**Guilty, until proven innocent?**

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“O you who have believed, be persistently standing firm in justice, witnesses for Allah, even if it be against yourselves or parents and relatives. Whether one is rich or poor, Allah is more worthy of both. So follow not [personal] inclination, lest you not be just. And if you distort [your testimony] or refuse [to give it], then indeed Allah is ever, with what you do, Acquainted”— Surat An Nisa [4: 135]

Dissemination of justice at the level of courts is a noble, yet one of the most difficult functions which magistrates, judges and quasi-judicial authorities have to perform.

Making sense out of a past event in the light of information provided by belligerent parties that are adamant about genuineness of their stance, examining witnesses and eventually giving a verdict based on one’s understanding is no simple task. This confusion is the reason that the concept of burden or onus to prove emerged.

In Pakistan the Evidence Act 1872 was repealed by the Qanun-e-Shahadat (Law of Evidence) Order, 1984 . Chapter IX of Part III discusses in depth production of and effect of evidence wherein sections 117 and 118 read as under:

“117 Burden of proof.\_\_ (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

118 On whom burden of proof lies. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

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Combined reading of these sections clearly entails that whosoever is making an assertion against someone is responsible to provide evidence to support the allegation otherwise the accuser would not have a case. So, if X claims that certain property is actually owned by him and not Y who has possession, onus to prove ownership lies with X and if he fails then the court would hold Y as lawful owner. Another interesting example is that of a monetary dispute where both X and Y admit to have signed a bond whereby X is supposed to make a payment to Y but refuses to do so, on account of being deceived by Y into signing the bond. If X is unable to prove the fraud, Y is absolved of any allegation of deception.

There is a wealth of literature in jurisprudence, derived from various case law with regard to burden of proof, on whom it lies under which situations and how it shifts from plaintiff to defendant and vice versa as a trial proceeds in the courts. Common sense demands that once the plaintiff/prosecution has discharged its onus of proof by providing necessary evidence, then it becomes the responsibility of the defence to prove its innocence. At least that is how the judicial system works. The verdict of guilt can only be given when the accused is charged with the commission of the crime or violation of a civil act. Until then the defendant should be considered innocent. “It is better that ten guilty escape than one innocent suffer”—William Blackstone KC (1723-1780)

The American legal system has already adopted this concept even in criminal cases but according to Bob Barr, an attorney and politician, while both appreciating and criticizing his country’s judiciary says: “The legal principle placing the burden of proof on accusers rather than the accused can be traced back to Second and Third Century Roman jurist, Julius Paulus Prudentissimus. Yet, this ancient concept, which forms the legal and moral cornerstone of the American judicial system, is quickly being undermined in the name of &#39;national security”. There is clear implication of miscarriage of justice even in the USA.

Interestingly, this was never part of the British jurisprudence but according to a research paper written by Frederico Picinali and published by the London School of Economics, Article 6(2) of the European Convention on Human Rights that states: “[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law” has been transposed into Britain’s Human Rights Act 1998.

As explained in the paper, assumption of innocence until proven guilty is a means to protecting the accused from ill-treatment and undue bias during a trial and before the establishment of truth. Besides, it gives the basis for ensuring application of rules of justice and fairness to the accused. In addition, presuming the defendant innocent involves a particular requirement: it is a necessary condition for conviction that the State proves the defendant’s guilt.

The idea here is to highlight a very important point which is the cause of much frustration and agony in our society. It takes minutes to hurl serious allegations against others putting at risk their reputation but most of the times it takes years to restore their earlier positions. During this period the amount of hurt they face is enormous, especially if they are innocent. The gossip that echoes, the remarks they hear, the meaningful gaze and the subtle avoidance of encounter are some of the public reactions they have to experience.

There are many cases where the accused, out of shame, either commit suicide or move to some unknown destination even if they are proven not guilty. The look of the raised finger is enough to put their lives in doldrums particularly in the event when they think that they have remained prudent to the best of their ability.

In a civil suit, an accused is held guilty or cleared of charges on a balance of probabilities but in criminal cases, there has to be evidence beyond reasonable doubt to hold someone responsible for committal of the crime. However, it has been commonly observed that the accused (in some instances, along with their close family members) are arrested on mere filing of the first information report (FIR). One such example among many of this kind is that of an unmarried young girl working as domestic help who was handed over to the police by her employer on suspicion of a minor theft. Before any case could be brought against her, she was raped multiple times while in custody, got pregnant and once released was married off to a person much older to her. Ironically, the stolen goods were never recovered from her possession.

Similarly, many blasphemy and of course sexual harassment cases that are filed, although difficult and sometimes impossible to prove by plaintiffs become instrumental in causing the accused to appear guilty before being formally charged. They seek different ways and means to establish their honesty but find themselves in a helpless position like a person desperately struggling to survive when caught in an eddy. For the sly ones, using such tactics is a convenient way to settle personal scores or achieve a nefarious purpose. It is up to the judiciary to enforce Ei incumbit probatio qui dicit, non qui negat at all levels to protect the authentic innocent from becoming victim of presumed guilt.

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