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## **The Constitution vs. the Evidentiary Exceptions: A Critical Re-appraisal of Custodial Discoveries under Article 40 of the QSO 1984.**

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### **ABSTRACT**

It is a study about the deep legal conflict over absolute constitutional immunity against self-incrimination versus the admissibility of custodial interrogation by statute. Although Article 13(b) of the Constitution of Pakistan is an initial protection against forced confessions, Article 40 of the Qanun-e-Shahadat Ordinance (QSO) 1984 still functions as a procedure avoidance by supporting information resulting in the discovery of a fact. The argument suggests that the doctrine of confirmation by subsequent recovery is a long-lived jurisprudential anachronism that squarely conflicts with the principles of due process and the Right to a Fair Trial (Article 10A) under the current standards. Moreover, the paper examines how this loophole in the evidence offers a system-wide incentive towards investigative coercion, and therefore, compromises the very purpose of the Torture and Custodial Death (Prevention and Punishment) Act, 2022. Through the study of comparative jurisprudence and the hierarchy of norms, the article suggests that Article 40 should be left out to provide Pakistan with an order of statutory inconsistency that removes the conflict between the criminal justice system and constitutional provisions. The study promotes a shift on independent forensic methodologies which are focused on human dignity rather than the result-oriented custodial extractions.

**Keywords:** Art. 13 (b) Qanun-e-Shahadat Ordinance, Self-Incrimination, Custodial Coercion, Constitutional Supremacy, Torture and Custodial Death Act 2022

### **Introduction**

The validity of the constitutional democracy does not just lie in the fact that there are rights, but whether they can be enforced against both the normal legislation. Under the structural architecture of the Pakistani legal system, the Grundnorm is the Constitution which provides fundamental rights as absolute restrictions on the state power.<sup>1</sup> The ban on forced self-incrimination as implemented in Article 13(b) is one of these, and is an impregnable guard between the citizen and the gangling arms of the state.<sup>2</sup>

The criminal justice system is based on the pillar of adversarial jurisprudence, which is that the prosecution has the sole burden of proving a case.<sup>3</sup> As such, the accused does not have a legal or moral obligation to assist in his or her conviction. This principle is not only a procedural rule but indicates the innate dignity of human dignity and the right to a fair trial and is now expressly guaranteed by Article 10A of the Constitution.<sup>4</sup>

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<sup>1</sup> A. H. Jilani the Constitution of the Islamic Republic of Pakistan, Oxford: Oxford University Press, 2013, 45.

<sup>2</sup> Pakistan Const. art. 13, cl. b.

<sup>3</sup> J. F. Karim and S. Karim, Access to Justice in Pakistan (Pakistan Law House, 2020), 217.

<sup>4</sup> M. Billal, S. Fatima, and W. Rafiq, "Protection Against Self-Incrimination: An Evaluation of Legal Framework in Pakistan," Global Legal Studies Review 8, no. 1 (2023): 82.



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Nevertheless, there arises a statutory contradiction in the facet of evidence within the Qanun-e-Shahadat Ordinance (QSO) 1984. Although Article 38 of the QSO broadly renders the confessions obtained under the influence of the police inadmissible to avoid any abuse,<sup>5</sup> Article 40 provides a controversial exception of the procedure. This clause permits certain custodial declarations to be admissible in the event they lead to the identification of a fresh reality a principle that lies in the doctrine of verification by after-finding.<sup>6</sup>

### **Constitutional Framework: Article 13(b)**

Article 13(b) of the constitution provides: No citizen, when charged with a criminal offence, shall be forced to testify against himself.”<sup>7</sup> This is not a mere procedural guideline, it is actually a substantial immunity to restrain the invasive powers of the state. The Pakistani Supreme Court has been in support of liberal interpretation of fundamental rights and compliance with the spirit of the law has been given more importance as compared to the technicality.<sup>8</sup> This protection, therefore, is not limited to the trial period but will be attributed to the very beginning of the investigation.<sup>9</sup>

