# Improving Efficiency of the Court Service in Pakistan: A Comparative Study of the Options for Reform

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## Abstract

The project is directed to formulate recommendations to improve the efficiency of court service in Pakistan as to civil litigation at the district level. The New Civil Procedure Framework (NCPF) is presented as a reform model for Pakistan with a renewed theoretical construct, innovative strategies and specific practical measures. The study focuses on the efficiency perspective of court service, its appraisal and improvement through procedural and managerial tools. Efficiency is measured through quantifiable indicators using empirical data which shows delay and abuse of court process as alarming performance issues causing tremendous sufferings for the end-users in Pakistani district courts. This analysis offers clues to identify the problem areas, i.e. outdated procedural law and its underlying theoretical assumptions and case management deficit. The NCPF, being a unique reform model, at first identifies the theoretical fault lines of the existing system and its inadequacy to contain performance issues in the long run. The broad framework of Woolf's experiment and Singapore's judicial modernization are taken into account while designing the NCPF, but the effort remained far from a blind replication. The magnitude and intensity of delay and abuse of court process in Pakistan necessitated looking beyond Woolf and Singapore. Though the theoretical foundation of NCPF model draws on Woolf's theory of balancing key imperatives (i.e. accuracy, expedition and economy) and the principle of proportionality, yet the innovative neo-proceduralist approach is its distinguishing feature. It is argued that the law must dictate the pace of litigation while the judge is only to *execute* the compliance regime with no or little discretion to condone. Following these constructs, the NCPF requires rigours initial scrutiny of cases, forewarning as to penal consequences of frivolous litigation and non-compliance, pre-planning, and use of modern management and digital tools to ensure expedition and efficiency of judicial service in Pakistan.

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# Contents

# Abbreviations

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| ADR | Alternate Dispute Resolution |
| AJP | Access to Justice Program |
| CCR | Case Clearance Rate |
| CPC | Code of Civil Procedure 1908 |
| CPR | Civil Procedure Rules |
| HDI | Human Development Index |
| ICCE | International Consortium for Court Excellence |
| ICT | Information and Communication Technology |
| IFCE | International Framework for Court Excellence |
| JSSP | Justice System Support Program |
| LJCP | Law and Justice Commission of Pakistan |
| NCPF | New Civil Procedure Framework |
| NJP | National Judicial Policy |
| NJPMC | National Judicial Policy Making Committee |
| SCP | Supreme Court of Pakistan |
| SJPP | Strengthening Justice with Pakistan Program |
| WJP | World Justice Project |

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# Chapter 1. Introduction

From a normative perspective and given the societal objective of establishing the rule of law and catering for the legal needs of the citizens in a democratic polity, courts are expected to deliver quality service while adjudicating as to their rights and obligations in civil disputes. An ordinary citizen being user of the court service whose rights and interests are under threat of violation, reasonably expects that resolution of the matter and its final determination would factually and legally be correct, arrived at by competent and impartial judges, within reasonable time, at minimum possible cost and after affording fair treatment and equal opportunity of hearing. In response, a well-functioning judiciary would come up to these expectations by offering a court service which would be accessible, affordable, expeditious, efficient, fair and effective. These attributes of an ideal judicial system depend on several internal and external factors. From an institutional perspective, characteristics like the structure of a legal system, organisational culture, judicial leadership, human capital, infrastructure and financial resources, and substantive and procedural law are the main areas. Without undermining the importance of other attributes of good courts and the said institutional facets, this project is exclusively focused on the efficiency aspect of court service attributable to civil procedural law and case management system. Efficiency perspective concerns the speed of the court process, timeliness of judicial service, and resultant economical use of resources. Efficient court service implies that the judicial activity and proceedings are so organised, planned and well-managed that while determining the cases finally, the legal remedy to the litigants is provided within a reasonable time and avoiding unnecessary cost, vexation and delay.

The unit of analysis of the project is district courts of Pakistan where ninety per cent of the entire country's litigation is dealt with. A fundamental premise in this regard is that performance of lower courts of Pakistan is underwhelming and plagued by delay and abuse of court process, and one of the factors instrumental for this state is the regime of underdeveloped and outdated procedural laws and inefficient court process, especially in the civil justice. On this premise, the project attempts to formulate reform proposals and recommendations to enhance efficiency and expedition by improving procedural tools and the case management system in the district courts of Pakistan. Since similar issues of performance (i.e. delay, case congestion and uncertainty etc.) in the civil litigation were tried

to be addressed through civil procedure reform in England and by case management up-gradation in Singapore during the 1990s, it shall be explored what broad lessons these experiments can offer for a reform model to be envisaged in this project for Pakistan. Hence, the main quest of the project is to explore how delay and abuse of the court process can be prevented and how expedition and efficiency can be ensured through improvements in the civil procedure and case management in Pakistan. It is pertinently observed that 'no subject is better suited to the simultaneous pursuit of Competence, Truth and Virtue than Civil Procedure'.[1] For that end, a reform framework shall be developed containing theoretical, strategic and practical recommendations.

The project starts by exploring how efficient courts look like and how attributes of 'good' courts can be measured in terms of quantifiable organisational performance (chapter 2). Thereafter, it shall be shown why Pakistan's district courts were selected as a unit of analysis and what gaps this research shall fill as an original contribution (chapter 3). This will be followed by an evaluative empirical analysis of on the ground performance of district courts in Pakistan in terms of timely and efficient disposal of cases during 2002-2014; magnitude of prolongation, backlog and abuse of court process is measured through specific indicators, i.e. case clearance rate, age of cases, end-user satisfaction etc. using secondary data in the form of official judicial statistics and litigants' interviews etc. (chapter 4). In chapters 5 and 6, a reform package is designed for Pakistan, namely the New Civil Procedure Framework (NCPF). Its theoretical constructs and major strategies are elaborated in chapter 5 while practical measures are proposed in chapter 6. In formulating the NCPF model, Woolf's civil justice reform experiment and Singapore's modern courts model shall be overviewed to see what broad lessons these experiments can offer in this pursuit. Hence, the project aims at evaluating Pakistan's district judiciary to identify and empirically establish issues of performance relating to efficiency and then by overviewing the reform measures in two comparator jurisdictions, it is explored what reform options can be available and applied in

[1] Carrington, Paul D. "Teaching Civil Procedure: A Retrospective View." *J. Legal Educ.* 49 (1999): 311, at 315

case of Pakistan. The outcome of the project would be a package of reform proposals in the shape of the NCPF model.

## 1.1 Research Questions and Methodology

Since questions of the project are multifaceted and deal with quite different but related aspects of lower courts' functioning, the methodology would also be multi-pronged. In this section, it shall be elaborated how each of the said research questions shall be answered and what different research methods be employed.

Following key research questions shall be tried to answer in this project:

I. What "good" courts are from an efficiency perspective in the 21st-century justice system and how we can know that?
II. Why efficiency perspective in important in studying courts and why it is preferred in this project? **(RQs I-II - chapter 2)**
III. Why district judiciary of Pakistan is selected as the unit of analysis for (a) performance appraisal in terms of efficiency and (b) for making reform proposals in civil procedure and case management?
IV. What research gaps this project is going to fill in case of Pakistan's district judiciary? **(RQs III-IV- chapter 3)**
V. What issues of performance from an efficiency perspective can empirically be identified in the district courts of Pakistan? **(RQ V - chapter 4)**
VI. How issues of performance (i.e. delay, congestion and abuse of court process) can be resolved by introducing a new framework of civil procedure and case management?
VII. What theoretical deconstruction and paradigm shift is required to introduce a fundamental change in the civil procedural law regime of Pakistan and what lessons the experiments of England and Singapore can offer in this regard? **(RQ VI-VII - chapter 5)**
VIII. What practical reform measures can be proposed as part of the new framework for improving civil procedure law and case management in the district courts of Pakistan? **(RQ VIII chapter 6)**

### *1.1.1 Efficient Courts – Doctrinal and Evaluative Research (RQs I and II)*

The first two questions **(RQ I and II)** of the project are concerned with a normative inquiry providing the theoretical understanding as a necessary prelude as to 'good, because efficient courts. It shall be argued that one significant feature of a well-functioning judiciary is that cases are determined within a *reasonable time and by minimum use of resources.* This inquiry at the very inception is essential as, in later part of the project, performance of district courts of Pakistan shall be gauged from that perspective. Therefore chapter 2 of the project starts with inquiring what "good" courts are from an *efficiency perspective,* how we can know that and why it is important.

This inquiry concerns two aspects of courts' functioning, i.e. normative and evaluative. Theoretically, a set of values and principles need to identify underpinning an ideal type of court system. Therefore, while exploring whether courts in a particular jurisdiction are functioning as per the *required* standards, a normative plinth is indispensable at first to know what courts are expected to achieve. These expectations are grounded in the evolution of the institution of courts for resolution of the private conflict in a triad. Shapiro observes that 'so universal across both time and space is this simple social invention of triads that we can discover almost no society that fails to employ it' and where an ideal type or porotype courts is nurtured.[23] However, Shapiro also argues that in the real world there are 'deviations from the prototype found in the behaviour of particular courts, showing how uncourtlike courts are'.[4]

Despite the reality of this digressive tendency of courts and despite actual efficacy of the judicial service for the citizens, for evaluative and reformative purposes, it is most important to know how a good court system should look like. Through doctrinal analysis, the features and contours of an ideal or prototype court system need to be identified as a prelude to test the existing functioning of courts on those standards. Salient features of such court system, its objectives and ideals can be found in scholarly debates, jurisprudential work as

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[2] Martin Shapiro, *Courts: a comparative and political analysis* (University of Chicago Press 2013).

[3] ibid 1

[4] ibid 1

well as in the international conventions and national constitutions. This literature shall be overviewed in chapter 2 to know how "good" courts are envisaged and especially how efficiency is viewed as a norm and a crucial feature of the modern court system.

Besides having a clear theoretical understanding of good courts, it shall also be seen how this theoretical reality can be *known* i.e. how practically the concepts of good courts are operationalized and then measured in quantifiable terms. For that end, it shall be investigated what *evaluative tools* are developed to gauge courts' performance in contemporary judicial systems in a scientific, objective and practical way. Different performance evaluation frameworks shall be scanned through which are employed in practice to gauge the quality and effectiveness of the judicial service especially the efficiency factor. This inquiry would provide spadework for appraising on the ground performance of district courts in Pakistan in the next phase of the project. Importantly it shall also be argued that institutional efficiency perspective is a good way of studying courts' performance due to its *objectivity and measurability*.

### *1.1.2 Why District Judiciary of Pakistan - Exploratory Research (RQs III-IV)*

Since the unit of analysis of the project is the district judiciary of Pakistan, in chapter 3 it shall be elaborated why Pakistan's district judiciary is selected and what gaps this project is going to fill as an original contribution **(RQ III-IV)**. Gaps shall be identified in the existing literature as well at the official level regarding appraisal of judicial service and development of the case management system. This exploration would provide a context where instant research project would fit in as an original contribution. For that end official documents, judicial statistics and relevant literature shall be analysed to show the existing state of official evaluation mechanism of Pakistani courts and its inadequacies. It shall be shown that empirical research in this direction, a comprehensive and in-depth appraisal and, based on that, necessary reconstruction of the system is conspicuous by absence. In addition to that, it will also be shown that Pakistan's prevalent civil procedure law regime is under-developed and unexplored and a systematic process for reviewing and updating it is inadequate.

### *1.1.3 District Courts of Pakistan 2002-2014– Evaluative Research (RQ V)*

Evaluation being purposive, it represents an endeavour to assess the *effectiveness* of a program or service. The concept of evaluation, as defined by Weiss is:

> The systematic assessment of the operation and/or the outcomes of a program or policy, compared to a set of explicit or implicit standards, as a means of contributing to the improvement of the program or policy.[5]

After exploring what good courts are from an institutional efficiency perspective and how it can be affirmed empirically, in chapter 4 on the ground performance of lower courts of Pakistan from 2002 to 2014 is measured by employing evaluative research approach and using certain quantifiable indicators. In view of the assumed underwhelming performance in terms of delay and abuse of court process, it would be established on the basis of evidence that these issues do in fact exist. It shall be seen how speedily, efficiently and to the satisfaction of litigants, cases in Pakistani lower judiciary were dealt with, in the last 10 to 15 years. This analysis of judicial service would reveal a consistent and systemic pattern of performance for a longer period and across all regions of Pakistan. For that end, the following indicators shall be employed:

a. Case clearance rate, age of cases, and backlog to be calculated from judicial statistics and official data of cases from 2002 to 2014.
b. End-user satisfaction based on qualitative feedback and interviews of litigants.
*c.* Ranking of Pakistan's judiciary among countries of similar conditions.

*Numeric Indicators based on Judicial Statistics*

Available data in shape of official reports from 2002 to 2014 would be analysed to find the actual output of the courts in terms of timeliness and efficiency in processing the cases. The secondary data in shape of judicial statistics (i.e. Annual Reports) merely show the number of cases filed and decided during a year in all district courts of Pakistan. These reports do not precisely *measure* performance in terms of indicators. Here this data shall be

[5] Carol H Weiss, *Evaluation: Methods for studying programs and policies* (Pearson College Division 1998) 4.

reanalysed and used to calculate case clearance rate, age of cases and backlog; these indicators shall then be compared over time, across regions and relative to different types of cases. It shall be tried to bring to the fore systemic delay and resultant ever-growing congestion in all categories of cases and across all regions affirming that underperformance can more conveniently be aligned with the inefficiency of the process and lack of management.

*End-user Satisfaction based on Qualitative Secondary Data*

Litigants' feedback as to their experience when they interact with the courts in Pakistan, can offer valuable input as to the performance of courts in terms of timeliness and efficiency. End-user satisfaction indicator is employed to show that delay and resultant vexation to the litigants do exist and can be linked with the failure of the system to *manage litigation and prevent abusive practices.* In this respect, secondary qualitative data in shape of in-depth interviews of 440 litigants conducted in 2010-11 within the premises of district courts of Lahore by Siddique[6], shall be re-analysed.

*International Ranking among similar Jurisdictions*

The relative score of Pakistan's judiciary and its international ranking on the yardstick of performance (measured through public perception and expert views etc.) shall also be used as a measure of performance. For that end, data and ranking of World Justice Project (WJP) shall be used which is an independent international entity committed to advance and measure the rule of law the world over. *WJP Rule of Law Index 2016,* based on surveys of more than 110,000 household and experts' interviews, ranks the countries of the world relative to the rule of law performance as experienced and perceived by the people in their daily life.[7] This appraisal uses nine factors including civil and criminal justice. Ranking of Pakistan in terms of the criminal and civil justice system would be compared among

[6] Osama Siddique, 'Law in Practice - The Lahore District Litigants Survey (2010-2011)' <http://lums.edu.pk/docs/dprc/Law-In-Practice-Lahore-District-Courts-Litigants-Survey.pdf> accessed 1 June 2016.

[7] World Justice Project, 'Our Approach: WJP Rule of Law Index' (*WJP*, 2016) <https://worldjusticeproject.org/about-us/overview/our-approach> accessed 25 Jan 2018.

countries of similar geographical and economic conditions to reveal how the justice sector of Pakistan relatively stands. If other countries having similar socio-economic and geographical conditions, perform better, *institutional and functional* aspects of Pakistani courts can be identified to have an instrumental effect.

### *1.1.4 New Civil Procedure Framework (NCPF) - Doctrinal and Comparative Research (RQ VI-VII-VIII)*

While trying to formulate a renewed theoretical framework for improving the civil procedure, some fundamental assumptions and constructs underpinning the existing civil procedure of Pakistan shall be challenged. A deconstructive approach and a paradigm shift perspective shall be employed. A new framework of civil procedure – New Civil Procedure Framework (NCPF) is introduced in chapter 5 which has three theoretical components i.e. new foundational legal theory as to civil procedure, specific strategies to be followed for implanting the NCPF model and dealing with issues of implementation and comparability.

For that end, both comparative and doctrinal research methods shall be applied. Existing law and their underlying jurisprudential fabric shall be analysed through doctrinal research which involves 'rigorous analysis and creative synthesis, the making of connections between seemingly disparate doctrinal strands, and the challenge of extracting general principles from an inchoate mass of primary materials.8 Since the last two chapters involve looking into the broader framework of reform experiments of the two jurisdictions and trying to find foreign solutions to the local problems, the comparative research method is employed. However, despite the usefulness of comparative methods, potential pitfalls and complexities are also taken care of in the last part of chapter 5.

The comparator jurisdictions are chosen due to certain similarities. Issues of the complexity of the process, uncertainty, delay and ensuing cost in civil litigation were identified as the main problems in the English civil justice system before introducing Woolf's

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[8] Jenny Steele, 'Doctrinal Approaches' in *An Introduction to the Study of Law* ed. Simon Halliday (Thomson Reuters 2012) 6

reform during the 1990s.[9] Similar issues were tried to be eradicated by gradually modernizing the case management system in Singapore during the 2000s. In the case of Pakistan, similar issues were identified. With a comparative research approach, it shall be seen to what extent these solutions can be applied in the case of Pakistan. Historically legal systems of all the three countries are based on common law tradition. Pakistan inherited its court system from its colonial past established by the English lawyers in British India in the nineteenth century.[10] Procedural laws of Pakistan and lower courts' structure and process as to civil and criminal cases, and evidence and limitation were promulgated during the colonial period which is operative till date mainly with their original structure without any substantial change. Similarly, during the English colonial period, the judicial and legal structure in Singapore was introduced in 1867 when the Straits Settlements were separated from India and a new crown colony was established.[11] Hence, entrenched into the common law tradition, legal systems of the three jurisdictions have common origin while the issues were also identical.

While looking into the experiments of comparator jurisdictions for extracting lessons for Pakistan, certain principles and approaches are elaborated in chapter 5 which are:

- Reasonable care for the externalities and organic context.
- The functional equivalence principle - Like should be compared with the like.
- Gradual adaptation - reforms may be allowed to settle in slowly.
- Heuristic approach – problem-solving methods, not perfect but enough for the purpose.

After formulating the theoretical constructs of the NCPF model in chapter 5, practical reform measures shall be proposed by looking into and analysing mainly the exiting civil procedure and court practices of Pakistan. Also, certain aspects of the Civil Procedure

[9] Lord Harry Woolf, *Access to Justice: Interim report to the Lord Chancellor on the civil justice system in England and Wales*, Vol I (Lord Chancellor's Department 1995) 7.

[10] Faqir Hussain, 'The Judiicial System of Pakistan ' (*Supreme Court of Pakistan*, 2015) <http://supremecourt.gov.pk/web/user_files/File/thejudicialsystemofPakistan.pdf> accessed 26 Jul 2017.

[11] Kevin Tan, *The Singapore legal system* (NUS Press 1999)

Rules (CPR) of England and Wales and Singapore's judicial modernisation shall be looked into.

## 1.2 Context and Objectives of the Project

Being a reform-oriented research project, it aims at analysing a specific functional aspect of lower courts i.e. efficiency and speed in the disposal of cases in the district courts of Pakistan and its nexus with procedural law regime and case management system. The unit of analysis is Pakistan's lower judiciary where the majority of the cases are filed, treated and disposed of. This project fits into the broader framework of access to justice reform and improving the quality of judicial service with the underlying assumption that a well-functioning judiciary is indispensable for rule of law and socio-economic development. The project is equally important for the conditions of Pakistan where amidst issues of mal-governance, institutional shortcomings and poor state of rule of law, it is desirable to reform state institutions including the formal justice sector. In this section, these contextual issues and relevancy of this project shall be overviewed briefly.

### *1.2.1 Access to Justice Reform, Rule of Law and Socioeconomic Development*

An efficient and effective court system is considered an essential constituent of a modern state structure and fundamental for socio-economic development. Contemporary law and development scholarship support justice reform in developing economies for these ends. With the rise of New Institutional Economics (NIEs) and neo-institutionalism during the 1980s and early 1990s, it was believed that establishing the rule of law through legal institutions is a must for entrepreneurial confidence; and therefore, an efficient justice system ensuring the protection of property rights and economic transactions is instrumental for economic growth.[12] Besides its economic pay-offs, the rule of law is also regarded as an intrinsic social value and a political ideal in itself.[13] Justice reform projects were guided by

[12] Douglass C. North, *Institutions, institutional change and economic performance* (Cambridge university press 1990)

[13] Amartya Sen, 'What is the role of legal and judicial reform in the development process?' (The World Bank Legal Review 2006), Vol. 2, 33-50

these ideals and since 1990s huge resources were poured into law and justice reform programs in developing and transition economies by international development agencies.[14]

### *1.2.2 Research Gaps and Relevance to Pakistan's District Judiciary*

Pakistan, being the sixth largest population of the world has long been trapped into problems of bad governance, institutional inefficiency and resultant socio-economic regress.[15] The underperformance of public sector institutions have also adversely affected rule of law and rendered the state authority incapacitated to maintain order and provide a protective conducive environment for economic activity on the one hand and contain rent-seeking behaviour, radicalisation and lawlessness on the other. Absence of rule of law is also linked with extremist tendencies among certain section of the society leading to the emergence of armed groups and challenging the writ of the state through violent means.

In this context, judicial reform in Pakistan has remained high on the agenda of international development agencies. Asian Development Bank made huge funding for the justice sector of Pakistan initiating the biggest ever justice sector reform program of Asia i.e. Access to justice Program (2001-2009).[16] Internally, the emergence of an activist judiciary during 2008-12 in Pakistan also kept the momentum of justice sector reform alive and re-invigorating for attaining an efficiency of courts services at the grass-roots level in the face of an enormous backlog of cases and delay in the lower courts. This commitment on the part of judicial leadership is reflected in the National Judicial Policy 2009 executing stringent measures to speed up the disposal of cases, clearing the backlog and reduce delay.[17] Strengthening Justice with Pakistan Program (SJP) 2010, a proposed project with $90 million

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[14] Richard E. Messick, 'Judicial reform and economic development: a survey of the issues' (The World Bank Research Observer 1999) 14(1), 117-136.

[15] Naved Ahmad "Governance, globalisation, and human development in Pakistan." (The Pakistan Development Review 2005) 585-594.

[16] Asian Development Bank, 'Pakistan: Access to Justice Program ADB Completion Report' (Asian Development Bank Report 2009) <https://www.adb.org/sites/default/files/project-document/63951/32023-01-pak-pcr.pdf> accessed on 01 Jan 2016

[17] Supreme Court of Pakistan, 'National Judicial Policy 2009' (*Law and Justice Commission of Pakistan,* 2009) <http://supremecourt.gov.pk/njp2009/njp2009.pdf> accessed 13 Mar 2016.

funding was an attempt on the part of USAID in this direction.[18] The UK Government through DFID also planned to initiate Justice System Support Program (JSSP) 2016-2020 funding £25 million for Pakistan's justice sector.[19] Since 'case management and delay constitute a chronic problem exacting major costs to Pakistan's economy'[20], this project is a humble academic effort to dig deep into these all-important problems and find ways to curtail these by reforming court process and case management systems.

Though, quite often trumpeted that judicial service is inefficient and the court process is slow, complex, uncertain and vexatious; however, rigorous empirical research is required to scientifically test the nature and extent of these maladies, and their causes in order to find the correct remedy. There are opinions in the scholarship where justice reform enterprise is viewed as misdirected and 'based on inadequate theory, selective evidence and insufficient evaluation'.[21] Reform practice, therefore, needs conceptual clarity and rigorous academic research based on empirical evidence which should inform the reform policy and practice. Since the official and internal process of review and development of the justice sector organization and lower courts' functioning in Pakistan is inadequate, as would be shown later in chapter 3, need for research in this direction becomes more pressing. In the context of the importance of court service and gaps of empirical research, this project would be an effort to weigh judicial service of Pakistan from an efficiency perspective and investigate the ways to improve and modernise court procedures and case management system of the lower courts of Pakistan.

### *1.2.3 Dearth of Performance Appraisal*

Appraisal of Pakistani lower courts at the district level with a focus on the aspects of efficient and timely determination of cases is important due to lack of necessary appraisal

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[18] Osama Siddique, *Pakistan's experience with formal law : an alien justice* (Cambridge University Press 2013) 139

[19] UK Government DFID 2016, DFID 7507 Pakistan Justice System Support Programme (JSSP)

[20] Asian Development Bank, 'Report and Recommendation of the Preseident on Proposed Loan and Technical Asistance Grant to Pakistan for Access to Justic Program' (Asian Development Bank 2001) <https://www.adb.org/sites/default/files/project-document/71344/rrp-32023.pdf> accessed 19 Oct 2016, 9.

[21] Livingston Armytage, *Reforming Justice: A Journey to Fairness in Asia* (Cambridge University Press 2012) 2.

of judicial performance. Despite huge capital interventions into the justice sector, a scientific and academic analysis of the performance of lower courts is most conspicuous by absence in the literature as well in official discourse. Proper tools of evaluative research were hardly employed for performance appraisal in case of Pakistan. It was observed in the pre-reform study by the Asian Development Bank in 2001:

> There is no coordinating body for developing legal and judicial policy, and no system for collecting empirical data to evaluate performance of the system, improve accountability, or recommend reform.[22]

The official data of cases of all lower courts was started to be compiled and published only in 2002 when it was required for the launch of Access to Justice Program by the Asian Development Bank. From then onward yearly official reports were published showing judicial statistics of cases pending, filed and decided during the year. However, these reports contain only bare statistics for each independent year with no analysis over time, or across different regions and courts, or among different types of cases. Compilation of this voluminous data is the first step towards evaluation but then the effort leaves short of necessary analysis as to what it all means and what conclusions regarding courts' performance can be extracted. In this project that analysis is offered as an original contribution. (See Chapter 3 for detail).

There is still yet another aspect of this evaluative analysis. Despite costly reform measures under foreign-funded justice reform programs (e.g. Access to Justice Program 2001-2009 by Asian Development Bank), and later stringent measures by the superior judiciary to clear the backlog of cases (i.e. under National Judicial Policy 2009-2012), impact of these reform measures were rarely assessed through empirical means officially or by academic research. While comparing indicators of performance over time, it will be shown in this project how these measures *temporarily and sporadically* boosted the output during the reform years besides having consistent patterns of low performance in terms of timeliness and efficiency in the final determination of cases.

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[22] Asian Development Bank, Report and Recommendation 2001 (n 20) 9

### *1.2.4 Personal Relevance*

My academic background and professional experience are relevant to this project. I served as a career judge in Pakistan from 1998 till 2015 in the district judiciary holding judicial positions as a trial judge as well as an appellate court and various administrative positions. As such, I had the opportunity to closely observe the courts at the district level in Pakistan, their functioning, and a number of issues of performance. During the judicial service, I did LL.M (Law and Development) from the University of Manchester, the UK in 2012-13. This mid-career academic pursuit afforded an opportunity to peep into a number of justice sector reform programs implemented in various developing economies. Importantly, no substantial and comprehensive empirical research was found as to Pakistan's justice reform experience and lower courts' functioning making the gap in the literature quite visible. Hence, the issues of mal-functioning of judiciary based on long personal and professional experience, my mid-career academic insights into justice reform programs and gaps in the literature as to Pakistan's lower courts were the key driving factors to pursue this reform-oriented research project.

Besides probable academic worth of the project, it is otherwise important and purposive. Delay and consequent cost of litigation cause immense sufferings especially for the vulnerable, poor and disempowered segments of Pakistani society. The reform proposals are just a humble attempt which may possibly get things improved at some point of time and play its role in alleviating the sufferings of common litigants. This humanitarian aspect and possible benefit are in line with the efforts of local government and judicial leadership of Pakistan as well as the international development community who pursue the societal objectives and ideals of strengthening the rule of law and bringing socio-economic development.

## 1.3 Scope of the Project and Scheme of Chapters

Access to justice through a well-functioning court system is a much broader phenomenon covering several factors and perspectives. Courts do function under an overall political environment and within certain socio-economic conditions and cultural setting. The very birth of a dispute between private parties in certain conditions, the need for its resolution and its actual settlement (or its failure) is a long journey involving several social, legal and cultural causes and factors and in that process, courts play an important role. Apart from these

external factors, the internal institutional dynamics of the court system is also replete with several factors having an impact on the functioning and performance of courts. However, this project is not going to take into account all of those external or institutional factors; it is limited only to a specific functional aspect of courts, i.e. performance in terms of efficiency and its nexus with court procedure in view of the issues of delay of court service, congestion of cases and abuse of court process.

### *1.3.1 Institutional Efficiency Perspective*

As discussed at the beginning of this chapter, there are certain attributes of a well-functioning judiciary – i.e. judicial service needs to be fair, accessible and affordable; it needs to be reasonably efficient and speedy, and it should deliver effective relief. Such service is possible only when certain factors, their right combination and mutual interplay are made possible. All these factors are relevant and important while studying the courts' performance. For instance, it is important to examine judicial leadership, its vision, direction and capacity. Also, the human capital of the justice sector i.e. judges and court administrators, their training, competency, accountability and integrity; working conditions, job satisfaction and morale are all crucial factors for the quality of judicial service. Again, financial resources, court facilities and physical infrastructure are essential components of a judicial system. Role of lawyers' community, their work ethics, self-regulation and competency is also important. Besides these, the regime of substantive law providing legal relief and remedies and procedural law catering for the process of court and administration of justice are other important aspects of courts. Out of the said attributes of a well-functioning judiciary and multiple instrumental factors, this project exclusively focuses on the efficiency of the court process attributable to the procedural law and case management system.

In view of the issues of delay and inefficiency in civil litigation, one way to cure these maladies is to review and reform the court procedures and case management processes constantly. In the Access to Justice Program of Pakistan (i.e. justice reform project funded by the Asian Development Bank and implemented during 2002 to 2008), the reform measures were mainly directed to developing court facilities, infrastructure and the working conditions, enhancing perks and salaries of the of the judges and staff, and human resource

development.[23] However, little attention was paid to the court processes and case management systems. Instead, the superior judiciary while launching the National Judicial Policy in 2009 to combat with the huge backlog piled up in years, resolved that 'we have to operate by remaining within the given legal/procedural framework. The laws are indeed time-tested'.[24] In contrast, the underlying assumption of this project is that civil procedure law of Pakistan is outdated and undeveloped and it requires considerable overhauling.

In England and Singapore, given issues of delay and uncertainty in civil litigation, reforms were introduced civil procedure and case management system. These experiments show that outdated and flawed court procedure can be one possible cause of judicial underperformance resulting in the delay. In the case of Pakistan, the procedural law regime remained highly under-studied and unexplored. In this context, these gaps provide enough justification for the project to make reform proposals and try to make an original contribution to the scholarship.

### *1.3.2 Scheme of Chapters and Research Questions*

*Chapter 2*

It will deal with two fundamental questions: what good courts are and how we can know that. It starts with providing a broader picture of "good" courts and various attributes of a well-functioning court system and its importance. It is further explained why out of these attributes, efficiency is a good way of studying courts. Later it would be shown how performance in terms of timeliness and speed can be measured through empirical methods and how delay and case congestion can be presented as issues of performance in quantifiable terms. Hence, the chapter would attempt the following research questions:

I. What "good" courts are from an efficiency perspective in the 21st-century justice system and how we can know that?

[23] Asian Development Bank, Pakistan: Completion Report 2009, (n16).

[24] Supreme Court of Pakistan, 'National Judicial Policy 2009' (n 17) 2.

II. Why efficiency perspective in important in studying courts and why it is preferred in this project? **(RQs I-II - chapter 2)**

This initial inquiry would offer theoretical clarity as to "good" courts especially from an efficiency perspective and various practical methods to measure this fundamental attribute. The findings of this chapter would help in evaluating the actual performance of Pakistan's lower courts in chapter 4.

*Chapter 3*

This chapter would present a case for studying district courts of Pakistan, evaluating their performance and justifying making reform proposals. It shall be argued what research gaps are there and how the project would try to plug these making an original contribution. It will be argued that relative to the importance of justice in terms of effective and efficient court service, it remained highly under-explored in the literature as well as at the official level. Two research questions would be dealt with in this chapter:

III. Why district judiciary of Pakistan is selected as the unit of analysis for (a) performance appraisal in terms of efficiency and (b) for making reform proposals in civil procedure and case management?
IV. What research gaps this project is going to fill in case of Pakistan's district judiciary? **(RQs III-IV- chapter 3)**

Chapter 3 starts by introducing some basic facts as to Pakistan's geography, economy, demography, and political and governance structure. This shall be followed by an overview of its judicial structure and the existing state of research and development relating to performance evaluation and improving court procedures and case management system. This chapter provides the necessary background and context of Pakistan and its judicial system to appreciate the performance of courts and issues of delay and congestion etc.

*Chapter 4*

This chapter will gauge district courts' performance in terms of speed and efficiency on the basis of three indicators based on the analysis of three different sets of secondary data. The chapter would identify certain issues of performance and maladies of

justice system relating to efficiency, timeliness and speed in the disposal of court cases. These issues are most important to be established through empirical evidence at first before linking these to the procedural law and case management system of Pakistan. It would be discussed in the next chapter 5 that how similar issues of performance were tried to be tackled by reform measures in the two comparator jurisdictions. The research question of this chapter is:

V. What issues of performance from an efficiency perspective can be empirically identified in the district courts of Pakistan? **(RQ V - chapter 4)**

This chapter starts by analysing the secondary data in shape of judicial statistics from 2002 to 2014 available as official annual reports to calculate numeric indicators like case clearance rate, age of cases etc. This will be followed by using end-user satisfaction indicator based on secondary data of 440 in-depth interviews and surveys of litigants recorded in 2010-11 within the premises of Lahore district courts (the second largest urban centre of Pakistan). Lastly, based on the data and reports of World Justice Project of 2016, the ranking of various jurisdictions of the world relative to the performance of their judicial system shall be re-analysed to find out the relative position of Pakistan among countries of similar conditions.

*Chapter 5*

In chapter 5 theoretical fundamentals of the proposed model (i.e. NCPF) of civil procedure, law regime shall be elaborated. Certain assumptions and constructs underpinning the existing civil procedure of Pakistan shall first be challenged and it shall be argued that the answer to these issues is a complete paradigm shift. Three aspects of the New Civil Procedure Framework (NCPF) shall be presented in this chapter i.e. new legal principles of civil procedure, strategies to shape up the new regime, and handling implementation issues. While doing so, not only the existing conceptual fabric shall be analysed through the doctrinal lens, but a comparative investigation shall also be made to see what lessons can be learnt from the civil justice reform experiments of England and Singapore. Following two research questions shall be dealt with in this chapter:

VI. How issues of performance (i.e. delay, congestion and abuse of court process) can be resolved by introducing a new framework of civil procedure and case management?

VII. What theoretical deconstruction and paradigm shift is required to introduce a fundamental change in the civil procedural law regime of Pakistan and what lessons the experiments of England and Singapore can offer in this regard? **(RQ VI-VII - chapter 5)**

The chapter attempts at exploring the fundamental and necessary paradigm shifts as to procedural justice providing the foundational theoretical plinth for the NCPF model over which new rules, court practices, management systems and policy initiatives can be erected. This conceptual endeavour would equip to go to the stage of making proposals for the reform for Pakistan's justice issues in the next chapter.

*Chapter 6*

Till the final stage of the project, three fundamental issues would have already been clarified: (a) what "good" courts are from efficiency perspective, (b) where Pakistan's district courts lag behind on that account and (c) what revised theoretical understanding is needed to bring the change and in view of reform thinking of comparator jurisdictions. The key research question of this chapter is:

VIII. What practical reform measures can be proposed as part of the new framework for improving civil procedure law and case management in the district courts of Pakistan? **(RQ VIII - chapter 6)**

In this chapter practical reform measures shall be proposed in three main areas:

- Macro-Level Initiatives
- Preliminary Treatment of Cases
- Stringent Scheme of Procedure and Compliance

These areas are three pillars of reform package of the New Civil Procedure Framework (NCPF) for Pakistan. All proposals are condensed in the conclusion of this chapter at the end. Recommendations include policy-making and administrative arrangements for operationalisation of the model. Role of judicial leadership, improving human capital, leveraging information technology and collaboration with other stakeholders and agencies. In the second part of the chapter, certain recommendations shall be made as to rigorous

preliminary scrutiny of cases, extensive planning for the court process, scheduling, pre-emptive measures and forewarning as to consequences of non-compliance. In the last part of the chapter, the third pillar of NCPF model shall be presented covering limited judges' discretion to do away with material requirements, and binding duties on them to arrest misuse of the court process.

# Chapter 2. Frameworks of Performance Evaluation of Courts

## 2.1 Introduction

In this chapter, the normative aspects of a well-functioning court system shall be explored with means and methods to evaluate it. At first, it shall be seen what 'good' courts are with particular reference to timeliness and efficiency of service; it shall also be argued that this perspective is important for performance evaluation of court service. This initial inquest is essential to provide a theoretical plinth for the next important research question, i.e. how underwhelming is the performance of district courts of Pakistan (chapter 4) from the efficiency perspective and how issues can be tackled through reform measures (chapters 5 and 6). Hence, before exploring ways to improve court processes and practices, and how problems of performance in case of Pakistan (i.e. delay, uncertainty and inefficiency) can be contained, it is desirable to first clarify what all this effort is trying to achieve and how a well-functioning court system should look like from a normative perspective.

The world over at national level states have envisaged, at least on paper, ideals of a judicial system and standards. For instance, the International Framework for Court Excellence (IFCE) is a framework of specific values and objectives developed by a multi-national consortium for an ideal court system. Such frameworks shall be analysed to extract the principles and standards laid down for the courts to achieve their objectives idealistically. Hence this chapter shall explore what "good" courts are from an efficiency perspective, how we can know that, and why does it matter. Two main research questions are:

I. What "good" courts are from an efficiency perspective in the 21st-century justice system and how we can know that?
II. Why efficiency perspective in important in studying courts and why it is preferred in this project?

Importantly, the dominant perspective of studying courts in this project revolves around the efficiency attribute of the court process and timeliness of service. The institutional view of studying courts is a broader area which may cover various characteristics of good courts, i.e. fairness of procedure, accessibility and affordability, integrity and competence of

judges, the accuracy of decision and effectiveness of relief. Of all these, efficiency is an important one; it implies that the court service may be so organised and well-managed that while determining the cases finally, the legal remedy to the litigants must be provided *within a reasonable time* avoiding unnecessary cost, vexation and delay. Efficiency perspective focuses on speed, timeliness of process and economical consumption of resources during the process. It shall be argued that this specific perspective is crucial in court studies generally and on its own, as well as for this project. This normative and theoretical inquiry is relevant as in chapter 4 it shall empirically be examined how well district courts of Pakistan are performing on the yardstick of "good" and "efficient" courts.

The first part of this chapter explores various attributes of court system normatively envisaged as ideals of a well-functioning judiciary. These attributes, however, need to be presented as quantifiable performance indicators to show that courts in a particular jurisdiction are, or not, in practice performing as per desired objectives and expectations. Therefore, in the second part of this chapter, some evaluative methods and techniques shall be explored which are developed so far to measure courts' performance. It would help build a framework to be employed in case of performance measurement of district courts in Pakistan in the next phase of the project (chapters 4).

Theoretical analysis of ideals of a courts system and practical means of appraisal relative to these constructs are important because 'any account of what the courts are intended to achieve immediately shows up their inadequacies and deficiencies'.[25] The very existence and legitimacy of the court system calls for assessing it objectively to know whether it is in fact and on the ground delivering what is legitimately expected of it. Hence, a normative framework followed by methods of weighing actual judicial performance relative to the norms is the central theme of this chapter. This inquiry is also relevant for reforming court processes as it would set a normative agenda and conceptual clarity as to where we need to be heading towards.

[25] Russell Fox, *Justice in the twenty-first century* (Cavendish Publishing 2000) 2.

I shall start the chapter with canvassing an ideal court system in a broader normative perspective looking into its core values and objectives and arguing that such a system is utterly indispensable and significant. This will be followed by justifying that institutional efficiency perspective is a useful and pragmatic way of studying and evaluating courts' performance. Later specific quantifiable indicators relative to standards of performance and reflective of efficiency of judicial service shall be explored. Out of the menu of empirical methods and measures elaborated in this chapter, some would be selected and carried to chapter 4 for measuring the on the ground performance of lower courts of Pakistan.

## 2.2 What are 'Good' Courts? – An Overview

Court system and its dispute resolution mechanism is an indispensable constituent of the governance structure of a modern state. It is a primal social institution in a triad, i.e. two contesting parties and a neutral arbiter. Inherent tension and conflict among members of the society – the dyad – creates a triadic dispute resolution system in the form of a court system to regulate behaviour and maintain order in society.[26] Court system is, therefore, most significant for the rule of law, and the latter's quality depends on effectiveness and ability of the judicial administration to ensure the protection of individual's freedoms and their rights.[27] Since the judicial system is structured to cater for the legal needs of citizens, it must live up to their legitimate expectations and perform accordingly in practice to achieve the desired ends. But in the real-world scenario appears to be quite different. Commenting on what is expected from courts, Shirley M. Hufstedler, Judge of the US Court of Appeal remarked:

> We ask courts to shield us from public wrong and private temptation, to penalize us for our transgressions and to restrain those who would transgress against us, to adjust our private differences, to resuscitate our moribund businesses, to protect us prenatally, to marry us, to divorce us, and, if not to bury us, at least to see to it that our funeral expenses are paid. These services, and many more, are supposed to be quickly performed in temples of justice

[26] Alec Stone Sweet, 'Judicialization and the Construction of Governance' (1999) 32 Comparative Political Studies 147

[27] Zoltán Fleck "A comparative analysis of judicial power, organisational issues in judicature and the administration of courts." In *Fair Trial and Judicial Independence* (Springer, Cham, 2014) 3-25.

> by a small priestly caste with the help of a few devoted retainers and an occasional vestal virgin. We are surprised and dismayed because the system is faltering.[28]

Expectations from the court system relative to the legal needs of the citizens are that courts act as the final arbiter in determining their rights and obligations, in resolving their disputes through authoritative and binding verdicts making court service accessible, expeditious, and affordable. The objectives can be materialised by following certain norms and values and by making this operative in practice. However, the court system as it exists on the ground 'is so variable, complex and dynamic that proper study of courts must return to first principles'.[29] Generally in modern democratic and constitutional polities, the world over, the underlying principles and core values of judicial functioning can be presented in terms of essential attributes of an ideal court system. These are:

- fairness of process and equality of opportunity;
- impartiality, integrity and competence of judges;
- the efficiency of process and timeliness of judicial service;
- affordability of cost by the litigants;
- economic use of public resources;
- accuracy of decision and effectiveness of relief.[30]

Conversely, issues of judicial bias, corruption, delay, inefficient court processes, inaccessibility and high cost are generally regarded as significant problems of the justice system the world over. For instance, the Indian court system is criticised for the excessive delay, substantial cost of litigation, the complexity of litigation, competence and integrity

[28] Ibid, 2

[29] Keith O. Boyum and Lynn Mather, *The Empirical Theories About Courts* (Quid Pro Books 2015) 1

[30] Fox, *Justice in the twenty-first century* (n 25)

issues of judges and lawyers, and overall failure to finally determine the litigious matter.[31] Other court studies suggest similar maladies in other jurisdictions.

The universality of these fundamental values and attributes is an established phenomenon. Judicial systems across the globe may not be identical and in fact may function in varying constitutional and political environment; these may belong to different legal origins, have different substantive laws, institutional capacity and resources. However, basic concepts relating to and expectations from a court system are, more or less, identical; a common spectacle of key attributes emerge in terms of efficiency, quality and fairness.[32] The mission statements as to these goals of justice can often be found in the national constitutions, legal instruments and official declarations. Citizens' right of a fair trial by an independent judicial forum through the final determination of their rights and obligations and criminal liability, is also universally recognised in international treaties and human rights instruments.[33] European Convention on Human Rights (ECHR), also provides that in the adjudication of rights and obligations 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.[34]

Court systems in various jurisdictions have expressly adhered to similar mission statements. The State Courts of Singapore, for instance, resolves through its Justice Statement, to provide effective and accessible justice service inspiring public trust with core values of timeliness, fairness, impartiality and responsiveness.[35] As a fundamental to

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[31] Oliver Mendelsohn, 'The pathology of the Indian legal system' (1981) *Modern Asian Studies* Vol 15(4) 823-863.

[32] Sherif Omar Hassan, 'Foreword' in Maria Dakolias, Court performance around the world: a comparative perspective (The World Bank, 1999).

[33] For instance, Article 10 of Universal Declaration of Human Rights reads: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." United Nations, Universal Declaration of Human Rights available at http://www.un.org/en/universal-declaration-human-rights/ accessed on 10/04/2018

[34] European Convention on Human Rights, Article 6 available at https://www.echr.coe.int/Documents/Convention_ENG.pdf accessed on 14/04/2018

[35] State Courts Singapore, The Justice Statement available at https://www.statecourts.gov.sg/AboutStateCourts/Pages/TheJusticeStatement.aspx accessed on 14/04/2018

governance and of law, one of the principles laid down in the Constitution of India is equal justice and free legal aid.

Similarly the Constitution of Pakistan (1973) provides for the right to a fair trial as a fundamental right.[36] Hence, fair trial through an independent judiciary and efficient judicial service are the social objectives to be achieved by the existing democracies as well as by the transition economies through organisational structuring and reforming judicial administration.[37]

Lord Woolf, while striving for civil procedure reform in the 1990s in England and Wales, canvassed the normative image of a court system in these terms:

*a.* The system should:
*b.* be just in the results it delivers;
*c.* be fair in the way it treats litigants;
*d.* offer appropriate procedure at reasonable cost;
*e.* deal with cases with reasonable speed;
*f.* be understandable to those who use it;
*g.* be responsive to the needs of those who use it;
*h.* provide as much certainty as the nature of particular cases allows; and
i. be effective: adequately resourced and organized.[38]

Identifying these values is the first and foremost step to canvass the contours of an ideal court system. It can be claimed that legitimate expectations from a court system can be satiated when these attributes are operationalised through necessary means and putting together various factors (i.e. physical, human and financial resources, political commitment, judicial leadership, and an efficient regime of procedural and substantive law etc.). From such courts, a common litigant can idealistically expect that final determination of rights and liabilities would be factually and legally correct and just; impartial and competent judges shall

[36] Constitution of Pakistan Article 10A of the available at http://www.pakistani.org/pakistan/constitution/part2.ch1.html accessed on 14/10/2018

[37] Fleck, A comparative analysis of judicial power (n 27) 5

[38] Sir Harry Woolf, The pursuit of justice in Christopher Campbell-Holt (ed) (Oxford University Press, 2008) 311

deliver it through a well-reasoned judgment, providing efficacious remedy with certainty and within reasonable time, at minimum possible litigants' cost, and by most efficient use of courts' time and resources.

### *2.2.1 Why "good" courts matter?*

An efficient judicial system has a significant role in economic and human development and in the social cohesion of a polity. To avoid Hobbesian state of mobocracy and social disintegration, justice needs to be centrally positioned in the political, social and economic life of a modern state.[39] Therefore, the formal legal justice system is an important institution of the state responsible for establishing the rule of law through its dispute resolution mechanism and as the final arbiter of determining liabilities. In the following space, a brief account is provided as to the understanding of the indispensability of the court system and background reasons for reforming it.

*Establishing Rule of Law - Traditional View*

Undoubtedly role of formal adjudication system for establishing the rule of law, social cohesion and for instilling order, is established and considered indispensable. Impact of sound judicial governance is not limited to adjudicated cases, but it generates an impression in the long run as to existence (or absence) of deterrence necessary to maintain order.[40] 'Courts backed by the coercive power of the State are fundamental of these objectives, and the responsibility of the state in the provision of *effective* access to the courts has an impact that goes much wider than the interest of litigants'.[41] Significance of the court system can be viewed from the traditional angle of the social need of justice and order in a modern state.

Modern societies have built around the state structure formal or informal institutions that offer 'renditions of justice' in the areas of governance, economic struggle,

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[39] Armytage, *Reforming Justice* (n 21) 9

[40] Marc Galanter, 'The radiating effects of courts' (1983) in *Empirical theories of courts* 117-42.

[41] Hazel Genn and Sarah Beinart. Paths to justice: what people do and think about going to law (Hart Publishing, 1999) 264

social order or in terms of fundamental human rights.[42] Justice is regarded as the basic tenet of society and the ultimate ideal of the state. In practice, the concept of justice is functionalised by agreeing on certain universal principles and building around it, necessary institutions. A critical facet of these renditions is legal justice administered through a formal court system which is widely believed to be indispensable for the social order.

In line with the broader political and social objectives of the judiciary in a constitutional and democratic polity, court system caters for the day to day legal needs of the citizens in protecting citizens' rights, and by settling disputes among citizens and determining their criminal liability through an independent and final arbiter. In view of these objectives, efficient courts do matter, and efforts can be seen on the part of local governments, development agencies and international organisations to reform justice sector as means to provide necessary protection to the rights and interests of the citizens.

*Economic Development and Rule of Law*

Quality judicial service is considered to have an impact on economic growth[43] by protecting contractual transactions, property rights and entrepreneurial interests. Law and development scholarship is replete with supporting the argument that legal and judicial institutions have an instrumental role in economic development. Judicial reform across the world was pursued during the 1990s and 2000s with the belief that socio-economic development is not possible without the rule of law, protection of human rights and democratic way of governance; for each of these objectives, the role of an efficient and quality judicial system is considered indispensable.[44] The theoretical understanding behind the justice sector reform programs during the 1990s was to establish the rule of law believing

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[42] Armytage, *Reforming Justice* (n 21) 10

[43] Ross Levine, "The legal environment, banks, and long-run economic growth." (1998) Journal of money, credit and banking 596-613.

[44] Maria Dakolias, Court performance around the world: a comparative perspective (The World Bank Publications 1999) Vol 23, 1.

that an efficient judicial system protects property rights, transactions, investments and individual liberties which in turn fosters economic growth and reduces poverty.[45]

Law and Development Movement (LDM)[46]in 1960s in the U.S and later in 1980s the World Bank's advocacy of law and justice reform under a broader development agenda termed as 'Washington Consensus'[47] are major movements nurturing *law-growth nexus ideology* which was deeply influenced by the rise of neo-institutionalism and North's New Institutional Economics in early 1990s. While supporting its reform agenda for development during the early 2000s, the World Bank adopted an institutionalist rationale regarding the role of courts in development. It was believed that through its dispute resolution role, court system shapes the behaviour of individuals and organisations, and have an impact on social norms; in turn 'these changes bring law and order and promote the development of markets, economic growth, and poverty reduction.'[48] Hence there was a general consensus among the scholars that the rule of law is a must for a capitalist market economy to function[49].

