Blind justice for all?

Parallel judicial systems in Pakistan:
implications and consequences for human rights

For Shirkat Gah

Shaheen Sardar Ali and Kamran Arif

Women living under muslim laws
النساء في ظل التشريعات الإسلامية
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# Blind justice for all?

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Parallel judicial systems in Pakistan: implications and consequences for human rights

Shaheen Sardar Ali and Kamran Arif

Introduction

The purpose of this paper is to discuss the concept of parallel judicial systems, their emergence in Pakistan, and to examine their implications and consequences for human rights. During the course of this discussion, it is proposed to take up each of the parallel judicial systems operating in Pakistan and discuss in some detail their legislative history and main provisions and whether or not they violate in any way the guarantee of equality before law and equal protection of laws contained in article 25(1) of the Constitution of Pakistan.

The concept of equality before law

The concept of equality i.e., that all persons are equal before law does not lend itself to a simple interpretation. It has been expressed and interpreted differently by different societies and judicial forums. The constitution of Pakistan guarantees it as a fundamental right stating that:

"Article 25(1), All citizens are equal before law and are entitled to equal protection of law." 1

Article 25(1) combines two ideals of equality of different origin. "Equality before law"2 is an expression of the English common law whereas "equal protection of laws"3 can be traced to the 14th amendment of the U.S. constitution.

Equality before law was an essential component of Dicey's famous exposition of "rule of law", which he explained as "the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts"4 i.e. one set of courts administering one set of laws to all the people.

Equality before law is a somewhat negative concept implying the absence of any special privilege in favour of any individual and equal subjection of all classes to the ordinary law. Equal protection of laws on the other hand means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in like circumstances. Thus, compared to "equality before law", "equal protection of law" is a more positive concept implying equality of

2 One of the features of Dicey's exposition of law. Also appears in the Irish Constitution.
3 Last clause, 14th Amendment to the American Constitution.
treatment in equal circumstances. However, both concepts aim at protection against arbitrary discrimination.

Parallel judicial systems

By parallel judicial systems we mean forums functioning parallel to the ordinary courts. Stated simply it is a forum or a complete hierarchy of forums, established through a special law under which particular persons or classes of persons are tried or have their civil disputes adjudged under special laws to the exclusion of the ordinary courts of the country. The question then arises: does a dual system of justice invariably contradict the concept of equality? Or is there any valid justification for the resultant hierarchies of citizens, laws, and judicial forums thus created?

It has been argued that every parallel judicial system does not violate the guarantees of equality. Such discrimination (or application of Special laws or forums etc.) is permissible if it is based on a reasonable classification and relates to the objective to be achieved. In other words, a dual system of justice may actually be required in reverse discrimination and affirmative action measures taken in the interest of the less advantaged sections of society. Thus a parallel judicial system may be justifiable on the ground that it aims at facilitating the administration of justice.

Emergence of parallel judicial systems

Parallel judicial systems have been prevalent in many countries including England, the U.S. and Pakistan. Despite Dicey’s vigorous exposition of one set of courts applying one set of laws, England has had two distinct parallel judicial systems coexisting for more than five hundred years i.e., the courts of common law and courts of equity.

In England, from the period of the Norman Conquest to the 13th century, common law became widely accepted. In 1258 the doctrine of precedent and the provisions of Oxford restrained the Chancellor from issuing new types of writs on his own initiative, and fettered the common law courts. Therefore, as a result of some unforeseen circumstances, common law either seemed to have no remedy, or one that produced substantial unfairness. In such cases a tradition evolved in which

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6 Ibid at p.6.
the King in Council was petitioned to exercise his extraordinary judicial powers. The King started referring such petitions to the Chancellor; this later led to the development of the Court of Chancery as an institution independent of the King. The King decided these petitions according to his own sense of justice, using equity to break the rigours of the common law. The two systems coexisted for so long because their jurisdiction did not normally overlap as equity usually applied for the omission of common law. But this did not usually benefit the litigants as they had to run from court to court to obtain relief. Finally, the Judicature Acts of 1873 and 1875 amalgamated the two systems and all courts started dispensing equity as well as common law.

In the U.S.A., too, parallel judicial systems exist, though in a different context. In addition to the State and Federal Courts, a tribal court system exists, with jurisdiction over American Indians. The Federal Law governing Indians is comprised of statutes, treaties and administrative and judicial rulings. For the most part of the 19th century, the government dealt separately with the various Indian tribes and the legal rights of each tribe were fixed by treaty. However, during the period between 1887 and 1933, there developed a tendency to impose upon all Indian tribes a uniform pattern of general laws and general regulations. The effect of this policy of ignoring the special rights conferred on individual tribes by treaty and statute and ignoring their political autonomy and cultural diversity caused tremendous and widespread resentment among the Indians. Therefore, pursuant to the Wheeler Howard (Indian Reorganisation) Act,1934, more than a hundred tribes in the U.S., adopted their own constitution for self-government. However, certain Acts of Congress still regulated some aspects of Indian tribal life such as commerce, interaction with non-Indians, ownership. Over the years some Indian tribes relinquished jurisdiction to State Courts. Others, such as the Indian tribes of Nevada decided to retrocede from this decision and set up their own court system in the early 70's. The basic intention was to revive tribal customary laws and to allow decisions to be made closer to home.

The ambit of operations of the parallel judicial systems in the U.S.A. appear to be very restricted and apply only where both parties are Indians. In reality therefore, the Federal legal system, in the garb of federal sovereignty, has narrowed the jurisdictional ambit of the Indian tribal judicial system.

In the U.S.A., parallel judicial systems evolved in an entirely different manner as compared to Britain. The imposition of a uniform judicial system on the American Indians, was tantamount to annihilation of their culture and value system and making it subservient to an alien set of rules and regulations. By only partially reviving the Indian legal system and conceding only some areas for adjudication the Federal government further marginalised the "natives" from mainstream American legal institutions.

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7 Ibid
8 Ibid.
In multi-cultural / ethnic societies, administration of justice demands a fine balance between
general and special laws and parallel judicial systems stepping in usually through special laws, tend
to upset this precarious balance.

Emergence and development of parallel judicial systems in Pakistan

On attaining independence in 1947, Pakistan inherited from British India a unified legal system and
a complete hierarchy of courts with defined and distinct jurisdiction at each level. However some
princely states had also acceded to Pakistan (for example Bahawalpur, Dir, Swat, Chitral etc.) and
these states had independent judicial systems administering their own laws. Added to this were
the tribal or Frontier Districts. They had never been made part of the mainstream of the British
Empire and were looked upon by the colonial powers as a source of perpetual potential threat to
the Imperial Government. Hence arose the need for special laws aimed at "the suppression of crime"\(^\text{11}\)
in these Frontier Districts. For this purpose the infamous Frontier Crimes Regulation 1901 (F.C.R.)
was promulgated.

After independence the Pakistan government chose
to retain the existing system along with the F.C.R
and thus emerged the first distinct parallel judicial
system in Pakistan.

After the 1953 anti-Qaidiani riots, Martial Law
was imposed on Lahore. Temporary military courts were then formed and became the first parallel
judicial system to be established outside the tribal and former princely states. Since then, military
courts have existed during each successive term of Martial Law in the country. These courts were
parallel to the ordinary criminal courts of the country and when, in 1985, martial law was lifted,
they were disbanded.

Parallel judicial systems in Pakistan - an overview

Presently there are a number of judicial systems in Pakistan which come within the purview of
"parallel judicial systems". Some of these systems are exclusively applicable to the tribal areas,
whereas others are applicable throughout the country. Incidentally, all of these systems have also
been incorporated into the constitution.

\(^{11}\) Preamble, Frontier Crimes Regulations (Regulation III of 1901).
Parallel judicial systems applicable to the entire country

i) These include the Federal Shariat Court\textsuperscript{12} and the Shariat Appellate Bench\textsuperscript{13} which had to (as its initial brief) determine whether or not existing legislation was in consonance with Islamic injunctions. Its jurisdictional ambit has, however, increased manifold over the years, threatening to overshadow the High Courts and Supreme Court of Pakistan.

ii) Article 2A,\textsuperscript{14} introduced through an amendment in the constitution has by some interpretations, also assumed the status of a parallel judicial forum capable of being used quite effectively by the judiciary to attribute to itself unlimited legislative powers.

iii) A parallel criminal court system (apart from Military Courts) had never existed in Pakistan. It was in 1987 that the Special Trials Ordinance (Ordinance 11 of 1987) was promulgated; this has served as the precursor of a whole series of laws establishing a parallel hierarchy of criminal courts in the country.

