

JUSTICE FOR ALL

Justice, social, economic and political is the constitutional aim proclaimed in the preamble of the Constitution of Pakistan which contains the requisite guidelines and provides for the infrastructure for attaining it. The Fundamental Rights guaranteed under the Constitution include: prohibition of traffic in human beings and forced labor, freedom of conscience, free profession, practice and propagation of religion, protection of interests of minorities including their right to establish and administer educational institutions, right to protection of life and personal liberty, protection against arrest and detention, and right to Constitutional remedies.

Anyone acquainted with the silent zeal with which the Pakistani Courts have safeguarded the rights of the people as reflected in the judicial pronouncement will instantly know that the instances of human rights violations that are bound to occur in any social order, due to conflicting interests of its components, are mere aberrations, readily corrected by the sound constitutional mechanism of this vibrant democracy.

Much has been said in recent years about our troubled courts. Both **criminal** and **civil** courts have come under fire. In **criminal courts**, defendants accused of crimes but not yet found guilty of anything languish in jails awaiting the lengthy processes of trial while victims of crimes feel deprived of anything approaching equal access to the scope of rights afforded to those accused of crimes. In **civil courts**, there are allegations that many litigants file frivolous lawsuits, playing "liability lottery" in hopes of hitting a jackpot, regardless of whether their claim has merit or not, with a resulting outcry from some quarters demanding "tort reform".

In both criminal and civil procedures, we see that wealthier parties are able to buy more successful outcomes at trial, while those who are not as financially sound are denied equal access to the public institutions established to resolve disputes and maintain public order.

The problem, however, is not restricted to Pakistan alone. Even if we start with the United States for example, a justice system which prides itself on having greater protections for the rights of persons accused of crimes, and for the equitable settlement of disputes, there are many areas in both criminal and civil proceedings where fairness and equity fall short. They have the greatest system in the world, but still there are various problems and prejudice in that society as well.

In Pakistan too there are number of cases and day to day activities in which the innocent are met with injustice and they are the ones who suffer. A glance at a newspaper reveals several murders of innocent human beings and members of the naïve public falling prey to the most heinous crimes each day.

Let us look at both criminal and civil systems to identify weaknesses and propose remedies. Without doubt some of these remedies appear costly. In reality though, these remedies serve to curtail the inefficiency of bureaucracy. Furthermore, freedom is not free and justice is the paramount purpose of court system. In the long run, the costs of providing justice are far less than the social upheaval and economic disruption that exist in its absence.

CRIMINAL JUSTICE REFORMS

A society needs to be “**tough**” on criminals, but at the same time it must ensure its stringent measures only fall upon the wrongdoers and, more importantly, it must ensure that the innocent are protected from loopholes and inefficiencies of the system, and are not made to suffer

Right of Speedy Trial and Competent Counsel

The Constitution guarantees the right of persons accused of crimes to have legal representation. It ALSO ensures the right to a “**speedy**” trial. BOTH rights are constitutionally mandated, not one or the other. Yet in the real world, persons accused of crimes, even if they are being held in “custody” (this means JAIL, even for those who have not yet been found guilty ... and who might never be...), must often waive their right to a “speedy” trial to give their legal counsel adequate time -- often over months and years -- to prepare a defense and hold a trial.

Imagine, what would happen if a defendant (especially if he were being held in “custody”) refused to waive his right to a “speedy” trial and, at the same time, refused to waive his right to competent legal counsel?

The fact that trials are dragged on for months and years is itself a violation of the Constitutional rights of persons accused of crimes, and demonstrates the need for reforming and streamlining the legal process.

At this point while highlighting the need for qualified legal representation, it is also pertinent to mention the role of public

defenders. Certainly, no class within the legal fraternity is more dedicated and hard-working than those underpaid, overworked representatives committed to ensuring an accused has a fair chance of attaining justice. The fact is, however, that a good defense is costly and the budgets for public defenders have not kept pace with the demands of their workloads.

