

## **The province of Sindh as a case study on the prosecution service**

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Prosecutorial services are generally governed by sections 492 to 495 of the Code of Criminal Procedure (CrPC), dating back well over a century, with necessary amendments from time to time. In criminal jurisdiction, the prosecution service is also regulated by the Sindh Law Officers (Conditions of Service) Rules 1940 and the Rules for the Conduct of the Legal Affairs of the Government. These rules superseded the rules made earlier in 1923. The change was necessitated on the separation of the Province of Sindh from the Bombay Presidency in 1937. From time to time indispensable amendments have been introduced into these rules.

The two provisions of the Sindh Law Officers Rules pertaining to conduct of the Legal Affairs of the Government i.e. Rules 9 and 10, are important, and exhibit the independence of the prosecutor in the conduct of criminal proceedings. The former rule provides for discretionary power to be vested in the law officers in conducting cases. However, the latter section retains the power of the government to issue any orders or directions to the concerned law officer, who is bound to act on such an order or directions. Rule 10 overrides any other section of the rules, including Rule 9.

The prosecution service throughout had remained under the home department, and had been regulated by the police, from which the public prosecutors and deputy public prosecutors were drawn from the ranks of deputy superintendents of police and inspectors. Under no condition was any officer below the rank of sub-inspector authorized to act as a prosecutor in any case.

In 1985, for the first time the prosecution agency was transferred from the administrative control of the police department and placed under the law department. This exercise took place in two phases: Karachi Division was placed under the law department immediately, whereas the rest of the divisions came under the law department from 1 July 1986. The designations of prosecutors working as public prosecutors and deputy public prosecutors were changed to district attorneys and deputy district attorneys on the recommendation of the Sindh Civil Service Commission and were inducted into the Provincial Civil Service. Their terms and conditions were then to be governed accordingly by the Sindh Civil Servants Act 1973, and the rules framed there under.

On 2 April 1994, interestingly, the prosecution service was by another notification transferred back to the administrative control of the police, removing it from the solicitor's department in the law department. No cogent reason was given for the reversal of this policy. The district attorney and other designated law officers were transferred back to the Police Department at the same level as deputy superintendents of police, inspectors and sub inspectors.

Finally, on 4 September 2001 restructuring of the Police Department began, and with it work on a separate prosecution service also commenced. In 2002 the Police Order was promulgated which repealed the Police Act 1861. Prior to the coming into force of the Police Order 2002, the prosecution service was again taken out of the administrative control of the police department and placed under the provincial law department, by notification of 31 December 2001.

In 2006, exercising powers under section 492 of the CrPC, the provincial government placed the services of all district attorneys and other law officers, such as public prosecutors and deputy public prosecutors, to work as prosecutors in accordance with the Sindh Criminal Prosecution Service (Constitution, Functions and Powers) Ordinance 2006. The Rules governing the Appointment and Conditions of Service of the Prosecutors were also notified in 2006. This ordinance has been re-promulgated and kept on the statute book.

This ordinance can be termed as the first-ever positive turning point in the political development of the prosecution services in Pakistan.

The newly-introduced prosecution service is still in its nascent stage of stabilizing as an institution. However, to substantively qualify as an independent institution, the office will have to comply with

the international standards of professional responsibility and the essential duties and rights of prosecutors. The Independent Standards of Prosecution place the following responsibilities on prosecutors.

Prosecutors shall: at all times maintain the honour and dignity of their profession; always conduct themselves professionally, in accordance with the law and the rules and ethics of their profession; at all times exercise the highest standards of integrity and care; keep themselves well-informed and abreast of relevant legal developments; strive to be, and to be seen to be, consistent, independent and impartial; always protect an accused person's right to a fair trial, and in particular ensure that evidence favourable to the accused is disclosed in accordance with the law or the requirements of a fair trial; always serve and protect the public interest; respect, protect and uphold the universal concept of human dignity and human rights.

The status of the prosecution service in Sindh was described in the *DAWN* daily of 21 January 2008:

The fate of over 66,000 criminal cases pending in different courts across the province hangs in the balance since the Sindh Criminal Prosecution Service (SCPS) still awaits the appointment of the Sindh Prosecutor-General after the post was vacated when the first Prosecutor-General, Rana Shamim, was appointed as a Sindh High Court judge in the post-Nov 3, 2007, situation. Appointments to other essential posts including additional prosecutors-general, deputy prosecutors-general and assistant prosecutors-general, are also awaited.

The SCPS was constituted by the Sindh Governor on May 13, 2007, with the promulgation of the Sindh Criminal Prosecution Services (constitution, functions and powers) Ordinance 2007. The department was to supervise police and other divisions' investigations into criminal cases in order to ensure the independent prosecution of cases where justice was doubted, the speedy disposal of cases that had been pending for many years and independent and efficient service for the prosecution of criminal cases. In this manner, it was thought, the justice system in the province could be improved.

