

The Role of District Judiciary in Protection of Human Rights

By

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Introduction: The terms 'human rights' and 'fundamental rights', thanks to the confluence of international law and municipal law, are synonymous, if not identical, and used interchangeably. It includes all rights, privileges, interests, safeguards, liberties and freedoms, which are legally binding and enforceable, without distinction or discrimination on the basis of nationality, place of origin, caste, creed, colour or gender. Without the enjoyment of such rights, the proper development of human personality and economic, social and cultural progress of society is inconceivable. Human rights are inherent to human beings, as they cannot live or enjoy life or develop their faculties or contribute to development, without availing human rights. Human rights make life worth living. A life worth living, in the minimal sense, presupposes certain safeguards and protections, such as, the right to personal safety, dignity, property, liberty, equality of status, of opportunities and before law, freedom of thought, belief, expression, movement and association, etc.

Denial of Human Rights lead to Conflicts: Non-observance of minimum standards of civilised behaviour by states in the treatment of human beings and the resulting violations of their fundamental rights, is recognized as a major cause of international strife and tensions. Such conflicts ensued mainly due to lack of

respect for and observance of human rights, in particular, the prevalent culture of dominating others and the policy of colonization for economic exploitation. The resulting wars and armed conflicts indeed caused profound loss/destruction of human/material resources, inflicting untold sorrow and suffering on the human race. Subsequent studies/analyses of these events led to the inescapable conclusion that strife or tensions in international relations were not entirely inevitable, were rather avoidable and indeed attributable to human conduct, particularly, man's propensity to greed and exploitation of others to enrich himself and advance his interests at the cost of others.

What is true of international conflicts is equally true of domestic unrest and tensions, in nations that deny human rights to its citizens. History shows such states remaining weak, under-developed and vulnerable, primarily on account of the brutal treatment of their subjects and the lack of access to justice to seek redressal of grievances.

Human rights is a new and evolving concept. As civilization advanced and human consciousness evolved, more and more attention was directed towards tackling the underlying factors and currents, responsible for the recurring crises and conflicts in the world. The issue of human rights violation, therefore, came to the forefront and became a focal point of attention for every discourse/conference at national or international level. Consequently, several national and international legal instruments were formulated, which provide for respect for and observance of human rights.

Human Rights Movement: The connection between justice and peace is undisputed, be it in affairs among citizens or relation between states. That is why the Charter of the United Nations in its very Preamble lays stress on "fundamental human rights, in the dignity and worth of human person, (and) in the equal rights of men and women". The promotion of human rights and fundamental freedoms for all, without discrimination as to race, sex, language or religion, is an objective of the United Nations. The Universal Declaration of Human Rights 1948, adopted unanimously by the General Assembly, guaranteed essential, civil, economic, social and political rights. The Declaration is kept in highest esteem. It is regarded as a "yardstick for measuring regard or disregard for human rights" and referred to as a "common standard of achievement for all peoples and all nations". The Declaration is widely quoted, referred to in judicial decisions and invoked in the resolutions of the United Nations, its specialized agencies and other international and regional organizations. It has inspired various international conventions and national constitutions, including our own Constitution. It was followed by 2 covenants, namely, International Covenant on Civil and Political Rights 1966 and International Covenant on Economic, Social and Cultural Rights 1966. They established binding and enforceable human rights obligations. Numerous other human rights instruments have been drafted and enforced, the prominent amongst these, the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment 1984, the Convention on the Rights of the Child 1989 and the Convention on Elimination of All Forms of Discrimination Against Women 1979.

Ending Discrimination Against Women: This paper is focused on exploring provisions in international law and municipal law, relating to women protection and the role of judiciary in Pakistan in the women empowerment and preventing abuse and discrimination against them. The adoption of Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) was an important milestone in the long and arduous journey of enforcing the civil, social, political and economic right of women. The Convention encapsulated into one composite document, the international standards of civilized conduct and behaviour for protecting the rights and enhancing the status of women, so as to ensure their integration in the society, as equal partners in progress and development. The adoption of the Convention was indeed an acknowledgment, by the international community, of the dismal state of affairs concerning women status in the world, encompassing all civilizations, cultures ad societies; and its determination to put an end to the abuse and exploitation of women and the on-going injustices and discrimination against them. The Convention envisages coordinated efforts by the international community for addressing the factors and causes adversely affecting the status of women, and suggesting appropriate strategies and measures for reform.

