

# **The role of Judiciary in Economic Development, Regional Integration and Foreign Direct Investment <sup>1</sup>**

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April 8, 2018

Among all the three organs of the state set out in the constitution, a well-functioning judiciary is crucial to democracy, governance, security, economic growth, and equity. No other institution has such a pervasive influence on so many aspects of the daily life of a citizen and also on that of the government. The executive has no choice but to comply with the directives of the courts, however unpalatable they may be. The legislature can take a cue from the courts' decisions and bring about changes in the laws or amend the constitution but the process required for this is cumbersome. The judiciary, particularly the Supreme Court of Pakistan, enjoys unfettered powers under the constitution. Hasan Askari Rizvi<sup>2</sup> describes the relationship between democracy and the justice system:

Democracy is based on liberal constitutionalism. It needs a well-established constitutional and legal system that recognizes civil and political rights, equality of all citizens irrespective of religion, caste, ethnicity or language and region. An independent judiciary ensures that the Rule of Law is available to all citizens. The civil and political rights have to be protected not only from the excesses of state institutions and functionaries but also secured against powerful interest groups that resort to violence or a threat thereof against any particular community or region.

This paper attempts to focus mainly on the role of judiciary in a country's economic development, promoting regional integration and attracting foreign direct investment.

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<sup>1</sup> This paper is extracted from the chapter on the Judiciary in author's recent book "Governing the ungovernable" published by the Oxford University in 2108.

<sup>2</sup> Rizvi, H.A. (2016): 'In Search of Genuine Democracy', *Express Tribune*, 19 Sept.

## CHANNELS OF TRANSMISSION

The main channels through which the judiciary and judicial processes can affect economic governance in a country indirectly or directly are (a) Rule Of Law and Accountability ( b) Security of Person and Property ( c) Protection and enforcement of contracts and ( d) Ensuring Equity by providing access to justice to the poor and less privileged segments of the population.

One of the principal components of governance is the Rule of Law which carries significant weight in the overall structure. It also shapes societal behaviour and conduct. Babar Sattar <sup>3</sup> articulates his views on the role of judiciary in ensuring the rule of law

What rule of law is meant to do is inject certainty into affairs of the state and society by defining the rules of the game and meticulously following them without exception. We are not a rule of law society because no one around here can be certain what the rules are and that they won't be changed midstream to accommodate the interests of one power elite or another.

In a polity where rules aren't entrenched, the law isn't certain, and cynics see judicial outcomes flowing backward from consequences desirable for the winning power elite, any court verdict – whether motivated by law or morality – will attract controversy.”

Another component, i.e. accountability, is also underlain as an independent judiciary would not tolerate any conflict of official and private interests on the part of those in power, be they politicians or bureaucrats. Accountability courts form an integral part of the value chain with the appellate authority vested in the higher courts

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<sup>3</sup> Sattar, B. ,2017): 'Not Guilty vs Not Proven', *The News*, 21 Jan.

but have not acquitted themselves in creating a deterrent effect against malfeasance and misuse of public office for personal gains.

The IMF in the *World Economic Outlook, 2017*<sup>4</sup> has confirmed that higher quality of legal systems and strong protection of property rights are associated with better medium-term growth outcomes in emerging and developing countries (EMDCs). However, in reality, like other institutions, preservation of the interests of the élites has not escaped the judicial history of Pakistan. Babar Sattar<sup>5</sup> once again has the following observations to make

the history of rule of law in Pakistan is a discreditable one of using the law and its processes to strike deals between competing power elites, as opposed to defining the boundaries of right and wrong and holding the guilty to account. In the past when courts waded into the political thicket and produced partisan consequences, they did so at the expense of public faith in the neutrality and integrity of rule. That is why many see the law as a tool for the powerful to settle scores, and not as an instrument of justice... Our system of checks and balances is neither potent nor functional. Our power elites don't like public officials exhibiting autonomy and independence.

Security of person and property, and the excesses and arbitrary actions of those in power are safeguarded by a vigilant judiciary. The Supreme Court has taken suo moto cognizance of many incidents in which the fundamental rights of individuals have been violated. The fact that the Military courts had to be established as a special act of the Parliament to try and prosecute those apprehended under the Anti Terrorism Act does show that the lower courts formed for this purpose have not been able to perform their duties in protecting security of person upto the expectations of the representatives of the public.

