ UN Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI\GEN\1\Rev.1 (1994), para. 11 (1994) (on equality before the courts and the right to a fair and public hearing by an independent court established by law).

¹⁷ Hereinafter, ‘ECHR’.

¹⁸ ECtHR, *Colozza v Italy*, (1985) 7 E.H.R.R. 516.

without being present'.¹⁹ In another case the ECtHR stated that any waiver of the right to be present must be clear and unequivocal'.²⁰

This shows that trials *in absentia* need to be minutely regulated, for them to be categorised as legitimate trials. The ECtHR has found that for a trial *in absentia* to be consistent with the defendant's right to be present at trial, the following conditions must be met. First, a defendant must have notification of his or her impending trial.²¹ Second, a defendant has to unequivocally and explicitly waive his or her right to be present at trial.²² Silence from the defendant after notice has been attempted does not constitute a waiver.²³ Third, a defendant must have the right to representation.²⁴ Finally, as mentioned above, the defendant must be able to subsequently obtain from a court, which has heard him, a fresh determination of the merits of the charge.²⁵

Although these requirements have been referred above from the European system of law, their application and acceptance by international law tribunals is unanimous. An example of this was seen in the case of *Prosecutor v Delalic*,²⁶ decided by the ITCY, where the defendant did not appear before the court at a hearing for untold causes and simultaneously had not explicitly waived through his lawyer his right to be present; in that case, there were multiple accused, and the office of the Prosecutor suggested tendering

¹⁹ *Ibid*, para 27.

²⁰ ECtHR, *Poitrimol v France*, (1993) 18 E.H.R.R. 130, para 31.

²¹ *Colozza* (n 18) paras 18, 19, 28; ECHR, *Lala v. The Netherlands*, (1994) 18 E.H.R.R. 586, para 14.

²² *Poitrimol* (n 20) para 31; Starkey, James G. 'Trial in Absentia' (2012) 53(2) St. John's Law.

²³ *Colozza* (n 18) para 28.

²⁴ ECtHR, *Pelladoah v The Netherlands* (1995) 19 E.H.R.R. 81, para 23.

²⁵ ECtHR, *Krombach v France*, App. No. 29731/96 [2001], para 85.

²⁶ *Prosecutor v Delalic*, Case No. IT-96-21-A, (International Criminal Tribunal for the former Yugoslavia Nov. 4, (1997).

documents as a group and permitting the defence to object later, while rejecting that intention the court adjourned and held that the right to appear at the trial was in effect irrevocable in the absence of a direct waiver and trials *in absentia* were forbidden for identified international tribunals.²⁷

Many criminal tribunals have faced serious criticism for conducting trials *in absentia* while not conforming to the principles described above. The prime example of this was the Special Tribunal for Lebanon where the court was set up for a finite period of time which would prevent absentee convicts from appealing against the judgements made on their case, once the court would run its course. This has led to constant calls for the courts decisions to be held invalid in opinions by academics and experts²⁸ and leads to the conclusion that for trials *in absentia* to be acceptable by international law, one of the requirements they need to fulfil is that the possibility to appeal must be given after first trial conviction.

D. Trials *in Absentia* and the Pakistani Justice System

Enshrined in the constitution of the Islamic Republic of Pakistan is article 10A which turns the right to a fair trial into a constitutional guarantee within Pakistan. This binds the court for fair and public hearing, both in civil and criminal cases, by an independent and non-discriminatory tribunal, within a reasonable duration.

²⁷ Delalic (n 26) Transcript, 8967-8976; ICTY, ICTR, SCSL, ICC.

²⁸ Jenks (n 11).

Ordinarily, trials *in absentia* are not permitted in all cases in Pakistan as per legislations like the Pakistan Penal Code²⁹ and the Criminal Procedure Code³⁰. Only certain types of cases can proceed to trial without the defendant's presence. Most important stages of a criminal trial cannot be fulfilled without the defendant's presence. This includes the collection of evidence³¹ which cannot be ignored to claim an error, omission or irregularity later³² as its violation would 'be declared nothing but a downright illegality vitiating the relevant proceedings of the trial of an accused'.³³ This was emphasised for cases involving the death penalty.³⁴

Trials *in absentia* can be traced back to the time prior to the 1999 military regime. The Cr.P.C. contains section 512 which deals with absentia Proceedings. In fact section 512 is not a provision for trial *in absentia*. It is a provision intended to preserve the evidence which may be used against the absconder when he is apprehended and brought before the court. It is compulsory to make proclamations and declare the accused as an absconder or proclaimed offender before this section is resorted to.³⁵

This is the general law of Pakistan. However, the following special statutes relating to anti-terrorism do provide for trial *in absentia*:

²⁹ Hereinafter 'PPC'.

³⁰ Hereinafter 'Cr.P.C.'.

³¹ Cr.P.C., s 353.

³² Cr.P.C., s 537.

³³ (2005) Pcr.L.J. 998.

³⁴ *Ch. Javaid Riaz v The State* (2007) Pcr.L.J. 1332.

³⁵ Research Directorate, Immigration and Refugee Board, Canada, *Pakistan*: 'Whether trial in absentia has been practiced since the October 1999 military coup and if so, when it was first used; the procedures for and implementation of 'Proclamation'; and a copy of the 'Proclamation' document' (Canada: Immigration and Refugee Board of Canada, 2000).

