**12. Protection against retrospective punishment.** (1) No law shall authorize the punishment of a person—

(a) for an act or omission that was not punishable by law at the time of the act or omission; or

(b) for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed.

(2) Nothing in clause (1) or in Article 270 shall apply to any law making acts of abrogation or subversion of a Constitution in force in Pakistan at any time since the twenty-third day of March, one thousand nine hundred and fifty-six, an offence.

## SYNOPSIS

1. Scope.
2. Object.
3. Retrospective statute.
4. Ex-post facto laws.
5. Ex post facto legislation.
6. Act/s attracting provision of Article 12.
7. Act/s not hit by provisions of Article 12.
8. Non-payment of loan—S. 5(r) NAB Ordinance, 1999.
9. Bargaining plea—Does it amount to plead guilty?

**1. Scope.** The provisions of Article 12 are analogous to the provisions contained in Article 11 (2). Universal Declaration of Human Rights, Section 9 (3) of U.S.A. Constitution, Article 20 of Indian Constitution, Article 6 of the 1956 Constitution and Fundamental Right No. 4 of 1962 Constitution. The theory upon which our political institutions rest is, that all

men have certain inalienable rights that among these are life, liberty and pursuit of happiness; and that in the pursuit of happiness all avocations, all honours, all positions, are alike open to everyone, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined. *[PLD 1964 Dacca 788 (DB)]* Under the provision of Article 12 of the Constitution, no law providing for a greater or different punishment which was available at the time of commission of the offence or default can be held to be a valid law muchless to interpret a law which on the face of it appears prospective. *[2001 PTD 668]* Under Article 12 of the Constitution ex post factor legislation can neither create new offences nor provide for more punishment for an offence then the one which was available for it when committed. *[PLD 2001 S.C. 607]* Recording of convictions and sentences in the criminal jurisdiction under *ex post facto* laws are prohibited. *[2006 P.Cr.L.J. 187 + PLD 1992 S.C. 14]*

**2. Object.** Article 12 provides protection against retrospective punishment. The protection given by this article may avail against those offences which are offences at the time when they are sought to be punished but were not offences at the time when they are done. An amendment imposing additional penalty attracts this Article. *[PLD 1964 Dacca 788 (DB)]* The object of the article is to prohibit conviction and sentences under *ex post facto* laws. *[1953 Cr.L.Jour. 1480]* Where a law merely authorizes with retrospective effect, the restriction of a Fundamental Right but neither creates an offence nor imposes a punishment, Cl. 1(a) of this article has no applicability. *[PLD 1965 Lah. 147]*

**3. Retrospective statute.** A statute is deemed to be retrospective which takes away or impairs any vested right acquired under existing law or creates a new obligation, or imposes a new disability, in respect to transactions or considerations already past. The word punishment suggests that the paragraph pertains to penal legislation and has no application to legislation concerning civil action. But the constitutional prohibition may not be evaded by giving a civil form to a measure which is essentially criminal. *[1935 IR 170]* As a general rule no statute shall be construed to have retrospective operation unless such operation appears very clearly, in the terms of the statute or arises by necessary implication. This means that it is open to the Court to look into the intention of the legislature and where it is made clear in some known way that the enactment will have a retrospective effect the Court will be bound to give effect to this intention of the legislature. *[PLD 1959 (WP) Lah. 883, = PLD 1960 Kar. 20]* Restriction under Article 12 of the Constitution has been imposed on the powers of legislature to the effect that it cannot make laws to punish acts or omissions of the past which by then were neither declared offences by law nor any punishment was provided therefore. Only exception created under Article 12(2) of the Constitution, covers the offence of high treason. Giving retrospective effect to any new enactment which enhanced punishment for offence from one which was provided for the same offence under law prevailing at the time when the offence was committed, has been prohibited under Article 12 of the Constitution. *[PLD 2007 Pesh. 179]*

Article 12, Constitution of Pakistan (1973) only ordains that no law shall authorize the punishment of a person for an act or omission which was not punishable by law at the time when the act or omission took place, or for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed. It can in no manner be construed as depriving the Legislature of its power to give retrospective effect to an enactment which the Legislature, by established rule of law, is competent to enact. *[PLD 1992 Lah. 517]*

3.1 **Protection against retrospective punishment.** Recording of conviction and sentence in the criminal jurisdiction under ex-post laws are prohibited. *[2006 P.Cr.L.J. 187]* Retrospective creation of offence for acts or omissions that were not punishable at the time they were done or to punish persons for offences by penalties greater than or different from those penalties for such offences at the time same were committed, is violative of Article 12 of the Constitution. *[PLD 1998 Lah. 203]*

Every legislation which makes an act done before passing of law and which was innocent at that time, such act/omission cannot be made penal and doer cannot be punished and prosecution for such an offence will be wholly void. *[PLD 2000 Lah 508]* Offender cannot be inflicted greater or a different penalty which was not prescribed when the offence was committed under Article 12 of the Constitution. *[2000 P.Cr.L.J. 1962]*

3.2 **Punishment—Should not be greater than prescribed at the time of commission of offence.** The amendment in the Penal Code was introduced with effect from the 14th of April 1972 by Law Reforms Ordinance XII of 1972. According to the amendment section 302 the punishment for murder was death or life imprisonment and life imprisonment according to section 57, PPC meant imprisonment for 25 years. According to Article 12 of the Constitution no law could authorize punishment of a person for an offence by a penalty greater than the penalty prescribed by law for the offence at the time the offence was committed. The accused could not, therefore, be sentenced to life imprisonment. He had to be sentenced to transportation for life. *[1978 SCMR 292]*

3.3 **Life imprisonment.** It is true that the term "life imprisonment" has no been specifically defined in Pakistan Penal Code, S. 57 of the said Code provides that for the purposes of calculating fractions of the term of punishment, "life" shall mean imprisonment for 25 years. Similarly Rule 198(b) of Pakistan Prisons Rules defines "life" as, a person sentenced to imprisonment for life—such sentence shall mean 25 years R.I. As held by the Lahore High Court in Muhammad Hussain vs. the State (PLD 1968 Lah. 1), "although transportation for life means a sentence span of the natural life of the convict, yet it has been accepted as being of 25 years' duration in view of provisions contained in section 57 of the Pakistan Penal Code. The expression "life imprisonment" came up for consideration before the English Court of appeal in *R vs. Foy* (1962 All England Law Report p.246) wherein it was held as under:-

"Life imprisonment means imprisonment for life no doubt many people come out while they are still alive, but, when they do come out, it is only on licence, and the sentence of life imprisonment remains on them until they die."

