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The Need of Informal Justice System in Pakistan

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Abstract

In Pakistan, the informal justice system, such as Jirga, Panchayat and Faislo, is often discarded in favour of the formal justice system, and even though the informal justice system is heavily criticized but it is subject to being reformed and implemented in accordance with the constitution of Pakistan as well as the international human rights standards. The implementation of the informal justice system can offer many advantages such as easy access to the justice, lessening the burden of the already overburdened courts, and revival of people's trust on the system. The informal justice system has historical roots in the society of Pakistan, and by involving community through participatory decision making can make it acceptable to all the stakeholders in the society. The present article will also consider the model of India with respect to the implementation of the informal justice system by establishing Nyaya Panchayat or Panchayat courts, and providing it with constitutional cover. It also attempts to address the criticism offered against the implementation of the informal justice system, and discusses its adherence and acceptance by the United Nations if it does not violate human rights, and provides an easy alternative to the formal justice system, especially in case of lack of capacity or geographical reach.

Keywords: Sharia law, Jirga, Nyaya Panchayat, Biradari, Alternative Dispute Resolution.

Introduction

The state and government of Pakistan are not willing to accept and implement the informal justice system (IJS), even though it offers many benefits and opportunities to the present formal justice system. By implementing the IJS, ordinary people can have an easy access to justice, and the by delegating their work to the local bodies, the already overburdened courts can reduce their workload. Most importantly, IJS allows ordinary people to participate in the decision-making process, thereby, restoring his/her trust in the justice system and the rule of law, and by involving community through participatory decision making, IJS

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can become acceptable to all the stakeholders in the society, including apex courts of Pakistan. Informal institutions like Jirga and Panchayat have historical roots within society and can prove instrumental in providing justice to everyone, including those who do not have access to the formal justice system. The criticisms on IJS can be addressed and reformed in accordance with the constitution of Pakistan as well as the international human rights standards. This article primarily focuses on Pakistan while analysing the historical, geographical and legal context of the arguments and discussions surrounding the implementation of the IJS. Besides understanding and analysing the discourse, this article also attempts to suggest the ways in which the IJS could be implemented in Pakistan, by taking into account the geographical and ethnic division based upon kinship to better understand the dynamics of Pakistani society. At this stage, the superior judiciary and other concerned government departments have emphasized the importance of the alternative dispute resolution in dispensing justice and to reduce the burden of the judges, which is very much possible and viable by implementing the IJS, as it is a an indigenous system, practiced and accepted by the people and developed and evolved over the time and thorough out their history.

Historical evolution

The British arrived to subcontinent on 24th August, 1608, and gradually established their control.[1] Their judicial system aimed at subjugation and maintained their distance from the native population, which laid down the foundation stone of their policymaking. On 15th August, 1947, the British left, after creating India and Pakistan. Both adopted parliamentary democracy, and continue the British model of governance and formal justice system.

Muslims ruled before the British, over the majority of subcontinent. Muhammad bin Qasim was the first Muslim to conquer subcontinent by defeating the local ruler of Sindh in 712 A.D. and establishing Muslim dominion, and thereafter, the invasions of Mahmud of Ghazna and Muhammad of Ghor in the 11th and the 12th century A.D., brought the Muslims into closer contact with the local people and had left the governance to them. The Muslim institutions did not properly get

1 'When and why did the British first choose to invade India?' *India Today* (New Delhi), 24 August 2019, https://www.indiatoday.in/education-today/gk-current-affairs/story/when-and-why-british-first-came-to-india-1591166-2019-08-24 accessed 4 September 2022.

foothold in subcontinent until 1206 A.D.,[2] as Qutub Uddin Aibek, consolidated his conquest of the Northern Indian subcontinent and laid the foundation of the Muslim administrative system, and introduced the Sharia law and its judicial machinery on a permanent footing, and established permanent institutions.[3]

Much of the procedure in the East India Company's Court of Justice has been derived from Sharia law,[4] but to better understand the pre-Muslim and pre-British justice system, the present-day Bangladesh should be studied as it implements IJS besides the formal justice system through traditional dispute resolution system, known as Salish, which is comprised of village elders to adjudicate petty disputes, because Salish has remained part of the rural arbitration system from the time immemorial.[5] During the pre-Muslim era, the local arbitration system was known as the Panchayat system, which is still recognized in modern India.[6] Panchayat, meaning 'rule of the people,' operates as IJS in rural India, to resolve civil, family, and criminal disputes of petty and local nature.[7] In ancient India, the village Panchayats comprised of the elders, with administrative and judicial powers, exercising full control over the villages.[8] The concept of Nyaya Panchayat or Panchayat courts was popular and prevalent in ancient India, and served as an instrument of law and order, and means of conciliation and arbitration within the community.[9] The awards or decisions of Panchayats were known as Panchs, and there were three grades of judges or Panchs, namely Puga, Sreni and Kula, while the decision of Panchayat was subject to revision by a Sreni, and further by way of second revision, it could be revised by a Puga.[10] The decisions of the Panchayats were binding, and during the ancient times, the villages enjoyed autonomy and were governed

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2 Muhammad Basheer Ahmed, *The Administration of Justice in Medieval India: A Study in outline of the Judicial System under the Sultans and Badshahs of Delhi based mainly upon cases decided by Medieval Courts in India between* (Karachi: Raja M. Ifthikhar Khan Advocate for Law Classics Publishers, 8, behind Kutchery P.C., City Courts, 1992), 25.