Parallel judicial systems applicable exclusively to the tribal areas

i) The F.C.R., operating as the only set of laws in the Federally Administered Tribal Areas of Pakistan. In addition to the F.C.R., (mentioned above) two other parallel judicial systems exist in the tribal areas of Pakistan.

ii) The first is the West Pakistan Ordinance 1 and II of 1968 applicable to some areas of the province of Balochistan.

iii) Similarly, the Provincially Administered Tribal Areas Civil Procedure (Special provisions) Regulation 1 of 1975 and the Provincially Administered Tribal Areas criminal Procedure (Special Provisions) Regulation 11 of 1975 are applicable to the Provincially Administered Tribal Areas (PATA) of the NWFP and establish a parallel hierarchy of Civil and Criminal jurisdiction alongside the ordinary court system.

With this brief overview, we can now take up in detail the foregoing judicial systems, their history, effects and implications for human rights.

\textsuperscript{12} Constituted under Art. 303 C of the Constitution of Pakistan.

\textsuperscript{13} Constituted under Art. 203 F of the Constitution of Pakistan.

\textsuperscript{14} Inserted in the Constitution under P.O. No.14 of 1985, Art. 2 and Sch. item 2 (w.e.f. March 2 1985).
Parallel judicial systems applicable throughout the country

The present constitution as originally enacted in 1973, did not provide for the establishment of any forum or system that could be termed as a parallel judicial system. Nor did the first seven amendments to the constitution bring about such a change, although some did curtail civil liberties. The incorporation of such systems into the constitution began during the Martial Law of 1977.

The constitution as it stands today, includes three distinct judicial systems that function alongside the ordinary judicial system i.e., the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court, the criminal law forums established under Article 212B of the constitution and a newly inserted Article 2-A. The interpretation of this article (2-A), may cause all the constitutional courts to exercise jurisdiction parallel to and at times overlapping each other and perhaps even to the legislature. But in order to fully comprehend the implications of these constitutional amendments, it is pertinent to discuss briefly the Martial Law of 1977 and the constitutional developments from then onwards.

When General Zia-ul-Haq imposed Martial Law in 1977 the phenomenon was not new to Pakistan. However in many respects, General Zia’s martial law was different from what the country had experienced before. Its legality was based neither on the abrogation of the constitution nor on any effective change establishing a new legal order. It was recognised by the Supreme Court in the Nusrat Bhutto case only as an extra-constitutional step required under the peculiar circumstances of the country at that point in time and subject to certain specified limits including only a limited license to amend the constitution. In the earlier days of Martial Law, this led to continuous confrontation between General Zia’s desire to perpetuate his rule and the efforts of the superior judiciary to keep him within the limits drawn in the Nusrat Bhutto case. With dubious use of his limited powers to amend the constitution, changing rules in the middle of the game, General Zia was victorious. In the process however, the entire constitutional and judicial system collapsed.

In Nusrat Bhutto’s case, the Supreme Court only conditionally legitimized General Zia’s Martial law by describing it as a ”constitutional deviation” justifiable on the principles of “state necessity” and for the ”welfare of the people.” Those relevant to the present discussion are:

1. That the constitution of 1973, although in abeyance, is still the supreme law of the land.

2. That the President and the Supreme Court are to function under the constitution.

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15 The Constitution of Pakistan (1956) was abrogated by General Ayub Khan when he declared Martial Law in the country in 1958, and General Yahya Khan meted out the same treatment to the 1962 constitution.

16 Begum Nusrat Bhutto vs. Chief of the Army Staff etc., PLD 1977 SC 657.
3. That the superior courts have the power of judicial review to examine the validity of any act or action of the Martial Law Administrator in the light of rules laid down in this judgment.

4. The Martial Law Administrator, however, was given limited power to legislate, including the power to amend the constitution, but only for advancing the purposes for which Martial Law was validated. It is relevant to mention here that the Supreme Court also cautioned the Martial Law Administrator against establishing parallel judicial forums (such as Military Courts) since the need for "Martial Law did not arise owing to the failure of the courts"\(^17\)

Needless to say, General Zia did not think it necessary to remain within these limits. Military Courts functioned throughout this period despite a few bold attempts\(^18\) by the Superior Courts to prevent abuse of human rights and fundamental freedoms. These efforts by the superior courts failed when, on October 16, 1979, the then Chief Martial Law Administrator amended the constitution (under Presidential Order 29 of 1979), inserting Article 212-A which provided for the establishment of Military Courts. This also took away the power of judicial review from the High Courts and abated pending proceedings. Nevertheless, the superior courts held\(^19\) that despite article 212-A judicial review of actions of Martial Law authorities is still vested in the superior judiciary.

In May 1980 Article 199 of the constitution dealing with original and writ jurisdiction was amended by Presidential Order No. 1 of 1980, adding clauses 3A, 3B, and 3C to it. This amendment resulted in completely ousting the power of review of superior courts so far as an act or action of the Martial Law authorities was concerned. But this order was challenged before the Balochistan High Court, which unanimously struck it down.\(^20\) While the appeal against this judgment was pending, the President proclaimed the Provisional Constitutional Order (P.C.O.) in 1981, providing for a new constitutional set up for the country. The P.C.O., was tailored to General Zia's needs and judges of the superior judiciary declining to take oath under this new set up were simply removed from office. Thus, with a single stroke, the General got rid of the dreaded "judicial review" along with the judges who could strike down the P.C.O. The judiciary had been dealt its final blow and henceforth it never interfered or questioned the powers of General Zia to legislate or amend the constitution in any manner.

\(^{17}\) Ibid.

\(^{18}\) For instance, Sattar Gul vs. Martial Law Administrator Zone B, NWFP. PLD 79 Pesh. 119 wherein the Peshawar High Court observed "If courts have not failed the country in discharging their duties, it is not understandable how the trial of a few cases by Military Courts is going to promote the welfare of the people." Also see Aizaz Nazir vs. Chairman Summary Military Courts. PLD 80 Kar. 444.

\(^{19}\) PLD 80 Kar. 444

\(^{20}\) Sulaiman & Others vs. President Special Military Court NLR 1980 Civil Quetta 873.
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The Federal Shariat Court and the Shariat Appellate Bench

The Federal Shariat Court (F.S.C.) and the Shariat Appellate Bench of the Supreme Court were incorporated into the constitution and to the detriment of other constitutional bodies, given enormous power in the domain of legislation.

The F.S.C., by the very nature of its functions is unique. Its creation was motivated, ostensibly by the urgent desire to determine whether or not a law was in conformity with injunctions of Islam (a function already entrusted to the Council of Islamic Ideology).\(^{21}\) The F.S.C. and its predecessor the Shariat Benches of the High Courts (and the Shariat Appellate Bench) had not been established through the mandate of the people. These forums were brought into the constitution by General Zia to counter the effect of the Supreme Court judgment in the Nusrat Bhutto case. In that judgment, the court had included General Zia’s acts and actions within the purview of judicial review.

With his Martial Law only conditionally recognised by the Supreme Court, and with no moral justification left for extending his rule, General Zia was badly in need of public support. Islam had been the cry of the 1977 elections, the General decided to raise it again! He embarked upon a process of "Islamisation" (the term "Islamisation" was coined during this period). The Council of Islamic

\(^{21}\) See articles 229-230 of the constitution of Pakistan.
Ideology (C.I.I.) was reactivated and commissioned to codify the Hudood Laws\textsuperscript{22} which were then promulgated in 1979. The General now needed judicial forums to enforce these laws. For this purpose, Chapter 3-A was added to the constitution under Presidential Order No. 3 whereby Shariat Benches were formed in the high courts, each consisting of three judges. A Shariat Appellate Bench was also constituted in the Supreme Court with an equal number of judges. The functions of these new forums was to decide on petitions, examining whether existing laws were in conformity with injunctions of the Holy Quran and Sunnah or not.

However since the Shariat benches formed part of the high courts, this did not fulfill the General's needs. Thus the Constitutional Amendment Order 1980 (P.O. No. 1 of 1980) was passed. Chapter 3-A of the constitution was replaced and instead of the Shariat Benches in the high courts, the F.S.C. was formed; however the Shariat Appellate Bench remained as it was.

In 1982,\textsuperscript{23} the F.S.C. was granted suo moto power to review laws -- a power unheard of in constitutional history. By the same order, the F.S.C. was also granted jurisdiction to call for and examine the record of any decided case by any criminal court under any law relating to Hudood. Thus the F.S.C. became the appellate forum for trial under Hudood laws whereas for grant of bail etc. the high courts still continue to exercise jurisdiction.