The issue under consideration has also been a moot point before the Indian Supreme Court. In *Laksman Naskar vs. State* (AIR 2000 S.C. 2762) it was held as under:-

"Sentence for imprisonment for life ordinarily means imprisonment whole of the remaining period of the convicted person natural life....."

However, while considering the effect of remission granted by the Government under the Prison Rules, it observe that after earning remissions it would not be an automatic release of a lifer and his release has to be preceded by the order of the Government for remitting the balance of the sentence.

In Pakistan as well Rule 140 of the Prison Rules framed under Prisons Act and as reproduced in Para-29 above codifies this authority of the Government. It lays down as to what "imprisonment for life" would mean if the remissions were to be calculated (25 years); what is the minimum period of substantive sentence that a lifer is to undergo (15 years); how the cases of all the prisoners who have served out the minimum period of substantive sentence as provided in sub-rule (i) are to be submitted to the Government for appropriate orders. This exercise is to be carried out for the purposes of section 401 of the Cr.P.C. which empowers the Provincial Government, *inter alia*, to suspend or remit the sentence of the prisoner and pass order of his release. While it is the function of the Court to pass a sentence, it is for the appropriate Government to carry it into effect, to regulate the custody of the convict/prisoner, to grant him remissions and to pass order of release under the law. If prisoner/lifer is released in terms of the Prison Rules under consideration, the said prisoner is in fact under an order of release and the sentence of imprisonment for life continues to enure. *[PLD 2006 S.C. 365]*

3.4 **Dishonest of cheque.** Section 489-F, P.P.C., was enacted on 25-10-2002 and the same was not on the statute Book when the accused had issued the said cheque. Retrospective punishment was expressly barred by Article 12 of the Constitution. Section 489-F, P.P.C., therefore, could not be applied with retrospective effect to punish the accused thereunder for the alleged Commission of offence. F.I.R., registered against the accused was consequently quashed. *[2004 YLR 2867]* Present order, however, would have no bearing on civil proceedings pending between the parties which were to be adjudicated on merits without being influenced by observations made herein. *[2004 P.Cr.L.J. 1545]*

3.5 **Retrospective punishment.** No law would authorize punishment of a person for an act not punishable at the time of its commission. *[PLD 2005 Lah. 377]*

3.6 **Criminal land has no retrospective operation—Special Court can try the offence but to pass punishment according to law prevailing at the time of the commission of the offence.** Accused had committed offence on 5-6-1997 when according to S. 10(3) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979, punishment for offence committed by accused was to extend to 25 years and whipping numbering 30 stripes but S. 10(4) of the Ordinance was introduced after date of commission of offence, hence, no punishment was to be awarded under said section, being in glaring violation of Article 12 of the Constitution. *[2007 SCMR 116]*

4. **Ex-post facto laws.** In American Constitutional law, an *ex post facto law* is one which, operating retrospectively on penal or criminal matters only, renders a previous innocent act criminal, aggravates or increases the punishment for a crime, alters the rules of evidence, penalizes an innocent act, deprives an accused of some protection or defence previously available, or otherwise alters his situation to his disadvantage. *[Calder v. Bull, 3 Dall 386]* Therefore, a retrospective law is one that relates back to a previous transaction and gives to it some legal effect different from that which it had under the law when it occurred.

In the case of *Calder* v. *Bull* Mr. Justice Chase, pointed out: "Every *ex post facto* law must necessarily be retrospective, but every Retrospective law is not *ex post facto*: the former only are prohibited. Every law that takes away or impairs rights vested agreeably to existing law is retrospective and is generally unjust and may be oppressive; and it is a good general rule that a law should have no retrospect; but there are cases in which laws may justly and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement; as statutes of oblivion or of pardon. They are certainly retrospective and literally both concerning, and after, the facts committed. But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigour of the criminal law; but only those that create or aggravate the crime; or increase the punishment or change the rules of evidence for the purpose of conviction. Every law that is to have an operation before the making thereof, as to commence at an antecedent time; or to save time from the statute of limitations; or to excuse acts which were unlawful, and before committed, and the like; is retrospective. But such laws may be proper or necessary, as the case may be. There is a great and apparent difference between making an unlawful act lawful; and the making an innocent action criminal, and punishing it as a crime.

It has been held that there is no violation of the *ex post facto* clause where the law, with retrospective effect, merely—

(a) changes the place of trial;

(b) varies the modes of execution or carrying out the sentence;

(c) provides for a longer period of incarceration between conviction and execution;

(d) alters matters of procedure, as no person has any vested right in a form of procedure;

(e) abolishes Courts and creates new ones.

Therefore without coming within the terms of this constitutional prohibition, the Legislature may abolish old Courts and create new ones, enlarge and diminish the power of any existing Court, create appellate jurisdiction where non existed before, transfer of jurisdiction from one Court or tribunal to another, make changes as to the number of Judges who shall preside at a trial, make changes as to the venue, and, generally effect any other changes in the modes of procedure or in the instrumentality of justice, as long as all the substantial protections with which the existing law surrounds a person accused of crime are left unimpaired. *[11 Am. Jur. C.L. Article 361]* What is prohibited under clause (a) of the Article is the passing of a law, making a past act or omissions punishable. A new procedure for the trial of past acts and omissions which amount to offences, is therefore, not prohibited. *[AIR 1953 S.C. 394]*

**5. Ex post facto legislation.** *Ex post facto* legislation means:

(i) Every law that makes an action done, before the passing of the law, and which was innocent when done, criminal, and punishes such action.

(ii) Every law that aggravates a crime or makes it greater than it was when committed.

(iii) Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed.