3 Ibid.

4 Ibid. 30.

5 Sarwar Alam, *Perceptions of Self, Power, and Gender among Muslim Women: Narratives from a Rural Community in Bangladesh* (London: Palgrave Macmillan, 2018), 56.

6 Ibid.

7 Doris C. Chu and Graeme R. Newman (eds.), *Crime and Punishment around the World: Asia and Pacific [volume 3]* (California: ABC-CLIO, 2010), 86.

8 Ashwinie Kumar Bansal, *Universal Law Series: Arbitration and ADR* (Delhi: Universal Law Publishing, 2009), 9.

9 Ibid.

10 Ibid.

administratively and judicially by the Panchayats, but almost disappeared under the Muslim rule, but were present in their old form under the British rule, but confined only to the village's social life.[11]

In Bangladesh, surveillance was the primary duty of Panchayet as it monitored and punish those who violated caste boundaries, and this practice continued during the Muslim rule, and the British incorporated this practice in the Village Self Government Act of 1919.[12] The chairperson of the Union Council would commission Salish to adjudicate disputes related to divorce, polygamy, and other minor clashes of the community, because of the traditional close relationship between the local notables and the clergies at the community level, and during the pre-Muslim era, the upper caste community leaders arbitrate religious disputes with the counsels of the Brahmin pundit.[13] During the Muslim rule, Muslim community leaders replaced the pundits, and as the Sharia law was not codified, religiously grounded legal decisions and judicial verdicts were always relied on the legal opinions of the Ulama (Islamic scholars), especially Mufti (legal experts), but thereafter, the British colonial judges adjudicated Islamic religious disputes with the counsels and Fatwa (Islamic ruling) of the highly qualified Ulama and Mufti.[14] A copy of the 'Jirga Laws'[15] under the British is still present in the libraries of Pakistan, making it a likelihood for the IJS to be accepted and implemented by the government, especially when alternative dispute resolution is being encouraged to settle disputes at the national level, which can be best implemented, as it has been through out the history of the local and indigenous population, through IJS, being even recognized by the UN, as long as it does not violates human rights.

Acceptability by the UN

A study by United Nations Development Programme (UNDP); the United Nations International Children's Emergency Fund (UNICEF) and UN Women, titled 'Informal Justice Systems: Charting a Course for

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11 Ibid.

12 Sarwar Alam, *op.cit.*, 56.

13 Ibid.

14 Ibid.

15 Union Catalogue of International Islamic University, Islamabad,whttp://opac.iiu.edu.pk:64445/cgi-bin/koha/opac-detail.pl?biblionumber=63&query_desc=pb%3ALahore%20Law%20Times%2C%20and%20itype%3ABK%20and%20itype%3ABK%20and%20holdingbranch%3ASL accessed 2 August 2022.

Human Rights-Based Engagement',[16] is the first comprehensive assessment of IJS and human rights protection, involving an exhaustive literature review and country-specific case studies in Bangladesh, Ecuador, Malawi, Niger, Papua New Guinea and Uganda, along with a desk study of 12 additional countries. It emphasized the need of IJS, subject to protecting and not violating human rights, and being a better alternative to the formal justice system, when rejected by the local population.

The report admits that no definition of IJS can be precise and sufficiently broad to encompass the range of systems responsible for delivering rule of law and access to justice.[17] It states that nature of IJS and the extent to which it is incorporated into formal system, depends on the historical circumstances of each country, as the legal system inherited from a colonial power, and the new system established during decolonization, influenced the role and status of customary law and IJS, and its interaction with the formal justice system.[18] It elaborates that providing accessible justice is state's obligation under international human rights standards, and does not require formal justice systems, if IJS upholds human rights, and delivers accessible justice to individuals and communities where the formal justice system lacks capacity or geographical reach.[19]

The study also deals with women rights as the respect for women's rights often remains tethered to the notion of balancing them with culture and customs rather than taking a more dynamic and process-oriented view of culture, thus, IJS, being based upon custom and religion, upholds and not challenge the values of the society, including attitudes and patterns of discrimination, and in case there is no clear state recognition of IJS or other delegation of state functions to traditional

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16 'A renewed vision for peace: Addressing the root causes of conflict,' Report of the United Nations Development Programme, 20 September 2022, https://www.undp.org/publications/informal-justice-systems, accessed 25 September 2022; Informal Justice Systems: Charting a Course for Human Rights-Based Engagement, https://www.undp.org/sites/g/files/zskgke326/files/publications/Informal-Justice-Systems-Charting-a-Course-for-Human-Rights-Based-Engagement.pdf, accessed 25 September 2022.

