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Parallel and Conflicting Laws

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ABSTRACT:

In Pakistan, due to lack of implementation of rule of law and delayed trials, litigants have lost faith considerably in the judicial system and find themselves under compulsion to settle their matters or to punish the abuser themselves, rather than approaching the courts of law and keep waiting for rest of their lives. The study is intended to highlight reforms of obstacles in our judicial system that will not only boost citizens' access and confidence in courts but will also help to break the cycle of mistrust toward judiciary. The scholars have been debating and propounding arguments about the unsuitability of the colonial legal system for the subcontinent people. They highlight its foreignness and its complexity which need comprehensive planning for its cure. It should be evident that 'delay reduction' must not comprise of enhancing court capacity only through bolstering the number of judges but there are several other factors that can create additional work load for the courts and cause delay, such as, inefficiency of court processes, higher levels of public litigations; non availability of other viable modes of dispute resolution; procedural flaws and most significantly overabundance of laws.

Keywords: Rule of Law Index, causes of delay, laws of colonial era, parallel laws, Article 227 of the Constitution.

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No society could be declared a civilized one unless it respects and abides by law. Rule of law could be established only when people have faith in the sanctity and righteousness of law. Such obedience could be achieved if people are educated in such a manner that they act in accordance with law without any compulsion. As regard to the contribution of pillars of the state, they almost bear the same importance, but judiciary has some additional significance for it as it interprets law and issues directions for its enforcement. The term justice, in its simple concrete sense, means to place the things where they are due to be placed. However, Global Index reveals that Pakistan's judicial system scores 0.39, where scores range from 0 to 1, with 1 indicating the strongest adherence to the rule of law. While the country's Global Ranking is 130/139.[1] Through this paper it is intended to highlight the impediments causing to create such state of affairs.

The act of legislation takes place in the country in a parliament which is fundamentally based on the UK model. The State was created under the Independence Act of 1947, an Act of the UK Parliament, which partitioned British India into two independent dominions of India and Pakistan previously governed in accordance with the Government of India Act, 1935. The Act of 1947 made the then existing Constituent Assemblies, the dominion legislatures. These Assemblies were allowed to exercise all the powers including framing of a new Constitution. However, on 14th of August, 1947, all existing laws were adopted, subject to specified amendments made by the Order.[2]

Likewise, roots of the current judicial system of Pakistan stretch back to the medieval period and even before. The system that we practice in Pakistan has evolved over a long period of time passing through several eras comprising of Mughal Empire and significantly British colonial period. During this process of evolution and growth it received influences and inspirations from foreign doctrines, notions and homegrown practices, both in terms of organizing courts' structure, jurisdiction and adopting trial procedures. Therefore, the present judicial system, we may say, has great impact on the substantive laws from colonial era, as well as present dominating powers of the world. Besides, having glance over the aspect of law making we find that most of our laws whether procedure or substantive are the enactments of nineteenth or twentieth century.

However, all laws are not made by the legislature, but they are recognized and administered by the courts and no rules are recognized and administered by the courts which are not rules of law. It is therefore to the courts and not to the legislature that we must go in order to ascertain the true nature of law. [3] Proponents of the theory of legal realism rely upon Austin's arguments that law is the expression of the will of the State through the medium of the courts; for realists the sovereign is the court. Austin argues that laws are type of commands issued by a sovereign to members of an independent

political society, and backed up by credible threats of punishment or other adverse consequences ("sanctions") in the event of non-compliance.[4] On the other hand it could sustain and stay efficacious if it is not abstract and socially unrelated. It must have pulsations from the soil and reflect homegrown conditions around. A law so evolved not only caters for what people need for their peaceful co-existence but also endures till the time the conditions around change. On the contrary, a law which is a patchwork of imported concepts can neither cater for the legitimate needs of the people nor stay successful because of its feeble basis and frequent violation.[5]