(iv) Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the offence, in order to convict the offender." *[PLD 1969 S.C. 599]*

**6. Act/s attracting provision of Article 12.**

**6.1 Control of Narcotic Substances Act, 1997.** No punishment could be awarded for an act not punishable under a law which was non-existent at the time of alleged commission of offence nor any charge under said enactment be proved. FIR registered in 1992. Accused cannot be awarded sentence under CNSA 1997 which was not in force at the time of registration of case. *[2000 YLR 137]*

**6.2 Anti-Terrorism Act, 1997.** Offence committed much prior to the Anti-Terrorism Act, 1997 came into force and was not governed by S. 38 of the Anti-Terrorism Act, 1997. Accused had killed the deceased with a hammer which was not a weapon and according to his confession he, in order to dispose of the dead body, had secretly cut it into pieces and threw the same away. All possible steps had been taken by the accused to conceal the offence. Act of accused was not a terrorist act as envisaged by S. 6 of the Anti-Terrorism Act, 1997. Notification and order transferring the case to the Special Court constituted under the Anti-Terrorism Act, 1997 would attract provision of Article 12 of the Constitution. Notification and order of transfer were consequently set aside with the direction to Sessions Judge to keep the matter on his file and decide the same on merits within a specified period. *[PLD 2000 Kar 89]*

**7. Act/s not hit by provisions of Article 12.**

**7.1 NAB Ordinance, 1999.** Offence of wilful default incorporated in the Schedule to NAB Ordinance, 1999 being a continuing offence, debtor who had neither paid the principal amount nor its mark-up, could not seek benefit under Article 12 of the Constitution as rule of retrospectivity was not applicable to the offence which was continuing in nature. Provision of S. 25-A, NAB Ordinance which was a new legislative measure to effect the recovery of outstanding loans from the defaulters, who had been designated as "wilful defaulters" and was enacted by the Competent Authority occupied the field validly and thus was not repugnant/ultra vires to Articles 4, 12 or 25 of the Constitution of Pakistan (1973). *[PLD 2000 Lah 508]*

**7.2 Article 12(1) read with Illegal Dispossession Act, 2005—Operation.** Penal provision contained in the Illegal Dispossession Act, 2005 cannot be given retrospective effect in view of Article 12(1) of the Constitution and thus the said Act has no application in the cases where alleged dispossession had come prior to the enforcement of Act, 2005. *[2011 SCMR 1137; PLD 2007 S.C. 423; PLD 2009 S.C. 404]*

**8. Non-payment of loan—S. 5(r) NAB Ordinance, 1999.** Non-payment of loan/dues in terms of the agreement within the contemplation of S. 5 (r) of the Ordinance is a continuing breach of duty or obligation, which itself is continuing if duty to repay the loan/dues continues from day to day and the bon-performance of that duty/obligation from that point of view if continuing default in the repayment of loan and if it is continuing, there

is a fresh starting point of limitation every day as the wrong continues. No limitation and no question of retrospectivity is involved as long as the duty remains undischarged. Offence contemplated under S. 5(r) of the Ordinance is the one which is committed over a span of time, therefore, the last act of the offender controls the innocence or otherwise of the party. Nature of default contemplated is not the default which is committed once and for al, it is continuous default and on every occasion the default occurs and recurs, it constitutes an act of omission which continues as therefore a fresh act. Offence contemplated u/s. 5(r) of the Ordinance is not retrospective but prospective in nature. Viewed in the perspective stated the transformation of the alleged civil action flowing out of the contractual obligations, into an "offence" under the Ordinance did not suffer from any flaw whatsoever. Punishments and creation of offences by the Ordinance are protected by Article 12 of the Constitution, in that, under Article 12 of the Constitution ex post facto legislation can neither create new offences nor provide for more punishment for an offence than the one which was available for it when committed, this is the limited impact of Article 12 of the Constitution. Only prohibition as to retrospectivity of the offence, contemplated under cl. (1), (a)(b) of Article 12 of the Constitution, therefore, is not attracted. Supreme Court, however, in order to ensure across-the-board accountability issued directions under Article 37 read with Article 187 of the Constitution for the application of S. 5(r) of the Ordinance which shall be suitably incorporated in the Rules to be framed under S. 34 of the Ordinance, which shall on promulgation become part of the Ordinance. *[PLD 2001 S.C. 607]*

**9. Bargaining plea—Does it amount to plead guilty?** What exactly the term "plea-bargaining stands for, what should be its exact import and significance, does it amount to "plead guilty" for the alleged offences and empowers the Accountability Court to convict and sentence the incumbent concerned by absolving the prosecution from its bounden duty to substantiate the accusation by producing cogent and concrete evidence; that whether the "plea-bargaining" amounts to "complete discharge of the accused persons" and no consequential penalty by virtue of amendment subsequently carried out in section 25 of the National Accountability Ordinance, 1999; could have been imposed upon the petitioners that whether the dictum as laid down in case titled *Khan Asfandyar Wali* v. *Federation of Pakistan PLD 2001 S.C. 607* has been misconstrued and misinterpreted when the alleged ill-gotten gains were deposited by the petitioners in favour of the Chairman of the Bureau prior to the announcement of the said judgment; that whether any loss had been accrued to the Government merely by tendering the medical opinion by the legally constituted Medical Board wherein the accused were also members and payment was made by Accountant-General office to the Government employees in accordance with rules and on the basis of length of their service; that whether the concept of "deeming conviction" is alien to the criminal administration of justice in Pakistan and was in violation of provisions as contained in Articles 4, 9, 12, 13, 14 and 25 of the Constitution which could not have been made applicable in the case of petitioners who were not charged for any specific offence and the notional conviction as provided under section 15 of the Ordinance did not entail the penal consequences of "deeming clause" and the Accountability Court should have confined itself to the question of acceptance and rejection of "plea-bargaining"; that whether the approval for acceptance of "plea-bargaining" could have been sought for from the Accountability Court without carrying the amendment on the subject pursuant to the direction of Supreme

Court given in *Khan Asfandyar Wali's* case and resultantly the transaction regarding "plea bargaining" stood, finalized on its acceptance by the Chairman of the Bureau and the Accountability Court did not figure in hence the question of any conviction and sentence did not arise and that whether the cases of accused persons were governed by on acceptance of "plea-bargaining" under section 25 of the Ordinance as enacted in its original form and could conviction and sentence be awarded pursuant to the amendment made subsequently under section 25 of the Ordinance which was not made applicable with retrospective effect. Supreme Court granted leave to appeal. *[2004 SCMR 1229]*

**13. Protection against double punishment and self-incrimination.** No person—

(a) shall be prosecuted or punished for the same offence more than once; or

(b) shall, when accused of an offence, be compelled to be a witness against himself.

SYNOPSIS

1. Double punishment.
2. "Prosecute".
3. "Shall be prosecuted".
4. When second trial is barred.
5. Same offence.
6. Continuing offence.
7. More than one trial for the same offence.
8. Exception.
9. Punish.
10. Article 13 read with National Accountability Bureau Ordinance, 1999—Rule of double jeopardy.
11. Clause (b)—No person is to be compelled to be a witness against him.
12. Dismissal from service.
13. Issuance of charge sheet on the same allegation.
14. Registration of second FIR.
15. Stoppage of annual increments.
16. Dismissal from Service—Acquittal on the basis of benefit of doubt.
17. Duty of the Court.
18. Taking of private information.