17 Ewa Wojkowska, *How Informal Justice Systems can contribute*, (Oslo: United Nations Development Programme, Oslo Governance Centre, 2006), 6, https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2013/1/Informal-Justice-Systems-Summary.pdf, accessed 5 September 2022.

18 Ibid., 7.

19 Ibid., 9.

chiefs, or enforcement or consideration of settlements reached through informal justice, the state remains obligated to protect under article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women.[20]

IJS is estimated to resolve around 80 per cent[21] of cases in many developing countries, and tends to address a wide range of issues including personal security and local crime; protection of property and livestock; resolution of family and community disputes; and protection of entitlements, such as access to public services.

The situation in Pakistan

The importance of IJS, especially Jirga system holds great significance for Pakistan, as in June 1947, the Shahi Jirga, and the Quetta Municipal Council voted to join Pakistan.[22] During the entire Afghanistan war, starting from 2001, the US has supported various Jirgas of local leaders between Pakistan and Afghanistan, as admitted by Richard Boucher, the US Assistant Secretary of State.[23] In 2008, Pakistan-Afghanistan 'Jirgagai', or mini-jirga, was a follow-up to a grand Jirga in Kabul, calling for the talks with Taliban to end bloodshed in both countries.[24]

Pakistan has written constitution which promises for inexpensive justice to its citizens.[25] Pakistan is a parliamentary federal republic, but is presently struggling to meet various challenges faced by the formal justice system, including the huge pendency of criminal and civil cases, which can be reduced by resorting to IJS, and supplementing and complimenting the formal justice system. Fazil Karim, a former Justice of the Supreme Court of Pakistan, in his book 'Access to Justice in Pakistan,' highlights this problem:

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20 Ibid., 10.

21 Ibid., 7.

22 Farhan Hanif Siddiqi, *The Politics of Ethnicity in Pakistan: The Baloch, Sindhi and Mohajir Ethnic Movements*, (London: Routledge, 2012), 59.

23 Remarks of Richard A. Boucher with the *BBC* World Service on 'Afghanistan and Pakistan,' Washington, DC., 30 October 2008, https://2001-2009.state.gov/p/sca/rls/2008/111459.htm, accessed 20 September 2022.

24 Zeeshan Haider, 'Pakistani, Afghan elders to meet to ponder,' *Reuters*, 26 October 2008, https://www.reuters.com/article/idUSISL182144, accessed 12 September 2022.

25 'Constitution of Pakistan 1973, Article 37(d), provides that state shall ensure inexpensive and expeditious Justice to every citizen, https://na.gov.pk/uploads/documents/1333523681_951.pdf, accessed 20 September 2022; The Constitution of Pakistan, Part II: Fundamental Rights and Principles of Policy, https://www.pakistani.org/pakistan/constitution/part2.ch2.html, accessed 22 September 2022.

> People are fast losing faith in the system, and it is feared that if radical steps are not taken immediately it would be inexorably grind to halt. People are scared to bring their genuine claims to civil courts. One outstanding example of people's apathy is almost complete absence of torts cases.[26]

By securing justice to ordinary citizens without inordinate delay, the integrity of judicial system would be restored, but the Pakistani courts are overburdened with the large dockets for multiple reasons, leading to failure of the formal justice system to address the long delays, including ignoring the IJS, which developed indigenously, with deep roots in the society. A system of civil justice is essential for the maintenance of a civilized society.[27] According to the survey conducted by the World Justice Project titled, 'The Rule of Law in Pakistan,' which was based upon interviews of the civil case litigants, around 82 per cent of them have experienced legal problems, hardships, and stress.[4] Moreover, the backlog of total cases exceeded two million, as there are around 2,160,000 pending cases.[28] Owing to the failure of the judicial system to effectively resolve the disputes at the earliest, there is a risk of the multiplication of disputes if they are not promptly addressed and adjudicated. It normally takes around 30 to 40 years to dispose a complex civil suit in Pakistan, after exhausting numerous rounds of litigation.[29] Supreme Court of Pakistan has stated in its annual report of 2018-2019:

> The trial court are first forums where public brings their disputes for resolution but due to inordinate delays and protracted trial proceedings the efforts relentlessly made by the Judiciary are undermined.[30]

The present justice system of Pakistan is based upon adversarial model, which was imposed by the British, which is opposed to contradicts Pakistan's social and cultural values, as litigants fight with each other for many years, and winning a case becomes a matter of life and death for them. Such adversarial culture of litigation has contributed in creating an environment of intolerance and chaos in the society rather than creating

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26 Fazal Karim, *Access to Justice in Pakistan* (Karachi: Zaki Sons, 2003), 363.

27 Brothers Steel Mills Limited versus Ilyas Miraj, *PLD*, 1996, https://pakistanlaw.pk/case_judgements/88019/brother-steel-mills-ltd-versus-ilyas-miraj, accessed 4 August 2022.

28 Editorial, 'Backlog in courts', *Dawn* (Karachi), 29 June 2021, https://www.dawn.com/news/1632089, accessed 21 August 2022.