There have been many cases involving persons who were accused of crimes as well as for victims and witnesses where the defense was represented by the Public Defender's office and where private attorneys were hired. To any ordinary observer, the difference in the quality of defense would be glaring. During pretrial motions and hearings, public defenders often walk into courtrooms with stacks of folders which they are busily perusing moments before the hearing, representing persons they have only just met. At the next hearing, perhaps a different public defender will be representing the case. Their efforts, however valiant, will always be a far cry from the professional representation afforded by private attorney. **Until resources of public defenders are improved**, in terms of both finance and the time that can be spent on each case, identical with what is usual and reasonable for comparable defense in the private sector, one should vigorously assert that the Constitutional requirement for competent legal counsel has not been satisfied. If the state is unable to provide COMPETENT counsel using state-of-the-art legal methodologies, then it is violating the Constitutional and civil rights of persons accused of crimes.

There is, today, clearly a two-tiered system of justice: one for those who **have money** and can buy access to justice and a separate and very unequal system for those who **do not** and cannot. And, while it is a cliché that minorities and the poor are hit hardest by this in equal access to justice, any impartial observer who has ever watched the difference between those going to court with money and those without, will attest that an unfortunate person coming from a family of modest means will face a terribly different standard of justice than an elderly from a well-established upper-class lineage. It is a sad truth!

Awaiting Trial

We must remember that those accused of crimes have, by definition, not yet been found guilty. They hold the presumption of innocence and, in many cases, they are going to trial instead of pleading their guilt because they are innocent and are prepared to assert the defense of that

innocence. I personally have seen many examples of where justice has been done in punishing the innocent, but also in freeing those wrongly accused. The current system penalizes those who refuse to accept a plea bargain and who wish to assert their innocence before a jury of their peers.

Persons accused of crimes, while awaiting trial, have not yet been found guilty of anything, and maintain a presumption of innocence. This basic principle, however, seems clearly to have greater weight in legal theory than in practice. Some are presumed innocent and allowed to live a reasonably normal life (other than the threat of a future trial hanging over their head) while others are treated, in all respects, no different than convicted criminals who have been jailed for the crimes they have been found guilty of. Isn't it the basis for discrimination? **Status and wealth!!!** Except for the most serious offenses by the most dangerous criminals, if a person has ties to the community, lengthy years of residence and a broad scale of networking connections, they will be allowed out of jail on their "**own recognizance**" or a bail amount will be set. Of course, the amount of bail and the share they will have to post to the bondsman to ensure their appearance at court will both be directly related to their status and wealth and, if bail is required, their ability to post it will be a direct correlation to their wealth, not to mention the fact that those least able to pay will be the ones considered most at risk so, in addition to the barrier of their poverty, their bail amount will, itself, likely be higher.

There is an absolute need for reform in the manner in which we deal with persons accused (but not yet found guilty) of crimes; paying lip service to their "presumption of innocence" will not suffice. The criminal justice system must actually start treating them that way. While we must clearly recognize that, after the often-difficult apprehension of suspects, it will sometimes be necessary to hold them until trial, we cannot forget that these are still people who are presumed innocent and that others accused of crimes are posting bail or walking free on their own recognizance while awaiting trial. Sometimes it is a close call between allowing a suspect to walk free and holding them in jail until trial, and yet the difference in how that impacts their lives is enormously different. In fact, those persons (presumed innocent) held in "custody" (jail) awaiting trial are essentially treated no differently than those who have already been convicted of crimes. Their treatment goes way beyond merely ensuring that they show up for trial; it does include a substantial measure of punishment. They are denied access to the means of gainful employment. They are denied access to their usual means of communication and recreation. They are even denied access to their usual manner of food and dress. They are transported in handcuffs, and even for routine court appearances outside the viewing of the jury they

are presented to judges garbed in "jail jammies", handcuffed to a chain of their fellow prisoners.

It is absolutely a violation of the presumption of innocence that those held for trial be treated so differently from those free on bail or their own recognizance, and yet so similarly to those who have actually been convicted of crimes. In the many cases where there is a legitimate flight risk or risk of danger to others, when those accused clearly do need to be held, prior to any conviction they should be treated as close to possible the same as in their non-jailed lives.