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<sup>4</sup> International Monetary Fund (2017) *World Economic Outlook* (Washington D.C.)

<sup>5</sup> Babar Sattar (2017): 'Rule of Law on Trial', *The News*, 10 June

The most direct link between an effective judiciary and economic growth is the protection and enforcement of contracts. A market-based economy is driven by various kinds of contracts reached between private parties. If these contracts are reneged or openly violated the exchange of goods and services would come to a grinding halt. It is the courts who are the custodians of these contractual obligations. Several decisions of the courts in Pakistan on enforcement of contracts between the Government and foreign investors were challenged and reversed by International Arbitration courts causing heavy financial costs to the exchequer and impairing the confidence of some of the prospective foreign investors. In order to restore the confidence of foreign investors particularly the Chinese investors who have committed \$ 45 billion to Pakistan under CPEC for the next 15 years, mutually agreed mechanisms of dispute resolution should be respected in both letter and spirit. If these arrangements preclude the interventions of the courts in Pakistan and only neutral arbitration courts are allowed this power then our judges should abide by these contracts. Any departure from this for some reason or the other would undermine the confidence of the foreign companies and result in a decline in the volume of foreign investment to the country.

Finally, the poor do not have the resources to pay for prolonged litigation and are therefore vulnerable to exploitation and suppression by the financially well-endowed members of society. Inexpensive, affordable, and expeditious justice and simplified alternate dispute resolution mechanisms that can come to the rescue of the poor are missing. Access to justice continues to remain a worsening problem for the poor. S.R. Khan,<sup>6</sup> in a benchmark study on law and order and the dispensation of justice shows enormously and unnecessarily drawn out proceedings: cases pursued to establish prestige, with many in the end being abandoned or in an in or out of court settlement after years of court

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<sup>6</sup> Khan, S.R., et al. (2007): *Initiating Devolution for Service Delivery in Pakistan* (Oxford University Press).

appearances. Influential people use the courts to settle scores and the police and the courts oblige and appear to collude with them in harassing the poor. Over half the respondents said that it was difficult to register a case with the police and most indicated that this was the case because the police were seeking a bribe.

A graphic description is provided by the convention organized in India on 'The Judiciary and the Poor' by the Campaign for Judicial<sup>7</sup> Accountability and Reform but is very applicable to Pakistan. The convention noted:

The judiciary of the country is not functioning as an instrument to provide justice to the vast majority of the people in the country. On the other hand, most of the judiciary appears to be working in the interests of wealthy corporate interests, which are today controlling the entire ruling establishment of the country. Thus, more often than not, its orders today have the effect of depriving the poor of their rights, than restoring their rights, which are being rampantly violated by the powerful and the State. [The judicial system] cannot be accessed without lawyers ... And the poor cannot afford lawyers. In fact, a poor person accused of an offence has no hope of defending himself in the present judicial system and is condemned to its mercy.

A research report on Pakistan that was prepared for the German Cooperation Agency in 2015 finds that:

“98.2 per cent of respondents in a survey opined that the poor and lower classes do not have access to justice in the formal justice system. In the same survey, 42.8pc felt that women and 25.2pc that landless peasants and agricultural labourers similarly lack access. One of the reasons for limited access to the formal justice system, as perceived by half the respondents, is the high legal fees charged by lawyers.

*The World Justice Project Report, 2016*,<sup>8</sup> on the Rule of Law Index, ranked Pakistan's criminal justice system as being at 81 out of 113 countries, above Bangladesh (97) but below India (71), and clearly very low down among the 113 countries surveyed. In the civil justice system, the same report ranked Pakistan even lower (106/113), below Bangladesh (103), Sri Lanka (96), and

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<sup>7</sup> CJAR (2007) Access of Poor and Delays in Justice( New Delhi)

<sup>8</sup> <https://worldjusticeproject.org/our-work/wjp-rule-law.../wjp-rule-law-index-2016>

India (93). On 'accessibility and affordability', Pakistan scores slightly higher than India, but lagging behind Sri Lanka and Bangladesh. A comparative analysis of the legal aid systems of Bangladesh, India, and Sri Lanka shows that these countries, although struggling like Pakistan in many ways in developing effective legal aid systems, have at least established organized aid structures.

