Change is the Only Constant - A Book Review

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Introduction

The debate whether certainty demands a stagnant law or continuous societal change calling for a parallel modification in legal regimes has long persisted among legal scholars. Proponents of the latter notion view progress as an inherent instrument of evolutionary change. They view stability in law as indispensable yet insufficient to meet the conflicting demands of society. It is believed that evolutionary law has a significant part in keeping the law stable. On the contrary, it is yet apprehended those variations in law are a gateway to unpredictability and might lead to chaos due to the difficulty faced in adapting to the changes in the law. Balancing these two conflicting approaches lies at the core of this book, which is the first of its kind in Pakistan—addressing the dilemma of an immutable law and the fluctuating needs of the society.

Pakistan inherited a plethora of laws that were formulated and enacted during the colonial period. These laws are still in place governing the public and private spheres of individuals and society. Whilst it is true that the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution") and other legislative instruments have undergone alterations and amendments; however, they are far from accommodating the existing needs of society. The pace at which governmental departments discharge their duty to bring the law in conformity with contemporary needs renders the evolutionary process futile. Legal writers have thus highlighted aspects of the law which are in dire need of change.

In this context, Justice (retired) Fazal Karim, former Judge of the Supreme Court of Pakistan, has made a celebrated contribution to the legal field by penning down several legal gaps in the Constitution as well as other legislative instruments and the systems of law emerging out of them. The book provides a detailed and comprehensive understanding of the inadequacies in Pakistan's legal framework, highlights laws that are either no longer in use, or are inefficient, and in derogation of the constitutional principles of Pakistan. It puts forward a convincingly strong case for reforming laws without causing any abrupt changes in the legal system which might harm its foundational characteristics.

Justice Fazal Karim began his distinguished legal career as a Civil Judge in 1960. He served as a Judge of the Lahore High Court and then rose to the rank of Supreme Court Justice, serving till his retirement in 1996. He has also served as a permanent member of the Court of Arbitration at the Hague and authored several landmark judgments. His scholarly contribution is compendious, including "The Law of Criminal Procedure", "Access to Justice in Pakistan: A Handbook of Civil & Criminal Procedure with Constitutional Setting", and "Judicial Review of Public Actions." His recent book *Change is the Only Constant*[1] systematically lays down the shortcomings in current laws and legal framework due to them being obsolete, prejudice to the fundamental rights of citizens, and being contrary to constitutional principles. He further signifies the practice of

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[1] Justice Fazal Karim, *Change Is the Only Constant* (Pakistan Law House 2019).

countries such as the U.S. and the U.K., which have a notable history of balancing legal stability with evolutionary changes in the law.

The pioneering book has been dedicated to Justice Dr. Javid Iqbal, a senior Justice of the Supreme Court and a remarkable philosopher. The book makes references to wide-ranging literature consisting of relevant founding judgments and the views of various renowned scholars, philosophers, academics and legal specialists. These views are often presented in a narrative form to lay both sides' arguments and make a stronger case for legal change. Although the book is directed towards constitutional and legislative change, the intended audience is not limited to judges and lawyers only; it has been made explicitly clear that the term 'law-makers' has been used in its widest sense, which also includes the common man who possesses the right to vote for a lawmaker. Each argument is beautifully supported with a famous aphoristic phrase. These phrases enable the reader to understand the necessity of unearthing the dormant legal shortcomings that have been normalised in Pakistan's legal system and simultaneously stress upon the need for bringing an evolutionary rather than a revolutionary change.

An Overview of the Book

Having served the country as a much-revered justice of the Supreme Court, Justice Fazal Karim has made a notable contribution to the legal field through his analysis of the Pakistani legal system. His focus has been on the pressing issue of improving and restructuring the law, which, in his view, is paramount to delivering equitable justice. Numerous scholars have promoted flexibility in law and conformity with modern-day needs, but Justice Fazal Karim has remarkably entrenched the concept and applied it, not abstractly but concretely, to the legal regime in Pakistan.

