

PREVAILING CRIMINAL JUSTICE SYSTEM IN PAKISTAN (ADVERSARIAL SYSTEM)

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CONCEPT NOTE

The status, welfare and prosperity of a society are dependent upon the rule of law and systematic dispensation of justice to all its citizens indiscriminately. The Judiciary is not only responsible for effective administration of justice (both criminal and civil), but also for its speedy and economical dispensation to all citizens of the state; hence, it is considered as one of the most important pillars of the State. The system developed for the administration of justice is commonly known as the Judicial System of a state.

The Pakistani criminal justice system is commonly branded and known as faulty and inequitable one due to problems faced: prior to setting law into motion, during investigation, and lastly protracted trial and appeals in the courts. Out of many other factors a few are: lack of adequate training, non-availability of modern investigation tools, outdated and archaic laws, particularly procedural laws, multiplicity and pendency of cases, and heavy court back-log. As we have adopted a ready-made alien criminal justice system from British rulers, the system suffers mostly due to the obsolete legal procedures which had been formulated as far as more than 150 years ago. In modern world, there are two prominent and predominant justice systems at work: adversarial and inquisitorial. This article is an attempt to appraise and critical evaluation of adversarial system as adopted in Pakistan, and to suggest vital and structural changes to make the prevailing criminal justice system of Pakistan more effective, speedy, economical, victim-friendly, just, modern and capable to keep up with the ever-changing socio-economical environment.

Key-Words: *Criminal justice, adversarial system, inquisitorial system, case back-log, inadequate training, archaic laws, obsolete legal procedures, indiscriminate justice, rule of law, judiciary, compensation, corruption.*

INTRODUCTION

The criminal justice system of Pakistan suffers from a lot of shortcomings, and ailments such as: mishandling of cases by law enforcement agencies especially Police, unavailability of adequate compensation to an innocent people, delayed disposal of cases, inadequate professional training to the members of law enforcement agencies, judicial officers and prosecutors. Pakistan has inherited mostly the judicial system from British Rule and also continued almost same system. In this judicial system there is a hierarchy of courts, Judicial Magistrate courts being at lowest and August Supreme Court at the apex level.

Judicial System of Pakistan, as per data and reports collected by different institutions including annual reports of the High Courts and Supreme Court, laments grave failure in dispensation of criminal justice at pre-trial stage up to the ultimate appellate stage. There are various reasons for the shameful failure. Lack of intelligent and efficient investigation Police officers, who can comply with the mandate of law for investigation process in accordance with Code of Criminal Procedure, 1898 (Cr.P.C.). Of particular importance is its section 173 that purports to curtail the delay in submission of Charge Sheet. Scrutiny of Charge Sheet by Public Prosecutors is another issue which has far reaching effects upon the trial at belated stage. This in turn contributes to the sluggish disposal of cases. As per Annual Judicial Report for the year 2017, there are 93, 403 pending cases in 29 districts of the Sindh Province alone.

In criminal trial some of the key stages are: collection of evidence by the investigation officers, production of the evidence in the court, the defense evidence produced by accused. In this system, criminal cases are handled by Investigation Branch, scrutiny of Police Report by Superintendent of Police under Police Rules, 1934, and by the Public Prosecutor under section 173 of Cr.P.C. The court has only an impartial status in adversarial justice system. After hearing the Prosecution and the Defense, the court assesses versions of both parties and weighing their evidence verdict of innocence or conviction is delivered. Almost like the United States of America and United Kingdom, here it is the defense that steers and manipulate the case at his sole mercy. Prior to establishment of separate prosecution department in Sindh Province, in the year 2010 (came into effect since 29th October 2009), the criminal justice system was totally at the mercy of Police as the investigation and prosecution were in their mandate. In addition, political influence was there to impede the progress of case.

Criminal Justice System is said to encompass investigation process by Police, adducing evidence in the court and advancement of the defense. The laws and rules framed for each stage is to be implemented with due caution and attentiveness to avoid prejudice to any party or a third party interests. Its main goal is to maintain peace and order in the society; therefore, mere technicalities shall not hinder in the administration of criminal justice. It is meant to provide speedy, safe and unbiased justice to the subjects of the State so that the society may rest in peace and harmony. After subversive action had become an order of the day in Pakistan, the criminal justice system came into hard debate in the country and also worldwide. The Supreme Court of Pakistan perceived that people of Pakistan are losing faith in dispensation of criminal justice by the courts thus Jirga and private settlement of criminal cases is frequently done by local feuds, sardars and headmen of the locality.