The jurisprudence of the ban on self-incrimination is aimed at the compulsion in its various forms. Anything that was obtained after stressing of the free will of the accused was violated either physically, through psychological means or through some form of inducement, is under the constitutional shade.<sup>10</sup> The reasoning behind Article 13(b) is designed on three pillars of jurisprudence:

**Article 14: The Preservation of Human Dignity** In accordance with Article 14, the law acknowledges that a person is not an instrument of the convenience of the state, and is instead a goal in itself.<sup>11</sup>

**The Integrity of Accusatorial Justice:** Preservation of the adversarial balance according to which the state has to prove its case by independent investigation, but not by custodial extraction.<sup>12</sup>

**The Mitigation of State Coercion:** It is crucial to acknowledge that the custodial setting is characterized as unbalanced and likely to be abused with power.<sup>13</sup>

Moreover, the authority of this right is enhanced by Article 8 that requires any statutory provision that is incompatible with or derogatory of fundamental rights to be invalidated.<sup>14</sup> Assuming that Article 40 of the QSO is an attempt to water down the immunity offered by Article 13(b), then the constitutional supremacy doctrine would require a judicial or legislative revision to put the legal balance back in place.<sup>15</sup>

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<sup>5</sup> Qanun-e-Shahadat Ordinance, art. 38 (1984).

<sup>6</sup> N. A. Malik, *Law of Evidence: The Qanun-e-Shahadat Order 1984* (Irfan Law Book House, 2017), 112.

<sup>7</sup> Pakistan Const. art. 13, cl. b.

<sup>8</sup> A. H. Jilani, *The Constitution of the Islamic Republic of Pakistan* (Oxford: Oxford University Press, 2013), 62.

<sup>9</sup> Nur Muhammad v. Commissioner, PLD 1968 Lahore 1441.

<sup>10</sup> M. Billal, S. Fatima, and W. Rafiq, "Protection Against Self-Incrimination: An Evaluation of Legal Framework in Pakistan," *Global Legal Studies Review* 8, no. 1 (2023): 84.

<sup>11</sup> J. F. Karim and S. Karim, *Access to Justice in Pakistan* (Pakistan Law House, 2020), 220.

<sup>12</sup> K. Gautam, "The Right Against Self-Incrimination under Indian Constitution & the Admissibility of Custodial Statements" (Master's thesis, Maurer Theses and Dissertations, 2021), 93.

<sup>13</sup> F. Einesma, "Confessions and Culture: The Interaction of Miranda and Diversity," *Journal of Criminal Law and Criminology* 90, no. 1 (1999): 32.

<sup>14</sup> Pakistan Const. art. 8.

<sup>15</sup> Zahir Shah v. State, 2002 SCMR 384.



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### **The Statutory Mechanism: Article 40 QSO Analytical Breakdown.**

Article 40 QSO operative framework requires that where information given by someone in custodial detention leads to the discovery of a certain "fact" the part of such information that can be clearly linked to such discovery can be brought to evidence.<sup>16</sup> This is a great colonial legacy and it can be traced to the jurisprudence of Section 27 of the Indian Evidence Act, 1872.<sup>17</sup> The basic argument behind this article is founded on the assumption of evidentiary reliability where the identification of a physical object is regarded as a material guarantee to certify accuracy of the previous utterance.<sup>18</sup>

This mechanism has an internal logic in that it has a specific procedural sequence whereby the declarant must be in the formal or constructive custody of a law enforcement agency at the moment of uttering the statement. This is then accompanied by a given exchange of information where the accused gives knowledge that pertains to a pertinent fact e.g. the exact location of a weapon or stolen property.<sup>19</sup> This is followed by a specific information exchange, wherein the accused provides knowledge regarding a relevant fact, such as the exact location of a weapon or stolen property.<sup>20</sup> To make this statement legally binding, the fact discovery should take place; the information should be the direct and immediate impetus of the retrieving of a material object that was previously unfamiliar to the investigating officers.<sup>21</sup> Therefore, the law thus produces a selective admissibility or a "bifurcation" of the statement, much of which is prohibited legally under Article 38, and which is the discovery-related component, is permitted to enjoy the benefit of evidence