29 Salauddin Ahmed, 'Justice delayed is justice denied', *Dawn*, 19 December 2016, https://www.dawn.com/news/1303235, accessed 21 August 2022.

30 Board Members of legal Aid Society, https://www.las.org.pk/about-us/board-members/, accessed 2 August 2022.

peace and harmony. The IJS provides for a union of elders and notables, belonging to the local community, being an indigenous system with roots within the society, and revolves around negotiations and dialogue among the community members as everyone can participate in an open hearing, commonly known as Panchayat in Punjab, Jirga in the Khyber Pakhtunkhwa (KP), as well as Baluchistan, and Faislo in Sindh.

Existing formal justice system hardly deals with the emotional sufferings of disputant parties, but in IJS, there are various customary practices which allow parties' emotions of anger and frustration to be properly delt with by public apology, or visiting the Otaq (a guest house or a meeting place in Sindh) of the opposite party called Tado Mer in local language.

The growing intolerance in Pakistani society can be successfully dealt with through dialogue, which is the core idea behind IJS. The government's failure to deal with the growing intolerance in the form of mob lynching, terrorism, suicide bombing, sectarian violence and so on, and the reliance on torture by the public as well as the public officials instead of fair trial. This only proves that IJS can provide an opportunity to counter and control such intolerance, by providing public with an opportunity to directly participate in the entire decision making process, and therefore, should have been legally and constitutionally recognised by the government, as done by India under article 40 of the Indian constitution which entails that, 'state shall take steps to organize village Panchayats',[31] thereby, giving Panchayat or any other alternate system, a constitutional cover.

The murder of Mashal Khan by his fellow students, accused of blasphemy;[32] the murder by a mob of two brothers Mughees Butt, age 19, and Muneeb Butt, age 15, in Sialkot;[33] or the mob killing of a Sri Lankan citizen, Priyantha Diyawadanage, accused of blasphemy,[34] demonstrate that people would take law in their own hands, and discard the due process. These incidents could never be justified and the culprits should be held accountable for their actions; however, it should be

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31 'Panchayati Raj - 73rd Constitutional Amendment Act', https://byjus.com/free-ias-prep/panchayati-raj/, accessed 19 August 2022.

32 'Mashal Khan case: Death sentence for Pakistan 'blasphemy' murder,' *BBC* (London), 7 February 2018, https://www.bbc.com/news/world-asia-42970587, accessed 30 June 2022.

33 'Pakistan investigates brutal mob killing of brothers', *BBC*, 23 August 2010, https://www.bbc.com/news/world-south-asia-11062184, accessed 22 June 2022.

34 'Pakistan: Killing of Sri Lankan accused of blasphemy sparks protests,' *BBC*, 6 December 2021, https://www.bbc.com/news/59501368, accessed 22 September 2022.

considered that all the problems of being an ordinary citizen, whose life is not at all easy in any given situation, possesses tendencies to demonstrate intolerance, which, if not properly addressed, will result in a disorganized society. Therefore, there is an urgent need to learn about alternatives, such as IJS, to resolve such issues with tolerance and maturity, as presently torture is being relied upon by the public and public officials instead of the rule of law.

In Pakistan, the traditional institutions used for dispute resolution include Sharika, Biradri, Pind and similar multiplex social organization. Conflicts in villages, like in many traditional societies, do not generally emerge between individuals but between groups. These conflicts start from individuals and would then transform into group conflicts due to mutual obligations of the kinsmen or fellow villagers. Walsh, a colonial administrator in India in the 20th century, wrote about the basis of crimes in the subcontinent.[35]

In Punjab, it has been described as multi-Biradari and multi-head village. Structurally the village community is open from inside towards the outside, that is, from the centre to the periphery, and makes different enclosures or units. These layers are based upon two criteria. First, of kinship; and secondly, of territorial ties. The former ties a villager horizontally to the Biradari, Sharika, and other kins, even beyond the territorial boundaries, while the latter ties vertically with the village. This does not mean that the two types of ties are equally important, and cannot be clearly distinguished from one another. The ties based on kinship are much stronger and more durable than those of village and territory. Sometimes making a distinction between Biradari, extending beyond village and village relations is difficult. The role of these ties in the social organization of the village needs to be deeply studied.

Biradari is further divided into those living in the same village and those living elsewhere.[36] Another characteristic of identification is Goot, but its importance is decreasing as many people do not know their Goots anymore, and among Jats, Goots would be Chohan, also found among Gujar community, as well as the Goot of Ashraf, Chadhair, Cheeme, Chathe, and so on. If there is only one Biradari living in a village, such as Jats, then the Goot becomes important and is used as a subdivision of the Biradari. However, the Biradari is then used as a subdivision, but Chadhair Biradari, or Cheeme Biradari, are examples from the Jat Biradari.[37]

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35 Muhammad Azam Chaudhary, *Justice in Practice* (Oxford: Oxford University Press, 1999), 10.