*Human Development and Justice Reform Agenda*

During the 2000s, the scope and agenda of justice sector reform found justifications in human development, besides its economic payoffs. World Bank's Comprehensive Development Framework (CDF) approach enlarged the concept of development giving it an all-inclusive twist by providing additional humanistic justification for legal reform. Chief Counsel of the World Bank, Danino observed in 2007:

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[45] World Bank, *Legal and Judicial Reform: Strategic Directions* (Washington, D.C. 2003) <http://documents.worldbank.org/curated/en/218071468779992785/Legal-and-judicial-reform-strategic-directions> accessed 24 Jul 2018.

[46] Trubek, M David and Marc Galanter. "Scholars in self-estrangement: some reflections on the crisis in law and development studies in the United States." (1974) Wis. L. Rev. 1062.

[47] John Williamson, John. "What should the World Bank think about the Washington Consensus? (2000) The World Bank Research Observer 15.2: 251-264.

[48] World Bank, *World Development Report 2002,* (Washington DC 2002), 131-2

[49] Hayek, F.A. *The Road to Serfdom*, (The University of Chicago Press, 1994)

> [W]hile governance is a crucial concept, my personal view is that governance does not go far enough: we must go beyond it to look at the issues of social equity alongside economic growth'.[50]

In this latest phase of law and development scholarship, the rule of law was started to be considered to be a development end in itself, besides being means to it. It was argued that rule of law is not only a way to afford a conducive entrepreneurial environment, but it also is 'an intrinsic value, independent of its effect on various other measures of development and does not need to be justified solely in instrumental terms'.[51] Sen finds connects between key factors of development, i.e. economic growth, individual and social goals and political enrichment; he observes that these 'complement each other and are mutually reinforcing'.[52] Hence under law-growth nexus assumption, justice sector reform was initially pursued for economic goals but the later rationale for law reform was enlarged and 'there has been a range of justifications for judicial reform with economic, political, social and humanistic renderings'.[53] All these development goals are believed to have strong nexus with the court system which is centrally stationed in the desired institutional locale, and that is why court reform is heavily supported and justified with these ideological underpinning.

### *2.2.2 Good Courts from Institutional Efficiency Perspective*

In the past two decades, justice sector reform enterprise remained heavily influenced by the institutionalist approach. Reform programs were pursued under the broader perspective of good governance by enhancing accountability, efficiency and effectiveness of political, economic and state institutions. North's new institutional economics and the mantra 'institutions matter', provided a theoretical underpinning for the justice reform practitioners

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[50] Roberto Dañino, "The legal aspects of the World Bank's work on human rights." (2007) *The International Lawyer* 21-25.

[51] Trebilcock, Michael J., and Ronald J. Daniels. *Rule of law reform and development: charting the fragile path of progress (*Edward Elgar Publishing, 2009) 5

[52] Amartya Sen, "What is the role of legal and judicial reform in the development process?" (2006) The World Bank Legal Review 2.1, 21-42, 34.

[53] Armytage, *Reforming Justice: A Journey to Fairness in Asia,* (n 21) 7

on these lines.[54] The World Bank advocated and practised the ideology of institutionalism while pursuing its justice reform agenda. It has identified three essential elements of the justice system – i.e. substantive law, adjudication of cases and judicial administration for measuring the organisational attributes, i.e. quality and efficiency of justice.[55]

Though not precisely as corporate businesses or other public organisations, courts are commonly considered as institutions having their peculiar features and ways of accomplishing tasks and playing their role under the constitutional mandate.[56] However, there are many shades even within this institutionalist approach. Characteristics of and generalisations as to an organisation - like patterns of individual behaviour, relations between various groups, and decision-making processes - can be applied for the court system as well.[57] Though the scope of the framework of studying courts in this project, is limited to the institutionalist approach, yet all institutional and functional aspects of the courts are not within the ambit of instant inquiry. The prime focus of this project is to look into (a) issues of performance relating to efficiency and timeliness factors of courts' service and (b) their attribution to the internal court processes and case management systems taking Pakistan as the unit of analysis.

From the institutional perspective, four major structural and functional areas of court system emerge. (See Table 1 Major Areas of Court System - Institutional Perspective below). These are: (a) the very rights which are being enforced and the remedies provided through courts (substantive law domain); (b) judicial leadership, subordinate judges, court staff and administrators (human capital); (c) processes and practices for adjudication of litigation and case management (procedural law regime); and (d) physical and financial resources and court management system (access to justice). If *good* courts are viewed in a

[54] Armytage, *Reforming Justice: A Journey to Fairness in Asia*, (n 21) 38.

[55] Dakolias, Court performance around the world (n 45).

[56] Jacob, Herbert. "Courts as organizations." in Boyum, K. O., & Mather, L. (eds.) Empirical theories about courts (Quid Pro Books 2015) Vol. 25, 197.

[57] Herbert Jacob, *Courts as Organizations* (Page 167) in Boyum, Keith O., and Lynn Mather. Empirical theories about courts. Vol. 25. Quid Pro Books, 2015.

normative perspective, some core values can be attributed to each of these areas. These attributes in each area reflect the features of a well-functioning court system.

Out of the four primary areas of courts' functioning (See Table 1 Major Areas of Court System - Institutional Perspective), the exclusive focus of this research is on the ***court procedure and case management***. This aspect can be closely aligned with timeliness and efficiency factors in providing judicial service. Though other attributes (fairness, impartiality, effectiveness, and affordability etc.) are important; however even these traits would lose their

| **Major Areas** | **Core Values** | **Detail Areas of Study** |
|---|---|---|
| **Substantive Law** | Justice<br>Equality<br>Fairness<br>Effective remedy | Principles of justice, legal rights and liabilities, crimes and punishment, legal remedies etc. |
| **Human Capital** | Integrity<br>Impartiality<br>Independence<br>Competence<br>Job Satisfaction | Judicial leadership; appointment, training, discipline and accountability of judges; their incentives and perks, and working conditions; employee satisfaction, motivation and morale. |
| **Court Procedure** | Efficiency<br>Timeliness<br>Certainty<br>Fairness<br>Equality<br>Management | Civil and criminal procedure, case management system, fact-finding, adjudicative processes; timeliness in the determination of cases; efficient use of court time and resources; use of technology etc. |
| **Access to Justice** | Affordability<br>Accessibility<br>Availability<br>Financial Discipline | Financial resources and budgetary allocation; physical infrastructure and court facilities; the cost of litigation; |

| | |
|---|---|
| | accessibility and affordability of judicial service. |

**Table 1 Major Areas of Court System - Institutional Perspective**

efficacy if relief is not provided on time. No doubt a court's decision must be accurate and just, but it must be arrived at within reasonable time and by a most economic use of resources.

*Efficiency,* being an important value of the justice system, relate to how cases are treated and processed in the courts through its procedural law regime and case management tools. The most general and common understanding of efficiency is the maximisation of output by utilising available resources. The efficiency factor can fairly be linked to the court processes and management which provide a vista to study internal operations of courts and their decision-making processes. Jacob, while concluding how organisational concepts can be applied to the courts, observed:

> The organizational paradigm particularly calls attention to the role of SOPs in decision making and the manner in which these SOPs develop and are transmitted to the members of the organization.[58]

Since time and resources are limited, their desired efficient use can be improved through smart case management. This factor is so fundamental that Tobin has to say that 'courts must either create an effective and credible management system or lose control over their internal management, and ultimately, the independence of judiciary'.[59] The expedition of judicial service is directly related to efficiency; delay in providing the relief is equated with its denial. Art 6 of ECHR provides that in 'determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.[60] For a remedy

[58] Herbert Jacob, "Courts as organizations." in Boyum KO and Mather L, (eds) Empirical theories about courts (Quid Pro Books 2015)

[59] Robert Tobin, An overview of court administration in the United States (Williamsburg, VA: National Centre for State Courts 1997) 9 quoted in Ostrom, B. J., Ostrom, C. W., Hanson, R. A., & Kleiman, M. *Trial courts as organizations (*Temple University Press 2007) 2.

[60] ECHR Article 6

to be effective, it not only has to be adequate and accurate, but it also has to be timely otherwise its utility is eroded especially in cases where delay adversely affects one of the parties or entails undue advantage to the other. Like in providing medical care timing is not an independent aspect of treatment but an integral part of it.[61] Efficient court processes and smart management is closely aligned and is considered a mean to achieve the fundamental attribute of timeliness in judicial service.

### *2.2.3 Why Procedural Efficiency a Good way of Studying Courts' Performance*

Institutional efficiency perspective of studying courts in this project is due reasons of (a) its relevance to the issues of the project, (b) objectivity in assessment, and (c) its logical and likely nexus with court procedures.

*Sound Procedures and Timeliness of Judicial Service - Relevancy*

One of the factors, instrumental for efficient judicial service is procedural soundness and better case management which are reasonably expected to have an impact on the outcome in terms of *timely* determination of cases and by most *economical* use of resources. Conversely, when the issues of delay, congestion and ensuing cost are detected as endemic problems of litigation (which may be due to several reasons), one possible way is to look into the way cases were handled through various procedural stages till their final stage. For instance, if a particular type of cases is adjourned more often (and cause delay) due to non-attendance of expert witnesses, the cause, among other factors, can be attributed to a vague and uncertain procedure as to penalty for non-attendance of such witnesses in the process. Moreover, if a court is over-burdened with huge pendency of cases, litigation management and cases allocation system is a relevant area to be investigated.

In the context of justice reform endeavours, *the World Bank Report 2002* focused on enhancing judicial efficiency by simplifying legal procedures besides increasing capacity

[61] Adrian AS Zuckerman, *Zuckerman on civil procedure: principles of practice* (Sweet & Maxwell, 2006) 4,18.

and accountability of judges and pumping adequate financial resources.[62] Since this project mainly concerns with delay in litigation as an issue of performance and its remedy through procedural law reform, it is most pertinent to evaluate performance on the yardstick of efficiency and timeliness first and then link these with the civil procedure to improving them later.

*The Objectivity of Performance Results*

Besides its relevance and importance for the objectives of this project, measuring efficiency and timeliness of judicial service can objectively present the courts' performance. No doubt ideally adjudicative and dispute resolution service needs to be provided within a reasonable time, at minimum cost, through a fair process, by impartial judges, affording an equal opportunity of hearing, arriving at an accurate and just decision and providing an effective remedy for the grievance. Of all these factors, timeliness through the efficient process and case management can be measured in relatively more objective terms.

It is quite difficult, though not undesirable, to empirically establish that decisions made by the courts, in a particular jurisdiction during a specific period or generally, are *just* and whether litigants were *fairly* treated and provided with *effective* relief. For such inquiries, empirical methods can be applied but these may return only subjective evaluations. It is not quite easy to 'functionalize' these attributes by translating these in objectively quantifiable indicators. For instance, in research studies weighing the quality of judgement or whether a court decision is fair and just, the researcher will have to depend on the 'views' of litigants, lawyers, or judges etc. Or else the researcher herself would dig into the facts of the cases and decisions or observe and follow actual trials and then based on certain notions of justice, would judge the abstract phenomena of justice. Either way, the final analysis would be arrived at through a subjective approach.

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[62] World Bank, the World Development Report 2002: Building Institutions for Markets (World Bank, 2002) <https://openknowledge.worldbank.org/bitstream/handle/10986/5984/9780195216066_ch06.pdf?sequence=10&isAllowed=y> accessed 13 Jun 2018, 131-2.

On the contrary, institutional efficiency can be measured more objectively and presented in quantifiable terms. The magnitude of time taken by the courts to finalise a specific number of cases in a jurisdiction could be shown in precise numeric dialect based on statistical data and quantifiable indicators. For instance, the difference between cases filed and decided in a period and presented in mathematical terms can reflect objectively on the demand-supply equilibrium as to courts' capacity on the one hand and legal needs of the citizens on the other. It can further be seen and measured what stages and processes a case must pass through to reach its final determination.

## 2.3 Measuring Efficiency and Quantifying Judicial Performance

Thus far, it was clarified what good courts are from a normative perspective. In this section, it shall be seen how the attributes of a well-functioning judiciary can be measured and presented objectively, and why at all, it is necessary. Though the accuracy of decisions, the fairness of the process, the impartiality of judges and effectiveness of relief are institutional attributes and fair indices of courts' performance, these are beyond the scope of the issues of this project. It exclusively concerns efficiency and timeliness of court service; however, the frameworks and measures of performance appraisal shall be generally overviewed briefly touching all attributes.

With a particular focus on efficiency, it shall be seen that different approaches are employed the world over to assess this attribute. Quantitative analysis of judicial statistics used to know the pace of proceedings, the number of adjournments and total time consumed to finalise a matter is one way to gauge efficiency. Under the growing influence of the tradition of socio-legal research, there is also abundant empirical work in the scholarship where surveys and interviews are used for qualitative feedback on efficiency as well as the quality of judicial service. Specific case studies in actual litigation and ethnographic fieldwork are also found in exploring the way courts function, manage and process cases. Moreover, international development agencies have long been engaged to assess the performance of various institutions, including the justice sector as a development indicator across the world. In this respect, the comparative global ranking of judiciaries by these agencies is another way to explore courts' performance.

### *2.3.1 Why measure performance – Case for Courts' Evaluation*

States not only need to have a facade of a formal court system in place, but the system must also be in working order according to the needs and legitimate expectations of the citizens. In assessing how well lower level courts are catering for the legal requirements of the citizens and the ends of justice, various actors may have their own objectives for court appraisal with varying perspectives. The political government may do it in its long-term project of socio-economic development and to ensure public accountability of state intuitions. Judicial leadership may consider it necessary for its internal monitoring purposes in the sphere of the administration of justice. Development agencies may gauge judicial efficiency as one of the indicators of development in the context of reform enterprise. Media and civil society may do it for public consumption and as a watchdog over state institutions. Academic research may place evaluation of judiciary as a necessary step before constructing an argument or for supporting a theory.

While studying courts in a particular jurisdiction with a view to identifying issues of performance, the empirical evidence is required to show the on the ground output of the system. In the context of the reform of English civil justice during the 1990s, the system was *considered* in crisis due to procedural complexities, the pace of litigation in courts, lawyers' aggressiveness and inaccessibility. But Genn posed a pertinent question: where the evidence for these averments was? She argues that such discussion about problems of access to justice 'proceeds largely in the absence of reliable quantitative data about the needs, interests and experiences of the community that the system is there to serve'.[63] Hence a scientific investigation into the way judiciary functions renders empirical evidence of performance indispensable for identifying issues and trying to address these.

In this reform-oriented research project, there are two inter-related objectives of performance appraisal of district courts of Pakistan. One, before recommending reform measures in the legal system of a country, at first, it needs to be shown and diagnosed that judicial performance in the relevant area *is* in fact underwhelming. The project builds on the

[63] Hazel Genn *Paths of Justice,* (n 42) 1

hypothesis that Pakistani courts at the lower level are marred by inefficiency, delay, congestion and abuse of court process and hence, underperforming. This argument cannot be substantiated without empirical material and necessary analysis through quantifiable indicators. Issues of performance shall then be carried over and explicitly attributed to the civil procedure and case management where improvement is desired. Hence, the primary purpose of the evaluation is to identify the problems before proposing reforms in the relevant functional aspects of the courts in Pakistan.

Evaluative research through empirical means in this project also serves another important objective. There exists considerable dearth of empirical evaluative studies on Pakistani lower courts in the scholarship as well as in the official practice. The matter is discussed in detail in chapter 3 where it is shown how the results of this evaluative research as to Pakistani district courts would fill some gaps as an original contribution (see 3.2 chapter 3 for detail discussion).

Access to and quality of *justice* has sufficiently been placed as an exalted aspiration, but then it is desirable to present justice as a quantifiable phenomenon having necessary tools to measure it. In social science research, such concepts are not observable on their own and need to be identified and clearly defined at first. A nominal, as well as an operational definition of each concept, is required in order to operationalise[64] and present them as constructs in concrete terms so far as it is possible and practicable. Then these need to be translated into observable indicators as evidence of presence and magnitude. The momentum of efforts to develop indicators for gauging institutional performance has increased since the 1980s.[65]

This section would elaborate possible methods of assessing courts' output which would help tailor a framework of evaluation to be applied practically in the case of Pakistan in next chapters. An overview of these different perspectives and frameworks shall clarify what practical methods and techniques have so far been developed and employed in measuring

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[64] David A. de Vaus, *Research Design in Social Research* (SAGE Publications Ltd 2006) 24

[65] Botero, Juan Carlos, Robert L. Nelson, and Christine Pratt. "Indices and indicators of justice, governance, and the rule of law: an overview." *Hague Journal on the Rule of Law* 3.2 (2011): 153-169, 153.

courts' performance by the national judiciaries, international agencies and by empirical researchers. The analysis would pave the way to extract a framework suitable for this project for evaluation of Pakistan's judiciary in the next chapter and in identifying different measures and indicators for this exercise.

### *2.3.2 Comprehensive Evaluation – the U.S. Model*

Since the late 1980s, both in developing as well as developed countries, judiciaries have been trying to evolve a system of performance measurement as part of efficient judicial governance and reform.[66] In the United States during the early 1990s, the National Centre for State Courts (NCSC) developed Trial Court Performance Standards (TCPS) consisting of 68 detail measures.[67] However, later due to the complexity and enormity of this system, an improved and simplified system was introduced, namely, *CourtTools* consisting of ten performance measures also termed as 'feasible few'[68] (See Table 2). Criteria of success in this respect were posited into specific factors like 'fiscal responsibility, employee satisfaction and engagement, client-customer satisfaction and effectiveness and efficiency of internal processes.[69]

The NCSC's model is designed to be a comprehensive framework of evaluation of courts' services covering major aspects of the justice service. It covers public image of judicial service in terms of fairness and accessibility mentioned under measure No.1. As to the efficiency of process and timeliness in deciding cases, measures from serial number 2 to 6 are relevant. Employee satisfaction in the work environment within the judiciary is another indicator which is fundamental to organisational efficiency generally. The financial cost of the litigation is also included in this broad framework. The framework systematically provides 'a

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[66] Richard Y. Schauffler, 'Judicial accountability in the US State Courts Measuring court performance' (2007) 3 Utrecht L Rev 112

[67] Pamela Casey, 'Defining optimal court performance: The trial court performance standards' (1998) 35 Court review 24

[68] National Centre of State Courts, *CourTools Trial Court Performance Measures* available at http://www.courtools.org/Trial-Court-Performance-Measures.aspx accessed on 18 Jan 2019

[69] Richard Schauffler, 'Judicial accountability in the US State Courts (n 67) 121

clear definition and statement of purpose, a measurement plan with instruments and data collection methods, and strategies for reporting the results'.[70]

[70] National Centre of State Courts, *CourTools* (2005) <*http://www.courtools.org/~/media/Microsites/Files/CourTools/CourToolsOnline-Final.ashx accessed on 28/01/2019*> accessed 3 Mar 2017.

| *CourTools Measures- National Centre of State Courts* | | |
|---|---|---|
| **1** | Access and Fairness | Ratings of court users on the court's accessibility, and its treatment of customers in terms of fairness, equality, and respect. |
| **2** | Clearance Rates | Number of outgoing cases as a percentage of the number of incoming cases. |
| **3** | Time to Disposition | Per centage of cases disposed within established time-frames. |
| **4** | Age of Active Pending Caseload | Age of active cases pending before the courts, measured as the number of days from filing until the time of measurement. |
| **5** | Trial Date Certainty | The number of times cases disposed of by trial are scheduled for trial. |
| **6** | Reliability and Integrity of Case Files | Per centage of files that can be retrieved within established time standards and that meet established standards for completeness and accuracy of contents. |
| **7** | Collection of Monetary Penalties | Payments collected and distributed within established timelines expressed as a percentage of total monetary penalties ordered in specific cases. |
| **8** | Effective Use of Jurors | Measurement of juror yield - the number of citizens who report for jury duty as a percentage of those summoned. |
| **9** | Employee Satisfaction | Ratings of court employees assessing the quality of the work environment and relations between staff and management. |
| **10** | Cost per Case | The average cost of processing a single case, by case type. |

**Table 2 CourTools Measures- Source: National Centre for State Courts (NCSC) 2005**

For instance, for measuring whether courts were accessible and treatment to litigants was equal, fair and respectful, a sample survey questionnaire is designed consisting of over fifteen easily understandable questions relating to litigants' experience when they attend the courts.

The NCSC's model is designed to be a comprehensive framework of evaluation of courts' services covering significant aspects of the justice service. It covers public image of judicial service in terms of fairness and accessibility mentioned under measure No.1. As to

the efficiency of process and timeliness in deciding cases, measures from serial number 2 to 6 are relevant. Employee satisfaction in the work environment within the judiciary is another indicator which is fundamental to organisational efficiency generally. The financial cost of the litigation is also included in this broad framework. The framework systematically provides 'a clear definition and statement of purpose, a measurement plan with instruments and data collection methods, and strategies for reporting the results'.[71] For instance, for measuring whether courts were accessible and treatment to litigants was equal, fair and respectful, a sample survey questionnaire is designed consisting of over fifteen easily understandable questions relating to litigants' experience when they attend the courts.

No doubt major areas of quality of judicial service in this framework of court performance are covered, i.e. accessibility, fairness, efficiency, speed, cost and treatment to the litigants. However, the quality and accuracy of judicial decisions and efficacy of relief granted at the end are conspicuous by absence. These aspects are equally important and performance in this respect too needs to be gauged and presented. But as discussed earlier, this project is mainly concerned with efficiency aspects, measures 2 to 6 (i.e. clearance rates, time to disposition, age of active, pending caseload, trial date certainty, reliability and integrity of case files of this framework are relevant. Essential elements of these measures shall be discussed in detail in the next section.

### *2.3.3 Measuring Efficiency and Timeliness through Workload Analysis*

Statistical analysis of caseload of courts offers the most objective method of assessing efficiency and timeliness factors. The tradition of collecting and analysing quantitative court data for judicial efficiency started in the early 1980s, deviating from the traditional qualitative approach before that time in Latin America and Europe.[72] The final results of this numeric analysis based on data of cases reveal how efficiently litigation as a whole as well as individual matters was treated and finally determined. Key indicators in this

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[71] ibid 2

[72] Merryman, John Henry, David Scott Clark, and Lawrence Meir Friedman. *Law and Social Change in Mediterranean Europe and Latin America: A Handbook of Legal and Social Indicators for Comparative Study*. (Stanford Law School, 1979).

respect are *clearance rate, time of disposition, age of cases, the magnitude of backlog, and the number of adjournments*. The Massachusetts trial courts metric reports is an excellent example of using these measures extensively.[73]

A most glaring feature of this investigation method is its objectivity as compared to the qualitative methods which are based on subjective feedback. If the majority of litigants complain of delay and judicial inertia, this will remain to be a subjective view. However, the phenomena of delay deduced from the fact that many cases could not be decided within the standard timeframe, would offer objective and hence, reliable performance results and patterns of institutional functioning. Besides objectivity, numerical analysis can *safely* be relied upon for comparing judicial performance as to timeliness over different periods, across regions and within different types of cases and courts. One approach is to gauge the efficiency of courts in relative terms comparing performance over time and across regions.[74]

Key indicators of this approach are discussed as under:

*Case Clearance Rate*

This indicator shows whether the court system is catering for cases filed for adjudication by calculating the *ratio between demand and supply* of judicial service. *The clearance rate* is presented as the percentage of outgoing cases relative to incoming cases during a fixed period. Claims filed before the courts during a set period are assumed as the aggregate demand of the judicial service, and the courts are *expected* to dispose of this workload within minimum possible time. For instance, if 10,000 cases arrive in the court system during a year and 9,000 were disposed of, the clearance rate would be 90 per cent. This implies that courts failed to clear all cases during that period and carried forward 1000 undecided cases to the next period.

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[73] Massachusetts Government, *Court Data, Metrics & Reports* (2019) <https://www.mass.gov/court-data-metrics-reports> accessed 29 Jan 2019.

[74] Arie Y. Lewin, Richard C. Morey and Thomas J. Cook, 'Evaluating the administrative efficiency of courts' (1982) 10 Omega 401 < https://www.sciencedirect.com/science/article/pii/0305048382900196> accessed 14 Oct 2019.

If this negative performance persists and a portion of undecided cases are kept on shifting to the next period, a backlog would gradually develop. Consistent low cases clearance rate would consistently leave a difference which would pile up most probably to an unmanageable level having a sow-ball effect.[75] The log jam congestion and delay are necessary effects of a low clearance rate. Importantly causes of this syndrome may be due to multiple factors ranging from a dearth of the required number of courts, facilities and resources, abundant frivolous litigation, corruption, incompetence and lack of motivation among the court personnel and judges, and systemic inertia on the part of political and judicial leadership etc. Of these factors, however, poor case management and complicated and outdated court procedure can be an instrumental and contributing factor.

*Time of Disposition*

In case different categories of cases are planned to be disposed of within a standard timeframe, performance is gauged as to the number of cases which could not be cleared within that time period. This indicator is computed as 'percentage of cases disposed or otherwise resolved within established time frames'.[76] In calculating this measure, the amount of time of inaction is taken out which is due to factors beyond the court's control (e.g. when parties seek time for private or mutual settlement). This indicator, however, would always reflect a negative performance of courts if the standard time frame for each category of cases appears reasonable to the litigants or outsiders but these are not *realistic* as these would not commensurate with courts' capacity, resources, the overall magnitude of workload, and other ground realities. For instance, if rent cases are to be disposed of within six months under the case management plan and policy, but a court is laden with a massive backlog of cases, the standard time requirement would never be complied with. One way of viewing this phenomenon is to stick to the time frames as these are and try to influence other factors and remove hurdles in achieving these goals. However, it needs to be considered that time

[75] National Centre of State Courts *CourTools* (n 71)

[76] National Centre of State Courts *CourTools* (n 71)

standards and targets are linked to several different factors and variables and cannot be achieved independently.

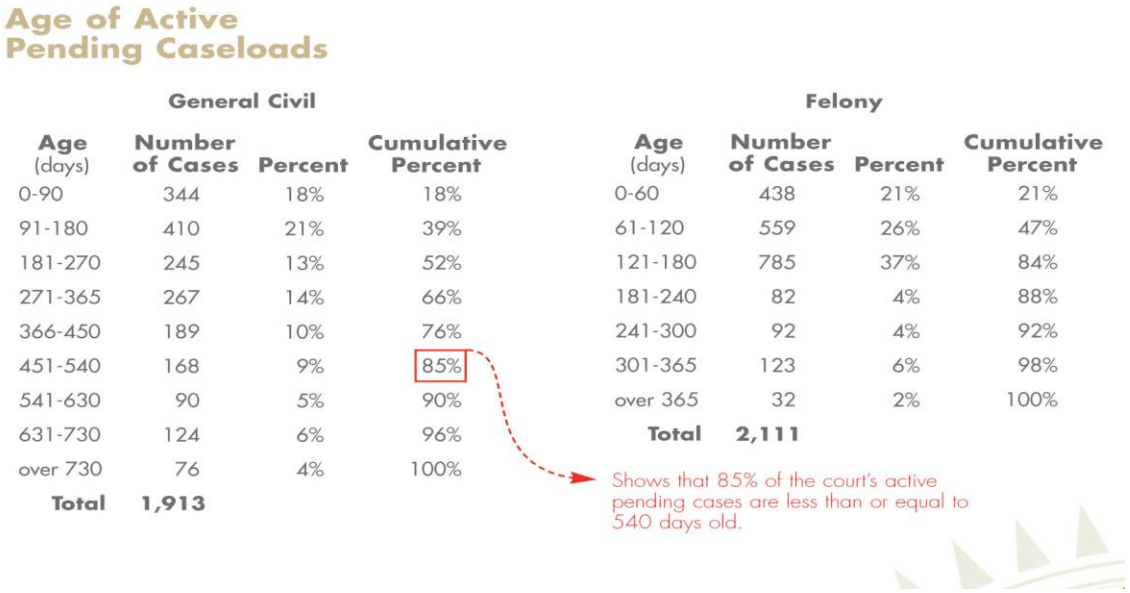
*Age of Cases*

Again, it is an important measure of efficiency to compute how long and what number of cases are *pending* in the court system awaiting their turn for judicial treatment. *CourtTools* measures provide the age of active or pending cases as a useful tool of performance computed in terms of the number of days from filing until the time of measurement.[77] When this measure is applied to the inventory of data of pending cases in trial courts, the results are most useful; it can reveal what percentage of cases are pending beyond the standard timeframe and for how long, and what category of cases or type of courts are consuming more time than others. If the results are comparatively analysed across regions or jurisdiction or over time, the measure may help locate the problem areas. For instance, if thirty per cent of family suits in region A are four or more years old while the percentage is only two per cent in region B having similar court structure and legal procedure, then some local factors are to be viewed responsible. If the same comparison is made over time and it shows that on average and for a longer period both areas have almost similar results, the earlier sharp contrast can then be neglected as sporadic or temporary conditions.

Where a specific category of cases needs to be resolved within a fixed standard period, the *age* measure would slice out the percentage of cases not resolved within that period and hence would reflect negative performance. An example of this method appearing in *CourTools* as a table[78] is shown below (see Table 3). Importantly age measure is indirectly connected to the clearance rate. Consistent negative clearance rate would leave a portion of cases ignored which would tend to grow older.

[77] ibid

[78] Ibid



**Age of Active Pending Caseloads**

**General Civil**

| Age (days) | Number of Cases | Percent | Cumulative Percent |
|---|---|---|---|
| 0-90 | 344 | 18% | 18% |
| 91-180 | 410 | 21% | 39% |
| 181-270 | 245 | 13% | 52% |
| 271-365 | 267 | 14% | 66% |
| 366-450 | 189 | 10% | 76% |
| 451-540 | 168 | 9% | 85% |
| 541-630 | 90 | 5% | 90% |
| 631-730 | 124 | 6% | 96% |
| over 730 | 76 | 4% | 100% |
| **Total** | **1,913** | | |

**Felony**

| Age (days) | Number of Cases | Percent | Cumulative Percent |
|---|---|---|---|
| 0-60 | 438 | 21% | 21% |
| 61-120 | 559 | 26% | 47% |
| 121-180 | 785 | 37% | 84% |
| 181-240 | 82 | 4% | 88% |
| 241-300 | 92 | 4% | 92% |
| 301-365 | 123 | 6% | 98% |
| over 365 | 32 | 2% | 100% |
| **Total** | **2,111** | | |

Shows that 85% of the court's active pending cases are less than or equal to 540 days old.

**Table 3 CourTools: Trial Court Performance - Age of Active Pending Caseload NCSC**

*Trial Date Certainty*

This indicator concerns the number of cases disposed of as per the scheduled dates fixed for the trial and the number of adjournments or continuances granted postponing the trial.[79] For instance, if a case is scheduled to have the first date of hearing followed by and limited to only a certain number of hearings for trial fixed by the court or under case management plan, it shall be analysed how many times and what ratio of cases were adjourned and put off onto the next date beyond the scheduled timeframe. Even when no specific scheduling is predetermined, the number of dates trial was adjourned on, would show trial date certainty measure. Further investigation can be made into the reasons and factors causing adjournments when these are beyond the standard or reasonable numbers.

*Reliability and Integrity of Case Files*

[79] ibid

This measure reveals '(a) how long it takes to locate a file, (b) whether the file's contents and case summary information match up, and (c) the organization and completeness of the file'.[80] Retrieval of the case file, the accuracy of its contents and its maintenance are regarded under the said evaluation tool as necessary aspects of efficiency and effectiveness of the court process. However, this factor can only be so linked with efficiency, if a delay in retrieval of files or accuracy can have some impact on court proceedings, swift determination and litigants' time and resources.

### *2.3.4 Assessing Public Confidence– End-user Satisfaction Indicator*

Qualitative research methods are typically associated more with social sciences and humanities rather than with legal research. However, this empirical approach attained higher currency in the legal academy of the US in the 1990s and in the UK during 2000s.[81] The scholars have used in-depth interviews and surveys in the qualitative research paradigm as a method to examine people's perception of and their experience with legal institutions, the law and justice in practice. Since in principle justice system is erected for the legal needs of the citizens, courts' services need to be examined in the social context on the scale of public trust in the system. One way of understating the phenomenon of a legal institution by an objective observer is to know how individuals who interact with it, perceive and interpret it. The interpretivist or constructivist epistemological approach provides a theoretical underpinning to this qualitative research method. While distinguishing interpretivist approach from a positivist perspective, Webley argues that 'interpretivism also considers people as product of their environment but additionally as those who construct the environment through their understanding of it'.[82]

In the scholarship, the tradition of gauging public perception and gathering experiences of litigants and general public through opinion polls and interviews is not very

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[80] ibid

[81] Peter Cane and Herbert Kritzer, *The Oxford handbook of empirical legal research* (OUP Oxford 2012) 1.

[82]Lisa Webley, 'Qualitative approaches to empirical legal research' (2010) in Peter Cane and Herbert Kritzer (eds) *The Oxford handbook of empirical legal research,* 926-930

old. In the context of English justice reform, Genn's empirical research project is one of the few pioneer projects. She argues that discussions about problems of access to justice 'proceeds largely in the absence of reliable quantitative data about the needs, interests and experiences of the community that the system is there to serve'.[83] The study was conducted during the 1990s and is based on the initial screening survey of a random sample of 4,125 individuals, followed by personal interviews of 1,134 and then in-depth interviews of 40 households. After collecting and analysing this data, she found that a large chunk of justiciable disputes was not coming to courts at all and a high proportion of problems are abandoned without resolution. She uses this indicator to show the failure of the civil justice system and lack of people's trust in it.[84]

The tradition of mapping the level of public trust on courts was developed and has consistently been used at the institutional level in the U.S. Starting from 1978, twenty-six state-level surveys were commissioned till 1998.[85] It was in 1998 that a comprehensive national study, i.e. Perception of the U.S. Justice System was commissioned by the American Bar Association based on telephonic interviews of 1000 American adults randomly selected. This survey was followed by another much broader nationwide survey sponsored by the National Centre for State Courts and Hearst Corporation in 1999, i.e. *How the Public Views the State Courts*.[86] From then onward National Centre for State Courts in the U.S. has been conducting such public surveys and interviews as a permanent tool to gauge various facets of judicial efficiency. The latest survey in that respect was in 2015 i.e. *the State of State Courts: A 2015 NCSC Public Opinion Survey.* The survey is based on telephonic interviews of 1,000

[83] Hazel Genn, *Judging civil justice* (Cambridge University Press 2009) 1

[84] ibid

[85] David B Rottman and Alan J Tmkins, 'Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges' (1999) Court Review: The Journal of the American Judges Association Vol 36 (3) < https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1011&context=publicpolicytomkins> accessed 10 Oct 2019.

[86] ibid

registered voters. This public opinion measure shows, among other things, concerns as to inefficiency and unfairness which is viewed deep-seated and real.[87]

In the case of Pakistan, as was discussed earlier there exist a huge void of such public opinion surveys and empirical research data. This evaluation framework has never been used by official bodies and at the administrative and judicial policymaking level. In the scholarship, only a few projects were directed to this mode of evaluation (e.g. by Siddique[88] and Chemin[89]). Hence qualitative feedback of the litigants is the most unused and alien indicator in the context of Pakistan's judiciary and its performance. In this research project, this qualitative research approach will be employed and secondary empirical data capturing real-life litigants' experience already published shall be used as a performance indicator.

The magnitude of satisfaction of end-user regarding various aspects of 'paths of justice' (like fairness, quality of procedure and outcome etc.) is based on the perceptions and experience of the litigants revealing *their* perspective. This poses the problems of subjectivity; litigants' mind-set is more influenced by individual interests and personal motives. Their non-expert opinion regarding the quality of institutional service would be based on their *personalised* expectations. However, the only aspect which attributes weight to this qualitative method is the litigants' experience; they are not passive observers of the system but real users facing real-life situations. Moreover, if a consistent pattern of experiences and views are noted, it may explain a shared perception as to the justice service.[90] Researchers may also strengthen the results of such inquiry through triangulation.

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[87] National Centre of State Courts, the State of State Courts: A 2015 NCSC Public Opinion Survey (2015) < http://www.ncsc.org/2015survey> accessed on 07 May 2017.

[88] Osama Siddique, *Pakistan's experience with formal law: an alien justice (*Cambridge university press, 2013).

[89] Matthieu Chemin, "The impact of the judiciary on entrepreneurship: Evaluation of Pakistan's "Access to Justice Programme"." Journal of Public Economics 93.1-2 (2009): 114-125

[90]Gramatikov, Martin, Maurits Barendrecht, and Jin Ho Verdonschot. "Measuring the costs and quality of paths to justice: Contours of a methodology." (2011) Hague journal on the rule of law 3.2, 349-379 <https://link.springer.com/content/pdf/10.1017%2FS1876404511200101.pdf> accessed 16 Jan 2019.

### *2.3.5 Expert Opinion and Elite Interviewing*

As stated earlier, views and experience of litigants and perception of the general public as to courts are important being end-users of the judicial system. However, their perceptions are based on their personal experience, needs, interests and corresponding expectations being non-experts. In contrast, the insiders, as well as outside professional observers, have the expertise to view and analyse the issues from a wider context and with a much better understanding of the system. The legislators, executive policymakers, judicial leadership, judges and administrators, lawyers, justice reform practitioners and academics are *experts* who are expected to go to the root of problems.

Qualitative feedback obtained through in-depth interviews and surveys of these professionals sitting at the helm of affairs or working within or along the organisation would offer insiders' view of the problems of judicial efficiency. They have the opportunity to work in or experience and study various aspects of the organisation and system from within and invasively. This method is applied in several studies on courts by independent researchers as well as by international agencies for evaluative and reformation objectives. For instance, Djankov and others formulated questionnaires and conducted extensive surveys of law firms and attorneys in 109 countries to measure procedure of eviction of a tenant through courts.[91]

World Justice Project (WJP) while preparing the *WJP Rule of Law Index* and quantifying rule of law in various jurisdictions, engages with academics, local experts and legal professionals. Besides extensive household surveys, 3000 in-country professionals in 113 countries were contacted through Qualified Respondents' Questionnaires (QRQs). These respondents were experts of civil and criminal justice, commercial law and public health.[92] In its ongoing project of measuring various aspects of governance, the rule of law including, the World Bank employs qualitative data in formulating and analysing Worldwide Governance Indicators (WGI). Hundreds of variables are calculated based on data of general surveys as

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[91] Djankov, S., La Porta, R., Lopez-de-Silanes, F., & Shleifer, A. (2003) *Courts*. The Quarterly Journal of Economics, 118(2), 453-517

[92] World Justice Project, *Behind the Numbers Methodology (Part Five) 2017-18* <https://worldjusticeproject.org/sites/default/files/documents/Methodolgy_17-18.pdf> accessed 15 Jan 2019.

well as feedback from experts in governmental as well as from non-government organisations.[93]

Elite interviewing as a method of qualitative research is also developed to be a significant source of inside information. While interviewing 80 superior courts' judges of Australia, Pierce pointed out some pitfalls of the project due to reluctance, non-political and neutral posture of judges. However, he found that 'interviewing senior judges is an effective way to study judicial actions and processes'.[94] It is important to reach out to their world view, experiences, thinking patterns, and the way they perceive the problems.[95] They are expected to view the issues as a whole from a broader context taking into account the overall goals of justice, the mechanical way in which the system works and get influenced by various actors and factors. Conversely, it is not strange for a researcher to document opinions of insiders, say, judges, as to issues of performance and their solution, and then end up concluding that these insiders are themselves part of the problem.

In the case of Pakistan, interviews of the relevant experts of the justice sector are the rarest phenomena. One of the very few instances is the work of Siddique who, while offering his critique on the justice reform program of Pakistan (Access to Justice Program 2001-2009), based his findings on interviews of academics, lawyers, policy experts, media persons and other civil society organisations. These respondents include those who worked in the reform program at the policy level and execution (reform designers and officers). Other officeholders of Ministry of Law, Federal and Provincial judiciaries and district judiciary

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[93] Kaufmann, Daniel and Kraay, Aart and Mastruzzi, Massimo, 'The Worldwide Governance Indicators: Methodology and Analytical Issues' (2010) *World Bank Policy Research Working Paper No. 5430* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1682130> accessed 17 Jan 2019.

[94] Jason L Pierce, "Interviewing Australia's senior judiciary." Australian Journal of Political Science 37.1 (2002): 131-142.

[95] Kvale, Steinar. "Dominance through Interviews and Dialogues", *Qualitative Inquiry* (2006) 12.3, 480-500.

were also interviewed.[96] He then analysed this data of informed outsiders and the insiders' voice to strengthen his argument while commenting on the gaps of the reform program.

### *2.3.6 Comparative International Ranking on Justice Sector Performance*

The international development community and other global entities have consistently been engaged in measuring several economic and social development indicators the world over. The rule of law is one key measure of governance which reflects the performance of legal institutions and the judicial structure of a country. World Justice Project, for instance exclusively covers the efficiency of the justice sector and courts' services in its *Rule of Law Index* reports.[97] Similar assessments are also made by the Freedom House, another non-government international organization. Its extensive reports from 2004 to 2012, i.e. *Countries at the Crossroads* provide a yearly analysis of governance performance and comparisons in 70 jurisdictions on transparency, the rule of law, corruption and state of civil liberties etc.[98] World Bank's ongoing project of collecting qualitative data for measuring *Worldwide Governance Indicators* is a rich source of the rule of law measure as one of the governance indicators.[99]

One approach of measuring the performance of justice institutions is to compare the output variables with some set *standards*; for instance, comparing the time taken in determining cases and the standard time fixed for such cases. Another approach is to compare the performance of the justice sector of a jurisdiction, not against an ideal set standard but with performance of other countries. The overall ranking of countries of the world on this criterion provides a broader picture of the efficiency of its legal institutions, mainly when the comparison is between countries having *identical circumstances*. This comparative analysis of working of state institutions is reliable due to the global standing of the agencies, their supposed neutrality and independence from the local influence and relevant research

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[96] Osama Siddique *Pakistan's Experience with Formal Justice* (n 18) 314-333

[97] World Justice Project <https://worldjusticeproject.org> accessed on 12 April 2017.

[98] Freedom House, *Countries at Crossroads 2004-2012* <https://freedomhouse.org/report-types/countries-crossroads accessed on 17 Jan 2019.

[99] World Bank, *Worldwide Governance Indicators* (2019) <http://info.worldbank.org/governance/wgi/#reports> accessed 19 Jan 2019.

expertise. This specific method of gauging performance shall be used in case of Pakistan by comparing its ranking with other identical jurisdictions. This aspect shall be elaborated in detail in the next chapter while discussing the evaluation framework of this project specifically for Pakistan's lower courts.

### *2.3.7 Case Study and Ethnographic Approach*

Observing real-life events during court hearings and through different stages of judicial processes during the trial and court proceedings in actual cases is another research approach employed by legal researchers. This method traces the chain of events right from filing of the case until its final determination and presents a complete life cycle of the litigation, revealing various processes and stages of the formal legal system. It shows how the litigants were treated, how their cases handled, what procedures were (or not) applied, and what practices followed. The researcher in such study engages with the real-life characters, their problems and the way actual court proceedings go on. It may also uncover the role of different actors like court staff, judges, lawyers, prosecutors, and the very disputants etc. This approach involves mixed research methods which may include face to face interviews of the actors involved, surveys and questionnaire, analyses of court record and documents, and observation of court hearings.

An example which may be linked with this approach is the case study by Djankov and others[100] as to formalism of judicial procedure and effectiveness and efficiency of courts generally in resolving simple disputes. They chose two specific disputes – eviction of defaulting tenant and recovery of dues on a bounced cheque and consulted attorneys and law firms asking questions as to multiple aspects of these disputes and court proceedings in 109 countries. The respondents of these surveys were direct observers of the court proceedings and in contact with the litigants and judges. The law firms were also presented with hypothetical cases, and in response, the firms were to provide step by step description of

[100] Djankov and others *Courts* (n 91)

procedure and time to be taken at each step. The firms' response was based on practising lawyers' observation and experience of handling such cases on the ground.

Another example of this approach is the study by Cashmore and Trimboli[101] of child sexual abuse cases for addressing difficulties of prosecution of these matters. Evidence was collected by (1) observing trial proceedings, (2) examining court documents, (3) interviewing the victims and their parents, (4) interviewing lawyers and court staff and (5) juror surveys. In the case of Pakistan, studying real-life litigation at lower districts level as a research tool is very rare. In providing an overview of Pakistan's formal legal system and uncovering several tragic realities of the flawed civil and criminal justice, Khan[102] relies on her field research into the litigation in various rural districts. Besides general surveys and interviews, she scanned the record of four cases about civil claims over the property and one theft case. The study revealed certain procedural pitfalls and practices which caused delay and unjust treatment of poor and vulnerable litigants.

Though this approach is fair for an in-depth analysis of the actual functioning of the system in specific cases, it is not without its limitations. Case study and ethnographic method can dig quite deep but only into a particular area; applying the findings to construct and justify a holistic view of the problems of the justice sector is slightly tricky. The small size of the sample also renders this method not quite relevant for a comprehensive and broad-based inquiry. However, this method is useful in revealing the critical details of phenomena which large scale data sets would not show.

### *2.3.8 International Framework for Court Excellence (IFCE) Model*

At the end of this section, it is important to elaborate a model of performance management developed by International Consortium for Court Excellence (ICCE). It is a multi-national consortium consisting of organisations from Europe, Asia, Australia, and the

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[101] Judy Cashmore and Lily Trimboli, *An evaluation of the NSW child sexual assault specialist jurisdiction pilot* (2005) NSW Bureau of Crime Statistics and Research Sydney < https://www.bocsar.nsw.gov.au/Documents/l18.pdf> accessed 10 Oct 2019.

[102] Foqia Sadiq Khan, *Quest for justice: Judicial system in Pakistan* (Network Publications 2004).

United States and has developed a framework of quality control of judicial service as a model for national judiciaries. The framework identifies:

> …values, concepts, and tools by which courts worldwide can voluntarily assess and improve the quality of justice and court administration they deliver…The absence of a court-specific framework and the inadequacy of existing benchmarking and performance measurement systems, at an international and national level, inspired the Consortium to develop this Framework'.[103]

At first, IFCE has set certain core judicial norms as targets which are equality before the law, fairness, and impartiality, independence in decision making, competence, integrity, transparency, accessibility, timeliness and certainty. Then in view of these broad principles and normative guidelines, higher performance is aimed to be achieved by focusing on three key areas: (a) court management and leadership as driver, (b) court policies, systems, processes and human, material and financial resources as systems and enablers and (c) user satisfaction and public confidence, and affordable and accessible court service as results. (See Figure 1).

In this evaluation framework, the goals are clearly specified with methods and numerical to reveal results in respect of each expected outcome. The measures are extensive and consist of quantifiable indicators for which the framework suggests that a court must have data and information collected through the case management system, financial and registry system, interviews and surveys of judicial officers and staff, lawyers and end-users. Relevant indicators as to efficiency and timeliness and relating to court proceedings and processes are similar to the *CourTool* framework. The framework lays down a comprehensive methodology to measure the performance and progress of courts relative to the said concepts and goals. Detail performance measures identified in the framework are presented in detail in Figure 1.[104]

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[103] International Consortium for Court Excellence, *the International Framework for Court Excellence, 2nd Edition March 2013* <http://www.courtexcellence.com/~/media/Microsites/Files/ICCE/The%20International%20Framework%202E%202014%20V3.ashx accessed 7 May 2017, 1.

[104] Ibid 42 International Framework of Court Excellence 2013, Appendix C, 43

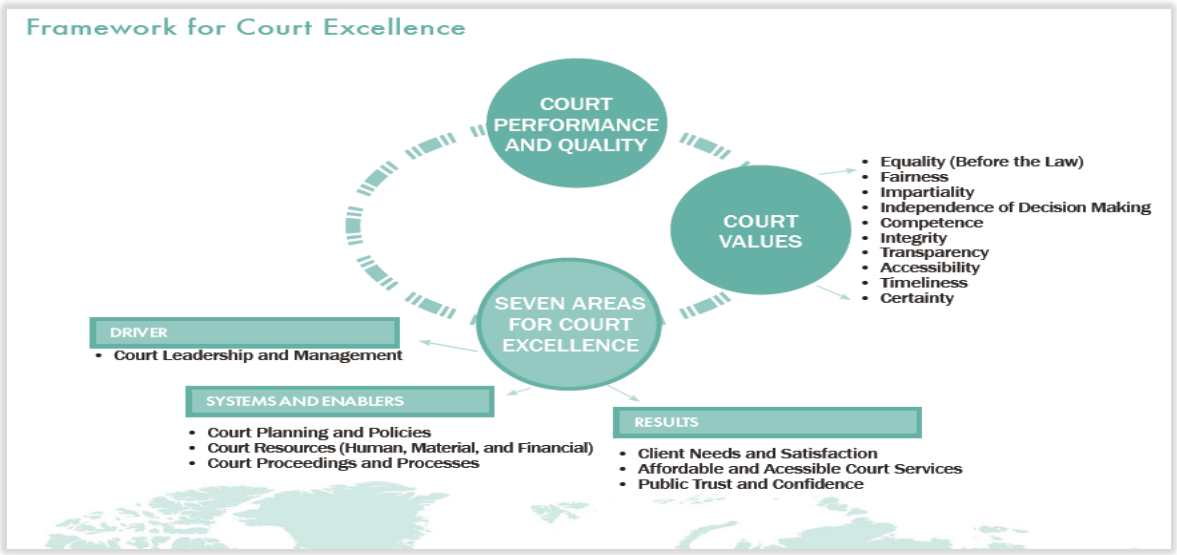


**Figure 1 Source: International Consortium of Court Excellence**[105]

## 2.4 Conclusion

A normative enquiry into fundamental attributes of a well-functioning court system and means to measure these is the first necessary step before assessing the performance of courts of a particular jurisdiction. The values of an ideal court system can be closely aligned with the reasonable expectations and legal needs of an ordinary citizen. In such *perfect* courts, judicial service shall be accessible, affordable, and expeditious; final determination of rights and liabilities would be factually and legally correct and just and delivered by unbiased judges, providing an effective remedy. Moving towards such judicial service fin a society is indispensable for socio-economic and human development and for establishing the rule of law. To improve court service in terms of expedition, institutional efficiency perspective is important as the justice sector is a public organization where its functional, procedural and managerial aspects can be studied and critically analysed. From an institutionalist angle, four major areas of the court system can be identified: (a) substantive law, (b) human capital, (c) court procedure and case management system, and (d) financial resources and physical infrastructure. In this project, delay and abuse of court process as issues of performance of

[105] ibid 42.