Many judicial systems are presently operating in Pakistan with adverse bearing on human rights. It has to be said, however that the one created by the F.S.C. and the Shariat Appellate Bench, is singular in that its implications reach out to each and every Pakistani. It is arguable whether even its architects were aware that a new Leviathan was being created, brandishing in one hand a supra - legislative sword and in the other, a supra -- judicial one under the shield of executive influence. How and by what justification, could the legislative, executive and judicial powers be combined in one body which is neither representative of the people nor autonomously constituted, is simply incomprehensible.

Courts have the sacred task of adjudicating upon the rights of citizens. Propriety demands that judicial organs dispensing justice between individuals or between the state and the individuals and bearing the responsibility (as in the case of F.S.C.) the delicate task of judicial review, must be completely independent. They should be free from all kinds of executive pressures if they are to function properly.

If terms of appointment is any indicator, then on the face of it, judges of the Federal Shariat Court are not free from such pressures. For instance, they (the judges), are appointed by the President who may also modify their term of appointment. He may, if he so chooses, assign to a judge any other office. In short, the Federal Shariat Court is the President's court as is borne out by the short history.

\textsuperscript{22} \ G.Mohammad, Islamisation of laws in Pakistan, PLD 1987 Journal 149 at pp. 261-262.

\textsuperscript{23} \ Under Presidential Order No. 5 of 1982.
of this forum. It was reconstituted when certain judges came up with rulings that were not exactly to the President's liking.

The Federal Shariat Court and the Shariat Appellate Bench also consists of ulama who may or may not be well versed in law or the intricacies involved therein. In these circumstances, what quality of justice can one expect from these courts? What is also extremely worrying from the point of view of women's rights, is the deeply misogynistic trends of most of our ulama. (We can almost be sure that the ones sympathetic to women's rights will never find themselves appointed to such forums anyway!). Therefore, in so far as interpretation and application of women's rights is concerned, the parallel judicial hierarchy of the F.S.C. and the Shariat Appellate Bench will prove a major setback for women.

Forums such as the F.S.C. and the Shariat Appellate Bench were forced into the constitution as part of a package that gave legal cover to martial law. No detailed discussion regarding these amendments and additions were ever undertaken. Hence the ensuing confusion within the constitution wherein the functions of the C.I.I., have been completely usurped by the F.S.C., making the Islamic provisions of the constitution redundant. Article 227(2) of the constitution clearly stands contradicted as it states that review of laws to determine their Islamic character can only be made by the C.I.I. and in the manner prescribed in part IX of the constitution.

This brings us to a very crucial issue, that of the deadlock between supra -- legislative -- cum -- judicial powers assumed by the F.S.C. and the Shariat Appellate Bench on the one hand and the constitution on the other. Which institution/system/law is supreme? If it is the constitution, then what about Chapter 3-A of the constitution which creates the F.S.C., and also contradicts many of its provisions? If, on the other hand, the F.S.C. is superior, then what of the constitution which gave it legal cover?

In either case for the people of Pakistan it is a no -- win situation. Martin Lau puts it rather succinctly thus:

"The immense power of the court led to a curious situation: the court cannot examine the constitution on its religious correctness but it can demand the change of virtually all other legal provisions. The Federal Shariat Court can in practical terms turn the legal system upside down --
protected by the constitution but not by its Grund norm amounts to a constitutional self destruction mechanism. The constitution has made itself meaningless."²⁴

The insertion of Article 2-A in the constitution

Among the many drastic changes made in the constitution by the revival of Constitution Order 1985,²⁵ was the introduction of Article 2-A. It reads:

"2A. The principles and provisions set out in the Objectives Resolution reproduced in Annex are hereby made substantive part of the constitution and shall have effect accordingly".

As no legislature had sanctioned this addition and no debates were held, it was not clear what had warranted this addition, especially since the constitution had been held in abeyance for the preceding eight years. Also, it was not clear what effects were envisaged by the inclusion of this new section. What was however quite clear was that yet another parallel judicial forum had been set in motion in Pakistan.

Before entering into a discussion on the legalities and consequences of the insertion of Article 2-A into the substantive part of the constitution, it would be useful to view the Objectives Resolution (as it was first called) in its historical perspective and to determine whether it was ever intended for the strains placed on it today?

One of the most striking features of the Pakistan movement was that its leaders never discussed in any great detail the constitutional set--up for the new state. It was only the fear of becoming a perpetual political minority in India that had united the Indian Muslims to demand a separate homeland for themselves. Other than this, there was no common focus; indeed they had widely disparate commitments and ideals. Entering into this debate at the time, would have diluted the Pakistan Movement.

On independence, this state of affairs did not help the first Constituent Assembly entrusted with the task of framing a constitution for the new state. No progress was possible. In March 1949, the Constituent Assembly passed a Resolution on the "aims and objectives of the constitution" now known as the Objectives Resolution. This was the first major step towards framing a constitution.²⁶

A bare reading of the resolution shows that it was a resolve by the first constituent assembly to frame a constitution on the outlines thus provided. The resolution consisted of nine clauses. (The


²⁵ P.O. No. XIV of 1985.

resolution annexed with Article 2-A contains ten clauses -- the clause relating to independence of judges is in addition to the original resolution). The preamble declared that sovereignty belongs to Allah and is to be exercised by the state through its people within the limits prescribed by Him. It also laid down that the state would exercise its powers and authority through the chosen representatives of the people. Emphasis was laid, among other things, on "the right of minorities to freely profess and practice their religion and to develop their culture and provide adequate provisions for the safeguard of their legitimate interests on principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam." 27

What the resolution did not contain was any special role or privileges for the clergy (ulema). It professed Pakistan to be a democratic state and not a theocratic state ruled by the ulama. It further resolved that if Pakistan were to become an Islamic state it would only be by the free choice of its citizens.28

The resolution was criticised by the minorities for laying too much emphasis on Islam and mixing state with religion and by the orthodox ulama for its emphasis on democracy and minorities.29 The resolution was welcomed widely. It was regarded as the foundation of a policy which would truly reflect the ideals and aspirations of the people of Pakistan. What it was never intended to be was an instrument above the constitution.

The Objectives Resolution, with minor changes, has been the preamble of each successive framing of the Pakistan constitution and was the subject of judicial discussion before it was inserted as Article 2-A of the present constitution. It came up for consideration of the Supreme Court for the first time in Asma Jillani's case30 whereby it was held that our grundnorm was enshrined in the Objectives Resolution.

After its transformation as Article 2-A, the Objectives Resolution has become the subject of a lot of controversy. The two main interpretations placed on it so far are:

1) That Article 2-A is a supra -- constitutional provision and hence above the other provisions contained in the constitution.31

2) That Article 2-A is not above the constitution and therefore no law can be struck down by simply invoking it unless a mechanism is provided for it.32

27 Ibid at pp. 35-36.
28 Ibid.
29 Ibid at p. 39.
30 Asma Jillani vs. Govt. of Punjab PLD 1972 SC 139.
32 Habib Bank Ltd. vs. Messers Textile Mills Ltd. PLD 1989 Kar 371 and Sharif Faridi vs. Federation of Pakistan PLD 1989 Kar 404
Such contradictory interpretations have led to conflicting judgments handed down by the superior judiciary in the country, the immediate implication of which has been an increased and unnecessary quantum of litigation by invoking this article.

However, in July 1992 the Supreme Court in a landmark decision 33 held, that Article 2-A is not a supra-constitutional provision and its introduction does not control the other provisions of the constitution, as otherwise it would require the framing of an entirely new constitution. It was further held that the courts, being creatures of the constitution, could not annul any existing constitutional provisions, on the plea of its repugnancy with the constitution 34.

Shafiiur Rehman J., went to the extent of declaring that "the accepted principles of interpretations of constitution provisions should not be lost sight of, ignored or violated in euphoria for instant Islamisation of Constitution, Government and Society" 35.

A few days after this judgment, the Supreme Court, after hearing a Criminal Appeal for four days, adjourned the hearing of the case to consider the possibility of conviction in view of the insertion of Article 2-A in the constitution, 36 effectively demonstrating that Article 2-A may yet remain a device to justify any action, even if it is against the law or the constitution. Were Article 2-A declared as controlling other provisions of the constitution, fundamental rights guaranteed in the constitution would also lose their sanctity, as these rights would become subservient to interpretations given in the light of Article 2-A. In fact the constitution itself would be subservient to an instrument resolving its creation. Judges leaning on its crutches would dispense justice over and above the very constitution under which they sit. Although for the moment, we seem to have buried such an interpretation, yet we can never be certain that it will not be dug out of its grave and used once more to haunt us.