ADVERSARIAL JUSTICE SYSTEM

As mentioned above, Pakistan has adopted a readymade system from British Colonial Rule and almost the same has been administered without any major structural, changes and modifications. It is commonly known as adversarial (argumentative) justice system unlike inquisitorial (interrogational) justice system. In it parties to the litigation are responsible for preparing their respective case, having full control over the case, where as in inquisitorial system, the presiding officer (judge) has the dominant position. Though Pakistani justice system is primarily adversarial in nature, the process of Islamization of laws has modified it in such a way that after the enactment of Shariah-based criminal laws, our system is deemed to have come closer to inquisitorial system.

In recent past, few amendments and reforms were also introduced in Civil Justice System by inserting Alternate Dispute Resolution (ADR) provisions in Civil Procedure Code. It is also worth mentioning that few models have been proposed for the Criminal Justice System of Pakistan on similar ways. Switching wholly to inquisitorial system is a slow process. However, the incorporation of various modifications in Civil laws in general and Family laws in particular, this shift toward the inquisitorial system is visible now. Pakistani justice system is not purely adversarial now as it was few decades ago.

Cr.P.C. is criminal procedural law of our land wherein comprehensive procedure for criminal cases (excluding certain special laws such as Hudood Laws) is laid down in detail. In addition, there are Qanun-e-Shahadat Order, 1984 (replaced the Evidence Act) and the Police Rules, 1934, that deals with the evidence and Police investigation process respectively. The Pakistan Penal Code, 1860, lists the offences and their punishments. Cr.P.C is general procedural law which provides for preventing the commission of offences, reporting of a case to police or magistrate, steps of investigation from arrest to collection of evidence, and submission of charge sheet in the court of law against the accused persons and discharge of accused due to deficient evidence. It also contains safeguards for the accused by giving him the opportunity to be a competent witness in his defense or to produce evidence in his defense. The procedure for the trial court is detailed out in chapters XX, XXII and XXII-A of Cr.P.C. It also includes provisions regarding fair trial, conviction its confirmation and appeals.

All the above phenomena derive its authority from the Constitution of the Islamic Republic of Pakistan, 1973. It provides for, in chapter I, Fundamental Rights which include Safeguards as to arrest and detention, Fair trial, due process, protection against retrospective punishment, double jeopardy. As already stated that Pakistan has adopted the colonial laws, and an adversarial system of the UK, thus the criminal case has to be proved by the Prosecution, when accused does not plead guilty, beyond reasonable shadow of doubt. As the legal presumption exists that accused is innocent and until and unless proved guilty by the competent court of law. The general guiding principle, except in few special laws, is that burden of proof always lies on the Prosecution (as per Articles 117 & 119 of Qanun-e-Shahadat Order, 1984). Due to the influx of terrorism, the after-effects of 9/11 attacks, national security threats and crumbling law and order situation, the legislator was compelled to introduce special provisions in the Anti-Terrorism Act, 1997, that shifted the burden of proof to accused; he is to prove his innocence.

As already discussed, the Cr.P.C. provides altogether process of investigation, trial, appeals; thus the involvement of Police, Prosecution, defense advocates and judges of the courts is dealt in it adequately. The investigation of a criminal case by Police is the initial step. As defined, investigation is reconstruction of crime scene. It is defined as collection of evidence process, in section 4 (1) Cr.P.C. Unlike Pakistani system, in England, the crime reporting system has been reformed and the reporting has been made easier. The complainant can even report to