Pakistani lower courts are tried to be contained through reforming civil procedure and case management. A sound regime of court processes and management can be instrumental in providing judicial relief within a reasonable time and at minimum possible cost.

Various means and tools developed for performance appraisal of courts were identified to explore how real courts can be judged on the normative standards generally. Empirical data and, based on its analysis, qualifiable indicators are explored to measure existence, magnitude and the nature of relative malfunctioning. Timeliness and efficiency factors can be gauged through workload and case disposal analysis and in this respect case clearance rate (CCR), backlog, and age of cases are main indicators. Comparison of performance based on these indicators across regions, over time and within different categories of cases may reveal institutional shortcomings. Besides numerical indicators, litigants' experience, expert and elite interviews, comparative international ranking and ethnographic fieldwork are also identified as research methods to gauge how well courts are functioning. This exploration shall help build an evaluation framework for the appraisal of district courts' performance in this project (chapters 3 and 4).

# Chapter 3. District Judiciary of Pakistan – the Unit of Analysis

It is pertinent to provide an overview of the district judiciary of Pakistan and its background before analysing issues of its performance from efficiency perspective in the next chapter and before formulating a model reform framework in civil procedure and case management areas in chapter 5 and 6. Here the following two research questions shall be taken up:

- Why is district judiciary of Pakistan selected as the unit of analysis for (a) performance appraisal in terms of efficiency and (b) for making reform proposals in civil procedure and case management?
- What research gaps this project is going to fill in case of Pakistan's district judiciary? **(RQs III-IV- chapter 3)**

It will be argued that in the backdrop of Pakistan's socio-economic and geo-political circumstances, district judiciary has a vital role in establishing the rule of law. But formal justice system at the lower rung, where ninety per cent of the litigation is conducted, has remained mostly underexplored especially in terms of empirical scrutiny into lower courts' performance and their possible solution through scholarly analysis. These gaps in the scholarship as well as in the official discourse shall be identified, and it would be shown that instant project is a humble and original effort which fits into this dearth.

Also, a more in-depth and upcoming investigation in chapter 4 as to the quality of judicial service from efficiency perspective would better be understood when the contextual, structural and functional contours of the court system of the target jurisdiction, i.e. Pakistan are appreciated beforehand. Court system germinates, evolves and functions amidst multiple external factors and circumstances in a given timeframe and within certain geographical bounds. Legal institutions including courts, interact, influence and get influenced by these factors and institutions which include, but may not be limited to, local ideological mindset, cultural influences, beliefs, political ethos and institutions; socio-economic and geographical conditions, level of education and way of life, trajectory of development and internal diversities; role of other state institutions, political elite and judicial leadership. No doubt, all these important factors may have their instrumental role as to efficiency factor of court

service. However, this project is not concerned with the causal links between the surrounding factors and efficient (or otherwise) court service. Rather it is limited to gauging judicial performance from an efficiency perspective and attributing the issues of delay and abuse of court process to internal civil court procedures.

The chapter starts with presenting a brief background of Pakistan followed by an overview of the judicial system and structural and administrative facade of the lower courts. In the next section official documents, judicial statistics and relevant literature shall be analysed to show the existing state of official evaluation mechanism of Pakistani courts and its inadequacies. It shall be argued that empirical research in this direction, a comprehensive and in-depth appraisal, and based on that necessary solution in updating the court procedures are conspicuous by absence. In the last part of the chapter, it will also be shown that existing civil procedure law regime is under-developed and a systematic process for reviewing and updating it, is inadequate. In the end, an attempt shall be made to formulate a suitable framework of performance evaluation of district courts of Pakistan. Hence, this chapter shall provide the necessary background of the court system in the target jurisdiction, the case for its performance evaluation and selected methods for doing that.

## 3.1 Pakistan and its Judicial System - A Broad Portrait

A brief sketch of the geopolitical conditions of Pakistan, its society and economy are presented here to appreciate the conditions within which the lower courts of Pakistan are functioning.

### *3.1.1 Geo-Political Scenario*

Pakistan is a country of over 200 million people - the sixth largest population and approximately 3 per cent of the world's total population. Its area is 796,000 km which ranks it 37$^{th}$ in the world, and it is around three times bigger than the total area of the UK. It sits at a strategic location in South Asia bordering Afghanistan and Iran on its west, China in the north, India in the east and the Arabian Sea in the south. Having the nuclear capability and 8$^{th}$ largest standing army of the world and surrounded by India, China, Iran and Russia, Pakistan's role within the region and on the international scene has remained significant. Historically, the present area of Pakistan used to be the western part of united India colonised

by Great Britain during the 18th century. It got independence from British rule in 1947 and seceded from India amidst strong opposition by Indian political intelligentsia. Since then it has consistent tensed relations with India, especially over the disputed territory of Kashmir, and both countries have fought four wars (i.e. 1947-48, 1965, 1971 and 1999). Reacting to Indian nuclear tests, Pakistan also acquired nuclear warfare capability in 1998.[106]

On its western frontier, Pakistan remained entangled in the Afghan War resisting Soviet onslaught (1979-1988) as an ally of the West and the US supporting Afghan guerrilla fighters, called *mujahedeen* who were charged with religious fervour and backed by the Western block. Pakistan's military establishment supported religious and ideological indoctrination providing a breeding ground for this brand of militancy against Soviet might. However, after Soviet withdrawal from Afghanistan and disintegration of USSR, post-Afghan War chaos emerged; the freedom fighters went into disarray and re-emerged as militant outfits and aligned with international terrorist organisations. For Pakistan, it became challenging to reverse the growth of religious militancy once triggered against the Soviet offensive, but now targeting the U.S and its allies including Pakistan. Hence, heated borders with India, the brunt of post-Afghan War instability, growth of extremist tendencies and offensive of terrorists on the civilian population as well as security forces, made Pakistan a tumultuous region and as a security state for quite long.

### *3.1.2 Political Economy and Democratic Institutions*

From the very beginning, the constitutional process and democratic institutions in Pakistan remained weak due to intermittent military interventions. On three occasions, military-led coups established direct military rule (1958-70, 1979-88 and 1999-2002) subduing political process and keeping the superior judiciary under the thumb. Due to tensed relations with India and later Afghan war, instability and security issues remained alive which factors afforded added importance to military establishment which assumed the role of a

[106] Central Intelligence Agency, *the World Factbook South Asia: Pakistan* <https://www.cia.gov/library/publications/the-world-factbook/geos/pk.html> accessed 15 Mar 2019.

dominant player in Pakistani politics. Military might assumed the position of the eighth-largest standing army in the world and developed its nuclear capability. Military spending eats up one-fifth of the entire revenue. In 2018-19 proposed defence budget is 21 per cent of the total allocations; it amounts to 3.2 per cent of the gross domestic product.[107]

Besides that, huge debt-servicing consumes more than half of the total revenue. If combined, defence spending and debt servicing eat up three-fourth of the entire budget of Pakistan, [108] leaving very little for administrative and development expenditure. Due to the challenges of internal and external security issues, social and human development, economic growth, law and order, and democratic and civil institutions building remained considerably slow. It was not the military rule alone that disrupted the political process and institutional growth. The traditional political elite class, civil bureaucracy and superior judiciary played a dormant role settling with the status quo.

However, despite military coups against elected governments on three occasions (1958, 1979 and 1999), democratic institutions and constitutional structure somehow survived and gradually developed. During the 2000s, the emergence of fresh political forces, a strong electronic free media, the civil society and intelligentsia, the superior judiciary and now even the military establishment are for the democratic and constitutional rule, economic growth and human development. The non-traditional political force with a progressive posture (Pakistan Tehrik-e- Insaaf - PTI) with the rhetoric of "new Pakistan" gained sizable representation in 2013 elections and then swept elections in 2018 and formed the government. An activist, vigilant and often invasive superior judiciary and the new military leadership are supportive of the democratic process, institutional reform, accountability, good governance and socio-economic development.

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[107] The Dawn, *Budget 2018-19: Rs 1.1 trillion proposed for defence (Baqir Sajjad Syed) April 28 2018* https://www.dawn.com/news/1404337 accessed 15 Mar 2019.

[108]The Express Tribune *Defence, Interest payments consume over thee-fourth of tax revenue (Shahbaz Rana Nov 30 2017)* available at https://tribune.com.pk/story/1572185/2-defence-interest-payments-consume-three-fourths-tax-revenue/ accessed 15 Mar 2019.

### *3.1.3 Society, Income and Development Indices*

Pakistan is a country of geographical, ethnic and cultural diversity and socio-economic disparity. Its overall human development conditions are deplorable. It ranks 150th out of 189 countries of the world as to Human Development Index (HDI) which includes life expectancy, schooling years, and gross national income.[109] The average score of the HDI becomes worse when the individual score of various regions within the country are seen as these 'variations reflect significant disparities between regions and provinces reflecting inequality in human development across Pakistan'.[110] Development, income and gender inequality is also worse among countries of South Asia. It has per capita income of $5311 in 2018 which ranks it 130th in the world.[111] Nearly one-third of its population is living below the national income poverty line while twenty-four per cent of the population is in severe multidimensional poverty zone.[112] As to health and education indices, performance is too weak. Forty-five per cent 'of the children drop out before completing the fifth grade, partly for economic reasons but largely because of non-functioning schools owing to teacher absenteeism and the generally poor quality of schooling in public-sector institutions.'[113]

Being 6th largest population of the world – i.e. 200 million -, two-third (around 63 per cent) of the people live in rural areas while 37 per cent live in cities.[114] Eighty per cent of

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[109] The United Nations Development Program, *Human Development Indices and Indicators: 2018 Statistical Update* (2018 New York, USA) <http://hdr.undp.org/sites/default/files/2018_human_development_statistical_update.pdf> accessed 18 Mar 2019.

[110] United Nations Development Program, *Pakistan Human Development Index Report 2017* (2017 UNDP Islamabad Pakistan) <http://www.pk.undp.org/content/dam/pakistan/docs/HDR/HDI%20Report_2017.pdf> accessed 18 Mar 2019, 5.

[111] UNDP Human Development Country Profile and Reports Pakistan <http://hdr.undp.org/en/countries/profiles/PAK accessed 18 Mar 2019.

[112] UNDP *Human Development Indices and Indicators* 2018 (n 110) 43.

[113] The Dawn, *Pakistan's Political Economy* by Shahid Kardar (Oct 13 2015) <https://www.dawn.com/news/1212666> accessed 18 Mar 2019.

[114] The World Bank, *The Rural Population (% of total Population)* < https://data.worldbank.org/indicator/sp.rur.totl.zs accessed 18 Mar 2019.

the poor population of the country are in rural areas.[115] Lack of necessary health facilities, education, transport and other amenities of life are far more deficient in the rural areas where the majority of the population live. Cities are overcrowded, and the state of public transport is worse due to lack of planning, resources and corruption.[116] Only 0.1 per cent of the population have cars, 12 per cent have motorcycles, and 10 per cent have cycles; a sizable 77 per cent population have none of these means of transport. Only 15 per cent people have access to the internet while out of 100 people 70 have mobile phone subscription.[117]

### *3.1.4 State Structure and Judiciary*

Overall constitutional setting of the state, and within that the hierarchical and administrative structure of the courts in Pakistan is based on the Constitution of 1973. Pakistan is a federal republic with Federal Government at the centre and provincial governments in four federating units, called provinces. The federal government and parliament at the centre exercise executive and legislative powers as to the whole of Pakistan in respect of certain defined areas enumerated in the Federal Legislative List in the Constitution of 1973.[118] Each province has its executive government (Provincial Government), a legislature (Provincial Assembly) and provincial judicature (High Court). The executive and legislative powers of the province extend to all those matters which are outside the Federal Legislative List.[119] Under this scheme of distribution of powers, the subjects of provincial judicature, district courts and civil procedure fall within the domain of the provinces.

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[115] The World Bank, *When Water Becomes a Hazard A Diagnostic Report on the State of Water Supply, Sanitation, and Poverty in Pakistan and Its Impact on Child Stunting (2018) Washington USA)* <http://documents.worldbank.org/curated/en/649341541535842288/pdf/131860-WP-P150794-PakistanWASHPovertyDiagnostic.pdf accessed on 18 Mar 2019.

[116] Muhammad Tahir Masood PhD, P. E. "Transportation problems in developing countries Pakistan: A case-in-point." (2011) *International Journal of Business and management* 6.11 (2011): 256.

[117] UNDP Human Development Reports (n 12).

[118] Articles 70, 90 and 141 of the Constitution of Pakistan 1973 available at http://www.na.gov.pk/uploads/documents/1333523681_951.pdf accessed on 4/9/2018

[119] Ibid Articles 137 and 142 of the Constitution of Pakistan

Besides the Federal Government and a bicameral legislature at the centre, each province has its provincial government and provincial parliament. Each province is further divided into smaller administrative units called districts which are mainly governed by the respective provincial governments through field administrators and by the elected local councils of districts under the overall supervision of the provincial government. Besides these districts, a small area known as Islamabad Capital Territory is treated as a district but governed directly by the capital administration under the Federal Government.

*Superior Judiciary*

On the judicial side, the apex court of the country is the Supreme Court of Pakistan (SCP) which exercises original jurisdiction in some constitutional and human rights matters and is also the final appellate court of the country.[120] The SCP is headed by the Chief Justice of Pakistan and consists of 17 judges appointed from the judges of the provincial High Courts. There are five High Courts, one for each of the four provinces and one for the Islamabad Capital Territory. Provincial High Court is the highest court of the province which has original jurisdiction in matters of fundamental rights under the Constitution and as appellate jurisdiction in respect of civil, criminal and other cases decided by the district courts. High Court of the province consists of the Chief Justice and other Judges of the High Court. Besides its judicial functions, each provincial High Court directly controls the administration of lower courts at the district level. Hence district judiciary functions directly under the exclusive supervision of the High Court of a province. The Supreme Court and provincial High Courts are referred to as ‘superior judiciary’ as against ‘lower’, ‘subordinate’ or ‘district’ judiciary.

[120] Constitution of Pakistan 1973 [Pakistan] Art 184, 185 and 186.

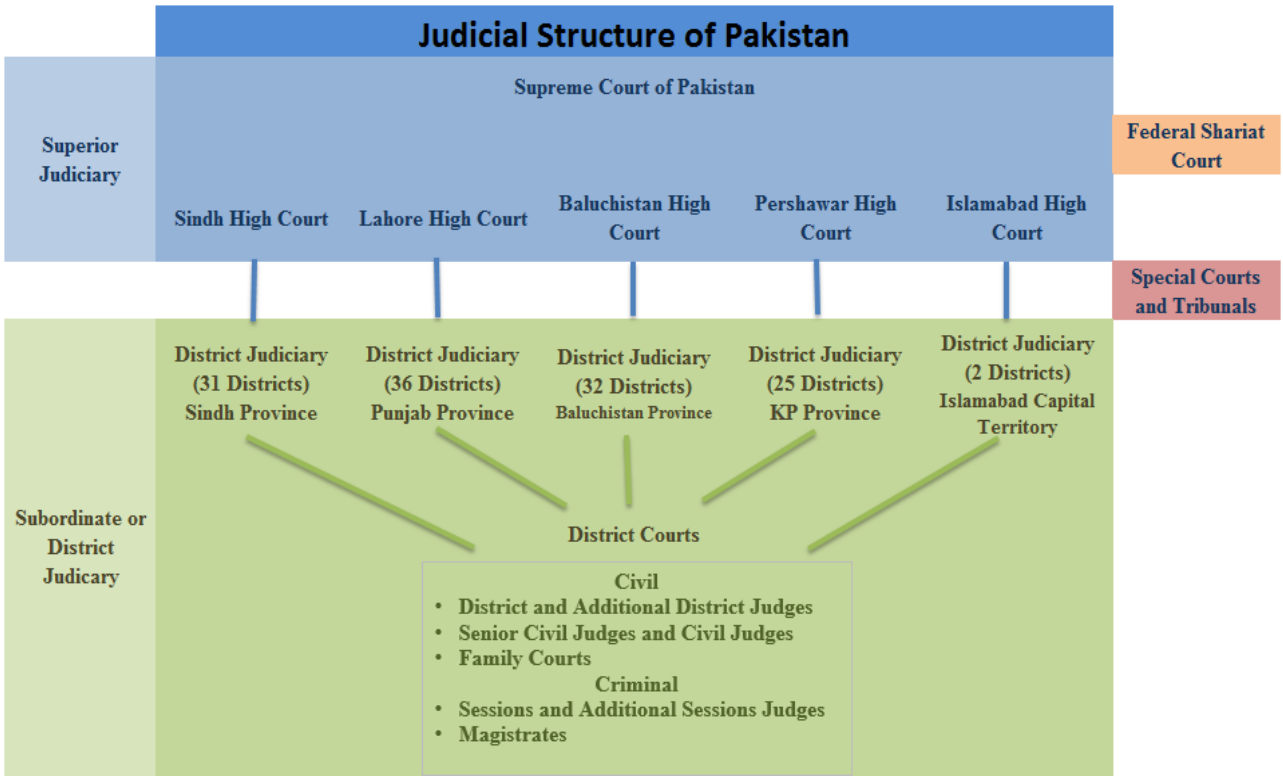


**Figure 2 Judicial Structure of Pakistan**

### *3.1.5 District Judiciary, Litigation and Procedure*

As indicated earlier, each province is further divided into smaller administrative units, called districts. These units are referred to as district for civil administration and civil justice; same units are termed sessions' division for criminal justice administration. A High Court has control and superintendence over all courts subordinate to it. Provincial High Court has authority under the Constitution to 'make rules regulating the practice and procedure of the [High] Court or any court subordinate to it'.[121] At the district level, subordinate courts can be classified in two further hierarchical categories: one, Courts of District and Sessions Judges and Additional District and Sessions Judges; and two, Courts of Senior Civil Judge, Civil Judges and Magistrates. Within the district at upper tier, there is one District and Sessions Judge (DSJ) who, besides having civil and criminal judicial powers, has got administrative control over all the courts in the district; besides that, there are Additional

[121] Ibid Articles 202 and 203 of the Constitution of Pakistan

District and Sessions Judges (AD&SJs) which have similar judicial powers as that of DSJ but have no administrative functions. Number of ADJs in a district varies and depends on the number of cases or population of the district. Besides one DSJ, on average, there are 4.3 AD&SJs per district.

The first tier, i.e. Courts of DSJs and ADJs act as a first appellate forum as to decisions of lower courts (i.e. of Civil Judges and Magistrates) and as trial courts for serious offences (e.g. murder, rape, robbery etc.). These are called District Courts for civil matters and Sessions Courts for criminal cases. The second tier, i.e. Courts of Civil Judges and Magistrates, mainly deal with the trial of civil litigation and minor offences respectively. Though criminal and civil courts act within the separate functional domains and under different procedural law regimes, yet all courts in a district function under a single administrative setup and as a single department of the administration of justice. (See Table 4 below). At the lower tier level within the district, there is one Senior Civil Judge in each district, and more than one Civil Judges, Magistrates and Family Court Judges. Though the number of civil courts varies across district given their population and volume of litigation, however, on average, there are 12.3 courts of Civil Judges, Family Court Judges and Magistrates per district.

Subject to overall administrative supervision, authority and control of the concerned provincial High Court, the District and Sessions Judge is the immediate head of the subordinate judiciary in a district dealing with its day to day affairs.[122] The High Court manages significant administrative matters (judges' appointment, promotion and transfers etc.) of subordinate judges through an Administration Committee comprising of the Chief Justice and senior-most Judges of the High Court.[123]

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[122] Faqir Hussain, 'The Judiicial System of Pakistan ' (*Supreme Court of Pakistan*, 2015) <http://supremecourt.gov.pk/web/user_files/File/thejudicialsystemofPakistan.pdf> accessed 26 Jul 2017, 15

[123] Peshawar High Court, *Judicial Estacode* (Peshawar High Court 2011) <http://peshawarhighcourt.gov.pk/app/site/53/c/Judicial_EstaCode.html> accessed 19 Mar 2019, 6.

| District Judiciary | Civil | Criminal |
|---|---|---|
| **Upper-level courts within districts** | Courts of District and Additional District Judges for civil matters | Courts of Sessions or Additional Sessions Judges for the trial of serious offences and appellate courts for minor offences |
| **Lower-level courts within districts** | Senior Civil Judges and Civil Judges, Family Courts, Rent Controller etc. having general or exclusive jurisdiction for trial of civil suits and matters. | Magistrates Class I, II and III for the trial of minor criminal cases and other criminal proceedings. |

**Table 4 Two Levels of Courts within District Judiciary**

Besides one district judge in a district, the number of Additional District Judges and Civil Judges vary considerably depending on the size and population of the district. For instance, in 2014, in Lahore district, which is the largest among all districts, there were 44 ADJs and 123 civil judges. The number is relatively quite small in other areas. In all 36 districts there were 341 ADJs and 826 Civil Judges.[124] The District Judge has powers to distribute the judicial workload among the civil courts of the district.[125]

Table 5 shows the population and number of districts (as per 2017 Census)[126] and the number of district courts working in 2014 in the districts.[127]

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[124] Law and Justice Commission of Pakistan, *Judicial Statistics of Pakistan 2014 available at* http://ljcp.gov.pk/nljcp/viewpdf/pdfView/UHVibGljYXRpb24vNWE4MzgtanNwXzE0LnBkZg==#book/ *accessed on 01/09/2018*

[125] S.15 of the Ordinance 1962

[126] Pakistan Bureau of Statistics Government of Pakistan, Province wise Provisional Resulkts of Census 2017 available at http://www.pbs.gov.pk/sites/default/files/PAKISTAN%20TEHSIL%20WISE%20FOR%20WEB%20CENSUS_2017.pdf accessed on 10/09/2018

[127] Law and Justice Commission of Pakistan *Judicial Statistics of Pakistan 2014* available at http://ljcp.gov.pk/nljcp/assets/dist/Publication/5a838-jsp_14.pdf accessed on 10/09/2018

| Provinces/Areas | Population (millions) | % | No of Districts | Subordinate Judiciary | | | |
|---|---|---|---|---|---|---|---|
| | | | | District Judges | ADJs | Civil Judges & Magistrates* | Total |
| **1. Punjab** | 110.01 | 52.9 | *36* | 36 | 341 | 915 | **1292** |
| **2. Sindh** | 47.89 | 23.0 | *29* | 26 | 79 | 254 | **359** |
| **3. Khyber Pakhtunkhwa** | 30.52 | 14.7 | *25* | 24 | 73 | 221 | **318** |
| **4. Baluchistan** | 12.34 | 5.9 | *32* | 17 | 28 | 113 | **158** |
| **5. Islamabad Capital Territory** | 0.20 | 0.1 | 2 | 3 | 13 | 27 | **43** |
| **Total** | **207.77** | **100** | **124** | **106** | **534** | **1530** | **2170** |

**Table 5 Population and Districts of Pakistan in 2017 and District Courts in 2014**
Source: Pakistan Bureau of Statistics Government of Pakistan 2017 and Judicial Statistics of Pakistan 2014
*Civil Courts include Senior Civil Judges, Civil Judges, Family Court Judges, and Magistrates etc.

The Supreme Court of Pakistan has got no direct administrative role in the affairs of district courts. However, since 2002, the Supreme Court of Pakistan exercised considerable influence in the policymaking process for the district courts through the National Judicial (Policy Making) Committee (NJPMC). This forum was the creation of a statute[128] which is headed by the Chief Justice of Pakistan and is comprised of Chief Justices of the four provincial High Courts. The forum provides a platform for the judicial leadership of the country to formulate and implement a uniform judicial policy for the courts of the entire country in all provinces. Since administrative heads of the judiciary of the provinces, i.e. Chief Justices of the respective High Courts, are members of the Committee, the policy decisions are directly enforced through them over the lower tier of the judiciary in districts. It was under NJPMC that the superior court ushered National Judicial Policy in 2009 for

[128] National Judicial (Policy Making) Committee Ordinance of 2002

clearing the backlog and expediting the pace of disposal of cases and it was implemented and monitored throughout the country through respective High Courts.[129]

*Civil Procedure*

At present, the procedure in civil litigation in Pakistan is governed under the Code of Civil Procedure 1908 (hereinafter to be called "the Code"), be it in the court of the first instance (i.e. trial court) or at the appellate level. All suits of civil nature usually are tried and filed in the court of the first instance, i.e. court of Civil Judge at the district level[130] while appeals and revisions mostly lie with the upper tier of district courts, i.e. courts of District or Additional District Judges. The Code has two parts, i.e. main statutory body (sections 1 to 158) and detail rules of procedure contained in its First Schedule. Initially, both parts of the Code were enacted and published, but it provides that the High Courts of a province has powers to amend, annul or add to any of the rules contained in the First Schedule.[131] The detail rules in the First Schedule, however, have the same effect as the main body of the Code unless amended or annulled by the relevant High Court.[132] Besides the Code of Civil Procedure 1908, there also exists a compendium of instructions known as High Court Rules and Orders Vol I to IV containing abundant directives as to a number of administrative and judicial matters regarding district courts and civil litigation, maintenance of judicial and financial record, infrastructure of the courts, staff management, court inspections and a number of other matters. Importantly this compilation was initially promulgated in the 1930s, and the major part of these rules and orders are still unchanged. A cursory overview of these four volumes indicates that these are outdated and need extensive overhauling. For instance,

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[129] Supreme Court of Pakistan, 'National Judicial Policy (Revised Edition 2012)' (*Secretariat, Law and Justice Commission of Pakistan*, 2012) <http://www.supremecourt.gov.pk/web/user_files/File/NJP2009.pdf> accessed 12 Mar 2016.

[130] Courts shall try all cases of civil nature unless jurisdiction is expressly or impliedly barred (s.9 of Code of Civil Procedure 1908) and normally suits are filed by presentation of plaint (s.26 of the Code).

[131] S.122 of the Code provides: "**Power of certain High Courts to make rules**. The High Courts may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all of any of the rules in the First Schedule".

[132] S. 121 of the Code supra

the rate of fee for a court process or summon which a court may levy is from 2 rupees to 50 paisa[133] (i.e. approximately 0.01 to 0.0025 pennies).

*Nature of Litigation*

Importantly over 90 per cent of the litigation is conducted in these subordinate courts at the district level. For instance, in 2009 number of pending cases in the subordinate judiciary was around 1.56 million cases while in the superior courts (i.e. Supreme Court of Pakistan and all the High Courts) there were only 0.138 million cases.[134] Hence the ratio is 92 to 8 per cent and this implies that most of the litigants in Pakistan are directly engaged with the district courts for their day to day legal matters and disputes. The ratio of cases pending in the superior and lower judiciary is typical. For instance, Indian superior and lower courts share a similar ratio of the number of cases, i.e. subordinate courts 86 per cent, 13 per cent in 24 High Courts and 0.2 per cent in the Supreme Court.[135] In Singapore, around 430,000 cases were filed in courts per year approximately during the 2000s and out of these 95 per cent are dealt with in the subordinate.[136] The pattern of this split of litigation between lower and higher judiciary is presented only to show the relative importance of subordinate judiciary which deals with the majority of the litigation problems of the citizens. It justifies endeavour of this project which is exclusively covering the district courts of Pakistan.

As stated earlier, 90 per cent of the entire litigation in Pakistan is being perused in the district courts. Majority of civil cases of the first instance are with the courts of Civil Judges while courts of DSJ/ADJs have mainly appellate litigation. Data of civil cases pending in 2013 in 34 districts of the province of Punjab, for instance, show that majority of cases (80 per cent) pending in the courts of civil judges are cases of the first instance (i.e. civil suits,

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[133] High Court Rules and Orders [Pakistan] Volume I Chapter XXXV Legal Publications

[134] National Judicial Policy Making Committee, *National Judicial Policy 2009* (Law and Justice Commission of Pakistan 2009) <http://supremecourt.gov.pk/njp2009/njp2009.pdf> acceessed 3 Sep 2017, 5

[135] PRS Legislative Research, *Pendency of Cases in Judiciary (2019)* available at https://www.prsindia.org/policy/vital-stats/pendency-cases-judiciary accessed on 19 Mar 2019.

[136] Waleed Haider Malik, *Judiciary Led Reform in Singapore Frameworks Strategies and Lessons* (World Bank Washington D.C 2007) 14.

family cases etc.); in contrast, in the courts of District/Additional District Judges most of the cases (81 per cent) are either appeals or revisions from the decisions of the lower courts of Civil Judges.[137] See Table 6 below.

| **Courts of Civil Judges- Punjab Cases Pending on 31-12-2013** | | | | | **Courts of District Judges- Punjab Cases Pending on 31-12-2013** | | | |
|---|---|---|---|---|---|---|---|---|
| **S. No** | **Category** | **Number** | **%** | | **S. No** | **Category** | **Number** | **%** |
| 1 | Civil Suits | 324,025 | 58% | | 1 | Civil Appeals | 57,481 | 70% |
| 2 | Family Cases | 90,255 | 16% | | 2 | Civil Revision | 9,280 | 11% |
| 3 | Succession etc | 20,286 | 4% | | 3 | Original Suits | 6,736 | 8% |
| 4 | Other Cases | 127,990 | 23% | | 4 | Other Cases | 8,646 | 11% |
| | **All Cases** | **562,556** | **100%** | | | **All Cases** | **82143** | **100%** |

**Table 6 Civil Cases Pending in Punjab on 31-12-203 LJCP Judicial Statistics 2013**

### *3.1.6 Role of Superior Judiciary in Accountability and Reformation of Lower Courts*

The Constitution of Pakistan 1973 erects state structure on the principles of separation of power and independence of the judiciary from the executive.[138] Superior judiciary and the lower hierarchy of courts, work independently from the executive and legislature (be it at federal or provincial levels). The legislative bodies at the centre and provinces are empowered as to primary legislation in the substantive and procedural law domains. However, the High Courts have powers to formulate subordinate legislation, detail regulations and issue instructions as to the overall administration of justice and functioning of courts. Now the Superior judiciary through NJPMC can also enforce policy measures as to cases and instruct the district courts through High Courts. Though the provincial executive governments provide financial resources for the district courts, these are used by the High Court with considerable financial autonomy. Within the allocated budget for the

[137] Law and Justice Commission of Pakistan, *Judicial Statistics of Pakistan 2013 available at* http://www.ljcp.gov.pk/Menu%20Items/Publications/2013/2013.pdf *accessed on 01/09/2018*

[138]Constitution of Islamic Republic of Pakistan 1973, Preamble available at http://www.pakistani.org/pakistan/constitution/preamble.html accessed on 26/07/2017

administration of justice, the High Courts have complete freedom to prioritise the expenditure from one to another head. For instance, the provincial Government of the Khyber Pakhtunkhwa delegated extensive financial powers to the Chief Justice of Peshawar High Court in 1995.[139] Hence, the superior judiciary has got the necessary judicial independence and enjoys complete administrative control and substantial financial autonomy relative to the district courts of the country.

Performance evaluation of lower courts and overall accountability of the justice sector of Pakistan legally and practically rest with the superior judiciary. It exercises complete administrative control and substantial financial autonomy over district judiciary. Since superior judiciary and the lower hierarchy of courts, work independently from the executive and legislature, therefore there exists no formal mechanism of public accountability through elected representatives and democratic institutions. Importantly, due to turbulent relations with other organs of the state, role of democratic institutions, legislature and executive was gradually marginalised in the reformation of functional aspects of lower courts. Political and democratic crisis in Pakistan has distanced politicians and legislators from the justice sector, which is left to judges and lawyers, who in turn are unwilling to review the fundamentals of the institution having technocratic perspectives and narrow agendas. Siddique while offering his critique as to justice reform comments on the legal community and observes:

> Current defenders and controllers of the justice sector reform agenda in Pakistan are by and large incapable of, unsuitable for, and disinterested in any deeper substantive issues of justice; it is about foreground institutions rather than background norms; and, therefore, it is inherently socially and politically de-contextualized.[140]

In his recent treatise on the political history of the judiciary of Pakistan, Hamid Khan, a leading lawyer and prominent member of the bar observed:

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[139] Peshawar High Court, *Judicial Estacode* (2nd Edition edn, 2011) p24 available at https://peshawarhighcourt.gov.pk/image_bank/Publications/Other/Final%20Judicial%20Estacode.pdf accessed on 19-03-2019

[140] Siddique 2013 p260

> Pakistan has a chequered judicial history, replete with periods of independence from and capitulation to the executive. The relationship of the judiciary and the executive in Pakistan has always been difficult because of struggles and vicissitudes in the life of the nation.[141]

He concludes:

> The judiciary in Pakistan has had to pass through difficult times, perform uphill tasks and face threats to its very existence during the course of its turbulent history. It is these vicissitudes that characterise the institution and define its strengths and weaknesses.[142]

Struggle to dominate the superior courts by the political actors and military establishment was mostly for political objectives and interests and not for genuine accountability and performance monitoring of the justice sector. During the past ten years (2005-2015), the resurrection of an activist judiciary in Pakistan and its highly autonomous mode and assertive behaviour towards political and semi-autocratic governments has further widened the gap and drifted the higher courts further away from representative institutions. The traditional aloofness of judiciary was further deepened due to political developments and reactive vision of the new judicial leadership. As a necessary result of this mindset, the superior judiciary 'has habitually displayed resilience to ideas of further training and professional up-gradation, quite often branding the same as contemptuous of the judiciary and a violation of its independence'.[143] Hence the political landscape of Pakistan and polarised relation between the higher judiciary and the executive has practically rendered the possibility of judicial accountability through democratic institutions redundant. In this scenario, the brunt of improvement and reformation of justice sector rests exclusively on superior courts.

In the case of Pakistan, the evaluation of justice sector performance and reformation are specifically important. Being the sixth largest population of the world, Pakistan has long been trapped into problems of bad governance, institutional inefficiency and resultant socio-economic regress. The growing influence of non-state actors, radicalisation and lawlessness

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[141] Hamid Khan, *A History of the Judiciary in Pakistan* (Oxford University Press 2016), 1

[142] Ibid Hamid Khan 2016, p537

[143] Siddique 2013 *Pakistan's Experience with Formal Law*, 228

are problems which are not only detrimental to the Pakistani society but pose a threat to global peace. These factors require that besides other areas, law and justice organisations may be reformed. International development agencies have already engaged in this process. For instance, in 2002 Asian Development Bank funded $350 million for Access to Justice Program (2001-2009) - biggest ever law reform program of Asia.[144] Later in 2010, USAID proposed a project offering $90 million for its Strengthening Justice with Pakistan Program (SJP). Though this project was never materialised, it affirmed the concerns of the international development community as to Pakistan's justice sector reform.[145] Now the UK Government through DFID is about to initiate Justice System Support Program (JSSP) 2016-2020 funding £25 million for Pakistan's justice sector.[146] Performance of courts and its measurement attain much significant position in this scenario.

In such milieu, performance appraisal of lower courts through internal monitoring system within the higher judiciary has become highly significant being the *only* formal accountability mechanism. Given gaps in the internal official evaluation system (which would be shown a little later), academic scrutiny of the issues of performance and their possible solution attains considerable significance in the context of Pakistan. This project is a humble effort in that direction.

### 3.2 A case for Performance Evaluation of District Courts of Pakistan

As elaborated earlier, each provincial High Court has got direct and complete administrative control over the district courts of the province. Performance monitoring by the High Courts as to district courts is done concerning (a) human resource and (b) judicial workload management. Conduct, integrity, and quality of judicial work of the judges are monitored under the disciplinary rules and performance evaluation tools. Here the second aspect of official appraisal is relevant which relates to the overall management of cases,

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[144] Asian Development Bank, Access to Justice Completion Report 2009, http://www.adb.org/sites/default/files/project- document/63951/32023-01-pak-pcr.pdf

[145] Osama Siddique, *Pakistan's experience with formal law: an alien justice* (Cambridge University 2013) 139

[146] UK Government DFID 2016, DFID 7507 Pakistan Justice System Support Programme (JSSP)

issuance of general directives and instructions to the lower courts and evaluating the judicial performance of the district courts as a whole. In this section, it would be discussed what empirical means are being used on the ground and how data is officially collected, compiled and analysed for monitoring purposes and for expediting final determination of litigation. Mainly it shall be explained how speed and timeliness factors are monitored. Fair treatment, quality of judgment, the accuracy of the decision, effectiveness of relief and integrity of judges, are though important facets of performance, but this project is limited to the efficiency factor of legal service which in turn is relevant for issues of delay, backlog and abuse of court process.

### *3.2.1 Compilation of Judicial Statistics*

The practice of collecting and compiling data of cases in the courts in Pakistan was started in 2002. Before that each High Court might have collected data of cases from district courts individually for monitoring and performance evaluation purposes, however, it was never centrally organized and compiled together to draw a broader picture. That is why pre-2002 judicial data of the lower courts is not publicly available. In 2002 when Access to Justice Program (AJP 2002-2008) was initiated by the Asian Development Bank for law and justice reform in Pakistan, such statistical record was badly needed. Before the start of AJP, in its initial report Asian Development Bank observed:

> There is no coordinating body for developing legal and judicial policy, no system for collecting empirical data to evaluate the performance of the system, improve accountability, or recommend reforms'.[147]

Relevant agencies involved in the reform process (i.e. Federal and Provincial governments, judiciary and the donor agency) required to have a reliable databank of cases to set the direction of reform and design detail policies and measures. It was under these circumstances that efforts were made to develop the practice and mechanism of a systematic compilation of judicial statistics. In 2002, a central and permanent statutory body namely

[147] Asian Development Bank, 'Report and Recommendation….(2001) (n 22) 9

National Judicial (Policy Making) Committee (NJPMC), was created to 'harmonize the judicial policy within the court system' for improving the performance of the administration of justice.[148] The Committee, headed by the Chief Justice of the Supreme Court of Pakistan, consisted of the Chief Justices of the provincial High Courts as its members. One of the functions of the Committee is to set performance standards and publish periodical reports. The NJPMC published the first report titled 'Judicial Statistics of Pakistan 2002' in 2003 which is the first authentic compilation of statistics of the entire country providing complete annual data of cases of the year 2002.[149] From 2003 onward, NJPMC continued to accumulate data from all the district courts of the country through respective High Courts and published annual reports which are the only authentic official data of cases available for the public eye now.

These reports contain data of cases pending at the start of a year, filed and decided during the year with closing balance as to cases in the superior courts as well as in the district courts. The data clearly shows cases regarding their nature, level (trial or appellate), region and category etc. Each High Court combines and presents statistics of all the districts under its control. The reports start with a general and brief foreword by the Secretary of the NJPMC and of Chief Justices' remarks followed by hundreds of tables showing the number of cases

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[148] National Judicial (Policy Making) Committee Ordinance 2002 [Pakistan] Para 4 of the of this law reads:

**"Functions of the Committee**.- The Committee shall coordinate and harmonize judicial policy within the court system, and in coordination with the Commission, ensure its implementation. The Committee shall also perform the following functions, namely:-

(a) Improving the capacity and performance of the ADMINISTRATION of justice;

(b) Setting performance standards for judicial officers and persons associated with performance of judicial and quasi judicial functions.

(c) Improvement in the terms and conditions of service of judicial officers and court staff, to ensure skilled and efficient judiciary ; and

(d) Publication of the annual or periodic reports of the Supreme Court, Federal Shariat Court, High Courts and Courts Subordinate to High Courts and Administrative Courts and Tribunals".

[149] National Judicial Policy Making Committee, 'Judicial Statistics of Pakistan 2002' (2003) <http://www.ljcp.gov.pk/Menu%20Items/Publications/Reports%20of%20the%20LJCP/reports/judicialstats02.pdf> accessed 18 Oct 2016.

separately for each provincial High Court and their respective district courts. In the second report for the year 2003, Secretary of the NJPMC remarked:[150]

> The report represents a measure of the performance of the Courts during the year 2003. The data, it is hoped, will be useful to all stakeholders, who participate in enhancing the performance of the courts, especially in providing ideas and suggestions for promoting access to justice. It is also to be hoped that this report, as well as the individual reports of the courts, will be used by researchers for analysis of the performance of the Courts and for proposing solutions to problems faced by the judicial system of Pakistan. Indeed, one of the major aims of these reports is to benefit from such analysis and proposals.

However, in fact, this data is raw material which *in itself* does not show any *measure of performance.* It is devoid of any statistical analysis and necessary conclusions as to performance, speed and efficiency. Given this gap, in this project, this copious raw data, i.e. annual reports from 2002 to 2014 shall be analysed for comparison of performance over time, as to category or across different regions and for elucidating *performance* in quantifiable terms.

### *3.2.2 Gaps of Analysis of Judicial Statistics in Official Evaluation Practice*

As hinted earlier, the annual reports containing numeric data is not a ready reflection of the performance of judiciary of Pakistan. Though it is claimed that 'through these reports that the Courts…present a measure of their performance'[151], yet this data lacks results as to judicial performance in terms of the pace of determination. The NJPMC, the Supreme Court and the High Courts involved in compilation and publication of these reports offer no analytical comment on the performance of courts. There is also no attempt to gauge actual performance by comparing it with some set standards or targets. As it is, the data can hardly be presented as a 'measure of performance'.

The practice of compiling bare statistics was followed throughout the series of yearly reports from 2002 to 2014. Lack of spatiotemporal comparison leaves the signs of

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[150] National Judicial Policy Making Committee, *Judicial Statistics of Pakistan 2003* (Law and Justice Commission of Pakistan) available at Page 1

[151] National Judicial Policy Making Committee, 'Judicial Statistics of Pakistan 2002' ibid1 (I do have snap shot)

alleged improvement blurred and claims of success unsubstantiated especially in the context of various judicial reform measures during this period. The reports also do not reveal whether some quantifiable goals were achieved or not. Hence the overall trends of improvement in (if any) or stagnation or worsening of the pace of determination of cases by the courts at least in statistical terms lurk behind the abundant numerical record. No doubt the data is indispensable and most important, but without evaluative analysis, it is useless. In view of this gap in the official practice and necessary review, this project shall use this data for meaningful conclusions as to performance.

It clearly is shown that official appraisal of performance through judicial statistics is inadequate. Collection of the data is an essential first step, but then the process stops short of presenting meaningful analysis. The gap is tried to be filled in this project by completing the process and making an original contribution. Therefore, the data from 2002 to 2014 shall be re-analysed to paint the canvass of performance objectively and though quantifiable indicators, i.e. case clearance rate (CCR), backlog, filing-disposal ratio, and the average age of cases.

Though the focus of the project is the appraisal of the on the ground performance of district courts of Pakistan, however, here it is an opportunity to examine the formal evaluation process and substantiate the point that internal institutional appraisal system is not adequate to present a realistic and vivid picture of the level of efficiency. It may be inferred that the data accumulated by the superior courts having administrative control over the district courts, is an essential but first step towards appraisal; the next and equally important stage, which is altogether missing from the official discourse, is the analysis of data to conclude as to performance. Accumulation, compilation and publishing judicial statistics are a means to an end; if further investigation is not made, bare numeric information may not present an evaluation. Besides trying to fill the analysis gap (as identified above in the official discourse) by scanning the data for the period from 2002 to 2014, it is useful to observe institutional output for a more extended period (i.e. thirteen years); this broader picture of performance is expected to show consistent patterns of courts' output cancelling out the effect of sporadic and temporary factors boosting or lowering the performance.

Importantly, a significant wave of justice sector reform came in 2002-2003 when Asian Development Bank launched access to Justice Program (AJP 2002-2008) in Pakistan. It was the most significant ever multimillion justice reform program in Asia. AJP was followed by rigorous implementation of stringent measures by the Supreme Court of Pakistan under National Judicial Policy 2009 (NJP 2009). After the success of Lawyers' Movement for the restoration of the deposed superior judiciary, the freshly revived and triumphant judicial leadership implemented NJP 2009, and several quick measures were enforced, and strict directives were issued to lower courts for clearing the backlog and expedite court processes. Impact of these significant reform efforts has not been comprehensively analysed in later years. In this respect, too, the findings of this project would be an original contribution. The inquiry would reveal the general and usual patterns of performance of the district courts for thirteen years and the way sporadic reform efforts had an impact on these patterns.

### *3.2.3 Evaluation Gap after Access to Justice Reform Program – AJP (2002-2009)*

Access to Justice Program (AJP) was the biggest ever justice reform program implemented in Asia in terms of scope of the reform measures, amount of funding ($350 million) and duration of the program.[152] The number of judges and court staff in the subordinate judiciary was drastically increased (i.e. from 1362 in 2001 to 2061 in 2008), the infrastructure of courthouses and judges' residences were erected, salaries and perks were increased, and court facilities were enhanced.[153] Later NJPMC, the highest judicial policy-making body of the country headed by top judicial leadership (Chief Justices of the Supreme Court and provincial High Courts), formulated and then implemented National Judicial Policy in 2009 mainly for clearing the massive backlog of cases pending in the district courts and expediting the pace of decision of litigation.[154] Importantly, the impact of both these reform efforts remained elusive and has not been assessed comprehensively till date through

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[152] Asian Development Bank, 'Pakistan: Access to Justice Program ADB Completion Report' 2009) <http://www.adb.org/projects/documents/access-justice-program> accessed 30 October 2015

[153] Ibid

[154] Supreme Court of Pakistan, 'National Judicial Policy 2009' (*Secretariat, Law and Justice Commission of Pakistan*, 2009)<http://supremecourt.gov.pk/njp2009/njp2009.pdf> accessed 13 Mar 2016

empirical scrutiny both in the official realm or through academic research. The analysis offered in this project (chapter 4) would, therefore, be a genuine contribution in this regard. Also, there appears dearth of post-AJP evaluation in the literature.

Gauging the impact of reform is vital in terms of expedition and efficiency. Since the 1990s, judicial reform has been an important component of the development enterprise the world over. However, despite the vehemence for these reform programs, there appeared 'mounting chorus of disappointment in the literature'[155] as to the success of these efforts. Law and development sceptics raise concern over the direction of reform by claiming that its impact remained elusive. Armytage builds on the academic commentary of Trubek, Carothers, Jensen and Hammergren and identifies growing perception of disappointment in the performance of judicial reform. His critique 'shows that both judicial reform practice and evaluation are demonstrably deficient'[156] and this he describes as 'evaluation gap' which obscures actual performance. In other words, it cannot be confirmed whether the deficit in performance is due to ineffective reform or inadequate evaluation practice. Moreover, it is highly undesirable in the struggling economies to go for costly reform programs without being sure as to their impact. Hence, there is generally an evaluation gap in justice reform landscape the world over which leaves room for scrutiny and empirical inquiry.

### *3.2.4 Elusive Impact of National Judicial Policy (2009-12)*

Political developments during 2007-2009 in Pakistan concerning judiciary-government standoff, are also relevant for the case of evaluation. In 2007, most of the superior court judges having an activist tilt were sacked by the Army Chief-cum-President of Pakistan. It triggered a strong reaction from lawyers' community who were joined by large segments of the society – opposition political parties, media, intellectuals, and civil society. The reaction turned into a prolonged and widespread agitation known as Lawyers' Movement

[155] Armytage, *Reforming Justice: A Journey to Fairness in Asia,* (n 21) 1

[156] ibid, 17

for the restoration of deposed judges. Under public pressure, the succeeding political government of Pakistan People Party had to restore the deposed judges in 2009.[157]

After restoration, the top judicial leadership in the Supreme Court of Pakistan decided to re-invigorate the justice system at the grassroots level by inhibiting the twin problems of delay and backlog in the lower courts in Pakistan. This commitment on the part judicial leadership emerged in the form of National Judicial Policy 2009 under NJPMC whereby several stringent measures were enforced and directions issued to the lower courts for speedy disposal of cases and clearing the considerable backlog piled up in decades.[158] The Policy was rigorously pursued for three years till 2012, but after the retirement of the then Chief Justice of Pakistan, Justice Iftikhar Mohammad Chaudhry, the vigour slowed down. Importantly impact of National Judicial Policy (2009-2012) was rarely explored through empirical scrutiny. Since in this project, evaluation of lower courts is gauged from 2002 to 2014, it covers both pre-NJP and post-NJP years. The assessment in this project is not only desirable and important, but it is also timely as well.

### *3.2.5 Relevance of Courts' Performance Evaluation in Diverse Milieu*

Performance analysis based on the said data is also important given the diverse conditions of Pakistan. Varying cultures, sharp urban-rural divide, and variation of the level of economic development among the districts and of education among the population that may have possible effects on the way public institutions function. In such diverse milieu, it becomes difficult to assess whether an institution's performance is different at various places in different circumstances and whether indigenous factors do have an impact. Or else, the institutional shortcomings are so grave that irrespective of surrounding conditions, performance is constant. Or maybe the correct assessment lies somewhere between the two scenarios. It is also essential to assess whether specific trends of performance are consistent over a more extended period or there are occasional hiccups of good or bad performance.

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[157] Hamid Khan, *A History of the Judiciary in Pakistan* (Oxford University Press 2016).

[158] Supreme Court of Pakistan, National Judicial Policy 2009

The spatiotemporal comparative analysis of courts' performance, which shall be attempted in this project, would provide a far more precise picture of courts' functioning in a jurisdiction like Pakistan. If data is used to paint a broader canvass of judicial performance, it may veil the influence of local factors on judicial efficiency. For instance, a broader overview may hide the fact whether similar judicial reform measures in backward districts did fetch substantial improvement as compared to urban centres of the countries. In chapter 4, besides taking the accumulated results of the entire country's judicial data, performance shall be gauged across diverse regions, over different periods and among the various category of cases. Hence the spatiotemporal comparative analysis would not only reveal whether efficiency in quantitative terms increased or not over a period but also whether the impact was same across all the regions or else parochial factors have had their influence.