Article 40 might seem to be a technicality in the evidence law, but its application has produced a major tension in the criminal justice system that is here to stay. The provision gives the physical "discovery" retrospective validity to the "statement" so that it is actually prioritizing the reliability of the result as opposed to the legality of the means by which to arrive at the result.<sup>22</sup> This forms a legal paradox commonly known as an evidentiary back door in which a confession that would otherwise be inadmissible in its entirety is partially admissible after a physical recovery is proven.<sup>23</sup>

### **The Doctrinal Collision: Testimonial Compulsion v. Derivative Admissibility.**

The constitutional question of the case lies in the derivative use of information obtained under duress, whether such a use is an infringement of the right against self-incrimination. Article 13(b) does not simply outlaw confiding a court trial, it outlaws the act of compelling an accused individual to give evidence against him/herself.<sup>24</sup> The constitutional injury thus happens when the state applies its authority in overriding the will of the individual. When the information is obtained by force of custody, the admission of the resulting information like a physical recovery indirectly confirms illegal

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<sup>16</sup> Qanun-e-Shahadat Ordinance, art. 40 (1984).

<sup>17</sup> A. Ahmad, *The Law of Evidence in Pakistan* (Oxford: Oxford University Press, 2009), 154.

<sup>18</sup> Aashna and N. Patra, "Credibility and Voluntariness of Confessions: A Study on the Indian Evidence Act, 1872," *Indian Journal of Law & Legal Research* 2, no. 1 (2021).

<sup>19</sup> M. S. Mughal and I. A. Chauhan, *Qanun-e-Shahadat Order 1984* (Five Star Publisher, n.d.), 88.

<sup>20</sup> *Mst. Askar Jan v. Muhammad Daud*, 2010 SCMR 1604.

<sup>21</sup> *Shaukat Hayat v. State*, 1990 PCr.LJ 217.

<sup>22</sup> K. Gautam, "The Right Against Self-Incrimination under Indian Constitution & the Admissibility of Custodial Statements" (Master's thesis, Maurer Theses and Dissertations, 2021), 94.

<sup>23</sup> *State v. Abdul Khalid*, PLD 2011 SC 554.

<sup>24</sup> Pakistan Const. art. 13, cl. b.



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activity.<sup>25</sup> Although the full confession may have been suppressed under the law, the state still enjoys the evidentiary fruits of the first forceful disclosure, which is a way of circumventing the constitutional requirement.<sup>26</sup>

There is a major argument as to whether there is a difference between the testimonial compulsion and the physical evidence. Those who support Article 40, claim that the provision only admits material evidence (the object) and not the testimony of the accused (the word).<sup>27</sup> Critics however argue that this distinction is a legal fiction; the physical evidence could not have been found in the possession of the prosecution but because of the forced statement.<sup>28</sup> The court is admitting the discovery, thus permitting the state to bypass the Privilege against Self-Incrimination by a technical legal measure.<sup>29</sup>

Finally, Article 40 does not clash with Article 13(b), but their clash is more structural than semantic. It is in touch with the integrity of the judicial process. When the law permits the fruits of coercion to be introduced in a court, it establishes a systemic perversity in encouraging the law enforcement to neglect the constitutional rights of the suspect to pursue physical recoveries.<sup>30</sup> This reconsiders Article 40 as an element of neutral evidentiary rule, but rather as a statutory anomaly that watered down the absolute immunity afforded to all citizens under the Constitution.<sup>31</sup>

### **Comparative Jurisprudence: Global Standards of Procedural Integrity**

The constitutional challenge to Article 40 becomes further supported when one looks at it in the context of comparative international law. The case of *Miranda v. Arizona* in the United States was a landmark decision. The state of Arizona defined that custodial interrogation is inherently coercive and required procedural safeguards to ensure preserving the privilege against self-incrimination.<sup>32</sup> This was based on the principle premise of *Brown v. Mississippi* where the Supreme Court held that any conviction on the basis of confessions obtained pursuant to state-sanctioned brutality directly violated the Due Process Clause.<sup>33</sup> The essence of the American jurisprudence lies in the Fruit of the Poisonous Tree doctrine that requires the exclusion of both the direct statements that were made under the coercion of the law, as well as the derivative evidence generated by such violations of the Constitution.<sup>34</sup>