Justice Fazal Karim venerates and holds the Constitution to its highest esteem; however, this reverence has not prevented him from underlining the lacunae in legislative instruments, including the Constitution, to reform the law as lucid, democratic, and inclusionary to better serve the ends of justice. Justice Fazal Karim has touched upon most key legislative instruments and has made a strong case for the reform of each underscored provision.

The need for reform stems from Justice Fazal Karim's in-depth observation of each provision of law. As opposed to the law existing under the auspices of a living Constitution, the author's scrutiny has exposed the law as suffering from obsolete, ambiguous, redundant, and often incompatible provisions. The aim of reform, for the author, is to draw a parallel between the contentious legal provisions and the current social circumstances while keeping in view both the needs of the individual and society. This is only possible by removing those constitutional provisions that are no longer in use, amending conflicting articles through parliamentary and judicial insight, and conferring constitutional powers considering the principle of separation of powers. Regarding other legislative provisions, their rectification is suggested by bringing them in line with the Constitution, especially the fundamental rights. A special emphasis is also placed on clearing out provisions that have colonial origins, and with time, have either turned archaic or contradictory to the evolving constitutional principles.

To accomplish these changes while maintaining stability in the law, it has been stressed that instead of judicial members, the job of proposing reforms in the Law Commission should be

assigned to people having the required energy, necessary experience, and knowledge. It is argued that judges are already charged with such a heavy workload that it becomes burdensome to spare time and energy for reforming the law in line with contemporary needs. Likewise, it has been proposed that provincial law commissions should be established considering the 18th amendment – thus, conferring a major portion of law legislation onto the respective provinces.

Discussion and Analysis

The book has been divided into six parts, and each part expands on a distinguished legal framework. Out of the six parts, four parts have been expended towards gauging and reforming the judicial system. The other two parts focus on constitutional provisions and other major legislative instruments concerning civil, criminal, and evidentiary rules etc. Each part is further sub-divided into several chapters for a systematic and step-by-step discussion of a particular limb of a legislative instrument or system of law.

Part I of the book emphasises an evolutionary change in law, and the Constitution in particular, through formal amendments by the legislative body and progressive interpretation by the judges. Through this exercise, the ultimate object is to shape the Constitution as a living Constitution,[2] which imports its meaning, without a change in its words, from changes in the social conditions of society. Such amendments are contingent upon a democratic and inclusionary legislative process. However, the author brings forward the critical issue that the constitutional amendment system in Pakistan does not ensure consensus, nor does it serve the ends of federalism. Unlike the U.S. and Indian Constitutions, the Pakistan Constitution only requires a two-thirds majority in Parliament to amend the Constitution. Moreover, there is no need to hold any public or parliamentary debates regarding the proposed constitutional amendment.

Apart from constitutional amendments, there are constitutional provisions, which are either conflicting, obsolete, or uncertain. This makes a persuasive case for bringing about robust reform of the Constitution. The much-debated immobility in law can be attributed to Article 2, which equates the ideological foundation of Pakistan with the tenets of Islam.[3] The said Article is also hard to reconcile with Article 3, which is argued to have its provenance in Marxism. With religious scholars vehemently arguing the Islamic nature of Article 3, the author highlights the need of harmonising these two Constitutional provisions to avoid any room for doubt and argument.

Another significant feature of the Constitution is the parliamentary system of government, emulated from the English system. The allocation of general seats in the National Assembly through direct and free vote results in a simple majority, irrespective of the proportion of votes cast for each candidate. This presents a strong need for a more representative and fairer electoral system, such as through the system of proportional representation. Moreover, there is a need for certainty and predictability to forestall the arbitrary exercise of the legislature's power to enact laws, overturn a court's decision, and amend the state's supreme law. This purpose can be achieved by reviving the practice of attaching long preambles and statements of objects and reasons, providing interpretative clauses, and publicising the drafts of statutes concerning life, liberty, or property of the public before their enactment.