Besides CEDAW, several other international instrument were enacted e.g. the Convention on the Political Rights of Women 1952, the Convention on the Nationality of Married Women 1957, the Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage 1962, together with conventions adopted by some UN agencies namely ILO, UNICEF and UNESCO, etc, enumerating the rights and entitlement of women to improve their civil,

social, economic and political status in the society. The CEDAW now culminates that process by enumerating, in one and fairly comprehensive document, all the essential human rights and freedoms of women and provides strategies and mechanisms of enforcement.

Art 1 of the CEDAW defines discrimination against women. This definition is both novel and unique: novel, because it departs from the earlier (traditional) definitions, given by the international instruments and municipal laws, using the familiar expression of “discrimination on the basis of sex”. The new definition is much clear in tone, specific in context and direct in form/manner, by using the phrase, “discrimination against women”. And it is unique, because it is fairly comprehensive in scope and extent, encompassing all acts and aspects of discriminations, including the intentional and unintentional acts and direct and indirect measures of public institutions/officials and private organizations/individuals. It also applies to the discriminatory act and practices in the domestic/family sphere.

Islamic Injunctions: It is alleged that some of the discriminatory provisions crept into the statutory book due to the prevailing misconceived religious notions and orthodox norms in the society. This is true because Islam is the most enlightened religion and cannot sanction gender discrimination. Among the religious movements, Islam devotes a considerable part of its philosophy, teaching and practices to female emancipation and the concept of equality between men and women. The Quran states in unequivocal words that women shall have rights similar to the rights against them, according to what is equitable (II:228). It

further states that there shall be no distinction, among men and women, in the area of moral and spiritual rights and obligations (XXXIII:35) Thus, Islam accords to women equality with men in civil, political, social and economic rights. However, as in other societies, the conservative elements interpret the religious injunctions retrogressively, thus creating avoidable controversies/problems. The need for strengthening liberal education, including religious instructions, is therefore manifest.

The protection of human rights is strongly asserted in the Holy Quran. There are numerous categorical verses to this effect. It is incumbent upon the State to observe and protect the human rights of all and especially of those who are weak and vulnerable. Says Verse 75 of Sura Al-Nisa:

هـ - وَمَا لَكُمْ لَا تُقَاتِلُونَ فِي سَبِيلِ اللَّهِ
وَالْمُسْتَضْعَفِينَ مِنَ الرِّجَالِ وَالنِّسَاءِ
وَالْوِلْدَانِ الَّذِينَ يَقُولُونَ رَبَّنَا أَخْرِجْنَا مِنْ
هَذِهِ الْقَرْيَةِ الظَّالِمِ أَهْلُهَا
وَاجْعَلْ لَنَا مِنْ لَدُنْكَ وَلِيًّا
وَاجْعَلْ لَنَا مِنْ لَدُنْكَ نَصِيرًا ۝

And why should ye not fight in the cause of Allah and of those who, being weak, are ill-treated (and oppressed)? Men, women, and children whose cry is: Our Lord! Rescue us from this town, whose people are oppressors; and raise for us from Thee one who will protect; and raise for us from Thee one who will help!

The sermon of the Holy Prophet at the Farewell Pilgrimage, furnished concrete foundation for the protection of human rights including the right to life, honour, protection of property, equality, prohibition of slavery, economic exploitation and discrimination on the basis of race, religion, caste or colour.

Constitutional Guarantees: The non-discrimination principle, envisaged by the CEDAW, is generally in accord with similar principles, enshrined in our country's Constitution. The Constitution contains several provisions, which speak of equal rights and equal treatment of all citizens/persons, without any distinction on the basis of sex. Such provisions are contained in the Preamble (now a substantive part of the Constitution), the Chapter on Fundamental Rights and the Chapter on Principles of Policy.