While the mere fact of lost freedom would have some punitive effect, every effort must be made to ensure that their sole purpose in being held is to ensure attendance of the accused in court and preventing him/her from endangering anyone else in the meantime, NOT to inflict ANY punitive measure whatsoever. The accused awaiting trial should be housed in facilities designed as much as possible to be like inexpensive but clean apartments, with entertainment and communications equipment and greater access to visitors. They should have private rooms, with access to common areas when they wish to socialize with others. They should have access to wider menu selections than those who have actually been found guilty, to accommodate personal preferences and dietary restrictions. They should not be placed in barred cells or handcuffs unless that greater need for security and safety becomes clearly demonstrated based on their own dangerous behavior, and only for specific cause after a separate hearing with judicial supervision. As much as possible, they should be provided the means of communicating with their places of employment so that, if possible, they can continue gainful employment from a remote site in ways that were not technologically feasible even a few years ago. Those who do lose income while restrained prior to any conviction should have all lost income restored at taxpayer expense to them if they are subsequently found "not guilty" at trial, and should be compensated for the indignity of imprisonment. But here the guilty are treated better than the innocent.

To those who will inevitably complain that these proposals are "coddling criminals," we must again emphasize that *these are persons held in jail who have **NOT BEEN CONVICTED***. If and when they are found GUILTY of their charges, then they can be treated like normal prisoners in the regular system of jails and prisons.

Such measures might also encourage greater efficiencies by motivating authorities to use greater judgment in determining how persons accused will be held for trial. Holding persons accused in custody should strictly be seen as a last resort, and should be employed only after all other measures, such as house arrest, work release programs, electronic

monitoring, etc. -- have been considered and found inappropriate. There are very few persons accused who are so dangerous to others or such risks of flight that they cannot be produced for trial with electronic surveillance.

The small additional cost of improving the facilities in a low-cost way for those held but not yet found guilty could be offset not only by other reforms, but by concentrated effort to use less expensive means of making sure those accused can be produced for trial. In any case, such costs are the costs of justice and of living in a free society that protects the rights of its innocent citizens. If such costs are burdensome to taxpayers, then they should examine how burdensome it is when borne by an innocent person, wrongly accused, and later found not-guilty.

CIVIL COURTS (TORT REFORMS)

We see that increasing numbers of litigants are being required (as terms of contracts they have been coerced to accept in order to accept opportunities as consumers, employees or otherwise participate in the activities of usual daily living) to accept compulsory arbitration in lieu of legal proceedings, and forfeit access to what should be the legal system, present to settle disputes and ensure access to judicial equity. Increasing numbers of losing plaintiffs are being assessed the costs of litigation, including the legal fees of defendants who win, so that some plaintiffs with legitimate claims may be intimidated from pursuing rightful remedies for fear of losing against better-funded defendants, and having to pay expensive court costs.

We hear much about the need for tort reform. While much needs to be done in this regard, one cause of high claims is to cover the costs of gaining access to court in the first place. Court costs are simply too high and the procedural constraints and technicalities so arcane that they are simply not accessible without costly professional advice. Yet, while this is a necessary condition for access to the public institutions which settle disputes, this condition is primarily available only to those with sufficient financial resources, thus shutting out many from their Constitutional right of access to petition their legal institutions charged with the enforcement of public policy on their behalf.

While the up-front costs of such access may be deferred for plaintiffs initiating lawsuits brought with the aid of consumer attorneys working

on contingency-fee arrangements, there is no such avenue of general public access to equitable legal action for those involved with other civil actions, including the domestic court, filing (and enforcing) motions for injunctive relief, probate actions or the defense side of tort actions (unless covered by insurance). Even this route shuts out many claimants, as many contingency-fee attorneys still require upfront and ongoing payment for "expenses," even if that does not include actual fees for professional services, but still many potential litigants cannot afford the high outright costs of filings, depositions, etc

The idea of people filing extensive frivolous lawsuits and hoping to cash in on a "liability lottery" is an urban myth. Real-world examples of such may exist, but they are extremely rare. The reality is that the current legal climate allows corporations to trample on the rights of workers and consumers with only minimal threat of a serious legal challenge. In criminal law there is a huge outcry to protect "victims' rights." But where is the outcry in civil law to protect the rights of those who are victimized? Any proposal for court reform must include protection for workers and consumers who are the victims of civil wrongs, and make it easier to gain access to low-cost legal representation and reasonable costs and procedures in the civil process itself.

