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International Donor Agencies Funded Judicial Reforms Endeavors in Pakistan: Old Wine in New Bottle

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Abstract: *Many governments and international organizations in Pakistan have introduced various reforms to promote the justice system in the country, but their efforts have ended in vain. The justice system in Pakistan has not been able to provide justice to common citizens. The reforms were aimed at decreasing the time span trials usually take in Pakistan and minimizing the cost of litigation; however, the basic purpose of the justice system, that is, the dispensation of justice, has remained unfulfilled. The reforms strengthened judicial hierarchy, improved infrastructures, and amended certain procedural laws but did nothing to address the real issues that were hindering the deliverance of justice to the common people. The legal fraternity and international donor agencies, who were the forces behind these reforms, have been the defenders of the formal justice system in Pakistan for reasons that are many.*

Introduction

Reforms in the judiciary have remained the demand of the people and, subsequently, the concern for successive governments since the creation of Pakistan. Pakistan, which had been carved out from the Indian sub-continent in August 1947, remained under the direct colonial rule of the British. The British erected the modern nation-state in the Indian sub-continent by establishing its institutional and legal frameworks. These institutional and legal frameworks--meant to govern colonial India, were inspired by the ones already established in the United Kingdom but in an improvised form.

The British partitioned the Indian Subcontinent into two separate states, India and Pakistan, through the Indian Independence Act of 1947. Both states inherited most of their institutions, frameworks, and governance structures from British Colonial India. After the British departure, the Government of India Act 1935 and the Indian Independence Act 1947 were the two major constitutional and legal documents which shaped the structural and functional aspects of the new states. The former became the provisional constitution, while the later empowered the constituent assemblies of the new states to legislate for their respective states (Khan, 2009). Besides, several substantive and procedural laws like the penal code 1860, the contract act 1872, the code of criminal procedure 1898, and the code of civil procedure 1908 were also inherited from the colonial era (Siddique, 2014).

Like other institutions and frameworks, the judiciary is also a colonial establishment in its structural, functional, and procedural aspects. It evolved through different legislative acts during colonial rule in the Indian Subcontinent. The Charter of 1623 was the first legal document that laid the bases of a formal colonial judiciary in the British Indian settlements (Munir, 2011). Various other regulations, acts and charters modified and empowered the judiciary as the company's settlements were enlarged and extended. For instance: The Charter of 1661, The Regulation Act of 1773, The Parliament Act of 1800 and The Parliament Act of 1823 (Hussain, 2011).

After the Indian War of 1857, the Crown enacted the Government of India Act 1858 and assumed all governmental responsibilities formerly held by the company. Subsequently, the Crown introduced various legislative frameworks for the colony, including the High Court of Judicature Act 1861 for the establishment of the high court (Munir, 2011). Similarly, the code of criminal procedure 1898 and the code of civil procedure 1908 established the district and sessions courts as subordinate judiciary at the administrative district level. The Federal Court of India, which became the apex court, was established under Section 200 of the Government of India Act, 1935. This act, with minor changes, became the provisional constitution of the new states, curved out of the Subcontinent in 1947 (Chauhan, 2019)

Pakistan has experienced a very tumultuous history in terms of constitutionalism and democracy. It took nine years to frame a constitution in 1956, which was abrogated in 1958 by the then-martial law dictator, General Mohammad Ayyub Khan (Kokab, 2011). He introduced another constitution in 1962, which was abrogated in yet another coup in 1969. The same is the fate of the present constitution (adopted in 1973), which has been abrogated or kept in abeyance three times. Besides, it has been amended from time to time. The structure of the state in these constitutions, with the exception of the 1962 constitution, remained the same as was provided in the Government of India Act 1935, that's, federal and parliamentary (Khan, 2009). Similarly, the judicial structure, procedure and jurisdiction have gone through minute alterations in the different constitutions adopted by Pakistan (Hussain, 2011). Moreover, various legislation, amendments and reform initiatives have been taken in order to update other legal frameworks but have met less success so far. The essence and base of the different legal codes, procedures and laws remained the same, as was inherited (Siddique, 2014)

The law regime of the justice system and the components it governs largely remain the same as was enacted by the British Indian government except for some changes (Hussain, 2011). The changes made by successive governments from time to time could not alter the basic character of the system. At times, these changes were more regressive, especially during the military rule of General Zia ul Haq laws were amended by interpreting orthodox Islamic fiqa (law) in order to Islamize the laws (ICG Report, 2010').