### *3.2.6 Judicial Accountability*

Constitutional arrangement and structure of judicial system of Pakistan provide no accountability of lower courts by external and independent observers. Under Article 203 of the Constitution of Pakistan, administration of district judiciary in all four provinces is under the direct control and supervision of respective provincial High Courts. No governmental executive agency or legislative body has any constitutional or legal role in monitoring the judicial functioning of lower courts. On the ground and within the judicial façade, a consistent process of performance analysis based on empirical data and monitoring appears weak. This is evident from the fact that annual reports published by the superior judiciary or its subservient agencies offer a blurred and descriptive numeric picture of pendency of cases, with no analysis for public consumption and accountability. These reports, as would be discussed later in the next chapter, lack evaluative scrutiny of overall performance and comparison over time to ascertain the trends of improvement or otherwise in terms of disposal of cases and backlog. Also, the last report of judicial statistics as to district courts available on the website of Law and Justice Commission of Pakistan pertains to the year 2014; no statistics are available from that year onward.

This scenario may be due to a lack of consistency or interest in evaluation mechanism. Siddique opines that 'Pakistani appellate judiciary has habitually displayed resilience to ideas of further training and professional up-gradation, quite often branding the same as

contemptuous of the judiciary and a violation of its independence'.[159] For these reasons, judicial leadership and court insiders develop their perception as to performance. These internal images of performance are limited and not very convincing for the external independent observers and court critics. In the context of Indian legal system, Baxi has termed this lack of institutionalisation as the crisis of law reform.[160]

In contrast, in certain jurisdictions, the process of evaluation and reformation is highly institutionalised and sophisticated. For instance, in the United States, National Centre of State Courts (NCSC) [161] being a non-government organisation founded at the urging of the Chief Justice of the Supreme Court of the United States. It works in collaboration with the superior judiciary and state courts administrators for improvement of judicial management of state courts. NCSC provides academic and research consultancy for evaluation and implementation of court management tools and methods. In the context of measuring the performance of courts, NCSC views:

> [J]udges and court administrators have only limited opportunities to view their work in perspective. The press of caseloads, along with everyday operational problems, often seems all-consuming. In this context, performance assessment actually helps court managers set goals as well as understand and manage organizational performance. With performance indicators in place, judges and court managers can gauge how well the court is achieving basic goals, such as access and fairness, timeliness, and managerial effectiveness.[162]

Absence of such external and institutionalised evaluative system is non-existent in Pakistan while internal monitoring process appears underdeveloped. Though the evaluative research in this project would be a one-off effort and that too in a limited perspective, it will at

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[159] Siddique, *Pakistan's experience with formal law : an alien justice* (n 6) 228

[160] Upendra Baxi, *The Crisis of the Indian Legal System. Alternatives in Development: Law* (Stranger Journalism 1982).

[161] The National Centre for State Courts (NCSC) is a non-profit court improvement organization based in the United States. It works in collaboration with the Conference of Chief Justices, the Conference of State Court Administrators, and other associations of judicial leaders. It is a think tank which provides research studies, information, education and consultation to the courts in judicial administration. Information about NCSC is available at <http://www.ncsc.org/About-us.aspx>.

[162] National Centre for State Courts, *Court Tools* (n 69).

least identify the missing links between desirability and mechanism of judicial performance appraisal and ways to move forward.

### *3.2.7 Dearth and Limitations of Evaluative Research Studies on Pakistan's Judiciary*

Empirical research studies regarding the performance of Pakistani courts are quite a few. Only four serious works have so far been produced having varying theoretical perspectives and objectives. These are from Chemin[163], Asian Development Bank[164], Armytage[165] and Siddique[166].

*ADB Completion Report 2009*

The evaluative report of Asian Development Bank (ADB) was published to paint a picture of Access to Justice Program (the biggest ever justice reform project in Asia funding $350 million during 2002-2008) highlighting successes of the program in some areas of judicial performance. The Report concludes:

> The AJP was effective in improving access to justice. …. Under the AJP, reforms in the judiciary, which comprised a majority of the policy reform agenda, were largely successful. Judicial efficiency improved and there is greater transparency and accountability in the delivery of judiciary services.[167]

These claims were supported by a comparison of some indicators from 1998 to 2008 detailed in Appendix of the report.[168] However, it appears pre-mature in 2009 to draw conclusions and make claims of success as the program just ended in 2008.

Moreover, this report is an official document for internal consumption of ADB; it concerns more with technical aspects of the program and its outcomes. It cannot be equated with a research-based evaluation having a clear theoretical framework and substantiated by

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[163] Matthieu Chemin, 'The impact of the judiciary on entrepreneurship: Evaluation of Pakistan's "Access to Justice Programme"' (2009) 93 Journal of Public Economics 114

[164] Asian Development Bank, 'Pakistan: Access to Justice Program ADB Completion Report', 15

[165] Armytage, *Reforming Justice: A Journey to Fairness in Asia* (n 21)

[166] Siddique, *Pakistan's experience with formal law* (n 6).

[167] Asian Development Bank, 'Pakistan: Access to Justice Program ADB Completion Report', 15

[168] Ibid, 21-24

extensive empirical data. The indicators used by ADB (like the number of judges, case workload and disposal rate etc.) are limited which renders this evaluation insufficient to reveal the broader picture of the performance of courts in Pakistan in an elaborative and comprehensive manner. The report may also be viewed as self-serving. Hence, an independent post-reform assessment is still desirable.

*Pakistan's Experience with Formal Law by Siddique 2013*

Siddique's empirical work is exclusively qualitative i.e. it covers a survey of 440 litigants who were interviewed within the premises of Lahore District Courts in 2010-11.[169] Siddique later used this data in his book *Pakistan's Experience with Formal Law.* However, the critique of the formal legal system of Pakistan by Siddique is from an altogether different perspective. He views the justice system in Pakistan failed to fulfil the legal needs of the people especially the vulnerable and the disempowered due to its colonial antecedents and disconnects between people's condition and the legal system. His central thesis supported by qualitative data is that when litigants come into the courts, they bring with them several vulnerabilities and disempowerments which may be due to 'gender, religion, caste, age, education, occupational privilege, wealth or geographical location'.[170] He argues that when these litigants interact with the justice system, it fails to provide a *level playing field*; rather the system aggravates that unevenness and 'cause it to be more lopsided, unfair, and disadvantageous for already disempowered and vulnerable.'[171]

This analysis of litigants' experience with court system tries to locate disconnects between court practice, legal community and reform endeavour on the one hand and issues of distributional inequalities, disempowerment and social asymmetries on the other. Siddique appraises judiciary on the criteria of its success or failure to addresses the said entrenched socio-economic vulnerabilities. He concludes that these issues of fundamental importance are

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[169] Siddique O, 'Law in Practice - The Lahore District Litigants Survey (2010-2011)' <http://lums.edu.pk/docs/dprc/Law-In-Practice-Lahore-District-Courts-Litigants-Survey.pdf> accessed 1 June 2016

[170] Siddique, *Pakistan's experience with formal law* 2013 (n 6) 174,208

[171] Siddique, *Pakistan's experience with formal law* 2013 (n 6) 175

given little or no priority by judicial leadership, the legal community and reform practitioners. He observes

> Current defenders and controllers of the justice sector reform agenda in Pakistan are by and large incapable of, unsuitable for, and disinterested in any deeper substantive issues of justice; it is about foreground institutions rather than background norms; and, therefore, it is inherently socially and politically de-contextualized.[172]

In contrast, in this project issues of performance of the courts from institutional efficiency perspective (i.e. timeliness, delay and abuse of court process etc.) shall be investigated for improving performance through procedural and managerial tools. It is not a study taking into account the sociological and political aspects of the disputes and disputants. Siddique used his data (i.e. Lahore District Courts Survey 2010-11 consisting of extensive interviews of 440 litigants) to present disconnects between legal institutions and socio-economic vulnerabilities of the litigants. This would use that data as a secondary source to gauge the end-user satisfaction indicator to present issues of delay in litigation, judicial mismanagement and abuse of court process exclusively from institutional efficiency perspective (and not in the sociological and historical context) to locate functional flaws in the procedure and case management.

*Armytage - Reforming Justice: A Journey to Fairness in Asia 2012*

Armytage's work is a critique of prevalent judicial reform enterprise and its evaluation. He argues that in the judicial reform enterprise, there exists an 'evaluation gap' as to development effectiveness of reform program as the impact assessment is 'technically difficult, slow and often disproportionately expensive' and concludes that evaluative methods of judicial reform are non-existent or highly deficient.[173] Armytage posits his findings on empirical analyses based on three case studies which include Pakistan's Access to Justice Program. He shows that it is difficult for the Asian Development Bank to show success due to

[172] Siddique, *Pakistan's experience with formal law* 2013 (n 6) 260.

[173] Armytage, *Reforming Justice: A Journey to Fairness in Asia* 2012 (n 21) 16.

continuous changing of goals for judicial reform, 'compounded by an endemic underinvestment in evaluation'.[174]

This work concerns two fundamental issues: inadequate theory of legal reform and insufficient evaluation of its impact on socio-economic development. In this broader context, Pakistan's reform effort was analysed as one of the three case studies. However, it falls short of a comprehensive evaluation of the performance of the lower judiciary of Pakistan particularly in terms of court service efficiency. Instead, he identifies gaps generally for the assessment of reform programs in terms of their impact on development. In this project, however, the objective is specifically directed to evaluate the performance of district courts in terms of efficiency of judicial service.

*Chemin - Impact of the judiciary on entrepreneurship: AJP Pakistan (2009)*

The empirical study of Chemin is an attempt to empirically establish that judicial reform (Access to Justice Program in Pakistan) started in 2002 have an impact on the entry rate of new entrepreneurs. He used the dataset of performance of 875 judges between 2001 and 2003 to assess whether reform affected judges' performance. He concluded that 'judges disposed of 25% more cases following the reform in affected districts,' i.e. 6 out of 117 districts.[175] Two variables were employed, namely judges' rate of disposal and entry of new entrepreneurs in the business. However, the study does not reflect a comprehensive assessment of judicial service. Also, it is too narrow for its temporal coverage. Access to Justice Program was initiated in 2002 and concluded in 2008. Chemin's empirical work is based on the dataset of disposal of cases by judges in 2001 and in 2003. As to AJP, it was premature to assess the impact of reform when the program hardly started. Even otherwise dataset of only two years leaves no chance to evaluate comparatively improvement or otherwise for over a more extended period.

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[174] ibid 20.

[175] Chemin, The impact of the judiciary on entrepreneurship 2009 (n 89).

In contrast, in this research project, performance evaluation is based on workload load analysis through statistical indicators; it also relies on other sources and evaluation methods including qualitative feedback of the litigants, public perception indicators and international ranking of Pakistan's judiciary. In terms of temporal coverage, this project deals with data stretching over the period from 2002 to 2014 covering the reform and post-reform years. This period is long enough to gauge performance comprehensively. In addition to this, the period also includes the second wave of judicial surge when in 2009 National Judicial Policy was implemented by an activist judiciary for clearing the decades-old backlog and expedite disposal of cases.

## 3.3 Evaluation Framework Suitable for Pakistan's Judiciary

In chapter 2, frameworks and methods of assessing judicial performance and efficiency were overviewed. These frameworks provide several quantifiable measures, indicators and set standards. Taking this learning forward, and for determining the level of efficiency and overall performance of court system of Pakistan, a mixed approach shall be employed which include (a) analysis of data of cases for measuring speed of disposal, backlog and age cases, (b) end-user satisfaction so far as it reflects efficiency of judicial service and issues of delay and abuse of court process and (c) ranking of district judiciary of Pakistan among countries having similar economic and/or geographical conditions. In this section, these three approaches shall be elaborated before going to chapter 4 where these shall be employed.

### *3.3.1 Analysis of Workload based on Judicial Statistics*

As discussed in detail in chapter 2, the study of caseload data is an objective way to measure efficiency. Statistical analysis of caseload of courts offers the fairest and objective method of assessing efficiency and timeliness factors. This analysis would show the capacity of the court system to deal with the cases filed, the time it takes on average to dispose of these and the growth of backlog of cases relative to that capacity. For instance, *Case -clearance rate* (CCR) indicator shows the difference between cases filed and disposed of during a fixed period. It reflects the demand side (i.e. the total number of registered cases) in terms of legal needs of the citizens and supply-side (i.e. cases finally determined) in terms of services provided by the courts within a fixed period.

For statistical analysis, data available as to district judiciary of Pakistan in shape of annual reports from 2002 onward, provides the number of cases pending, filed and decided each year. From this data, the clearance rate, age of cases, backlog and its growth trend, shall be computed for each year and then all years from 2002 to 2014 shall be compared. Comparison of these statistical indicators shall also be made among various districts and category of cases. This approach most objectively assesses the quantum of the workload of cases, fluctuations in its magnitude and direct output of the courts in numerical terms.

### *3.3.2 Public Perception and End-User Satisfaction to measure the efficiency*

Another approach of assessing court service efficiency is to accumulate the subjective views of the users of the system who interact with it in real-life situations. With this understanding, I will analyse how the litigants and general public rate Pakistani judiciary in terms of delivery of service and efficiency relative to their legal needs and expectations. This approach is important in the context of Pakistan as within the administration of justice and official evaluation mechanism, public opinion and litigants' real-life experience has never been used as a tool to assess institutional performance. No official data is known to have been compiled and published as to the problems faced by the very citizens generally for whom the entire façade of justice is erected. Though officially delay may be cited as an issue, the official views remain untested empirically and hence delinked from the subjective perceptions and problems of the litigants. Courts and judicial administrators in Pakistan exclusively engage with numerical data and remain aloof to the humanistic facet of the court service at grass-root level. Real-life stories and experience of the litigants can directly and truly reflect the miseries of litigants which bare digits would miss out.

### *3.3.3 Comparative Analysis of Judiciary by International Ranking*

Generally, a relative international ranking of various state institutions in different jurisdictions may not adequately reflect the actual performance of those institutions due to the complex interplay of a number of factors in each jurisdiction. However, the comparison between institutions among countries having *identical* circumstances may indicate how well or poorly an institution is performing. This contrast cancels out the influence of external factors which may vary across countries and geographical regions. For instance, in rich countries, the court system may be performing better due to a higher stage of development as

compared to developing countries. But when countries which have identical geographical and economic and socio-political conditions, target institutions can be compared for evaluation. In such comparison, political and economic factors are assumed to have an almost equal level of pressure, if any on the output of an institution. The relative position of Pakistan's judiciary among countries of similar conditions would offer some insights into the institutional drawbacks. Though this comparison may not precisely show the performance of courts as to timeliness factor, yet a general overview of performance based on the surveys and interviews of the public as well as legal experts, would be helpful. In this regard, the reports of the World Justice Project shall be analysed comparing civil and criminal justice service with countries of similar conditions.

Ranking of countries of the world and comparative analysis of working of state institutions is reliable due to the global standing of the agencies, their perceived neutrality and independence from the local influence and relevant research expertise. The scope, capacity and extant fieldwork in the justice sector by the World Justice Project (WJP) renders it a valuable and reliable evaluation analysis of judiciaries of the world. World Justice Project (WJP) is an independent international organisation working for the rule of law around the world. It 'employs a multi-disciplinary approach through original research and data, an active and global network, and practical, locally-led programs to advance the rule of law worldwide'.[176] WJP has developed a comprehensive methodology to gauge the rule of law in practice in terms of specific *outcomes* which the rule of law brings to a jurisdiction.

*World Justice Project Rule of Law Index*[177] consists of nine factors which are further sub-divided into 47 specific sub-factors (see Figure 3 below). The nine key areas of investigation relate to checks on governmental authority, corruption, participatory governance, fundamental rights guarantee, regulatory enforcement, civil and criminal justice and informal justice system. For the purpose of inquiry of this research project, civil justice and criminal justice (Factors 7 and 8) are relevant. The yardstick of the existence of the rule

[176] World Justice Project available at https://worldjusticeproject.org accessed on 12 April 2017.

[177] World Justice Project, 'Our Approach: WJP Rule of Law Index' (WJP, 2016) <https://worldjusticeproject.org/about-us/overview/our-approach> accessed 25 Jan 2018 (n 7).

of law in a jurisdiction is linked with positive attributes of the justice system. The sub-factors typology of civil justice factor shows that civil justice is supposed to be accessible and affordable; it is independent and free from discrimination and corruption; it is efficient, not subject to unreasonable delay and effective in providing justice. Criminal justice factor covers soundness, efficiency and fairness of criminal adjudicative system but also extends to criminal investigation, and correctional system of criminal behaviour.[178]

178 ibid WJP 2016, 13

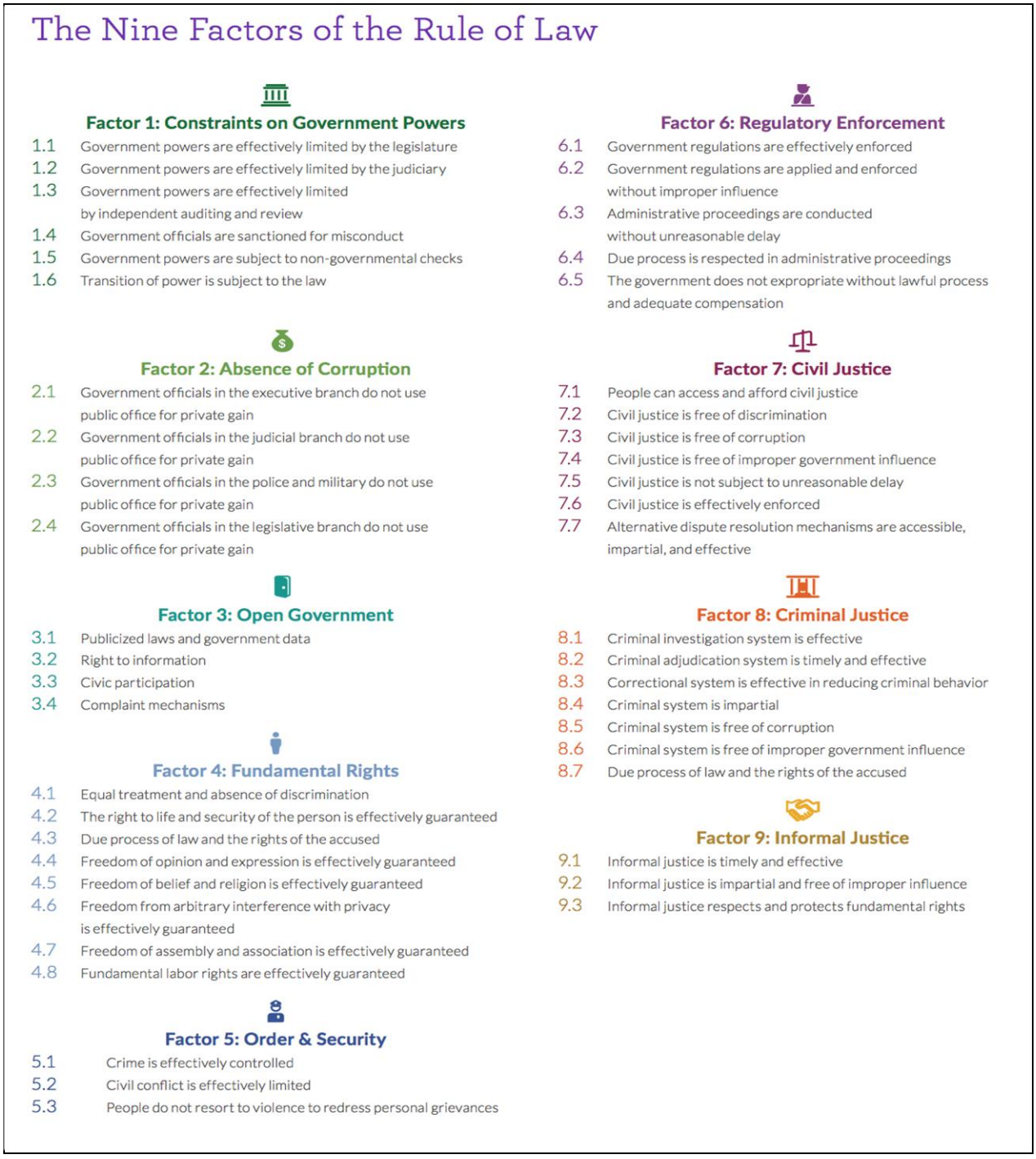


**Figure 3 Nine Factors of Rule of Law Source World Justice Project**

Rule of Law Index Report of 2016 is the latest work. It is based on more than 110,000 households and 2,700 expert surveys in 113 countries. Each country is allocated a score ranging from 0 to 1 (i.e. 0 showing lowest while 1 indicating highest on the rule of law

index). Importantly for each country, this score is based on a survey of 1000 respondents interviewed in the three largest cities besides feedback of a set of in-country legal experts and academics. General population poll (GPP) was conducted by leading local polling companies. In the case of Pakistan, Gallup Pakistan (affiliated with Gallup International) did face to face interviews of 1920 respondents among ordinary citizens in 2016. The opinion of experts was collected through qualified respondents' questionnaires (QRQs) which contained closed-ended questions filled by legal experts and academics.[179]

### 3.4 Conclusion

After discussing the theoretical and normative underpinning of a well-functioning and efficient court system as 'good courts' and means to gauge this 'goodness' (chapter 2) and before actually looking into the efficiency in practice in the target jurisdiction (chapter 4), this intervening chapter provides the necessary background of Pakistan's district judiciary, justification for evaluating lower courts' performance and a brief framework of evaluation. Given the political and socio-economic conditions of Pakistan, and the importance of judicial service at the grass-root level, performance appraisal of the lower judiciary has remained underexplored from research and development perspective. Absence of overwatch by democratic bodies and marginalised role of other state agencies in judicial accountability makes the internal monitoring, evaluative and reformative process highly significant. There exist visible gaps in the official evaluation and accountability process as numeric data is compiled and published without necessary analysis as to performance in terms of speed and efficiency. Qualitative feedback of the litigants is not at all a tool of assessing the system's output in the official discourse. The literature on Pakistan's district judiciary is quite limited and have varying perspectives. A dearth of empirical research on these lines and comprehensive and in-depth analysis of issues of performance as to efficiency perspective offers a ripe opportunity to make a genuine contribution. The framework of evaluation selected for Pakistan, and to be employed in chapter 4, is broad-based covering appraisal through the *objective* output of court service in numerical terms, *subjective* views based on

[179] ibid WJP 2016, 15

litigants' real-life experiences and *comparative* ranking of judiciary among countries of similar conditions. In the next chapter, the efficiency factor of district courts' service of Pakistan shall be weighed by three-pronged triangulating methods and sources, i.e. (a) statistics of cases from 2002 to 2014, (b) 440 litigants' interviews in 2010-11 (contained in Siddique's work) and (c) international ranking of Pakistan among countries of similar conditions by the World Justice Project of 2016.

# Chapter 4. Measuring Performance of District Courts of Pakistan (2002-2014)

## 4.1 Introduction

Timeliness in the determination of litigation and efficient use of court resources is one of the critical features of an ideal court system as discussed in detail in chapter 2 while looking into the normative and theoretical constructs of 'good' courts. On these standards and with the perspective of institutional and procedural efficiency, the actual performance of district judiciary of Pakistan from 2002 to 2014 shall be evaluated in this chapter. This evaluative study based on empirical evidence is important not only given the dearth of evaluation of judicial service of Pakistan (as elaborated in chapter 3) but also in identifying and empirically establishing the issues of performance and later looking for their solution through procedural and managerial tools.

Judicial underperformance has got more than one dimension. Transparency International observes in National Integrity System (NIS) Country Report 2014 on Pakistan:

> Until the recent past, Pakistan's judicial system has been facing problems like inefficiency, lack of training, huge judicial backlog and corruption particularly in the subordinate courts, and access to justice was neither easy nor speedy for the citizens.[180]

Limited to the efficiency perspective, the key research question of this chapter is: what issues of performance from the efficiency perspective can be empirically identified in the district courts of Pakistan? **(RQ-V).** Fort that end it shall be investigated how well Pakistan's lower courts have performed from 2002 to 2014 and whether performance is marred by delay, congestion and abuse of court process, and mismanagement and maladministration.

At first, through specific quantifiable and interconnected indicators, timeliness factors shall be measured which are Case Clearance Rate (ratio between the number of cases filed and decided in a fixed period - CCR), age of trials and growth rate of the backlog. CCR

[180] Transparency International National Integrity System – Pakistan Country Report 2014 available at Page 57

shows the capacity of the courts relative to the influx of new cases during a fixed period. Cases filed represents the legal needs of the citizens, i.e. demand side while the amount of workload disposed of by the district courts shows the system's capacity, i.e. supply side. Positive CCR would indicate that cases are being decided at *enough* pace relative to the speed of inflow of cases and not leaving any balance to accumulate as backlog. Conversely low CCR not only creates congestion but also tend to linger matters on increasing the age of pending cases and adding into the overall workload relative to the limited capacity of courts. These indicators would be calculated using judicial statistics from 2002 to 2014 published as annual judicial reports by the Law and Justice Commission of Pakistan, a statutory body headed by the Chief Justice of Pakistan and Chief Justices of the High Courts of the four provinces.[181] The reports contain voluminous numerical information for each year as to cases of all types (civil, criminal, family and others) filed and decided in *all* district courts of the country.

Performance of district courts shall be compared over time and across different regions of Pakistan to minimise the effects of spatiotemporal factors. Such comparison of performance shall cancel out the influence of local or temporal factors like regional diversity, rural-urban divide, level of development, and different phases of political situations. It would clarify whether the delay in disposal of cases is systemic and due to internal and institutional downsides or else external factors do have an impact on the time taken in the final determination. Hence, issues of performance could be *conveniently* related to the institutional drawbacks if it is established that these are endemic and exist with more or less, the same magnitude in all regions and over a more extended period amidst a variety of external conditions.

Selection of the timeframe of judicial performance, i.e. 2002 to 2014 is on purpose. Firstly, it is long enough to show consistent patterns of institutional output cancelling out the effect of sporadic spikes of relatively high-performance phases or low dips. The study would also clarify how various reform measures, policy initiatives and external political turmoil affected courts' performance during this period. Performance shall be analysed regarding

[181] Law and Justice Commission of Pakistan Ordinance 1979 [Pakistan].

three main phases, i.e. (a) Access to Justice Program (2002-08), (b) Lawyers Movement (2007-08) and (c) National Judicial Policy (2009-11).

With the growth of socio-legal research tradition, qualitative data based on litigants' views, is a valuable source of information for the researchers, policymakers, and judicial administrators for assessing the performance of the courts on the ground. In the second section of the chapter, the pace of disposal of cases shall be studied through litigants' experience, their views and perception using end-user satisfaction indicator. For that end, secondary data, i.e. in-depth interviews and surveys of 440 litigants, shall be re-analysed. This data was collected and recorded in 2010-11 in the premises of Lahore District Courts and published as *Law in Practice - The Lahore District Litigants Survey (2010-11)* by Osama Siddique.[182] The findings would reveal those aspects of delay in litigation which could not be exposed in statistical analysis. The qualitative analysis would not only triangulate the results of numeric analysis but also fill some gaps in the later. For instance, statistical data shows a percentage of delayed cases, but qualitative feedback reveals that cases are deliberately lingered on to tease the opponents and the system is incapable of arresting this practice.

The last section of this evaluative study re-analysis the ranking and relative position of Pakistan's judiciary among countries of the world having similar geographical, economic and development conditions. For this comparative analysis, mainly data and reports of the World Justice Project (WJP) shall be relied upon. It shall be shown that courts in Pakistan are lagging due to institutional drawbacks as with similar external circumstances judiciaries in other jurisdictions are performing better relatively. The assessment of court service across various jurisdictions by the WJP is based on qualitative data which include surveys of the litigants and general public as well as interviews of the experts. Though WJP results are based on public perception as to all aspects of judicial service including efficiency, this analysis would still help extract the impression of court service on delay.

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[182] Osama Siddique, 'Law in Practice - The Lahore District Litigants Survey (2010-2011)' <http://lums.edu.pk/docs/dprc/Law-In-Practice-Lahore-District-Courts-Litigants-Survey.pdf> accessed June 2010.

## 4.2 Performance Analysis based on Case Workload and Backlog from 2002 to 2014

The background of collection and compilation of data of cases in the district courts was discussed in detail in chapter 3 (Para 3.2.1). Annual Judicial Reports published from 2002 till 2014 (with few years missing) are available on the website of Law and Justice Commission of Pakistan (LJCP).[183] These reports show several different categories of cases pending, filed and decided during a year in all district courts of the country as well as in the superior courts. Importantly, this data on its own does not provide any measure of performance and lacks an evaluative analysis. Here an attempt shall be made to re-arrange and re-calculate the data sets and analyse it to get specific performance results in terms of efficiency (or otherwise) of the courts' service.

### *4.2.1 Case Clearance Rate (CCR) and Backlog – an Overview*

Case Clearance Rate (CCR) is a standard indicator used in several other jurisdictions to measure judicial efficiency and timeliness factors. As discussed in chapter 2, it is one key indicator (besides nine others) of the *CourTools* - a performance appraisal system developed by the National Centre of State Courts (NCSC) in the US (see Para 2.3.2). This indicator is shown in terms of the 'number of outgoing cases as a percentage of the number of incoming cases'.[184] It is calculated as:

$$Case\ Clearance\ Rate = \frac{Number\ of\ cases\ decided\ during\ a\ fixed\ period}{Number\ of\ filed\ cases\ during\ that\ period}\ \text{X}\ 100$$

In terms of CCR, performance can be viewed in three categories: negative performance, balanced performance and over-performance. In the first scenario, if more cases are filed than decided, the ratio would be less than 1 or below 100 per cent (negative performance). For instance, if 500 cases are instituted in one year and only 400 could be disposed of by the courts, clearance rate would be 0.8 or 80 per cent in terms of the ratio

[183] Law and Justice Commission of Pakistan <http://ljcp.gov.pk/nljcp/home/publication> accessed on 13/04/2019

[184] National Centre of State Courts, the State of State Courts: A 2015 NCSC Public Opinion Survey (2015) <*http://www.ncsc.org/2015survey*> accessed 07 May 2017.

between decided and filed cases. Any percentage less than 100 or ratio less than 1 would necessarily imply that more cases are filed than disposed of leaving at the end a balance to be carried forward to the next period resulting into a backlog. For calculating CCR and comparing the ratio of cases filed and decided, a timeframe (in this case one year) needs to be set and presumed as the standard period within which disposal performance is to be judged. Consistent low case clearance rate over several years would cause a snowball effect resulting in consistently swelling backlog.

In the second scenario of balanced performance, the working capacity of courts matches the demand side, i.e. workload of the cases courts is expected to deal with. Hypothetically each year, if no opening balance (previous year backlog) exists, CCR of 100 per cent implies that all cases filed in that year are disposed of leaving no balance at the end. This may be termed as a perfect equilibrium of institution-disposal ratio where institutional efficiency, resources of courts and all other factors affecting performance are at their optimum level to exactly match the workload to be disposed of within a year if that timeframe is assumed to be a standard period for performance measurement.

In the third case scenario, courts would be over-performing if the courts' capacity to decide the cases surpasses the workload. For instance, with no opening balance if 500 claims are filed in one year and these are required to be decided in that period, and then these are disposed of within eight months (CCR is 120 per cent), for the remaining four months courts would remain idle. In case there exists a backlog from the previous year, that extra time may be utilised in clearing those cases. If such over-capacity is consistent, the backlog, if any, would ultimately extinguish and the timeframe target of one year would be achieved much earlier. However, if such maximum timeframe benchmark is disregarded, courts would be considered far more efficient to decide workload much more before and most swiftly without stretching it to the maximum target period. This higher efficiency level has got two advantages: it will gradually eat up the existing backlog, if any, taking it ultimately to nought and then, when there is no backlog, the system would decide cases much quicker.

### *4.2.2 Low and High CCR in Pre-reform and Post-reform Periods (pre-2002 to 2006)*

From annual reports for over 13 years (2002 to 2014), CCR is worked out for each year in Table 7. Since data for each district of the province is separately presented in these

reports and grouped under four provincial High Courts, the opening balance of all district courts, cases filed in these and decided were combined to work out CCR. Columns 1 to 4 and 7 of the Table show opening balance, number of cases filed and disposed of during the year and the balance left at the end of each year from 2002 to 2014. Column 5 shows the actual difference between the numbers of cases filed and decided. Column 6 calculates the clearance rate (CCR) as the percentage of cases disposed to new cases filed during the year.

| 1 | 2 | 3 | 4 | 5 | 6 | 7 |
|---|---|---|---|---|---|---|
| **Year** | Opening Balance | Institution Filed | Decided | Diff (Filed - Decided) | Case Clearance Rate | Closing Balance (Backlog) |
| | (million cases) | | | | | (million) |
| **2002** | 1.09 | 1.52 | 1.41 | -110,000 | 93% | 1.22 |
| **2003** | 1.22 | 1.77 | 1.73 | -40,000 | 97% | 1.27 |
| **2004** | 1.27 | 1.84 | 1.86 | 20,000 | 101% | 1.27 |
| **2005** | 1.27 | 1.81 | 1.81 | - | 100% | 1.27 |
| **2006** | 1.27 | 1.91 | 1.85 | -60,000 | 97% | 1.33 |
| **2007** | 1.33 | 1.93 | 1.74 | -190,000 | 90% | 1.52 |
| **2008** | 1.52 | 2.06 | 2.02 | -40,000 | 98% | 1.56 |
| **2009** | 1.56 | 2.54 | 2.66 | 120,000 | 105% | 1.35 |
| **2010** | 1.35 | 2.27 | 2.41 | 140,000 | 106% | 1.10 |
| **2011** | 1.08 | 2.55 | 2.36 | -190,000 | 93% | 1.19 |
| **2012** | 1.19 | 2.53 | 2.37 | -160,000 | 94% | 1.26 |
| **2013** | 1.26 | 2.49 | 2.30 | -190,000 | 92% | 1.37 |
| **2014** | 1.37 | 2.62 | 2.45 | -170,000 | 94% | 1.44 |

**Table 7 Case Clearance Rate (CCR) District Courts Pakistan 2002-2014**

*Source: Judicial Statistics of Pakistan – Law and Justice Commission of Pakistan Reports 2002-2014

The data presented here show that the disposal rate is lower than the filing rate in most of the years from 2002 to 2014 which results in continually increasing backlog each year. This data does not reveal pre-2002 scenario, however opening balance of 1.09 million in 2002 as a backlog from previous years can reasonably be presumed to have piled up after years of consistent low disposal rate. In 2002 opening balance was 1.09 million cases and in that year CCR remained 93 per cent leaving an increased balance of 1.22 million which is

higher than the opening balance of 2002. In the next year CCR slightly increased to 97 per cent but due to being less than 100 per cent CCR, backlog increased to 1.27 million.

In the next two years, i.e. 2004 and 2005, CCR surpassed 100 per cent mark as the institution-disposal ratio is balanced (i.e. the number of cases decided equals the number of cases filed). This improved disposal rate halted the otherwise bulging backlog at least temporarily; the opening balance of 1.27 million cases at the start of 2004 remained the same at the end of 2005. This improvement surfaced in the third year of the launch of Access to Justice Program started in 2002 which aimed at improved judicial policymaking, strengthening judicial independence, expeditious and inexpensive justice, legal empowerment, efficient judicial governance and human resource development.[185] Immediately the number of courts, judges, and the para-legal staff was increased; infrastructure and office facilities were enhanced and improved; more financial resources were pumped in, and perks and service conditions of the judges were upgraded.[186] Special allowances which caused an increase in the monthly salary by 27 to 56 per cent, were granted to the subordinate judges as part of their wages, making them the highest-paid public servants.[187] These changes over the years (1998 to 2008) can be viewed in Table 8 below.

| | 1998 | 2001 | 2004 | 2005 | 2006 | 2007 | 2008 |
|---|---|---|---|---|---|---|---|
| **Funding (million PKR)** | 1095.2 | 1488.51 | 2318.08 | 2656.49 | 3311.3 | 3952.1 | 4587.7 |
| **Number of Judges** | 1269 | 1362 | 1797 | 1792 | 2048 | 2039 | 2061 |
| **Workload Disposal (million cases)** | - | 1.41 | 1.86 | 1.81 | 1.85 | 1.74 | 2.02 |

**Table 8 Funding and Strength of Judges in Subordinate Judiciary in Pakistan (1998-2008)**

[185] Asian Development Bank, ADB Completion Report: Pakistan Access to Justice Program (ADB 2009) <https://www.adb.org/sites/default/files/project-document/63951/32023-01-pak-pcr.pdf > Page 23-24 accessed on 3 Mar 2017.

[186] Ibid.

[187] Ibid.

Financial allocation and human resource input for the subordinate judiciary are two key variables which are essential and can be linked with the swift rise of CCR in 2004 and 2005. The lower judiciary was generally regarded as under-resourced both in human as well as in financial capital. Immediately before initiating the AJP in 2002, Asian Development Bank observed as to Pakistan's judiciary that it 'has been repeatedly compromised by political practices, and has not garnered the necessary degree of independence from the executive, especially in terms of securing an adequate and predictable level of resourcing'.[188] Therefore an increase in the budgetary allocation was made, and a new lot of judges and court staff was recruited. Table 9 shows the difference between pre-reform and post-reform scenario as to budgetary allocations and strength of judges from 1998 to 2008. This data shows that 68 per cent increase in the financial allocation and 34 per cent in the number of judges, boosted disposal capacity by 30 per cent. The ability to dispose of cases was enhanced, and performance improved.

| | 2001 | 2008 | *Diff* | | Increase by |
|---|---|---|---|---|---|
| **Financial Allocation** | **1488.51** | **4587.7** | *3099.19* | ⬆ | **68%** |
| **Number of Judges** | **1362** | **2061** | *699* | ⬆ | **34%** |
| **Disposal Capacity** | **1.41** | **2.02** | *0.61* | ⬆ | **30%** |

**Table 9 Comparison of Pre- AJP and post-AJP reform 2001-2008**

It may sound convincing, on its face, that existing workload before 2004 required more and better-resourced courts, and when a 33 per cent increase in number judges filled the gap, this equated the demand-supply balance. Though growth in number of courts and resources can, and in fact did make the difference in these years, this reform approach and measure *alone* (i.e. constant fiscal and human resource injection) would not guarantee to keep the CCR at 100 per cent or above *in the long run* as would be discussed and substantiated a

[188] Asian Development Bank, 'Report and Recommendation of the Preseident on Proposed Loan and Technical Asistance Grant to Pakistan for Access to Justic Program' (2001) <https://www.adb.org/sites/default/files/project-document/71344/rrp-32023.pdf> accessed on 3 Mar 2017, 1.

little later in view of the low performance in later years. Two fundamental reasons are offered in support of this argument:

- Pumping in more resources is not a solution always available to enhance courts' capacity and improve performance as resources are still finite and scarce. Beyond an optimum level, funds would not be possible. Moreover, these need to be prioritised and allocated *proportionately* to various sectors of public life (i.e. housing, food and clean drinking water, health, education, transportation and other civic amenities). It is not possible to provide justice and court service at *all* cost and irrespective of its economic fallout.
- Improved performance due to enhancement of resources does not imply these are used most economically. Efficient use of resources is the central and indispensable principle of all public sector organisations and a fundamental canon of public spending.

I will return to this argument later after analysing two other significant events (Lawyers' Movement 2007 and National Judicial Policy 2009) which did influence the judicial statistics during that period.

### *4.2.3 CCR Dip - Low Judicial Performance - Lawyers' Movement (2007-2008)*

After 2005 CCR started sliding down from all-time high 101 per cent in 2005 to 97 in 2006 and then an all-time low 90 per cent in 2007 (see Figure 4 Case Clearance Rate and Backlog (2002-2014)Figure 4). This scenario can be attributed to the judicial crisis at the national level and the resultant country-wide lawyers' boycott of courts' proceedings. It all triggered on 9th March 2007 when General Pervez Musharraf (then the President of Pakistan and the Army Chief) suspended Chief Justice of Pakistan, Iftikhar Mohammad Chaudhry on charges of misuse of his office.[189] Though after four months he was reinstated in July 2007 due to initial resistance from lawyers but then on 3rd Nov 2007, General Musharraf suspended the Constitution and promulgated Provisional Constitution Order of 2007 (PCO 2007) sacking the entire superior courts' judges and then inviting only a selected lot along

[189] Hamid Khan, *A History of the Judiciary of Pakistan* (Oxford University Press 2016) 486-528

with some fresh recruits to take fresh oath under the new constitutional order i.e. PCO.[190] This ignited the second, but this time large scale wave of agitation by the lawyers which gradually turned into a country-wide protest. Under the banner of the Lawyers' Movement and with a mission to restore pre-PCO superior courts judges, legal community was joined by opposition political parties, media, students and civil society. Street agitations and clashes between security forces and unarmed protesters were witnessed, followed by massive scale arrests of lawyers and other public figures.[191]

Lawyers' Movement ended in March 2009 victoriously when pre-Nov 2007 judiciary was restored including the Chief Justice of Pakistan by the political government of Pakistan People's Party.[192] However, this nationwide turmoil adversely affected the pace of district courts' proceedings as lawyers were mostly engaged in the protests and also observed intermittent strikes abstaining from attending the courts. Low CCR, i.e. 90 per cent in the year 2007 was due to this unprecedented political crisis. Being an exceptional phase, this lower performance shall be ignored to find consistent patterns of performance and CCR.

### *4.2.4 National Judicial Policy 2009 – Combating Backlog and Delay*

After a long struggle on the streets and under the immense pressure of the Lawyers' Movement, pre-Nov 2007 judges of the superior courts were restored in March 2009. During the Lawyers' Movement and while holding public gatherings and leading processions, deposed Chief Justice of Pakistan, Iftikhar Mohammed Chaudhry promised in his speeches to bring systemic reform in the lower judiciary.[193] Later after restoration in Mar 2009, the

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[190] The Dawn, Provisional Constitutional Order (Nov 4, 2007) available at https://www.dawn.com/news/274269 accessed on 15/04/2019

[191] Taiyyaba Ahmed Qureshi, "State of Emergency: General Pervez Musharraf's Executive Assault on Judicial Independence in Pakistan." NCJ Int'l L. & Com. Reg. 35 (2009): 485.

[192] Toby Berkman, 'The Pakistani Lawyers' Movement and the Popular Currency of Judicial Power' (Harv. L. Rev., 2010) available at http://heinonline.org/HOL/LandingPage?handle=hein.journals/hlr123&div=80&id=&page= accessed 26 Sep 2017.

[193] Siddique, *Pakistan's experience with formal law: An alien justice* 3.7

charged and victorious superior judiciary showed serious resolve to take longstanding twin problems of delay and backlog by the horns. The then Chief Justice of Pakistan observed:

> The restoration of 3rd November (2007) judiciary ushered in a new era…. The people of Pakistan have reposed great confidence in the ability of the judiciary to redress their grievances and grant them relief.….We must strive hard to meet their expectations. This is time to repay our debt to the nation. We could do so by addressing the perennial twin-problems of "backlog" and "delays" in the system of administration of justice. To achieve the objective, the National Judicial Policy was formulated.[194]

He further observed that:

> The Policy seeks to achieve its objectives by efficient utilization of existing resources. We have to operate by remaining within the given legal/procedural framework. The laws are indeed time-tested…However, keeping in view the gigantic effort new resources would be needed…I am confident that the Government will provide the requisite funds.[195]

The restored Chief Justice rallied all the provincial High Courts' Chief Justices under the forum of National Judicial (Policy Making) Committee (NJPMC – a statutory body comprised of the top judicial brass with powers and mandate to formulate and implement measures for improved court services. NJPMC announced National Judicial Policy 2009 which was viewed as 'the Pakistan's judiciary's most prominent post-restoration articulation to put its house in order'.[196] Though before 2009, respective High Courts have been monitoring disposal-based performance as to the lower courts through various administrative and internal monitoring tools, yet NJP 2009 was a much organised, centralised and concerted effort by the superior judiciary collectively. After consultation with the lower judiciary and provincial High Courts, uniform guidelines and instructions were issued to all the district

[194] Supreme Court of Pakistan, 'National Judicial Policy (Revised Edition 2012) (*Secretariat, Law and Justice Commission of Pakistan*) < http://www.supremecourt.gov.pk/web/page.asp?id=383 accessed 22 Apr 2019, 1-2.

[195] Ibid SCP NJP Revised Edition

[196] Siddique (2013) 37

courts in Pakistan compiled in short document known as National Judicial Policy 2009 (1st Edition).[197]

Core mission statement and objectives of the Policy were to strengthen judicial independence, curb corrupt practice within the judiciary, and expeditious disposal of cases. It provided strategies for curtailing and then ultimately eliminating the backlog in the superior as well as the subordinate judiciary. Courts were directed to necessarily dispose of a percentage of cases in the backlog with new cases. Cases filed up to 31st Dec 2008, were classed as old cases and it was directed to put 50 per cent of the effort to clear old cases and 50 per cent to new cases. Timelines were fixed for disposal of all categories of civil and criminal cases and other proceedings. For instance, bail applications in criminal non-bailable offences were directed to be decided at the magisterial level within three days, at Sessions Courts' level within five days and the High Court level within seven days. Similarly, criminal trials in offences punishable with seven years' imprisonment would be decided within six months and those carrying a punishment of 7 years or above would be concluded within one year. Rent cases were directed to be determined within four months and family cases within 4 to 6 months.[198]

These instructions were followed by continuous and strict monitoring of performance relative to the standards, targets and timelines set under the Policy. District judicial administrators and judges were obliged to send periodical reports to their respective High Courts. These daily, fortnightly and monthly judicial statistics from the entire district courts of the country, have continuously been reviewed by the NJPMC for monitoring purposes.[199] The Registrar of the Supreme Court of Pakistan in the Annual Report of Pakistan 2010 observed:

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[197] Supreme Court of Pakistan, 'National Judicial Policy 2009' (*Secretariat, Law and Justice Commission of Pakistan,* 2009) <http://supremecourt.gov.pk/njp2009/njp2009.pdf> accessed 13 Mar 2016

[198] Ibid

[199] Supreme Court of Pakistan, 'Annual Report June 2015 - May 2016 http://www.supremecourt.gov.pk/web/page.asp?id=2381 accessed 22 Apr 2019, 162.

> The NJPMC has been monitoring data received from various High Courts of the country. It appears that the courts, especially the subordinate courts, have performed relatively well and achieved targets. Not only have they reduced the pendency of cases but set pace for rendering time-bound decisions in all civil and criminal disputes.[200]

These measures remained the top priority of the judicial leadership headed by the then Chief Justice Iftikhar Muhammad Chaudhry. After his retirement in 2013, though the Policy remained intact for some time and NJPMC forum continued holding its meetings, yet the drive lost its zeal. Annual Report of the Supreme Court of Pakistan for 2014-15 shows that a meeting was held in Sep 2014 wherein performance of courts was reviewed and recommendations were made for its improvement.[201] Importantly, in the next year's report i.e. Annual Report of the Supreme Court of Pakistan 2015-16 contains no mention of any activity relating to the Policy.[202] The forum of NJPMC under the Law and Justice Commission of Pakistan issued reports of judicial statistics till 2014, but then no such report is either published or made available on its website. The last available and published report as to data of cases of lower courts of Pakistan is for the year 2014.[203] It shows the changed priorities of the top judicial leadership succeeding after Justice Chaudhry. The NJP 2009 remained the hallmark of his regime from 2009 to 2013. Once he left, NJP faded out; in 2014 during the keynote speech of the new Chief Justice of Pakistan on the occasion of International Judicial Conference 2014 (organized by the Supreme Court of Pakistan) while highlighting the issues of justice in Pakistan, nothing at all was mentioned as to National Judicial Policy and relative performance of district judiciary of Pakistan.[204] Hence, NJP 2009 was more a sporadic

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[200] Supreme Court of Pakistan, 'Annual Report April 2010-Dec 2011' (*Supreme Court of Pakistan* 2011) <http://www.supremecourt.gov.pk/Annual_Rpt/Statistical%20Data%20Analysis.pdf> accessed 18 Nov 2015, Page 10

[201] Supreme Court of Pakistan, 'Annual Report May 2014- May 2015' 2015) <http://www.supremecourt.gov.pk/links/sc-a-rpt-2014-15/index.html> accessed 20 Nov 2017, Page 224

[202] Supreme Court of Pakistan, 'Annual Report June 2015-May 2016' 2016) <http://www.supremecourt.gov.pk/web/user_files/File/SCP_Annual_Report_2015_2016.pdf> accessed 20 Nov 2017

[203] Judicial Statistics of Pakistan 2014 National Judicial (Policy Making) Committee.

[204] Inaugural and Keynote Address of Chief Justice of Pakistan 2014 during International Judicial Conference 2014 Islamabad (Pakistan) April 2014 (Supreme Court of Pakistan) available at http://www.supremecourt.gov.pk/web/page.asp?id=1826 accessed on 27/04/2019

emergency plan based on the personalised vision and agenda of Justice Chaudhry, rather than an institutional long term strategy.