Mr. Shamim was appointed as the first prosecutor-general but was later elevated as a Sindh High Court judge after the imposition of a state of emergency on Nov 3, 2007, since when the post has been lying vacant. Meanwhile, no inductions were ever made for the posts of additional prosecutors-general, deputy prosecutors-general and assistant prosecutors-general.

Ishaq Lashari, the SCPS secretary, told Dawn that the induction to these posts, as well as to the posts of district prosecutor, were in progress. "A commission, which is headed by the provincial chief secretary, will appoint the Sindh prosecutor-general and has called applicants in this regard," he said. "Meanwhile, a requisition has been sent to the Public Service Commission for the appointment of nine additional, 27 deputies and nine assistant prosecutors-general to deal with criminal cases in the Sindh High Court, the Federal Shariat Court and the Supreme Court of Pakistan."

According to Mr. Lashari, 27 district public prosecutors would be appointed to prosecute cases before the province's district and session's courts, while 93 deputy district prosecutors would be appointed for assistant and additional session's courts. As many as 214 assistant district prosecutors would be appointed for the courts of the judicial magistrates.

He told Dawn that 63 deputy district prosecutors had already been appointed while inductions for the remaining deputy district prosecutors, assistant district prosecutors and district public prosecutors were in progress. Mr. Lashari added that district public prosecutors would be appointed for prosecution in the 18 special courts in the province, including anti-terrorism courts, anti-corruption courts and anti-drugs/narcotics courts.

The SCPS secretary pointed out that the country's conviction rate was very low, 11.66 per cent in Pakistan and 2 to 5 per cent in Sindh, because of inefficient investigations conducted by incompetent policemen and unskilled prosecutors. The conviction rate in other countries was

much higher: 37.4 per cent in India, 39 per cent in South Africa, 90 per cent in the UK crown courts and 98 per cent in the lower courts, 85 per cent in Australia, 85 per cent in US federal courts and 87 per cent in state courts, and 99.9 per cent in Japan.

Saying that the SCPS was currently lacking personnel in key posts, Mr. Lashari predicted that its performance would take off once the process of making appointments was completed.

The office of the Criminal Prosecution Service Department is housed in a portion of the old KDA building, Sindh Secretariat No.3, but the space available does not fulfill the requirements. According to the additional secretary of the SCPS, Iqbal Zaidi, offices have been acquired in the old State Bank Building, Sindh Secretariat No.6, and the renovation work being carried out there will soon be completed.

According to Dawn's sources, it is mandatory for the police and other investigation wings to send the Sindh prosecutor-general a copy of an FIR within 48 hours of it being registered. The SCPS is authorized to recommend strict departmental action against officials found responsible for registering defective or fabricated cases, and the department may also withdraw such cases.

The most recent figure available regarding jail inmates in the Province of Sindh as of 21 October 2008 (courtesy of the Legal Aid Office) are that the total number of detained is 18,162. Out of these, male convicts are 2266 and under-trial male prisoners are 15,634. There are 43 female convicts, and 133 under-trial female prisoners. There are 38 babies suffering incarceration along with their mothers. The jail population also includes 228 condemned prisoners, including one female; 32 male and one female detenues, and three male civil prisoners.

The problem of people snatched by the criminal justice system (victims as well as accused) does not end with investigations; another ordeal in waiting is the prosecutorial phase in the courts. The interconnections between officials further aggravate injustice. Due to elitist political growth, more and more reliance was placed on the police in the past so as to consolidate power. This further corrupted the police and in the process destroyed the very foundations of investigation and prosecution. The police reputation has declined to a point where even well connected and respected citizens are wary of dealings with them. They perceive police not as an instrument of the rule of law, but as a corrupt, militaristic, insensitive and a highly politicized force, operating mainly to guard the interests of the powerful.

An Asian Development Bank soft loan to Pakistan is de facto primarily responsible for the Access to Justice Program, in which the state is engaged "in improving justice delivery, strengthening public oversight over the police, and establishing specialized and independent prosecution services? In this we see the Police Act 1861 being replaced by the Police Order 2002 and new laws to constitute and provide for the functions of independent prosecution services in Pakistan, thus, divorcing prosecution from the investigative arm of the police. Arguably, more valid grounds can be cited for the creation of an independent prosecution service in Pakistan, being article 175(3) of the constitution, which mandates that "the judiciary shall be separated progressively from the executive within three years from the commencing day? Thereafter, there was the appeal decided in Govt. of Sindh v. Sharaf Faridi (PLD 1994 SC 105), and finally, article 37(i), which notes that: "The state shall decentralize government administration so as to facilitate expeditious disposal of its business to meet the convenience and requirements of the public.?"lt;/P>

At this crucial juncture with the introduction of a comprehensively new and progressive prosecution system, what needs to be underscored is the difference in lawmaking and the law's implementation. Legislation per se does not solve problems; it is implementation which is the litmus test of good government, for it is in the implementation that the purpose and the objective of the legislation on the one hand, and transparency and accountability of the administration in the law's application on the other come under scrutiny. How far the new prosecutorial services are able to balance the rights of the accused vis-?vis the victim will determine the elements of good government in the scheme's application.