Methodology

This study is based on content analysis with qualitative deductions. The study has relied on secondary data, mostly articles and books. However, most of the analysis and deduction is taken from Dr. Osama Siddiqi's seminal research work, "*Pakistan's Experience with Formal Law: An Alien Justice".*

Discussion

Robert Hale deconstructs the three commonly held beliefs and assumptions about the background rules which govern disputes in a courtroom. For instance, he argues that background rules are neither neutral nor do they create equal socio-economic relations; rather, they are biased and tilted towards a section of society in building asymmetric socio-economic relations in a given milieu. They empower different groups in society differently. Regarding

the second assumption (neutrality of the state in upholding and implementing background rules), Hale says that the state resorts to coercing the general populace to comply and obedience to these biased rules. According to him, the state takes responsibility for executing these rules by relying on force and coercion. The state assumes the role of custodian of these rules on the basis of which society is patterned (Kennedy, 1993).

Hale also questions the third assumption regarding the role of a courtroom, which is considered an appropriate arena for contesting disputes arising from the consequences of these background rules. Hale argues that the unequal 'bargaining power of the parties, which is the result of these background rules, becomes an obstacle in the way of the supposedly neutral and objective principle of justice administered in the court. Moreover, Hale is also sceptical about the 'balancing role' of the court between the parties having different economic empowerment (Hale, 1939). Therefore, Hale suggests meaningful legislation and planned government intervention aimed at minimizing the asymmetric socio-economic relations and different bargaining powers.

According to Siddique (2014), the reforms in law and judiciary in Pakistan have never taken into consideration the critique provided by Robert Hale. For example, the reforms have always focused on 'delay reduction' and 'speedy justice'. To achieve these goals, the assertion has always been on the 'capacity building' of the judicial structure (infrastructure, judges, managerial staff etc.) and amending the procedural laws to make it an efficient case disposal machine (Siddique, 2014). The stress on the capacity building of the judicial structure stems from the third assumption discussed above, where it was assumed that the courts are suitable forums for resolving disputes that grow from asymmetric background rules of the society. This fundamental fallacy of reforms ignores any other possible avenues and alternatives.

Similarly, it results in the exclusion of needed legislation for addressing socio-economic disparities. This fallacy also hides the limitations of courts in dispensing justice. Moreover, due to this, the background rules, which cause hierarchical and stratified social structure, which in turn causes unequal bargaining powers in the courtroom contestation, get little attention.

In the continuity of this assumption of capacity building of the judicial structure, various law reform commissions have recommendations more or less similar and in the same direction. Almost all reform commissions[1] have shown full faith in the existing legal framework and judicial structure; however, with minor alteration and patchwork; except for one commission (Salah Uddin Commission, 1980), the report has a section arguing alternatives, but this report, like others, was not materialized. For instance, the one patchwork recommendation which can be found in these reports is alterations and a few amendments in procedures, both civil and criminal. By and large, these reports have shown confidence in the laws and procedures and have stressed the strict implementation of the existing laws and procedures; thereby saying that problems exist due to the non-application of and non-adherence to laws and procedures (Siddique, 2014).