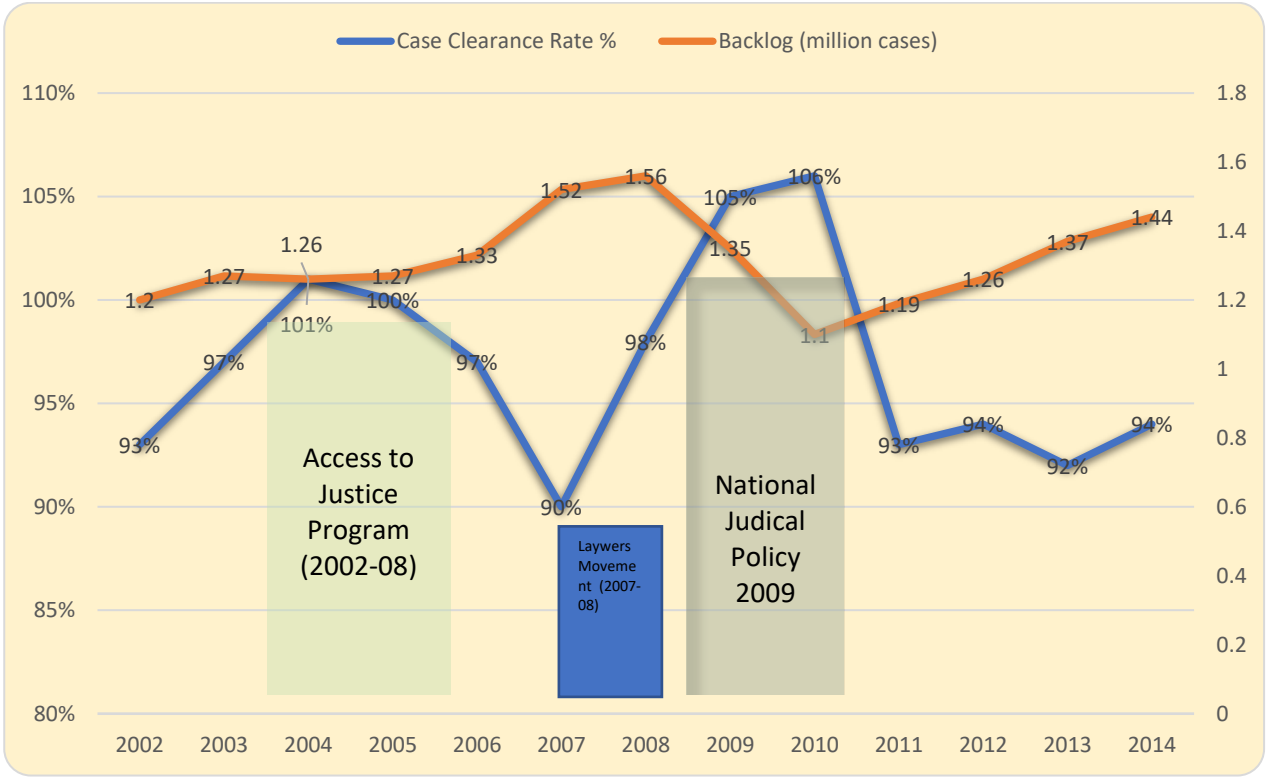


**Figure 4 Case Clearance Rate and Backlog (2002-2014)**

### *4.2.5 Impact of NJP 2009 on Judicial Performance during 2009-14*

A fair disposal rate relative to the filing rate for the year 2008 was seen, i.e. a steady 98 per cent CCR can be attributed to restoration of deposed judges and end of Lawyers Movement in that year. (See Figure 4). In the next two years, i.e. 2009 and 2010, the disposal rate was unprecedentedly surpassing the filing rate. All-time higher CCR of 105 and 106 per cent were recorded. This caused a sharp decrease in the backlog from 1.57 million cases to 1.10 million. This visible change in performance was the direct impact of the NJP measures as mostly the human resource strength did not undergo any substantial change during this period. For instance, in the provinces of Sindh and Khyber Pakhtunkhwa, the working strength of judges in the subordinate judiciary was 418 and 346 in 2008 respectively; the numbers in the

next year changed only to 437 and 381in both provinces[205]; on 31-12-2011 number of judges in these provinces were around 471 and 344 respectively.[206] Hence the change in the number of judges was negligible, but performance in terms of disposal of cases was phenomenal.

| | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 |
|---|---|---|---|---|---|---|---|
| Disposal (million cases) | 2.02 | 2.66 | 2.41 | 2.36 | 2.37 | 2.30 | 2.48 |
| New Filing (million cases) | 2.06 | 2.54 | 2.27 | 2.55 | 2.53 | 2.49 | 2.65 |
| Number of Judges | 2061 | 2061 | 2061 | 2113 | 2113 | 2554 | 2353 |
| CCR | 98% | 105% | 106% | 93% | 94% | 92% | 94% |
| Backlog (million cases) | 1.56 | 1.35 | 1.10 | 1.19 | 1.26 | 1.37 | 1.44 |

**Table 10 Judicial performance (2008-2014) NJP and its impact**

However, comparative analysis of the data of cases during the initial two years of National Judicial Policy (i.e. 2009-2010) and in later years (i.e. 2011-2014) reveal some sharp contrasts. The CCR which remained 105 and 106 per cent in the first two years abruptly dropped to 93 per cent in 2011; from then onward it continued in low nineties from 2012 to 2014. (See Figure 4 and Table 10). The backlog of cases, as always, also started climbing up the ladder; from 1.1 million cases in 2010 and reached 1.44 million in 2014. Hence after two years' best results in terms of high disposal rate and considerable reduction of the backlog, the performance of lower courts started reverting to its old pattern from 2011 onward. Though the main actor behind the Policy and its fervent executor, the then Chief Justice of Pakistan retired in Dec 2013, it appears that the drive lost its vigour and zeal much before his departure. Importantly, during 2009 and 2010 when NJP was at its full boom, disposal capacity shot up from 2.02 million cases per year in 2008 to 2.66 in 2009 and then came down to 2.41 million cases per year in 2010. In later years it remained around 2.30 million. Increase

[205] Asian Development Bank and

Law and Justice Commission of Pakistan, 'Judicial Statistics of Pakistan ' 2009) <http://www.ljcp.gov.pk/Menu%20Items/Publications/Reports%20of%20the%20LJCP/Judicial%20Statistics/Judicial%20Statistics%20for%20Pakistan%202009.pdf> accessed 13 Mar 2016

[206] Law and Justice Commission of Pakistan, *Judicial Statistics of Pakistan 2011* p149 and 189

in the number of judges during 2013 may also have an impact on this enhanced disposal capacity.

In contrast to the earlier AJP strategy of enhancing human and financial resources, the NJP 2009 adopted the approach of enforcing emergency measures by the enthusiastic top judicial leadership giving stringent instructions to the lower courts. This strategy worked well but only temporarily. After two successful years of high performance (2009 and 2010), CCR came down. Though overall capacity to dispose of more cases increased from around 2 million cases in 2008 to 2.35 million in 2013 and 2.48 million in 2014 onward, but this impact can also be attributed to the increased number of judges.

Though the Policy measures achieved unprecedented higher CCR and reduced the backlog considerably, it failed to implant permanently a case management system which may consistently and steadily make 100 per cent CCR in later years. Concerted emergency efforts were successful in reducing the massive backlog within a limited time, but these did not last long to keep the pace go on. Possibly without enhancing the workforce and without bringing significant changes in the existing court processes and litigation culture permanently, the NJP 2009 could not keep a consistently higher performance in the long run. Moreover, it only attempted surgical and emergency assault to contain the backlog which already turned massive without eradicating the root causes and deep institutional factors which at the first place have let the backlog bulge for over so many years. Of these institutional factors, outdated procedural law regime and poor case management are important.

NJP experiment offers the lesson that stringent measures under a missionary and authoritative drive, could have only momentary effects; institutional flaws, like a malignant tumour, would come back and resurrect when the zeal of emergency fizzles out. National Judicial Policy 2009 could be termed as a temporary and quick executive fix for the otherwise deep-rooted and institutional problems of judicial underperformance. One way to deal with the issue is to improve the procedural and managerial aspects of court processes.

### *4.2.6 Delay and Age of Cases*

Delay is usually cited to be a problem intrinsic to the courts' system the world over and that is why timeliness is one of the core judicial values set as a performance standard for

higher judicial efficiency.[207] Low CCR causes steady bulging of backlog, and in turn, this congestion overloads the courts and delay ensues. With the delay, more and more cases are pushed into the category of 'old' cases. There can be two methods of measuring delay: one, by calculating the time taken to dispose of a case finally and then comparing the percentage of cases decided within the set standard timeframe (or reasonable time) with those which could not be so decided. For that measure data of decided cases should be compiled in such a way to inform the time from initial filing till final determination. But in case of Pakistan, the data relied upon (i.e. Annual Reports of judicial statistics from 2002 to 2014 published officially) do not provide such information. It only shows an opening balance of cases at the start of a year, cases filed and decided during the year and closing balance at the end.

The other method of gauging delay is to analyse the age of pending cases. Again, the data from 2002 to 2014 is not of much help to determine this variable regarding all High Courts except the High Court of Sindh. In this section it shall be tried to establish underperformance in terms of delay through the age of pending cases and for that purpose Sindh province data shall be used by calculating the ratio between 'delayed' or 'old' and 'new' cases.

### *4.2.7 Analysis of Sindh Province Data 2002, 2009 and 2011– Age of cases*

The Sindh data of cases is reasonably representative of the phenomena of delay in Pakistan's district courts for two reasons. One, in the analysis of judicial performance earlier in this chapter, the indicators (like case clearance rate and backlog, etc.) are not very different as compared to other provinces. Secondly, like other provinces, Sindh is a blend of diverse regions in terms of socio-economic and human development indices. It has two highly developed urbanised centres, i.e. Karachi and Hyderabad, and there are also impoverished and

[207] International Consortium for Court Excellence, 'The International Framework for Court Excellence' (*National Centre for State Courts*, 2013) <http://www.courtexcellence.com/~/media/Microsites/Files/ICCE/The%20International%20Framework%202E%202014%20V3.ashx> accessed 15 Nov 2016

most underdeveloped rural districts like Badin, Thatta and Dadu.[208] Annual Judicial Statistics Reports of 2002, 2009 and 2011 provide pendency of cases filed in each year. The year-wise data are re-grouped into three different time scales as shown in Table 11.

*Pre-AJP Reform Period - 2002*

Data of 2002[209] shows that majority of the cases, i.e. 81.6 per cent are less than three years old while over 16 per cent are from 4 to 7 years old; over 2 per cent are from 8 to 35 years old. Hence, one-fifth of total cases can be rated as delayed as these are four or more years old. This scenario represents the state of delay in the pre-reform period.

*Post-AJP reform Period -2009*

Before the launch of Access to Justice Program (AJP - 2002-08) delay was identified as a crucial issue of the justice sector in the pre-reform studies[210] and was later tried to be addressed through various reform measures. The Program was completed formally in 2008, and different reform actions had already been executed and operational.[211] Importantly data of Sindh province for the year 2009[212] regarding the age of cases reveals no improvement at all if compared with the pre-reform year of 2002. (See Table 1). Though the total number of pending cases dropped down from 121,599 to 112,780 but age of the pending cases remained almost the same in both periods. In 2009 over 80 per cent cases were 1 to 3 years old while the remaining 20 per cent is four or more years old. Interestingly this picture appears to be a replica of 2002. This analysis shows that despite an increase in the number of courts, judges and staff and improved infrastructure and more financial resources under AJP, no progress at all was made as to the age of cases variable.

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[208] Government of Sindh, 'Sindh District-Based Multiple Indicators Cluster Survey 2003-04Findings Report: Multiple Indicator Cluster Survey 2014' 2005) <http://sindhbos.gov.pk/wp-content/uploads/2014/09/Sindh-MICS-Report-2003-04.pdf> accessed 01/11/2017

[209] Ibid National Judicial Policy Making Committee Judicial Statistics of Pakistan 2002

[210] Ibid Page 6

[211] Asian Development Bank, 'Pakistan: Access to Justice Program ADB Completion Report' 2009

[212] Law and Justice Commission of Pakistan, Judicial Statistics of Pakistan 2009 Page 147-48

| Age of Cases – Sindh Province (2002, 2009, 2011) | | | |
|---|---|---|---|
| | | | |
| **2002** | | | |
| 8-35 Years old (1968-1994) | 4-7 Years Old (1995-1999) | 1-3 Years Old (2000-2002) | |
| 2685 | 19,708 | 99,164 | 121,557 |
| 2.20% | 16.20% | 81.60% | 100% |
| | | | |
| **2009** | | | |
| 8 Years or more old (Pre-1995 to 2002) | 4-7 Years (2003-2006) | 1-3 Years (2007-2009) | |
| 3505 | 17,424 | 91,851 | 112,780 |
| 3.10% | 15.40% | 81.40% | 100% |
| | | | |
| **2011** | | | |
| 8 Years or more old (Pre-1995 to 2003) | 4-7 Years (2004-2008) | 1-3 Years (2009-2011) | |
| 1738 | 7,694 | 96,709 | 106,141 |
| 1.60% | 7.30% | 91.10% | 100% |

**Table 11- Age of Cases Sindh Province District Courts 2002, 2009 and 2011**

*National Judicial Policy Impact - 2011*

The stringent measures under National Judicial Policy in 2009 were explicitly directed to clear backlog of old cases and speed up the pace of disposal of litigation. Timelines were fixed for different categories of cases and targets were given to clear backlog of old cases (4 and more years old).[213] When the Policy was initiated in 2009, the ratio of old and new cases was 20 to 80 per cent in the province of Sindh but then in the third year of Policy, i.e. 2011 backlog of old cases shrink only to 9 per cent while the ratio of new cases increased to 91 per cent. (See Table 11 and Figure 5).

[213] Supreme Court of Pakistan, 'National Judicial Policy 2009'

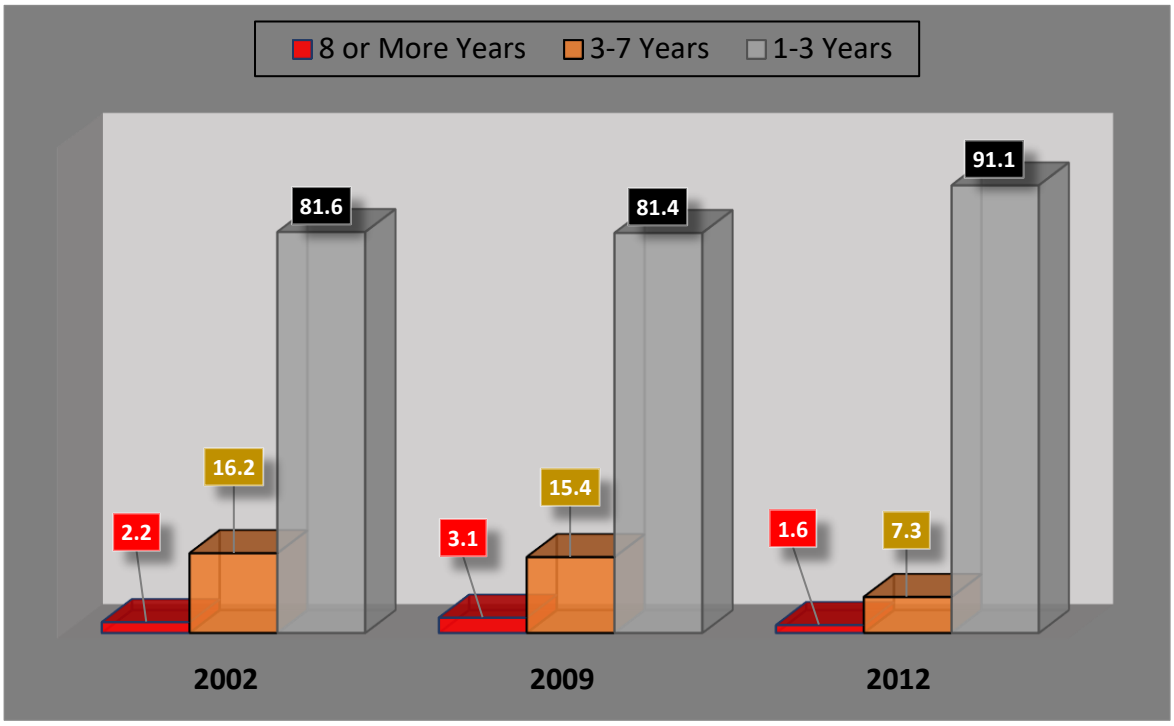


**Figure 5 Old and New Cases Percentage (2002, 2009 and 2011) Districts Courts Sindh**

No doubt the directions under the Policy did reduce the backlog, including old cases in three years (2009-2011). But it needs to be determined whether the strategy offered a long-term solution to the problems of delay and backlog or else NJP measures were only sporadic and temporary based on the personal vision and agenda of the then Chief Justice of Pakistan as he was the chief architect of the Policy. After his retirement in 2013, the Policy was not pursued by his successors in office as intensely as he did as shown earlier. To see the impact of the Policy in later years' data of cases of 2012 onward is important. But after 2011, only two further official reports were published by the Law and Justice Commission of Pakistan till date. These reports of 2013[214] and 2014[215] do not contain year-wise data of cases. This deficiency hinders complete investigation into the exact ratio of old and new cases in later

[214] Law and Justice Commission of Pakistan, 'Judicial Statistics of Pakistan ' 2013) <http://www.ljcp.gov.pk/Menu%20Items/Publications/2013/2013.pdf> accessed 14 Nov 2017

[215] Law and Justice Commission of Pakistan, 'Judicial Statistics of Pakistan ' 2014) <http://ljcp.gov.pk/nljcp/viewpdf/pdfView/UHVibGljYXRpb24vNWE4MzgtanNwXzE0LnBkZg==#book/> accessed 14 Nov 2017

years. However, a rough estimate can be made in view of the overall backlog of cases from 2012 onward.

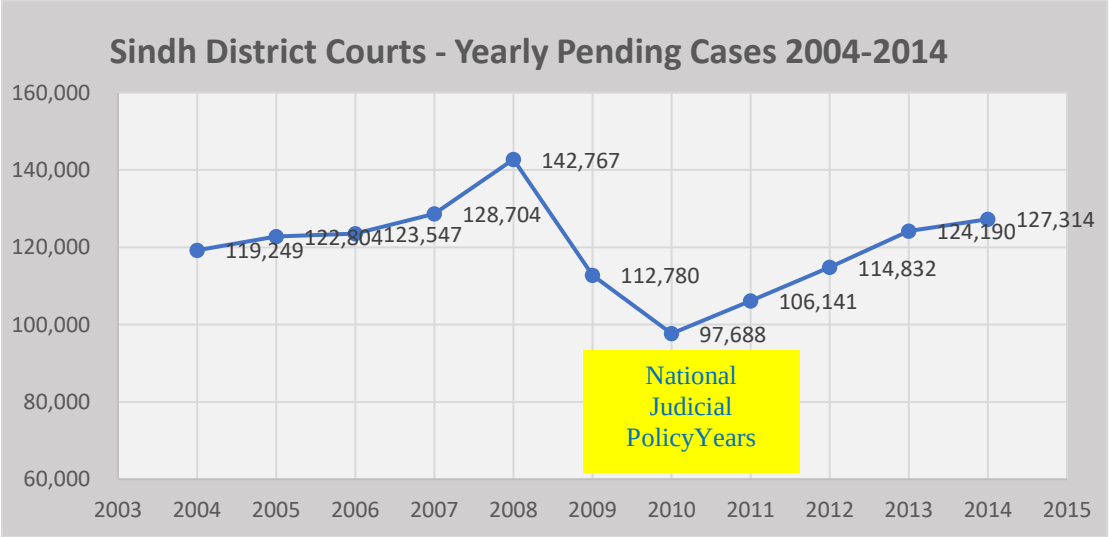


**Figure 6 Sindh District Courts Pending Cases (2004-2014)**

Figure 6 shows pending cases in the district courts of Sindh province each year from 2004 till 2014. [216] The total volume of cases tends to increase gradually after NJP years. Though NJP 2009 brought it down considerably in 2009 and 2010 but then from 2011 onward, it again started a resurge. This pattern shows that the factors, be it fundamental institutional causes or external circumstances, would keep the backlog growing while the sporadic surgical measures, like NJP 2009, would only contain it only temporarily. Though the ratio of old and new cases is not clear from this data, it can fairly be assumed that growing backlog is indicative of the presence of old cases as more and more undecided cases are piled up in this bulk. The trend and pace of increase in the overall backlog of cases (i.e. roughly 6000 cases per year) indicate that after ten years the volume will be around 200,000 cases in Sindh province which would include old cases as well.

### *4.2.8 Findings and Analysis of Ratio of Old and New Cases*

Delay and age of cases and ever-increasing backlog have remained the major pitfalls of performance of the court system of Pakistan for a more extended period. Capacity

[216] Ibid 39 (Judicial Statistics of Pakistan 2014) Page 98

building and resource enhancement under AJP could not adequately and completely contain these performance issues. Decades-old institutional drawbacks surreptitiously worked underneath to produce these results. In 2009 a charged superior judicial leadership took the huge backlog as a challenge which developed gradually due to several factors including inefficient processes, institutional dysfunctionalities and mismanagement. The reaction of the superior judiciary in imposing strict measures under NJP 2009 over lower courts may be justified as an emergency treatment to clear the backlog and old cases. However, NJP measures did not address the root causes of the problem which in fact, at the first place occasioned low CCR and resultant accumulation of backlog.

Moreover, under NJP 2009, superior judiciary issued directions to the subordinate judiciary to decide cases swiftly and comply with the timelines set in the Policy. For various categories of proceedings, i.e. bail matters, criminal cases and civil, exact deadlines were set. The Policy did not, however, take into account the number of judges and judicial time available relative to the workload. The all-important question remained unanswered: what amount of cases *can be* decided, by what number of judges and in what time? Without this prior calculation, the imposition of timeframe targets is inappropriate. For instance, if a court has on average receive 20 bail applications, it is not possible to decide each of these within set 5 days when that court has other cases fixed for proceedings at the same time. Also, speedy disposal of a large volume of cases during a short period may compromise the quality of judicial service. Chances of a miscarriage of justice are open in such conditions. Hence, the strategy of thrusting directives upon the subordinate judiciary to clear the backlog might have compromised the quality of decisions and judicial service and even justice.

NJP 2009 contained only stringent directives to clear the backlog; no structural or functional change in the courts' system was introduced. Procedural laws, case management system, and court practices were the institutional areas which were, among other factors, caused the backlog to develop gradually over a longer period of time in the first place. These unresolved institutional issues appear to have been missed out. Once the zeal of NJP 2009 slowed down, the backlog of cases started to re-emerge; the directives proved to be ineffective in bringing long-lasting institutional changes. NJP was a sporadic attempt to clear a considerable backlog piled in years without permanently addressing the intrinsic causes which occasioned it in the long run.

### *4.2.9 The influx of New Cases and Pace of Disposal (2002-14)*

Thus far, the supply side of the judicial service in terms of clearing the backlog and capacity to dispose of cases is discussed in detail. However, the variable of the influx of cases, i.e. the demand side of judicial service is also important to be analysed to present the complete picture. For that end, it is assumed that a number of the cases filed for one year is the aggregate annual demand of the courts' services by the citizens. On the other hand, the number of cases decided during that year reflect the supply side of judicial service in response to that demand. This demand-supply ratio analysis would reveal how well judiciary is responding to the legal needs of the people in statistical terms by disposing of a certain number of cases as compared to the cases filed.

The CCR in case of Pakistan has already been elaborated earlier in terms of the capacity of courts to decide cases. If the influx of cases per year remains constant, enhancing disposal capacity can bring the CCR to 100 per cent benchmark. But if the filing rate increases simultaneously, disposal rate will be relatively low. The rise in the number of cases entering the judicial system would lower the CCR when the disposal rate is constant. For instance, if 100 cases are filed in one year and only 90 could be decided, CCR would be 90 per cent; next year disposal capacity is enhanced to 100 cases, but then 110 cases are filed; this situation would keep the CCR still in negative zone, i.e. 90 per cent despite increased capacity to dispose of more cases as compared to previous year. This scenario necessitates that the influx of cases variable needs to be *controlled and managed.*

| | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Disposal | 1.41 | 1.73 | 1.86 | 1.81 | 1.85 | 1.74 | 2.02 | 2.66 | 2.41 | 2.36 | 2.37 | 2.3 | 2.48 |
| New Filing | 1.52 | 1.77 | 1.84 | 1.81 | 1.91 | 1.93 | 2.06 | 2.54 | 2.27 | 2.55 | 2.53 | 2.49 | 2.65 |
| CCR | 93% | 97% | 101% | 100% | 97% | 90% | 98% | 105% | 106% | 93% | 94% | 92% | 94% |

**Table 12 Filing and Disposal Pattern 2001-2014 * Cases shown in millions**

Any study aiming at finding solutions to improve performance also need to take influx of cases variable into account as in case of Pakistan, the data reveals an alarming pattern: despite enhancement of disposal capacity (due to various reform measures) CCR level remained below 100 due to *parallel and simultaneous climbing up of the filing rate*. (See Table 12 and Figure 7). From 2002 onward despite improvement in disposal rate per year, a gradually increasing number of new cases every year kept the CCR under 100 in most of the years. In Figure 7 the dotted green line (representing decided cases - in millions) though improved gradually over the years but it struggled to chase the continuous red line (cases filed) which climbed up above the disposal level for most of the time. This phenomenon kept the CCR under 100 per cent most despite an increase in the disposal capacity.

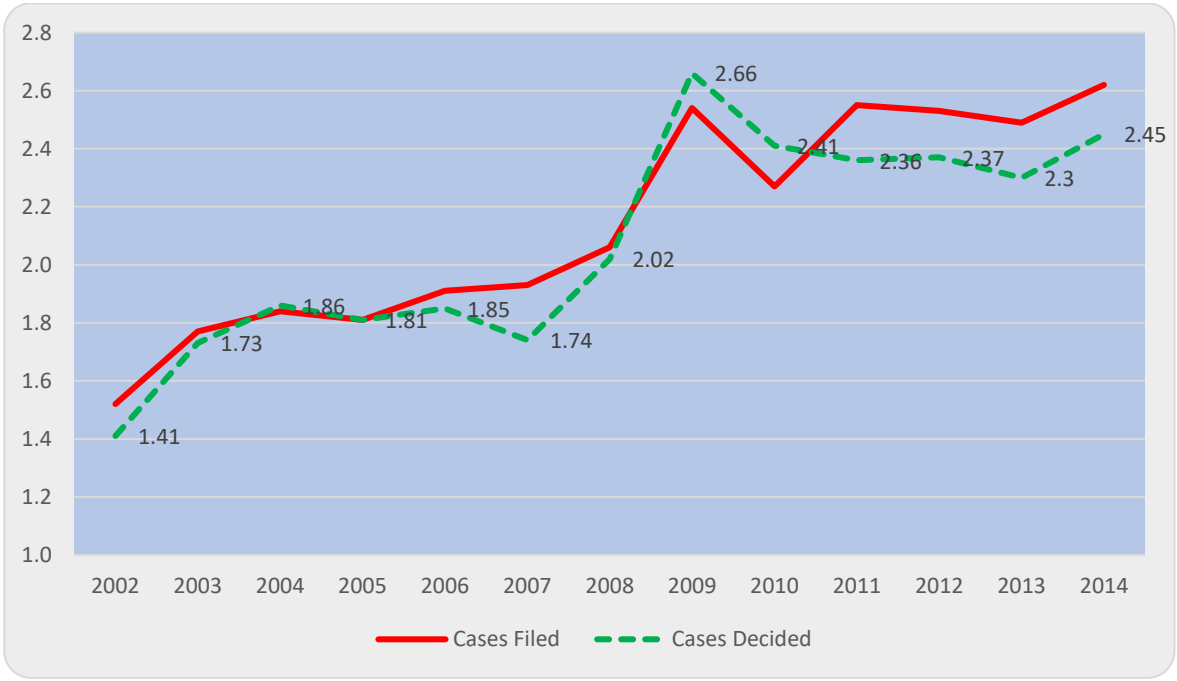


**Figure 7 Case Filing and Disposal 2002-2014**

The parallel rise in filing rate calls for a separate empirical investigation to know why this happens. However, one possible explanation for litigants' behaviour in instituting more and more cases after the reform efforts, can be the perception that it may take less time, and therefore less cost now to pursue litigation, attracting potential litigants who wait for inexpensive justice. Though important but this is not an issue to be investigated in this project

deeply. What matters here is the revelation that despite enhanced disposal capacity, CCR could not be improved effectively and backlog could not be chained due to the parallel rise of the influx of cases. It appears that judicial leadership and justice reform practitioners could not anticipate it and CCR remained under 100 per cent despite all efforts. Hence, enhancing the capacity to dispose of more cases by the judicial machinery does not appear to be the only answer to the problems of low disposal rate and resultant bulging backlog.

It can be argued that from time to time, increase in human and financial resources is required to match the demand for judicial service. This strategy of resource building, however, has got practical limitations. Resources not being abundant would be needed proportionately to all sectors of public life, and there is a limit to judicial spending. Making resources available all the time for whatever number of cases flooding into the system, is not possible. The correct approach, as was tried by Woolf and in Singapore and would be discussed in chapter 5, is to play smart by efficient use and proportionate allocation of optimum judicial time and available resources. Pre-Woolf thinking of providing justice *at all cost* was substantially transformed, instead replaced by the theory of proportionality, rationing of justice and management of litigation.

In the case of Pakistan, on both occasions (i.e. AJP 2002-2008 and NJP 2009-12) the variable of the influx of cases was paid little attention. It appears that the backlog and incoming cases were assumed to be the *task* judiciary is going to undertake and had little influence over it; the underlying assumption seems that all cases deserve processing irrespective of the fact whether these genuinely need judicial treatment or not. The practice of initial and tentative investigation to weed out undeserving cases is highly desirable; this treatment is essential to decide whether a case needs a complete cycle of trial or appears frivolous or can be swiftly resolved without hearing or can be settled quickly with little effort in the initial stage or can be diverted to alternate resolution rout. A new approach needs to be introduced to place the courts at a position where judges could pause and make this preliminary but most important probe. This paradigm shift is an essential segment of the reform model proposed for Pakistan in chapters 5 and 6.

### 4.3 End-user Satisfaction - Litigants' Experience

The litigants who interact with the court system are well placed to offer first-hand information as to the efficiency and effectiveness of judicial service; their stories can be more revealing than bare statistics exposing the humanistic face of that interaction, and the system treats their legal needs. 'A court that does not have the trust or confidence of the public cannot expect to function for long as an effective resolver of disputes, a respected issuer of punishments, or a valued deliberative body'.[217] Here, it is important to assess the performance of the court system on the criteria of the very people for whom the entire façade of justice is built to *serve*.

Issues of delays and backlog have already been established through statistical analysis of workload over a longer period in the previous section; however, further scrutiny of these results this time through qualitative data is on purpose. Issues of performance, if looked into from a socio-legal perspective and through the sufferings of the people, may offer a live view and more realistic understanding of the actual justice service *in practice.* As discussed in chapter 3, qualitative feedback of the litigants and looking into the judicial performance from the aspect of real-life difficulties of the litigants, is conspicuous by absence in the official evaluation discourse of Pakistan. Even in the scholarship, qualitative and ethnographic research into litigants' real-life stories, experience and mindset as to lower courts is very rarely done in case of Pakistan. While building on his theory of disconnects between Pakistan's justice sector reform discourse and litigants' problems on the ground, Siddique observes

> Pakistani justice sector policy dialogue and reform agenda has never made an attempt to be informed and shaped by any rigorous empiricism that looks to probe the nature of actual problems faced by disputants who seek recourse to courts.[218]

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[217] David B. Rottman and Alan Tomkins, 'Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges' (1999) 36 Court Review: The Journal of the American Judges Assosciation, 24.

[218] Siddique, *Pakistan's experience with formal law* (2013), 105.

As to malfunctioning of the justice sector, Siddique points out that litigants' difficulties as perceived by purely lawyerly and judicial approach are the real issues; he argues that it is important to understand what people mean by their problems, i.e. the *folk concept of problems*. He further contends that litigants' issues as perceived by the legal community may 'tend to lose sight of the intent, aspiration, and expectation of ordinary people'.[219] Here, in this section issues of performance regarding efficiency (as surfaced in the statistical analysis in the previous section) shall be triangulated and with that, the humanistic facet of these issues shall be highlighted as an important but neglected perspective of administration of justice and its appraisal in Pakistan. For that end, secondary data collected in shape of surveys and face-to-face interviews published as *the Lahore District Courts Litigants Survey (2010-2011)* shall be relied upon.[220]

The data consists of extensive interviews of 440 randomly selected litigants when they were attending the district courts on various days to pursue their cases in the Lahore District Courts Complex. Issues and questions related to multiple aspects of judicial service like timeliness, cost, fairness, court facilities and court process, and attitude of lawyers, judges and the staff etc. The respondents of the Lahore Survey were selected by probability sampling method, and they adequately represent the litigant population interacting with courts in Pakistan. Lahore is the second-largest city of Pakistan with a population of over 10 million. It is a predominantly urban area with some peripheral rural population. Lahore is significant due to comparatively higher level of its education, industry, trade and commerce. The litigants were therefore expected to be more affluent and socially empowered as compared to other less developed districts of the province. Also, the litigants coming from suburban and rural peripheral areas would represent reasonable diversity of respondents' sample. Even otherwise, there is no reason to believe that the court system would be any better in other backward and deprived districts of the country. Hence the result of this Survey can be generalised and relied upon regarding the image of judicial service of Pakistan based on end-user satisfaction criterion.

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[219] Ibid.

[220] Siddique, 'Law in Practice - The Lahore District Litigants Survey (2010-2011)'

### *4.3.1 Objectives of Lahore District Courts Survey 2010-11*

Siddique collected the empirical qualitative data in the context of a specific framework and for strengthening his theory. He expounded this theory and applied the data in his later work, i.e. *Pakistan's Experience with Formal Law: An Alien* Justice wherein he tried to explore a *correlation* between the socio-economic problems of the litigants and the way the justice system treats them when they bring their disputes into the courts. His central argument is that given the state of socio-economic imbalance of Pakistani society, litigants carry with them certain disempowerment and vulnerabilities due to their background in terms of household income, level of education, gender, social status and living standard and urban-rural divide. But the court system remains oblivion and unresponsive to these factors and fail to offer *necessary and added* protection to such litigants and hence remains socially decontextualised and indifferent. Siddique observes while concluding his argument based on the Survey results:

> The Lahore Litigants' Study underlines the fact that when Pakistani disputants/litigants approach the formal court system, they bring with them various levels of existing and entrenched disenfranchisement and disempowerment…..The milieu with which they are faced when they interact with the legal and court system, however, is not one where there is much evidence of any official institutional, structural and substantive attempts to somehow level the playing field for them. Instead, the current forms, structure, and culture of extant system exacerbates the unevenness of the playing field. They cause it to be even more lop-sided, unfair and disadvantageous for the already and disempowered and vulnerable.[221]

Hence Siddique's basic premise is the disconnects between socio-economic susceptibilities of the litigants and unresponsive formal justice system. This, however, is not the theoretical framework of this project which has different objectives and perspective. Lahore District Courts Survey shall be analysed with the view that whether courts in the lower tier are providing a service to the litigants within a reasonable time and by efficient use of court resources and as per their reasonable expectations. The issue of this project is how well lower judiciary of Pakistan responds to the legal needs irrespective of their socio-economic vulnerabilities and equally among all the citizens. This inquiry assumes that as of

[221] Siddique 2013 Page 174-175

norm, courts behave in a detached manner and without a *pro-poor bias*. The neutrality of the courts remains an intrinsic core value of the judicial system in a normative context. In an ideal world, courts' service must be accessible to everyone; its process must be efficient and judicial remedy must be equitable for *all*. Courts are to take the course of *law and justice* blindly by efficiently and effectively enforcing the rights of the citizens whatever be their background. Principles of justice alone, and not the relative circumstances of the parties of litigation, must dictate the process of courts. It is with this theoretical approach that the Lahore Survey data shall be re-analysed to construct a broader picture of the performance of district courts based on end-user satisfaction perspective, leaving behind the original aim of Siddique.

### *4.3.2 Delay – A much-cited issue*

Lahore District Courts Survey data is important from the aspect of its timing. It was conducted in 2010 and 2011 after two major waves of judicial reform in Pakistan already discussed earlier i.e. Access to Justice Program (2002-2008) and National Judicial Policy (NJP 2009). The survey covers several aspects of judicial service mainly focusing on litigants' experience as to timeliness in the disposal of cases, substantive fairness and merit, an opportunity of the level playing field, the role of judges and lawyers, courts' facilities and access, and overall level of satisfaction. Importantly of all these aspects delay in the final determination of cases was the single most crucial factor complained of by the majority of the litigants who were interviewed in the Survey. The respondents were asked as to the duration of their own cases pending in courts. Out of 440 respondents, 52% said their cases are older than two years, 30% stated over 5 years and 13% reported that these could not be finalised for more than a decade. This implies that only 5 per cent of litigants had their cases less than two years old; 95% litigants are on the other side of the fence.

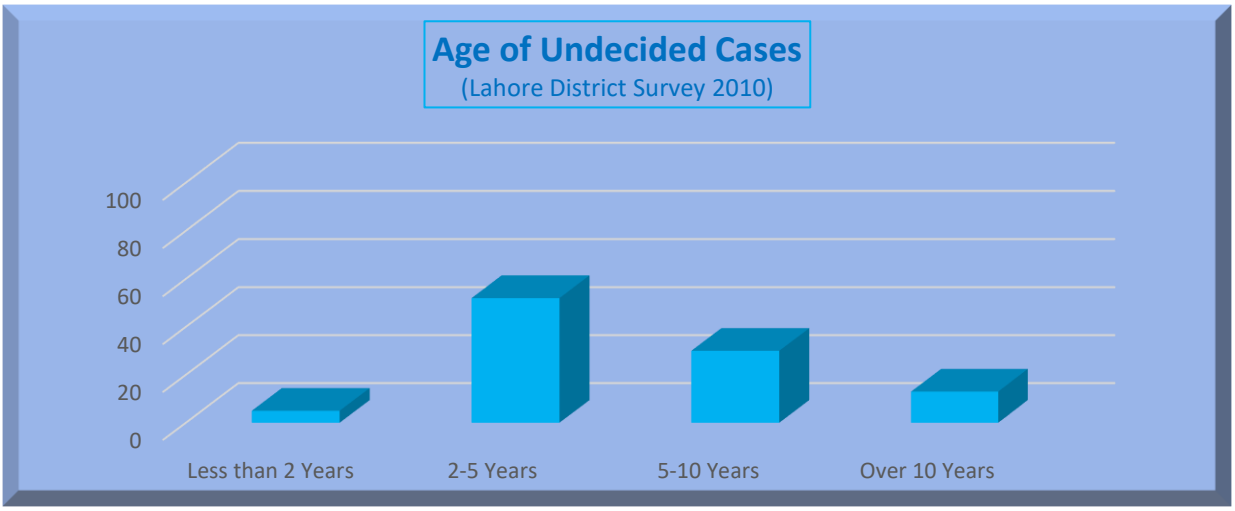


**Figure 8 Lahore Survey Responses as to Delay**

In response to a general question as to the time courts take in processing the cases, 81% of the respondents complained "a lot of delay" while 13% reported "a fair bit of delay". Hence the majority of respondents (94%) described the court processes as "debilitated by delay". Importantly 67% were unsure when their case shall be decided finally. When specifically asked about their level of satisfaction as to the pace of the court process in their cases, 76% said they were dissatisfied. The number of hearings and attendance in the courts also reflect the amount of physical and mental agony for the litigants. When asked about the number of court hearings, the majority of the respondents (48%) said that they lost count how many times they attended the courts. Many reported that their trips are just wasted due to adjournments.

Besides this statistical summary, though it sounds subjective, it is important to present the bitter real-life stories laden with agony and helplessness of the litigants and their feelings against the courts' system. Some of these responses are quoted below.[222]

- Respondent No. 72 said that as a child, he used to accompany his grandfather in the court to pursue the case and now he is still dragging it as a grown-up man.

[222] Ibid Siddique Interviews of various respondents p.123.

- Respondent No. 104 said that his case is 28 years old and he is 70; he changed 15 lawyers and wanted to resolve the dispute before he dies which his opponents never want.
- Respondent No. 133 said: "For 20 years have I been waiting for justice. Judges and lawyers ensure that the case does not come to the conclusion. I am very tired, but I have no place to go. This legal system is a complete failure".
- Respondent No. 115 said that his case has been running for seven years without any progress from square one, which leads him to think that either the judges or lawyers were corrupt. He informed that one of his previous lawyer was bought over by the other party.
- Respondent No. 118 was an older man of 80 years who broke down during the interview and said that he is 80 and his brother died fighting in court; that litigation consumed and killed him. It was observed that 'he was not the only one who started crying during the Lahore Survey'.
- Respondents also commented that the system is such that opponents can misuse it to elongate the court process. Some respondents also pointed out that unnecessary court time is wasted on non-contentious issues and other matters relating to official legal record or documentation.
- Respondent No. 119 said that his case was pending from 1979 i.e. it took 31 years till 2010 when he was interviewed.
- One respondent said: "The cases never get resolved. The courts keep giving date after date for the next hearings. People get destroyed in litigation. The courts have become like shops. As long as you can pay bribes, you can delay a case forever and coerce your opponents and tire them out".[223]

[223] Ibid p.116 Respondent No.206 December 24, 2010.

From this data, it is evident 'that for the majority of respondents, a civil suit is synonymous with a costly, exhausting, and frustrating wait'.[224] These responses fly in the face of a decade (2002-2010) of reform efforts to inhibit delay.

As discussed in the previous chapter, in the official data, a 'case' is counted as a single unit pending or decided by a judicial forum. This information is fundamentally misleading while computing delay as the statistical data shows age of a *single case processed or pending in a separate court*; the data is not compiled in a way to indicate actual time taken by the judicial system to resolve a *single controversy* between the same parties on the same subject matter going through the preliminary, trial and appellate phases in different tiers of judicial fora. Official data needs to be compiled in a manner to reveal total time taken to redress a party's grievance from the date petition is presented to a judicial forum till grant of relief and to redress their grievance. Therefore, delay needs to be considered in this context and when litigants complained of delay, they naturally are referring to the unresolved controversies and disputes which may be lingering on for long in *different* legal fora. Hence, studying actual delay as a negative performance indicator must be taken in terms of an unresolved controversy between the same parties and not as a numeric unit of a single pending case in one tier of the court system.

Besides this interview-based data, the general survey conducted in 2015 containing public opinion as to the performance of state institutions is also relevant to be consulted. Gilani Research Foundation Survey carried out by Gallup Pakistan is based on the survey of a sample size of 150 Pakistanis who have a case pending in a court.[225]

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[224] Ibid Siddique p. 124

[225] Gallup Pakistan, Gillani Research Foundation Polls (Sep 2015) available at http://gallup.com.pk/45-pakistanis-who-currently-have-a-case-in-a-court-of-law-said-that-the-case-has-been-pending-since-2-years/ accessed on 05 Jul 2017

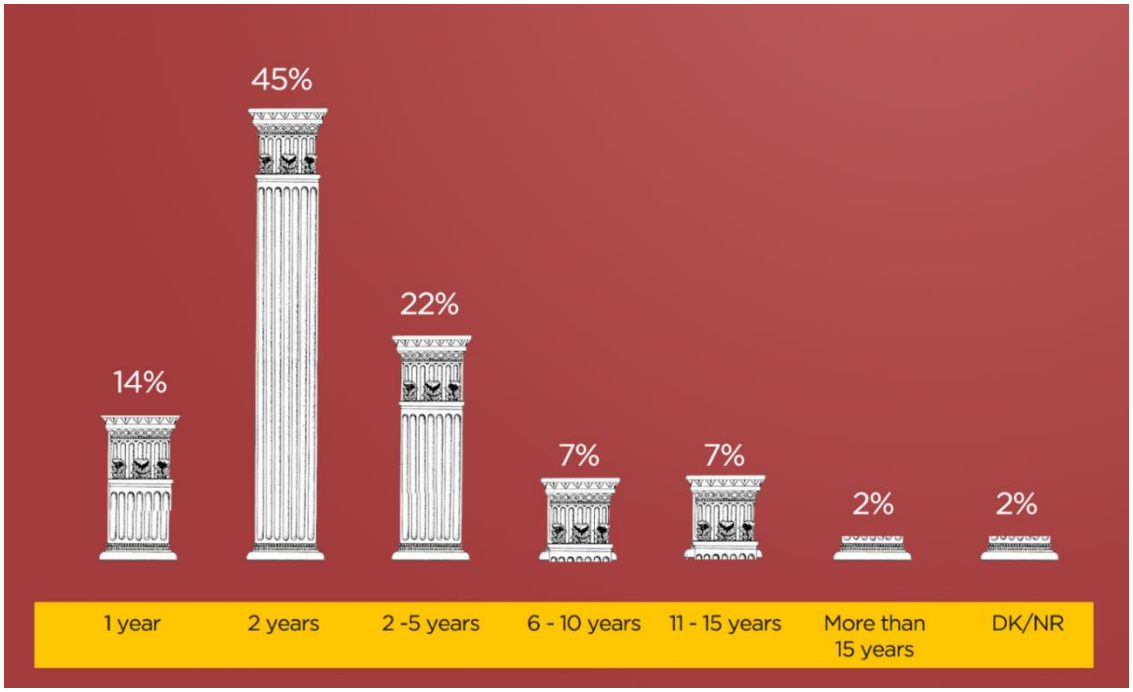


**Figure 9 Gallup Pakistan – Gillani Research Foundation Survey Sep 2015**

Around 45 per cent litigants said their cases are pending for 2 years; 22 per cent reveal these are pending from 2 to 5 years. Alarmingly 16 per cent stated these are pending from over 5 to 15 years. (See Figure 9). Though the size of the sample is slightly small, however, the study is based on a survey of men and women in rural and urban areas of all four provinces of the country during 2015 with an estimated error margin of approximately ± 2-3 per cent at 95% confidence level. Hence the results of this survey can be relied upon, and these otherwise find corroboration from other sources discussed earlier.

### *4.3.3 The frailty of Justice System to Inhibit Abuse*

Besides delay, the second most prominent problem of the litigation, as it emerged from the empirical inquiry of Lahore Survey, was the incapacity and indiscretion of the formal legal system to deter abuse of the court process by the resourceful opponents. Respondents frequently alluded to 'frivolous or mischievous litigation as an effective strategy of choice by legal opponents'.[226] Many respondents were quoted saying that the court system

[226] Siddique, *Pakistan's experience with formal law : An alien justice* (2013), 133.

is misused to drag the opponents into lengthy litigation to get advantage and make the other party exhausted and frustrated. One of the respondents (i.e. respondent No. 196) openly said that he is using court proceeding to pressurise his opponents.[227] Respondent No. 205 said: 'Everything can be resolved out of court. Only fraudsters drag any disputes to the court so that they can misuse the court system'. The purpose of frivolous litigation was to make the other party go for settlement outside the court as 69% respondents agreed with this suggestion.

Importantly 73.5% of the respondents believed delay benefitted certain parties who perpetuate it. 'Responses to other survey questions also revealed serious respondent concerns about the routine self-serving manipulation of the formal legal system by the resourceful contestants and their agents'.[228] Among the main reasons quoted for long delays in court proceedings, most frequently cited reason was 'delaying tactics by opponents, (i.e. by 206 respondents); other causes were adjournments by opposite party's lawyers, judicial inaptitude, the overload of cases and judicial corruption.[229] As to questions on the role of lawyers, responses were mostly venomous. Most of the respondents put the blame on their lawyers, and commonly cited response was that parties wished to settle the dispute, but lawyers would linger it on.[230] Importantly some respondents viewed that it is the lawyers who cause the case to linger on so that they can get more and more money; they get even bribed by the opposite party and often get paid for delaying the proceeding or for keeping unmeritorious cases alive.

These responses indicate that the courts could not effectively prevent misuse of the judicial process by one party to achieve its objectives to the annoyance of the opposite party primarily when the delay is caused by design. It implies that false claims or defences brought to the courts are not penalised adequately enough to deter the potential misusers. Moreover, the delaying tactics in terms of undue and unreasonable adjournments and engaging the courts and the opponents in petty matters and non-issues during the litigation, could not be prevented by the system. As discussed in para 4.2.9 above, the influx of new cases grew over the years

[227] ibid, 133.

[228] ibid, 134.

[229] Ibid Siddique p.13

[230] Ibid p.141

burdening the courts with more and more workload. Despite higher work disposal capacity, new cases flooding in continued build pressure on the courts and delay could not be contained. Qualitative feedback of the litigants indicates the fact that a large chunk of litigation is not genuine and only frivolous. Reform efforts in Pakistan overly focused on capacity building which is important at the relevant space, but in view of massive influx of new cases and potential misuse of court process through false litigation, efforts may also be directed towards filtering out cases by managing litigation by preliminary inquiry into the matter so that courts' energy is consumed only in genuine dispute. Hence, capacity building is only one part of the solution; procedural and case management tools also need to be employed to inculcate vigilance against the misuse.

### *4.3.4 Disruption of Court Proceedings*

There can be several factors involved in causing a delay in the litigation process noticed during the Lahore District Courts' Survey. It was observed that court proceedings were disrupted on several occasions and for various reasons. On one day, it was due to election of local Bar engaging the lawyers; on two other days lawyers were on strike protesting against the abduction of a lawyer in a small town of the province.[231] The power of lawyers taking decisions of strikes and not attending courts on the various pretext, appear to be unbridled and poorly regulated. Courts as an institution seem to have very little control over the collective actions and behaviour of the Bar.

It was also observed on another day during the Survey that all the judges were engaged in an administrative meeting causing the court proceedings at a standstill for half of the day. This shows insensitivity on the part of judicial administrators to manage the official and courts business in such a way to avoid making the litigants' wait. It was also observed that usually the court hours were from 09:00 am to 04:00 pm, but after 01:30 pm, judges would typically not hear any further cases. Frequent power cuts would slow down court functioning as the staff was unable to operate their computers. Siddique observes:

[231] Siddique 2013, 112.

> The shortened courts day meant more frenzied activity in the mornings...On the other hand, disruptions in court proceedings due to absent judges, power cuts, or demonstrating lawyers produced long periods of inactivity and uncertain waiting.[232]

All these disruptions reduce the total span of the actual court activity. Frequent posting and transfers of the judges and following reallocation of cases to new judges were regarded as one primary reason causing a lot of delay to case proceeding. Siddique reports that quite disturbingly, 19 per cent of the respondents stated that judges in their cases changed so frequently that they lost count of it. This shows the institutional weakness to inhibit disruptive factors and regulate the conduct of the key actors. It also indicates inadequate or non-existent case management system which can keep the judges, parties, lawyers, witnesses and other officials bound to comply with the timelines of a case and the scheduled activity. Survey results from this aspect indicate that court proceedings are prone to be interrupted and hence lingered on with impunity and at will.