The same tendency can be observed in the European human rights law. European Convention on Human rights Article 6 A consistent interpretation of the European Convention on Human Rights by the European Court of Human Rights has been that proceedings are effectively unfair when evidence obtained as a result of ill-treatment or torture is admitted.<sup>35</sup> This legal philosophy focuses more on the purity of the judicial process than on the factual truth, and holds that a state cannot take advantage of its own

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<sup>25</sup> M. Billal, S. Fatima, and W. Rafiq, "Protection Against Self-Incrimination: An Evaluation of Legal Framework in Pakistan," *Global Legal Studies Review* 8, no. 1 (2023): 85.

<sup>26</sup> J. F. Karim and S. Karim, *Access to Justice in Pakistan* (Pakistan Law House, 2020), 222.

<sup>27</sup> N. A. Malik, *Law of Evidence: The Qanun-e-Shahadat Order 1984* (Irfan Law Book House, 2017), 118.

<sup>28</sup> K. Gautam, "The Right Against Self-Incrimination under Indian Constitution & the Admissibility of Custodial Statements" (Master's thesis, Maurer Theses and Dissertations, 2021), 95.

<sup>29</sup> *Nur Muhammad v. Commissioner*, PLD 1968 Lahore 1441.

<sup>30</sup> Law Commission of India, 152nd Report on the Code of Criminal Procedure 1973 (1994), 24.

<sup>31</sup> *State v. Abdul Khalid*, PLD 2011 SC 554.

<sup>32</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>33</sup> *Brown v. Mississippi*, 297 U.S. 278 (1936).

<sup>34</sup> F. Einesma, "Confessions and Culture: The Interaction of Miranda and Diversity," *Journal of Criminal Law and Criminology* 90, no. 1 (1999): 34.

<sup>35</sup> J. F. Karim and S. Karim, *Access to Justice in Pakistan* (Pakistan Law House, 2020), 225.



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unlawful actions.

These global standards are a sign of a more mature international agreement: the methodology of investigation is as significant as the evidence that it generates. In nations such as India, having the same colonial evidentiary heritage as Pakistan, the Law Commission has defined the exception of discovery of fact as one of the main of the so-called lacuna which enables the custodial abuse.<sup>36</sup> Through the preservation of Article 40, the Pakistani legal system is still behind these changing international standards of due process and the right to a fair trial.<sup>37</sup>

### **The Institutional Paradox: Custodial Reality in Pakistan.**

The law is impossible to judge in abstract terms of institutional reality. The difference between the constitutional theory and the investigative practice is frequently filled in Pakistan by the custodial coercion. Reports by different human rights organizations and many observations made by different courts have continuously reported on the use of custodial violence as one of the main weapons in addressing crimes.<sup>38</sup> However, even with the new directions of law, an old investigative culture of relying heavily on confessions instead of forensic or circumstantial proofs still prevails in the culture of law enforcement.<sup>39</sup>

These failures were a focus of important legislative recognition, in the form of the Torture and Custodial Death (Prevention and Punishment) Act, 2022.<sup>40</sup> Nevertheless, the Act makes it a crime to torture but it does not affect the evidentiary incentives of the Qanun-e-Shahadat Ordinance. In this pragmatic sense, article 40 runs the risk of an investigation being a shortcut. When the material recovery of an item is adequate to confirm the admissibility of a custodial declaration, the urge of police officers to obtain such revelations by lawful or illegal means is bound to exist.<sup>41</sup>

Even those limited evidentiary exceptions can pervert institutional behavior in an environment in which investigation capacity is frequently limited by scarcity of resources and in which internal accountability mechanisms are ineffective.<sup>42</sup> Article 40 is a legal cover to extracting evidence, and the outcome of the coercive questioning is smoothed out to be handed over to the court.<sup>43</sup> As a consequence, the provision does not just give an easy time to discover facts; it also contributes to the furtherance of the culture according to which the violation of Article 14 (Dignity of Man) is the customary practice of criminal investigation.<sup>44</sup>