**1. Double punishment.** Article 13 of the Constitution sanctifies the well- settled principle of law that no person will be tried for an offence on the same set of facts on which he has already been acquitted or convicted. For applicability of the rule of "*autre fois acquit*", essential conditions to be satisfied are: (1) there must have been a trial of the accused for the offence charged against him, (2) the trial must have been by a court of competent jurisdiction, and (3) there must have been a judgment or order of acquittal, (4) the parties in the two trials must be the same, (5) fact-in-issue in earlier trial must be identical with what is sought to be re-agitated in the subsequent trial. *[2011 SCMR 484]* Criminal proceedings and disciplinary proceedings were not synonymous or interchangeable for having distinct feature and characteristics. Provisions of Article 13 of the Constitution and maxim "*nemo debet bis vexari pro una et eadem causa*" (no person should be twice disturbed for the same cause) would not apply to such case. *[2011 SCMR 484]*

Article 13(a) of the Constitution provides that no person shall be prosecuted or punished for the same offence more than once whereas S. 403(1), Cr.P.C. prohibits the second trial for an offence during the course of existence of conviction or acquittal of a

person as the case may be in consequence of final adjudication of such offence by the Court of competent jurisdiction. Hence the rule against *autrefois acquit* finds place in S. 403(1), Cr.P.C., and the counterpart of the said rule *viz.*, *autrefois convict* has received recognition. Per Article 13(a) of the Constitution of Pakistan, 1973. Secondly, it would be seen that the Constitutional guarantee is only available if the accused is convicted and punished. Thus if the prosecution results in acquittal so far as this Article is concerned the second prosecution is not prohibited. However, S. 403(1) prohibits the second trial for an offence during the course of existence of conviction or acquittal of a person as the case may be in consequence of final adjudication of such an offence by a Court of competent jurisdiction. Section 403(2), Cr.P.C., further provides exceptions to the rule regarding double jeopardy enunciated in S. 403(1), Cr.P.C., *viz.*, a person acquitted or convicted of any offence may afterwards be tried for any distinct offence for which a separate charge might have been framed against him on the former trial so also subsection (3) provides a further exception in cases where different offences are in issue. Finally, subsection (4) provides that even though a person has been acquitted or convicted by the previous Court he may subsequently be charged with and tried for any other offence constituted by the same act, which he may have committed if the Court in which he was tried first was not competent to try the offence with which he was subsequently charged. On an analysis of the foregoing provisions of law it is clear that Article 13(a) of the Constitution operates as a bar to prosecution and punishment of an accused for the same offence more than once. *[PLD 2003 Kar. 97, 1995 SCMR 626, 2001 SCMR 1083]* Article 13 of the Constitution sanctifies the well-settled principle of law that no person will be tried for an offence on the same set of facts on which he has already been acquitted or convicted. For applicability of the rule of "*autre fois acquit*", essential conditions to be satisfied are:

(1) there must have been a trial of the accused for the offence charged against him;

(2) the trial must have been by a Court of competent jurisdiction, and

(3) there must have been a judgment or order of acquittal;

(4) the parties in the two trials must be the same;

(5) fact-in-issue in the earlier trial must be identical with what is sought to be re-agitated in the subsequent trial. *[2011 SCMR 484]*

It is for the first time in the history of Sub-continent that the right of protection against double punishment and self-incrimination has been elevated to the status of a Constitutional right. Article 13 of the Constitution, 1973, embodies the provision of the maxim *nemo debt bis vexari pro eadem causa* (no person should be twice disturbed for the same cause), and the Common Law principle of *autre fois acquit* (formerly acquitted) and *auture fois convict* (formerly convicted) which means that no one shall be punished or put in peril twice for the same offence. Protection guaranteed under Article 13 is not contingent on an earlier conviction alone, but provides safeguard both against second prosecution as well as second punishment for the same offence. *[2000 UC 96]* No provision like Article 13 of Constitution of Pakistan, 1973, existed in the earlier Constitutions of 1956 and 1962. Article 13 in cl. (a) thereof had given Constitutional status to principle *"autre fois convict and autre fois acquit"* which was earlier embodied in S. 403, Cr.P.C. and Article 15 of Qanun-e-Shahadat, 1984. Scope of Article 13(a) of Constitution of Pakistan was wide. Article 13 of Constitution of Pakistan, 1973 had forbidden not only

double punishment but also prosecution for second time. *[2000 YLR 2173]* In order to attract application of S. 403, Cr.P.C. and Article 13(a) of the Constitution, it is essential that offender must have been prosecuted in accordance with law by a Court of competent jurisdiction. *[2003 YLR 1507]*

Important principle under lying invocation of this rule is that if such person is tried by a Court of competent jurisdiction for an offence irrespective of the fact whether he is convicted or acquitted, he cannot be tried again for the same offence. *[2001 YLR 1107]*

It is a settled principle of legal jurisprudence that no person will be tried for one and the same offence twice. Before, however, this principle can be invoked the following conditions have to be satisfied—

(a) that the accused has been already tried for the offence charged against him;

(b) that the trial was held by a Court of competent jurisdiction; and

(c) that there was judgment or order of acquittal or conviction. *[PLD 1970 Kar. 386; PLD 1965 Lah. 461; PLD 1965 Kar. 541]*

Whether the accused's acquittal on the charge of murder be right or wrong, there has to be an end to litigation. It would be shocking to the judicial conscience to try a man for the second time for the same offence that is why Article 13 of the Constitution, 1973, prescribes "no person shall be prosecuted or punished for the same offence more than once". *[1981 SCMR 1008]* Trial of the same charge would be violative of Article 13(1) of the Constitution and S. 403, Cr.P.C. *[PLD 2003 Lah 593]*

Article 13 of the Constitution has provided a Constitutional guarantee for protection against retrial and double punishment for the same offence which cannot be taken away or whittled down even through a legislative measure. Procedural shield to the same effect is also provided by S. 403, Criminal Procedure Court read with S. 26 of General Clauses Act. *[PLD 1998 Lah. 239 + PLD 1998 Lah. 307]*