### *4.3.5 Archaic Laws and Obsolete Legal System*

Based on the respondents' comments on the state of laws, the author concluded that the rules and legal system are archaic, complex, unintelligible and having 'differential and asymmetric distributive consequences'.[233] To the suggestion of whether Pakistani laws are outdated and did not cater to ground realities, 56 per cent respondents agreed with this statement; 8.5 per cent partially agreed with this opinion while 14 per cent disagreed. Importantly 21.5 per cent said that their knowledge as to this issue is too limited to comment on it. Some also viewed that unclear and ineffective laws are the cause of their legal troubles leading to discriminatory treatment. Respondents were also asked as to the neutrality of Pakistani law and their adequacy in providing adequate relief. Majority of the respondents, i.e. 54 per cent painted Pakistani laws as 'biased, unjust and inadequate'; 20 per cent did not offer any comment while 25 per cent disagreed with this statement.

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[232] Siddique 2013,112.

[233] Siddique, *Pakistan's experience with formal law : an alien justice* p. 125

This part of the survey and its findings are based on a factually erroneous assumption. Not being experts of the legal science, ordinary litigants cannot be expected to comment on the laws and judicial system being a technical matter. It appears that the negative responses as to law (i.e. that these are outdated, biased and inadequate) were based on the bitter experience of litigants while interacting with the courts. These responses can reasonably be taken as their resentful reaction against the system and not as an expert comment on the law. This does not imply that Pakistani laws are flawless, but the evidence collected in support of the claim is not relevant. Views of ordinary litigants can not back the argument of obsolete laws; the question is thrown to the wrong audience. Being users of the system, they could validly comment on the effectiveness and efficiency of judicial service and the remedy they expect from the courts. But out of frustration or disappointment, which can be for quite valid reasons, their knowledge is too limited to comment on the legal system which is too technical and complex for their lay opinion.

### *4.3.6 Main Impediments and Overall Dissatisfaction – a Big Picture*

In the Survey, respondents were asked as to the main impediments in pursuing their litigation and whether they wish to settle their dispute through courts or outside the courts. Critical difficulties identified by the respondents of the survey are tabulated in Table 13 in the order of higher to the lower number of responses. Cost of litigation, the attitude of lawyers, the complexity of the legal system, corruption, judicial attitude and distance from courts were most frequently cited replies. The constant shifting of judges, strikes of the lawyers and unintelligibility of court language were also considered major problems by a sizable population of respondents. (See Table 13)

| Main difficulties in pursuing litigation | No. of responses |
|---|---|
| Cost of litigation | 200 |
| Attitude of lawyers | 166 |
| Complexity of legal system | 152 |
| Corruption | 143 |
| Judicial attitudes | 141 |
| Distance of court from home | 135 |
| Constant shifting and transfer of judges | 97 |
| Language of court proceeding and laws | 83 |
| Other | 64 |
| Attitude of court staff | 52 |
| Strikes by lawyers | 43 |
| No response | 36 |
| Discrimination/Intimidation due to caste, clan, gender, ethnicity etc. | 23 |

**Table 13 Impeding Factors (Source Siddique's Lahore District Court Survey 2010-11)[234]**

General comments of the respondents and their choice to bring the disputes to courts are most revealing. The interviews disclosed that most of the litigants aspired to resolve their disputes outside the court and they were most reluctant to approach courts due to 'heightened wariness about getting embroiled in potentially time-consuming, costly and often ultimately inconclusive litigation'.[235] Narrations of litigants were laden with utmost despair and frustration; they viewed that they never want to get into the courts, which is a recipe for destroying one's wealth, life and dignity. A general propensity was most evident among the litigants to avoid the courts due to trust deficit on the justice system. The responses also reveal that litigation was perceived more as a tool to satiate revenge, settle the score, and tease the opponent. These emotions clearly show that the court system is considered to serve the interests of the abusing party, rather than of justice. Hence a robust system appears to be non-

[234] Siddique *Lahore District Courts Survey* Table H-48, 92.

[235] Siddique 2013, 156.

existent to prevent misuse of the legal process and delay in practice by the powerful to the disadvantage of the vulnerable.

Siddique informs that

> A fair number of respondents expressed both a preference for non-court dispute resolution mechanisms and non-preference for the courts by pointing out frivolous, coercive, or illegitimate use of the latter.[236]

Respondents were also asked their choice if they would again bring their disputes in the courts. Responses clearly show overall dissatisfaction as out of 440 respondents, around 42 per cent resolved not to bring their disputes to the courts in future due to their bitter experience; about 40 per cent though stated they would, but they still were dissatisfied, and their only reason was that they have no other alternative. Siddique concludes that more than 80 per cent of the total randomly selected litigants were dissatisfied with the functioning of the courts on this score.[237] This qualitative feedback indicates the negative performance of the district courts of Pakistan on the touchstone of end-user satisfaction indicator and mainly due to delay, abuse of court process, mismanagement and resultant cost.

### 4.4 Judicial Performance and Impact of External Factors

The project is trying to identify issues of performance of district courts of Pakistan in terms of delay and inefficiency and their attribution to the procedural law regime. As several internal and external factors may be instrumental for these problems, it is relevant here to locate the institutional drawbacks causing these issues. For that end, firstly judicial performance shall be compared among diverse regions within Pakistan and then the overall ranking of Pakistan's courts' performance shall be seen relative to that of the countries having similar conditions. This comparison may clarify that there exist institutional and functional flaws as district courts are underperforming in diverse internal conditions. The overall international ranking would show the relative ability of courts among countries having the

[236] Siddique 2013, 162.

[237] Siddique 2010 Law in Practice.

same conditions, geographical regions and state of socio-economic development. The study of World Justice Project report of 2016 shall mainly be relied upon besides ranking by the World Economic Forum and the World Bank.

### *4.1.1 Performance of District Courts in Local Diversity*

Pakistan is a country of diverse geographical regions and varied socio-economic conditions. There are around 124 districts which are ranked quite differently on the Human Development Index.[238] (See Figure 10). Based on multiple development indicators like education, health and sanitation etc., these districts are classified as high, high medium, medium, low medium, low and very low on Human Development Index.

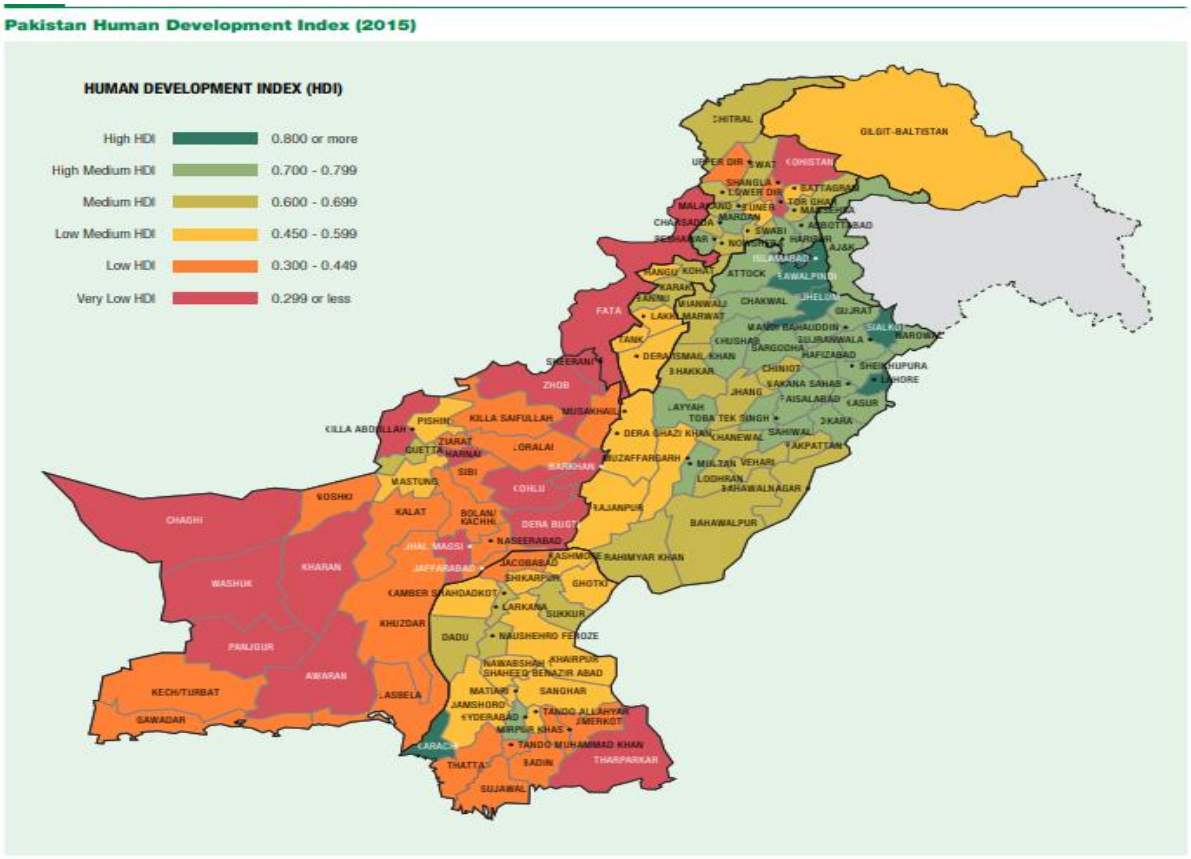


**Figure 10 Source: UNDP HDI Report Pakistan 2017**

[238] United Nations Development Program, 'Pakistan National Human Development Report Unleashing the Potential of a Young Pakistan (UNDP 2017) 31 available <https://www.undp.org/content/dam/pakistan/docs/HDR/PK-NHDR.pdf> accessed 06 Nov 19.

A comparison is made between five urban centres having high development status (Group A) and five districts with low or very low development indicators, i.e. health, education, sanitation, etc. (Group B). Case clearance rate (CCR) is calculated for each district taking the ratio of cases filed and disposed of during 2002 in that district from the official data available as *Judicial Statistics of Pakistan 2002*.[239] In Table 14, the CCR of both groups (High HDI and Low HDI) show a mixed pattern. Districts of both groups have varied CCR i.e. performance in terms of rate of disposal relative to the influx of cases is good, medium or high irrespective of their level of development or HDI ranking. Hence, socio-economic, geographical and human development factors do not appear to be influential to the courts' performance.

| Filing-Disposal Ratio of District Courts 2002 | | |
|---|---|---|
| | Districts/Cities | CCR % |
| High HDI | Karachi South | 87 |
| | Hyderabad | 104 |
| | Lahore | 76 |
| | Faisalabad | 98 |
| | Peshawar | 92 |
| Low HDI | Thatta | 109 |
| | Dadu | 84 |
| | Shikarpur | 102 |
| | Mirpurkhas | 91 |
| | Vehari | 77 |

**Table 14 Comparative CCR High and Low HDI Districts 2002**

During the high-performance years, for instance, in 2009, a similar unaffected pattern of CCR can be found. Another comparison is made in Table 15 among six districts of KP Province based on the data of cases of civil courts for the period from 01-01-2009 to 31-12-2009. It shows opening balance, claims filed, disposed of and end balance. Three districts

[239] Law and Justice Commission of Pakistan, *Judicial Statistics of Pakistan 2002* NJPMC available at http://www.ljcp.gov.pk/Menu%20Items/Publications/Reports%20of%20the%20LJCP/reports/judicialstats02.pdf accessed 07 Nov 2019.

namely Peshawar, Haripur and Abbottabad are highly ranked on UNDP HDI, i.e. at number 14, 18 and 13 respectively. The other three, namely Tank, Upper Dir and Batagram, are listed low on HDI, i.e. at numbers 76, 92 and 70 respectively.[240] From judicial statistics of 2009, CCR is calculated for each district separately. [241] The ranking on HDI of both groups is quite distant apart, but the CCR has got no substantial difference. Importantly, even the volume of workload in these two groups is considerably different (high in developed districts and low in the poor); this variable also has no effect on the CCR. This analysis indicates that external factors relating to development and the volume of workload have no impact on judicial performance.

| CIVIL COURTS JUDICIAL STATISTICS KP PROVINCE – From 01-01-2009 to 31-12-2009 | | | | | | | |
|---|---|---|---|---|---|---|---|
| | UNDP HDI Ranking 2016 | Districts | Opening Balance | Filed | Disposed of | End Balance | CCR % |
| High Medium HDI | 14 | Peshawar | 21840 | 48206 | 51900 | 18146 | 108 |
| | 18 | Haripur | 7926 | 14140 | 16424 | 5642 | 116 |
| | 13 | Abbottabad | 12318 | 18305 | 21800 | 8823 | 119 |
| | | | | | | | |
| Low HDI | 76 | Tank | 1552 | 2529 | 2668 | 1413 | 105 |
| | 92 | Upper Dir | 2189 | 5533 | 5963 | 1759 | 108 |
| | 70 | Batagram | 1365 | 2818 | 3233 | 950 | 115 |

**Table 15 Civil Courts CCR KP Province 2009**

### *4.4.1 International Ranking of Pakistan's Judiciary - WJP Index 2016*

Generally, it can be argued that external factors like social and cultural conditions, level of economic development and geo-political scenario of a particular jurisdiction may have their impact on the performance of its institutions. However, comparative ranking and the score of institutions among countries of *similar conditions* can offer valuable insight for

[240] UNDP HDI Pakistan National Human Development Report 2017 (n) 153.

[241] Law and Justice Commission of Pakistan, *Judicial Statistics of Pakistan 2009* available < http://www.ljcp.gov.pk/Menu%20Items/Publications/Reports%20of%20the%20LJCP/Judicial%20Statistics/Judicial%20Statistics%20for%20Pakistan%202009.pdf> accessed 07 Nov 2019.

locating *institutional* drawbacks. Comparison among the equals may bring forth the real institutional functioning when other external and possibly instrumental factors are constant.

The ranking of countries of the world based as to the *rule of law* by the World Justice Project (WJP) is pertinent to rely on. WJP is an independent international entity to advance the rule of law the world over. It collaborates with global agencies, businesses, local governments and academia. One of the functions of WJP is to measure the rule of law through extensive empirical research and publish this data and reports in this regard. Its report i.e. *WJP Rule of Law Index 2016* uses more than 110,000 household survey and expert interviews to 'measure how the rule of law is experienced and perceived in practical, everyday situations by the general public worldwide'.[242]

The report represents the rule of law in nine factors which include Civil Justice (Factor 7) and Criminal Justice (Factor 8). Civil Justice factor is measured by exploring 'whether ordinary people can resolve their grievances peacefully and effectively through the civil justice system'.[243] This is determined on certain sub-factors, i.e. the system is accessible and affordable, it is corruption-free, and service is delivered without unreasonable delay.

On the other hand, Factor 8 Criminal Justice is measured on the criteria of timely, effective, corruption-free, impartial and non-discriminatory investigation and adjudication of offences.[244] These measurements are based on surveys and interviews. The ranking is based on scores of individual countries as to factors and sub-factors ranging from 0 to 1 representing two extremes as to adherence to that factor. Please refer to Para 3.3.3 for detail methodology and data of WJP Index 2016.

*Comparison in the Region and Among Lower Middle-Income Countries*

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[242] World Justice Project, 'Our Approach: WJP Rule of Law Index' (2016) (n 7).

[243] World Justice Project, 'Civil Justice (Factor 7)' (2016) <https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2016/factors-rule-law/civil-justice-factor-7> accessed on 25 Jan 2018.

[244] World Justice Project, 'Civil Justice (Factor 8)' (2016) <https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2016/factors-rule-law/criminal-justice-factor-8> accessed 25 Jan 2018.

The ranking of Pakistan as to the overall rule of law scenario based on the score of all factors (i.e. 0.38) is 106 in 113 countries of the world. Within the region, i.e. South Asia, it is the second last lagging behind Nepal, India and Sri Lanka which are at 63, 66 and 68 respectively with a considerable margin.[245] (See Figure 11). The report also compares the overall score of the rule of law among countries placed in different income groups. Among the group of a total of 28 lower-middle-income countries of the world, Pakistan is almost at the bottom, i.e. at 25th position.[246] (See Figure 12). These two comparisons were as to the overall rule of law indicator.

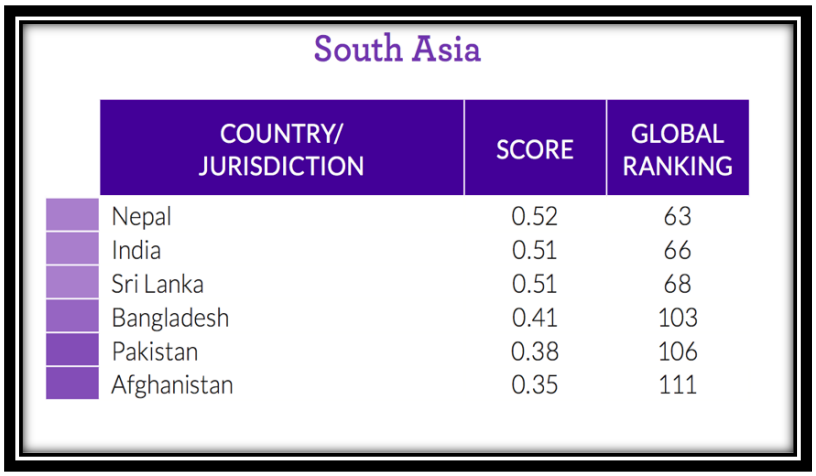
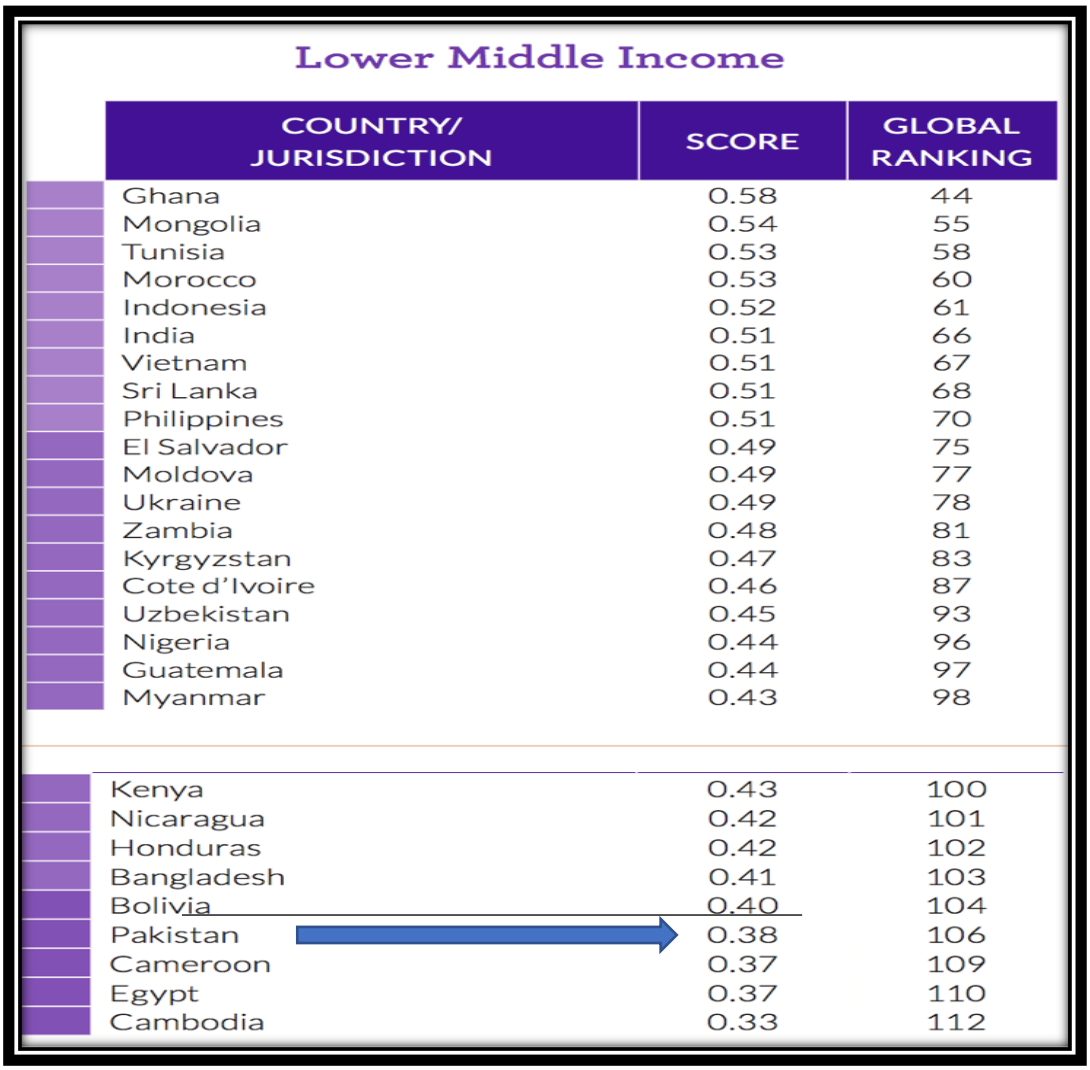



**Figure 11 Rule of Law Ranking of South Asia – Source WJP Rule of Law Index 2016**

[245] World Justice Project, 'WJP Rule of Law Index 2016' (2016), 23.

[246] World Justice Project, 'WJP Rule of Law Index 2016' (2016) Page 23 Page 13



Lower Middle Income

| COUNTRY/ JURISDICTION | SCORE | GLOBAL RANKING |
|---|---|---|
| Ghana | 0.58 | 44 |
| Mongolia | 0.54 | 55 |
| Tunisia | 0.53 | 58 |
| Morocco | 0.53 | 60 |
| Indonesia | 0.52 | 61 |
| India | 0.51 | 66 |
| Vietnam | 0.51 | 67 |
| Sri Lanka | 0.51 | 68 |
| Philippines | 0.51 | 70 |
| El Salvador | 0.49 | 75 |
| Moldova | 0.49 | 77 |
| Ukraine | 0.49 | 78 |
| Zambia | 0.48 | 81 |
| Kyrgyzstan | 0.47 | 83 |
| Cote d'Ivoire | 0.46 | 87 |
| Uzbekistan | 0.45 | 93 |
| Nigeria | 0.44 | 96 |
| Guatemala | 0.44 | 97 |
| Myanmar | 0.43 | 98 |
| Kenya | 0.43 | 100 |
| Nicaragua | 0.42 | 101 |
| Honduras | 0.42 | 102 |
| Bangladesh | 0.41 | 103 |
| Bolivia | 0.40 | 104 |
| Pakistan | 0.38 | 106 |
| Cameroon | 0.37 | 109 |
| Egypt | 0.37 | 110 |
| Cambodia | 0.33 | 112 |

**Figure 12 Rule of Law Lower Middle-Income Countries Source WJP Rule of Law Index**

*Comparison as to Civil and Criminal Justice Factors*

Specifically, as to Civil Justice factor, the ranking is 106 i.e. it is among the lowest eight countries out of 113 in the world. Within the region, it is at number 5 out of 6 while among 28 lower-middle-income jurisdictions, it is 23rd. Under Civil Justice, the sub-factor of 'No Unreasonable Delay' (number 7.5 in Figure 13) has the lowest score of 0.24. In Criminal Justice index, Pakistan's position is slightly higher, i.e. 81 in the world ranking with a score of 0.38 while within the region it is 4th out 6 while in the said income group it is at 14th out of

28.[247] These rankings are re-arranged and simplified in Table 16 presenting a clear picture of judicial performance ranking based on public perception and expert interviews. (See also Figure 13).

| | **World Ranking** | **Regional Ranking** | **Lower Middle-Income Group Ranking** |
|---|---|---|---|
| Civil Justice (Factor 7) | 106/113 | 5/6 | 23/28 |
| Criminal Justice (Factor 8) | 81/113 | 4/6 | 14/28 |
| **Rule of Law (All 9 Factors)** | **106/113** | **5/6** | **25/28** |

**Table 16 Ranking of Pakistan's Civil Justice and Criminal Justice Factors**

The low ranking of Pakistan on the Civil and Criminal Justice factors *within the region* and *among lower-middle-income* countries suggest that the justice sector is malfunctioning. This does not imply that external economic and political considerations do not influence judicial institutions at all; it only shows, and quite importantly, that in other countries, despite having similar difficulties, judiciaries are performing relatively better. Especially Pakistan's ranking based on Civil Justice factor is considerably low (5 out 6 and 23 out of 28 countries). This result is in line with the findings of statistical analysis and negative feedback of the litigants presented earlier.

[247] ibid Page 122

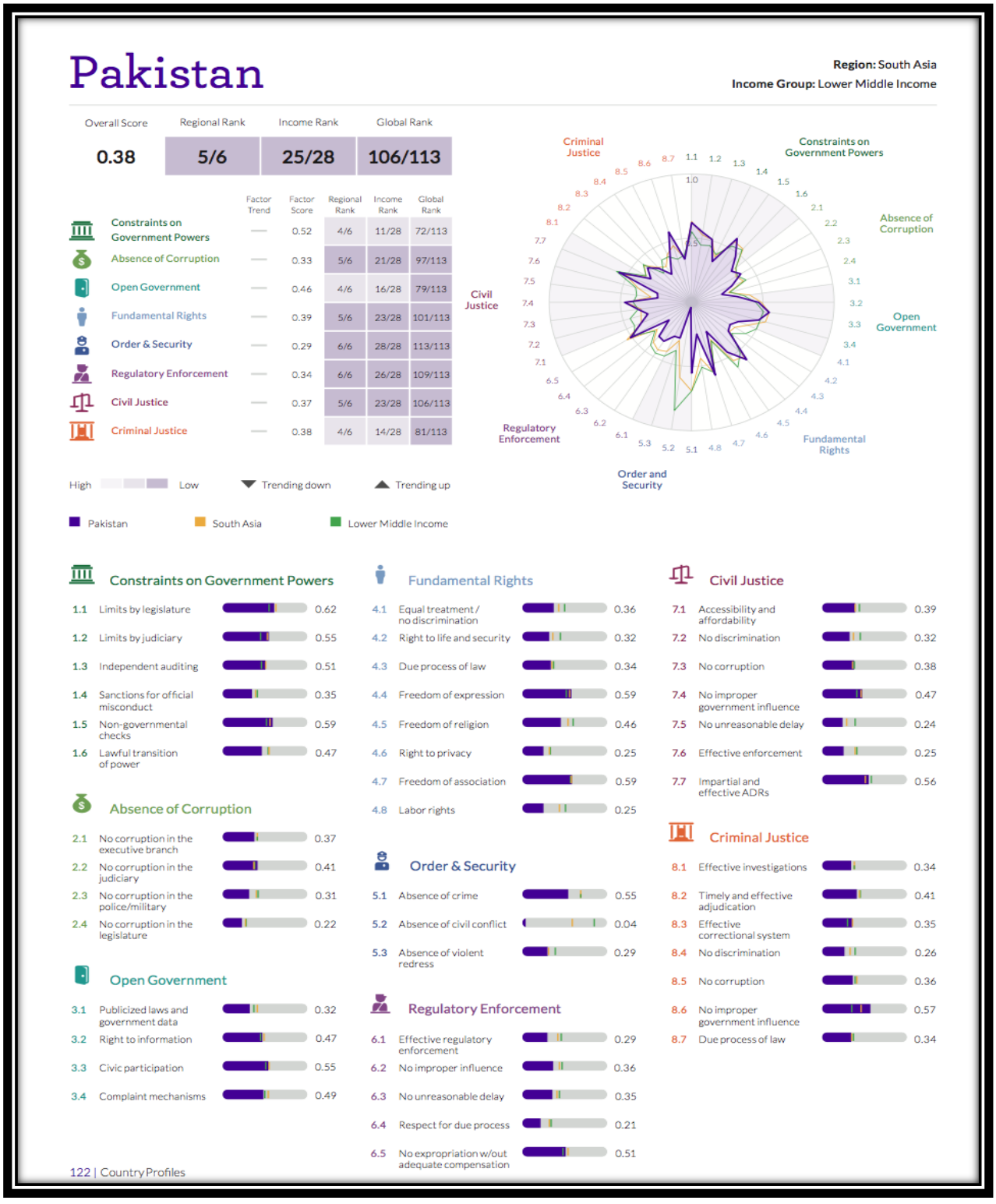



**Figure 13 All Factors – Pakistan's Ranking - Source WJP Rule of Law Index 2016**

### *4.1.2 World Bank and World Economic Forum Score – Rule of Law*

Worldwide Governance Indicators (WGI) is another comprehensive databank of governance indicators, developed by the World Bank covering six major areas of governance (i.e. accountability, political stability, government effectiveness, regulatory quality, the rule of law and control of corruption). Two numeric scores are employed to gauge these factors: (a) percentile rank indicator (0-100) where 0 is the lowest rank while 100 is highest and (b) performance score between -2.5 (weak) to 2.5 (strong). The indicator of Rule of Law measures 'perceptions of the extent to which agents have confidence in and abide by the rules of the society, and in particular the quality of contract enforcement, property rights, the police, the courts'.[248] On this standard score of Pakistan in four years, i.e. 2000, 2005, 2010 and 2015 is taken from the said data and results are tabulated below (see Table 17).[249] This picture shows consistent poor ranking and score of Pakistan on the rule of law index which includes perception as to courts.

| | Percentile Rank (0-100) | Performance Score |
|---|---|---|
| **2000** | 19.62 | - 0.95 |
| **2005** | 21.53 | - 0.88 |
| **2010** | 27.49 | -0.74 |
| **2015** | 23.56 | -0.79 |

**Table 17 Pakistan's ranking and performance of Rule of Law (Source World Bank WGI)**

[248] World Bank, Data Bank Worldwide Governance Indicators available at http://info.worldbank.org/governance/wgi/index.aspx#home accessed on 14 April 2017

[249] ibid

World Economic Forum is an international not-for-profit organisation which provides a platform for the world's 1,000 leading businesses to collaborate. The Forum is committed to improving the state of the world through public-private cooperation.[250] The Forum has published a series of reports on global competitiveness from 2011 to 2016. These documents mainly concern with assessment of the competitiveness of over 130 economies providing 'insight into the drivers of their productivity and prosperity'.[251] In the Global Competitiveness Report 2011-2012, Pakistan is ranked at 102 in the world on the index of 'efficiency of the legal framework in settling disputes'.[252] In later reports of 2015-16, the position is 108th while in 2016-17 Report it is at 109 out of 138 economies of the world.[253] The declining trend of ranking from 102 to 109 shows the negative performance of the judicial system. These rankings corroborate with the classification of Pakistan worked out by the World Justice Project earlier.

## 4.5 Conclusion

While gauging the attributes of timeliness and efficiency of district courts' service of Pakistan, statistical data of cases from 2002 to 2014 was used to work out and compare indicators of case clearance rate, age of cases and overall volume of the backlog. The results show a low clearance rate, i.e. lower yearly disposal rate than the filing rate, in most of the years. Consistent negative CCR resulted in gradual bulging of the backlog throughout. Capacity-building measures under Access to Justice Program (2002-2008) initially improved the CCR for some time as more courts, judges, staff, facilities and resources were pumped in. However, resource boosting is not always an option available due to their inherent scarcity. Moreover, without changing the internal court functioning and management, it cannot be claimed that available resources are being used most economically and efficiently. Stringent

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[250] World Economic Forum Website available at https://www.weforum.org/about/world-economic-forum

[251] World Economic Forum Global Competitiveness Report 2016-17 available at https://www.weforum.org/reports/the-global-competitiveness-report-2016-2017-1

[252] Klaus Schwab and Xavier Sala-i-Martin, *The global competitiveness report 2011-2012* (Citeseer 2011)

[253] Klaus Schwab and Xavier Sala-i-Martin, 'The Global Competitiveness Report, 2016-2017' (*World Economic Forum*, 2016) <http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017_FINAL.pdf> accessed 5 Dec 2016

measures under National Judicial Policy (2009-2011) also boosted the CCR and reduced the backlog but only temporarily as these emergency measures were surgical and pursued under the personalised vision of the then Chief Justice. This attempt could not eradicate the root causes and deep institutional factors which at the first place slowed the pace of disposal and let the backlog bulge in years and years. That is why after just two years of excellent performance (2009-2010), CCR came down to low nineties from 2012 to 2014. Importantly when the capacity to decide more cases enhanced, the influx of new cases also increased simultaneously keeping the CCR still under 100 per cent. This aspect could not be anticipated and catered for probably under the assumption that the court system has no control over the incoming flow of cases. Hence given low CCR, ever-increasing backlog, old age of cases and high filing rate, reform attempts did not dig deep into other institutional factors, of which outdated procedural law regime and poor case management are important.

Performance of district judiciary reflected in the experience of litigants who interact with courts offers some valuable insights as this evaluative method has rarely been employed in case of Pakistan. Secondary qualitative data reanalysed shows that the court process is prone to be misused and frivolous litigation is prevalent. The court system appears not equipped and directed to contain such practices effectively. Delay due to misuse of court process, lawyers' interests, disruptions of court proceedings and mismanagement on the part of judicial administration was a source of litigants' agony. International ranking of Pakistan's court service among countries of identical regional and economic conditions is poor which shows that internal institutional drawbacks have a dominant instrumental role in low performance. Given the inadequacy of previous reform efforts to attain durable solutions of the problems, a new approache is desirable and worth consideration in the relatively unexplored but important area of civil procedure and case management system. Similar issues of performance made the English and Singapore judiciaries to look beyond traditional thinking and introduce reforms based on new ideas and modernised management concepts. In the next two chapters, reform options shall be explored for Pakistan out of the box and on these lines by presenting a New Civil Procedure Framework (NCPF) as a reform model for the issues of civil litigation in Pakistan.

# Chapter 5. Theoretical Constructs of the New Civil Procedure Framework (NCPF) for Pakistan

## 5.1 Introduction

In the previous chapter, it is empirically established that ever-inflating backlog due to consistent low case clearance rate, ensuing delay, age of cases and rampant misuse of the court process to vex the opponents are issues which district judiciary of Pakistan is grappling with throughout. Evidence shows that attempts to resolve these issues through capacity building reform measures and enforcement of stringent one-off directives to clear the backlog and expedite proceedings, could not help keeping the disposal rate at par with the influx of cases, and hence arrest the bulging backlog in the long run. Though increased disposal through enhanced human and financial resources, was achieved from time to time, yet the influx of new cases also grew simultaneously and continually posing the challenge of a heavier-than-capacity workload. The option of pumping in more resources is not an option readily and always available due to their inherent scarcity; stringent directives also could not address deeper institutional drawbacks in the long run. In this blind alley, however, the way out appears to consider approaches and ideas out of the box. The new strategies adopted in the civil justice system and innovative experiments of other jurisdictions, with certain modifications and adaptations, are worth consideration to construct a new reform model for Pakistan.

Judicial underperformance in terms of delay and abuse of court process generally and in case of Pakistan can be due to several institutional and external factors of which outdated procedural law and case management deficit are relevant and vital factors to be looked into. The focal point of this and the next chapter is to see what theoretical framework and practical measures can be suggested to improve procedural law and case management in case of Pakistan under a renewed reform package. Importantly, before plugging holes in the practical aspects of courts' functioning, some fundamental principles and assumptions need first to be challenged and some dogmatic shackles are broken. This theoretical deconstruction is expected to place the reform rational out of the box. The traditional foundational principles namely (a) substantial or complete justice, (b) equity-based approach and (c) adversarial

system shall be challenged.Thereafter, a model framework shall be designed by exploring new vistas whereupon the façade of a new civil procedure and case management regime can be raised. In doing so, the hard-core reality of finite resources shall be centrally aligned with the objective of justice.

While formulating the contours of a conceptual model and a bunch of practical recommendations under the New Civil Procedure Framework (NCPF) for Pakistan, the English civil procedure reform and modernisation of case management in Singapore during the 1990s shall be overviewed to see what lessons these experiments can offer. Based on Woolf's proposals, the new regime of the procedural law of England and Wales, i.e. Civil Procedure Rules (CPR) with detailed Practice Directions (PDs) endowed extensive powers to the courts to control the pace of litigation and pursue the overriding objective of civil justice through active case management. In Singapore, administrative and management techniques with stringent compliance requirements assisted by a regime of modern information and communication technology were introduced in the 2000s. These reforms not only implanted a host of new strategies, methods and techniques to manage the court proceedings and litigation, but posited these efforts in a renewed theoretical approach i.e. in providing court service to the public, the objective of substantive justice needs to be balanced with time-resource constraint reality by active case management, proportionate allocation of resources, use of modern technology and introducing efficient processes. This paradigm shift appears to be a diversion from or refinement of the traditional approach of substantial justice, i.e. complete justice by applying correct law to true facts in individual cases.

Reform strategy and recommendations for Pakistan shall be posited in this renewed legal theory of balancing the key imperatives. It shall be argued that judicial relief not only has to be accurate, but it also needs to be just by providing it within a reasonable time, in deserving cases and with necessary and proportionate use of public and litigants' resources and taking into account the entire bulk of litigation. This chapter shall deal with the proposed paradigm shift as a solution to issues of Pakistan in three ways presented in the three main sections of this chapter. At first, the core of the new overarching and balancing approach shall be explored elaborating its fundamental theoretical constructs. In the second part, certain strategies shall be discussed to operationalise these constructs and means to achieve the

principal objective of justice. Lastly, some aspects and difficulties of implementation of new approaches shall be discussed.

## 5.2 Transition from Traditional Approach to New Model - A Paradigm Shift

As was seen in chapter 4, court service in Pakistan is marred by many issues of which inefficiency, delay, mismanagement and misuse of court process are prominent and relevant here. Despite two significant waves of reform efforts performance indicators still could not be improved in the long run. In this respect, the civil procedure law and case management remained neglected; this area was never fundamentally turned around except some sporadic and occasional amendments. Under the Access to Justice Program (2002-2008), most of the efforts were directed towards capacity building measures and improving infrastructure.[254] Even under the National Judicial Policy 2009, though stringent directions to the lower courts were issued, the fundamental structure of the civil procedure and litigation management remained intact; instead, it was resolved expressly that the Policy would be implemented by remaining within the existing legal and procedural framework.[255]

It appears that the civil justice system is trapped in the century-old legal traditional thinking; legal practice seems to be wrapped in a thick mist of euphoric nostalgia of these assumptions. Therefore, the underlying beliefs of the existing procedural framework and its objectives need to be critically reviewed; it is time now to define the renewed approach of civil justice through a paradigm shift in Pakistan providing necessary underpinning over which the façade of new rules, administrative initiatives and modern managerial techniques can be built for durable performance results.

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[254] Asian Development Bank (2009). "Pakistan: Access to Justice Program ADB Completion Report." Retrieved 30 October 2015, 2015, from http://www.adb.org/projects/documents/access-justice-program.

[255] Supreme Court of Pakistan "National Judicial Policy 2009." (n ) 5.

*Importance and Role of Procedure*

Generally, efficiency and effectiveness of court service can be due to several factors (political, socio-economic, cultural, institutional and human). However, the way courts function, cases managed and resources allocated, are the most important feature of the justice system. Woolf observed that in 'any justice system, the role of the procedure is far greater than generally accepted. Procedural improvements can transform the ability of a legal system to achieve efficient and proportionate justice'.[256] Procedural rules are expected to regulate, bind and guide the actions of the key actors, i.e. judges, lawyers and the litigants, etc.[257] for accessible, fair and efficient court service.[258] No doubt substantive law, providing the legal basis for civil rights and obligations, is an integral part of civil justice system; however, the critical question is not 'what rights do we give?', but having given those rights, having imposed duties and obligations, what opportunities and structures do we provide for the public to enforce those rights and obligations or make good their entitlements'.[259] Court service is offered to enforce legal rights and obligations but 'without an efficient civil justice system, substantive rights are no more than words and rule of law, a mere aspiration'.[260]

Also, procedural law is not a static phenomenon; once developed, it may not be able to work amidst changing legal needs, new challenges developed over time, and nature and volume of civil litigation. Like any other public sector standard operating systems, it needs constant reviewing and revamping. Procedure 'may stand in need of reform in order to deal with changing circumstances or because it becomes inefficient or ineffective over time through misuse or abuse'.[261] The jurisprudential framework and legal theory on which the procedural law is based also need to be dissected. Therefore, before exploring fresh

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256 Sir Harry Woolf, The pursuit of justice. (Christopher Campbell-Holt ed, New York, 2008) 16

257 Neil Andrews, *Principles of civil procedure*. (London Sweet & Maxwell 1994) 3.

258 Adrian Zuckerman, *Zuckerman on Civil Procedure Principles of practice 2013* (n 62) 3 (referring to Rule 2(2) of the Supreme Court Rules 2009 [UK])

259 Hazel Genn, *Judging Civil Justice* (CUP 2010) 11.

260 Hazel Genn (2010) *Judging Civil Justice* quoting Sir Anthony Clarke 'The importance of civil justice: nationally and internationally' (American Bar Association Conference London 3 Oct 2007) 18

261 John Sorabji, *English civil justice after the Woolf and Jackson Reforms: A critical analysis* (CUP 2014) 21.

approaches, existing theoretical assumptions and principles shall be briefly overviewed here at first.

### *5.2.1 Existing Principles of Civil Procedure –Traditional Approach*

Code of Civil Procedure 1908 of Pakistan was originally drafted by the English lawyers for Untied India during British colonial rule, and it is based on same theoretical constructs as nurtured in the English legal tradition during the nineteenth century. Three fundamental principles of the traditional approach namely (a) substantial or complete justice, (b) equity-based approach and (c) adversarial system are relevant here.

*Substantial Justice Principle*

Historically, the sole objective of civil justice is to essentially arrive at the correct decision to achieve material justice as observed in *Knight v Knight*[262]*;* the entire focus of the law remained on doing complete justice, i.e. justice on merits of an individual case where decision is substantively accurate.[263] 'A substantively accurate decision was one arrived at through the correct application of true facts to right law, such that when properly acted on, it vindicated or enforced legal or equitable rights or obligations.'[264] Traditionally, it is singly focused to procure accuracy[265] , and in this way, mere assertions of civil law are 'translated into binding determinations'.[266] This normative and exalted aspiration appears simple, straight and most desirable; however, it seems too idealistic and quite distant from the pragmatic world and ground realities. It shall be argued a little later how this approach is insufficient to

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[262] *Knight v. Knight* (1734) 3 P. WMS 331, 334 and also in *Davis v. Eli Lilly & Co* [1987] 1 All ER 801 at 804

[263] John Anthony, *On civil procedure* (CUP, 2000) 387.

[264] Sorabji *English civil justice after the Woolf* (n 258) 2.

[265] C. H. van Rhee and A. Uzelac, 'The Pursuit of Truth in Contemporary Civil Procedure: Revival of Accuracy or a New Balance in Favour of Effectiveness?' *Truth and Efficiency in Civil Litigation Fundamental aspects of fact-finding and evidence-taking in a comparative context* (Intersentia, 2012) 3.

[266] Andrews, *English Civil Procedure* (n 254)15.

cope with the practical issues faced by the court system and difficulties in managing loads of cases.

*Adversarial principle*

One of the traditional norms of administration of justice is adversarial principle or party–control litigation system. It was perceived to be one of the tenets of the civil justice system[267] and was defended on the ground that right of hearing and freedom to allege or defend one's claim before an impartial legal forum is the fundamental right of every citizen; the law cannot or should not restrict this freedom of choice. The underlying assumption is that a litigant is the best judge of his interests; parties have the right incentives, and are better acquainted and placed to pursue their case. Various provisions of the Code of Civil Procedure 1908 of Pakistan do reflect this principle in operation as courts follow a non-interventionist approach and remain restricted in the somnolent regime.[268] For instance, there is no bar as to the magnitude of evidence a party wishes to produce or amount of time to be consumed in recording evidence, so far as it is tentatively shown to be *relevant.* The court has little control over it which is supposed to facilitate the parties or their lawyers to present their claim or defence the way they wish. In England before Woolf reform in the 1990s, the principle remained continuously under attack and was curtailed even before the new procedural law was introduced there in 1998.[269] Later the Civil Procedure Rules introduced in 1998 under Woolf reform proposals, considerably took out most of its sting by granting extensive powers to the courts to actively manage the pace of cases and be in control of the process.

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[267] Jenny McEwan, Jenny. "Evidence and the adversarial process." *The Modern Law* (Hart Publishing1998) 47.

[268] Singapore Chief Justice called it as the somnolent regime See Chief Justice Chan Sek Keong, "Pursuing Efficiency and Achieving Court Excellence – The Singapore Experience", a paper delivered at the 14th Conference of Chief Justices of Asia and the Pacific, 12-16 June 2011, Seoul, South Korea, at para 4, available at <http://app.supremecourt.gov.sg/data/doc/ManagePage/3841/CJ%20Speech%20at%2014th%20Conference%20of%20CJs%20of%20Asia%20and%20the%20Pacific.pdf> (last accessed 2 February 2012)

[269] Neil Andrews, *English civil procedure: fundamentals of the new civil justice system*. (OUP 2003) 33.

*Equity-based approach*

Equity-based approach is also a basic canon of the traditional approach where courts have ample discretion to relax or do away with formalities, time limits and other procedural requirements. As seen in the English legal tradition, rigidity and strict adherence to rules approach did not last long and was replaced by the decision on merits and not mere technicalities in 1875 (by introducing Judicature Act 1875 and other relevant Rules). Non-compliance of procedural and formal requirements was rendered as not fatal unless it caused a miscarriage of justice. During the proceeding, non-compliance of rules for anything to be done within a particular time or otherwise did not affect the case of the defaulter; the court could rectify the error without causing injustice.[270] In *Cropper v Smith*, Bowen L.J observed that the 'object of the Courts is to decide the rights of the parties, and not to punish them for their mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights'.[271] Same is the case in Pakistan. This creed remained consistently reiterated in the rulings of superior courts. Code of Civil Procedure 1908 equips the courts with ample powers to cure the irregularities and to extend the time limit in fit cases and take such steps as are reasonable in the circumstance and which the court deems appropriate.

The paradigm shift and new approach challenge these three fundamental pillars of the traditional theory of civil procedure. Table 18 below shows these contrasting concepts at a glance.

[270] RSC Ord.2, r.1 [England]

[271] *Cropper v Smith* (1884) 26 Ch D.700 at 710

| Traditional Approach | Paradigm Shift |
|---|---|
| Substantial Justice in Each Case (Narrow Focus of Doing Justice in Individual Case) | Proportionate or Distributive Justice in all cases (Broader Aim – Doing justice in all cases - Principle of proportionality through litigation management) |
| Justice: Finding Truth and Applying Correct Law | The overarching aim of Justice: Balancing key imperatives, i.e. Accuracy, Expedition and Economy |
| Adversarial Model- Party Control Litigation | Pro-active and Interventionist Courts Enforcing Compliance |
| Extant Judicial Discretion for the Ends of Justice – Equity-Based Approach | Judge's Duty to Execute Material Procedural Requirements and Compliance of Timelines |

**Table 18 Traditional Approach and Paradigm Shift**

### *5.2.2 Principles of the Model Framework – An Overview*

It appears that traditional ethos of civil litigation, i.e. substantial justice, party-control litigation, adversarial policy and equity-based discretion are based on the assumption that courts *can* entertain all litigation having bounteous time and resources. The reality, however, dictates that resources are always scarce, and court service like any other public service has to be offered in view of available resources. The traditional equity-based approach also assumes that the judge, laden with extensive powers and a robust, equitable approach, would always take the right course in all eventualities devising best of the solutions in all types of individual cases and situations; only such an ideal judge would successfully find the truth and apply correct law to all matters coming before him and would remain unaffected by surrounding factors and practical difficulties. This too is not the case in the actual world, particularly in the circumstances of a developing country like Pakistan.

A judge works in the real world amidst several factors and circumstances surrounded by pressure groups, political interests, cultural and institutional compressions, workload stress, and systemic management deficit. His subjective thinking, personal aptitude, morale, skills and other relevant faculties also do influence running the court business. Therefore, merely providing a judge with extant powers under a procedural law *on paper* is not enough and workable. A way through these circumstances, in the limited context of the role of procedural law and case management, need to be looked out of the traditional box. A renewed framework of court procedure and practice is direly needed. That is why in case of English reform experiment 'they questioned the justice system's underlying framework, and specifically its aim [and] the outcome of that extraordinary investigation was the rejection of the theory of justice that had underpinned the civil justice system since 1870s.[272]

The paradigm shift to be elaborated here may serve as a necessary underpinning for the model theoretical framework and before making recommendations as to practical reform measures for Pakistan. Built on the deconstructed debris of the traditional approach, the new façade has to be based on the renewed principles and modern approaches. Though the new paradigm follows Woolf's path, in essence, it shall be presented here with necessary modifications and certain vital additions. Briefly, the principles of the proposed NCPF model for Pakistan are:

- **Proportionality**: As opposed to substantive justice at all cost in individual cases, proportionate and distributive justice approach needs to be adopted to handle the entire bulk of litigation given finite resources.
- **Balancing Theory**: In a pragmatic world, key imperatives of justice, i.e. accuracy, economy and expedition, need to be adjusted while dealing with individual cases.
- **Stringent Compliance**: Court's extant discretion need to be replaced by a strict duty to execute the scheme of law as to compliance and unswerving adherence to material procedural requirements and pre-planned time frame.

[272] Sorabji, *English civil justice after the Woolf* (n 258) 30.

- **Rigorous Preliminary Scrutiny**: Sifting the deserving cases at initial stages and allocating only necessary procedures relative to the facts of the case.

### *5.2.3 Balancing Between Key Imperatives: Accuracy, Economy and Expedition*

Existing procedural law regime of Pakistan underwent no significant change from its original shape developed in the 19th-century colonial era (i.e. Code of Civil Procedure 1908); it rests on the traditional approach and aims to do substantial justice in individual cases. Though it provides for necessary key stages to process a single claim for final determination; it does not, however, cater for how to achieve that objective while handling thousands of cases within the limited available resources. The reason for that appears that the overall direction and scheme of the civil justice system is not set to treat the entire bulk of litigation. Traditional philosophy of doing justice by applying correct law to true facts in individual cases eclipse predominantly. Time-resource constraint reality and agenda of economy and expedition do not appear prominent in this regime. It does not imply that speed and affordability were never the concerns of the justice system; instead, it overly focused on substantial justice, apparently as the sole aim civil procedure.