[2] *Brown v Board of Education of Topeka* [1954] 347 U.S. 483.
[3] *Republic of Pakistan v Abdul Wali Khan* PLD 1976 SC 57.

The author also makes particular references to certain constitutional provisions which are either irrational (such as Article 62 which puts the onus on a court of law to interpret the moral character of a person), or against the freedom of a person to vote (such as Article 63-A which curtails a party member's freedom to vote), or non-justifiable (such as the process of passing a bill with as low the number of members as 58, without any in-depth parliamentary debate). The problems inherent in these provisions reflect the dire need for legal reform.

Constitutional powers as conferred on the President are either insufficient or enormously unlimited. The President's qualified prerogative, which is limited only to advising on the passage of a bill under Article 75, is a matter of controversy. At the same time, the withholding of assent from approving a bill can turn it into dictatorial power. Therefore, it has been suggested to either adopt the American style of veto power or make it mandatory for the President to record his reasons for withholding assent and requiring the legislature to repass it with a majority vote. The President is also vested with the legislative function of making temporary legislation, such as an ordinance. The author has recommended that Pakistan being an independent and sovereign state should do away with such an executive power, as it is a purely legislative function.

Uncertainty and contradictory provisions in the Constitution have clogged the legal system of Pakistan. Various constitutional provisions, such as Articles 48, 90, and 91, complicate the matter by giving the impression of a system of a dual or triple executive in the country—as a bare reading of these Articles brings forth the notion of two distinct executive bodies, the Federal Government, and the Cabinet. Therefore, the insertion of a vesting clause locating executive power solely with the Federal Government is indispensable. Furthermore, it has become necessary to do away with certain colonial imports, such as Article 91(7), which states that the Prime Minister serves 'during the pleasure' of the President, as the real executive power now vests with the Prime Minister and not the President.

The Principles of Policy are another hallmark of the Constitution. The unenforceability of these Principles has led to their neglect by the Federal and Provincial Governments; the author stresses upon their constitutional obligation, as envisaged under Article 29, to prepare a report on a yearly basis regarding the affairs of the Federation and provinces, respectively, on the observance and implementation of the Principles of Policy.

The Constitution also lays down the framework pertaining to the administrative branch of the election commission, which is presided over by members of the judiciary. However, it has been contended that judges are not experts in conducting elections and therefore, to save the integrity of the judiciary as an institution, judges must not be entrusted with such an administrative task. The author recommends the creation of special tribunals authorised to handle election petitions. Moreover, Article 220 is also in conflict with Section 5 of the Election Act 2017; the former vests the responsibility of assisting the election commission in the executive authority, and the latter makes judicial officers, such as subordinate judges, liable to assist the election commission. Therefore, to observe the mandate of Article 220 of the Constitution in letter and spirit, the author recommends that the subordinate judiciary should be excluded from performing this administrative task.

After having dealt with the Constitution, the author in Part II underlines the gaps and inconsistencies in other major laws enacted in Pakistan and proposes specific changes to them. The procedural law governing the criminal justice system in Pakistan is the Code of Criminal Procedure 1898 ("1898 Code"), which has largely remained unchanged. Numerous examples have been laid to substantiate this issue—provisions which were to guarantee fairness and justice to the victim, accused and society alike have remained fixed and intransigent. For instance, the broad powers of the police, including the power to arrest,[4] conduct interrogation and investigation,[5] and search a person and premises,[6] results in a mistrust in the institution of the police. Many of these provisions are also in conflict with constitutional rights, such as section 342, which is not in conformity with the right to protection against self-incrimination. In some of these instances, the judgments of the Supreme Court clarify the position of the law. For example, in *Amir Khatoon v Faiz Ahmad,*[7] the right to protection against self-incrimination as provided in Article 13 of the Constitution was upheld. However, the continued presence of these sections can be misleading for the judges. The Police Rules 1934, which govern the institution of police and their powers, are also inconsistent with the Police Order 2002, which embodies constitutional principles and doctrines of fundamental human rights. For instance, classifying under-trial prisoners based on their standard of living is purely discriminatory and in contravention of the right to equality as provided under Article 25 of the Constitution. Additionally, the exceptional power to handcuff an individual is routinely exercised in Pakistan; this is incongruent with sections 46 and 50 of the 1898 Code. Therefore, it has been suggested by the author that the provisions pertaining to the powers of arrest by the police should be brought in line with the constitutional provisions. To achieve this, primary legislation should be passed which expressly provides for the power to handcuff in a limited set of circumstances based on the nature of the offence and the principle of proportionality.

