

# **THE CRIMINAL JUSTICE SYSTEM IN PAKISTAN: CONTEMPORARY PROBLEMS IN SECURING EFFICIENT ADMINISTRATION OF CRIMINAL JUSTICE**

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## **INTRODUCTION**

The effective, efficient and fair administration of criminal justice is indispensable to the achievement of a healthy social environment, which in turn is conducive to achieving progress in national development on many fronts. The well-being of the citizenry also mandates that, as far as possible, they be protected from high levels of criminal activity and that offenders be punished and returned to society as productive members. Revived public confidence in the criminal justice system requires that criminal investigations and trials be conducted speedily and efficiently so that witnesses, victims and parties may be spared as much loss in time and financial resources as possible.

2. The author's years of experience as a trial judge have led him to believe strongly that delay in the disposition of criminal charges is a basic malady which generates a wide array of problems including increased crime rates. Consequently, every effort must be made to improve methods of criminal investigation and trial. Because most of the developing countries of Asia are still struggling to shake themselves free from the vestiges of colonial legal systems, which have produced problems common to many of them, common solutions may be feasible as well, which should encourage an integrated approach to resolving such shared problems.

3. Some of the needed changes will have to be accomplished through amendment to revision of substantive penal and criminal procedure codes. There may be less of a common approach of these matters, however, particularly concerning substantive criminal code revision, because legislation usually reflects a given society's history, traditions, culture and mores which may not be shared by other countries. Those responsible for such amendatory programs, therefore, must be careful not to depart so far from traditional national values that the resulting criminal justice system functions out of touch with society and thus generates more problems than have been resolved through revision of old laws.

## **INVESTIGATION**

4. Criminal investigation in Pakistan is the exclusive responsibility of the police. The organization of the police in Pakistan is covered by special legislation apart from the Code of Criminal Procedure, which is concerned exclusively with the conduct of criminal investigations. The principal administrative unit within a province is a district which further is subdivided into police stations. Each district is under the command of a superintendent of police, while police stations are in the charge of inspectors or sub-inspectors under the superintendent's control and supervision.

5. All offences under the Penal Code and special laws are divided into cognizable and non-cognizable offences, a categorization which affects criminal investigation as well as other phases of criminal proceedings. Police officers may arrest for cognizable offences without a warrant, but may not do so for non-cognizable offences.

6. The process of investigation begins with receipt of information about commission of a cognizable offence. The officer in charge of a police station to which such information has been submitted proceeds immediately to identify, locate and arrest the believed offender and to collect evidence of guilt. The chief methods relied on are interrogation, scientific forensic investigation and search. The Code of Criminal Procedure contains adequate authorization for arrest and search. Criminal investigations may also be commenced on the basis of reason to suspect the commission of a cognizable offence. Investigations should

be completed as speedily as possible. After criminal investigation has been completed, an officer in charge submits a final report to a magistrate having jurisdiction to try the matter.

7. Intelligent and competent criminal investigations are obviously of the greatest importance to efficient administration of criminal justice. Those who conduct them should be highly educated and trained, and possessed of a high degree of imagination and flexibility in selecting methods of investigation best suited to particular cases. Without such abilities and talents, police officers are handicapped in conducting adequate investigations. Such talents are all the more needed in the light of increasing ingenuity displayed by present day offenders. Officer also must know much about human psychology and the values held by those in the society, within which offenders violate the law and the police carry on their professional activities. Finally, perhaps the most important attribute police officers must have is personal integrity and honesty, manifested by a sincere desire to conclude criminal investigations solely on the basis of ascertained facts.

8. Unfortunately, Pakistan today has no specialized agency responsible for conducting criminal investigations, which seriously handicaps the administration of justice. The present police structure is a heritage from the times before independence when the police were organized for administrative convenience, particularly with a view to maintaining security and order in the troubled political and social environment of the time. In effect, police forces were structured as instruments of political oppression and control. This can be illustrated by the code provisions allowing police officers to detain anyone under certain circumstances without either an arrest warrant or an authorizing order from a magistrate. Moreover, the code goes beyond this to allow police to arrest without a warrant or magisterial order if they know of a design to commit a cognizable offence and in their judgment the commission of the offence can be forestalled only through immediate arrest. The significant dimension of this statutory authorization is that no means is prescribed to assess the genuineness of the claimed knowledge that a criminal design has been formed on the part of those arrested.