Not only has the system become so complex that it cannot be accessed without very expensive professional counsel, but large, pompous courtrooms simply cost too much to run. Accordingly, damage claims arising out of tort actions must be high enough to cover all the pain and suffering -- not from accidents, but from going through the legal system, plus the actual costs of court and exorbitant legal fees. And, in fact, if the damages are not sufficient in pure monetary terms, it will not be possible to obtain qualified professional representation (thus equitable judicial access), no matter how important or otherwise relevant the issue of law and equity might be.

Civil courts where attorneys are not permitted (i.e., small claims), and therefore have no incentives to generate needless complexity, are inexpensive and efficient, and participants usually feel that real justice is served, perhaps on a broader scale than in more expensive and unwieldy courts. Lawyers do not feel threatened by the existence of such courts because the amounts at issue are not worth their time.

Of course, lawyers will argue that simple cases require less complexity. But what about cases handled in binding arbitration? Some of those are very complex.

In contrast, what do we get from our high-paid judicial experts (judges)? Other than in full-blown trials spanning many days or weeks and

running up thousands of dollars in purely administrative and procedural costs, what we actually see is that the trained jurist presiding over motions and hearings is often presented with huge files regarding complex cases which the judge often reviews only cursorily and hastily, quickly trying to distill extensive records and statements into key points and often overlooking obscure but possibly relevant points.

Jury Duty

Those who are selected for consideration as jurors are overwhelmingly either retired persons or persons working as employees for companies who will continue to pay them during the tenure of their jury service. Those who are self-employed work for small companies who cannot afford full reimbursement, students, or whose role cannot be covered by others may be excused on the basis of "financial hardship."

What this means, however, is that in a system where those accused of crimes or involved in civil litigation are guaranteed the right of being tried by a "jury of their peers," if a self-employed business owner or commissioned sales person or professional person (doctor, lawyer) were accused of a crime (or litigating a civil dispute) arising out of their economic or professional role, they could be assured that one of their peers who might represent their views and perspectives will NOT be sitting on the jury -- or that, in the rare case of a self-employed entrepreneur or professional person who does make the economic sacrifice, that they will be extremely underrepresented and that the very existence of a juror representing their "peers" would, itself, be an extreme rarity.

A doctor being sued in a malpractice case or a business owner accused of violating environmental laws can go to trial with a firm assurance that the jury that hears their case will NOT be a jury of their "peers." All of their peers have been systemically excluded as a matter of the way in which jury pools are created.

SUGGESTIONS FOR REFORMS

There are several steps we must take towards real court reform:

1. (Criminal and Civil)

We must streamline court processes in a way that would reduce costs considerably, so that those with legitimate claims are not intimidated from pursuing their lawful rights. A possible remedy would be to move judges out of those expensive courtrooms and chambers and into small, informal proceedings modeled after small claims court, traffic court, arbitration and mediation, so that litigants may enjoy the benefits of streamlined cost savings within the existing judicial system and all of its safeguards for their rights, including the rights of appeal rather than the contractual acceptance of an arbitrator's singular decision. The proceedings must be simple and informal, with an eye towards mediation-like consensus-building and the efficiency of more informal small-trial procedures, rather than adversarial litigation; a system in which the judge is able to not only review a broad perspective of the context of the case without a full trial but also does have the power to render binding legal judgments.

2. (Criminal and Civil)

It is also possible to ensure availability of QUALIFIED legal representation if the courts cannot be made sufficiently simplified to ensure access without it. In criminal cases, those accused of crimes who cannot afford legal representation should have it provided for them, but measures must be taken to ensure that the dedicated, hard-working public defenders compete on a level playing field and have sufficient funding to ensure an equivalent quality of personalized representation as is provided by the private sector. Perhaps there was a time when people could credibly defend themselves in any meaningful sense, but today, in any civil case beyond small claims, a person who is handling any action in a courtroom simply is denied access to reasonable judicial equity unless represented by qualified counsel. The tax payers that support the existence of a judicial system are denied access to that system solely because of their economic status and in turn denied equal protection under law, rendering them victims of economic discrimination.

3. (Civil) Reform Contingency Fees.