36 Ibid., 11.

37 Ibid., 13.

Also, there is a sense of competition between the cousins for respect in the village, to the extent that the word used for cousin in Pashto language is Tatbur, which stands for enemy too, and in Punjabi language, the word for the families of the cousins is Sharika, and for a single person Sharik means 'the one who shares or takes part'. These conflicts within such a unit are the highest honour or Izzat, and is not divided equally between the brothers, because normally, the eldest inherits it, but there are also examples when others earn it.[38] Eglar, differentiating between family and Biradari, writes:

> The line of demarcation between one's own family and the biradari as well as the essential unity of the two are expressed in a proverb: 'one does not share the bread but one shares the blame.' That is a family owns property in common and consequently shares income and expenditures, but the biradaris, who live in different households, each with its own shared income, are affected by the wrongdoing of any one of its members into whatever household he belongs and their prestige suffers thereby.[39]

Thus, there can be no doubt that such a complex kinship ties bread disputes which can become ugly but can be amicably resolved through already traditional and informal institutions, making their need and implementation urgent.

The survey, conducted by Mr. Naveed Shervani, while working for a report, 'Access to Justice and State of Human Rights in Pakistan under the both Formal and Informal Justice System',[40] on the basis of data collected from the Pushto District of KP, revealed that an overwhelming majority of respondents did not know about some of the formal institutions, and those who knew had negative views about them. This aspect of the research is just the tip of the iceberg as the formal justice system is rapidly losing its efficacy and faith of the people.

The present formal justice system needs urgent reforms as it is unable to face the challenges of the recent times, especially the lack of participation by the people as they are even unable to understand the English language which is integral to the formal justice system but alienates the litigants. The Britishers introduced English as the official language with a motive to disenfranchise the masses, and gradually created a coterie of an English-speaking class, which still continues in

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38 Ibid.

39 Ibid., 14.

40 Conducted by Community Appraisal and Motivation program(CAMP): Opportunities and possibilities of legal pluralism (www.camp.org.pk) accessed 2 October 2022.

Pakistan, even after 75 years of its independence, even though the majority of the population is unable to understand the oral arguments and written judgement and orders in English, as well as the legal jargon. The Supreme Court on numerous occasions has given directions for introducing Urdu in the offices, but it has not borne any fruit yet.[41] The landmark judgment was given in this regard by the former Chief Justice of the Supreme Court of Pakistan, Jawwad S Khawaja,[42] in the case of Muhammad Kowkab Iqbal v. Govt. of Pakistan the Secretary Cabinet Division, Islamabad.[43]

The constitution of Pakistan accepts and implements Sharia law, especially with respect to the penal, family and inheritance laws, and admits the use of alternative dispute resolution to amicably resolve disputes. The Sharia law accepts the participation of elders in resolving family disputes which has been accepted in the case of the Sharia Court of the UK and the Bradford Sharia Office,[44 & 45] which are considered to be the modern expression of the Jirga system, with participation of family members in the arbitration process.[46]

Even in the wake of the recent destruction caused by the floods, Pir Pagara had opened the doors of his dargah to flood-affected people,[47] when the state had failed, proving the efficiency and efficacy of the informal institutions, especially in the face of a catastrophe and calamity. Hence, the formal justice system hardly considers the difficulties faced by the litigants in understanding the law which is in alien language, and alienates the local population due to the lack of direct participation, but that can be overcome by the IJS. However, there are criticisms over the IJS in which it has been used to advocate violence and violate human rights.

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41 Irfan Haider, 'Supreme Court orders govt to adopt Urdu as official language', *Dawn*, 8 September 2015, https://www.dawn.com/news/1205686, accessed 25 August 2022.

42 Ibid.

43 Muhammad Kowkab Iqbal versus Government of Pakistan the Secretary Cabinet Division, Islamabad, *PLD*, 2015 Supreme Court 1210.

44 Anna Marotta, *A Geo-Legal Approach to the English Sharia Courts: Cases and Conflicts* (Leiden: BRILL, 2021), 87.

45 https://find-and-update.company-information.service.gov.uk/company/11942792, accessed 20 August 2022.

46 Anna Marotta, *op.cit*., 88.

47 'Govts Doing Nothing for Flood-hit Masses, says GDA leader', *Dawn,* 20 September 2022, https://www.dawn.com/news/1710943, accessed 29 September 2022.

