# NEED FOR JUDICIAL REFORMS

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It is by now conventional wisdom that good governance requires the strengthening of the rule of law and ensuring access to affordable justice. While our ethos of governance has given our ruling elite and the privileged segments of society the 'power' to ride rough shod over laws, rules and regulations, the poor suffer the harassment of public officials and are denied their basic rights. The poor feel increasingly disempowered because the subordinate judiciary, with which the bulk of the population has to deal with, suffers from lack of competence and corruption. And hence the widespread distrust in the judiciary in general and the lower judiciary in particular.

The excesses of state functionaries and the advantaged has been facilitated by state institutions becoming dysfunctional deficiencies in the design of the legal framework and the way it works. Many laws and regulations are poorly designed and are hence complicated or even defective. Moreover, these are administered in ways contrary to their intent and spirit.

Defects in laws are compounded by them being administered in ways contrary to their intent and spirit, the lack of their predictable application, the dearth of a culture of voluntary compliance of decisions, with just a handful being self-executing with little by way of actual execution – the system thus failing as a social deterrent. The weak enforcement in part reflects the difficulties of monitoring compliance.

For economic development, legislation, its predictable application (anchored on the twin foundations of equity and certainty) and the effectiveness and efficiency of the judicial system to enforce contractual obligations in a timely manner is paramount. Our courts on average take three years to resolve a commercial dispute compared with less than half this time in other jurisdictions.

The system also struggles with a body of jurisprudence which is less than consistent, if not made up of conflicting judgements. There is no concept of over-rule – as is the case in other common law jurisdictions. Coordination between courts or benches of the same court suffers on account of a lack of clear guidelines flowing to the subordinate courts. Apart for this failing making it difficult to assess whether the court will uphold or strike down a particular public contract the resulting confusion has incentivised corrupt practices, granting a free hand to the lower courts to pick and choose from conflicting decisions to apply the law as a result-oriented tool. All this obviously erodes investor confidence. Whereas the law must be concerned with results but when the results are secured by ignoring the process you get palm tree justice.

The weaknesses of such factors which move the wheels of the economy restrict the scale of business transactions, and thereby growth, through reduced economic activity, with firms being forced to diversify operations into activities not their core competence. This lowers the efficiency of, and the return on, investment. Since it takes years to get disputes resolved through courts, contract violators gain simply by getting a case stuck in the court queue. The courts oblige by liberally granting stay orders, which facilitate, if not actively encourage, illegal occupation of property - testing the fundamental principle/right, i.e. security of one's property. Not surprisingly, business transactions get restricted amongst parties having trust in each other's business ethics. Development of trust requires long-term stable

interactions. If trust cannot be established, contracting remains restrained, the cost of conducting transactions remain high, discouraging business development and growth. Both economic actors and the economy remain small. The ease of contract repudiation increases the costs and uncertainty of investment. Pakistan, therefore, finds itself constrained by a low trust culture, where neither the regulatory environment nor the unregulated market is conducive to dynamic change.

One must also sympathise with the courts in that the prosecution service and police do not just function on the whims of the government (whereas they should be fiercely independent), they also epitomise incompetence. Similarly, whereas there are complaints that dockets of superior courts have a significant percentage of rent and property related cases, in several instances resulting in stay orders, this is partly owing to issues of legislation and absence of a system guaranteeing titles. A common complaint is that judges have a heavy work load. But then the solution is not what is most widely propagated, 'more judges'. The issue, as will be argued below, can be partly addressed through internal reforms. Currently, more than 90% of cases are litigated in courts without getting settled before trial because the system encourages frivolous litigation and a high proportion is appealed with, as mentioned above, generously conferring double-digit adjournments, granting of open-ended stay orders, and non-adherence to the civil procedure code causing delays owing to the dilatory ploys of lawyers with the judiciary, which play an enabling role by not imposing costs and denying adjournments.

The lawyers cannot be blamed for gaming the system to the advantage of their clients but the judge cannot be absolved for being an indifferent bystander or spectator. He is the referee with a duty to make both sides play fair. In our case, he seldom, if ever, performs that duty when an adjournment is requested. Yet, no one regards that as a serious dereliction of duty which makes the system unfair and in the long run dysfunctional and unworkable. All the factors highlighted above result in low disposal rates and are costly for the economy.