A World Bank 'Enterprise Survey' reported that 38 per cent of Pakistani firms find the court system a major constraint in doing business in comparison to 14 per cent in South Asia as a whole. Under 'Investment Climate Assessment' a third of Pakistani firms perceive the low quality of courts as an obstacle in comparison to a fifth in Bangladesh.

These reports and assessments about Pakistan's judicial system and especially the protracted litigation, inordinate delays in the disposal of cases, extended and unending periods in which stay orders and interim injunctions remain valid receive a lot of attention from the law firms advising foreign companies making investment decisions overseas.

Individuals in civilized societies are able to peacefully coexist through mutual observance of agreed upon rules. They are motivated to observe and internalize those rules when punishment for transgression are swift and certain. When this assurance is lost, when punishment is uncertain and long-delayed, or when the innocent are punished as frequently as the guilty, the entire fabric underpinning civilization and the rule of law unravels. The failure to provide such assurance explains the unrest and anarchy prevailing in every segment of society. Some of the top legal brains of the country have indeed already diagnosed and prescribed the remedies for this malaise.

Mr. Justice Saqib Nisar, the chief justice of Pakistan said in one of his judgments in 2015: 'a judiciary which ... is tardy ... and has no urge ... and ability to decide the cases/disputes before it expeditiously ... is a danger to the state and the society.'

In *MFMY v Federation*, Justice Nisar also went on to prescribe the remedy for addressing delays which many countries in the world have adopted: proactive case management by judges. He said, 'the courts must, thus, exercise all the authority conferred upon them to prevent any delays which are being caused at any level by any person whosoever'.

One of the main reasons for protracted and expensive litigation is less than acceptable productivity of judges in the lower courts. Table I shows that the monthly average disposal per judge of the District courts is 74 in contrast to 351 of the Peshawar High court. Although we fully realize that the District courts conduct trials which take much longer time than the appellate courts it is still reasonable to assign the District judges a performance indicator of disposing at least twice the present number of cases i.e. 148 by summarily dismissing and heavily penalizing frivolous litigation, allowing very few stay orders and adjournments, organizing day to day hearing over extended number of hours, speeding up writing of judgments and various other techniques which the Honorable members of the National Judicial Policy Committee are more familiar than the pendency would decline from the current number of 1.507 million to 955,740 providing a major relief to the genuine litigants. In that case the difference between new cases instituted and disposal would be net reduction of 297817 every month. If this target rate of monthly disposal of 564610 pending cases is maintained and assuming no substantial increase in the number of new cases instituted it is quite conceivable to reduce the backlog in 5 to 6 months. At the current net rate of 15512 it would take 97 months to reach the same point. A more realistic target of 111 disposals per month would bring it down between 9 to 10 months. These calculations do not assume any increase in the number of judges keeping the quality considerations in mind. It is not obvious as to why the judges at the District level cannot be asked to achieve the less ambitious target of 100 to 110 when the High court judges are already deciding 181 cases per month.

The discussion above leads to the conclusion that the channels of transmission linking the judiciary and economic development and governance are weak and leave much to be desired. These links can be strengthened only through a set of reforms across the whole chain involved in the Administration of Justice—the Police, Investigation, Prosecution and the courts but as this article is focused on the judiciary the scope is limited to Judicial reforms only.

## JUDICIAL ACTIVISM AND ECONOMY'

In this section we would dwell upon in some detail as to how does judicial activism and suo moto actions impact the economy and the perceptions of foreign investors

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There is a strong relationship between the rule of law and investment and business development. In absence of a conducive legal environment, the uncertainties created by other factors such as political instability, security, law and order, energy, and the like,, worsen the situation. However, a well-functioning judicial system can reassure the investor and act as a countervailing force to the other negative attributes. An investor will part with his financial savings and share his expertise and experience only when he is assured that a firm is profitable. For profitability, arbitrary and discretionary actions on the part of state actors need to be kept at bay. To achieve this, non-discriminatory and impartial application of law, enforcement of contracts, protection of property rights, and speedy disposal of legal cases are necessary and need to be seen to be happening.