At times though, certain commissions have recommended measures for the protection of the marginalized groups in society, but the same bothered little to dig out the deep structural socio-economic causes of marginalization. Some reports have also pointed out to non-implementation of the previous reports'

[1] For instance; (a) Commission on Marriage and Family Law 1956; (b) Quetta and Kalat Laws Commission 1958; (c) Law Reform Commission 1958; (d) Law Reform commission 1967; (e) High Powered Law Committee Report 1974; (f) Law Committee for Recommending Measures for Speedy Disposal of Civil Litigation 1978; (g) Secretaries' Committee Report 1979; (h) Salah Uddin Ahmed Committee 1980; (i) Pakistan Women's Rights Committee 1976; (j) Commission on the Status of Women Report 1985; (k) Commission on Reforms of Civil Law 1993; and (l) Commission of Inquiry for Women Report 1997.

recommendations by the non-serious governments and the reluctant bar and bench. While some reports have tried to find out the flaws in the country's tumultuous constitutional history. They have reasonably analyzed the judicial institution in the wider context of institutional growth in the country. According to these reports, the growth of the judiciary, like other civilian institutions, was greatly hampered during the constitutional history of the country, characterized by martial laws and weak democratic governments.

Similarly, these reports also point out the politicization of the judiciary, where it became controversial and occupied with cases of political substance and nature. This institutional degradation was also caused by the low standard of legal education in the country, which resulted in a low-quality legal fraternity—bar and bench. Although the recommendations of these reports are reasonable, they lack a deeper socio-economic structural analysis of the polity where the system operates (Siddique, 2005).

Besides these governmental reports, recently, and especially in the previous three decades, certain multinational and international organizations have carried out legal reform projects in Pakistan. The sole aim of these funded projects was to enhance and build the efficiency of the legal and judicial system for providing accessible and speedy justice to the people (ADB-MoL Report, 1999). To achieve the goal of efficiency, the recommendations of these projects revolve around the furnishing of the judicial machine, which includes improving the physical infrastructure of the judiciary, especially the lower judiciary, giving incentives and good salaries to the judges and other court staff and making the judicial process work.

While the rationale behind efficiency overtly meant uplifting the poor and vulnerable, it offered them as such. Neither their unequal bargaining power was compensated nor was their vulnerability addressed to achieve 'efficiency'. Instead, efficiency was assumed to be achieved through a furnished and incentivized judicial structure than seeing it through the equal bargaining power of the contesting parties. To achieve efficiency, this approach was very superficial; it ignored the underlying complex and hierarchical societal impediments in the way of efficiency. It does not mean that the legal fraternity cannot play a role in achieving efficiency, but merely focusing on providing good incentives to them for bringing efficiency is equally naïve. In these projects, no focus was given to the type, quality, and ideological factors of legal education, which the legal fraternity has been acquiring for a long. The legal fraternity produced through existing legal education is itself a social class which becomes the defender of the social order and pattern of relations. (Kennedy, 1982)

Similar to efficiency enhancement, the approach to 'capacity building and elevating human capital development also stresses an increase in salaries of court staff, providing furnished and equipped workplaces, and training of judicial officers and lower judiciary staff. This approach also ignores the causes and flaws which are at the roots of the system. The approach is also a testimony to the belief in the existing legal framework and judicial system. This is a sort of mere whitewashing and repair of the old judicial and legal edifice of the country. (ADB-MoL Report, 1999)

Additionally, the recent activism shown by the higher judiciary on the pretext of public interest litigation has also been motivated by delay reduction, a popular approach to access to justice in the legal fraternity of Pakistan. The motivation for sue-moto action comes from the higher judiciary's constitutional role as 'guardianship of the fundamental rights'. Critics, on the other hand, are sceptical and hence less optimistic about the judicial motivation for the public interest. Instead, they count other factors behind this phenomenon, including the zealous whims and public stunts of some activist judges, an act to undermine the already weak civilian

administration, manhandling of complex and technical issues etc. (M. Khan, 2014).

Besides, judicial activism has been criticized for over-simplification of problems like delays and inaccessibility, which are deeply rooted in the structure of the system and society (Munir, 2021). The cases taken up through public interest litigation are usually in the jurisdiction of the lower courts; so, instead of empowering the lower courts with meaningful reforms, the issues are taken up by the higher judiciary.