9. Pakistani police also participate in a system of preventive detention and other measures intended to prevent the commission of certain crimes. They have independent powers to detain those believed to be on the verge of committing offences, but also assist executive magistrates in the utilization of magisterial preventive jurisdiction in security cases, unlawful assemblies, public nuisances and disputes over immovable property giving rise to an apprehension that there will be a breach of the peace. Magistrates thus rely on the police to enforce their powers to maintain law and order within the limits of their local jurisdiction. Police also are responsible to serve processes requiring witnesses to appear in criminal courts and in certain cases before courts established under special laws.

10. The principal difficulty generated by this mix of police duties is that police officers require different abilities and aptitudes to conduct criminal investigations they need for crime prevention and control, including exercise of preventive jurisdiction. It is difficult for officers to perform both classes of functions with equal skill. Moreover, the heavy time burden imposed by preventive actions reduces almost to vanishing point, the time available to conduct criminal investigations. This difficulty is encountered in most of the developing nations; the functional infirmities and abuses which it brings about, corrode the very foundations of criminal justice in all of them. The only effective solution to the problem lies in the separation of these two functions through the creation of special agencies who do nothing apart from the conduct of criminal investigations, leaving maintenance of public security and order and crime prevention to the regular police.

11. It is somewhat incongruous that under the system of procedure inherited from the British, with its broad powers of police arrest, detention and seizure, police were forbidden to rely on interrogation. For the Code prohibits the use of any statement made in the course of a criminal investigation by anyone to a police officer, at the inquiry or trial of any offence under investigation when the statement was given. The only exception is impeaching use against a witness who has testified at the trial. Provisions in the Evidence Act also forbid the use, at the trial, of a confession made to a police officer or during detention, other than a portion which can lead to a recovery. This is not so in certain other Asian Countries. Whatever the validity of the assumption underlying the code provisions concerning the reliability of confessions, the statutory disability on this form of criminal investigation has adversely affected the administration of criminal justice in Pakistan. In particular, the exclusionary rule has resulted in large number of acquittals in criminal prosecutions. If a separate criminal investigatory agency can be created, staffed with well qualified and

adequately compensated officers trained to be protective of human rights, the statutory disability on use of interrogation as a criminal investigative device, can be eliminated without courting abuse of such powers.

### **PUBLIC PROSECUTION**

12. In contrast to the Japanese system, Pakistan has no centralized apparatus of public prosecutors. In all courts below that of general trial competence, i.e., the court of sessions, prosecution is conducted by police officers holding inspector or sub-inspector rank, designated as prosecuting inspectors and sub-inspectors. These are under the direct supervision and control of a prosecuting deputy superintendent who heads the prosecution agency in a district. The latter, like others of equivalent rank in the field police, is subordinate to the superintendent of police who in turn derives his authority from and is under the general control of the provincial government through the provincial inspector-general of police. However, magistrates before whom trial of a criminal case will be conducted may permit prosecution to be handled by any person other than a police officer below a certain rank prescribed by the provincial government.

13. Criminal cases tried in courts of sessions must be prosecuted by a prosecuting official if they have been initiated through a police report. Prosecuting officials are appointed by the provincial government for a local area to appear either in all or specified classes of cases. They function under the control of provincial government through the secretary in charge of the provincial law department. In the absence of a prosecuting official, or if none has been appointed, a district magistrate representing provincial government in a district may appoint any other person, although preferably a police officer of specified rank, to present the prosecution evidence in a particular case.

14. In cases before a high court, the provincial government is represented by the advocate general or an assistant advocate general. At that level it is clear that the police have no role and that litigation is the sole responsibility of provincial government.

15. It may be of interest that the Code allows a prosecuting official to withdraw a prosecution, with consent of the court, before pronouncement of final judgment. In that event, a defendant is either discharged or acquitted, depending on the stage of the proceedings reached when prosecution is withdrawn. A police officer conducting a prosecution in magistrate's court has similar powers of withdrawal. It may incidentally be noted that under the Pakistani system no police officer who has participated in any way in the investigation of a criminal matter before trial can conduct the prosecution of that case.

16. It must be acknowledged that the prosecution system in our country leaves much to be desired and is only marginally conducive to an efficient and fair administration of criminal justice. Because the processes of investigation and prosecution are exclusively under the control of executive authorities, they can be improperly influenced by officials who, properly speaking should play no role in criminal justice matters. Political interference, coupled with inefficiencies in collecting criminal evidence, causes a low rate of convictions, because those responsible for preliminary evaluation of criminal investigations lack legal and practical knowledge and thus cannot truly weigh the strengths and weaknesses of cases to be tried in court.