It is the obligation of an Islamic State to enforce Islamic laws in it and make sure that the judicial system remains lodged within it. Those who do not judge by what Allah has revealed are the disbelievers, wrongdoers and defiantly disobedient.[6] The State had undertaken the responsibility to order lives of the people of Pakistan in individual and collective spheres in accordance with teachings and requirements of Holy Quran and Sunnah.[7] According to Article 31 of the policy, it provides that steps shall be taken to enable the Muslims of Pakistan, individually or collectively to order their lives in accordance with the fundamental principles of Islam. It further provides that the State shall endeavor to make teachings of Holy Quran and Islamiat compulsory, to encourage and facilitate learning of Arabic and publishing of Quran. These are a kind of declaration and promises which the Constitution makes with the Nation. It further ensures that all laws shall be brought in conformity with the injunctions of Islam as laid down in Holy Quran and Sunnah.[8] Even there is the role of Council for Islamic Ideology which could furnish advice and make recommendations in order to bring the laws in conformity with the injunctions of Islam. But legislature may proceed with law making prior to furnishing of advice by the Council and may reconsider the law when the advice is so furnished. However, nothing has been provided within the Constitution which makes it mandatory for the legislature to follow the recommendations or advices furnished by the Council for Islamic Ideology.[9]

In 1979 Hudood Laws were promulgated relying on the source material from Holy Quran and Sunnah:

Offence against Property (Enforcement of Hudood), of 1979

1. As to the thief, male or female, cut off his or her hands: a punishment by way of example, from Allah, for their crime: and Allah is Exalted in power (Qur'an 5:38).

2. The punishment of those who wage war against Allah and His Messenger, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land: that is their disgrace in this world, and a heavy punishment is theirs in the Hereafter (Qur'an 5:33).

3. Aisha, may God be pleased with her, narrates the Prophet saying, " The people before you destroyed themselves because whenever an influential person committed a theft they left him alone, and when a person from the lower classes stole they cut his hands. I swear to God, if Fatima (my daughter) steals Muhammad would cut her hand".(Bukhari & Muslim)

Offence of Zina (Enforcement of Hudood), of 1979.

1. If any of your women are guilty of lewdness, Take the evidence of four (Reliable) witnesses from amongst you against them; and if they testify, confine them to houses until death do claim them, or Allah ordain for them some (other) way (Qur'an 4:15).
2. The woman and the man guilty of adultery or fornication, - flog each of them with a hundred stripes: Let not compassion move you in their case, in a matter prescribed by Allah, if ye believe in Allah and the Last Day: and let a party of the Believers witness their punishment (Qur'an 24:2).
3. Let no man guilty of adultery or fornication marries and but a woman similarly guilty, or an Unbeliever: nor let any but such a man or an Unbeliever marries such a woman: to the Believers such a thing is forbidden (Qur'an 24:3).
4. Ubadah bin al-Samit relates that when this verse was revealed the Prophet said, "Take it from me, take it from me. God has provided for them a way out. In case of unmarried with an un-married, one hundred lashes, and in case of married with a married, stoning to death (Hadith).

Offence of Qazf (Enforcement of Hadd) , of 1979

And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations), - flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors (Qur'an 24: 4).

The Prohibition (Enforcement of Hadd) Order 1979

O ye who believe! Intoxicants and gambling, (dedication of) stones, and (divination by) arrows, are an abomination, - of Satan's handwork: eschew such (abomination), that ye may prosper (Qur'an 5:9).

The paper shall restrict to discuss the implications of offence of Zina amongst Hudood Laws and parallel laws created for it. Initially Zina was liable to hadd if it was committed by a man who is an adult and is not insane with a woman to whom he is not, and does not suspect himself to be married; or by a woman who is an adult and is not insane, with a man to whom she is not, and does not suspect herself to be, married.[10] But after massive amendments in Cr.P.C, P.P.C and Hudood laws a new offence of Fornication has been created in P.P.C. which is totally identical to the offence of Zina. According to it a man and a woman not married to each other are said to commit Fornication if they willfully have sexual intercourse with one another. Punishment here could not go beyond five years along with fine below ten thousand rupees.[11] Both offences are dealt

under different laws and it is hard to differentiate between their nature. It creates a complex situation for litigants as to where they could seek remedy in such type of case. Prior to lodging of complaint he shall have to seek advice from a lawyer The only difference in these offences is the number of required witnesses to lodge a complaint. However both of them are non cognizable offences i.e. accused could not be arrested without issuance of warrants from competent court of law, whereas offence of zina was previously cognizable offence i.e FIR had to be lodged and accused could be arrested by police directly. Although police was authorized to arrest an accused person directly but it has been settled by the Honorable Courts that simple saddling a person with an accusation of having committed a crime and even the registration of a criminal case, is not enough for his arrest. In order to do so, the police officer is required to collect some incriminating material. In the absence of such a material, he is legally competent to dispense with the arrest of the accused. In this regard, reference can be made to section 157(2), Cr.P.C. read with 24.4 (1) of the Police Rules, 1934.[12] It had not been appreciated even in cases of the most heinous offences that the police is under the statutory obligation, to necessarily and straightway arrest an accused person during an investigation as long as he is joining the investigation and is cooperating in the same.[13]