Another attempt to reform the justice system in Pakistan was made in the shape of the 'Islamization' of the laws and structures. It was done on the pretext of making the justice system efficient and at par with the popular aspirations of the predominantly Muslim population. In order to achieve this, a council of Islamic ideology was formed to assist and guide the legislature in making laws consistent with Islamic sharia (Mehdi, 2013). Besides, a parallel court system, with a federal Shariat court and a Shariat bench of the Supreme Court, was erected to gauge the religiosity of laws and decisions of the lower courts (Article 203-c). Under this scheme, certain new laws were also made, besides amending others. For instance, making the vague and fluid objectives resolution an operational part of the constitution (2-A), passing the Hudood laws and amending the blasphemy laws and Evidence Act of 1872 (Strasser, 2014).

This Islamization/reforms approach was adopted during the martial regime of General Zia ul Haq, so it needs to be analyzed in the wider political context. Besides, this brought more confusion, controversy and regression to the already shaky and dysfunctional judicial structure and legal framework, let alone betterment (Mehdi, 2013).

In a very recent reform initiative funded by European Commission and Department for International Development (DFID), a somewhat novel approach was adopted by linking access to justice with the political and economic empowerment of the litigants. Although seemingly a refreshing approach, empowering the vulnerable disputants to a contest in adversarial litigation, ignored the wider historical, sociological and economic context of the dispute and the disputants in Pakistan. While the approach might have empowered a party in a legal battle, it could not solve the complexity of the issue at hand. For example, a land dispute is usually very complex in the given context and cannot be fully resolved in the present formal land legal regime (Siddique, 2014).

The basic motivation and expectations of given reforms approaches and endeavors aimed at achieving efficiency in terms of delay reduction. To do this, the focus was to make the formal courts more efficient and empowered. This stress on efficient formal courts is, however, misconceived and misleading. This could only result in a strong formal court rather than a justice system, which could be brought by bridging the gap between people's aspiration for justice and their actual experience of getting it.

Besides, it creates a virtual monopoly of the formal court system, which leaves no space for alternatives and informal arenas; and no room for meaningful legislation and change in social patterns. The obsession of these reforms with delay reduction is also flawed as there are high chances of 'miscarriage of justice'. The author of decisions of the formal courts needs time because in writing decisions involving complex laws and disputes usually, simplifications are made. Qualities of decisions are compromised in the race to achieve delay reduction. Besides, the zeal for delay reduction has always favored the empowered party of the dispute.

By using the analysis and findings of Indian judicial reforms by Buxi (1982), Siddique has characterized Pakistani reforms as the reforms initiatives are always initiated and led by the governing elite rather than the populace, thus making them non-participative and highly technocratic; these law reforms are devoid of any coherent philosophical and ideological base; and hence ignore social reality (Buxi, 1982).

The reform projects are most often authored by the legal fraternity—judges and lawyers—that criticize, evaluate, and suggest remedies to the system without any glance at the history, sociological makeup of the polity or any other alternative structural analysis and view. They have always come in defense of the existing system while proposing minor repairs to its edifice.

By no coincidence or random happening, this legal fraternity acts as custodians of the existing system. Their confidence stems from their own stakes involved in the system. Firstly, their interests and stakes are the progeny of the 'kind' of legal education they got and the training they received during their profession. The ideological base of their education makes them ardent supporters of the system and hostile to any other alternative system. Similarly, their monetary benefits and a socioeconomic class of theirs make them supporters and defenders of the existing system and sceptical of any viable alternative (Galanter, 1968).

Legal education in Pakistan is also run and managed by the legal fraternity—retired judges and lawyers. Legal studies are understood and imparted not as a science, a multidimensional and interdisciplinary subject with different philosophical and theoretical bases, but as a craft. This exacerbates things when graduates of such craft-ridden education become the architects of the reforms. Moreover, legal fraternities all over the world are conservative when it comes to structural and institutional changes, notwithstanding their pro-democratic biases and struggles (Siddique, 2007).