police by telephone, email or even a text message, which is sufficient to bring the police into motion and start investigation. The complainant, in Pakistan, has to visit the police station for lodging of his complaint which is commonly known as First Information Report (FIR). If Station House Officer (SHO) of Police station fails to record the FIR, then law provides an alternate under section 22-A and 22-B of Cr.P.C to approach the Justice of Peace for seeking directions to SHO to record the complaint. However there is procedure of direct complaint before the court of Judicial Magistrate under section 200 Cr.P.C wherein the oral or written complaint is to be made to the Magistrate in a view to take cognizance of the case. It seems to be a complicated procedure on one hand and on the other hand corruption and maladministration of Police hinder to set law into motion. No action is possible unless FIR is registered at the concerned Police Station or a complaint is lodged in the court. It is also settled that a cognizable offence (police officer may arrest without warrant) can only be registered under section 154 of Cr.P.C. In case of a non-cognizable offence (where police officer cannot arrest without warrant) the complaint is registered under section 155 of Cr.P.C and the police can only investigate the case with permission of Magistrate under section 155 (3) of Cr.P.C. Provision of Bail is also provided in Cr.P.C under section 496 for bail-able offences, section 497 for post arrest bail, and section 498 for Pre-arrest bail. Though there is no provision of appeal against bail orders but if it is refused then accused may apply before next appellate court where bail granting order can be challenged under section 497 (5) of Cr.P.C.

Role of Prosecution is fraught over during criminal trial. Prior to Criminal Prosecution Acts promulgated by provincial governments, the whole prosecution was conducted by Police Prosecutors. The Prosecutor and Defense Counsel are called Officers of the Court.

In adversarial system there are two parties in a criminal case: the state and the accused. The Cr.P.C lists various courts with different jurisdiction keeping in view the place of occurrence and nature of offences. Few offences are tried summarily as provided in chapter XXII of Cr.P.C. whereas trial procedure in Judicial Magistrate Court is provided in chapter XX. The High Court and Sessions Court shall follow the procedure laid down in chapter XXII-A of Cr.P.C. wherein no proceedings can be conducted except by the Public Prosecutor. In addition, there are several special courts, tribunals and other institutions which are given limited mandate by special laws to try the offences committed under the special enactments i.e. Anti-Corruption,

Anti-Terrorism, Anti-money Laundering, Customs Act, and Control of Narcotics Substances Act etc.

Trial of the case is indefeasible right of accused unless he forfeits or surrenders such right. The Jurisdiction of criminal court to try an offence is provided in Chapter I Part II whereas place of inquiry and trial of an offence by the courts is provided in Chapter XV of the Code of Criminal Procedure, 1898. In both trials viz trial before Magistrate and trial before Sessions Court, High Court or any special tribunal or court, the safeguard of rights of accused for fair trial, as is guaranteed in different provisions of the Constitution of Islamic Republic of Pakistan, 1973, is considered by insertion of provisions regarding supply of documents which are basis of accusation, framing of charge [precise accusation made by some authority (court) against accused to be tried for and make his defense, if any]. When court frames Charge against the accused, his plea is to be recorded by the court. Where accused pleads guilty at first instance a conviction may be ordered by the court in its discretion. Generally it is settled by the courts for safe administration of justice to avoid conviction on heinous crimes upon plea of guilty by the accused as provided in section 265(F)1 of the Cr.P.C. then the court shall proceed to hear the complainant, if any. It also provides that death sentence shall not be executed until it is confirmed by the High Court of the respective province.

It would not be out of consideration that the general procedure for evidence, admissibility of proof and its related rules are provided in the Qanoon-e-Shahadat Order, 1984 (QSO) (i.e. Islamized version of Evidence Act, 1872). The QSO applies to all judicial and quasi-judicial proceedings except Arbitration proceedings as provided in it. Its provisions can be divided into three classes: those applicable to criminal proceedings, those applicable to civil proceedings, and those commonly applicable to both. The QSO also discuss the number, competency, qualification and disqualification of witnesses. Likewise, it divides the evidence into primary and secondary; and into private and public documents etc. The QSO also creates legal presumptions which a court / judge should keep in mind. Thus we can say that the QSO is somehow a detailed law for recording of evidence. It also includes provisions about opinion of experts which are made admissible in evidence. The provisions of article 164 of QSO make the modern devices and system admissible in evidence.