Judicial activism and suo moto actions taken by the Supreme Court and , particularly since 2009, could have been profitably utilized to address some of the structural issues plaguing the judiciary and attention could have been focused on reforms that could, (1) do away with the procedural and process difficulties in ensuring broad- based access to justice; (2)



revise outdated and redundant laws and processes; (3) maximize the employment of modern technology to improve case management; (4) encourage the establishment of Alternative Dispute Resolution (ADR) mechanisms, (5) track and enforce the National Judicial Policy 2009; (6) direct and ensure that the special courts and tribunals adhered to the deadlines for disposal of cases. These measures would have had a more enduring and fundamental impact on the economic governance of the country and help to remove some of the obstacles in the way of investment and equitable economic growth.

The reverse was the case and the economy had to bear certain costs because of the proactive decisions of the Supreme Court in matters of economic policy. In a paper presented by the author at the kind invitation of the then Chief Justice Tassaduq Jilani at the International Judiciary Conference held at Islamabad in April 2014<sup>9</sup> illustrated this point with the help of four real examples.

Pakistan's country risk profile which was already quite high has heightened with the addition of a new type of risk i.e. litigation risk. Even if investors and businesses are able to surmount all the different hurdles imposed by the federal, provincial, and local governments they are then faced with an additional imponderable that adds to uncertainty and unpredictability of investing and doing business in Pakistan. After all the approvals have been obtained there is the fear that the Supreme Court might take suo moto cognizance of the transaction, issue a stay order and decree lengthy time-consuming proceedings to decide the case. Alternatively, some other party aggrieved with the outcome of an executive decision may file a petition that is readily admitted by the courts. A large number of frivolous petitions are filed every year that have dire economic consequences. The penalty for filing these is insignificant but their cost to the economy is enormous.

Economic decision-making is highly complex and its repercussions are interlinked both in time and space. For example, prices are determined by interactions among hundreds of thousands of economic agents and no

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<sup>9</sup> Ishrat Husain (2014) Economic consequences of Judicial Actions. A paper presented at the International Judiciary conference held at Islamabad on April 18-19, 2014

administrator, planner, economist, or judge can ever improve or better the market mechanism. Only in cases of market failure, monopoly, or external factors should the regulator intervene. Tampering with this natural way of determining prices seriously distorts the allocation of resources. It is simply not feasible for any individual or group to acquire and command the enormous information that is necessary to decide on what the prices level should be. Administered prices or prices fixed by any means other than those determined by the market result in winners and losers and have distributional consequences.

Private sector and profit making form the backbone of market-based economy to stimulate growth, and alleviate poverty. Where undesirable practices are detected the judiciary has every right to intervene. For example, it should curb rent-seeking through collusion between private players [Any excess profits earned beyond competitive practices are rent seeking whether it is imperfect market structure, government concessions or collusive practices] or where favors are being bestowed by the executive on their cronies, or the pre-determined rules and processes for tenders and contracts are being violated and awards not being transparently made. In other words, if there is any attempt made to dilute or weaken the forces of competition the judiciary has every right to intervene. However, simply opposing privatization on the grounds that it reflects the populist sentiment without taking into account the economic consequences can do more harm by destabilizing the economy at large. The annual recurring losses of the State owned enterprises take away one fourth of the total tax revenues of the country. Fiscal deficit would be reduced by 3 percent of GDP and the domestic and external borrowing requirements would be curtailed resulting in lower debt burden if these enterprises are off loaded. It is my firm view that these savings could then be used to raise budgetary allocations for Education and Training, Health care, Drinking water and sanitation which an ordinary citizen badly needs. The banking sector instead of receiving subsidies today pays billions in taxes and dividends to the exchequer. It is gratifying to note that the Supreme court has recently revived the case of privatization of Pakistan Steel Mills.

The situation is not dissimilar in neighboring India which too has a similar legacy. Pratap Mehta (2005) <sup>10</sup>terms the Indian judiciary as a deeply paradoxical institution. The courts have accumulated great power, even managing to limit parliament's right to amend the constitution. They have however also become an institution of governance , in effect enacting laws which are the sphere of parliament, pronouncing on public policy, and have even directly taken over the supervision of executive agencies.