### **Theoretical Background: The war between Reliability and Rights**

The defense of Article 40 is established majorly on the epistemology of reliability which holds that the physical discovery of a fact retroactively justifies the veracity of the statement that gave rise to it. In this sense, the "result" actually serves as a material

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<sup>36</sup> K. Gautam, "The Right Against Self-Incrimination under Indian Constitution & the Admissibility of Custodial Statements" (Master's thesis, Maurer Theses and Dissertations, 2021), 97.

<sup>37</sup> Law Commission of India, 152nd Report on the Code of Criminal Procedure 1973 (1994), 26.

<sup>38</sup> National Commission for Human Rights, Torture at Adiala Jail: NCHR Inquiry Report (2022), 12.

<sup>39</sup> J. Karim and S. Karim, Access to Justice in Pakistan (Pakistan Law House, 2020), 228.

<sup>40</sup> Pakistan. The Torture and Custodial Death (Prevention and Punishment) Act, 2022.

<sup>41</sup> Justice Project Pakistan and National Commission for Human Rights, Gap Analysis: Torture and Custodial Death (Prevention and Punishment) Act, 2022 (2022), 18.

<sup>42</sup> K. Gautam, "The Right Against Self-Incrimination under Indian Constitution & the Admissibility of Custodial Statements" (Master's thesis, Maurer Theses and Dissertations, 2021), 99.

<sup>43</sup> Nur Muhammad v. Commissioner, PLD 1968 Lahore 1441.

<sup>44</sup> Pakistan Const. art. 14, cl. 2.



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guarantee of truth, which allows allowing the evidence to be transferred into the judicial record.<sup>45</sup> Contemporary legal theory however creates a clear distinction between epistemic truth and procedural justice.<sup>46</sup>

Moreover, empirical psychological studies are mounting the reliability assumption. Research on custodial behavior has shown that when a person is heavily psychologically or physically coerced, there is a likelihood of him or her giving false or true information just to succumb to the pressure exerted by the interrogator and end the suffering.<sup>47</sup> When it comes to false confessions and coerced confessions, it has been shown that a recovery does not necessarily mean a voluntary or a reliable confession to a crime anywhere in the world.<sup>48</sup> Therefore, the self-logic of Article 40, that truth is confirmed by discovery, is based on a rather weak and quite debatable psychological premise.<sup>49</sup>

After all, in the Constitution of Pakistan, the right against abuse of state is more important than administrative or even investigative convenience. Basic rights including those in Article 13(b) and Article 14 are unconditional and are not subject to the effectiveness of law enforcement.<sup>50</sup> Article 40 disregards the constitutional order of things by making the reliability of the outcome more important than the legality of the procedure, as the accused is not a right holder but a source of information.<sup>51</sup>

### **The Supremacy of the Constitution and the Limits of the Legislative Power**

Article 8 of the Pakistani legal system serves to confirm the structural integrity of the system since it provides a provision that any law or custom that is inconsistent with fundamental rights shall be voided to the degree of such inconsistency.<sup>52</sup> This is an absolute restriction of the legislative authority and makes sure that no common law containing the Qanun-e-Shahadat Ordinance can work to the effect of weakening the "Absolute Immunity" of the citizen. When Article 40 is construed to allow the state to gain evidentiary benefits of forcible disclosures, it would be in conflict with Article 13(b) directly<sup>53</sup>. One of the basic guarantees is that the state is not allowed to otherwise do that which it is specifically forbidden in the constitution to do directly (compelling testimony); what the state may not do directly (compelling testimony), it must not do indirectly (admitting derivative discoveries).<sup>54</sup>

To overcome this statutory contradiction, the judiciary has the prime facie power of exercising Narrow Interpretation. This would entail compelling the prosecution to prove before any discovery following a custodial statement is admissible in judicial record that the custodial statement is voluntary beyond any reasonable doubt.<sup>55</sup> Nonetheless, this judicial solution might not be adequate in handling the institutional motivations of torture. Thus, the legislature bears the major responsibility of either revising or repealing

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<sup>45</sup> Aashna and N. Patra, "Credibility and Voluntariness of Confessions: A Study on the Indian Evidence Act, 1872," *Indian Journal of Law & Legal Research* 2, no. 1 (2021).