33 Hakim Khan and others vs. Govt. of Pakistan (PLD 1992 SC 595)
34 Ibid at pp.616-617
35 Ibid at p. 630
36 S. Iftikhar Gillani Vs The State.
Parallel criminal judicial system

Up to the year 1987, apart from the military courts, which functioned parallel to ordinary criminal courts, the settled areas of Pakistan did not have parallel criminal judicial systems i.e. a set of courts in addition to the ordinary courts, where a person accused of an offence could be tried.

Criminal courts with specialized jurisdiction like the courts established under the Suppression of Terrorist Activities Act 1975 have existed for some time, but these were not considered as parallel judicial forums as they try persons charged with a particular offence, under a special law wherein the ordinary criminal courts have jurisdiction. In other words, every person charged with an offence under such special law would be tried by the same special forum.

It is the recent phenomenon of the "Speedy Trial Courts" that can truly be termed as a parallel criminal judicial system i.e. a system of criminal courts that functions parallel to the ordinary criminal courts, where a person accused of a criminal offence may be tried.
Such a system was introduced for the first time through an Ordinance in 1987 which was followed by a series of such laws that culminated with the passage of the Constitution (12th Amendment) Act 1991.

It is also pertinent at this stage to mention that the Federal Shariat Court also exercises appellate criminal jurisdiction (in Hudood cases) which is in some respects parallel with the High Courts as has been discussed earlier. In the following sections it is proposed to trace briefly, the history and evolution of these laws, their effect on the judicial system and implications for human rights.

**Forerunners to Article 212B of the constitution**

The idea of establishing criminal courts for the specific purpose of speedier trial is neither new nor confined to Pakistan. India had experimented with similar laws immediately after independence. One such law was The West Bengal Special Courts Act 1950 which provided for the establishment of special courts for speedier trials, and empowered the State Government to refer "case or classes of cases or offences or classes of offences" to such courts. This Act was challenged before the High Court of Salacity as violative of Article 14 of the Indian constitution.37 A Full Bench of the Salacity High Court held that the Act was discriminatory and violative of Article 14 in so far as it purported to vest in the State Government an absolute and arbitrary power to refer to a special court trial "any cases" which must include individual cases.38 On Appeal, the Supreme Court of India upheld this decision observing that: The fact that it (the Act) gives unrestrained power to the State Government to select in any way it likes the particular cases or offences which should go to a Special Tribunal and withdraw in such cases the protection which the accused normally enjoys under the criminal law of the country, is on the face of it discriminatory and that classification based on speedier trial of offences offended Article 14 of the constitution.39 That was the end of such special courts in India and other laws.40

In Pakistan, special courts for speedy trials were first established through the Special Courts For Speedy Trials Ordinance 1987. Since then, similar ordinances, with minor modifications, were promulgated from time to time. Except for the Special Courts For Speedy Trials Act 1987 (which was to remain in force for two years), no such Ordinance ever met legislative sanction.

The Special Courts For Speedy Trials Act 1987 and later all similar laws empowered the Provincial Governments to establish Special Courts for Speedy Trials and also to refer cases to it. All these laws

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37 Article 14 of the Indian Constitution corresponds to Article 25 of the Constitution of Pakistan.

38 Anwar Ali Sarkar Vs The State Of West Bengal (AIR 52 Cal 150).

39 The State Of West Bengal Vs Anwar Ali Sarkar (AIR 52 SC 75)

40 Subsequently all similar laws providing for such special courts were declared unconstitutional by courts in different cases (eg The Saurashtra State Public Safety Measures Ordinance 1949 was struck down by the Supreme Court in Kathi Raning Rawat Vs State Of Saurashtra AIR 52 SC 1952).
provided for their own procedure to the exclusion of the Cr.P.C. The term "public good" however, was not specifically defined. Provincial Governments, in their discretion, were thus empowered to refer almost every case for speedy trial. And as the emphasis was on speedier trial of offences, each waived certain procedural safeguards provided to an accused under the Cr.P.C., and contained provisions restricting the court's power to grant adjournments. The most striking feature of all such laws was that the Provincial Governments were given the discretion to refer cases (or classes of cases or offences or classes of offences), for trial to such special courts if in the government's opinion it was in the public interest that such case be tried and decided speedily.

The Ordinance and later the Act of 1987 also provided for the trial of the accused in absentia i.e. in the absence of the accused. The Special Courts For Speedy Trials 1987 was challenged in the Lahore High Court as violative of Article 25 of the constitution, which held that it did provide for reasonable classification permissible in law. The provision relating to trial in absentia was however struck down as being violative of Article 10 of the constitution and hence void. The decision was upheld on appeal.41 Provisions relating to trial in absentia were later not included in such subsequent Ordinances.

And as the emphasis was on speedier trial of offences, each waived certain procedural safeguards provided to an accused under the Cr.P.C., and contained provisions restricting the court's power to grant adjournments. The most striking feature of all such laws was that the Provincial Governments were given the discretion to refer cases (or classes of cases or offences or classes of offences), for trial to such special courts if in the government's opinion it was in the public interest that such case be tried and decided speedily.

All such laws also had a provision regarding "manner and place of execution of any sentence" providing that the government could specify the manner and the place of execution of any sentence passed under this ordinance, having regard to the deterrent effect which the execution is likely to have.... No doubt a broad hint at public executions! However, when the government of Punjab decided to publicly hang a man convicted of murder, the Supreme Court took suo moto notice of the matter42 and stayed the public execution in order to decide whether public executions violated the

constitutional guarantee of the inviolability of the dignity of man. The public executions were not carried out. However a provision to this effect was not included in Article 212-B.

All such laws (including the 12th amendment) have one common feature. Each was to last for a specified period, Article 212-B is to remain in force for three years.43

**Insertion of Article 212B in the constitution**

Article 212-B begins with its own preamble44. "In order to ensure speedy trial of cases of persons accused of heinous offences......" which shows that the Article was inserted not because the ordinary criminal courts were not functioning properly, but to ensure the speedy trial of a few selected ones.

Unlike the prior special courts laws, which only provided for a trial forum, Article 212-B provides for a complete judicial system with a Special Court for trials and an appellate forum, the Supreme Appellate Court. Thus completely ousting, at every level, the jurisdiction of the ordinary criminal courts.

Article 212-B vests the Federal Government with power to constitute by law45, as many Special Court(s) (consisting of a judge of the High Court or a person qualified to be a judge of the High Court) and as many Supreme Appellate court(s) (consisting of two High Court judges and a judge of the Supreme Court) as it may deem necessary.

Article 212-B provides that cases of persons accused of heinous offences as provided by the law46 may be referred to the special court by the Federal Government or an authority or person authorized by it, if in its view it is "Gruesome, brutal and sensational in character or shocking to the public morality"47. Appeal from the Special Court lies only to the Supreme Appellate Court, the decision of which is final. Once the case is referred to a Special Court, the jurisdiction of all other courts, including the Supreme Court, on any ground, stands ousted.

The standard provided for guiding the Federal Government in exercising its discretion i.e. the offence being gruesome, brutal and sensational in character or shocking to public morality, is far too vague and general to be of any use as a standard for such discriminatory classification. The discretion is to be exercised by the "Federal Government or authority or person authorized by it". It is not stated whether the discretion would be judicially exercised or not. In each subsequent

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44 For full text of the 12th Amendment see Appendix-G.
45 The Special Court(s) and the Supreme Appellate Courts are to be established by Act of Parliament.
46 An Act of Parliament has to specify offences under which cases can be referred to special Courts.
47 Art 212-B (1) of the Constitution.
ordinance promulgated for its operation, only the term "Federal Government" is used, making the reference to the Special Court the sole discretion of the Federal Government. The exercise of such discretion is also not amenable to judicial review as jurisdiction of all courts is expressly barred once a case is referred to a Special Court. Placing such unguided and unchallengeable discretion (i.e. singling out individuals to be tried by special courts), in the executive, besides violating Article 25, is as unjust as selective prosecution itself. Furthermore, such discretion by the government would mean that those with influence would be able to manipulate the exercise of such discretion and this would mostly appear to be used against minorities and the underprivileged classes (including women). It can also be used as an instrument of political intimidation. Also, as the Special Court depends for its jurisdiction on the discretion of the executive, therefore, by inference, ordinary criminal courts lose jurisdiction at the instance of the executive.