In the Preamble, the State is obliged to ensure the full observance of the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam; and to guarantee to all citizens, fundamental rights, including the equality of status, of opportunity and before law. Art 3 of the Constitution states that the State must eliminate all forms of exploitation, which certainly includes the elimination of abuse/exploitation of women. Art 4 provides for the right of individuals to enjoy the protection of law and to be treated in accordance with law. This provision, as per superior courts' observations, is the equivalent of the doctrine of "rule of law". The principles of non-discrimination on the basis of sex finds special mention in Articles 25, 26 and 27 of the Constitution. Art 25 provides for equality of law and equal protection of law. Art 26 and 27 provide for equal access to public places and appointment in services.

The Constitution contains specific provisions for protecting women against abuse and exploitation. Article 37 (e) obliges the State to make provisions for securing just and humane conditions of work, ensuring that women are not employed in vocations unsuited to their sex. It further provides for maternity benefits to employed women. Art 35 commands the State to protect the marriage, the family, the mother and the child. Art 34 directs the State to take appropriate measures so as to enable women to participate in all spheres of national life. Besides the protective provisions, the Constitution also allows the State [Art 25 (3) & 26(2)] to take positive measures, by way of affirmative action, for enhancing the status of women. Art 32 provides for the representation of women in the local Government institution. Art 51 and 106 provide for the reservation of seats for women in the legislature.

Poor Implementation: Having enumerated, somewhat exhaustively, the constitutional provisions, which provide for improving the status of women in the society, it would not be fair to give the impression that all legislative measures and policy guidelines are fully and effectively implemented. Unfortunately, this is not the case. There are provisions on the statute book, which are patently discriminatory. There are problems of implementation of laws that are beneficial to women. The non-enforcement of law of inheritance is a case in point. The socio-cultural norms in the society continue to operate against women rights/interests. Lapses occur in full enforcement of laws/policies due to inadequacy of resources. Such shortcomings are required to be addressed and

remedial measures put in place to ensure the full implementation of rights and entitlement of women.

Role of Judiciary: Experience shows that governments are often negligent or indifferent in discharging their obligations under the law. As such, the Constitution mandates the judiciary to safeguard, protect and enforce the fundamental and other legal rights of citizens. The Preamble to the Constitution and Article 175 thereof, provide for independence of the judiciary and its separation from the executive. The issues of judicial independence and its separation from the executive, are to an extent settled in the judgments of the Supreme Court in the cases, Government of Sindh v Sharaf Faridi (PLD 1994 SC 105), Al-Jehad Trust v Federation of Pakistan (PLD 1996 SC 324) and Malik Asad Ali v Federation of Pakistan (PLD 1998 SC 33).

Similarly, while interpreting the Constitution, the Supreme Court observed that access to justice is a fundamental right of the citizens of Pakistan. This was emphatically laid down by the Court in successive judgments viz Ms Benazir Bhutto v Federation (PLD 1988 SC 416) and Government of Baluchistan v Azizullah Memon (PLD 1993 SC 341). Accordingly, the State is mandated to provide effective avenues for access to justice, through various executive and judicial fora.

Right, in legal parlance means and implies what is right, correct, just or equitable. It means a claim or interest in accordance with the law and justice, hence it is immaterial as to whether it is referred to as human right or fundamental right or legal right. Its enforcement is the responsibility of the court which has jurisdiction

in the matter. It could be the supreme court, high court or special court or subordinate court.

Needless to say, the enforcement of fundamental rights has close nexus with independency of judiciary. Independence of judiciary is linked with the ability and capacity of courts to perform their stipulated functions namely to interpret the Constitution and the law, decide cases, settle disputes and redress public grievances. Indeed, only an independent judiciary, enjoying complete administrative, decisional and financial independence and totally separated from the executive, can effectively perform this function. To attain this goal, the Constitution prescribes a whole set of safeguards and guarantees so that the judiciary in its institutional capacity and judges in their individual capacity, are protected against pressure or influence from outside. To ensure such independence, the Constitution prescribes the qualifications for and mode of appointment of judges, security of tenure, service conditions, salary and other privileges, together with grounds and mode of removal of judges of Supreme Court and High Courts. Such safeguards are duly extended, through law and rules, to district judiciary, performing functions under the administrative control of the high courts.