1.1 **Accused served out a legal sentence.** Where an accused has served out a legal sentence of imprisonment for life on the charge of *Qatl-i-Amd*, appeal seeking enhancement of his sentence to death cannot be legally heard as the enhanced sentence, if recorded, would be hit by the doctrine of double jeopardy as per mandate of Article 13 of the Constitution. *[2002 SCMR 93]* But where accused is neither tried nor convicted or acquitted, *PLD 2002 S.C. 687* or only charge-sheet served, *2002 MLD 859* or complaint withdrawn or dismissed earlier, *2002 YLR 401* or penalty imposed in a departmental inquiry, *PLJ 2002 Trib. Cases Lah. 248* provisions of S. 403, Cr.P.C. or Article 13 of the Constitution are not applicable. Where State has not filed any appeal or revision against the acquittal of the accused, judgment of the trial Court though set aside in appeal filed by co-accused, it would be of no avail to the accused acquitted. Re-summoning of the accused hit by the principle of double jeopardy. *[2002 P.Cr.L.J. 453]* Accused once having served out substantial legal sentence for an offence could not be awarded another sentence for same offence. *[2004 SCMR 810]* The rule would not apply in case of a number of inquiries without following any order of a competent authority. *[PLJ 2004 Tr.C. (Services) 87]* Where offences alleged against the petitioner fell under Ss. 30, 31 & 32 of Local Government Ordinance, 2001 for fictitiously preparing National Identity Cards and also fell under Ss. 420,

468 & 471 of Penal Code, 1860 for preparation of fake identity cards and using of them as genuine. Alleged offences fell under two distinct statutes being tried independently in different Courts. Contention of the petitioner was that trail of the alleged offences in different Courts at the same time would amount to double jeopardy in violation of Article 13 of the Constitution. *Held*, where the extent of two offences was different and they fell under different statutes, their trial independently, would not amount to double jeopardy. *[2004 YLR 1299]*

**1.2 Initiating disciplinary proceedings.** Criminal proceeding and disciplinary proceeding are not synonymous or interchangeable for having distinct features and characteristics. Provision of Article 13 of the constitution would not apply to such case. *[2011 SCMR 484]*

**2. "Prosecute".** The Supreme Court in the case of *Syed Alamdar Hussain Shah vs Abdul Baseer PLD 1978 S.C. 21* has interpreted the meaning of the word "prosecution" in Article 13(a) to include the commencing, conducting and carrying a suit to a conclusion in a Court of justice meaning thereby that a fresh prosecution for the same offence is barred only where such prosecution has been finally concluded and ended either in acquittal or conviction. Significantly, the marginal heading indicates this Article is a protection against double punishment, which tends to show that it is only where the prosecution has finally concluded ended either in acquittal or conviction that a fresh prosecution for the same would be barred. *[PLJ 1978 S.C. 221]* Civil servant proceeded against under disciplinary laws could not said to have been dealt with in derogation of Articles 25 *etc.*, of the Constitution. *[2010 SCMR 169]*

**3. "Shall be prosecuted".** Words "shall be prosecuted" mentioned in Article 13(a) of Constitution of Pakistan, 1973 referred to initiation of proceedings of a criminal nature before a Court of law or Judicial Tribunal in accordance with the procedure prescribed in the statute which created the offence and regulated the procedure. Proceedings initiated by Authority against civil servant under Punjab Civil Servants (Efficiency & Discipline) Rules, 1975 did not constitute a judgment or order of a Court or Judicial Tribunal necessary for the purpose of supporting a plea of double punishment. Petitioner civil servant having failed to point out that Authorities had initiated proceedings against the petitioner in violation of rules and regulations of the Authority, Constitutional petition was not maintainable. *[2001 PLC (C.S.) 661]*

Departmental inquiry and disciplinary proceedings against a civil servant were meant to maintain purity of public service which was in the highest public interests. Departmental penalty, therefore, was no bar against criminal proceedings. *[2001 PLC (C.S.) 1059]*

Civil servant having been punished once by imposition of minor penalty and that action having attained finality, by no principle of law same matter could be re-opened for purpose of imposing a higher penalty even on the ground that discovery of fresh material had pointed to the grave misconduct of civil servant. *[2000 PLC (C.S.) 1373]*

**4. When second trial is barred.** The second trial is barred only when previous conviction or acquittal is made by a Court of competent jurisdiction. *[PLD 1970 Pesh. 66. PLD 1964 Lah. 1 (DB) 6. DLR (WP) 30]* The question as to whether a particular trial is barred by reason of previous prosecution ending in conviction or acquittal is a question to be determined on the facts and circumstances of a particular case; one of the tests is

whether facts are the same or not, but the true test as has been said in cases decided by the High Court is not so much whether the facts are the same in both trials as whether the acquittal or conviction from the first charge necessarily involves an acquittal or conviction in the second charge. *[PLD 1963 Dacca 92]* Where the accused is acquitted of a charge of misappropriation under Section 409, P.P.C. he cannot be subsequently tried on a charge of falsification of accounts on the same facts. *[PLD 1963 Dacca 61]* On the principle of double jeopardy a second trial cannot be allowed to be proceeded with when the ingredients of the two offences are the same. *[14 DLR 263]*

5. **Same Offence.** The term offence signifies the act or omission made punishable under the same provision of law. If an act or omission is punishable under separate or different provisions of law the person committing it cannot be said to have committed the 'same offence'. *[AIR 1965 S.C. 83]* Article 13 comes into play after the first proceedings are concluded. *[1981 SCMR 1008 + 1992 P.Cr.L.J. 1273; 1991 MLD 1706]* Two inquiries respecting same matter one being departmental and the other with Anti-corruption department can go side by side. *[1991 P.Cr.L.J. 283; 1989 SCMR 316]* Not only facts relied on by prosecution should be same at both such trials, but facts constituting former offence should be sufficient to justify conviction for offence subsequently charged. Previous prosecution must be before a Court having jurisdiction to try both former offence as well as offence for which accused was subsequently prosecuted, otherwise there could not be valid prosecution. *[2004 SCMR 1632]*

5.1 **Offences of identical nature.** No principle regarding protection against double jeopardy as guaranteed by Article 13 of the Constitution, and S. 403, Cr.P.C., was available to an accused for the offences off identical nature committed and repeated by him from time to time, though in certain cases as defined in S. 234, Cr.P.C., an accused could be charged and tried for such offences at one trial. *[2004 YLR 2577]*

6. **Continuing Offence.** An offence is said to be continuing when it is "repetitive offence". Where a foreigner was required to obtain a permit for his stay in Pakistan and on his not obtaining one, he was tried for the offence and was convicted and sentenced. He was subsequently tried against for staying in Pakistan without obtaining a permit for such stay and it was contended that the subsequent prosecution was barred. It was held that the residence of the petitioner in Pakistan without a permit was the continuance in the same offence and nobody can be tried and convicted more than once in respect of the "same offence" unless the statute or the particular provision of the law clearly provides that if so continued, it would amount to a fresh offence which is committee daily if continued from day to day. Therefore the second prosecution was barred in this case. *[PLD 1963 Dacca 92 (FB). 13 DLR 892. PLR 1962 Dacca 60]*