Surely procuring correct decisions through the process of finding facts and then applying the right law is the primary aim of civil justice. Ideally, a sufficient number of judges to deal with all cases with enough infrastructure and facilities and ample time for each case would serve the purpose quite well. But such an arrangement is practically not possible as the court's human, financial and physical resources are finite. Judicial service, like any other public service, incurs the cost and since resources are limited, it is not possible to provide the best service to all the litigants regardless of time and cost factors. This exposes the inherent tension between the societal goal of making affordable justice accessible to all on the one hand and the reality of time-resource duo constraint on the other. In traditional thinking, no comprehensive answer to this issue can be found. However, while reforming the English civil procedural law, Lord Woolf offered a theory of balancing between key imperatives of justice by placing the overriding objective of the litigation system right in the centre. The traces of this new approach can be found in Bentham's theory of utility maximisation. Before going to Woolf's approach and its application in the case of Pakistan, a brief account of Bentham's view is worth mentioning here.

*Utility Maximization*

As opposed to the classical approach of doing complete justice in individual cases, Bentham presented utility maximisation perspective of enforcement of rights and obligations, i.e. greatest happiness for greatest numbers. Based on the principle of utility, for Bentham procedural law is a means to execute substantive rights in a way to achieve maximum good.[273] The flip side of utility maximisation is disutility minimisation, i.e. avoiding cost, delay and vexation while executing substantive rights. Hence, if zero-level disutility is to be achieved, all substantive rights need to be enforced without litigation. But since in the real world, resolution of disputes through the formal court system cannot be avoided, its disutility in terms of time, cost and vexation should be curtailed to the lowest possible level. A case can be delayed or even refused to be heard if utility so demands; therefore *utility*, and not *justice*, is the primary determining factor. If disutility is greater than the utility, then, as Bentham views 'the price ought not to be paid and the law ought rather to remain unexecuted'.[274] While applying this principle, procedural law should be based on, and courts need to follow *cost-benefit analysis*; they may elect, for instance, to disallow adjournment, or refuse to admit a piece of evidence despite its relevancy or a case may be decided without a full trial. The price of justice should not be paid where the benefit of relief outweighs the cost of litigation.

### *5.2.4 Principal Objective of the Civil Justice System and Woolf's Overriding Objective*

The approach to treat individual cases on merits by allowing the parties opportunity and autonomy to present their stance, was prevalent before civil procedure reform in England and Wales during 1990s as is now the case in Pakistan's civil procedure. Lord Woolf, principal architect of new Civil Procedure Rules of England and Wales, however, broke with the traditional approach and advocated a balance between certain principles arguing that court

[273] Jeremy Bentham (1843) PJP at 8 quoted in Sorabji 2014 (n 258) 82.

[274] J. Bentham (1843) RJE Vol. 7 at 335 quoted by Sorabji 2014 (n 258) 89.

service should be just in results, fair in treatment, at a reasonable cost, determining the case with expedition and should provide certainty.[275] Woolf questioned the fundamental structure within which procedural law would operate and then giving it a new turn, laid the basis of a comprehensive objective of the civil justice system through a complete paradigm shift.[276] Zuckerman observes:

> The objective of the civil legal process remains of course the same: enabling the court to decide disputes on their merits….substantive justice, or justice on their merits. But the CPR now recognise that substantive justice is not the sole aim of civil process. [It] must be delivered by means of proportionate use of resources (public and litigant alike) and within reasonable time.[277]

The overriding objective introduced in the new CPR based on Woolf's reform recommendations represented the legislature's intention that the court service must be just, timely and proportionate.[278] The objective covered *at the same time* certain essential aspects of litigation and looked beyond the sole aim of a decision on merits. Substantive justice, in isolation, did not remain to be the *only focal point* of civil litigation. Hence all the three factors, i.e. truth/accuracy, timeliness and proportionality, were made the basis of the new procedural scheme. 'The overriding objective makes plain that all three imperatives are central components of civil litigation justice system'[279] and it 'is not a statement of intent, nor a pious catechism of procedural virtues, but a core and pervasive feature of English modern civil justice'.[280]

The argument of the new approach is not that the system may compromise accuracy and quality *deliberately* and undermine the ideal of justice; rather it is argued that efforts need to be directed having regard to the finite resources and by employing these in the most *economic and efficient* manner. Zuckerman observes that once 'we accept that the

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[275] Woolf, *The pursuit of justice 2008* (n 39).

[276] Falconer C, Foreword to 2nd edn Civil Procedure Rules (HMSO, 2005) vi.

[277] Zukerman on Civil Procedure 2013 (n 62) 6.

[278] Ali v Kayne [2011] EWCA Civ 1582.

[279] Zuckerman (2013) p.6

[280] Ibid Neil Andrew 2003 p31

commitment to accuracy is not absolute and boundless, we must also accept that the choice of procedure must involve compromises'[281] which is unavoidable.

### *5.2.5 Theoretical Foundation of the Model Framework*

Pakistan's civil procedure and court practice need to be brought out of the straitjacket of classical substantive and individualised justice approach. A paradigm shift is required where the scope of 'justice' is enlarged: cases need to be resolved by aiming, *at the same time,* factual and legal accuracy as far as practicable, expedition, most economic use of resources and their proportionate allocation among all deserving cases. This all-encompassing and comprehensive objective must be made an integral part of the primary legislation. The grand agenda would not in any way undermine the primacy of substantive justice; rather it enshrines an explicit commitment to achieve that end in a more efficient way with less cost in view of other important factors, principles and means.[282] Therefore, the first and foremost step towards reforming the civil justice system in the case of Pakistan is to appreciate this new and comprehensive approach and centrally positioning it in the procedural framework as a binding obligation. This aim can be achieved through efficient court processes, active management techniques, modern technology and other strategies to be discussed below.

It is, therefore, recommended that the Code of Civil Procedure must contain, at the very beginning, this direction-setting policy statement as an agenda of the civil justice system and as the principal objective. All powers, functions and processes must then sprout from that big aim. This new approach calls for juxtaposing and centrally aligning the time-resource constraint reality with the objective of substantial justice in law. It is not doing away with substantial justice but providing it in view of that reality which itself cannot be done away with. Hence, instead of the narrow objective of complete justice in individual cases, the direction should be to follow the principle of proportionality and balancing between the imperatives of accuracy, economy and expedition.

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[281] Ibid Zuckerman 1995 p

[282] Ibid Sorabji 2014 p117

## 5.3 Strategies to Achieve the Principal Objective

In order to operationalize the proposed balancing theory and its principles, and to achieve the principal overarching objective of justice, certain legal, administrative and management strategies followed by detail measures are indispensable. This would set the direction of the institutional activity towards the said grand objective. Six main strategies are proposed in this respect:

- Strategy I - Strict neo-procedural approach.
- Strategy II - Rigorous preliminary scrutiny of cases.
- Strategy III - Proportionate allocation of time and resources.
- Strategy IV - Rationing procedure.
- Strategy V - Assessment of adverse impact of time.
- Strategy VI – Active case management.

### *5.3.1 Strategy I - Neo-Proceduralist Approach – the Wind of Change*

As was seen in the English legal tradition that with the introduction of a new procedural law regime in 1875 (i.e. Judicature Act 1875 and Rules) strict adherence to rules and technicalities was replaced by an approach of 'decision on merits'. Non-compliance of procedural requirements was rendered as not fatal unless it caused a miscarriage of justice. The amended law equipped the courts with ample powers to cure the irregularities and to extend the time limit in fit cases. During the proceeding, non-compliance of rules for anything to be done within a fixed time or otherwise did not affect the case of the defaulter; the court could rectify the error without causing injustice.[283]

Existing civil procedure law of Pakistan is also based on the said equity-based approach where courts are empowered to avoid technicalities and to give a decision on substantive merits of the case. Supreme Court of Pakistan has held in a number of rulings that law is a living organ and courts are bound to adopt a realistic and pragmatic approach for its

[283] RSC Ord.2, r.1 [England]

application, looking into the peculiar facts and circumstances of each case;[284] it is also held that adjudication should always be based on merits and no one should be non-suited on technical grounds.[285] Courts are, therefore, endowed with extensive discretionary powers to relax or even do away with procedural formalities. For instance, section 148 of the Code provides that the court may, in its discretion, extend the time fixed by law or granted by the Court even after its expiry.[286] It can also grant adjournments on such terms as it deems fit (Order 17 Rule 1 CPC), examine parties and witnesses, and allow evidence at any time etc. Purpose of such discretion is to open the field for the courts to arrive at factually correct decision instead of hindered by the rules and procedural formalities.

Besides these discretionary powers in specific conditions, courts have also got general inherent powers as recognized under section 151 of the Code of Civil Procedure 1908 which reads:

> Sec. 151.—**Saving of inherent powers of Court. ---**Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the Court.[287]

But despite these generous and extensive powers, delay and misuse of the process of the court as was shown empirically in chapter 4 could not be avoided. It appears that these discretionary tools are not effectively utilised in practice for the ends of justice and to prevent delay and abuse. Equity allowed courts to ignore formalistic aspects and let the parties present their claims free from technical fetters. But this autonomy appears to have dragged the litigation in practice into the domain of deliberate default and abuse while the courts remained dormant with a condoning posture.

As stated earlier, the assumption of existing civil procedural law regime is that an ideal judge has a number of options available to him who will get the right solution in all

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[284] PLD 2010 S.C. 642 [Pakistan]

[285] PLD 2004 S.C. 154 [Pakistan]

[286] Code of Civil Procedure 1908 s. 148 [Pakistan]

[287] Code of Civil Procedure 1908 s.151 [Pakistan]

individual cases and all situations; also that he would remain unaffected by a number of surrounding factors and would take on against all the odds for the ends of justice. But in practice courts are not that effective as these appear in law; not using the available powers readily, seems to be part of the problem. It is, therefore, suggested that the law may take control of the litigation process while all the key actors (judges, lawyers and litigants, etc.) must comply with it. A judge must be under an *obligation to execute* the legal requirements; instead of his dictating the pace and course of litigation, the law must dictate and carry through, and the judge is bound to ensure it.

### *5.3.2 Justifications of the neo-proceduralist approach*

An effective legal system requires a substantial degree of the mandatory compliance regime. Importantly, whether non-compliance is under the compulsion of circumstances, or by design, it affects the entire administration of justice and causes delay. Hence, not only the process in a particular case is affected but it also affects other litigants. In *Beachley Property Ltd v Edgar*[288] while disallowing to condone delay by the plaintiff, Lord Woolf viewed that the court must consider the effect of the default on the administration of justice:

> One had to consider the position not only from the plaintiff's point of view, but from the defendant's and also the point of view of doing justice between other litigants as well….It was very important that the court's resources should be used as efficiently and effectively as possible.

In the new English civil procedure, courts are still given powers to condone non-compliance. For instance, CPR 3.10 provides that in case of non-compliance with any rule or practice direction, the proceeding would not be invalidated unless the court so orders; it can also remedy the error. The court may also extend or shorten the time for compliance (CPR 3.1(2)). However, all these court powers to rectify defects, extend time or relieve a defaulting party from sanction are subservient to the overriding objective as it is clearly provided in CPR that it is the duty of the court to further the overriding objective while exercising any power under the rules (CPR 1.2(a)). Hence, the scheme of CPR binds the courts to strive for the

[288] [1996] TLR 436

overriding objective and under that, also exercise discretionary powers to deal with defaults and take appropriate action in *fit* cases and situations.

Though subservient to overriding objective, this arrangement, however, has got certain difficulties specially in the context of Pakistani litigation culture. At first, discretionary powers add considerable burden on the judge when asked to treat the default as he deems fit by inquiring into the factual background of the default and determining the quantum of penalty. Law, while endowing these powers, presumes that he has ample time, energy, motivation and resources to do so. In case of default, the party would apply for condonation and the court would have to entertain such peripheral applications, invite arguments, hear probably both the parties, use judicial mind and then decide it. All such satellite issues take time and consume resources hindering the expeditious disposal of cases. Therefore, these powers should be endowed in a very limited sphere and used sparingly. Hence, non-compliance as to time and procedural requirements is one major cause of delay, complexity, cost and vexation; further hearings to condone these would add into that delay.

In contrast, a strict procedural law regime leaving very little room for condonation of non-compliance may appear harsh but have more prospects of running the proceedings efficiently. The hardships entailing from insistence on strict compliance and penal consequences for defaults may be compared with hardships resulting from allowing errors to be rectified and defaults condoned in ways where more time and resources are consumed. Moreover, courts' discretion to excuse and repair non-compliance would encourage lax behaviour and open up the flood gate of peripheral litigation on technicalities and damage control proceedings. In the case of Pakistan, where vexatious litigation practices and deliberate abuse of the court process are extensively reported, such a harsh regime can be far more effective.

Under the neo-proceduralist approach, it is argued that the law must take control of the process as far as practicable. Strict compliance regime would fetch certainty and predictability in the proceedings. Not only in the English legal tradition, particularly after Woolf, but the strict compliance regime is also attaining a substantial place in other jurisdictions and its significance is being recognized. For instance, commenting on courts' discretion to extend time in the case of Singapore civil justice system, it is observed:

> There has been a fundamental change in judicial approach towards the control of proceedings in the interest of expedition and economy…. A whole new philosophy has emerged emphasising the priority of avoiding delay in litigation. Although the law governing the extension of time and dismissal for want of prosecution has a direct and vital bearing on the time taken for a case to proceed through its various stages, this is an area which has been left untouched by the reforms presumably because the courts need to have a broad discretion to avoid the injustice which may result from arbitrarily imposed time-limits. Nevertheless, Waller LJ's admonition in Letpak Ltd & Ors v Harris" that 'the wind of change was blowing fast' in the direction of a greater emphasis on the observance of the rules of court in the interest of the general administration of justice appears to be as relevant today as it was in 1996.[289]

*Recommendation*

Strict adherence can be inculcated in two areas: (a) material requirements of procedure and law and (b) pre-planned and pre-agreed time schedule. The courts' duty must only be to execute this scheme. In doing so, the courts need to manage things to keep the litigation process to proceed ahead on the tight rope of the legal scheme. Firstly, the distinction may be made between mere formalities and the material requirements. All efforts must in all circumstances be directed under an obligatory law regime to take non-compliance head-on. Court administrators should be engaged in extensive pre-planning and scheduling of different stages of proceedings and effective pre-warning of adverse legal consequences for any deviance. This may sound to be reverting to the strict proceduralist approach shunned in the nineteenth century in English legal tradition. However, a neo-proceduralist approach is to be adopted to get decisions on merits but by avoiding misuse, non-compliance and delay.

Mandatory procedural requirements must not be abundant and merely of technical nature; rather, these should be such which must go to the heart of substantive justice and directed to achieve the overriding objective of civil litigation. Courts must be under an obligation to execute the consequences of non-compliance necessarily to create necessary deterrence which may gradually shape the patterns of behaviour of potential defaulters to adapt to the strict regime. The default must be substantially penalised under the *law* with very little room for the courts' discretion to condone it. Law, and not the courts' discretion, must

[289] Jeffrey Pinsler, "Principles Governing the Court's Discretion to Extend Time." (SAcLJ 11 1999) 25.

dictate the terms and way to treat defaults. General and extensive discretion of a court to *deal* with and punish lax tendencies as it deems fit has not been effective. The substantial financial cost to compensate the other party, as well as the exchequer, should be the necessary results of non-compliance. Only such arrangement may tend to curtail delay occasioned by default.

### *5.3.3 Strategy II - Rigorous Preliminary Scrutiny of Cases and Forewarning*

Statistical analysis as to delay and litigants' views in Lahore Survey suggest that the litigation process is heavily misused and deliberately prolonged to serve personal interests in the district courts of Pakistan. In view of this empirical evidence, it can safely be assumed that a ratio of cases filed are either frivolous or one of the parties is more interested in prolongation rather than swift resolution of the controversy. This implies that time and energy is either completely wasted by *undeserving cases* or consumed more than necessary in others. Two fundamental assumptions provide a conducive milieu for misuse of the judicial process. One, all claims filed alleging violation of rights at the very inception are *entertained* and normally put in the process of trial for ascertaining the truth. Secondly, it is presumed to be the obligation of the court system to treat *all cases equally* through a uniform and standard process.

Rigorous preliminary scrutiny and an informed decision based on it is conspicuous by absence in the existing civil procedure law of Pakistan to determine whether or not a case deserves to be put in the trial process at all, and if so put, what amount of time and resources need to be allocated for that. A cost-benefit analysis needs to be made at this stage. As of principle, only deserving cases need to be put on trial and procedural tools may be applied to these cases relative to their genuine needs and in a proportionate way. The strategy should be to go deep into the facts of a case at the very initial stage; the courts must, with a judicial mind assess the level and magnitude of judicial treatment it deserves.

This initial investigation would be an opportunity for the courts to place and prioritize a case in view of its facts relative to other cases; it also makes courts to look into other ways for its settlement, narrow down the scope of enquiry and allocate only necessary procedures, time and resources. Preliminary inquiry and consultation may also result in settlement of the cases there and then or through alternate resolution mechanism. This is also an opportunity to inform the parties in an effective way that, it would necessarily entail

possible consequences if their stance is later established to be unfounded, vexatious and frivolous. These forewarnings may enable the parties to calculate the risk of going into the mode of litigation. No doubt initial engagement of the courts with cases and litigants consumes time, the approach to filter out only deserving cases for trial appears better than sending all cases to that stage.

Hence initial rigorous and mandatory inquiry and court's engagement with facts of the case, litigants and record at the very inception, would result into a conscious and informed decision as to the future course of action, efficient use and proportionate allocation of resources and tailored resolution of the controversy. This is an opportunity to control and regulate future behaviour of the litigants and arrest potential tendency of straying from the set course of law and timeframe.

### *5.3.4 Strategy III - Principle of Proportionality and Distributive Justice*

A citizen cannot claim absolute entitlement of best judicial service regardless of its cost. Like all public service, it is not possible to do complete justice in all the cases as resources are scarce. Therefore, proportionate treatment and allocation of appropriate time and resources is a consideration which the law needs to give ample space, and the judicial administrators have to bear in mind not only for the parties to a single case but the way it affects other cases and litigants. A 'judge's responsibility today in the course of properly managing litigation requires him…to consider the effect of his decision upon litigation generally'.[290] The cardinal principle of the new judicial philosophy is that 'its primary, or predominant, policy aim is to secure effective access to the justice system by ensuring an equitable distribution of the court's resources amongst all litigants.'[291]

The distributive justice approach is fundamental to Woolf's theory of civil justice. The concept was not altogether alien in the legal discourse before him. For instance, simpler and less value claims were dealt with by county courts through summary procedures while

[290] *Jones v University of Warwick* [2003] EWCA Civ 151.

[291] Sorabji 2014 (n 258)136.

higher value claims by High Court under a detailed procedure under the pre-Woolf procedural law regime.[292] Even in the US litigation tradition, the principle of proportionality was operative. The US federal courts are obliged while determining the extent of discovery in an individual case, to assess 'the needs of the case, the amount in controversy, the parties' resources, [and] importance of the issues at stake'.[293] The principle, however, found much central position in Woolf's reform thinking and later in practical rules of procedure, i.e. CPR. Lord Woolf observes that:

> to preserve access to justice for all users of the system it is necessary to ensure that individual users do not use more of the system's resources than their case requires. This means that the court must consider the effect of their choice on other users of the system.[294]

Pre-Woolf procedural law regime appears more committed to the individualistic approach to justice. 'It took no account of the wider effect that any particular case had on other court users…As a theory of justice, it did not 'look beyond the case in hand'[295]. To provide court service to the maximum deserving litigants, allocation of time has to be rationed by curtailing hearings and hence maximising utility.[296] Employing all procedural tools to all the cases irrespective of their relative weight would be misapplying the limited resources irrationally and disproportionately. Zuckerman, while arguing in favour of rationing procedure observes that:

> not all the cases are important, intricate and difficult, and not every case requires access to maximal procedural provisions. A well-organised system should contain, therefore, a mechanism for husbanding procedural resources by ensuring that the procedure employed is proportionate to the needs of the particular case.[297]

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[292] ibid 104.

[293] John L Carroll, 'Proportionality in Discovery: A Cautionary Tale' (Campbell Law Rev 32 2009) 455, 458.

[294] Woolf (Final Report 1996), 24.

[295] Sorabji 2014 (n 258) 116.

[296] Sorabji 2014 (n 258) 162.

[297] Andrian Zuckerman, "A reform of civil procedure: rationing procedure rather than access to justice." *Journal of law and society* 22, no. 2 (1995): 155-188, 167.

*Application of the Principle of Proportionality*

Prioritisation and classification of cases for rationing procedure seem utterly desirable. However, there may be difficulties in proportionate treatment in an effective way. The subjective nature of attributes like seriousness, importance and intricacy, offers difficulty in assessing the relative weight of cases. Despite that difficulty, the scheme of rationing procedure is worth implementing, rather indispensable. Courts can be guided under the procedural law by certain principles in sifting important from unimportant and in determining relative significance and complexity of the cases. Bentham's rules of exclusion of evidence may be relevant here and can be applied. These are that (a) greater evil should not be produced for avoiding a lesser one, and (b) greater good should not be avoided to achieve a lesser good. If allowing certain evidence occasions greater disutility by way of delay, cost and annoyance than the benefit it may entail in the final determination of a cause, it may be excluded on the basis of said rules.[298]

While making an assessment on these lines, it is challenging to determine objectively and quantify 'good' and 'evil'. Bentham uses certain standards to come out of this maze by applying felicific calculus for measuring the degree of pain or pleasure based on seven factors; these are intensity, duration, certainty or otherwise, proximity, fecundity, purity and extent of the number of people influenced.[299] Courts may apply a similar test of felicific calculus in determining the relative importance of cases as well as allowing procedural tools within a case, for instance, while granting adjournments, extending time, dealing with non-compliance of requirements, checking misuse of the process and deciding to proceed or not with the trial. Use of discretion with this mind-set and guided by these principles, would work as a check on the use of available procedural methods and tools.

Differential treatment to various categories of cases need classification and prioritization in view of factors like value of claim, vulnerability of the parties (e.g. minors, low paid employees and labourer, elderly etc.), range of impact (e.g. disputes concerning

[298] Jeremy Bentham (1843) PJP at 10 referred by Sorabji 2014 at p 91.

[299] Sorabji 2014 (n 258) 92.

public works projects public nuisance) and sensitivity and seriousness of matter (e.g. matters involving life, liberty, livelihood and health etc.). For each category of cases, only such time and procedures should be allowed, which is necessary and just. While setting the agenda of civil procedure and elaborating the overriding objective at the very beginning, CPR Para 1.1(2) (c) provides that cases need to be dealt with in ways which are proportionate to (i) the amount of money involved, (ii) importance of the matter, (iii) complexity of the issues and (iv)the financial position of each party. An instance of the application of this principle is three procedural tracks introduced in England in CPR. Para 26.8 of CPR provides that while deciding the track for a claim, the court shall consider the monetary value of the claim, the nature of the remedy sought, the complexity of a case, the number and circumstances of the parties, and evidentiary requirements. These tools can be employed in the case of Pakistan and made part of the new civil procedure rules.

### *5.3.5 Strategy IV – Active Case management but within the Procedural Bounds*

As of principle, the civil justice system has to play within the imperatives of accuracy, expedition and economy in this world of finite resources. Since a model theory of procedural law would centrally position the time-resource constraint reality along with the objective of justice, one possible and effective way to strike a balance between these imperatives is economic use of available resources, smart management and efficient court processes. This strategy needs to be applied both in conducting the proceeding in a single case as well as handling the entire litigation. Proactive and dynamic management approach needs to be adopted as a way of thinking by the judicial leadership, judges, court administrators, lawyers and other operatives of the system. While referring to the accuracy of judgement, expedition and the proportionate use of resources, Zuckerman concludes:

> an adequate system of adjudication of civil disputes must meet [the said] three basic requirements, all of which are as integral as each other to the enforcement of civil rights… [C]ourt adjudication involves inevitable compromises arising from the need to balance competing imperatives or desired goals. Striking such balance is the peculiar business of management…The need for managing competing demands is not peculiar to court adjudication but is a constant in any public service…[as] in reality there is no such thing as a management free

service; there are only well managed services and poorly managed services and many shades in between.[300]

Before Woolf's reform, pre-trial preparation and conducting the trial was mostly done by the lawyers who decided the matters as to the selection of facts to be disclosed, what preliminary objections to be raised, what interlocutory remedies to seek and what witnesses to be produced. Usually, courts would respond and react when parties so desired during litigation. Under the party-control or adversarial principle, the litigants or their lawyers played a dominant role in the progress of the case at all stages, i.e. from pleadings to selection of procedure, settlement of a claim, and evidence. The new procedural law, i.e. CPR, expected the courts to be in command of the litigation by imposing the duty to pursue the overriding objective by *actively managing* the litigation process. CPR 1.4(2) reads:

(1) The court must further the overriding objective by actively managing cases.
(2) Active case management includes –
(a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
(b) identifying the issues at an early stage;
(c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
(d) deciding the order in which issues are to be resolved;
(e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;
(f) helping the parties to settle the whole or part of the case;
(g) fixing timetables or otherwise controlling the progress of the case;
(h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
(i) dealing with as many aspects of the case as it can on the same occasion;
(j) dealing with the case without the parties needing to attend at court;
(k) making use of technology; and
(l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.

The crux of these management strategies is that the court would play a proactive role in dealing with material aspects of a case trying to resolve the matter accurately and quickly as

[300] Zuckerman 2013, (n 62) 5.

far as possible. Besides this part, the CPR also provides other powers to achieve the overriding objective. In the Code of Civil Procedure 1908 of Pakistan, no directions and guidance are provided for the managerial role of the courts. Recently in 2018 one of the province's High Court (Peshawar High Court) amended the rules' part of the Code and inserted a bunch of directions in this regard (Order IX-A Case Management and Scheduling Conference). Rule 1 of this Order[301] enjoins that in each case after receiving the plaint, petition or appeal, the court shall start case management and scheduling conference taking *appropriate* steps to deal with all aspects of the case.

Introduction of this legal provision shows that in Pakistan, efforts are underway to enable the courts to actively manage a case which is undoubtedly the first step in the right direction. No doubt, as of principle, active case management by the courts and scheduling the activities is an essential facet of the litigation process bringing more control to the court. However, as was seen in the case of Pakistan, courts despite having extensive powers could not effectively check delay, abuse and inefficiency. For instance, under section 151, courts can make an order for the ends of justice and prevent abuse of the process.

Given past experience and inability of the courts to effectively check abuse and delays, it is suggested that instead of the phrase 'power to manage cases', the law needs to specify 'duties of the court to take specific measures'. The law may achieve the overriding objective through courts, rather than asking the court to accomplish it through active management. As was argued in the case of Pakistan that the more powers are open-ended and general, the more these would be useless and ineffective. A regime of stringent legal obligations for courts consisting of clear, specific and binding steps, and containing consequences of non-compliance for the judges, can be an answer to the problem. Some practical suggestions are proposed in the next chapter in this regard. Hence, the principle to be followed in formulating the procedural reform is to lay detail binding measures instead of general managerial directions for the courts. Moreover, the law may also provide a

[301] Peshawar High Court Notification 15-J/2018 dated 23-01-2019.

mechanism for the judicial administrators to manage and deal with the entire bulk of litigation and its allocation to various courts.

### *5.3.6 Strategy V - Assessing Adverse Impact of Time*

Dispute resolution through the formal court process necessarily consumes time in procedural requirements and truth-finding process. No doubt hasty, and therefore, likely inaccurate decisions must be avoided in all circumstances, and a reasonable degree of accuracy should be strived at within affordable and minimum possible time. One way to minimise the impact of this disutility of litigation (i.e. consummation of time), is to assess the adverse impact of time on the interests of one or both the parties and by taking steps to avoid these and compensating the party adversely affected. Not only the courts would try to determine the case within a reasonable time but also see how it affects the ongoing interests of the litigants. In each case, the important question for the courts to be addressed at all stages of the proceeding should be that how crucial time is for one of or both the parties during the proceeding and what toll this factor is going to take. For instance, time consumed in a civil suit as to defamation may have no practical impact over the future financial or personal interests of either party. But there can be cases where time is of the essence and highly material for the litigants like disputes as to a property which is the only source of income for one party while it remains in the hands of another party during the pendency of the case. Also, time factor in cases between the ex-partners over the custody of minor kids is crucial.

In cases where exercise of legal rights and enjoying benefits of some office, property or legal status is halted due to the litigation process, time factor needs to be identified in the preliminary stage of the litigation, and the procedure must make it incumbent on the courts to continually monitor that impact and take necessary steps. The traditional approach to civil justice provides solution of such eventualities in terms of cost of litigation or compensatory damages awarded at the conclusion of litigation. But a more proactive and pre-emptive approach is required, and in fit cases, suitable arrangements during litigation should be made to alleviate the ongoing miseries of the litigants affected by the adverse impact of time. Courts need not solely to rely on the final compensatory reliefs to litigants and must strive beforehand, as far as practicable to avoid their sufferings during the litigation. This is

possible only when courts are constantly assessing the adverse impact of time on the litigants' *ongoing interests.*

### *5.3.7 Strategy VI – e-Justice - Use of Information Technology and Communication*

One critical tool of modern management and organisational efficiency is the use of digital technology. Court service has traditionally been considered inefficient and slow, and therefore, information technology can best be used to combat these longstanding issues and make judicial service a better, efficient and quality public service. Case management and court automation through tailored software applications, e-filing facilities, e-communication, recording evidence and hearing cases from a distance through video links, creating virtual courts, integrated system of scheduling and fixation of hearings of the trials and preservation of and access to data are main areas where digital technology can revolutionise the court service in Pakistan. Though it involves cost, it is expected to save time, resources and energy tremendously as can be seen in other public sector services, and corporate and business environment at national and international level.

In the new procedural law of England among several other things, making use of technology is equated with dealing the cases justly as part of the overriding objective of the civil justice system.[302] CPR provided for using telephonic, or video links for recording evidence and using conference calls for pre-trial conferences avoiding the physical appearance of the parties or their lawyers in the courts. In the case of Singapore

> courts take a hard-nosed and business-like approach towards technology … as a strategic force-multiplier in .. never-ending quest to provide enhanced access and convenience and an expanding menu of innovative applications to all who turn to our courts for judicial relief or redress'.[303]

For instance, the milestone of eCalaendering system in Singapore was achieved in 2009 which 'aims to provide a realtime overview of Courts' utilisation and insight into the

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[302] Civil Procedure Rules [England and Wales] CPR 1.1(2)(k)

[303] Magnus, R., and Singapore Subordinate Courts. "e-Justice: The Singapore Story." *Article presented at the Sixth National Court Technology Conference for the National Centre for State Courts*. 1999 <https://pdfs.semanticscholar.org/7d39/b7953e5e4e287ce6a6cd0fd398181807c643.pdf> accessed 03 Sep 2019.

caseload of each Court, to assist the Subordinate Courts in resource planning'.[304] Hence, leveraging technology in case management, justice administration and court proceedings need to be made part of the grand agenda to reform the court system in Pakistan.

### 5.4 Issues of Reform Implementation, Change and Legal Transplant

While formulating a reform package and bringing change in the litigation law and practice, the viability of embedding reform measures on the ground is generally taken into consideration. This aspect becomes more important when the principles and practices of a new framework and foreign jurisdictions are being considered as is the case in this project. Legal transplant and emulating reform measures of other jurisdictions is the practical utilisation of comparative jurisprudence. It is the process of looking into foreign solutions for local problems. Comparative research 'can claim to show the way to a better mastery of the legal material, to deeper insights into it, and thus, in the end to better law'.[305] It is cross-fertilisation of ideas and experiences[306] , and that is why the comparative study is one significant aspect of the reform initiative. For instance, in 2009 after a thorough scrutiny, jury system, though a common-law feature, was introduced in Japan which is a civil law jurisdiction.[307]

The comparative approach appears rewarding when identical issues are tried to be addressed in one jurisdiction through solutions applied and experiments made elsewhere. Such studies also reveal how far these solutions have remained successful there. But it is not without difficulty due to inherent problems of comparability and potential pitfalls. New approaches and principles adopted, and procedural improvements introduced elsewhere, have to be considered with caution while applying these in the functional aspect of district courts in

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[304] Subordinate Courts Singapore Annual Report 2009 <https://www.statecourts.gov.sg/cws/Resources/Pages/AnnualReport.aspx> accessed 03 Sep 2019.

[305] Zweigert, Konrad, Hein Kötz, and Tony Weir, *Introduction to comparative law* (Oxford: Clarendon Press, 1998) Vol 3,33-34.

[306] Walter Joseph Kamba "Comparative law: A theoretical framework" *International and Comparative Law Quarterly* 23.03 (1974): 485-519.

[307] Dimitri Vanoverbeke, *Juries in the Japanese legal system: The continuing struggle for citizen participation and democracy*. (Routledge, 2015).

Pakistan. In this section, it shall be seen what principles need to be generally considered while implementing practical reform measures in a jurisdiction, looking into the home-grown problems and their solution in a comparative context. Following factors and principles need to be considered in this respect.

### *5.4.1 Surrounding Organic Context*

While comparing legal institutions of two or more jurisdictions, and especially when reform experiments are borrowed, issues of varying contextual environment, the difference in legal and political systems, socio-economic conditions and cultural factors need to be taken care of with much caution. State institutions including courts, do function in various in varying geographical, social and political conditions. Natural resources, climate, and physical conditions, social habits and culture, trajectory and level of economic development, political ideology and system, level of education and human development, religious and ethical mind-set, and social stratification and so on are factors which can influence and have an impact the way law and legal institutions including courts function. Even within a country, these variations may exist and pose a challenge to apply uniform solutions to issues across the board. Commenting on this distinctiveness of comparative research approach, Adams concludes that a comparatist tries to 'reconstruct the meaning of foreign law [which] calls for actively engaging its socio-cultural context and, depending on the aim of the research at hand, for a lesser or greater degree of interdisciplinarity and/or external perspectives'.[308] It implies that the more a legal phenomenon is entrenched into local conditions, variant value system and distinct political morality, the more in-depth research into the said externalities would it require.

These externalities are important due to the interactive nature of legal institutions. Rabel observes as to this interactive character of legal institutions:

[308] Adams, L. H. J., and M. van Van Hoecke. "Doing what doesn't come naturally. On the distinctiveness of comparative legal research." European Academy of Legal Theory 11 (2011), 239-40.

> Within the body of scholarship, courts are generally understood both as legal institutions and as political institutions interacting with other legal or political institutions and responding to political, economic, social and cultural dynamics.[309]

Besides mutual interplay of other factors, the germination and historical evolution of legal institutions in a specific cultural and social setting render the legal system inwardly contextualised. 'Legal facts, the legal concepts and the evidence produced of how law operates are all embedded within legal constructs' and therefore the law cannot be studied beyond its organic context.[310] Kamba views that the process of comparison is greatly influenced by three factors, i.e. jurisprudential outlook, social background and legal context.[311] However, for the comparatists, considering the entire context of surrounding conditions and local factors appears asking for too much; it may render them exhausting to account for numerous phenomena, their causal interconnectedness and nexus with legal institutions.

True, that while introducing foreign solutions to local problems, indigenous conditions cannot be ignored altogether, nor legal institutions can be presumed to work in an *absolutely detached* environment and on their own. However, it would also be incorrect to swing to the other extreme i.e. to assume that courts' functioning is fused with social circumstances of a particular jurisdiction so deeply that it renders impossible to make a successful transplant and import reform measures; and on this pretext, doing away with, and disregarding the usefulness of, comparative study. In these extreme scenarios, the best advice for the comparatists is, therefore, to 'watch out, be brave and keep alert'.[312] No doubt a different legal system would remain 'other', but this does not necessarily imply total incompatibility of intent and purpose.[313] Hence, while emulating procedural reform measures

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[309] Jiunn-rong Yeh and Wen-Chen Chang, *Asian courts in context* (CUP, 2014) 5.

[310] John Bell, "Legal research and the distinctiveness of comparative law." Methodologies of Legal Research, European Academy of Legal Theory (2011): 155-176, 164.

[311] Kamba (n 307).

[312] Zweigert and others, *Introduction to comparative law* (referring to Eichendorff) (n 306) 36.

[313] Bell, Legal research and the distinctiveness of comparative law (n 311) 169.

of one jurisdiction to another, a balanced and context-conscious approach with a *reasonable amount of alertness* is required. Law reforms and institutions developed elsewhere, should not be disregarded simply because it is foreign, nor its *foreignness* be ignored altogether while applying it in local conditions. The divergences and similarities may at first be identified and then these may be accounted for.[314]

### *5.4.2 Functionality Principle*

While comparing a particular aspect of law (i.e. procedural law and court process reform in this case), one pragmatic way is to follow the functionality principle i.e. finding 'functional equivalence' of a phenomenon in two jurisdictions in the wake of possible external and contextual disparities. It implies that the legal phenomena or institutions in both comparator jurisdictions must have the same *role*; like should be compared with the like. The commonality of issues and societal goal to resolve these, lead the reformers in one jurisdiction to explore methods applied elsewhere. Commenting on the principle functionality in comparative methodology, Zweigert and others hold that 'the legal system of every society faces essentially the same problems, and solve these problems by quite different means though very often with similar results.[315]

The process of finding functional equivalence is more applicable in legal translation. Since legal terms and institutions are jurisdiction-specific, linguists try to convey these in the foreign language by finding their 'functional equivalence'.[316] It is 'the process, where the translator understands the concept in the source language and finds a way to express the same concept in the target language in the way, in which the equivalent conveys the same meaning and intent as the original'.[317] Applying this analogy to a reform study, the

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[314] ibid 22.

[315] Zweigert and others, *Introduction to comparative law* (n 306).

[316] Susan Šarcevic, "Legal translation and translation theory: A receiver-oriented approach" in *International Colloquium, 'Legal translation, theory/ies, and practice',* (University of Geneva 2000) 17-19.

[317] Marcela Müllerová Shiflett, Functional equivalence and its role in legal translation. *English Matters* (2012) *3*, 29-33 <https://www.pulib.sk/web/kniznica/elpub/dokument/Kacmarova3/subor/mullerova.pdf> accessed 10 Sep 2019.

issues under comparative investigation must be 'posed in purely functional terms'[318] without reference to its local embeddedness if possible. For instance, the problem may be formulated in functional terms, i.e. 'how court service and proceedings can best be *managed* in the district courts to avoid delay and enhance efficiency in a jurisdiction'.

Functional equivalence can be traced by looking into similarities in the comparator jurisdictions. It needs to be established at the very outset that delay, complexity and resultant vexation are endemic in the litigation of the comparator jurisdictions and possibly occasioned, besides other factors, by institutional inefficiencies and procedural defects. Hence, commonality of the problems and their immediate causes would open up possibility of application of foreign solutions to local issues. These similarities as to objectives and issues of the court system, make the solutions attempted elsewhere, relevant. Zweigert and Korz hold that 'as a general rule developed nations answers the needs of legal business in the same or in a very similar way [with] a presumption that the practical results are similar'.[319] However, if the problems are same, instead of being contented with the *presumption* that solutions too would be similar, the comparatist must *test and critically analyse* why these would not be similar.

Importantly, it needs to be investigated in a comparative study whether an institutional judicial process is so deeply entrenched into the cultural and social setting that it can breathe only in that environment. Or else, is it by nature so *mechanical and detached* that it can reasonably be adopted in verbatim or with some modification in the recipient jurisdiction. A solution cannot be rejected merely because it is foreign, nor it may blindly be adopted simply because it worked elsewhere. While considering new approaches, principles and practical reforms in procedural law, it may be analysed whether these are by nature more functional and less based on the moral views, specific ideology and value system of the

[318] Zweigert and Kotz, *Introduction to comparative law* (n 306) 34.

[319] Ibid 40.

society. A comparative study is more viable in those parts of the private law which are relatively 'unpolitical' and where answers to legal issues, as a general rule, are identical.[320]

### *5.4.3 Gradual adaptability Approach*

Future impact of reform measures relative to the institutional issues on the one hand and expected response of the local actors are intrinsically a speculative study. For development practitioners, policymakers as well as researchers, it is challenging to show *futuristically* how the proposed reform and new tools would work in specific conditions. Unless a legal institution is not actually practised in the field in the recipient jurisdiction, it would always remain to be a speculative approach to determine its success or failure and that how the local factors and actors would react to that. Two aspects can be considered relevant in this respect, i.e. gradual adaptation of the new institutions and necessary modification in the local conditions as well as in the reform measures.

A heuristic perspective – i.e. tracing solutions not perfect but practicable and sufficient for immediate ends – needs to be adopted. It shall be seen how a specific problem was resolved through institutional means and procedural methods and why it was resolved in that way in a detached manner. 'Instead of concentrating on studying particular material and isolated provisions, emphasis should be on the comparisons of those specific solutions that each state makes in situations that are practically identical'.[321] It also needs to be considered that specific changes and improvements and necessary working conditions need to be introduced for the reform measures to work in the recipient jurisdiction. For instance, judges and staff can be trained to run the e-communication system and further apprise the users (lawyers and clients, etc.) how to use it.

Foreign solutions can also be applied with operationalise modifications and necessary adaptations. Commenting on the Asian courts in various diverse jurisdictions of

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[320] Zweigert and others *Introduction to comparative law* 1998, 40.

[321] Jaakko Husa, Comparative Law, Legal Linguistics and Methoodology of Legal Doctrine in Van Hoecke, Mark, (eds.) *Methodologies of legal research: which kind of method for what kind of discipline?* (Bloomsbury Publishing, 2011) 217-18.

Asia, it was argued that Asian courts are neither entirely traditional nor result of complete transplantation; rather these are the result of a complex mix of local and foreign content.[322] As to courts in East Asian countries, it is viewed that these have been shaped under the colonial influence of the West as well as the internal urge of modernization besides other factors.[323]

Neither the reform measures nor the local conditions need to be statically positioned in their relevant squares. Reform endeavour must take the heuristic approach, i.e. broadly looking into the possibility of applying a solution tried elsewhere for identical problems and for similar objectives. Having done this, the phenomena of gradual adaptation may also be allowed to work and let the change settle in. Initially, an apparent misfit may face sudden denunciation, but it may later gradually melt down into the local mould adjusting at the end probably perfectly. Hence, gradual acceptability of a foreign product and necessary adjustment of surrounding factors in the recipient jurisdiction is the pragmatic approach to be adopted.

## 5.5 Conclusion

A paradigm shift followed by adaptation and operationalisation of fundamental constructs in procedural law and case management regime is recommended as a possible solution to the issues of delay, inefficiency and abuse of court process in district courts of Pakistan. Theoretical contours of the model framework, i.e. New Civil Procedure Framework (NCPF) are the basis for reform measures for Pakistan's civil litigation in the district courts. In doing so, experiments of two other jurisdictions are also consulted. A paradigm shift is suggested digressing from the existing individualised justice approach and replacing it with an overarching legal theory where a balance between instrumental constraints is the main objective. In support of this distributive or proportionate justice approach (as against the substantive or individualised justice), it is argued that the civil justice system has to play within certain imperatives, i.e. accuracy, expedition and economy. Court decisions not only

[322] Yeh and Chang, *Asian courts in context* (n 310) 8.

[323] Wen-Chen Chang, "East Asian foundations for constitutionalism: Three models reconstructed." (*NTU L. Rev.* 3 2008): 111.

have to be accurate, but these also need to be timely, affordable and arrived at by necessary, minimum and proportionate use of public and litigants' resources. This core agenda may be placed at the centre of the model framework and proposed procedural law of Pakistan while the rest of the legal rules, instructions and powers must be made subservient to this grand objective.

It is further proposed that this new balancing approach can be applied through certain strategies. The first important strategy is to have a strict neo-proceduralist plan replacing the equity-based approach, i.e. the law must dictate the pace and process of litigation where parties are under unavoidable obligation to comply with material procedural requirements and pre-planned timelines and the judges must only *execute the scheme of law with little discretion to condone.* Secondly, in-depth scrutiny of cases in the initial stage must be a fundamental requirement to filter in only deserving cases. Thirdly, at this initial stage, proper assessment of nature and circumstances of each case may be made to ensure a just differential treatment and prioritization, reasonable procedural needs and allocation of proportionate resources and time. The parties may also effectively be forewarned as to possible adverse consequences of frivolous litigation or deliberate default or abuse of the court process. Fourthly, procedural law may provide a regime of mandatory, targeted and specific measures for the courts to take; the overriding objective may be achieved by the law through courts which must execute that scheme of law through managerial tools. Fifthly, the law must require courts to pre-emptively assess the adverse impact of time as to ongoing interests of the parties and take measures to avoid these and award adequate compensation. Lastly, information and digital technology need to be employed extensively in judicial culture, for greater efficiency, economical use of resources and expeditious disposal.

Besides the theoretical framework and strategies to achieve the principal objective, introducing change in the system and bringing in new ideas, involve implementation difficulties. Given the diverse social, political, economic and cultural setting of various jurisdictions and disparities even within a country, a balanced approach is required taking a *reasonable* amount of care to consider the context and relevant externalities. Mainly when foreign solutions are considered, one way forward is to look for functional equivalence, i.e. similarities between issues, objectives and solutions. In addition to that, providing necessary conditions in the local environment and customising the reform measures for local needs may

also be considered. Moreover, change may be afforded an opportunity to gradually adapt, settle and spread roots. The next important step is to propose practical and specific measures in law and at the administrative level to *operationalize* the model.

# Chapter 6. Operationalization of the NCPF Model –Practical Measures

## 6.1 Introduction

Theoretical constructs and specific strategies as to the New Civil Procedure Framework (NCPF) were identified in chapter 5 the crux of which is that through a significant paradigm shift, the distributive justice and neo-proceduralist perspectives may lead the civil procedure and case management reform in Pakistan. It was concluded, on a theoretical plinth that litigation needs to be treated collectively and proportionately and while adjudicating in a pragmatic world, a balance needs to be struck between accuracy, economy and expedition. For that end, a stringent procedural law regime, rigours initial filtering through preliminary inquiry, modern and smart management and use of digital technology are key strategies. Certain guidelines as to implementation issues were also considered, i.e. reasonable care for the context and externalities in the target jurisdiction, necessary adjustment of local conditions and tailoring of the foreign reform measures. Having analysed these theoretical approaches and principles, now it shall be seen how the NCPF framework can be operationalized through practical reform measures and what options for improving civil litigation process and case management system of Pakistan can be considered.

On the foundational layer of the said theoretic model, three pillars of reform measures are proposed to be further erected to complete the NCPF model. The first pillar comprises a bundle of policymaking and administrative arrangements to set the scene for reform, trigger the implantation and then keep up with the ongoing process of review and improvement. The second and third pillars of the NCPF model consist of recommendations as to judicial conduct of cases and handling the workload. Amendments in the procedural law are suggested. These may appear to be one-off steps; however, it is suggested that all changes need to be constantly reviewed and improved under an ongoing reform agenda. All these recommendations are directed to achieve a higher level of efficiency and expedition.

The first pillar of NCPF places the role of judicial leadership centrally, which may nurture the vision for change, and take the command in triggering, implementing and managing the reform process and leading from the front. At this level, the core objective of the civil justice system needs to be centrally positioned in law and policy, followed by

designing and implementing a robust case management system and some critical changes in civil procedure law. The human capital needs to be managed and trained besides leveraging information technology. The superior judiciary also needs to take other stakeholders and relevant agencies in the loop in a collaborative way to implement the reform program.

The second pillar of the reform measures comprises of a host of legal, judicial and administrative measures for initial management of cases. These proposals include rigorous preliminary scrutiny of claims, extensive planning for the entire litigation workload at district level collectively as well in individual cases. Scheduling and pre-trial hearings, pre-emptive measures and forewarning as to consequences of non-compliance are main features of this pillar. The objective of these measures is to allocate necessary and proportionate time and resources to fit cases and economic use of procedures for ultimately lessening the burden of the courts and saving more time for the trial of complex and deserving cases. These suggestions are posited in the principle that *the system* (and not the parties or individuals) should be in control to drive the pace and direction of the litigation. Within the NCPF model and guided by the neo-proceduralist approach, it is suggested that judges may play their role in planning things in consultation with the litigants and the lawyers as far as practicable, and later execute the plan with no room for any noncompliance. This early and prompt treatment of cases would help to filter the undeserving cases, sending fit cases to alternate routes of resolution and limiting the scope of trial only to the material issues.

The last part of the chapter - the third pillar of the NCPF model – comprises of suggestions as to the trial and hearing stage. Once the preliminary treatment is effectively completed, and the course is well planned and scheduled, judges must have no or very little discretion from that stage onward to do away with material requirements and condone deviation from pre-planned timelines. In the NCPF regime, judges would be under a legal obligation to impose consequences of default or non-compliance. The suggestions also include amendments in adjournment law and powers of the court as to misuse of the court process to make these legal provisions effective and operative. The regime of costs which courts are empowered to impose as to the expense of litigation, for compensation against vexatious claims and as to non-compliance and default of procedural requirements, are also discussed in detail as measures to regulate potential unbridled culture and behaviour patterns of misusing court service at will. It is also suggested that in the final determination of the

case, where a judge is in a better position to make informed decision based on material on record, stern actions may be taken to arrest corrupt practices; civil courts must give their findings regarding frivolous litigation and deliberate false representation of facts and then referring those to the criminal courts who appear to have committed offences against administration of justice.

Having already treated the foundational theoretical layers of the NCPF model in chapter 5, now three main areas of practical reform measures and recommendations, i.e. Macro Level Initiatives, Preliminary Scrutiny of Cases and Stringent Execution of Procedure shall be discussed in detail in this chapter. Figure 14 below shows the overall picture of the New Civil Procedure Framework (NCPF) for Pakistan.

