

Economic costs of judicial (in)actions

[Part I]

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Pakistan inherited a legal and judicial system from the British rulers. While the colonial masters have moved forward with time and modified their laws and procedures consistently, we are still frozen in the 1850s.

A number of well-informed commentators have diagnosed the weaknesses and shortcomings of the system, both on substantive matters as well as procedural issues. There is a broad consensus that the present system is inequitable, expensive, protracted and time consuming. The proceedings span decades to obtain a final decision and, having reached that stage after so many appeals and reviews by multiple tiers, the execution of decrees is slow and cumbersome.

Frivolous litigation without any substantial penalties, tampering of evidence and retraction by key witnesses under pressure and due to monetary benefits are prevalent widely. Use of modern ICT tools in case management, recording of evidence, transparency in preparation of cause lists, servicing of summons and other administrative matters are also sporadic and selective.

The quality and content of legal education, enrolment as lawyers, non-observance of the code of conduct and the open display of rowdy behaviour, and the inherent conflict of interest in regulation are issues that have been highlighted several times by well-meaning members of the Bar themselves. Further, the human resource management of the judiciary falls below the desirable benchmarks due mainly to factors such as the method of appointment of judges at the entry level and their perfunctory training, promotion based on seniority rather than performance and expertise, reluctance to weed out the incompetent and corrupt, and payment of same amount of compensation across the board to everyone.

The recent debate on the basis of appointment to the Supreme Court — seniority or merit — reflects the divergence of views within the profession itself about the possible direction of high-level judicial appointments. It is indeed gratifying that some highly competent individuals of caliber and integrity have been appointed to the Supreme Court in the last few years on the basis of merit, expertise and performance rather than seniority.

Each one of the topics mentioned in the previous paragraph has been widely debated in newspapers, electronic and social media, seminars and conferences ad infinitum by able lawyers, retired judges and scholars. The first Law Reform Commission was formed in 1958, followed by another in 1967 with several committees on judicial reforms in the intervening period until 1979 when a fulltime standing Law and Justice Commission headed by the chief justice of Pakistan was set up to constantly work for the improvement, modernization and reforms of the legal system. Another committee created in 2002 — the National Judicial (Policy making) committee — also exists and formulated the 2009 National Judicial Policy. Each commission and committee has come up with very sensible and practicable suggestions but somehow the progress in adopting and implementing them has been extremely lethargic. It is time to translate these recommendations and proposals into time-bound result-oriented actions.

The subject I wish to take up here is the severe economic costs caused by the protracted delays and frequent unjustified adjournments, indefinite stay orders, multiple stages of appeals, suo-motu cognizance taken by the Supreme Court and consequential judicial activism, and the lingering pace of execution of decrees awarded by the courts. Before discussing the economic costs in some detail, two suggestions would go a long way in addressing some of the issues facing our legal system.

First, the whole administrative structure of the judiciary — from the lower courts to the Supreme Court — needs a complete overhaul in the induction, promotion, training and severance of human resource and bringing in experts and specialists in fields such as economics and finance, ICT, adoption of ERP and e-office, e-case management systems with dashboards along with a centralized data center and dynamic website; reengineering of business

processes; adequate physical infrastructure for the judges ,their staff; and regular monitoring and reviews by the Law and Justice Commission. The antiquated system of 'readers' and 'nazirs' and clerks needs to be replaced by a professional management system.

Second, the Alternate Dispute Resolution (ADR) mechanism and small-cause courts without the representation of the lawyers would bring a lot of relief to poor litigants who cannot afford the costs of litigation; it will also help reduce the burden on the courts.

It is seldom realized that there is a close causal relationship between economics and law that runs both ways. Usually, they are considered two separate disciplines with little shared linkages. This is not correct. In fact, rule of law, sanctity of private property and contract enforcement form the basis of all economic transactions. Markets cannot function efficiently without observing these underlying principles. Disputes between the contracting parties are adjudicated, mediated, resolved or arbitrated by the judicial system. In the realm of economic governance, interpretation of laws, regulations, and rules belong to the domain of the judiciary and their verdicts are binding upon the executive branch.

There is hardly any recognition that incorporating economic analysis in judicial verdicts can potentially resuscitate dead capital buried in informal and illegal settlements and squatters, promote financial savings, augment tax revenues, reduce land speculation and prices, enforce banking and other regulatory compliances, minimize elite stranglehold and bring about many other economic benefits to society. It has been found that whenever economic analysis is taken into account and expert opinions have been sought by the judges, the quality of the verdict improves and the economy benefits. We are by no means arguing in favour of the Chicago School law and economics model of rational choice and the belief that legal rules and court decisions should be aimed only at promoting efficiency. In our view, equity and easy and affordable access to justice ought to play an equally important role in the legal system.

What are the economic benefits a sound judicial system can bring about? First, trillions of rupees worth of urban property is possessed by households living in informal and illegal settlements, squatters, katchi abadis in the main metropolitan centres of the country. They live in substandard conditions without access to basic services. As they have been settled illegally with the connivance of the land mafias, politicians, bureaucrats and police, they do not have title to the pieces of property they are living in.

The owners of land in katchi abadis that were regularized were able to get titles on the basis of which they were able to obtain mortgages for further improvement, using their plot as collateral. In many other cases, they were able to move up socially and shift to better places or used bank loans to start or expand their businesses. The release of this huge amount of dead capital can be put to efficient and productive economic use while at the same time upgrading the social and economic status of excluded poor communities.

The courts can order enforcement of laws that were meant to regularize and legalize these katchi abadis, establishing titles and ensuring proper planning, utilities, open spaces and amenities rather than order forced removals as encroachments. It is to be commended that the Lahore High Court recently decided a six-year-old pending case against the foreclosure law which has fueled mortgage lending by commercial banks in the country.

To be continued

The writer is the author of 'Governing the ungovernable'.