The civil justice system, governed by the Code of Civil Procedure, 1908 ("1908 Code"), ought to provide inexpensive and expeditious justice. However, the 1908 Code is antiquated; it has outlived its utility and is not in line with the changed circumstances. It has been advised to form a special Law Commission which should be tasked with suggesting measures on how to make the system less adversarial and avoid the exploitation of the poor by the rich litigants; how to stop the delay in disposal of cases, and how to minimise the number of unnecessary appeals and revisions filed. Emphasis has also been laid on separating civil issues from criminal ones and appointing specialised judges in both sets of cases. This separation would enable the handling of cases in a timely and efficient manner.

The Law of Evidence in Pakistan is also outmoded and contains controversial rules. It has been recommended to adopt the exclusionary rule, whereby any evidence obtained in violation of fundamental rights is considered inadmissible. Moreover, the provisions of the law of evidence are highly discriminatory against women, such as the provisions relating to women's competence to testify. In the case of women's competence to testify in Hudood cases, two arguments have been provided to argue against the discriminatory law: 1) various legislative provisions have been interpreted in such a way that certain limitations have been read into them and the rule for their

[4] The Code of Criminal Procedure 1898, s 46(2), 54, 55(1)(c).
[5] Ibid s 160, 161.
[6] Ibid s 102, 103, 165.
[7] PLD 1991 SC 787.

absolute application has been digressed with—the rationale for doing so was to interpret them in line with the social needs and changed circumstances of the time, and 2) the strategy of *ijtihad* needs to be employed in interpreting Hudood laws by reconciling the preservation of the sacred text and making it a living document capable of growth at the same time.

Reforms in the judicial system constitute a major portion of the book. Part III begins with reiterating the obligation of lawyers to strike a balance between their duty towards their client and their duty to bring justice—in case of conflict; the latter duty must prevail. At the same time, the accused has a right to be represented by a counsel, who is afforded a greater leeway in appealing to the sympathies of the court to press for the innocence of the accused. With these observations in mind, certain proposals have been put forward to refine the growing number of lawyers and bar associations in Pakistan, such as enhancing the quality of legal education, revamping the examination system, and disciplining lawyers.

After lawyers, judges form the bedrock of the judicial system, and their power to adjudicate and interpret must be exercised within the confines of the Constitution. Judicial power is a crucial aspect; however, the advisory jurisdiction of the Supreme Court, under Article 186 of the Constitution, negates this concept. The said Article vests no independent power onto the Supreme Court to consider or not consider the question referred to it by the President, which is in fact at the desire of the Prime Minister or the Cabinet. Following the U.S., it has been suggested to do away with the advisory jurisdiction in Pakistan. The matter relating to appointment, retirement, removal, and pension of superior judges is also confusing. For instance, the vesting of the ultimate power to decide the nomination and appointment of judges with the Parliamentary Committee under Article 175-A and the Supreme Court's vehement nullification of the effect of the said Article in several judgments depicts a doubtful scenario. Moreover, regarding the impeachment procedure, it has been recommended to follow the system adopted by the U.S. and U.K., where impeachment proceedings are carried out by the Senate alone. This system acts as a check upon the judiciary as the Senate represents the people.