7. **More than one trial for the same offence.** For an act or omission constituting an offence under two or more enactments, offender would be liable to be prosecuted and punished under any of those enactments as provided by S. 26 of General Clauses Act, 1897, but he could not be punished twice for the same offence. *[2006 P.Cr.L.J. 954]*

Main test in such a case is as to whether same evidence would sustain conviction under both laws and words "same offence" would mean an offence ingredients of which were the same. Case against accused was for smuggling of narcotics for which he was tried and convicted by Special Judge (Customs) and if his trial was to take place under

Control of Narcotic Substance Act, 1997, same evidence would have to be led before the Special Judge, Anti-Narcotics and ingredients of both offences would be the same. Second trial of accused which was nullity in the eyes of law was ordered to be quashed. *[2000 YLR 2173 = 2000 P.Cr.L.J. 204]*

Point in issue was as to whether a person who had been tried by the Special Judge, Customs and either acquitted or convicted for smuggling or being in possession of narcotics could be tried for the second time by the Special Judge under the Control of Narcotic Substances Ordinance, 1996. Held, the offence of smuggling and carrying of narcotics being one and the same, the second trial was barred in view of Article 13 of the Constitution, S. 26 of the General Clauses Act, 1897 and S. 403 of Cr.P.C. Cases pending against the accused were quashed accordingly. *[2000 P.Cr.L.J. 1002]* Offence committed under the Customs Act, 1969, having covered the offence under the Control of Narcotic Substances Act, 1997, could not be tried for the second time under the latter Act and the accused could not be punished twice for the same act as ordained by Article 13 of the Constitution. Conviction and sentence of accused under the Control of Narcotic Substances Act, 1997 were consequently quashed. *[2000 MLD 364]*

Accused had already been convicted by the Customs Judge for recovery of the heroin from him under the Control of Narcotic Substances Act, 1997, Second case had been registered against the accused on the basis of same fats, investigation, evidence and recovery which were subject matter of the first trial. Points involved in the subsequent trial were the same which had already been considered and decided in the first trial. Conviction and sentence of accused by the Special Judge in the second trial were consequently set aside. *[2000 MLD 206]*

Trial before Special Judge under the Control of Narcotic Substances Act, 1997, was initiated subsequently on the same occurrence. Second trial was barred in view of Article 13 of the Constitution as also under S. 26 of General Clauses Act, 1897, and S. 403, Cr.P.C. *[2001 P.Cr.L.J. 248;]*

Trial in the Court of Special Judge (Customs and Taxation) would either result in conviction or acquittal on the basis of facts, evidence and alleged recovery in the case while the other trial under S. 9(c) of Control of Narcotic Substances Act, 1997 in presence of same facts and in same set of evidence by the Special Judge, would patently result in a duplicate punishment or atleast a duplicate trial in violation of the doctrine of double jeopardy. *[PLD 2000 Kar 181]*

**8. Exception.** Federal Shariat Court having not been satisfied with the meager sentences awarded to accused by Trial Court had issued suo motu notices to accused to explain as to why their sentences might not be enhanced. Prosecution had also filed a revision petition against the accused to the same effect. Said suo motu notice and the revision petition did not amount to retrial of the accused, but rather the same were continuation of the original trial for the same offence. *[2000 MLD 965]* Filing of second complaint after withdrawing the first does not violate the provision of law. *[2001 YLR 1107]*

Two separate trials of the petitioners were conducted one under Articles 3 & 4 of Prohibition (Enforcement of Hadd) Order, 1979 and the other under Ss. 8 and 14 of Dangerous Drugs Act, 1930. Trial of the petitioners under both the statutes was not violative of the provisions of Article 13 of the Constitution read with statutory laws under S. 403, Cr.P.C. and S. 26, General Clauses Act, 1897. *[PLD 2000 Quetta 26]*

Matter brought to the notice of High Court in Constitutional petition had reflected that Fundamental Rights of minor were likely to be violated. High Court, in view of serious threats of violation of Fundamental Rights to life and property of petitioner, could entertain Constitution petition. *[2000 YLR 2097]*

8.1 **Distinct offence.** Offence of smuggling of heroin was punishable under Customs act, 1969 whereas possessing narcotic drugs (heroin) was punishable under Control of Narcotic Substances Act, 1997. Offences against accused were not same but were distinct. Second trial would only be barred when offence was same, but if offence was distinct, accused could be tried before two different Courts under two different enactments on basis of common set of facts and trial would no be barred. Accused were not sent up to stand trial in different Courts, under same offence but under distinct and different offences. Trial of accused, was not barred under Article 13(a) of Constitution of Pakistan, 1973 or S. 403, Cr.P.C. or on principle of "double jeopardy". *[2000 P.Cr.L.J. 956]* Act of smuggling or import or export of narcotics are distinct and separate offences and acquittal or conviction in one would not bar trial under the other. *[PLD 1990 FSC 62]*

8.2 **Departmental enquiry.** A civil servant can be proceeded against in a criminal Court as well as before a departmental authority, if the act done is actionable in both the forums. *[PLD 1985 S.C. 134]* Departmental and criminal proceedings can be initiated independently of each other. *[2000 YLR 718]*

8.3 **Case at investigation.** Case at investigation stage, issuance of non-bailable warrants amounts to comply an act in aid of investigation. *[PLD 1980 S.C. 6]* Murder charge was never framed for the murder of three persons killed in the occurrence and the petitioner and none of the persons who were sought to be made an accused in the complaint filed by the respondent were ever tried in the earlier case. Murder of three persons and the evidence sough to be produced by the respondent in the complaint was also different. Principles of *autre fois* acquit (acquitted formally) and *autre fois* convict (convicted formally) were not attracted in the case. *[PLD 2004 Lah. 591]*

9. **"Punish".** The word "punish" occurring in Article 13 in Article 13 of the Constitution would mean to cause the offender to suffer for the offence or to inflict penalties on the offender or to inflict penalty for the offence. *[2000 YLR 1448]*

10. **Article 13 read with National Accountability Bureau Ordinance, 1999—Rule of double jeopardy.** The rule of double jeopardy as per Article 13(a) of the Constitution would not be applicable thereto since admittedly the first prosecution of the appellant/accused under the Customs Act has still not reached any conclusion. It would also be seen that Section 403(1) of the Cr.P.C., also contemplates a previous acquittal or conviction of an accused for an offence and prohibits a fresh trial for the same offence on the same facts for any other offence for which a different charge for the one framed against him might have been made u/s 236 or for which he might have been convicted u/s 237. Consequently, in our opinion, both the foregoing provisions of law contemplate that before the same can be pressed into service the first trial of the accused must have been concluded which may either result in an acquittal or conviction which is not the case. For all the foregoing reasons, we are of the view that the second trial of the accused under the NAB Ordinance, 1999 is neither violative of Article 13(a) of the Constitution nor in contravention of S. 403(1), Cr.P.C. *[PLD 2003 Kar. 97]*