Article 25 guarantees equality before the law and equal protection of laws. This should ordinarily mean that all persons in similar circumstances should be treated in the same manner. By creating special courts this guarantee is withdrawn. Two persons charged with the same offence can be tried by different forums under vastly different procedures/ even if such procedures were to ensure a fair trial, as our constitution does not contain a "Due Process" clause that provides for uniform procedural safeguards, trial by different forums for the same offence would violate Article 25.

As the main purpose for establishment of such special courts is to ensure speedier trial, the procedure devised is such that it handicaps the accused in his defence. For example, the power of courts to grant adjournments has been considerably curtailed. Persons tried by special courts are also at a manifest disadvantage in terms of the number of appellate forums they can move. Thus a person tried by a special court may appeal only to the Supreme Appellate Court. On the other hand if this same person were to be tried by ordinary courts, the benefit of three judicial forums would be extended to him i.e. the Trial Court, the High Court and the Supreme Court.

**Parallel judicial systems in the tribal areas**

**The Frontier Crimes Regulation (FCR)**

As mentioned above, on independence, Pakistan inherited alongside "settled" areas and princely states, some tribal or Frontier Districts that had never been made part of the mainstream of the British Empire. These were areas considered a threat to the colonial powers. Therefore, special laws were promulgated for the tribal or Frontier Districts, the purpose of which was "the suppression of

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48 Due process implies in accordance with certain procedural safeguards. These appear in the fifth and fourteenth amendments to the US constitution.
crime". This law, called the Frontier Crimes Regulation (F.C.R.), came to be known as the "black law" due to its extremely harsh, inhuman and discriminatory provisions.

This legal system was designed by the British to rule through a class of local notables who not only enjoyed social influence and status within society but were also loyal to the British. The object was to depict a policy of non-interference in their centuries old system of Riwaj; the real purpose was to keep them away from a universally recognised judicial system denying them the basic human right of equality before law and equal protection of laws.

Unfortunately, the F.C.R. was retained and applied to the tribal areas even after independence and emerged as the first parallel judicial system in Pakistan.

The F.C.R. is based on the premise of suppression of crime by infliction of the severest possible punishment. The administration of justice is neither its aim nor purpose.

Both the substantive and procedural provisions of the F.C.R. are violative of the basic fundamental principles of the administration of justice. On the procedural side, the F.C.R., denies the accused due process of law. The entire procedure is based on a system of inquiry rather than presenting of evidence, examination and cross-examination of witnesses etc. Engaging of counsel too is not permitted. Appeals to the superior judiciary i.e., the Supreme Court and High Court which are constitutionally guaranteed rights of every citizen of Pakistan, are denied to persons subject to the F.C.R. The substantive provisions of the F.C.R. are no less discriminatory and repressive. Since the very purpose of these laws is to "suppress" crime; its penalties have been formulated keeping in view this purpose. "Blockade of hostile or unfriendly tribe", confiscation of the property of all or any of the members of such tribe, prohibition to erect new villages or towers on the frontier, removal of entire villages, demolition of buildings used by robbers and collective responsibility of the entire tribe for the act of an individual tribesman are some of the inhuman penalties that are inflicted.

49 Preamble, Frontier Crimes Regulations (Regulation III of 1901)
50 For details see Appendix I.
51 Per Amir-ul-Mulk Mengal J., speaking for the court in Balochistan Bar Association vs. Govt. of Balochistan PLD 1991 Quetta 7
52 Ibid.
53 Sec.21, F.C.R.
54 Ibid.
55 Ibid sec. 31.
56 Ibid sec. 32.
57 Ibid sec. 34.
Special laws were promulgated for the tribal or Frontier Districts, the purpose of which was "the suppression of crime". This law, called the Frontier Crimes Regulation (F.C.R.), came to be known as the "black law" due to its extremely harsh, inhuman and discriminatory provisions upon inhabitants of the Frontier Districts. Section 30 of the F.C.R., is especially unjust to women as adultery is defined as an offence committed only by the woman to the exclusion of her male partner.

The provisions of the F.C.R. have been challenged at different times in the superior courts of the country. In the case of Toti Khan vs. District Magistrate Sibi and Ziara 58, provisions enabling executive authorities to refer any criminal case to a jirga was challenged as repugnant to Article 5 and void under Article 4 of the 1956 Constitution (then in force). S.A. Rehman, C.J., (as he was then) accepting the contention was of the opinion that the provisions were ex-facie discriminatory.

Similarly in Khan Abdul Akbar Khan vs. Deputy Commissioner Peshawar, 59 certain provisions applicable to Pathans and Balochis only, were challenged as violative of Article 5 of the 1956 Constitution (then in force) in so far as they did not provide equal protection of law to these communities. Kayani J., ruled that this amounted "to racial discrimination and is open to criticism as discrimination between a negro and a white man".

Unfortunately, soon after these judgments, Martial Law was imposed in the country (1958, and the 1956 Constitution of Pakistan abrogated, fundamental rights suspended and once again the F.C.R. reigned supreme. In 1979, it was again challenged before the Shariat Bench of the Balochistan High Court and found repugnant to Islam. 60

58 PLD 1957 (W.P.) Quetta 1.
59 PLD 1957 (W.P.) Pesh 100.
60 Maulvi Mohammad Ishaque Khosti vs. Govt. of Balochistan PLD 1979 Quetta 217.
The situation as it stands today is that the F.C.R. still holds sway over the Federally Administered Tribal Areas (FATA) of the country and the citizens of the area labour under all the disabilities resulting from such retrogressive and repressive laws.

**The West Pakistan Ordinance I and II of 1968**

In the province of Balochistan, special laws have been promulgated alongside the ordinary courts administering the ordinary laws of the land. They are the Civil Procedure (Special Provisions) Ordinance I of 1968 and Criminal Law (Special Provisions) Ordinance II of 1968.

Historically speaking, the province of Balochistan had a number of laws applicable simultaneously to its different regions such as Balochistan Agency Laws, Forest Laws, Civil and Criminal justice Laws and the F.C.R., which mainly held the field. Therefore Ordinance I and II of 1968 were initially not made applicable to the Provincially Administered Tribal Areas (PATA) where the F.C.R. was in practice. However, in 1979, the F.C.R., was challenged before the Shariat Bench of the Balochistan High Court in Maulvi Mohammad Ishaque Khosti vs. Govt. of Balochistan\(^{61}\) on the ground that it was violative of Islamic injunctions as enunciated in the Holy Quran and Sunnah. The Shariat Bench declared the F.C.R. as bad law, by reason of its repugnancy to the injunctions of Islam. Soon after the pronouncement of this judgment, Ordinance II of 1968 was made applicable to PATA of Balochistan through Criminal Law (special Provisions) Regulation 1979.

The salient features\(^{62}\) of Ordinance II of 1968, like its counterpart Regulation in the NWFP, (discussed below) is that it provides special procedure for trial of scheduled offenses as described in section 2(c) of the Ordinance.

Its most special aspect is that the Criminal Procedure Code (V of 1898) is not applicable to any proceedings under this Ordinance. Even the Evidence Act 1872\(^{63}\) was not made applicable to the proceedings thus conducted, but after the promulgation of Qanoon-e-Shahadat Ordinance 1984 the High Court of Balochistan held that this law shall apply to the proceedings under the Ordinance.\(^{64}\)

It is the Deputy Commissioner (D.C.) who has exclusive jurisdiction to take cognizance of a scheduled offence committed within the district.\(^{65}\) He then refers the case to a tribunal constituted by him, consisting of a President who is to be an officer not below the rank of Naib Tehsildar and

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61 Ibid
62 For details of this Ordinance see Appendix II
63 Now read as Qanoon-e-Shahadat, 1984.
64 FLD 1987 Quetta 141.
65 Sec. 4 Ordinance II of 1968.
four other persons. The tribunal then proceeds to determine the guilt or innocence of an accused person and submit its findings in the form of a report to the D.C. who has the authority to acquit or convict the accused or to remand the case to a second tribunal. He may award the accused any sentence or fine, no matter what the punishment provided for the offence under the Pakistan Penal Code (P.P.C.) i.e., the ordinary criminal law of the country. The arbitrary powers of the D.C. extend to the limit where even if an accused is found guilty of murder, the D.C. may acquit him or simply impose a fine. Such arbitrary powers are not subject to the judicial review of any ordinary court either in appeal or revision.