It is transformed into an hybrid justice system that has borrowed elements from adversarial and inquisitorial systems, wherein the former dominates. Though there are provisions regarding Shariah, (which, though distinct, is closer to inquisitorial system,) were incorporated in some substantive laws, but procedure regarding criminal trial remains almost the same. In Pakistan the rules and provisions of criminal procedure are not masters rather these are subservient. As the sole interpreter of law, the apex courts have also settled general principles which are now considered as settled principles of law. For example: prosecution has to prove the case beyond the reasonable doubt; Justice should be seen to be done; Justice must not be defeated merely on technical grounds; benefit of doubt at any stage shall go to accused; accused is favorable child of court or accused is presumed to be innocent until and unless proved guilty; burden of proof always lies upon Prosecution, and if accused takes a specific plea then he has to prove it, but if he fails to prove the plea he shall be convicted; the principles aim to protect the people from evil; in criminal administration of justice, the approach of the court shall be dynamic; the evidence in total is to be considered by the court, but not in bits and pieces; Falsus in uno falsus in omnibus is strictly applied in criminal cases.

Though all the above principles are being strictly followed by the criminal courts but the society is still suffering from ailments of criminal actions of outlaws. Thus it is the thrust of time to reform the criminal laws to yield fruitful results. When compared with other nations where conviction ratio is more than that of Pakistan and India like in Australia and USA (Federal) 85%, USA (States) 87%, England (lower courts) 98%, Crown Court 90% , while in Japan 99.9%, it is unsatisfactory state for Pakistan where conviction ratio is less than 10% per annum. So for few agencies, where Prosecution is strengthened, the results are worth appreciating, as compared to Police Department and other agencies. As annual report of Anti-Narcotics Force of Pakistan shows, it secured more than 94.5% of conviction in its cases for the year 2016/17.

CONCLUSION

The basics of criminal law are mainly to uphold the justice, equity, and fair play among the citizens of state. The justice demands fair play and speedy disposal of the cases, so the society may get benefits of an effective justice system. The criminal justice system of Pakistan has

gone through different phases, as discussed above; therefore, each phase involves a distinct institution of the state. Professionalism may not be the only requirement, until and unless institutionalized practical efforts are made to meet the current requirements by making extreme amendments or consolidation of laws to yield fruitful results in the system. There must not be a run in haste that one institution is better than the other or one is responsible solely, rather all concerned institutions must work coherently and as a team. Internal stability and political challenges have been faced by Pakistan since its inception. For effective dispensation of criminal justice, the Judiciary, Prosecution and Police have to develop a dynamic approach in their lines of action; They have to work in a way that complements, support, strengthen and consolidate each other. A criminal case usually weakens due to steps taken by Police or Prosecution at pre-trial stage, thus more attention and care to address the lacunas at this key stage is required.

RECOMMENDATIONS

Following recommendations may help improve the criminal justice system in Pakistan:

- The standards of professional education and training requires improvement.
- The social attitude of the concerned personnel should be altered; they must consider themselves servants of state and its citizens rather than masters, lords or slaves.
- To improve Police, reforms are dire need of the hour; they should be equipped with modern gadgets, devices and tools; and needless to say that better infrastructure is to be put in place for effective enforcement of law.
- Effective enforcement of existing laws must be ensured through checks and balances especially in Police and Prosecution offices.
- Strengthening the institution of Police through increasing their numbers and capacity building including training in a systematic and advanced technology.
- Elimination of internal and external influence during investigation including but not limited to the political influence.
- Strengthening the Prosecution department by raising the number of Prosecutors, and by streamlining their training and courses on modern ways.

- Enhancing the numbers of judges and benefits to curb their mental discomfort and training of the judicial officers prior to posting/assigning any special job folio; this will help in the reduction of unbearable workload especially the lower courts which will improve court efficiency
- Separate presiding officers for separate courts/jurisdictions should also contribute toward their proficiency and speedy disposal of cases.
- Shortening or rationalizing the procedure of trial and curbing delay tactics.
- Facilitation and utilization of emerging modes and techniques of investigation such as Forensic Science, Digital Forensic, DNA testing and so on so forth.
- Reforms made by the British, American and European justice systems must be carefully studied and should be utilized to bring procedural and substantive law reforms in Pakistan keeping in view of our socio-economical and political environment.

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