Part IV of the book delves into the power of judicial review in Pakistan, which is also fraught with differing clauses and unfettered powers. Article 199 of the Constitution conflicts with a series of cases by restricting the definition of "person" to the exclusion of courts and tribunals[8]—the inconsistent rulings have created a state of confusion as it is unclear whether the orders passed by a judge in an administrative or consultative capacity would be amenable to judicial review. The author also questions the unrestrained sou moto power exercised by the Supreme Court, which is held to be against the constitutional principle of judicial power. It has been recommended to either repeal Article 184 as judges cannot act as administrators by initiating cases on their own, or clearly lay down the extraordinary circumstances for the exercise of this power. Moreover, it is also vital to clearly elucidate whether the power to declare a constitutional amendment as unconstitutional and void rests with the Supreme Court or the Parliament.

[8] *Shah Jamal v Election Commission* PLD 1966 SC 1; *Malik Asad v Federation of Pakistan* PLD 1998 SC 161; *Muhammad Ikram Chaudhry v Federation of Pakistan* PLD 1998 SC 103; and *Muhammad Ikram v Registrar* PLD 2016 SC 961.

Following this, judicial function is also considered to be highly dependent upon the interpretative process and its methodological tools—the subject-matter of Part V of this book. The author makes a strong case to perform this function considering changed circumstances, even if it means to digress from an established precedent or practice. However, at the same time, the author cautions that this must be done within the scope of powers conferred by the Constitution. Dictionaries form a vital part of judicial interpretation and there has been a controversy regarding whether sole reliance should be placed on dictionaries as aids to interpretation or whether other external aids to interpretation, such as the context, purpose, and subject of law, should be resorted to as well. To strike a balance, it has been recommended to provide official definitions of crucial words appearing in the Constitution or in any other legislative instrument.

Finally, Part VI makes an important closing contribution by shedding light on reforms in the workplace of judges, which is often regarded as unnecessary. Issues pertaining to long delays and frequent adjournment of cases have persisted within the judicial branch. An objective and narrow criterion to take up a case of review or appeal is critical for the timely disposal of cases. It has also been proposed to create divisions of the Supreme Court and High Courts to make the system more open and transparent. Parliament should play a role in constituting benches and assigning judges to ensure public confidence in the process. Moreover, for clarification purposes, Order XI of the Supreme Court Rules necessitates modification to exclude the power to remove a judge from a bench or to withdraw a case from him. Certain improvements in the judicial procedure are also imperative, such as making it time efficient and transparent for the welfare of both individuals and society at large. Lastly, to ease both the litigants and lawyers, simpler, concise, and jargon-free judgments are preferred.

Conclusion

Philosophers and scholars have employed various qualitative and quantitative methods to assess the goodness or badness of law. For Justice Fazal Karim, it is the evolution of the legal regime with the social, political, and economic aspects of society, which results in justiciable and equitable law. There is no gainsaying in acknowledging the hard work which has gone into thoroughly and methodologically writing this book, as it not only highlights inconsistent and conflicting legal provisions, but also lays down concrete ways to undo the static nature of law. The reforms proposed have been substantially buttressed through either fundamental doctrine that forms the core of constitutional and legal principles, or comparative analysis with other countries. The book is highly significant for lawmakers as it can adequately assist them with accommodating the proposed changes and carrying forward this practice of change where the situation demands. The areas of law touched upon by the author for an evolutionary change are not exhaustive. There is a huge chunk of legislative instruments which should follow a similar careful examination considering the methodology used in this book. The author has, however, dealt with the key branches of government, and fundamental legal instruments from which other laws are derived. Therefore, this book may be considered as an initiative, and similar suit must be followed by other academics, scholars, and lawmakers to bring the existing laws in conformity with the changing circumstances.