Furthermore, the D.C. is conferred with powers whereby he may order the whole or any part of the fine recovered to be paid as compensation for any loss or injury. No civil court is competent to take cognizance against a claim to compensation based on such claim or injury. Section 14 of the Ordinance provides punishment for a woman who knowingly commits adultery, but no such punishment is provided for the man who commits adultery with a married woman.

Ordinance II of 1968 by depriving the citizens of Balochistan of equality before law and equal protection of laws is manifestly discriminatory to women. One will probably not come across a graver miscarriage of justice - where two persons accused of the same offence are meted completely opposing treatment. It stands to reason that a woman and a man are equal participants in the offence, yet the law turns a blind eye to one offender merely on the basis of gender. Section 14 of Ordinance II, 1968, holds a mirror to the degrading and humiliating position of women in Balochistan. The people of Balochistan did not ask for a separate law, it was imposed on them.

The preventive provisions of the Ordinance under discussion, reflect a "ruler and the ruled" dichotomy reminiscent of our colonial past. The D.C., no doubt motivated by exigencies of "law and order", is empowered to impose a fine or demand security from any adult member of a family who has a blood feud with another family. This is irrespective of whether such an adult is directly involved in the vendetta or not!

A major focus of criticism as regards Ordinance II of 1968 is that the D.C., who is basically an executive officer, prepares a list of members of the tribunal who then sit as a judicial forum headed

66 Ibid sec. 6.
67 Ibid sec. 11.
68 Ibid sec. 12.
69 Ibid Sec. 29.
70 Ibid Sec. 13.
71 Ibid.
72 Ibid Sec. 40.
by a member of the executive. Therefore, not only are citizens denied due process of law and justice, the public image of justice is also eroded as even the mere pretence of a judiciary independent of the executive is not maintained.

The PATA regulations

Another highly confusing parallel judicial system that has emerged over the years is prevalent in what are termed as Provincially Administered Tribal Areas (PATA). These comprise Malakand, Dir, Swat, Chitral and Kohistan located in the North West Frontier Province (NWFP) of Pakistan. Swat, Dir and Chitral were former states of British India governed by their own rulers. They acceded to Pakistan, and, were later on merged with the then province of West Pakistan. On dissolution of the one unit, these territories became part of the NWFP. Administrative units were created, civil administration and police force established and they were brought at par with the other districts and divisions in the province. In the initial years, following the merger of the former states, judicial powers of the former rulers were exercised by the administration. The substantive and procedural laws based on riwaj (custom) of these areas, but with a different hierarchy of judicial forums possessing different powers were applied.

By Regulation I of 1970, the Criminal Procedure Code (Cr.P.C.), the Evidence Act and the Police Act were made applicable to the said areas. From then onwards, nearly all the procedural and substantive laws, both civil and criminal, as were enforced elsewhere in the NWFP, were made available to the inhabitants of these areas. As such the ordinary courts, both civil and criminal, functioned for nearly four years to try and settle disputes. But then, in 1975, the Provincially Administered Tribal Areas Civil Procedure (Special Provisions) Regulation I of 1975\(^3\) and the Provincially Administered Tribal Areas Criminal Procedure (Special Provisions) Regulation II of 1975\(^4\) were made. Dir, Swat and Chitral districts were included in the definition of PATA under Article 246-B of the constitution thus according tribal status to areas where none existed prior to independence. The consequence of this action was that these areas were brought within the purview of Article 247 (3) (4) of the constitution withdrawing law making power for these areas from parliament. Hence duly elected representatives of PATA, sitting in the Provincial and National Assemblies are competent to legislate for the entire province/country except the constituencies they represent! The irony of it all is that this discrimination is enshrined in no less a document than the constitution. On the one hand, the inhabitants of PATA are at par with the "settled" districts of the province in terms of the right of adult franchise. They elect members to the Provincial and National Assemblies but their democratically elected members are completely ineffective in terms of participation in the legislative process of the areas they legally represent. On the other hand, a nominee of the Federal Government (the Governor of the NWFP) is deemed competent to decide the fate of the people of these areas and make laws for them.

\(^3\) Regulation No. 1 of 1985 NWFP Extra-ordinary gazette, 26.7.75.

\(^4\) Regulation II of 1975 (NWFP Extra-ordinary gazette, 26.7.75.)
Following the enforcement of Regulation I and Regulation II, a dual system of judicial forums has emerged that operates simultaneously alongside the ordinary civil and criminal courts. An investigation into an offence committed in areas where these regulations are applicable is carried out under the provisions of the Cr.P.C. and placed before the D.C. in cases falling within the purview of Regulation I. From then on machinery for the trial of offenses provided by the said regulation is activated. Application of the Evidence Act and the Cr.P.C. is then excluded and the case is referred to the jirga. A jirga is constituted comprising of a government official not below the rank of Naib Tehsildar, who is its President and four other members appointed by the D.C. The findings of the jirga are then submitted to the D.C., who has wide discretionary powers to deal with the case which includes passing a sentence on a person convicted as prescribed in the Pakistan Penal Code (P.P.C.). (except the death sentence). Appeal lies with the Commissioner of the division and revisional powers lie with the Government of the NWFP. Provisions of Regulation II are similar, except in that they apply to disputes of a civil nature.

From a study of Regulation I and II, it is obvious that they are laws carrying adverse implications for human rights. By validating a parallel hierarchy of judicial forums based on unrepresentative legislation alongside ordinary courts and then arbitrarily including or excluding certain matters from their purview, reflects a gross violation of fundamental human rights. For example, disputes involving a minor, insane persons and the government have been given the benefit of the protection of the ordinary laws of the land whereas the rest of the citizens are to seek redress of their grievances through the executive authorities from a jirga comprising of the government official and laity. One may logically infer, therefore, that most inhabitants of PATA have been relegated to second class citizens in their own country. They are neither equal before the law nor entitled to equal protection of laws as professed in Article 25 of the Constitution of Pakistan. Indeed, the fact of the matter is that these regulations possess the dangerous potential of tearing apart the fragile cohesive fabric of the nation by stunting any growth towards national integration. Citizens of Pakistan who happen to live in PATA are denied all the principles of a criminal trial as well as settlement of their civil disputes. Preambles to both regulations are silent as to their objectives, except that the

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75 Sec. 3 of Regulation I and II of 1975.
76 Sec. 3 of Regulation I of 1975.
77 Ibid sec. 4.
78 Op. cit. at n.2
79 Sec. 6 Regulation 1 of 1975.
80 Ibid Sec.11.
81 Discussed at length by Qazi Mohammad Jamil J., in Mohammad Iqbal vs. A.C. Swat, PLD 1990 Pesh. 51.
provisions are to "meet the special requirements of these areas", which at the end of the day simply means a perpetuation of the colonial psyche of maintaining an iron grip on the more "troublesome natives". The rationale for one parallel judicial system throughout PATA is incomprehensible on historical counts too. Prior to their merger with West Pakistan the judicial systems in the former states of Dir, Swat and Chital were different from each other. After merger in 1969, the ordinary law and courts were extended to these areas for years. What "special requirements" suddenly surfaced and what compulsions of state security motivated promulgation of these discriminatory regulations is anybody's guess.

Sympathisers of the jirga system have tried to draw comparisons with trial by jury (as practiced in the USA for instance) to prove its efficiency and relevance. It would be useful therefore to bring forward some points of distinction between the two forums. The presiding officer in a jirga is a government officer and member of the executive branch of the government exercising judicial powers. In a trial by jury, a judge presides. Members of both the jirga and jury are local people. The difference is that in the trial by jury system the adjudicators are drawn from all sections of the population whereas a jirga comprises of the elite of the area. Furthermore, in trial by jury due process of law is given to both parties whereas in a jirga giving parties an opportunity of hearing is discretionary, rather than mandatory. In short, settlement of disputes through jirga as envisaged in PATA Regulations 1 and II is a grave miscarriage of justice in that it is a denial of the basic human right to a fair trial.

Implications and consequences of this dual judicial system are more detrimental for women. To begin with, the operation of the Muslim Family Laws Ordinance 1961 (MFLO) and the Family Courts Ordinance has not been extended to PATA. Therefore, women from these areas, already labouring under repressive customary practices are denied that very negligible relief available under the MFLO in the form of restraint on polygamy, recovery of dowry etc. Moreover, even in fields where women's rights have been established by the law of the land (for example inheritance, child custody, exercising the option of puberty in marriage), getting members of a jirga who represent the male elite of an area to be favourably inclined to women seeking redress from the injustices of men is too optimistic an expectation.