First Reference already decided related to the corruption and corrupt practices committed by the accused and his one co-accused during the period when the accused was serving in Pakistan Navy as Chief of the Naval Staff and received commissions and bribes from suppliers who were under contract with Government of Pakistan to supply defence material to Pakistan Navy. Second Reference related to a different acts of corruption and corrupt practices committed by the accused and two other persons during a different period. Trial or prosecution of accused for different offences committed at different times and detected at a later stage was not violative of the principle of double jeopardy or double prosecution or punishment and Article 13 of the Constitution or S. 403, Cr.P.C., was not attracted. *[PLD 2003 Kar. 105, 1993 SCMR 1177 ref.]*

**10.1 Proceeding by Article 4(2) Disqualification for Membership Order, 1977.** Proceedings qua reference under Article 4(2) of Order, 1977 could not be equated to that of "criminal trial". Provisions of Article 13 of the Constitution and S. 403, Cr.P.C., would not be attracted to such order passed under Article 4(3)(a) of Order, 1977 as same was neither acquittal nor discharge. Question of double jeopardy would not arise as petitioner had never been tried by any Court or judicial Tribunal on charges framed by Accountability Court. No prejudice was caused to petitioner, who would have opportunity to approach higher forums available in the hierarchy, in case of any grievance against judgment of Accountability Court. *[204 SCMR 1632]*

**11. Clause (b)—No person is to be compelled to be a witness against him.** A cardinal principle of Criminal law is that every person even, the accused is innocent in the eye of law, until his guilt is proved beyond the shadow of any reasonable doubt. An accused person is not supposed to answer such question which have tendency to expose him to a criminal charge.[14] Statement of confessional nature made by an accused while in police custody cannot be used against him for any purpose. Likewise confessional statements made by an accused, by inducement, threat or promise is irrelevant in a criminal proceeding.[15] Under subsection (2) of S. 340, Cr.P.C., the accused has been made a competent witness for the defence. However, option lies with him to depose on oath as a witness or not and his competence as a witness is different from compelability. In others words he may be a competent witness for the defence but cannot be compelled to appear as such by the Court or any party. I am conscious of Article 13 of the Constitution which *inter alia* provides that no person shall when accused of an offence, be compelled to be a witness against himself. Even otherwise it is well-recognized principle of Islamic criminal jurisprudence that no one can be compelled to be witness against himself. *[PLD 1983 FSC 173]*

**12. Dismissal from service.** Article 13 of the Constitution is very clear on that point according to which no person can be vexed twice on same charge. Employee having been punished for his past misconduct, said punishments, on the principle of double jeopardy, can not be made basis for dismissal order. Competent Authority in show-cause notice had observed that formal inquiry was not needed in view of available documentary evidence. No explanation given in show-cause notice as to what were the documents and what was their nature. Employees were never provided the details of available documentary evidence to enable him to rebut the same. Show-cause notice, in

---

14 S. 161 Cr. P.C.
15 S. 24 Evidence Act.

circumstances, suffered from a legal infirmity and penalty imposed upon him on the basis of such show-cause notice could not be upheld. Competent Authority had dispensed with a formal inquiry by passing a mechanical order and did not pass a speaking order containing reasons. Employee should not have been condemned on the strength of said mechanical order. *[2004 PLC (C.S.) 959]*

**13. Issuance of charge sheet on the same allegation.** Petitioner serving as Assistant Director was issued charge-sheet on allegation of irregular exchange of plots by him. Petitioner replied the charge-sheet and Director-General/Authorized Officer, came to the conclusion that petitioner was not involved in irregular exchange of plots. Show-cause notice was issued to petitioner on same allegations (in which petitioner had been exonerated) and thereafter one after the other two charge-sheets were issued to petitioner on same allegations. Authority, under Article 13 of the Constitution was not competent to issue show-cause notice and charge-sheet on the same allegations in which he had already been exonerated and order of said exoneration still held field as same had not been challenged by the Authorities which had attained finality. Charge-sheets subsequently issued for the purpose of initiating inquiry on same allegations, would not stand in the eye of law. *[2004 PLC (C.S.) 1517]*

**13.1 Criminal proceeding and disciplinary proceeding.** Criminal proceeding and disciplinary proceedings are not synonymous or interchangeable for having distinct features and characteristics. Provisions of Article 13 of the Constitution and maxim "*nemo debet bis vexari pro una et eadem causa*" (no person should be twice disturbed for the same cause) would not apply to such case. *[2011 SCMR 484]*

**14. Registration of second FIR.** Earlier F.I.R., was lodged by complainant against accused person under Ss. 419/420/467/468/471, P.P.C., and investigation in that case was being conducted by Range Crime Branch and bail before arrest was granted to accused. During pendency of investigation, complainant had moved another application on which Anti-Corruption Department had initiated inquiry under Anti-Corruption Establishment Rules, 1985. Said later inquiry had been challenged by accused through Constitutional petition. Contention of accused/petitioners was that in presence of earlier F.I.R., on the same subject, second F.I.R., could not be registered and that initiation of inquiry by Anti-Corruption Establishment on subsequent application of complainant, was illegal as accused could not be vexed twice on same allegation. Matter was still at early stage and only inquiry had been initiated on application of complainant and initiation of inquiry was not an adverse action. Mere apprehension of petitioners/accused that second F.I.R., would be registered against them, was not sufficient to issue writ against the Authorities. Even otherwise, no bar existed in law for registration of F.I.R., by Anti-Corruption Department relating to offences mentioned in the Schedule, even if F.I.R., had earlier been lodged by Local Police as Article 13 of the Constitution and S. 403, Cr.P.C. would only come in the field if accused after prosecution, had been convicted or acquitted of same offence. Accused in F.I.R., earlier lodged against them, had even not been tried so far. Principle of double jeopardy, in circumstances did not attract in the case of accused. *[2004 MLD 1201]*