17. It is the author's belief that the Japanese system of public prosecution has abundant merit and is excellently adapted to a fair and efficient administration of criminal justice. Other nations in the Afro-Asian region might do well to enact an equivalent to the Public Prosecutor's Office Law, modified to reflect local conditions and environments. The aspects of the Japanese system which in particular deserve consideration are:

- (1) Public prosecutors, like judges and attorneys, should be members of the legal profession and have passed a national bar examination.
- (2) They should be under the administrative control of a supreme public prosecutor.
- (3) They should be authorized in their own discretion to institute prosecutions, urge the proper application of law by courts, and supervise execution of judgments.
- (4) They should have authority to conduct their own investigation of criminal cases, should they believe it appropriate to adopt such a course of action.

- (5) They should be empowered to recommend summary trial.

18. Nevertheless, some reservation may be expressed about the vesting of exclusive discretion in public prosecutors, as in the Japanese system, to determine whether prosecution will be instituted. This concern is heightened because a single executive authority, namely Ministry of Law, controls both the evaluation of criminal cases and the conduct of public prosecution functions. The system clearly works well in Japan, but one should not assume without further deliberation that it will work as well if translated to another nation and social environment. Thus, it may be that some sort of final authority to approve both institution and non-institution of prosecution, should be lodged in a court system as an ultimate guarantee that human rights will be respected in the course of decisions bearing on institution of prosecution.

19. To compare our system with that of Japanese, under the Pakistan system a lower court can take cognizance of an offence either upon receipt of a complaint summarizing the facts constituting an offence, a written police report recounting such facts, or information received from any person other than a police officer, or on the basis of a magistrate's personal knowledge or suspicion that an offence has been committed. Cases also can be commenced in a court of sessions on the basis of a complaint. This procedure not only causes confusion, but also increases judicial work loads because complaints at times are false or biased. Provision should be made for initiation of prosecutions only on the basis of a submission by a prosecuting official and not complaints by police officials or private citizens, although perhaps with an ultimate judicial review to safeguard against abuse. In any event, such a system can work only if there is an independent and professionally competent public prosecutor's department.

## **CRIMINAL COURTS**

20. The lowest level courts in the Pakistani judicial hierarchy are magistrate's courts of the first, second and third classes. Magistrates are appointed by the provincial government which also defines the local limits of their jurisdiction. Special magistrates also may be appointed to try particular classes of cases within a delineated area. All magistrates are subordinate to a district magistrate appointed by the provincial government, who defines the local jurisdictional areas for them and issues rules or special orders, compatible with the Code of Criminal Procedure, governing distribution of caseloads among them.

21. Magistrates are empowered by the Code to pass sentences of imprisonment not exceeding three years. Consequently, they are competent to try all Penal Code and special law offences punishable by a maximum term of imprisonment not exceeding that limitation. They also may impose fines not exceeding 5,000 rupees and may imprison upon default of payment. It should be noted that certain magistrates have been specially invested with powers to try all non-capital offences, and some have been authorized to conduct summary trial of petty matters.

22. Courts of sessions are the next highest courts in the judicial system. Each of the nation's four provinces is divided into a specified number of sessions divisions corresponding to police districts. A provincial government establishes a court of sessions by appointing one or more judges for that court. Additional and Assistant Sessions Judges may be appointed for any court. Sessions judges or Additional Sessions Judge may assess any sentence authorized by law, but sentences of death must be confirmed by a High Court. Assistant Sessions Judges are competent to assess sentences of imprisonment not exceeding seven years. Thus, Sessions and Additional Sessions Judges conduct original trial of all serious cases, e.g., culpable homicides. They also hear appeals against orders of conviction entered by magistrates.

23. The High Court is at the apex of each province's judicial hierarchy. It may impose any sentence authorized by law in any case in which it has original jurisdiction. It also possesses broad revisional powers, because it has appellate jurisdiction over all judgments entered by courts of sessions. The Supreme Court of Pakistan is the court of ultimate jurisdiction, and hears, in addition to the performance of other functions under the Constitution, appeals and revision petitions against the judgments and orders declared by the latter to embody a subject matter fit for Supreme Court's review.

## **A SEPARATE INDEPENDENT JUDICIARY**

24. Magistrates perform executive as well as judicial functions. In particular, in their capacity as executive magistrates they exercise what is called magisterial preventive jurisdiction. This, as already mentioned, covers cases of public security, public nuisances, unlawful assemblies and immovable property disputes which may engender breaches of peace. In addition, they frequently are called upon to perform other duties of an executive nature. But the most significant aspect of their position is that they are under direct control by executive authorities through the district magistrate who represents the provincial government at the district level.