82 The opportunity of hearing is provided by the Jirga to the parties and it may record evidence as well but may also refuse to do so at its own discretion.

83 Sec.14 of Re. 1 of 1975 contains exactly the same punishment for adultery by a married woman as sec.14 of W.P.Ordinance II of 1968 and turns a blind eye to the man who is an equal participant in the offence.

84 The MFLO is the only piece of progressive legislation in the area of Family Law in Pakistan promulgated during the rule of Ayub Khan.
Implications and consequences for human rights

The controversial issues arising from the discussion regarding parallel judicial systems in Pakistan are many. First and foremost is the question whether these systems fulfill the basic requisites of equality before laws and equal protection of laws. If they do, then on what grounds may we justify this difference of treatment meted out to supposedly equal citizens of one country?

In Inamur -- Rehman vs. Federation of Pakistan arguments were forwarded to explain specific circumstances under which different laws and/or forums could be made applicable to equal citizens of a country. In other words, when may a classification, grouping or categorisation be legitimate and even essential for the protection of certain persons or classes of persons. For instance, it is argued that certain disadvantaged sections in society need special laws to bring them at par with the rest of the country. But even such protective laws need to be monitored closely since it has been experienced that after an initial advantage, these laws actually prevent people from becoming "equal".

Now taking into consideration the various parallel judicial systems operating in Pakistan, it is proposed to analyse the classification and justifications on which they are based.

The numerous adhoc constitutional amendments made mostly during General Zia's regime have converted the constitution into a self contradictory instrument. For example, equality before law and equal protection of laws is one of the fundamental rights enshrined in the constitution. Yet this selfsame equality is trampled upon in its other provisions. For example, the people of PATA are subject to the F.C.R., wherein due process of law is completely absent. An administrator is the law maker, implementer, the prosecutor, the judge and the counsel all rolled into one. No right of appeal is allowed to any judicial forum in the country, neither can it be called to question at any level of government. The right of franchise too, has been denied to the "tribals", and the members returned to parliament from these areas, aside from being unrepresentative have no say in legislation affecting their constituencies. The constitution itself concedes law -- making powers of these areas to the President.

As far as PATA Regulations 1 and II and the West Pakistan Criminal Law (Special Provisions) Ordinance II of 1968 are concerned, they are both discriminatory and violative of basic human rights of the inhabitants of these areas as they too deny access to the ordinary legal forums of the country. The status of PATA is outlined in Article 246 of the constitution. It empowers the Governors of the NWFP and Balochistan to legislate for these territories and gives legal cover to parallel judicial forums.

It is argued that since PATA Regulations 1 and II are applicable only to certain areas of the NWFP, this creates a classification of persons without serving a valid legal object. The reason for this contention is that territories included in PATA are otherwise on an equal footing with the rest of the

1992 SMCR 563.
The numerous adhoc constitutional amendments made mostly during General Zia's regime have converted the constitution into a self contradictory instrument province both administratively and politically. After merger with the rest of the country they were subject to the ordinary law and judicial forums of the country before the creation of their status as PATA. The only manifest basis for singling out these areas for application of the regulations is cited in the preamble as: "the special requirement of these areas". No further mention is made of 'special requirements', lending credence to the argument that there is no rational plausible explanation for imposition of these discriminatory forums on the people of PATA. The classification may have been considered reasonable and the object justified had PATA been substantially different in some manner from the other parts of the province. But if this was the case, then on what grounds did the government initially extend the ordinary laws of the country to this area? In a landmark judgment, Mohammad Irshad vs. A.C. Swat, Qazi Mohammad Jamil J., speaking for the court, declared both regulations violative of Article 25 of the constitution. The government has appealed to the Supreme Court and the judgment of the High Court stands suspended. One cannot, at this stage either gauge or predict the outcome of the case, but it would be worthwhile to recall the report of Justice Allah Baksh Khan, who in 1981 was commissioned to ascertain public opinion and to find out the feasibility of the enforcement of normal laws in PATA. He recommended the repeal of Regulation 1 and II stating:

"It would therefore be in the interest of national integrity that uniform civil and criminal laws are enforced in the district of Dir, Swat and Chitral as well as the Malakand protected area and the entire division brought at par with other parts of the country in the field of administration of justice. The "riwaj" has outlived its utility and people of this division deserve to get rid of the evils of "riwaj" which were perpetrated during the tyrannical rule of the despotic Nawab..."\(^87\)

In Balochistan too, the Criminal Law (Special Provisions) Ordinance II of 1968 came under heavy criticism. It became the subject of constitutional litigation and was struck down as violative of articles 25, 2A and 175(3)\(^88\) of the constitution of Pakistan. In Balochistan Bar Association vs. Government of Balochistan, Amir-ul-Mulk Mengal J., speaking for the court quoting Article 8 of the constitution was of the opinion that "the legislature shall not make a law which takes away or abridges fundamental right or any law which is in contravention of the constitution. Such a law thus

\(^{86}\) PLD 1990 Pesh. 51.

\(^{87}\) Report if Justice Allal Baksh Khan dated 15.11.82.

\(^{88}\) This art. of the constitution of Pakistan deals with separation of the judiciary from the executive.
would be void to the extent of such contravention". Following the line of argument taken up in Irshad vs. A.C. Swat, the court tried to determine whether the laws under discussion were "based on rational and reasonable basis, having an object to be achieved through such legislation or not". The court found that legislative power in this context "was exercised in a most whimsical and subjective manner... We find sufficient force in the contentions raised by the counsel for the petitioners that the application of the Ordinance in the areas where people live in like circumstances is neither universal nor uniform and it has been left entirely to the whims and caprice of the government to decide without any rational basis to withdraw the Ordinance or re-apply the same in any area in a most subjective manner and there being no criterion in taking such a decision. Hence the classification is neither intelligible nor reasonable nor is it discernible".89

The fate of the parallel judicial systems in PATA and Balochistan therefore hang in the balance. The Supreme Court has yet to pass a judgement and no matter what the outcome, it is heartening to see that these forums are being challenged in the highest judicial forums of the country. The classification on which these discriminatory laws and forums were justified are being rejected and its rationale questioned. On the face of it, the purpose of classification of some areas of the NWFP and Balochistan as PATA, was to treat these areas as special due to their backwardness. Presumably the idea was to use these special laws and forums as instruments of reform to bring these backward areas into the mainstream of national life. On the ground however, these special laws and parallel judicial systems have emerged as instruments of oppression due to the fact that discretion (to use these forums) vests with the executive sitting simultaneously as a court of law. It is an established fact that the primary responsibility of the executive authority, especially the kind wielded in Pakistan tilts away from the interests of minorities and other disadvantaged sections of society, especially women.

The members of a jirga (which is an all male forum) clearly carry their social inadequacies while performing the duty of judicial decision making. They may be guided more frequently by their own prejudices than established legal norms. Furthermore, being the local elite they feel responsible for maintaining the local status quo. They may feel that if they were to support women's rights vis-a-vis the existing customary practices they would lose face.

Coming to the parallel judicial forums applicable throughout the country, it has been mentioned above that they are the result of indiscriminate amendments to the constitution thrown in at random to perpetuate the power base of individuals. This caused contradictions and confusion. Jurisprudentially speaking too, concepts having a completely different normative base have been made to co-exist and complement each other. The resultant judicial system is thus a patchwork of secular and Islamic provisions that do not co-relate. But it is the convenience of gaining legitimacy (no matter how transient), through insertion of constitutional amendments that seems the overriding concern and not the creation of a homogeneous judicial system guaranteeing human rights. One therefore arrives at the uncomfortable conclusion that the parallel judicial forums within the constitution were motivated neither by justifiable classification nor any lawful object. The sole

89 PLD 1991 Quetta 7.
purpose appears to be a Machiavellian desire to rule and control the populace by all possible means - violation of human rights notwithstanding!

Let us take the example of the parallel criminal judicial system. Under the newly enacted Qisas and Diyat Act 1990\(^{90}\) the victim and/or his/her heirs may pardon the offender. Yet this provision is in contradiction to Article 45 of the constitution which empowers the President to "to grant pardon, reprieve and to remit, suspend or commute any sentence passed by any courts tribunal or other authority". This provision of the constitution has been challenged in Sakina Bibi's Case\(^{91}\) as Un-Islamic. In replacing the Qisas and Diyat Act, the idea was to highlight the fact that compulsory death sentences were un-Islamic. But as a matter of fact, where it suits state authority, capital punishment has been retained and is being meted out with impunity. The suppression of Terrorist Activities (Special Courts Act) 1975 and the Speedy Courts introduced under the 12th Amendment to the constitution are instances of legislation where capital punishment is awarded, yet the F.S.C. with its suo moto jurisdiction and duties to strike down un-Islamic laws has remained a silent spectator.