The judiciary is an institution of highest value in any, indeed, every society. Dispensation of justice is a function exclusively assigned to the judicial organ of the State. Conceptually, and as organized, the judiciary is one, united, interconnected and well integrated institution. The hierarchy among courts as well as individual judges is for functional purposes. Otherwise, the objects and

goals of courts are common. Therefore, the hierarchy in courts or difference in grade or rank of judges, should in no way deviate from the established principle of functioning independently to decide cases and dispense justice, freely, fairly and impartially to all manner of people and all segments of society.

District Judiciary: The district judiciary is a crucial organ of the judicial system. Forming the lower tier of judicial hierarchy, it is the point of citizens' initial interaction with the system of administration of justice. Bulk of litigation is conducted at this level. In actual fact, a very small number of litigants directly knock at the door of the superior courts. As per judicial data of all courts, only 10% cases are in the superior courts i.e. Supreme Court and High Courts, whereas 90% litigation is pending in the subordinate courts. This data shows the importance and significance of district judiciary in terms of its interaction with the general public and the volume of cases being dealt with by such courts.

The court, whether superior or inferior, is the court of law, established under and has to decide in accordance with the law. Its jurisdiction and powers are prescribed by the law. To that extent, there is no difference or distinction between a superior or inferior court. Besides, the Constitution and the law apply equally and evenly to all citizens. Laws have a function to serve: they are for the betterment of society and benefits of people. Therefore, it is incumbent upon all the courts, superior, intermediate or inferior, to ensure that the benefits of law reach the common man. In this regard, the district courts play an important role in the enforcement of constitutional safeguards, which are duly incorporated in statutes, both substantive and procedural. The Cr. PC, CPC, law of evidence, to

name a few, are procedural codes, which enforce the citizen's fundamental and legal rights. Following an amendment to Section 491 of the Cr.PC, the senior District judiciary now also partakes in issuing the writ of habeas corpus.

The District judiciary must ensure compliance with the legal and constitutional safeguards namely rule of law, fair trial, due process, equality before law and equal protection of law and prohibition of torture for extracting confession or evidence. It has an obligation to prevent the acts of brazen violation of human rights including incidents of extra-judicial killing, death in custody and arbitrary arrest or detention. It must protect the rights and interests of weak and vulnerable sections of society, in particular, women, children, prisoners, minorities and other disadvantaged groups. The courts must attempt to minimize delay and control the cost of litigation. This is possible through strict adherence to law and procedure. The judge should through his ability and better performance be in effective control of court proceedings. This will surely expedite trial proceedings.

Violence Against Women: The district judiciary, in particular, Judicial Magistrates and Sessions Judges operate as trial courts in criminal cases. They are the general courts, which decide all criminal matters, be it listed in the Pakistan Penal Code 1860 (PPC) or any other special law. As such, these courts deal with cases of violence against women or offences related to women. Such offences are mostly defined in the PPC. The punishment prescribed for murder is death as Qisas or imprisonment for life as Tazir or imprisonment for upto 25 years, where the punishment of Qisas is inapplicable. However, in the year 2005, an exception was made by

amending the law to the effect that the lesser punishment of imprisonment upto 25 years will not be applicable to an offence committed in the name or on the pretext of honour; in such an eventuality, the punishment shall remain death or imprisonment for life (S 302). Similarly, through another amendment, it was clarified that the Wali/heir of the victim (who can waive or compound Qisas) shall not include an accuse/convict involved in murder, if committed in the name or on the pretext of honour (S 305). However, whereas the punishment of Qisas can be waived or compounded (through badal-i-sulh) at the behest of Wali/heir, no female may be given in marriage or otherwise in badal-i-sulh (S 310). Similar safeguards are provided in the cases of hurt to prevent the abuse of the law in the name or on the pretext of honour (S 338-E). Though yet another amendment in 2005, the act of giving a female in marriage as badal-i-sulh is prohibited, punishable with imprisonment for upto 10 years, with minimum of not less than 3 years (S 310-A)

Through certain recent amendments, protection has been accorded to women. It includes the offence of insulting the modesty of a woman or causing sexual harassment, as defined in Section 509 of the PPC, for which, the penalty of 3 years imprisonment and fine for upto Rs. 500,000/- is prescribed. Further, through a special enactment viz The Protection Against Harassment of Women at the Workplace Act 2010, sexual harassment at the workplace is prohibited. Departmental proceedings are

conducted by 3 member Inquiry Committee, which can award any of the minor or major penalties leading to dismissal from service. Appeal against its orders lies before the Ombudsman. Moreover, through an amendment in 2002 to the Family Court Act 1964, the Family Judge is conferred upon the power of the Magistrate of the First Class for the trial of offences of hurt, wrongful restraint/confinement, assault, criminal force and insulting the modesty of women, involving spouses. This was done with a view to provide a more congenial environment to the couple to attempt to resolve their differences including settling the minor (compoundable) offences through conciliation or otherwise.