<sup>46</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>47</sup> F. Einesma, "Confessions and Culture: The Interaction of Miranda and Diversity," *Journal of Criminal Law and Criminology* 90, no. 1 (1999): 33.

<sup>48</sup> K. Gautam, "The Right Against Self-Incrimination under Indian Constitution & the Admissibility of Custodial Statements" (Master's thesis, Maurer Theses and Dissertations, 2021), 96.

<sup>49</sup> J. F. Karim and S. Karim, *Access to Justice in Pakistan* (Pakistan Law House, 2020), 231.

<sup>50</sup> Pakistan Const. art. 14, cl. 2.

<sup>51</sup> *State v. Abdul Khalid*, PLD 2011 SC 554.

<sup>52</sup> Pakistan Const. art. 8, cl. 1.

<sup>53</sup> A. H. Jillani, *The Constitution of the Islamic Republic of Pakistan* (Oxford: Oxford University Press, 2013), 82.

<sup>54</sup> *Nur Muhammad v. Commissioner*, PLD 1968 Lahore 1441.

<sup>55</sup> *Zahir Shah v. State*, 2002 SCMR 384.



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the provision so that the law of evidence would be in line with the modern human rights practices.<sup>56</sup>

The Constitutional Supremacy principle requires complete congruence. The sovereignty of the state in prosecute should still be subordinate to the responsibility of the state to adhere to the Dignity of Man and the Right to a Fair Trial."<sup>57</sup> The normative interdependence between the Maqasid al-Shari'ah and rights further ensures that this is also statutory conflict insofar as any failure by the system to guard the right against self-incrimination is likely to obstruct the ultimate goals of the Islamic law and give rise to corruption of the society.<sup>58</sup> The legal system by incurring the adverse effects of permitting Article 40 to continue in its present state stands the danger of letting a Parallel Jurisprudence operate wherein the Constitution grants the immunity and the statute interferes with the extraction process.<sup>59</sup> In the end, it is upon closing this gap that the criminal justice system is aimed at being legitimate and therefore making sure that investigative methodologies are as legal as the verdicts that they aim to generate.<sup>60</sup>

### **Jurisprudential Rebuttal and Counter-Arguments**

In defending the current evidentiary status quo, proponents of it usually do so by offering a triad of practical arguments. To begin with, they declare that the clause has a reasonable protection due to the fact that even the confession in itself is inadmissible. Second, they claim that admission should be limited to facts of discovery, and the extension of the exception should be limited because of this fact.<sup>61</sup> Third, and most often, they postulate that law enforcement performance needs to have some element of procedural detachment in order that material evidence is not lost to the court since of technicalities.<sup>62</sup>

Third, and most often, they postulate that law enforcement performance needs to have some element of procedural detachment in order that material evidence is not lost to the court since of technicalities.<sup>63</sup> The protection of the individual autonomy and dignity through the most vulnerable phases of the law procedure is not only a testimonial right of the courtroom but a primary right of the individual.<sup>64</sup> The legal system may hollow out the core of the constitutional rights, making them subordinate to the administrative objectives of the state by means of permitting the indirect use of compelled disclosures.<sup>65</sup> Moreover, the argument of the efficiency of the investigations should be denied in the very cases when it is in a direct conflict with the Constitutional Hierarchy. The rule of law deems the legitimacy of a conviction to reside as much of the process as it resides of

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<sup>56</sup> Law Commission of India, 152nd Report on the Code of Criminal Procedure 1973 (1994), 28

<sup>57</sup> Pakistan Const. art. 10A, art. 14.

<sup>58</sup> Abid Ullah, advocate Wassan, Shahid Hussain at all, "The Normative Interrelationship between Maqāsid al-Sharī'ah and the Realization of Ḥuqūq: An Analytical Study," *Sareer-A-Khama* 4, no. 4 (2025): 142.