Offence of Zina requires four witnesses having the qualification of Tazkiyahul Shahood while Fornication needs two witnesses. In both cases witnesses should be examined at once for filing a complaint otherwise complaint cannot be lodged and Court will not summon the accused.[14] Similarly, offence of Qazf has also been declared as non cognizable and a private complaint is to be lodged for such purpose.[15] Once option under offence of Zina has been availed by the complainant he could not reach the court again for complain of Fornication.[16] On the other hand if at the time of dismissing complaint of Fornication the Presiding officer finds grounds before him, he may convict the complainant for false accusation of Fornication.[17] Now a complainant has to opt for filing of complaint under Hudood Laws or Pakistan penal Code. In both cases he has to take witnesses with him. Four for Hudood Laws and two for Fornication. If he fails to establish his complaint of Fornication which although is less agonizing, he could be convicted suo moto also. In any case channel adapted by him could not be switched later on. Such provisions of law are not only discouraging for an ordinary citizen to come forward but also making it impossible for courts to deliver justice.

Our law restricts polygamy by imposing conditions that second marriage could be registered only after getting permission from Arbitration Council and existing wives. Otherwise it shall constitute an offence and the offender shall have to undergo imprisonment extendable to one month along with fine of twenty five thousand rupees.[18] The fine here is greater than the fine

imposed upon a person guilty of Fornication which is a willful sexual relationship between a man and a woman and is a non cognizable offence.[19] The law maintains age for entering into marriage and all those who contribute into the marriage of those below the age of eighteen, may be convicted.[20] But a girl below the age of 16 could not be convicted even if she had entered into sexual relationship with anyone out of her own will.[21]

As regard to the Succession Act, it is the enactment of colonial era which came into being in 1925. A century old law was adopted by both the dominions at the time of independence without any substantive change. The law discusses in detail testamentary and non testamentary succession, domicile, wills, bequests etc for non Muslims also. However, there is no provision as to how share of a Muslim legal heir shall be ascertained in the assets left behind by the Muslim deceased. The law is silent about the entitlement as well as disqualifications of legal heirs to receive his or her share. Such shares when left undecided by the courts of law cause to create dispute amongst them even after they get succession certificate or letter of administration.

Our legal system also reflects pluralism in the form of multiplicity of forums present within the institution. Besides Supreme Court and High Courts, we have Federal Shariat Court, established through Constitutional provisions. The jurisdictions are segregated despite the fact that it has been constitutionally settled that all existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah and no law shall be enacted which is repugnant to such injunctions. Therefore, all the courts must act in accordance with Shariah. The set up of the Federal Shariat Court is distinguished and comprises of 8 judges. Out of them, 3 are required to be Ulema (Islamic scholars), who are well versed in Islamic law. The judges hold office for a period of 3 years and the President may further extend such period. The Court may, on its own motion or through petition by a citizen or a government (Federal or provincial), may examine and determine as to whether or not, a certain provision of law is repugnant to the injunctions of Islam. Appeal against its decision lies to the Shariat Appellate Bench of the Supreme Court, consisting of 3 Muslim judges of the Supreme Court and not more than 2 Ulema (Islamic scholars), appointed by the President. If a certain provision of law is declared to be repugnant to the injunctions of Islam, the Government is required to take necessary steps to amend the law, so as to bring it in conformity with the injunctions of Islam. The Court also exercises appellate and revisional jurisdiction over the criminal courts, deciding Hudood cases. The decisions of the Court are binding on the High Courts as well as Subordinate Judiciary. Rest of the matters are taken up by the courts which do not hold the characteristic of sharia nor their judges are required be well experienced with Shariah laws.