Critique and criticisms

IJS is criticized for inflicting inhuman punishments over the people who are allegedly guilty. Such as directing a girl of the guilty party to be married to the victim party under the tradition 'Suleh Badel', which is made punishable under the Pakistan Penal Code, 1860 (PPC).[48] The superior judiciary of Pakistan have rejected this practice, and recently was held by the honourable Federal Shariat Court, in Sakeena Bibi v. Secretary Law, Government of Pakistan, that:

> That nefarious practice of Swara has been in vogue in different parts of Pakistan under different names and different pretexts; according to such practices girls or females are given and taken in Nikkah or otherwise as consideration for compromise. This evil practice of forced marriage of girls in the name of compensation of murder, raping and settling other disputes has been in prevalence in different parts of Pakistan by different names like vani, sawra, sharam, khoon baha, sang chatti and karo- kari etc. All such evil practices in which females are given in Nikkah or otherwise to the victim party in the name of consideration for compromise or badal-i-sulh are un-Islamic and against the principle of holy Quran and Sunnah for the following reasons irrespective of the fact whatever name they are called.[49]

There are many instances in which the decisions made by the local people and village heads were illegal and violated human rights, as in the case of Mukhtaran Bibi, also known as Mukhtar Mai, who was brutally gang-raped on the orders of her village council, because of an offence her 12-year-old brother was alleged to have committed, and she accused 14 men of raping her, but the trial court sentenced six to death and acquitted the others, citing a lack of evidence, while the Lahore High Court then overturned five of the six convictions in appeal, and her appeal to the Supreme Court was rejected in 2011.[50 & 51] The Supreme

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48 310-A. Punishment for giving a female in marriage or otherwise in 'Baidl -e-Sulh', Wanni, or Swara: 'whoever gives a female in marriage or otherwise compel her to enter into marriage, 'Baidl -e-Sulh' Wanni, or Swara or any other custom or practice under any name, in consideration of civil dispute, or criminal liability, shall be punished with imprisonment of either description for a term which may extend to seven years but shall not be less than three years and shall also be liable to fine of five hundred thousand rupees'.

49 Sakeena Bibi v. Secretary Law, Government of Pakistan (PLD 2022 Federal Shariat Court 57).

50 'Profile: Mukhtar Mai', *BBC*, 21 April 2021, https://www.bbc.com/news/world-south-asia-13163169, accessed 2 August 2022.

Court also dismissed her review application,[52] making it a rare example where the victim found no justice from the informal as well as formal justice institutions in Pakistan, but it can still be argued that human rights violations and criminal acts can never be justified in any situation, and same is true for the IJS, as only those decisions of should be accepted which upholds the human rights and in accordance with the criminal justice system of Pakistan, especially rape, which should never go unpunished.

Another example is of Taliban illegally dispensing their own harsh system of justice in Swat in KP, in 2009, after the government had lost control of 80 per cent of Swat.[53] Many causes for the support of this system were pointed out, which included, first, poor peoples' access to justice as the government did not provide speedy and cheap justice to people through their well-established justice system, that is, Qazi courts, mini councils or Jirgas; secondly, after the merger with Pakistan in 1969, confusion and chaos prevailed in Swat, as the litigants did not know where to turn for justice; thirdly, the prolonged procedures, undue delay, great expenditures, bribes, misuse of Riwaj or traditions, and the further deterioration by PATA Regulations, which were promulgated in 1975, to replace Frontier Crimes Regulation, and envisaged Special Jirga laws supported by required sections of the prevailing criminal and civil justice system of Pakistan, but were abolished by the Supreme Court of Pakistan in 1994,[54] causing alienation of locals, and giving space to Tehreek-i-Nafaz-i-Shariat-i-Mohammadi (TSNM); fourthly, the Taliban leaders exploited the prevailing sentiments of the people of the failure of Pakistani government and military to stop US drone attacks on Pakistani soil instead of bombing and shelling Swat and killing innocent citizens.[55]

Thereafter, a solution was found to stop the violence in Swat with the KP government, by entering into a peace agreement with the Taliban through TSNM, which some commentators supported as the only alternative acceptable to the people who are exhausted from fighting

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51 The State and others v. Abdul Khaliq and others (PLD 2011 Supreme Court 554).

52 Mian Aqeel, 'SC dismisses review appeal against acquittal of accused in Mukhtaran Mai gang-rape case,' *The Express Tribune* (Karachi), 13 June 2019, https://tribune.com.pk/story/1991466/sc-dismisses-review-appeal-acquittal-accused-mukhtaran-mai-gang-rape-case, accessed 30 June 2022.

53 'Why Swat went under Taliban control', *Dawn*, 7 February 2009, https://www.dawn.com/news/881025/why-swat-went-under-taliban-control, accessed 30 June 2022.

54 'Promulgation of Pata Regulations', Government of Khyber Pakhtunkhwa, https://cmd.kp.gov.pk/page/promulgation_of_pata_regulations, accessed 30 August 2022.

55 'Why Swat went under Taliban control', *op.cit.*

between the military and the militants, and that the people would also get speedy justice.[56]

It could never be argued that the harsh justice system introduced by the Taliban could ever be accepted as it violates human rights and the constitution, and even though government entered into negotiations with them, it must be remembered that it was accepted by the people because of their frustration from and the failure of the formal justice system. Taliban's justice system is illegal under section 6(2)(g) of the Anti-Terrorism Act, 1997.[57]

Majority of the Pashtun people do not accept the ideology of Taliban, and accept their own customary legal code known as Pashtunwali, meaning 'the way of the Pashtuns,' which is followed by the Pashtun living in Afghanistan, Pakistan and other parts of the world and it has governed their way of life for centuries.[58] It is unwritten like the British constitution but every Pashtun proudly practices it,[59] and is applicable to 40 per cent of Afghans.[60]

There is no denying the decisions contrary to law have been passed, however, the centuries old indigenous system is otherwise very cheap, and the IJS cannot be and should not be ignored for curable flaws. Even, formal laws are always subject to amendments in changing times, and by recognising the IJS, can make monitoring and regulating it easy.

