JUSTICE OF THE PEACE

Uzair Kayani

The World Justice Project ranks Pakistan at 130 out of 142 countries in its 2023 Rule of Law Index. We ought to rank a lot higher. This badly misnamed index relies on eight, mostly irrelevant factors: fundamental rights; open government; civil justice; criminal justice; absence of corruption; constraints on government power; order and security; and regulatory enforcement. Most of these factors and associated subfactors check whether the law protects and facilitates ordinary citizens. However, what Pakistan instinctively knows, and the World Justice Project does not, is that the Rule of Law is not meant to facilitate or protect citizens. It is meant to control them as the government sees fit. Only the last two factors, and those in substantially revised form – order, security, and enforcement – should count.

Such would be the view of James Fitzjames Stephen, the strident critic of John Stuart Mill who developed or reviewed many of the key laws under which our judiciary operates today. The interested reader may consult Really Mcbride's Mr. Mothercountry: The Man Who Gave Us the Rule of Law. Aside from codifying the laws that still govern most Pakistanis' legal experience, Stephen is known for his book, Liberty, Equality, Fraternity, which attacked Mill's On Liberty on the grounds that the purpose of the law was to enforce or compel obedience to the 'moral' authority (read 'government'). Stephen, perhaps Pakistan's greatest lawgiver, came from the conservative tradition of Edmund Burke and Thomas Carlyle. He did not prevaricate, as Mill and other contemporaries did, in trying to justify colonialism as a necessary and temporary burden to civilise the oriental savage. He was, in fact, quite clear that all people, whether 'Western' or 'Eastern' had, and would always have, something of the savage in them. They had to be coerced to act 'morally,' just as his beloved scriptures suggested to him. Stephen's view of the 'liberty' that Mill spoke of along roughly libertarian lines was that of 'ordered liberty': liberty only to the extent that it did not countenance disobedience to rightful authority. He expanded in his book: "Estimate the proportion of men and women who are selfish, sensual, frivolous, idle, absolutely commonplace and wrapped up in the smallest of petty routines, and consider how far the freest of free discussion is likely to improve them. The only way by which it is practically possible to act upon them at all is by compulsion or restraint."

In line with this thinking, Stephen-e-Azam proposed codifying the common law of England just as he had in colonial India: it would become more intelligible to dimwitted judges and lawyers, and more stable, being statutory and difficult to amend, rather than judge-made and readily mutable. He also opposed local Indian judges having the authority to decide cases involving native Englishmen, and showed striking sympathy for Edward Eyre, the Governor of Jamaica who resorted to murder and barbarous floggings to

suppress and punish the Morant Bay Rebellion of 1865.

Stephen understood, as our courts and other institutions sharply do, the irksome problem of 'the bloody civilian'. It happened to be bloody colonial subject in his day, but if his laws have not merited much amendment until now, I must assume that they remain fit to purpose.

Our laws continue to be largely statutory or regulatory. They continue to emanate from a legislature, bureaucracy, or elsewhere, without much popular or representative legitimacy. Perhaps the one key innovation that we can claim from Stephen's time is that our laws and regulations have become more fragmented: distributing powers and privileges to many more groups or power centres than the Crown that Stephen sought to empower. We have special schemes and privileges for many of our state organs, and specific grants or favours to several private groups. We might ask: why was such an innovation necessary?

That question will lead us back to a critique of Millian utilitarianism. True believers in what is variously called classical liberalism or neoclassical economics argue for the primacy of the market, free exchange, protection of property, contract enforcement, and the correction of market failures such as collective action problems, moral hazard, adverse selection, or monopoly. This rosy picture animates most of the 'development' initiatives of the World Bank, the Asian Development Bank, and any other number of arguably well-meaning bookworms. However, Pakistan's lawgivers and law deciders seem to know that this picture is not quite right.

A 'developing country' like ours (as the euphemism goes) can only liberalise its economy if groups with the power to do substantial violence within the state accept such a liberalisation. They must reason that they stand to gain more from the liberalisation than from their existing special access to resources or other perquisites. This would only happen if the market is so thick and complex that they have to rely on relatively unknown market actors to generate their returns. Most of the time, they can just rely on the state or a small set of other power centres.

As the unrest in various parts of Pakistan, and indeed most developing countries, shows, the weak state does not enjoy a monopoly on the 'legitimate' use of violence. Most of the time, except in the technical sense of being a 'sovereign' entity in international law, the weak state is barely legitimate in the first place.

Violence can erupt at the drop of a hat in rural Punjab, Sindh, Balochistan, and KPK, usually with nontrivial local support. In such circumstances, the key problem for the state is indeed an 'order and security' problem rather than a development problem. It cannot force other power centres (whether public or private) to shed power, and must appease them to maintain the peace. To understand this dilemma more fully, the reader may consult Cox, North, and Weingast's article on The Violence Trap, or more generally, North et al's Violence and Social Orders. By protecting entrenched interests and ensuring an uneasy truce between groups with the power to do great violence, our legal luminaries can sometimes look inefficient and ungainly.

The good Mr. Stephen had only one plenipotentiary to worry about, but our jurists and lawmakers have a great many potentates to please. It is their job, then, to tell the common citizen which of these many Chaudharies must be obeyed or favoured, and in which domains. Such is the rule of law in a state with many chiefs and the steadfast articulation of this in the face of uninformed ridicule is a great personal sacrifice that our lawmakers and judges make. They are, perhaps in a truer sense than many others, 'justices of the peace'.

For further corroboration the author directs the reader to televised court proceedings that graciously allow the casual viewer to discover and record for posterity some fresh evidence of how the judicial sausage is made in Pakistan.

The author is an Associate Professor of Law at the Shaikh Ahmad Hassan School of Law (SAHSOL), Lahore University of Management Sciences.