<sup>59</sup> J. F. Karim and S. Karim, *Access to Justice in Pakistan* (Pakistan Law House, 2020), 235.

<sup>60</sup> K. Gautam, "The Right Against Self-Incrimination under Indian Constitution & the Admissibility of Custodial Statements" (Master's thesis, Maurer Theses and Dissertations, 2021), 102.

<sup>61</sup> N. A. Malik, *Law of Evidence: The Qanun-e-Shahadat Order 1984* (Irfan Law Book House, 2017), 122.

<sup>62</sup> A. Ahmad, *The Law of Evidence in Pakistan* (Oxford: Oxford University Press, 2009), 160.

<sup>63</sup> K. Gautam, "The Right Against Self-Incrimination under Indian Constitution & the Admissibility of Custodial Statements" (Master's thesis, Maurer Theses and Dissertations, 2021), 105.

<sup>64</sup> J. F. Karim and S. Karim, *Access to Justice in Pakistan* (Pakistan Law House, 2020), 240.

<sup>65</sup> M. Billal, S. Fatima, and W. Rafiq, "Protection Against Self-Incrimination: An Evaluation of Legal Framework in Pakistan," *Global Legal Studies Review* 8, no. 1 (2023): 88.



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the result<sup>66</sup> in a system governed by the rule of law. The permissibility of a statutory exception to trump a basic guarantee in the name of flexibility is contrary to the promise of Article 10A and upon which state convenience should be used to dilute the Constitution precedents.<sup>67</sup> Finally, the evidences reward that is implemented by Article 40 should be eliminated so that the state could bear the burden of proof using independent, forensic, and ethical tools.<sup>68</sup>

### Strategic Reform Proposals

**Full Legislative Repeal:** The best solution is the complete its omission of Article 40. This would compel the state to adopt the independent investigations and forensics instead of custodial extractions.

**Tight J.A.P. Protection:** Article 40 was required to be admitted only by a Voluntariness Hearing that could be ordered by the courts. The prosecution would also have to have to establish beyond reasonable doubt that the statement that resulted in the discovery was not forced.

**Mandatory Audio-Visual Recording:** Recodifying a mandate on the digital recording of any custodial interrogation would bring transparency and give the judges an opportunity to see the situation surrounding the provision of information.

**Independent Oversight:** The creation of special, independent units to examine custodial behavior would help to make sure that the incentives of Article 40 do not promote law-breaking investigative laziness.

**Switch to Forensic-Based Models:** Re-focus state resources on DNA, fingerprints and digital forensics in order to take the justice system off-course of over-dependence on what the accused say

### Conclusion

Article 13(b) is a pillar of accusatorial justice and it is necessary to have it in place so that the burden of proving can be left to the state. Although Article 40 of the QSO has a strong connection with the historical roots of the colonial evidentiary tradition, it is a serious statutory contradiction when it is compared to the modern human rights principles and the current institutional reality of the Pakistani investigation procedure.

The existing system of admissibility in derivatives in which the actual outcome of a statement is relied upon to justify its extraction provides an incentive structure of systemic encouragement towards custodial coercion. This is a direct contradiction of the unconditioned safeguards that the Constitution intended. The convenience of the prosecution should never obscure the basic rights of the individual in a legal system that tends to promote the Rule of Law and the Human Dignity.

The review of Article 40 is not after all a question of doctrinal purification but a constitutional requirement. To fill the gap between the statutory laws and the ultimate command of the Constitution, the state has to shift towards the investigational culture in which the forensic evidence is given precedence over custodial extractions. The sanctity of the "Right to a Fair Trial" and the "Immunity of the Accused" should be upheld to make sure that pursuit of truth is not inconsistent with pursuit of justice.

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<sup>66</sup> Pakistan Const. art. 10A.

<sup>67</sup> Zahir Shah v. State, 2002 SCMR 384.

<sup>68</sup> Law Commission of India, 152nd Report on the Code of Criminal Procedure 1973 (1994), 30