Understanding Indian model

A lot can be learned from India, which has recognized IJS, and the rights of its indigenous forest dwelling tribal communities under the Forest Rights Act, 2006,[61] realising the importance of the indigenous communities, their way of life, and their dispute resolution mechanism, and, thereby, implemented the indigenous system of Nyaya Panchayat and Gram Nyayalya. The law Commission tried to revive it as people courts, for being the age-old Indian tradition of encouraging dispute resolution outside the legal system, by the intervention of elders, or assemblies of learned men and similar bodies. Panchayat means the

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56 'Justice in Swat?', *Dawn,* 20 February 2009, https://www.dawn.com/news/832824, accessed 30 August 2022.

57 Atta-ur-Rehman and Syeda Yasoob Zahra, *The Criminal Major Acts* (Lahore: Key Law Reports Publications, 2019), 10.

58 'Pashtunwali,' *Dawn,* 6 December 2015, https://www.dawn.com/news/1224461/pashtunwali, accessed 30 July 2022.

59 Ibid.

60 Peter Hodgkinson, *Capital Punishment: New Perspectives* (London: Routledge, 2016), 257.

61 https://tribal.nic.in/fra.aspx#:~:text=The%20Forest%20Rights%20Act%20(FRA,and%20other%20socio%2Dcultural%20needs, accessed 2 August 2022

coming together of five persons of village, to judge disputes or determine group policy, and had functioned with great vigour in the villages, but the hierarchy of courts was gradually introduced.

In Panchayats, consensus forms the basis of a decision, which is wholeheartedly accepted by the parties, but a visible division of urban and rural society exists as the urban population followed the British system, while the rural society followed Dharma Shastras and Neeti Sutras, but, thereafter, urban court system gained more royal patronage and prominence, and the rural Panchayats reduced to caste panchayats, which is now being revived in India. Nyaya Panchayats possess power to settle civil, criminal and revenue disputes of petty and local nature granted to them under certain laws.[62]

Article 40 of the Indian constitution states that, 'state shall take steps to organize village Panchayats'.[63] Article 243B provides for the establishment of Panchayats at the village intermediate and district levels in every state, and establishing them under various state legislations, like Uttar Pradesh (UP), Madhya Pradesh and West Bengal.[64] Part IX, from articles 243 to 243O, of the Indian constitution deals with Panchayats, including its definition, constitution, composition, duration, disqualification from membership, and powers and authority, and so on.[65]

Nyaya Panchayats were established in the Manipuri district in 1949, under the UP Panchayat Raj Act, 1947,[66] while the Bihar state, has 1,14,000 wards, with 'Panchs' (arbitrators) in around 1,10,000 of them, and of the 8,392 gram panchayats, there are 8,392 Sarpanchs (head of village courts).[67] This could reduce the burden of the courts and police, provide speedy justice, and the Panchayati Raj Department is responsible for training members to deal with various offences.[68] A module was prepared by the Chanakya National Law University, for training village Sarpanchs, Up-Sarpanchs, Nyay Mitras and Nyay Sachivs.[69]

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62 Ashwinie Kumar Bansal, *op.cit*., 9.

63 'Panchayati Raj - 73rd Constitutional Amendment Act', *op.cit.*

64 Ashwinie Kumar Bansal, *op.cit*., 9.

65 'Constitution of India,' National Portal of India, https://www.india.gov.in/my-government/constitution-india accessed 13 June 2022; https://legislative.gov.in/constitution-of-india,

66 Ashwinie Kumar Bansal, *op.cit*., 9.

67 'Village courts could try most cases locally in Bihar,' *Hindustan Times* (New Delhi), 4 July 2017, https://www.hindustantimes.com/patna/village-courts-could-try-most-cases-locally-in-bihar/story-f2EMxEOxfsYlQrmYOVcxYM.html, accessed 30 June 2022.

68 Ibid.

69 Ibid.

Way forward

There is a dire need and space for reforming the IJS, and make it more acceptable within the given legal parameters, by gradually replacing the traditional landlords, spiritual leaders such a Pirs and Mirs with those who are educated, rational and knowledgeable. It can begin by developing community mediators for ensuring educated decision making which is inconformity with the constitution and the existing laws. Continuous monitoring and analysing decisions of private mediators and local notables is the essential part of enforcing such a system. There is also a need to deeply understand, observe and study about the existing mechanism of dispute resolution like Jirga, Faislo, Panchayat etc., with an aim to strengthen the IJS.