## CONCLUSION

Pakistan's Courts must be recognized as a central institution for our economic development, regional integration and foreign direct investment. Its role in protecting private property rights and impartial and expeditious enforcement of contracts lends a great deal of comfort to local and foreign investors. This trust is based on the legacy of the British system which Pakistan inherited and provides a clear set of codes and case law that confer some degree of predictability about the outcomes. The failure to update the procedures and laws of the 19<sup>th</sup> century have been a source of grief . As a leading Pakistani lawyer <sup>11</sup> has so aptly commented, the British model on which the Code of Civil Procedures (CPC) 1908 was based was discarded even in the UK a long time ago. The British model

preferred form over substance on account of this fundamental flaw, litigations continue in Pakistan for decades while lawyers squabble over issues of virtually no consequence. In each piece of litigation there is a lawyer seeking justice for his client and an opposing lawyer who will very successfully prolong and delay the litigation while liberally drawing upon various dilatory provision of CPC. Knock outs on the basis of hyper-technicalities and the causing of abnormal delays are in fact appreciated and considered 'assets' and 'qualities' of astute lawyers.

The recent attempts to derail from the established path that was underpinned by essential characteristics of the system i.e. impartiality and

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<sup>10</sup> P.B. Mehta (2007): 'India's Judiciary: The Promise of Uncertainty', in D. Kapur, and P.B. Mehta (eds), *Public Institutions in India: Performance and Design* ( Oxford University Press, Delhi)

<sup>11</sup> Mansoor Hasan Khan (2011), Judicial Reforms , *Dawn*, 1 April 2011

semblance of it, prudence in exercise of discretion has caused some anxiety . There is a dire need to implement the reforms which were proposed by the National Judicial policy committee in 2009. Those and some other reforms , once fully implemented, would once again restore the glory of the judiciary in Pakistan. The Supreme court can also direct the Executive branch to form Law Reform Commission or other commissions to bring about the reforms in the whole chain of Administration of Justice i.e the Police, Investigation, Prosecution and Prisons.

The salient points of the proposed judicial reforms are recapitulated below:

1. Laws pertaining to economic transactions have outlived their utility and do not conform to the modern business practices. Other laws and procedures pertaining to civil, criminal, evidence and decree enforcement should also be updated in light of the modern day demands
2. The disposal of cases by the District courts is sub optimal. Their performance , among other indicators, should be evaluated by the number of cases disposed off against the target given. Frivolous litigation should attract severe penalties and summary dismissals clearing the dock for more substantive cases
3. The administration of courts can be strengthened by the use of ICT tools, induction of talented staff and streamlining of procedures and intensive supervision and monitoring by the superior courts
4. Access to justice for the poor should be ensured by a pro active publicly provided Legal Aid system . Small causes courts ought to be revived
5. Land disputes that form the bulk of courts work load can be easily transferred to separate courts or tribunals because the computerized Land Record Management systems has made it easy to adjudicate disputes
6. The courts should vacate the stay orders and interim injunctions in case of taxes, bank loans and other commercial disputes within 15 days

7. Courts intervention and stay orders in implementing the Foreclosure law is hurting the extension of credit to the SMEs and housing. Modern Bankruptcy Laws would ensure orderly exit of dead firms and clean up the banking system.
8. A separate cadre of the judges well conversant in commercial and corporate laws should be established and the capacity of existing judges enhanced through regular training courses.
9. Alternate Dispute Resolution (ADR) is deeply rooted in the cultural and social norms and should be made an integral part of the judicial value chain

The (NJP) Committee, which comprises the chief justices of all the high courts presided over by the chief justice of the Supreme Court, is an ideal platform for the formulation, design, and implementation of these reforms. The power, prestige and resources the Supreme court has under its command are unparalleled. The honorable members of the committee overseeing the policy will be performing a great service to the nation if they regularly monitor and ensure that these reforms are being implemented both in letter and spirit. This single outcome will be a hundred times more valuable than hundreds of disparate cases of judicial activism.

TABLE I  
 CASES PENDING BEFORE THE COURTS IN PAKISTAN  
 February 2018

	Pending	Instituted	Disposed	Balance	Disposal per judge
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SUPREME COURT	38350	1437	1730	38342	108
HIGH COURTS	298601	20261	21760	295745	181
Lahore	150573	12011	10537	152047	224
Sindh	94325	3289	3646	93160	93
Peshawar	30800	3769	6679	27862	351
Balochistan	6510	404	225	6140	22
Islamabad	16393	788	673	16536	135
DISTRICT COURTS	1520350	266793	282305	1507193	74
GRAND TOTAL	1857871	288496	305844	1841606	78
Source:	Law and Justice Commission of Pakistan				