The key here is to "reform," not to "eliminate" Contingency fees have been one of the real guarantees of popular access to the court system for those who could not otherwise afford legal representation in those cases where such fees are available. Still, paying 30% or 40% of an award to an attorney is an expensive price to pay for access by those who have been wronged to the public institution charged with righting those wrongs. But simply limiting the percentage fee would be counterproductive. A more appropriate solution would be to establish a graduated scale for fees. For example, fees for small judgment -- say, amounts up to Rs. 50,000 -- could go as high as 40% or more, while those from Rs. 50,000 to Rs. 500,000 might be limited to 20-25% of that layer (in addition to the higher rate charged for the portion in the primary layer), the portion of judgments from Rs. 500,000 to Rs. 1,000,000 might be charged a fee limited to 15% in this third layer (in addition to the split rates on the first and second layers) and amounts over Rs. 1,000,000 to 5% of the portion over all the primary layers.

4. (Criminal and Civil)

Make the courts accessible to individuals. Require that every court, at every level, provide clear, simple information about completion and filing of forms, procedures to be followed and how to operate in the court environment, so that individuals realistically can defend themselves "in pro per." Simplify legal mumbo-jumbo and arcane, irrelevant procedurals so that individuals can realistically defend themselves by stating their cases and describing their evidence in simple English. Many of the strict requirements for forms and procedures currently observed are not really germane to the finding of fact and the application of law that the court process is actually supposed to be about. One might almost suspect that, other than in the small claims courtrooms that are of no interest to attorneys, the process has intentionally been made artificially complex and convoluted to make the role of attorneys more "necessary" than what nature and common sense would dictate. Provide greater access to law libraries and assistance in finding relevant points and authorities

and information about other applicable legal references. Quit nickel-and-diming participants with petty charges such as exorbitant costs for three-cent photocopies or costs of transcripts that could easily be provided on disk or electronic file transfer from the court clerk's word processor.

5. (Criminal)

Reform the treatment of persons accused of crimes but not yet found guilty, to consider every alternative for ensuring appearance at trial without holding them in "custody" (jail), and holding them only as a last resort when there is a clear and present flight risk or a risk to the public safety and then, until they are convicted, holding them in clean, private facilities designed to feel as much like a home or apartment as possible with access to the lifestyle preferences in entertainment, communications, food and clothing as possible until a conviction has actually been obtained.

6. (Criminal and Civil)

Make more effort to stick with scheduled court dates. Currently, if the matter before the court develops into anything other than what is routine or what was expected, inadequately prepared judges and even opposing attorneys, become flustered and need to seek repeated delays ("trailing" the calendar) and postponements ("continuing" the case). They don't seem to realize how this impacts the real-world lives of actual human beings who have to work for a living, in travel time and expense and time off from work. Often the issues have been covered in filings within the massive reams of documentation in a file, so it is not necessarily that judges or attorneys have not been given notice, if they would take the case as seriously as mediators or arbitrators do. Yet hearings are often re-scheduled instead of taking a few extra minutes of court time while all the parties are present to listen to a summary of the issues and consider the legal issues (or adequately becoming familiarized with the issues and background before the hearing), even if it would require a recess to allow the judge time to review judicial precedents or other legal references. This might result in specific relevant hearings taking up more time, which should be considered when setting the calendar, however in the long run fewer court dates for additional hearings would ease courtroom congestion. Of course, this does allow attorneys the opportunity to keep the meter running.

7. (Civil)

Implement realistic tort reform, redefining issues of liability and damages in common-sense terms that make people accept responsibility for their own choices and award damages commensurate with actual losses, to reduce the incentives behind frivolous and "deep pocket" lawsuits that drive up costs by clogging up the court system.

8. (Jury Service)

Provide adequate compensation and/or incentives to allow self-employed entrepreneurs, professional people, etc., the opportunity of participation in jury service. The systematic exclusion of an entire class of persons from jury service is discriminatory and denies them their guarantee of being judged by a jury of their "peers." If this cannot be rectified, then perhaps we should give up the illusion of amateur citizen "juries of peers" judging others and empanel trained professionals as jurors.

People should not be intimidated by the very legal system that was supposedly created to help them maintain order and settle disputes. Being accused of a crime or going to superior court in a lawsuit will never become a pleasant experience, but it should not be much substantially more traumatic than small claims court or a traffic ticket, other than the weightier issues of more complex cases. Those with legal defenses or valid claims should feel free to pursue them, while getting an order shouldn't be a big deal, thus removing the intimidation of the judiciary from Pakistani life.