Since the religion of Islam does not provide for separation of this world and hereafter, rather requires conviction that this world shall yield to the life after death, the eternal life. The faith is also comprised of the concepts that Allah Almighty, being the only sovereign power in this universe, has given His injunctions for every aspect of life, say from individuals to the affairs of the state. The commandments have been delivered through the main sources of Quran and Sunnah. Whatever has not been revealed in Quran, was intentionally left to be described and interpreted by the Holy Prophet (p.b.u.h).

The main directives with regard to the necessity and administration of justice has been prescribed in Quran, whereas practically a model had been developed in Medina based on such directives, by the Prophet (p.b.u.h) to be followed by the world till its end. The Messengers have been sent with the Clear Signs and sent down the Book and the Balance with them so that mankind might establish justice**.**[22] It is commanded that judgements between people are to be made justly**.** Allah loves the just.[23] Believers are required **to** show integrity for the sake of Allah, to bear witness with justice. Hatred for people should not incite them into being unjust. Being just is closer to piety**.**[24] Whims and desires of nonbelievers should not be followed.[25]

The main objective of Shariah is to construct human life on the basis of Marufat (virtues) and to cleanse it of the Munkarat (vices), the accepted goods and condemned sins and evils by human nature ever since beginning of human life. Shariah does not at all limit its role to providing us a list of virtues and vices but also lays down the entire scheme, prescribes directives for the regulation of our individual and collective life. Most of these directives are comprised of rights and duties of citizens, their administration and enforcement through judicial system. Believers are to be the upholders of justice, bearing witness for Allah alone, even against themselves or their parents and relatives. Whether they are rich or poor, Allah is well able to look after them. One should not follow his own desires and deviate from the truth.[26]

The touchstone of Shariah Law are the permanent and unalterable extremely beneficial elements while there are some others which are flexible and has potentialities of meeting the ever increasing requirements of every time and age. The unalterable are the Quran and Traditions of the Prophet (p.b.u.h), the prohibitions and limitations prescribed therein. The second part of Islamic Law which is subject to modifications according to the needs and requirements of the changing times consist of Ta'weel, Qiyas, and Ijtehadand Istehsan. In this context the law giver has delegated power to lay down laws by resolution of jurists (Mujtahids), the Ijma or consensus of opinion.

The jurists by their individual deductions or from their collective resolutions categorized laws amongst other classifications into public and private laws. They are rights of God and rights of men, the former corresponding to rights of public and latter to private rights. Rights of the former class reside in God as they exist for the benefit of the community therefore they are also described as the rights of the community. For instance, the right to levy revenue belongs to the community, and is exercised on its behalf by the ruler of the state as against the private right to receive the rent amount etc. Punishment for these public and private rights' infringement or swift disposal of a complaint to seek redress have been deliberated upon at length by the jurists. This deliberation upon laws and procedures caused evolvement of substantive laws as well as evidence and law of procedure. It is the obligation of an Islamic State to enforce these laws in it and make sure that the judicial system remains lodged within it. Those who do not judge by what Allah has revealed are the disbelievers, wrongdoers and defiantly disobedient.[27] Not only this that doing justice must be in accordance with the divine guidance but it has been described as the source of public welfare. If the holy books had been observed in their true spirit, the believers would have consumed abundance from above and from beneath.[28]

There is another aspect of parallel law making in the country. We have similar laws for the same type of offence both at criminal and civil side and sometimes both are availed by the litigants. Amongst several, few examples are:

Dispossession from Immoveable Property

Similar remedies are available in both channels:

Illegal Dispossession Act 2005 (CRIMINAL REMEDY)

Suit for Declaration and Permanent Injunction (CIVIL REMEDY)

FOR Narcotics/Psychotropic Substances

Prohibition (Enforcement of Hadd) 1979, Control of Narcotics Substances Act 1997, Sindh AbkariAct and Drugs Act 1976 all are in field at the same time, enacted to control usage of psychotropic substances and intoxicants.