Besides criminal law, laws exist which confer statutory rights to women against any injustice or discrimination. Such rights/safeguards are available under the Muslim Family Laws Ordinance 1961, requiring the registration of marriage, acknowledging the right of wife to delegated divorce, prohibition of contracting second marriage by husband without permission, etc. The Family Court Act 1964 provides special procedure for expeditious disposal of family disputes eg dissolution of marriage, recovery of dower/dowry, maintenance allowance, custody of children, guardianship, etc. Similarly, the Child Marriage Restraint Act 1929 prohibits the solemnization of marriage between minors and prescribes punishment for parties and others who facilitate the solemnization of such marriage. The recently enacted Sindh Child Marriage Restraint Act 2013,

is a welcome step, which prescribes a uniform age of majority i.e. 18 years for marriage and prohibits solemnization of child marriage by either of the party or by parents or guardian/facilitator and prescribes punishment upto 3 years imprisonment as well as fine. Similarly, the Dissolution of Muslim Marriage Act 1959 enables the wife to seek the dissolution of marriage on specified grounds viz husband being missing or sentenced to imprisonment or insane or suffering from serious disease or ill-treatment of wife or non payment of maintenance, etc.

An old and most beneficial provision for women has been the Muslim Personal Law (Shariat) Application Act 1962, which provides for the payment of inheritance share to women as heir to the property/assets of their ancestors/relatives. Through an amendment to the PPC, depriving any women of her inheritance through deceitful/illegal means is declared an offence, punishable with imprisonment for upto 10 years as well as fine for up to 1 million rupees (S 498-A). Similarly, forced marriages through coercion or any other manner whatsoever is also made an offence punishable with imprisonment for upto 7 years and fine for upto five hundred thousand rupees (S 498-B). In the same way, the practice of compelling or facilitating the marriage of women with Holy Quran is also prohibited which is punishable with imprisonment for upto 7 years and fine of five hundred thousand rupees (S 498-C).

The Way Forward: The following reformative measures are suggested:

1. The movement for expanding the scope of human rights/fundamental rights and effective implementation/operationalisation thereof must be carried forward by human rights activists/organizations. Of the 2 theories of application of international law in the domestic sphere viz monism and dualism, Pakistan follows the theory of dualism, meaning, international law has to be incorporated in the municipal sphere through a legislative enactment. The superior courts, in particular, Supreme Court of Pakistan have, through liberal interpretation, applied the norms/principles of international law through harmonious construction. The Court not only followed the international conventions, ratified by the Government of Pakistan but also UN Declarations, otherwise not binding on the State (*Shehla Zia v WAPDA*, PLD 1994 SC 693). The courts repeatedly observed that as member of the comity of nation, Pakistan must honour its international obligations. In the case of *Nasrullah Khan Henjra v Government of Pakistan* (PLD 1994 SC 23), the Supreme Court had occasion to interpret a provision in the country's Extradition Act 1972, in the light of relevant fundamental right to freedom of movement. The Court rejected the view that in the light of such fundamental rights, a citizen cannot be deported or extradited to another country to face trial. In reaching its conclusion, the Court relied upon another provision of the Constitution which expressed the aspirations of the people to create an ideal state which should play an effective role in the international affairs and occupy an "honoured place among the nations of the world". The Court expressed the view that the nation cannot attain such an honoured and coveted place among the nations of the world if it becomes a safe heaven for outlaws and criminals.