- i. Section 4 of Suppression of Terrorist Activities (Special Courts) Act 1975³⁶
- ii. The absentia trial was also provided for during the Zia-ul-Haq's Martial Law in 1977,
- iii. Section 10 of the Anti Terrorism Act 1997;³⁷
- iv. Section 13(10) of the Terrorist Affected Areas (Special Courts) Act 1992³⁸

Before a trial *in absentia* takes place, the court makes a proclamation, the process for which conforms to the international law requirements for trial *in absentia*. The proclamation is regulated by Section 87 of the Cr.P.C which provides that if the court is satisfied that a person whose warrants have been issued is concealing himself or has absconded to avoid execution of warrants, then the court can proceed under this section. The proclamation needs to be completed within seven days and until the proclamation has been published in at least three national daily newspapers, out of

³⁶ The Suppression of Terrorist Activities (Special Courts) Act XV of 1975 was amended in 1990 (by Act V of 1990) and s. 5A introduced sub-section (4) of which, read as follows:

‘5A (4): An accused person may be tried in his absence if the Special Court after such inquiry as it deems fit, is satisfied that: (a) such absence is deliberate and brought about with a view to impeding the course of justice; or (b) the behaviour of the accused in court has been such as to impede the course of justice and the Special Court has on that account ordered his removal from the Court’.

³⁷ Section 295A of the Pakistan Penal Code has been included in the schedule of offences exclusively triable under the Anti Terrorism Act 1997.

³⁸ Section 13(10) of the Terrorist Affected Areas (Special Courts) Act 1992, read as follow:

(10) Any accused person may be tried in his absence if the Special Court after such inquiry as it deems fit, is satisfied that--- (a) Such absence is deliberate and brought about with a view impending the course of justice: or (b) the behaviour of the accused in Court has been such as to impede the course of justice and the Special Court has on that account ordered his removal from the Court.

which one must be in Urdu language. The Court can also proceed under section 88 of the code. The Special Court shall proceed with the trial after taking necessary steps to appoint an advocate to defend the accused person who is not before the Court. For this the requirements are that the proclamation issued must be:

- i. Published;
- ii. Pasted at a conspicuous place at his ordinary place of residence and
- iii. Pasted at a conspicuous place outside the court house.
- iv. After proclamation the law allows a minimum of 30 days time for the accused person to put in appearance.

Not only does this make it easier to spread the call for the defendant, it also complies with the international law requirements for trials *in absentia*.

But, in spite all that, all above mentioned provisions have dispensed accurate safeguards to assure that these provisos are not employed prior to being convinced that:

- i. The accused is deliberately concealing himself to impede justice and there is no fear to accused from the prosecution agencies,
- ii. A counsel is provided at the state expenses to defend the accused as according to the right of fair trial,
- iii. A proper proclamation has been issued in terms of Section 87 Cr.P.C.
- iv. The law also provides that if the accused subsequently appears and satisfies the court that his absence was not wilful, and was for the reasons beyond his control, the

conviction recorded *in absentia* may be set aside and the accused be put to trial afresh.³⁹

Moreover, essentials of trial *in absentia* are in contradiction with Article 9 and 10 of the Constitution, as was held in *Mehram Ali v Federation of Pakistan*⁴⁰, where the accused was convicted *in absentia*⁴¹ by an anti-terrorism court, but later on the appellate court placed restrictions on provisos of Anti Terrorism Act 1997⁴² regarding trial *in absentia*. It declared that such trials needed to conform to regular procedures of the court due to which s. 19 (10) (b) of the ATA 1997⁴³, was declared *contra legem* (against the law) under Article 9 and 10 of the constitution and was therefore declared invalid.

Similarly, in *Mir Ikhtlaq Ahmad & another v The State*⁴⁴, where conviction and sentence of death awarded by the trial court to defendants in a trial *in absentia* was quashed by the High Court as it deemed the trial to be violative of article 9 and 10(1) of the constitution and section 10 (11-A) of the 1997 Act. The court stated that since the accused had not been accorded any opportunity to be heard and were convicted nonetheless, their conviction was contrary to the principles of natural justice and therefore not sustainable under the law, following which a retrial of the case was ordered.

This shows that courts in Pakistan are also wary of the use of trials *in absentia* and do come to the aid of victims of such an injustice, when needed. However, case law is not the primary source from which such results are being derived, therefore, changes

³⁹ Immigration and Refugee Board (n 35).

⁴⁰ *Mehram Ali v Federation of Pakistan* (1998) PLD 1945.

⁴¹ Ibid 49.

⁴² Hereinafter 'ATA 1997'.

⁴³ Which provides for trial of an accused in absentia on account of his misbehaviour in court.

⁴⁴ *Mir Ikhtlaq Ahmad & another v State*, (2008) SCMR 951.

brought by it are unlikely to aid substantively to fight the injustice of trials *in absentia*. Change needs to come from the primary source (legislation), which has the capacity to enact lasting change.

E. Conclusion

Trials *in absentia* are trials which do not conform to the standards of a fair trial as established by the legal system in Pakistan. The rationale behind providing the basic guarantees to defendants is that the requirements which make a trial legal in a court of law and respectful of the basic guarantees of a fair trial are fulfilled. This is done to ensure that the power gap between the state (which is accusing the defendant with powerful resources at its disposal) does not unfairly punish the defendant through legal means. The basic idea of criminal justice is that an accused person is inevitably presumed to be innocent unless the prosecution can settle his guilt, beyond reasonable doubt, while keeping within the parameters of a fair trial. By excluding the defendant from the trial process, trials *in absentia* reach beyond what a fair trial allows. While concerns of speed are also relevant here, they are unlikely to balance the demands of a fair trial, without a defendant, unless an explicit waiver has been obtained from the defendant.

It borders on irony that a device introduced to aid in the speedy achievement of justice (trials *in absentia*) has not only engendered more injustice but also has allowed courts to violate the *grundnorm* of a fair trial, thereby enabling the delivery of speedy injustice.

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