Besides the emphasis on law as a tool for development nationally, it has also gained the same currency internationally in recent decades. Law has been assumed as the only mode and medium for the solution of different issues which are otherwise very complex due to their economic and political natures. This centrality of law has further emboldened the legal fraternity and has enhanced its role in legal and judicial reforms. Moreover, it has furthered sidelined alternative views for big changes on socio-economic levels, which are considered correlational to accessing justice (Kennedy, 2012).

Apart from this, the overemphasis on the law has also enhanced the role of international financial institutions in the reform zeal of developing post-colonial states. These institutions have their own baggage of ideological bias and agenda for a free-market economy. Similarly, the central role of law in multiple and complex issues has given rise to the popular but misleading phrase of 'the rule of law'. The rule of law is a fallacy when it gets preference on political deliberation and dialogue on the distributional pattern (Kennedy 2008).

The tendency of assistance and guidance from international financial institutions has further curtailed indigenous wisdom and the role of the state in reform agenda and discourse. This further exacerbates things as the focus of international financial institutions is on the free market economy, where market actors are considered a source of 'good laws'. The free-market-oriented reforms will further silence the voices for reforms meant to change societal inequalities and distributional patterns (Newton, 2006).

Delay creations are complex and ambiguous phenomena created by multiple factors. For example, the general trend of surging litigation in society is due to the unprecedented increase in population, urbanization with rural-urban migration and the decline or breaking down of normative framework in society and the vanishing or unavailability of alternative forums and mechanisms for dispute resolution. The delay creation is partly due to the gaps in laws, court processes and procedures, but the most important factor in delay creation is the unequal social patterns. Litigants, lawyers, judges and court staff have also played a part in delay creation.

Besides, the complex, multifaceted and entrenched nature of the underlying

dispute/issue also prolongs the proceedings. Similarly, outdated and flawed laws and procedures become the source of delay. Moreover, government departments like police and revenue also cause significant delays in creation. So, delay reduction and speedy delivery cannot be achieved by merely focusing on enhancing the efficiency of formal courts.

Conclusion

Despite multiple reforms in the justice system of the country, the judicial structure miserably failed to provide justice to the common citizen at their door steps hence failing in their basic duty. This chapter highlights the broader contours of the formal justice system of Pakistan. A holistic view of the promulgated justice system has been taken since its genesis and historical background while keeping in view the structural and functional aspects in sight. Apart from this, the loopholes and shortcomings which are plaguing the system are also elaborated besides various reforms, and their impact has been analyzed. As a result, it has been observed that the justice system is colonial in nature which was established by the British Government in India and had been developed over time since the start of the seventeenth century under the auspices of the East India Company.

After the partition of the sub-continent, Pakistan automatically inherited the colonial state model, which was left by the British. Pakistan, without any modification and amendment, adopted the legal system and institutional frameworks which were left by the colonial power in India. Notwithstanding its pathetic record and bleak history of constitutionalism and intuitional developments, successive governments in Pakistan have tried half-heartedly to reform the justice system by initiating and carrying out different reforms but to no avail because they have not been successful in achieving its primary objectives of service delivery and dispensing justice to the common citizens. All such reforms were focused on speeding up the trials and reducing the litigation cost neglecting the basic tenet of delivering justice at the doorstep. And to add insult to injury, the mechanism adopted for this efficiency was based on a skewed and flawed approach which further complicated the justice system. The sole focus of all these reforms was limited to maximizing and enhancing the judicial hierarchy, building judicial infrastructures, and amending certain specific procedural laws. The reformers provided very little room for establishing alternative fora and addressing the multiple and complex factors involving these issues. The force behind all these reforms initiatives has been derived from its architects — the legal fraternity and the International Donors Agencies — both of whom are staunch defender of the formal justice system for obvious reasons.

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