25. Of course, as noted, their judicial functions are significant, for they punish offenders who have been adjudicated guilty of crimes. High courts assert some control over these functions through exercise of their appellate jurisdiction, as do courts of sessions exercising their revisional authority. In an effort to separate executive from judicial functions, magistrates in some districts have been assigned to perform only judicial duties, but a complete separation of judicial from executive functions, mandated by the Constitution, is yet to come.

26. This amalgamation of judicial and executive functions underlies many of the ills in our administration of criminal justice. For one thing, time devoted to performance of executive responsibilities is unavailable for the discharge of judicial functions and delays the latter significantly. More importantly, magisterial independence in the performance of judicial duties is substantially imperilled because of the subordination of magistrates to executive authorities. Fundamentally, the basic natures of the two responsibilities are so at odds that they cannot be lodged in a single class of officials without jeopardizing the rule of law and a balanced, independent exercise of judicial discretion. The exercise of judicial powers requires a balanced, impartial frame of mind which is difficult or impossible for one engaged in executive activities to maintain. The awareness of a status, subordinate to higher executive authorities cannot help but adversely affect the performance of judicial functions. In short, the attitudes and priorities of those acting as executive magistrates are basically different from those charged exclusively with judicial responsibilities.

27. The Japanese judicial system appears attractive in comparison. However, the greatest care must be given to the selection of judges, so that only qualified persons are chosen and that no improper factors of caste or creed enter into the selection process. This is not an observable difficulty in Japan, but it might be so in certain other nations if special attention is not devoted to delineation of objective criteria for appointment and promotion and the establishment of appointing machinery invulnerable to discriminatory administration.

28. The author's belief is that in certain nations there is excessive emphasis on the selection of all ranks of judges from the bar, ostensibly designed to ensure adequate professional competence, particularly in high judicial forums. Whatever the merits of limiting appointments in higher courts to persons with extensive trial experience, there is much to be said for a system which would open the lower grades of judicial service to those who have law degrees and who pass a competitive national examination for entry into judicial service, even though they may not have been admitted as practicing barristers or attorneys and thus lack experience in trying cases. Promotion then could be based on seniority and proven professional competence. This is a variant on the Japanese system of judicial selection which might well be appropriate for adoption in Pakistan and other nations. It is important, however, that if such a system of entry-level judicial selection is adopted, there must be a national judicial training and research institute to provide for a uniform entry level and in service education for judges.

## **AMENDMENTS TO PROCEDURAL AND SUBSTANTIVE LAWS**

29. Legal experts in Pakistan have been concerned since the time of independence with significant changes in procedural and substantive laws, necessary for a better administration of criminal justice. Although some of the delay in prompt disposal of criminal cases, can be attributed to an inadequate number of judges facing heavy caseloads in inadequately accommodated courts, much of it is the consequence of lengthy, intricate and cumbersome procedures required by inherited codes. A special case in point is the evidence law in Pakistan, with its complicated provisions governing proof of documents and its limitations on relevancy and admissibility of evidence.

30. Certain procedural amendments have been made in response to these needs. A new procedure has replaced the older distinction between trials on summons and warrants in lower courts, and commitment inquiry proceedings have been abolished in serious cases triable in courts of sessions. Sessions cases are now tried in accordance with new procedures which, coupled with other changes affecting a number of minor matters, have promoted speedier disposition of criminal matters.

31. However, a candid evaluation of these changes is that they have been made too slowly and on too limited a basis to achieve the desired results. This seems to be explainable because of the reluctance of people to accept unfamiliar notions. The failure of the amended system to speed up disposal of criminal cases also highlights the fact that many of the causes for procedural delay lie outside the ambit of formal procedural law, and are not cured by changes in the latter. Moreover, changes made to control official abuses and safeguard individual rights are likely to slow down rather than accelerate trial processes, even though they are essential to avoid arbitrary exercise and abuse of power. The ultimate goal of procedural reform must be an elimination, or at least a significant reduction, of miscarriages of justice; the greater the possibility of dishonest or improper official activities, the greater the need for appropriate procedural safeguards.

32. A major step toward judicial independence is embodied in a draft ordinance now under consideration by the Federal Council, which would establish new courts, a Qazi court, within the provinces. These Qazi courts for the various districts would work a virtual separation of the judicial from the executive functions, because they would be under the superintendence and control of the provincial high court.