The Court, therefore, upheld the provision of the Extradition Act and allowed the deportation of the alleged offender, as required under the bilateral extradition treaty. In the same way, in the case of *Wajid Shamus-ul-Hassan v Federation of Pakistan* (PLD 1997 Lahore 617), the High Court found support in the Universal Declaration of Human Rights 1948 and International Covenant on Civil and Political Rights 1966 (not yet ratified by the Government) for striking down a statutory provision i.e. Section 2 of the Exit from Pakistan (Control) Ordinance 1981. The Court observed that the mere non-ratification of the Covenant would not undermine the importance of internationally recognized valuable rights specified therein.

2. Legislation pertaining to women, in particular, laws which enhance the status of women needs to be implemented. Art. 25 provides for affirmative action by making special provisions for the protection of women and children. On this ground, the Supreme Court in the case of *Shirin Munir v Government of Punjab* (PLD 1990 SC 295) held that admission quota for girls in medical college, in addition to seats on merit, is permissible, it being an affirmative measures under the Constitution. In the case of *Inayat Bibi v Ishaq Nazirullah* (PLD 1992 SC 385), the Supreme Court ruled that contrary to the applicable customary law, Christian women could inherit property in the presence of male heirs. In reaching this inclusion, the Court relied on the principle of justice, fair play and good conscience. And in the case of *Ghluam Ali v Mst. Ghulam Sarwar Naqvi* (PLD 1990 SC 1), the Supreme Court rejected the legal claim of “adverse possession”

by the brothers and observed that such a claim cannot prevent sister from claiming her share in ancestral property. In this regard, it is proposed:

- i It be made obligatory on the Revenue Authorities that in the event of death of a person, they should carry out necessary mutation in the Record of Rights and transfer the shares to each legal heir, male or female. This will entail a consequential amendment in the Land Revenue Act 1962.
 - ii In the same way, the Excise and Taxation Department, which keeps record of property, may also be obligated to change such record, in the event of death, thereby allotting to every heir his or her share in the property.
 - iii Devolution of inheritance be made compulsorily registerable under Section 17 of the Registration Act 1908 and the registration of title subject to payment of reasonable stamp duty.
 - iv The civil courts be empowered to act suo-moto or on the application of an aggrieved party by taking cognizance of a dispute in inheritance. And while deciding the issue, the court may utilize the service of an arbitrator or mediator or conciliator to reach an amicable settlement of the dispute. In case no amicable settlement is reached, the court may proceed to decide the dispute within a short period, say 3 months.
3. As already prescribed in the National Judicial Policy 2009, the cases of women/children are prioritized for early disposal. The trial/appellate courts should

therefore, take up their civil/criminal cases on priority basis and render judgments expeditiously to redress their grievances and grant them relief.

4. The judiciary must continue to reform and modernize itself for the effective discharge of its role/functions and so as to protect the rights/liberties of citizens. The enjoyment of fundamental rights by citizens through an affective and efficient judicial system would have a positive impact on maintenance of peace in society and improved law and order situation in the country. This would spur trade, commerce and economic development. International/national DFIs (Development Financial Institutions), multinationals and local entrepreneurs/investors, before committing investment, definitely enquire about and take into consideration the availability of a reformed legal system and efficient system of judicial administration in the country. A country with chequered history of constitutional deviations, repeated interruptions in its democratic system and blatant disregard for law by high and mighty, has to pay special attention to the need for creating a viable and sustainable legal system and system of judicial administration. All eyes are therefore focused on the judiciary to fulfill its legal and constitutional role and sustain the confidence of its citizens and foreign or local investors.

5. Developed and advanced nations have progressed in various spheres of life, including arts and science, by strict adherence to the supremacy of law and a system of free, fair and impartial dispensation of justice. Rule of law and total submission to law are the hallmark of successful societies. Respect for and observance of human rights is a sine qua non for good governance and economic and social development. Good governance and socio-economic

progress are contingent upon adherence to the letter and spirit of the constitution. The present-day world is characterized by phenomenal changes and developments. Such changes and developments indeed warrant proper preparations and appropriate responses to meet the challenges of time and address the emerging realities of society. Like all other professions, the disciplines of law and administration of justice are undergoing change and reform. Law is increasingly being used as an instrument of change to facilitate in the orderly consolidation of gains and open new avenues of development. The judiciary quite naturally is expected to play its due role in laying sound foundation for good governance, economic development and social progress.