The task of effectively and efficiently implementing the IJS can be better done if the gaps in available knowledge, literature and discourse are properly filled. Following steps can be helpful to ensure the implementation of the IJS possible in Pakistan:

(i) Making study of IJS with an aim to find loopholes in decision making process;
(ii) Conduct survey of the laws of land which involves dispute resolution through local notables, union counsellors, Panchayat etc.; and
(iii) Take measures to link IJS to formal justice system, in order to avoid any violation of human rights, and to bring them in conformity with the laws of land.

Most important aspect of the IJS is the introduction of the participatory decision-making process which includes agreement of parties involved in the dispute over the proposed decision. Such community mediators may offer the proposed solutions of dispute or best possible alternatives to dispute rather than to arbitrarily impose their decisions upon the litigants. It can be a paradigm shift from the existing method of the imposition of decision by members of Jirga, Panchayat, Faislo etc., towards a more cohesive and interconnected decision-making process which is legitimate due to direct participation of the people. Even the formal alternative dispute resolution mechanism and methods mainly provides facilitation between the disputant parties, by bridging the gap between them, while focusing on restoration of their relationship as well as safeguarding their mutual interests.

Decisions are not imposed by mediators during the mediation in local and international mediation sessions. Similar to this principle, the community mediators could gradually replace the landlords and Pirs and Mirs, and adopt a participatory decision-making model which shall go a long way in supporting the existing formal justice system which is

already overburdened by cases, and creating a trust deficit of the litigant public as well as public at large.

The implementation of IJS by India and Bangladesh, and the enforcement of Sharia law through courts in UK have presented a model to Pakistan to be followed with respect to the implementation of the IJS. Naturally, Pakistan can modify and adjust to its administrative and constitutional needs, and can reform it to ensure the implementation of the rule of law as well as human rights.

IJS can not only provide an alternative to the IJS but also shall compliment it by adjudicating disputes in such cases where due to geographic and socio-economic shortcomings, the present formal justice system is unable to perform and dispense justice to the aggrieved. Whatever the final decision is made by the IJS can be challenged and subject to being set-aside if it fails comply with, or contradicts, the present formal justice system.

It has been admitted by the superior judiciary and jurists of Pakistan on various occasions that alternative dispute resolution is a viable mode of dispensing justice especially as the courts are already overburdened. Former Supreme Court Justice, Nasir Aslam Zahid, at the International Conference on Alternative Dispute Resolution, 'An Overview of National and International Best Practices', organised by the Legal Aid Society in collaboration with the Sindh Judicial Academy, that the burden of the country's judiciary, which is struggling to cope with the backlog of 1.9 million cases nationwide, can be reduced by promoting the practices of alternative dispute resolution.[70] Even the Sindh High Court has introduced amendments to the Code of Civil Procedure and other relevant laws, to make the alternative dispute resolution viable and possible at the district judiciary level, and the IJS is the best mode of implementing the alternative dispute resolution by training the local community leaders to dispense justice at their respective locality, and contribute in lessening the burden of the judiciary as well as restore the faith of the people in the judicial system and the constitution, by making them part of the decision making process, through participatory decision making process.

Conclusion

There is a dire need to implement the IJS in Pakistan, which has been accepted and practices by the people of this region for ages, and can

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70 Naeem Sahoutara, 'Call to promote alternative dispute resolution to lessen burden on judiciary', Dawn, 14 April 2019, https://www.dawn.com/news/1475900, accessed 21 August 2022.

provide an easy and cheap alternative to the formal justice system of Pakistan. Pakistan can learn from its neighbouring countries which have implemented IJS, and whatever are its shortcomings, they can be overcome by modifying it to the needs of the formal justice system, especially by implementing the rule of law as well as upholding the human rights. The people of Pakistan have lost their trust in their government, but by implementing IJS and promoting community based participatory decision-making model, can help in reviving the faith and rebuild trust, and combat intolerance, extremism, community violence, vigilante justice, and mob violence.

Presently, the government as well as the superior judiciary are striving towards alternative dispute resolution in order to face the growing pendency of cases in the courts. And even though this is only one advantage of lessening the burden of the judiciary, offered by adopting the IJS, there are many other areas which need immediate attention and addressing which includes the rise of extremisms, which can be countered by adopting IJS as it is entirely based upon dialogue and face-to-face interaction.

By using English language and unable to directly participate in the process, there is this growing feeling of alienation and hostility towards the existing justice system, but by implementing the formal justice system, not only the faith and trust of the people can be restored into the system but they can feel part of it and this can prove instrumental in reducing the hostile feelings of the local population towards state institutions.

Lastly, in face of dire criticism, about powerful men of the locality abusing their powers and violating human rights can be controlled and monitored and the protection of human rights can be ensured by officially and constitutionally recognising it, as was done by India. By not recognising it, the vulnerable people of vulnerable communities will continue to become victims of these powerful men, but by constitutionally recognizing the IJS, necessary efforts can be made to keep these powerful individuals to abuse law, victimise week individuals and human rights are protected through the entire process. But, if Pakistan continues to ignore the importance and need of IJS, it will only worsen the already worst situation, and the dream and goal of speedy and inexpensive justice can and will never be achieved.