Anti Terrorism Laws

Similar laws on the subject which are in field are The Suppression of Terrorist Activities (Special Courts) Act of 1997

Anti-Terrorism Act (ATA) of 1975

Chapters VI, VII & VIII of PPC

Time is also wasted when the cases are transferred back and forth from courts of ordinary jurisdiction to the courts having special jurisdiction by virtue of creation of special laws and tribunals. According to the Punjab Prosecutor General, in 2014, out of a total of 1,195 ATA cases heard by the province's fourteen ATCs of Punjab, 178 (15 percent) were transferred to regular courts because the police had wrongly applied the ATA to these

offenses. The situation in Sindh appears to be even more serious. In Karachi, the capital of Sindh Province, from January 2013 to December 2013, 391 of 565 cases (69.2 percent) heard by the city's five ATCs were transferred to the regular courts for not falling within the ATCs' ambit. However by then the police had spent considerable time in investigating these cases, the prosecution on their scrutiny, and the ATCs in hearing them. In Khyber Paktunkhwa, fifty-two cases of 706 cases (7 percent) decided by the ATCs in 2014 were transferred to other courts for wrong application of the ATA by the police.[29]

Privileges provided to high officials in our Constitution have also proven to an obstacle in the way of dispensing justice. The provision is also against the spirit of supremacy of divine law. As regard to the scope of Article 248, the honorable Chief Justice Hamoodur Rehman, had held that each and every `act done or action taken by the Prime Minister is not necessarily covered by this Article. The Article necessarily refers to his official acts and not to acts done by him in his private capacity. Only those acts are covered which he does in exercise of his powers as Prime Minister and in the performance of his functions as Prime Minister. The honorable judge observed that the immunity cannot possibly extend to anything done illegally nor does the immunity protect the Prime Minister in respect of any criminal proceedings, rather it must be shown that whatever was done had some co-relation to the official functions or duties or powers of the Prime Minister. Further that immunity is an exception to the general principle that no one is above the law, therefore it is to be interpreted strictly in accordance with the settled principles of interpretation. [30]

Syed YOUSAF RAZA GILLANI, former prime minister of PAKISTAN, assailed an order passed by a bench comprising of seven Judges of Honorable Supreme Court (the "trial Bench"), whereby it was decided that a charge be framed against him for having committed contempt of the Court. The Honorable Court while giving its findings, observed that the appellant, in his grounds of appeal, had requested the Court to refrain from criminal action with respect to a duly elected Prime Minister when it was contended that stability of the democratic system obtained by the people of Pakistan, may depend on the outcome of that case. The court ruled that such argument seemed to be based on a claim of special privilege that accords the appellant preferential treatment by preventing him from receiving equal treatment in accordance with the law and the constitution. Consequently, it would have led the Court to formulate its opinion, not in accordance with the mandate of law but in fear and anticipation of a possible outcome that may flow out of its decision. The court further observed, that in other words, the appellant was urging the Court to resurrect and adopt a form of the doctrine of necessity, which in the past had blighted Constitutional rule in Pakistan. The court further held that the appellant's claim to a 'special privilege' on account

of his executive office, amounting to an exception from contempt proceedings, does not find any basis in our Constitution and referred to its Preamble, Article 5 and Article 25. The court further held that the Prime Minister had although not relied upon the limited and functional immunity from court processes, which is offered to certain official acts under Article 248 of the Constitution, however the cumulative effect of these provisions is quite powerful and hard to miss. Our law does not accord individual immunity to the appellant from complying with the law. Therefore, even though the appellant was a duly elected Prime Minister of the country and deserved respect, the Court did not show any restraint and forbearance on account of his position. The court dismissed the appeal with the concluding reason that it was necessary to dispel the appellant's claim to a special privilege as a matter of law, and also, that a fear of anticipated consequences must not influence its decision.[31]

It has been observed by the honorable Supreme Court of Pakistan that holders of public office when performing their functions in their Offices, can have no interest other than the interests of the People of Pakistan in whose name they hold office and from whose pockets they draw their salaries.[32]

Justice Louis Brandeis, succinctly explained another important reason why government officials, must be subjected to the same rules of conduct as ordinary citizens. According to him if the government becomes a lawbreaker, it invites every man to become a law unto himself and invites anarchy.[33]

The study of laws herein above presented in respect of parallel, conflicting as well as overabundance of laws, requires serious concern by the legislature which may resolve the issue by consolidating laws and bring together number of existing Acts of Parliament on the same subject into one Act without changing the law in any way. Courts are not only overburdened due to them but also find themselves reluctant to give their verdict when the alleged act falls under more than one act of the parliament.

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