33. Five ordinances promulgated in February 1979 amended the Penal Code in respect of certain offences affecting movable property and the social order, to bring the criminal law into closer conformity to the Quranic injunctions on those matters. Consequently, the Islamic provisions of Haddood replaced the earlier law relating to offences of theft, robbery, decoity, adultery, false accusations of adultery, and drinking of intoxicants.

34. In addition, a draft ordinance in respect of the law of Qisas and Diyat, prepared by the Council of Islamic Ideology, is under examination by the Federal Council. If it should be adopted, a guardian of a deceased person might compound an offence of murder at any time before execution of sentence by accepting certain things in consideration. All offences against the person, including murder, also would be subject to a waiver of prosecution by an adult male guardian of the person killed or injured, even though no compensation has been paid. Offenders who have not been sentenced to the extreme punishment, or against whom for any reason that punishment is not to be enforced, may be exonerated upon payment of compensation to a victim's heirs. If the ordinance is promulgated, certain conforming amendments in the Evidence Act probably will be necessary.

35. Such changes in our penal laws should guarantee the sort of social justice needed for our country, as well as promote a quicker dispatch of criminal justice. Their objective is the creation of a climate of social thought and action in which the maximum benefits can be ensured for the largest number of people. This is attested by the fact that they are in conformity with the Quranic injunctions.

36. It might also be worthwhile to examine the possibility of creating forums within local councils to dispose of cases involving petty offences. Many of these sorts of matters can be resolved much more effectively and speedily through local councils than through judicial trial processes. This is so because members of local councils, on the basis of their social status, are well able to discover the truth and arrive at an appropriate conclusion. The people involved also are usually disposed to accept the determinations of local councils. Hence, such a system can not only relieve the overburdened court system to a significant extent, but also promote a sense of participation among local people in the settlement of disputes. This approach is particularly attractive for countries hard pressed financially to underwrite the appointment of more judges to dispose of accumulated dockets.

## **OTHER CONSIDERATIONS**

37. What with specification of obstacles to the fair and speedy dispensation of criminal justice, the most glaring cause appears to be a want of necessary education and the absence of honest minds on the part of those who administer the system. No criminal justice system is better than the people who are responsible to see that it functions. Therefore, at whatever cost, society's energies must be marshalled to combat the

monstrous triumvirate of ignorance, illiteracy and dishonesty. The creation of an educated society is one effective answer to the problem of delay in disposing of cases. No criminal justice system can be viable to operate in a climate of illiteracy within a backward society.

38. Budgetary priorities must be reordered to give greater emphasis to criminal justice. Defence budget devour large segments of the available resources of many developing nations. Prompt settlements of legal matters bring health and prosperity in their wake because time, energy and funds spent on protracted litigation are diverted from other uses which will bring much greater benefits to society, such as the construction of dams and water conduits. The inherent difficulty in this approach, of course, is that money spent for better administration of criminal justice does not appear to produce the palpable results of defence expenditures or public works. Nevertheless, a properly staffed judicial system capable of coping with current caseloads, can produce revenue in the form of fines and costs which offsets all or most of the cost of operating them or, in some instances, even more. But even without that financial advantage, fair and speedy justice for all citizens is vital as a means of avoiding lawlessness and a deep-seated frustration which may find its expression only through an appeal to God, which is a euphemism for revolution.

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39. What is required in the context of socio-economic development is a fundamental changes in the values governing human behaviour and the approach to problem solving. There was a time when honesty, integrity, efficiency and hard work were virtues encouraged through tangible rewards. Regrettably, it is a malady of our times that those qualities no longer are symbolic of the importance and effectiveness of judges. Steps must be devised and taken to change the ordering of society, so that judges once again feel and are made to feel that they are in a respected position within society, an indispensable factor for the effective administration of justice.

## **CONCLUSIONS**

40. This chapter perforce is but a feeble effort to identify specific areas which demand immediate attention if the goal of fair, swift administration of criminal justice is to be achieved. Each developing nation should establish independent, effective agencies to investigate and prosecute criminal matters. These

independent agencies must, however, coordinate their activities so as to ensure a unity of functions and results. The nation's judiciary must be independent. The number of courts and judges must be enlarged sufficiently to dispose of current caseloads. Attention must be devoted to the nation as a whole in such matters, for eradication of illiteracy and the promotion of valid traditional social values. Appropriate changes must be made in substantive penal laws and procedural codes. Budgetary priorities must reflect these concerns. Only through a resolution of these pressing matters we can achieve an effective, efficient and fair administration of criminal justice.