Article 37(d) of the Pakistani constitution requires the state to ensure inexpensive and expeditious

justice. The term "access to justice" in relation to crimes is generally correlated only to rights of the accused. But looking at the extremely low conviction rate in Pakistan, which hovers around 10 per cent (and in Sindh is less than five per cent), one is compelled to ask whether complainants and victims have "access to justice" is the judicial system fair to those against whom crimes are committed?

If in a specified period in any given area a thousand rapes are committed, it can be safely presumed that a very large number of them are not even reported to the police; perhaps a hundred will reach the formal judicial system, and with the conviction rate at less than five per cent, the total number of perpetrators found guilty of their crimes may be no more than five in that thousand. In reality, it has been reported that during the last four to five years not a single gang rape case has ended in conviction in Sindh. Similarly, no more than five per cent of victims and complainants in cases of murder, armed robbery and other heinous crimes that take place all over the province get justice on account of the ridiculously low rate of conviction. There is something radically wrong with our judicial system that is responsible for this pathetic state of affairs! And while the judiciary has to take some blame for this failure, it is not the only player in the system. Apart from the judiciary, the other main components are the police, (as the only investigation agency), the prosecution (which until recently was the police), and the prisons. Unless all these components work smoothly the results will always be disappointing.

It may be remarked that generally it is the poor, children, women, the have-nots, and vulnerable sections of our countries that don't get justice. Justice may seem to be open to all, but only in the same way as Harrods or Selfridges is "open to all" the doors are poised to welcome only those with the requisite financial stature. The black hole of such "unmet legal need" exists not just with reference to a lack of access to formal courts, but embraces interaction with police, the prosecutors and the prison authorities. Lack of judicial access is compounded by profuse ignorance of legal rights. And scarce judicial resources are concentrated in urban areas to the alienation of the masses in rural sectors.

Access to justice needs to be given the same priority that is given to nuclear power development or the military budget in India and Pakistan. As noted earlier, the Asian Development Bank provided Pakistan with a loan of USD 350 million under an access to justice development initiative. As a result of this scheme, there has been considerable additional work on court buildings, furnishings and library stocks, but there has been no change in the quantity and quality of justice being dispensed. The prosecution has not been a beneficiary, nor have personnel numbers. The United Kingdom with a population of around 60 million has some 30,000 lay magistrates alone, whereas 165 million Pakistanis are served by barely 900 magistrates. The magistrates handle and look after around 75 per cent of the total criminal cases that enter the formal criminal justice system and even this small number is not supported by an acceptable prosecution service. Furthermore, the pool of candidates from whom the magistrates and judges emerge is also shallow. In Pakistan, legal education remains in the doldrums and the questionable quality of law graduates is passed onto the bench.

Contrary to popular belief, formal courts are not the ones primarily responsible for the lack of access to criminal justice. The real cronies are the seemingly behind-the-scene players with whom an aggrieved person (including the complainant or the victim) will first interact. After all, the dispensers of justice depend on the facilities of justice. In this context, it is the police (as the investigation as well as the prosecution agency) that work as the main filter mechanism between individuals (i.e. complainant/victim and the accused). The more cumbersome or troubling it is to file First Information Reports and the more police harassment and bribery that exists, the more cynicism is associated with the processes to follow.

Article 2 of the International Covenant for Civil and Political Rights requires the prosecution service in any criminal jurisdiction to be viewed and assessed through the kaleidoscope of human rights. Whether the prosecution service fulfils the requirements of article 2 depends on its capacity to protect the fundamental rights of the main parties, i.e. the complainant/victim, the accused, and also the witnesses. The Sindh enactment of 2006 creating the Sindh Criminal Prosecution Service should be welcomed as a major step in the right direction. The new law inter alia visualizes the creation of

an independent prosecution service that will be free from executive control and capable of protecting the rights of both the complainant/victim and the accused. As observed earlier, only time will tell whether or not this law will be implemented, but obviously vested lobbies and obscurantist forces will employ all their powers and tactics to make it extremely difficult to enforce.

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*Footnote: Extract of a paper prepared for the Fourth Asian Human Rights Consultation on the Asian Charter of Rule of Law, on the theme of prosecution systems in Asia, held in Hong Kong from 17 to 21 November 2008.*

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