Then there is also the activism of the judiciary itself either through stay orders, or worse still, the overturning of economic decisions (e.g. the widely quoted examples of rulings on the privatisation of the Steel Mills, the LNG project, the domestic price of sugar, etc.) that essentially lie in the domain of the executive has added litigation risk to the already high-risk profile of the country from the poor law and order situation, creating political uncertainty and unpredictability of policy decisions. Such judgments have contributed to policy paralysis and postponement of urgent economic decisions, driving away potential investors, while the country has ended up spending millions of scarce dollars to defend such actions in international courts.

But then, admittedly, a major reason underlying these occurrences is the government. It is the biggest offender, appealing against rulings against it, because no one is prepared to accept responsibility for not having appealed. For example, in tax related cases the demands of FBR can be excessive (if not illegal at times) to meet targets and any time bound stay orders may encourage state arbitrariness.

Furthermore, the judicial system needs judges with better understanding of commercial regulations and practices. The lack of an adequate skill set/skill mix is a major issue. To illustrate, the Federal HC, which has been given original jurisdiction, would be adjudicating important commercial and economic cases, especially since a key institution, FBR, is also located there. But this court seemingly has no judge with adequate experience/background of commercial law/practices on its bench.

The discussion above hints at issues afflicting the judicial system, governance, case load management, low disposal rates, skill set, inadequate allocations for non-salary inputs and laws not translated in Urdu (leaving much of the population unaware of its rights). This writer is of the view that the solution for reducing litigation and delays and making the system more efficient and effective is not simply more judges. A brief set of proposals is presented below. These should precede the determination of the need for additional judges and budgets, although, admittedly, the factors mentioned above and the implementation of the proposals below are inextricably linked; for example, i) judges adjourn cases because of their heavy docket; and ii) speedier adjudication of cases will reduce lives of stay orders.

a) Discourage frivolous litigation by imposing court costs and levying hefty charges on those seeking frequent adjournments, while recognising, as argued above, that government systems and behaviour of its functionaries also need to change.

b) Judges should encourage written arguments and limit the time for oral arguments. A transcription of all court proceedings beginning from the SCP and working its way down to High Courts and beyond

with copies should be made available to parties as a routine matter. This will prevent judges from wasting time by flippant remarks and counsel will become more precise when whatever they say becomes a matter of record.

c) Small Causes Courts should be settling minor disputes through summary procedure, while family courts and court-annexed Alternative Dispute Resolution should be strengthened (which, admittedly, would work only if litigation is made expensive) and civil, criminal and commercial cases assigned to different courts based on relevant expertise and experience of the judge - with arbitration being encouraged for commercial cases, saving court time on matters of routine awards.

d) There should be an institutionalisation of regular inspections, performance monitoring and investigation of complaints against subordinate courts by higher courts and publishing these in annual reports. But then the apex court is today controlling appointments, regulation and discipline (all rolled into one) and is not prepared to tolerate a role for anyone else -suggesting the need for a judicial ombudsman.

e) As argued above there is need for systematic and periodic reviews since unpredictability is being caused by conflicting judgments, without an over-ruling/over-arching one: as in other common law jurisdictions. Similar cases should be clubbed and heard by the same bench with clear guidelines flowing to subordinate courts.

f) The superior judiciary has become a self-perpetuating oligarchy. They control appointments, regulation, discipline and removal and countenance limited, if any, role for anybody else. Has this led to a better judiciary?

g) Contempt of court laws and the offence of scandalising/maligning a judge requires review, since the prevailing concept is archaic, stifling free speech and criticism of court processes. At a personal level judges have no right to a higher level of protection than any other citizen through defamation laws. In our case, the 'superior judiciary' is far more thin-skinned and uses the contempt laws to protect its image; a vestige of our colonial heritage, under which, when dealing with 'far away colonies with coloured people', it was necessary to maintain the majesty of law. However, it is now time that the coloured people are treated as citizens of a sovereign state instead of subjects of far away colonies.

Finally, the current system favours lawyers and lionises judges, inducing protracted litigation with limited benefit to the ordinary public; political cases taking precedence over ordinary civil and criminal cases. And without the necessary corrective actions it will be difficult to elicit wider support for additional resources.

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