Then there is the confusion created due to the insertion of Article 2A to the constitution making the Objectives Resolution a substantive part of the constitution. From the massive bulk of litigation piling up since its "elevation", it is evident that Article 2A has opened a Pandora's box of varying interpretations as to the extent and scope of its standing vis-a-vis other provisions of the constitution.\(^ {92}\) The ensuing needless litigation and confusion is cause for genuine worry in legal, political economic and social circles, the implications of which are now unfolding themselves. The immediate result is yet another parallel jurisdiction of the High Courts and Supreme Court overlapping the F.S.C.. Judging whether laws are in consonance with Islamic injunctions may no longer be restricted to the F.S.C.. as the High Courts and Supreme Court may also wish to try their hand at a similar exercise! Who or what factor is to determine, should such an occasion arise, which forum has the final authority? Is the F.S.C., a body formed on clear violation of the Objectives Resolution(i.e. independence of the judiciary) authorised to pass judgment on matters of such importance? On the other hand, are the High Courts and Supreme Court competent to take cognizance of matters clearly within the purview of the F.S.C., by invoking the provisions of the Objectives Resolution now called Article 2-A? These and numerous other crucial questions arise out of the medley of rules, laws, judicial rulings, constitutional amendments, Ordinances etc... that comprise the legal system of Pakistan today. The spectre of state power however willing to go to any lengths to maintain and consolidate the status quo looms large as the only coherent image in this vast sea of incoherence!

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\(^{90}\) The Criminal Law (Second Amendment Ordinance) VII of 1990, 5th September, 1990.

\(^{91}\) PLD 1992 Lah. 99.

\(^{92}\) e.g., in Federation of Pakistan vs. Malik Ghulam Mustafa Khar PLD 1989 SC 26, the court held that it was not open to it to hold any of the provisions of the constitution as violative of the Objectives Resolution (Art. 2 a). On the other hand, in Tyeb vs. Messrs Alpha Insurance Co. 1980 CLC 428, it was held that Article 2A was on a higher footing than other provisions of the constitution.
Postscript

This paper was finalised at the end of 1992. Since then a number of changes have taken place, making parts of this paper of academic interest only.

First of all, the Supreme Court of Pakistan has upheld the decision of the Peshawar High Court in Muhammad Irshad’s case and the decision of the Balochistan High Court in Balochistan High Court Bar Association’s Case. As a result, PATA Regulations (Regulations I and II of 1975) applicable to the provincially administered tribal areas of the NWFP, and Regulation I and II applicable in the tribal areas of Balochistan has ceased to have effect. Thus the forums established under these Regulations have stopped functioning and all pending cases have been transferred to regular courts of law. The FCR in the Federally administered tribal areas however remains unaffected.

Article 212-B of the Constitution providing for the establishment of Special Courts for Speedy Trials and the Supreme Appellate Court has since lapsed. The Constitution (Twelfth Amendment) Act 1991, provided for these forums for three years only. Early this year (1994) on the completion of the three year period these special forums were abolished and all cases pending before them were transferred to the ordinary courts of law.
FEDERAL SHARIAT COURT AND SHARIAT APPELATE
BENCH OF SUPREME COURT
(CRIMINAL JURISDICTION)

BENACH
SUPREME COURT

APPEAL (UNDER CONSTITUTION)
BY LEAVE OF COURT

F.S.C.

APPEAL/REVISION OF
'CASE DECIDED' LIES TO FSC

OFFENCES UNDER
HUDOOD LAWS

HIGH COURT

TRIAL COURT

APPEAL TO SUPREME COURT
(UNDER THE CONSTITUTION)

Miscellaneous matter (before final
disposal in same transaction bail etc.)
lies to High Court

Offences under the Hudood laws are tried by the
ordinary criminal trial courts i.e. magistrate and sessions judge

LEGEND
Double line represents forms and processes provided under the constitution
Single line represents forms and processes provided under the Code of Criminal Procedure
SPEEDY TRIAL COURTS (12TH AMENDMENT)

APPEAL TO SUPREME APPELLATE COURT

SUPREME COURT

APPEAL (UNDER CONSTITUTION) BY LEAVE OF COURT

CONFIRMS DEATH SENTENCES PASSED BY SESSIONS JUDGE

APPEAL / REVISION

SESSION JUDGE

Appeal lies to High Court when sentence is 4 years or more imprisonment

Appeal lies to session judge when sentence is less than 4 years imprisonment

MAGISTRATE

Trial Court for trial of offences referred to it by govt.
Once a case is referred jurisdiction of all other cases is barred

LEGEND
Double line represents forms and processes provided under the constitution
Single line represents forms and processes provided under the Code of Criminal Procedure
HEIRARCHY OF CIVIL COURTS

SUPREME COURT

Appeal (under constitution) by leave of the court

HIGH COURT

2nd Appeal / Revision

DISTRICT JUDGE

Appeal lies to High Court if value of suit i.e. value of relief claimed is Rs.100,000/- or more

CIVIL JUDGE

Appeal lies to district judge if value of suit i.e. value of relief claimed for is less than Rs.100,000/-

CIVIL JUDGE 1ST CLASS HAS UNLIMITED PECUNIARY JURISDICTION

LEGEND
Double line represents forms and processes provided under the constitution
Single line represents forms and processes provided under the code Civil Procedure
HEIRARCHY OF CRIMINAL COURTS

SUPREME COURT

- Appeal to Supreme Court (under the constitution) by leave of the court
- Confirms death sentences passed by sessions judge
- Can quash proceedings before trial courts
- Habeas Corpus

HIGH COURT

Appeal / Revision

SESSIONS JUDGE

- Appeal lies to sessions judge when sentence is less than four years imprisonment etc.

MAGISTRATE

- Includes Magistrate 1st Class
- Magistrate 2nd Class
- Magistrate 3rd Class

Trial Courts

- Appeal lies to High Court
- Sentences is 4 years imprisonment

LEGEND
Double line represents forms and processes provided under the constitution
Single line represents forms and processes provided under the Code of Criminal Procedure
JUDICIAL SYSTEM IN TRIBAL AREAS (FATA) FRONTIER CRIMES REGULATION (FCR)

Lacks forum and safeguards of ordinary civil and criminal courts

Supreme Court

Appeal by leave of the court

High Court

Appeal/2nd Appeal/Revision

District & Session Judge

Appeal

Magistrate

Criminal

Civil Judge

Civil

JUDICIAL FORMS FOR ENFORCEMENTS OF FUNDAMENTAL RIGHT

Supreme Court

Appeal by leave of court

High Court

Commissioner

Dy. Commissioner and Jirga

High Court has the original jurisdiction for enforcement of fundamental rights guaranteed in the constitution

LEGEND

Double Line Represents forms and processes provided Under the Constitution

Single Line Represents forms and processes provided under the Code of Civil and Criminal Procedure
PATA REGULATION (CRIMINAL)

SUPREME COURT

Appeal to Supreme Court
(By leave of the court)

HIGH COURT

Confirms death sentences passed by session judge

SESSION JUDGE

Appeal lies to session judge if sentence is less than 4 years in punishment

MAGISTRATE

GOVT OF NWFP

Revision

COMMISSIONER

APPEAL

Appeal to high court if sentence more than five years punishment

TRIAL COURT

JIRGA & DY. COMMISSIONER

Trial court for offences mentioned in Sec 3 of Regulation No. 1 of 1975

LEGEND
Double line represents forms and processes provided under the constitution
Single line represents forms and processes provided under the Code of Criminal Procedure
PATA REGULATION (CIVIL)

Supreme Court

Appeal to Supreme Court (By leave of the court)

Constitutional Petition

May be challenged under Act 19 of constitution on limited grounds

GoVT of NWFP

Revision lies to govt. of NWFP

Commissioner

Appeal lies to Commissioner

Appeal to high court if value of suit is Rs.100,000/- or more

Jirga & Dy. Commissioner

Civil Judge

Appeal lies to district judge if value of suit is less than Rs.100,000/-

Session Judge

Appeal revision to High Court

Trial court for dispute provided in Sec 3(1) of regulation No.2 of 1975

Legend
Double line represents forms and processes provided under the Constitution
Single line represents forms and processes provided under the Code of Civil Procedure
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