**15. Stoppage of annual increments.** Civil servant remained associated with construction of bridge as Sub-Divisional Officer. Certain technical defects were noticed in the construction of bridge and departmental inquiry was initiated. Civil servant was though

found innocent and was exonerated by the Inquiry Officer, yet the Authorized Officer imposed penalty of stoppage of one increment on him. Matter was reopened, one year later, and second inquiry was initiated by the Authorities but the second charge-sheet was dropped for certain reasons. Once again during third inquiry a new charge-sheet along with statement of allegations was issued to the civil servant wherein the same charges were reproduced. Authorities, as a result of third inquiry, imposed stoppage of three increments on the civil servant. Penalty imposed by the Authorities was maintained by the Service Tribunal. Plea raised by the civil servant was that imposing of penalty for the second time amounted to double jeopardy. *Held*, Civil servant, as a result of comprehensive inquiry, was held responsible for not following the skew and alignment correctly which could have not only played a havoc with the users of the bridge but also spoke a volume about the technical know-how, efficiency and professional skill of the civil servant. Successive inquiries could have been held to unveil the reality. Authorities had awarded minor punishment of stoppage of three increments which did not commensurate with the gravity of the charges. Penalty could have been increased by the Competent Authority while exercising powers as conferred upon it under R. 7-A of North-West Frontier Province (Efficiency and Discipline) Rules, 1973, which had been enacted to meet such sort of eventualities and the same could not be equated with the double jeopardy. Civil servant was never exonerated in any inquiry and no injustice had been done to him. Supreme Court declined to declare the entire disciplinary proceedings null and void due to some procedural lapses as Supreme Court ordinarily refuses to interfere with the concurrent findings of fact given by Departmental Authority and Service Tribunal. *[2004 SCMR 492]*

**16. Dismissal from Service—Acquittal on the basis of benefit of doubt.** Mere acquittal of the civil servant on the basis of benefit of doubt from Court of Appeal in foreign country, the serious charge of drug trafficking and being apprehended at foreign airport by Customs Officials could not be brushed aside easily. Supreme Court observed that such act of the civil servant had not only impaired the image of Pakistan Judiciary but had given bad name and reputation to the country and the nation. Civil servant had also earned adverse reports in two Annual Confidential Reports whereby he was reported to be corrupt. Judgment passed by the Service Tribunal was based on valid and sound reasons and was in consonance with the settled law. *[2004 SCMR 540]*

**17. Duty of the Court.** It is the duty of the Court under Articles 9 and 14 of the Constitution to safeguard and preserve life and dignity of the citizens and protect them from serious and hazardous risks, so that they can live a happy and meaningful life. *[2004 PTD 534]*

**18. Taking of private information.** Taking of private information without any allegation of wrong doing of ordinary people would be an extraordinary invasion of fundamental right of privacy. Taking of one's most private details would affect his life making him potentially vulnerable and insecure. *[2004 CLD 1680]*

**18.1 Enhancement of sentence of a convict already undergoing sentence of life imprisonment.** The genesis of Article 13 of the Constitution can be traced to the English Common Law rule "*nemo debet bsi vexari*", which, in literal sense, means that a person may not be put twice in peril for the same offence. This principle by now ha come to assume a universal application and is found in Constitutions of

most of the countries. This almost universally accepted principle and as enshrined in Article 13(a) of the Constitution of Pakistan in its import and as evolved through the precedent case-law, has following implications:-

(i) A person may not be tried for a crime in respect of which he has previously been acquitted or convicted.

(ii) In respect of the crime of which he could on some previous charge/indictment has been lawfully convicted.

(iii) Where the offence charged is in effect the same or substantially the same as one in respect of which the person charged has previously been acquitted or convicted or in respect of which he could, on some previous indictment, have been convicted.

(iv) The evidence necessary to support the second indictment or the facts which constituted the second offence would have been sufficient to procure a legal conviction upon the first indictment either as to the offence charged or as to an offence of which on the indictment, the accused could have been found guilty.

(v) The offence charged in the second indictment must have been committed at the time of the first charge *i.e.* a conviction or acquittal for an assault will not bar a charge of murder if the assaulted person later died.

(vi) The earlier adjudication leading to guilt or innocence of a person charged must have been through a valid process and by a Court of competent jurisdiction.

(vii) The conviction or acquittal in the previous proceedings must be enforced at the time of the second trial.

(viii) The proceedings in which the plea of double jeopardy is being raised must be fresh proceedings where the person is sought to be prosecuted for the same offence for the second time.

When the conviction or acquittal of a person is under challenge in appeal of revision the proceedings are neither fresh prosecution nor there is any question of second conviction or double jeopardy. An appeal or revision is continuation of trial and any alteration of sentence would not amount to double jeopardy.

An appeal against an acquittal wherever such is provided by the procedure is in substance a continuation of the prosecution.

To say that an appellate or revisional Court cannot enhance the sentence of a convict who during the pendency of the appeal or revision, as the case may be, has undergone the sentence under challenge is to negate the mandatory provisions relating to the powers of the appellate Court under sections 423, 427 of Cr.P.C., and of the revisional Court under sections 435 and 439 of the same Code. Under these provisions, the concerned Court, seized of the appeal or revision, has the power to annul, to reduce or to enhance the sentence.

The question of sentence is primarily a matter of judicial discretion to be exercised in the first instance by the Trial Court. The Court of appeal can enhance the sentence if the same is found to be inadequate or not in accord with judicial principles laid down by superior Courts in this regard. But it will depend on circumstances of that case and it would be undesirable to lay a principle of general application.

There are four broad principles/guidelines in this regard where the Court could interfere and enhance the sentence. Those are as under:-

(i) Where the sentence was not justified by law.

(ii) Where a person was sentenced upon a wrong factual basis.

(iii) Matters improperly taken into consideration or fresh matters to be taken into account.

(iv) The sentence manifestly is excessive or wrong in principle.

These are mere guideline and their application would depend on each case. The cases entailing capital charge are to be decided with utmost care. When law vests a discretion in Courts to award sentence of death or life imprisonment, it casts a heavy duty to balance the various considerations which underlie these sentencing provisions. The circumstances surrounding the offence, the question of *mens rea*, the principle of proportionality of sentence, of the gravity of the offence charged, the considerations of prevention or of deterrence and of rehabilitation may also be kept in view if the circumstances of the cases and the law applicable so warrant.

There is no rule of general application that the serving out of sentence during the pendency of appeal or revision, by itself, would constitute a bar for enhancement of sentence or that any exercise to that effect would be violative of Article 13 of the Constitution. This could be one factor which the Court may consider, along with other factors and the principles while deciding the question of enhancement.

Mostly there were multiple factors which weighed with the Court in not enhancing the sentence and the circumstance that a convict has already undergone the sentence also weighed with the Court.

Article 13 of the Constitution of Pakistan is not a bar for enhancement and final determination by the appellate Court established under the law. *[PLD 2006 S.C. 365]*