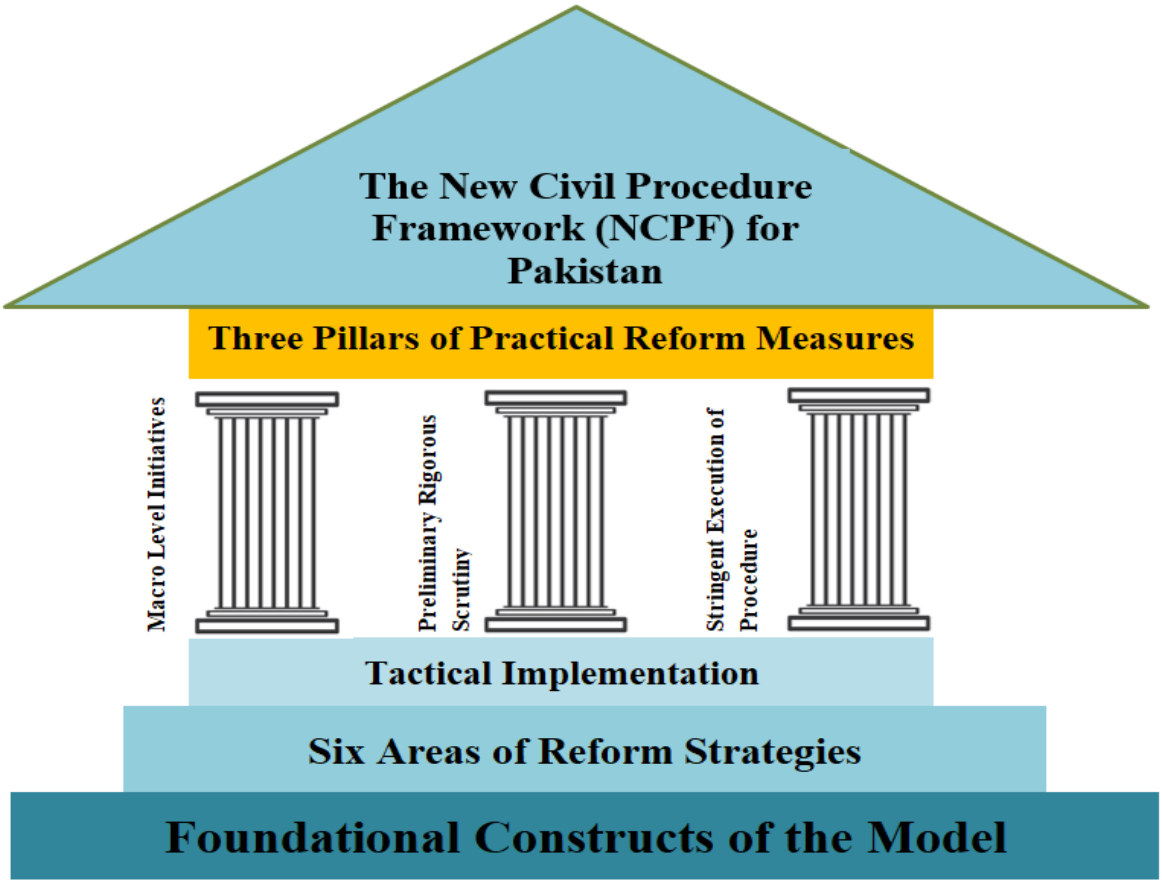


**Figure 14 Model Theoretical Framework and Practical Reform Measures.**

## 6.2 Macro-Level Initiatives and Setting the Scene – the First Pillar

Bringing change in the institutional and functional aspects of district courts, the active role of the judicial leadership and drastic policy initiatives at that level is an indispensable trigger to kick-start the NCPF model. The superior judiciary, being in command of the district judiciary, shall set the agenda, design the reform program, and monitor its implementation and ensure to keep the reform process go on. For these objectives, human capital management, modernisation of case management, incorporating digital justice or e-justice regime, and collaboration with other key actors, stakeholders and institutions are the key areas of proposed activities.

### *6.2.1 Judicial Leadership - Role, Vision and Agenda*

Constitutionally and in practice superior judiciary of Pakistan has exclusive command and control over the district judiciary. Therefore, their leadership role, vision and expertise, their drive to improve the system and effective supervision certainly plays a crucial role in upgrading the system. Example of Singapore can be viewed in this respect where the success story of state of the art and modernised judiciary was initially triggered and then seamlessly led by excellent individuals who guided through the reform process throughout. Yong Pung took over as Chief Justice of the Supreme Court in 1990 having the background of a banker and experience of management on key positions in the public sector. His team included the Registrar of the Supreme Court and one specialist (i.e. Richard Magnus - the key architect of the subordinate judiciary reform). These individuals are cited to be the main drivers of the reform process in Singapore who initially built around them a team of senior judicial officers and court administrators and trained them in the modern management discipline. They ignited and equipped the workforce, and effectively shared the reform vision and motivated the subordinate judiciary. Malik comments on this aspect of Singapore's journey:

> While inclusiveness and teamwork are hallmarks of a successful strategy, any reform initiative requires a strong leader to motivate and direct the process.[324]

In case of Pakistan, the onus of legal and moral obligation of running the administration of justice effectively and efficiently rests mainly on the superior judiciary as it has the constitutional mandate, necessary administrative and financial autonomy, and exclusive supervisory control over to the subordinate judiciary. Its role is pivotal in providing an efficient, inexpensive and expeditious court service and transforming the existing system. Whether initial impetus for change sprouts from within or outside, the process needs to be carried forward by the superior judiciary itself but without undermining the role of other constitutional state actors and democratic and political institutions; rather it can be done with the support of and in collaboration with these entities. For the reform process, it is indispensable that the top judicial leadership in tandem with other political bodies takes the foundational steps at the macro level and then monitor it as the process goes on. This is the most important and crucial first step towards genuine and effective reform endeavour, and superior judiciary can lead from the front and undertake this huge task in collaboration with other institutions and taking in the loop other stakeholders.

### *6.2.2 Legal Forum and Reform Policy*

A constitutional and legal platform is required for the superior judiciary to provide a formal and institutional base for the NCPF model to stand on. This institutional platform already exists in the shape of National Judicial Policy Making Committee (NJPMC). Under the Constitution of Pakistan, each province's High Court has exclusive administrative control and supervision over the district judiciary as to all districts within the purview of a province. However, in 2002 this statutory forum, i.e. NJPMC was created through an enactment (i.e. the National Judicial (Policy Making) Committee Ordinance 2002) for articulating and implementing a uniform judicial policy for the entire country. The Committee consists of the Chief Justice of Pakistan as its Chairman and the Chief Justices of the provincial High Courts

[324] Walid H Malik (2007) p xxiii

as its members. Importantly these members are the administrative heads of the district judiciary in their respective provinces. The Ordinance lays down following functions of the Committee:

> **4. Functions of the Committee**.- The Committee shall coordinate and harmonize judicial policy within the court system, and in coordination with the Commission, ensure its implementation. The Committee shall also perform the following functions, namely:-
> (a) improving the capacity and performance of the administration of justice;
> (b) setting performance standards for judicial officers and persons associated with performance of judicial and quasi judicial functions.
> (c) improvement in the terms and conditions of service of judicial officers and court staff, to ensure skilled and efficient judiciary; and
> (d) publication of the annual or periodic reports of the Supreme Court, Federal Shariat Court, High Courts and courts subordinate to High Courts and Administrative Courts and Tribunals.[325]

Since effective execution of NCPF model can be through an institutionalised setting, the said law is inadequate; it is silent as to *the grand objective* of this arrangement, binding nature of the policy, and enforcement mechanism of the recommendations of the Committee. It also has limitations as to the scope of functions of the Committee and issues of consistency of the policy. Therefore, it is recommended that amendments may be proposed to further elaborate and expand the functions of the Committee and have the reform process meaningful, incremental and ongoing. For the NCPF model to be operationalised, such improved and effective institutional platform is indispensable. Reform initiatives of this apex forum generally need to be binding on all relevant agencies, whether judicial or executive. It is also recommended that while formulating policy recommendations by the NJMPC, these may be overviewed by the elected and parliamentary bodies to keep the process move forward in a democratic milieu. Also, the composition of the Committee needs to be expanded to include public representatives, justice reform specialists, officers from lower judiciary and district court lawyers.

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[325] The National Judicial (Policy Making) Committee Ordinance, 2002 [Pakistan] s4

### *6.2.3 Policy Document and Annual Plans of the NCPF Model*

Before executing the NCPF model on the ground, it may first be designed on paper. For operationalising the framework, a single policy document needs to be formulated. The NJPMC forum may, after extensive deliberations and consultation with the essential stakeholders, i.e. Ministry of Justice in the Federal Government and provincial Law Ministries, justice reform experts, legal community and district judiciary. This document may contain the institutionalised vision, objective and overall direction of the model, theoretical constructs, principal strategies, planning and major areas of practical measures. This policy document may reflect the paradigm shift in judicial thinking and the new approach regarding civil justice and court service; it may serve as a mission statement based on the new approach underlying practical reform measures and targets.

Besides this single direction-setting document, the NJPMC may also issue yearly planner containing all targets to be achieved and activities during the year in a phased manner providing a *roadmap for gradual progress.* This proposal is based on the model of Singapore's incremental reform process. In England, the civil procedure reform came as a big bang replacing the existing edifice altogether, in one go and entirely with the introduction of new CPR. In Singapore, however, the process was slow, gradual and incremental. This approach suits Pakistani litigation culture due to multiple socio-cultural factors. The human fabric of the society generally and the key actors in justice sector (judges, lawyers, government officials and even superior judiciary) appear to have attuned to the traditional court culture as there seems no significant and widespread drive or substantial resistance against the maladies of justice system nor any urgency can be traced for putting things upside down. These actors appear to have well-adjusted and complacent with the status quo and may try to improve by remaining within the four corners of existing ideology. Moreover, given the poor state of education, the litigants and general public may also take time to adjust with the new legal culture. Since the NCPF model is stringent and may contain harsh measures, it will take longer to *tolerate* and assimilate it.

This incremental approach was one of the key strategies adopted in Singapore's justice reform journey. From 1992 to 2001 nine Judicial Work Plans were designed and executed. It is observed:

> Judicial reform is a medium- to long-term process that requires timely feedback on the impacts and results of change. To address this need, Singapore's courts introduced varied reviews and established milestones against which progress has been monitored.…. The annual work plans were used to draw lessons and set new milestones. These plans were then used to mobilize organizational resources to accomplish results. Taken together, the annual work plans launched since 1992 have implemented and institutionalized about a thousand initiatives.[326]

Besides the strategy to let the system settle in slowly, the incremental approach would also provide an opportunity to monitor the progress and impact of various measures and their necessary modification. Feedback of the key functionaries and users can be of immense importance in the gradual adaptation of the new system.

### *6.2.4 Core Objectives of the New Procedural Law Regime – A Paradigm Shift*

The foundational layer of the NCPF model contains a core objective of the civil justice system. As elaborated in chapter 5, the principal aim is to treat cases justly by a proportionate allocation of time and resources, by balancing between accuracy, expedition and economy, and by adopting a stringent neo-proceduralist and strict compliance-based approach. To achieve this normative and comprehensive objective in practice, it must first be placed at the heart of the primary legislation, i.e. in the first part of the Code as is done in the CPR where the overriding objective of the civil justice is incorporated at the very inception. It must be made obligatory for the judiciary as a whole as well as individual judges to achieve this objective through enforcement of the scheme of law. The existing procedural law regime is devoid of any such direction-setting provisions. The proposed part must be legally binding to be followed while legislating other legal provisions of the new code, or the secondary legislation part of the Code (i.e. detail rules) and while issuing instructions and practice directions to the subordinate judiciary. All court functions, powers and proceedings must be subservient to that core agenda and principles laid down; judges must also follow these while interpreting the rules, executing the law and processing the litigation. Detail rules (i.e. the

[326] Waleed H Malik 2007 (n 137) 51.

second part of the Code), must also be reformulated by all the High Courts in accordance with the principal aim and these principles.

This proposal have similar background as that of Overriding Objective introduced in the new English Civil Procedure Rules (CPR) which in unequivocal terms set the purpose of the civil justice system at the very outset declaring in CPR 1.1(1) that this is a 'new procedural code with the overriding objective of dealing with cases justly'.[327] The term 'justly' is further elaborated in CPR 1.1(2) as ensuring equality, expedition, proportionate treatment, and fairness. CPR 1.2 further provides that the court must seek to give effect to the overriding objective while exercising any power under the CPR or interpreting the rules; courts must further the overriding objective by actively managing the cases (Rule 1.4 CPR). Hence, the overriding objective is not only an agenda of the civil justice system, but it is also a binding direction as well as an empowering procedural tool– it represents an unswerving and rationalised commitment to provide justice. The intention behind this explicit statement appears that while applying and interpreting detail procedural requirements, the ultimate purpose of civil litigation (i.e. just decision within a reasonable time and at an affordable cost) should in no way be lost sight of during all stages of litigation. Not only the courts, but the parties and lawyers are obliged to act within the ambit of the overarching objective.

Similar legal provision may be introduced in the new procedural law under the NCPF for Pakistan setting the overall direction and principal objective of the civil justice, i.e. courts collectively and individually are under the mandate to resolve civil disputes (a) justly, (b) within reasonable time, (c) with minimum and proportionate allocation of resources, (d) only in deserving cases, (d) by effectively preventing misuse of the judicial process (e) employing smart procedural and managerial tools and (f) by using affordable digital technology. All legislative, administrative and judicial actions must be made subservient to this mission statement of the new procedural law regime.

[327] CPR 1.1(1)

### *6.2.5 Making Functional a Dynamic Case Management System*

When a committed judicial leadership have set the agenda through a central direction-setting document, the next important measure is to design the new case management system and incorporate it in the new civil procedure law. Code of Civil Procedure 1908 originally and as adopted and amended by each province from time to time had a scheme which exclusively focuses on the way a court shall deal with *a single case*. Though the compendium of High Court Rules and Orders Volumes I to IV (compiled in the 1930s) is adopted by all provincial High Courts to be followed in administrative and managerial affairs of district courts,[328] yet these instructions have no mention of managing with the litigation as a whole and the process of a single case. Management of litigation needs to be introduced in the law at three levels: (a) handling the entire district's litigations by the district administrator judges, (b) managing all cases sent to and entertained by a single court and (c) processing and managing the pace of an individual claim by a court. These important managerial tasks appear beyond the purview of existing procedural law.

English procedural law under the Woolf reform, i.e. CPR promulgated in 1999 introduced case management as an important function of the court. CPR mandates that to achieve the overriding objective of civil justice, cases need to be actively managed. CPR 1.4 reads:

> **Court's duty to manage cases**
>
> (1) The court must further the overriding objective by actively managing cases.
>
> (2) Active case management includes –
>
> (a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
>
> (b) identifying the issues at an early stage;
>
> (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
>
> (d) deciding the order in which issues are to be resolved;
>
> (e) encouraging the parties to use an alternative dispute resolution (GL)procedure if the court considers that appropriate and facilitating the use of such procedure;

[328] For instance Lahore High Court has provided these volumes on it official website <https://www.lhc.gov.pk/rules_and_orders> accessed 24 Jul 2019.

(f) helping the parties to settle the whole or part of the case;
(g) fixing timetables or otherwise controlling the progress of the case;
(h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
(i) dealing with as many aspects of the case as it can on the same occasion;
(j) dealing with the case without the parties needing to attend at court;
(k) making use of technology; and
(l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.

These directions and guidelines under the CPR appear more focused on the proceedings of a single case by a court which is though quite important, but in case of Pakistan it is suggested to cover all the three levels of litigation management as mentioned earlier as (a), (b) and (c).

Recently some attempts are made in Pakistan to introduce case management framework. For instance, in Khyber Pakhtunkhwa province, Peshawar High Court introduced in 2018 a new whole chapter, i.e. Order IX-A 'Case Management and Scheduling Conference' in the Code of Civil Procedure 1908.[329] These amendments appear to be the first legislative effort to formulate guidelines and introduce case management. Rule 1 of this new Order IX-A provides that the court shall under its own supervision and invariably in each case start 'case management' and 'scheduling conference' and these terms imply expeditious disposal of cases, control of the court over the case, discouraging wasteful pretrial activities, improving quality of trial by getting things prepared by the litigants and lawyers, encourage cooperation and by conducting scheduling conferences.[330] These goals are well-directed but need to be operationalized in the practical world. The amendment is a step in the right direction telling what to do; however, further detail guidance is required to know how to do it. A judge should know very clearly how to proceed and manage the process and deal with all possible hindrances and factors which cause the delay. Lahore High Court has made an attempt in 2017 producing a document namely 'Case and Court Management District

[329] Peshawar High Court Notification No.15-J/2018 dated 23/01/2018 published in Official Gazette

[330] Peshawar High Court Amendments in CPC 2018.

Judiciary Punjab 2017'[331]. However, a more comprehensive and wide-range package of instructions is required for all the districts of the provinces.

Case and time management regime in district courts can be introduced and incorporated in (a) primary legislation, (b) secondary legislation or rules, (c) detail instructions and (d) yearly plans for each province and district for monitoring and evaluation purposes. Amendments may be introduced in the primary legislation part of the Code of Civil Procedure 1908 (i.e. sections 1 to 158) by the provincial legislatures providing a broad framework of the case and time management system in the civil litigation. This primary legislative part must bind all the actors to follow the scheme of the system while making, interpreting or executing the relevant rules and instructions and while processing cases. At the second level, since High Courts of the provinces have powers under section 122 of the said Code to amend or add rules in the second part of this Code (secondary legislation consisting of detail rules), detail instructions need to be introduced here. It will provide a single authentic and enforceable legal document, replacing sporadic instructions and guidelines issued through various notifications and orders of the High Courts from time to time. These rules and directions may clearly and in sufficient detail oblige the judges, lawyers, litigants, witnesses, officials and other relevant actors to follow and comply with these. Most importantly there must be consequential provisions strictly dealing with any default or non-compliance through penalties. Key amendments and proposals as to these detail rules are proposed in detail in section 2 and 3 of this chapter.

At the third level, the National Judicial Policy Making Committee need to issue a policy document for execution and monitoring of the case and time management system. This document, (which can be called as Case and Time Management Policy) may elaborate the administrative role of the High Courts and district courts to monitor and take all practical steps for the introduction and incremental settling in of the new system. For instance, a future date may be clearly set for coming into force of the new regime of procedural laws and all the

[331] Lahore High Court, 'Case and Court Management District Judiciary Punjab' (LHC 2017) available <https://www.lhc.gov.pk/system/files/CMP_Booklet_DJ_%28Revised%29_Updated_Update.pdf accessed 29 Jul 2019.

stakeholders may be sufficiently trained how to run the system and how to manage difficulties of bringing change. The Case and Time Management Policy may also provide specifically for general instructions as to training the judges and evaluating their performance relative to the compliance requirements of the case management system.

Lastly, each High Court should formulate a yearly plan for the whole province as well as for each district assessing the available time, human and financial resources realistically, and court facilities on the one hand and the volume of cases, i.e. the backlog and pending cases as well as those filed during the year. This planning may help the High Courts to allocate resources proportionately as per the needs of each district. For instance, expected pendency of cases in district X per judge is high, judges from other districts having relatively low pendency per judge can be transferred there permanently or temporarily. This administrative measure can also be used in districts where relatively there are more old cases. The planner may also help the administrative judges and the High Courts to weigh the overall burden of workload, the number of courts available, complexity of each case, amount of time genuinely needed for various proceedings in those and the amount of time available with the district courts. The plan may also lay realistic targets for each court, making provisions for training of the judges, court administrators and staff and ultimately assessing the performance in an objective way.

To summarise the process of *designing a case management system and making it functional,* the following steps are required:

a. Amendments in the statutory part (ss. 1-158) of the Code of Civil Procedure 1908 may be proposed and sent to the parliament and provincial legislature for consideration and formal legislation.
b. All four provincial High Courts and ICT High Court may reformulate, overhaul and propose drastic amendments in the First Schedule of the Code of Civil Procedure 1908, which deals with detail rules as to civil procedure. This new regime of civil procedure may be approved by the Committee and reviewed from time to time.
c. Each High Court may also draft a manual of instructions regarding case management for guidance for the district judiciary.

d. Each High Court may also formulate a yearly case management plan for the whole province as well as for each district.
e. All these steps may cover management of the litigation as a whole at the provincial as well as at the district level, and provide for management of cases of the district collectively and also individual cases by a court.

### *6.2.6 Managing Human Capital and Administration*

Human resource is pivotal for the achievement of the organisational goal, and therefore, its management is a crucial strategy. Issues of performance relative to the efficiency of process and timeliness of service may have causal links with the human capital employed; improvement of institutional performance can be made by developing and reorganising this vital constituent of the organisation. Though this project mainly deals with attribution of the problems of delay and congestion to the procedural law regime and case management aspects. However, while making reform proposals, it cannot at all be denied that triggering a change in functional aspects of the court system and putting into operation and monitoring the impact of a new procedural law regime is not possible without upgrading the human component of the justice system. Besides having a visionary, dynamic and pro-active judicial leadership at the top, the technical expertise, training, discipline, and motivation of the workforce (i.e. judges, court administrators and paralegal staff) are significant factors for change. Hence, while designing and initiating a new regime of procedural law and case management system, its operationalisation and execution necessarily call for committed, capable and motivated planners, administrators, specialists and field workers to execute the system.

The leadership needs to instil inspiration and consistent motivational zeal among the subordinate workforce to pursue the agenda of change and reform in spirit as well as in content. A training module may be prepared for the judges and conveyed to them online or through training sessions in the provincial and federal judicial academies in line with the new regime and change in courts' working. District court judges and staff need to understand the new vision and improved system and skills to run it effectively. The training modules must be updated from time to time, and subordinate judges need to be imparted refresher courses.

Besides training for change and execution of the reform measures, subordinate judges and bar members must be engaged not only in the initial process of formulation of the

reform package but also in its updating and related issues and difficulties of execution; the policy document and reform drive need to be fluid and reviewable from time to time and subject to change in consultation with the key stakeholders. A top-down approach tradition (i.e. where a policy and reform measures are prepared at the top level and simply *imposed* in the field through the managers and field workers) may be replaced by an approach of engagement and taking ownership of the reform process by the subordinate judiciary. Judicial tasks may be separated from the managerial and administrative functions of the case and court management. Judges should only be hearing cases and conducting trials and adjudicating upon legal and factual matters. Other tasks which are non-judicial and are more management-oriented should be handed over to the expert non-judicial staff, administrative judges, specialist court managers and IT professionals.

One major cause of consistent adjournments or discontinuance of court proceedings, as was seen in the empirical analysis of Lahore District Courts Survey, was the transfer of judges or their engagement in administrative meetings etc. This implies that when a judge is not available on a day for any reason, *his* court would remain inactive and cases shall necessarily be adjourned by the court staff and no other judge would be temporarily assigned to conduct proceedings there. Presently, district courts in Pakistan are assigned to individual judges and in their absence, *their courts* remain vacant and dysfunctional; hence, energy, time and resources of litigants, witnesses, lawyers and other officials appearing in the court are wasted in case the presiding officer is absent for some reason. To cope with this eventuality, the High Court and the administrative judge in the district must have a stop-gap plan: it must be ensured that when cases are pre-scheduled and fixed in a court, a judge is always available for that day. For that end following suggestions and administrative steps may be considered:

- Courts need not be allocated and presided over exclusively by a single judge during the tenure of his posting in a district. Cases must be heard in the courts, and not by specific judges who may be swapped and shuffled as and when required.
- All holidays of the judges need to be pre-planned well before time and in consultation with a central scheduling system. When the judge is expected to be on holidays, no case may be fixed for that period or else some other judge may take over during that period.

- Vacancy due to urgent and unforeseen incidents must be catered for by replacing another judge from the same district or the adjoining district. For instance, for certain number of districts a judge may be assigned to reach and conduct proceedings in court where presiding officer becomes absent due to some emergency.
- Posting and transfers of the judges should be managed in such a way and pre-planned that court proceedings and hearings are not affected. Similarly, administrative meetings of the judges and other official assignments may be scheduled to avoid conflict with hearing dates in the courts.

### *6.2.7 Institutionalised Empirical Evaluation and Monitoring of Court Performance*

As discussed earlier (chapter 1 s.1.4.2), justice reform initiatives are viewed by some scholars to be 'based on inadequate theory, selective evidence and insufficient evaluation'[332] in the scholarship. It has also been elaborated that internal scrutiny of judicial performance in Pakistan is inadequate as the judicial statistics in shape of annual reports merely represent numeric information and keep short of an evaluative analysis (chapter 3 s.3.2.2). Also, the absence of qualitative feedback of the litigants in the official evaluation practice and its dearth in the scholarship (chapter 4 s.4.3) are gaps which need to be filled while pursuing a reform project. Therefore, empirical evaluative process based on in-depth analysis of judicial data, litigants' experience and comparative research must be made a permanent feature of the administration of justice. The cyclic process of policymaking, its execution through practical reform measures, appraisal of results and then reviewing the policy and modifying the measures must be a continuous process. In the Singapore experiment, the appraisal process was formalised. It is observed that:

> As the complexity and scope of reforms have increased over time, judicial policy makers have begun to institutionalize the functions of monitoring, evaluation, and control of both the reform process and day-to-day operation of the courts. A Research and Statistics Unit was set up to assemble information and data for policy decision making, fine-tune improvements, and take corrective actions where necessary. [333]

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[332] Armytage, *Reforming Justice: A Journey to Fairness in Asia* (n 21) 2.

[333] Waleed H Malik 2007 (n 137) 52.

Hence, instead of being sporadic and infrequent, execution of reform measures, evaluation of their impact, needs to be monitored, assessed and controlled through an institutionalised mechanism and consistently. Consultation and feedback from the judicial personnel, litigants and other stakeholders must be employed as a permanent feature. For continuous upgrading and development of the system academic research, empirical inquiry, comparative studies of other jurisdictions, and consultation with justice reform experts need to be given due place.

### *6.2.8 Collaborating with other Agencies and Stakeholders*

As was discussed in chapter 3 (s.3.1.6), the superior judiciary has got complete administrative control over district courts in the policy-making process as well as in the day-to-day supervision and monitoring. Besides that, respective High Courts also have got considerable financial autonomy. This arrangement has ensured the independence of judiciary quite effectively. However, it has also resulted in the tight compartmentalisation and reactive aloofness of judicial administration from the mainstream political actors and state functionaries. As hinted in chapter 3 (para 3.1.6) in the peculiar political milieu of Pakistan, the tensed relation between judiciary and executive has further stretched the void even to the areas where both organs of state can or should work together for the betterment of the justice system without compromising judicial independence.

Also, it was observed (while evaluating district judiciary and overviewing the role of judicial leadership) that there exists no substantial cross-jurisdictional cooperation and collaboration between Pakistan's judiciary and international justice agencies and other countries' judiciaries. Academic comparative research studies are also conspicuous by absence. To revamp the judicial system, Pakistan's judiciary needs to open its ties with relevant actors and institutions both within and outside the country. Given the limited economic resources and dilapidated state of Pakistan's overall economy, learning from the experience of other jurisdictions and international organisations can be relatively inexpensive as compared to home-grown experiments and possible error and trial hiccups. The approach, as adopted in Singapore, has the potential to leapfrog towards a beneficial collaboration and concerted effort.

Inside the country, two examples of co-operation with internal agencies can be considered, i.e. with land record department and contract registration authorities. Seventy to eighty per cent of Pakistan's population is rural and the majority of civil disputes in these areas relate to agricultural land and record of rights. Since the land record system and registration is mostly manual and outdated in Pakistan, civil disputes take too long to collect evidence and decide rights in this domain. The land record and official documents as to immovable property, which is extensively used and relied upon in the civil litigation, are maintained in centuries-old Persianised Urdu version not comprehensible by common litigants.[334] Judiciary may work together with land record departments to have access to a modernised, computerised and authentic data of land record to minimise the time of trial consumed in procuring manual evidence of record of rights.

The second example of the collaboration of judiciary with the outside world can be the liaison with contract registration authorities. It usually takes time to prove contracts between parties in the courts especially through oral evidence. Executive departments responsible for maintaining a register of contracts may develop a digital database of such contracts, its contents, photographs and videos of the execution of contracts by the parties and their biometrics and then providing access to courts to get disputed contracts digitally verified. This may take far less of courts' resources and time in establishing disputed transactions. With a mutual understanding of the issues, constraints and potential capabilities of each other, judiciary and executive departments can better develop such innovative tools to curtail delay and infuse efficiency in the litigation process.

The Singapore experiment of judicial reformation shows that the strategy of building bridges was implemented by developing ties and liaising with the outside world. Under this extrovert approach, the leadership and the reform team cultivated long-lasting seeds of interaction and cooperation with relevant agencies within the country and outside. They developed links with judiciaries of Australia, the UK, Norway, and the US besides international academic and justice agencies like National Centre of State Courts, Institute of

[334] Siddique, *Pakistan's experience with formal law*, (n 88) 139.

Judicial Administration of Australia, and some UN entities.[335] Chief Justice of Singapore Subordinate Courts observed:

> These knowledge networks enable us to expeditiously acquire a vast array of critical know-how and best practices, including technology. We have thus been able to leapfrog and to avoid costly learning experiences. We are grateful to the various court administrations which have unstintingly shared their wisdom with us.[336]

Besides the links with other agencies and organizations, it is also proposed that at local level in the districts, Court Users Committees may be formed consisting of litigants, local elders and other representatives. The district judicial administrators may take feedback from these Committees, listen to the litigants' problems and try to resolve issues specific to the local conditions of a district.

### *6.2.9 Use of Digital Technology*

Use of information and communication technology (ICT) in the justice sector is required at provincial High Court as well as district level for allocation, management and distribution of the workload among the courts. In this respect, following factors may be taken into consideration which includes, but are not limited to:

- Organic needs of the justice sector and compatibility of the technology with existing or new procedural law and case management system.
- Required structural changes and resources, issues of transition, gradual adaptation and operationalisation of the new digital system.
- Recruitment and training of IT experts and managers, and adaptability of digital culture by the judicial leadership, existing workforce, the lawyers and litigants, other legal and relevant government agencies.
- Compatibility of the new system with contextual realities, cultural, geographical, socio-economic conditions and regional diversity within the jurisdiction.

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[335] Magnus, *e-Justice: The Singapore Story 1999* (n304).

[336] ibid 5.

Having these major areas and factors in view, the following practical steps are proposed in this direction.

*Digital Case Management Software and Integrated Scheduling Diary*

Since cases are mostly entertained within the district courts and normally the parties and subject matter is local to the territorial area of a district, it is advisable that these cases are handled by the respective district judicial administration through a uniform data management and integrated case diary system within the district. Cases may be entered in the software at the very inception by giving each case a unique reference number which should remain the same in the court of first instance as well as in appellate courts showing when exactly the *controversy* was brought into the court by certain parties and as to what subject matter (i.e. property, contract, business etc.). At the very beginning and through an initial and tentative inquiry by the administrative judge, cases may be put into different categories as to their sensitivity, urgency and complexity. The system may also have a record of the available courts having permanent presiding officers posted in the district as well as judges who can be available if some courts become vacant temporarily and as a stop-gap arrangement. Cases may then be allocated to the courts for preliminary hearing and detail scrutiny (to be discussed in detail in the following section) at the first available date for such category and the digital software may help the administrative judge make such allocation.

The court to which a case is allocated then may conduct preliminary proceedings and record key findings in the digital system; in case, if it is considered necessary, it may be sent to the trial stage with clear timelines, scheduling and fixing responsibly and pre-planning all other matters. The software then would assist the administrative judge in fixing dates of trial and hearing in view of the availability of judicial time, courts, presiding officer etc. Key stages of the trial may also be recorded in the system with its ultimate result. Later these cases may further be monitored and managed by the administrative judges as well as the appellate judges in appeal stages. In short, the whole purpose of digitizing the case flow software is to allocate cases relative to their specific needs and proportionate to available time and resources, manage and monitor the entire litigation workload of the district, and streamline and pre-plan the proceedings and track the life-cycle of a single legal controversy through all stages.

*Digital Access and Communication between the court system and outside world*

Court functioning involves the process of two-way communication, i.e. receiving information by the court and communicating with the outside world. This involves receiving claims, relevant papers, official record etc. by the courts and sending information to the litigants, lawyers, and official agencies etc. This process needs to be inexpensive, time saving and efficient. Secure digital communication through officially controlled software, the internet, mobile SMS services and telephonically can be a way forward in this direction. Though digital information culture has swayed most aspects of our life, using it as a procedural tool in the justice sector of Pakistan has yet to find roots. No doubt some steps are taken by way of amendments in the procedural law to use these communication tools, but these changes may prove to be piecemeal and ineffective if not supported by an organised support system, expert digital communication handling and necessary equipment. For instance, in the Code of Civil Procedure 1908, Peshawar High Court amended the rules and provided for service of summons through short message service, email, publication on the official website.[337] But the rules are silent as to how this shall be done; necessary infrastructure and expertise need to be part of these developments.

It is therefore proposed that at the provincial level and under the respective High Courts, a centralised digital system needs to be implanted managed and controlled by the IT experts linked to the district judicial administration of each district. The IT wing of the High Court may provide necessary training to the judges and court staff and provide support services. Each district may also have an official digital communication system linked to the central system and controlled by the district court administrators.

One important use of the system is to serve summons and notices through electronic means. A most effective way of sending information to a person appears to be through mobile phone service due to the fact that in Pakistan mobile SIMs and numbers are registered in the

[337] Code of Civil Procedure 1908 [Pakistan] Peshawar High Court Amendments vide Notification No.15-J/2018 dated 23/01/2018

name of users through the process of Biometric Verification System.[338] The official teledensity indicators of 2018 show widespread use of mobile, i.e. 72.8 per cent cellular mobile users or 150.2 million cellular subscribers.[339] This data also finds support from the World Bank's data indicating that in 2017 73 per cent of the population had a mobile-cellular subscription.[340] Hence, cellular technology is one effective mean of court communication. Other options like secured internet especially communicating with lawyers in their chambers may also be considered.

*Online Hearing and Recording of Evidence*

The IT establishment in a district may also offer the facility of video-linked conference and communication. A litigant, witness or a lawyer in one district may appear in the IT facility of the judicial setup in that district and may be linked with another district's court for recording statements and submission of oral arguments. The issue of availability of internet facility in all areas of Pakistan may be a difficulty. But the use of the internet and digital access is a fast-growing trend in Pakistan. For instance, in 2000 only 0.1 per cent of the population used the internet but in 2018 broadband subscribers are around 58 million and broadband penetration crossed 28.3 per cent.[341] Majority of the districts have internet facilities and it is reasonably expected that other districts may have it in future. Even otherwise, it does not appear to be a huge task to procure internet facility at the official level at the district headquarter. Recently Supreme Court of Pakistan launched its first-ever e-Court hearing – in a murder case appeal the Supreme Court Judges in Islamabad (Principal Seat) heard

[338] Pakistan Telecommunication Authority *Biometric Verification* available at https://www.pta.gov.pk/en/biometric-verification accessed on 06/08/2019

[339] Pakistan Telecommunication Authority *Annual Report 2017-18* available at https://www.pta.gov.pk/en/data-&-research/publications/annual-reports accessed on 06/08/2019

[340] World Bank *Mobile Cellular Subscription (per 100 people)* available at https://data.worldbank.org/indicator/IT.CEL.SETS.P2?locations=PK accessed on 06/08/2019

[341] Pakistan Telecommunication Authority *Annual Report 2017-18,* (n 339) x.

arguments of lawyers through video link from Supreme Court Branch Registry at Karachi which is 900 miles away.[342]

## 6.3 Preliminary Scrutiny, Planning and Pre-emptive Measures – 2nd Pillar

To achieve the objective of proportionate allocation of resources, here, specific measures are proposed to deal with the cases with a pre-emptive approach. These initial steps would afford the court administrators and the judges an opportunity to take an informed decision in a single case as to its requirements, the amount of time it deserves and procedures to be applied. At the very inception, the judge must go to the heart of controversy as presented by the parties and assess how each case needs to be processed and treated. Existing rules governing this initial stage in Pakistan are either inadequate or ineffective which results in the uniform treatment of *all* cases irrespective of the time, mode, and resources these deserve. In this section important aspects of this stage, i.e. initial scrutiny of written claims, oral hearings, planning and fore-warnings and other provisional arrangements shall be elaborated. These recommendations form an important part of the NCPF model – the second pillar.

### *6.3.1 Claims and Defences in Written Form and Supporting Documents*

Pleadings of the parties and documents submitted before the court is the most important information containing averments and counter-allegations of the parties as to the factual matter. This is an opportunity for the parties to lay before the court *their version of the truth*. Under the Code of Civil Procedure 1908 of Pakistan, civil claims are initiated by the presentation of the plaint in the relevant Court[343] while the defendants or respondents are to submit their written statement in response to the claim admitting or denying the averments. Pleadings are dealt with under Order II (Frame of the Suit), Order VI (Pleadings Generally), Order VII (Pliant) Order VIII (Written Statement and Set-Off) of the Code which contains

[342] The News Daily *Pakistan's Supreme Court to start e-court system from Monday* <https://www.thenews.com.pk/latest/475315-pakistans-supreme-court-to-start-e-court-system-from-monday> accessed 06 Aug 2019.

[343] Civil Procedure Code 1908 [Pakistan] s.26 and Order IV rule 1 of the Code provides that suit shall be instituted or filed by presentation of the plaint in the relevant Court or to such officer designated for the purpose.

detail rules as to their form and requirements. Appendix A of the Code provides several templates or forms for various types of civil suits and defences.[344] Importantly this part of the procedure is almost unchanged from the time of its promulgation since 1908. The scheme of law, as it exists, as to pleadings of the parties, is merely to ascertain where the parties are at issue and if they are, the court would frame issues as to the conflict areas and then push the case into evidence stage to let the parties prove their respective claims. Therefore, the role of the court at this initial stage to scan pleadings appears too mechanical.

The procedural requirement of submitting written pleas can be used to minimise frivolous litigation and false claims or defences if in-depth scrutiny is conducted at the very initial stage. Instead of merely enabling the parties to present their claims and defence, pleadings must have a more extensive usage; procedural law must provide clearly that any deliberate disinformation, misstatement or concealment in the pleadings would have penal consequences. In addition to that the law must also make it binding on the courts to necessarily make a decision, while finally determining the case before, during or after trial, as to the veracity of statements submitted in the court in the pleadings at the initial stage; and in case a judge is of the opinion that false information was submitted, he must refer the matter to the criminal or magisterial court to take it up.

Though criminal law provides punishment for giving false information to the courts as an offence (chapter XI of Pakistan Penal Code 1860)[345] but despite having this clear penal law, civil courts are neither bound by the existing civil procedure law nor is the case in practice to refer the matter to a criminal court. Dreadful stories of the litigants as to false claims against them appearing in the empirical evidence in chapter 4 shows that use of criminal tools against those who use court forum to tease their opponents is entirely missing. The culture of frivolous and vexatious claims or defences appear to have found roots in the system being unchecked and burdening the courts and squeeze judicial time and energy for genuine cases.

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[344] Civil Procedure Code 1908 [Pakistan].

[345] Pakistan Penal Code 1860 [Pakistan].

Importantly, the existing civil procedure do not in itself cater for such *functional linkage* between 'offences' committed during civil proceedings against the administration of justice, and transmission of information from the civil courts to the criminal courts. Absence of such a mechanism would naturally result in the use of the process of civil courts for ulterior personal motives at will as is being done in practice without any deterrence. Therefore, the civil procedure needs to emphatically make such arrangement to ensure criminal process and resultant punishment for false information submitted in the court in the form of formal pleadings.

One important factor, however, needs to be taken care of in this regard. Given the poor literacy rate in Pakistan generally, it needs to be ensured that whatever is written down in the pleadings by a legal professional or petition writer is exactly what the actual claimant or respondent say and mean as he/she is going to be held responsible for it with penal consequences. For that precaution, parties also need to be examined in person in the initial stage of the case (see next section 6.3.2) and contents of the written claim or defence need to verify through an oral examination of parties. Besides that and before accepting the pleadings and examining the parties, they must in all circumstances be apprised adequately and fore-warned in very clear terms that if what they are submitting in writing and say before the court in the initial stages, turns out to be false, they would face legal consequences in terms of (a) dismissal of their claim or defence with cost and (b) prosecution, trial and punishment of fine or imprisonment by a criminal court upon the referral of the civil court. Judges must be bound under the procedure to make these warnings in unambiguous terms at the very inception.

### *6.3.2 Oral Examination of Parties at the First Hearing*

Given the level of education in Pakistan, examination of the parties in the courts in the initial stages of cases is the most crucial step to understand the *actual* controversy (if any), narrowing down the scope of inquiry and of judicial interference, look for other means of resolution and for proportionate treatment and application of pertinent procedures. Only 58 per cent of the population is 'literate,' i.e. have bare minimum education to read the

newspaper in Pakistan;[346] it is worst in the region as per the UNESCO Global Education Monitoring Report.[347] It is quite probable that plaint and written statements of the parties normally drafted by lawyers or petition writers, may not contain what parties know, mean or state. Though existing procedural rules provide for the examination of parties, yet this procedural process is not emphatic enough and have minimal scope; in practice, this procedural tool is rarely used and therefore, mostly redundant.

Order X Rule 2 of the CPC reads:

> **Rule 2. Oral examination of the party or companion of party.--** At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court, or any person able to answer any material question relating to the suit by whom such party or his pleader is accompanied, shall be examined orally by the Court, and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party.

The word 'shall' was substituted for the word 'may' in this rule by an amendment in 1993[348] in order to make the provision more forceful. However, the rule still appears ineffective and inadequate in its application. It never elaborates for what end such examination needs to be made. In the absence of a clear objective in law, courts may either render it purposeless and tend not to proceed under it or else would underutilise it. Case law also dissuades to use the preliminary statements as evidence or conclusive admissions and limits these only for ascertaining the real matter in controversy and for clarity in the framing of issues, if the pleadings of the parties are evasive and ambiguous. It is held by the Supreme Court of Pakistan that better statements obtained after such oral examination may be considered but these cannot take place of statements on oath, nor may these be taken as conclusive admissions.[349]

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[346] Ministry of Finance, Government of Pakistan '*Pakistan Economic Survey 2016-17'* <http://www.finance.gov.pk/survey/chapters_17/10-Education.pdf> accessed 22 Jul 2019.

[347] The Dawn, Literacy rate has fallen to 58pc, minister tells Senate (21 Dec 2018) available at https://www.dawn.com/news/1452740/literacy-rate-has-fallen-to-58pc-minister-tells-senate accessed on 22/07/2019

[348] Civil Procedure (Amendment) Ordinance 1993 [Pakistan]

[349] 1996 CLC 1758

True, such initial statements cannot be used as evidence against the other party (as not being subject to cross-examination), but these can be made useful for other purposes. Firstly, it affords an opportunity for the court to understand the court is directly hearing the controversy from the litigant without any medium and in his language. In written pleadings, parties may tend to present only favourable facts or their subjective interpretation or in a garbled way or may hide unfavourable facts. But when a judge is examining a party, he aims at finding the truth and understand the stance in an unbiased way. In such oral examination, the judge may ask questions as to the matter which might not have been disclosed in pleadings.

Secondly, if by law such statements are required to be made under oath and the parties are forewarned that false statement shall have penal consequences, chances of frivolous litigation can be minimised. This may create necessary deterrence for false and vexatious claims and engage the court at the very beginning to note an evasion, silence or misstatement and judicially analyse it against the maker there and then.

Thirdly, when the judge understands the core dispute between the parties, he is able to make a decision on how the controversy can best be resolved or treated. It can be decided summarily in view of all available material and information before the court; it can be considered for settlement through a suitable alternate mechanism; it may also help court narrow down the scope of inquiry in trial and call only such evidence which is absolutely necessary ad sufficient for effective determination of the case.

Fourthly, it is underutilisation of this procedural tools not to give any evidentiary weight to the oral statements of the parties before the court in the preliminary stage. These should be used at least against the maker and for bringing on judicial record the direct version of the parties without any intervening mode or actor. Existing law is silent on this point and case law bars giving any evidentiary importance.

Hence, the oral examination of litigants can be used as an effective tool to clarify the matter and place the judge in an informed position to take an appropriate decision, including avoidance of trial and ultimately saving time. Though the idea may appear in contrast to Woolf's thinking of limited orality, yet an oral examination of parties can be an

effective tool in case of Pakistan against frivolous litigation. To conclude, in circumstances when a litigant is under oath, having been warned of penal consequences of false statement, standing in the court and facing a judge who is inquisitive in an unbiased and neutral way and interested in going to the 'real' matter of fact, the chance of sending frivolous litigation and vexatious claims to full trial can be minimised. Given these crucial advantages of preliminary examination, it should be made an indispensable pre-trial requirement with clear objectives and for setting the direction of the case from the very beginning.

*Recommendations*

- Oral examination of parties must be an indispensable requirement of commencement of proceedings of the civil suit under the law.
- These statements must be under oath and have penal consequences if found false.
- The judge must forewarn the parties as to penal consequences of false averments.
- The judge must record his finding as to the real controversy and how it may best be treated in terms of minimum possible resources and time.

### *6.3.3 Rigorous Preliminary Scrutiny and Allocation of Procedure*

To operationalise the principle of proportionality – i.e. only necessary and proportionate time, judicial energy and resources should be allocated relative to the circumstances of a case – preliminary hearing of the case is an indispensable requirement. Trial of a case involving the recording of evidence, consulting documentary record, arguments and then writing a reasoned judgment take much of the courts' and litigants' time and resources. Rigorous preliminary scrutiny can be an effective way to decide what appropriate treatment a case deserves given its circumstances and relative to the overall workload of litigation. This crucial step may enable the court to take a conscious and informed decision as to the future course of action in a case. Under the existing civil procedure law in Pakistan, in the initial stages of the litigation, civil courts of the first instance appear *merely* to ascertain whether allegations in the pleadings are alleged or denied. Order X the Code of Civil Procedure 1908 Rule 1 provides:

> **Rule 1. Ascertainment whether allegations in the pleadings are admitted or denied.**—At the first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits

> or denies such allegations of facts as are made in the plaint or written statement (if any) of the opposite party…The Court shall record such admissions or denials.[350]

The Court would then straightaway frame issues and invite evidence if material before it is not sufficient for a just decision. Order XIV Rule 1(5) of the Code provides for framing of issues:

> **Rule (5).-** At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

Next Order XV provides for 'Disposal of the Suit at the First Hearing. Rule 3 of this Order provides:

> **Rule 3-(1)** Where the parties are at issue on some question of law or of fact, and issues have been framed by the Court as hereinbefore provided, if the Court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues, and if the finding thereon is sufficient for the decision, may pronounce judgment accordingly….
> (2) Where the finding is not sufficient for the decision, the Court shall postpone the further hearing of the suit and shall fix a day for the production of such further evidence, or for such further argument as the case requires….

A bare reading of this legal provision the Code gives a clear impression that in-depth preliminary inquiry, setting the course of action, evaluation of the impact of the trial on the parties during the case, financial consequences of proceedings and other necessary matters are not catered for beforehand. Under the existing scheme of law and practice, cases appear to flow too frequently into the costly and time-consuming trial stage. Though certain

[350] Code of Civil Procedure 1908 [Pakistan] Order X Rule 1.

amendments introduced in the Code appear to attempt to avoid full trial and divert the case to swift settlement, but these provisions still lack the preliminary rigorous scrutiny.

In this context, two amendments are relevant (s.89-A and Order X Rule 1-A CPC) introduced in 2002. Section 89-A was added in the Code empowering the court to send a case for alternate dispute resolution (ADR) for its expeditious disposal.[351] To supplement that course of ADR, Order X after Rule 1 (which obliges the court to ascertain whether a claim is admitted or denied at the first hearing of the case), Rule 1-A is added which reads:

> **Rule 1-A.** The Court may adopt any lawful procedure not inconsistent with the provisions of this Code to:
>
> (i) conduct preliminary proceedings and issue orders for expediting processing of the case;
> (ii) issue, with consent of the parties, commission to examine witnesses, admit documents and take other steps for the purpose of trial;
> (iii) adopt, with consent of the parties, any alternative method of dispute resolution including mediation, conciliation or any such means.[352]

These legal tools are too extant and depend on the court's discretion. At first, the court *may, or not,* choose to take recourse to proceed under this rule. If the purpose of this legislation is expeditious disposal of cases, then it is not understandable why judges are not bound to take this route and why it is left at their will. It is also not clear what will *persuade* the judge to adopt this mechanism when it is not binding. An overburdened court or a not-very-proactive and disinterested judge is expected to avoid these *time-consuming optional* proceedings.

Moreover, if at all a judge decides to proceed under this rule, it is not clear what exact lawful procedure he/she shall adopt, what preliminary proceedings shall be conducted and what orders be issued for expediting the case. Importantly no official data is available to see how many cases were actually sent to ADR or resolved finally through this route. However, performance in terms of age of cases and backlog in district courts of Pakistan as

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[351] Code of Civil Procedure 1908 [Pakistan] s.89-A.

[352] Code of Civil Procedure 1908 [Pakistan] Order X Rule 1-A.

assessed in this project from 2002 to 2014 (chapter 4) indicate minimal use of this mechanism.

Law needs to clarify how exactly a case is to be handled at the preliminary stage; it is unrealistic to assume that a judge would devise procedures and steps on his own to resolve each case when the law is silent on this point. If at all a judge steps ahead and comes up with his brand of procedure, it would run the risk of individualised methods, and subjective approach and whims, rather than uniform and institutionalised and permanent ways, of dealing with cases. Hence, the procedure must in very unequivocal terms tell what to do and how in an authoritative and binding style.

Procedural law must dictate the course of action for expedition and efficiency, while the judge must only execute that scheme. Instead of asking the judge to look for the ways of expeditious disposal, the law must provide such ways to tread on. Woolf tried to shift the pace of litigation taking control from the parties and giving it to the judges; however, the way forward, especially in circumstances of Pakistan, is to provide control to the law and procedure which must be binding not only on the litigants and lawyers but also the judges with clear consequences for non-compliance. This scenario is inevitable because existing Pakistani law provides abundant discretion to the courts, but still, these discretionary powers could not help resolve the issues.

One aspect of CPR in dealing with cases justly and in achieving the overriding objective is to treat a case relative to the amount involved, its complexity and parties' financial position (CPR 1.1(c)). The court is to assess what proportionate allocation of resources should be made to one case considering the needs of other cases. For that end, CPR introduced a system of three tracks of procedure: small claims of up to £10,000; fast track for cases between £10,000 and £25,000 or certain non-monetary claims (injunctions, specific performance and declarations); and multi-track for cases of higher value and complexity

requiring more judicial time and energy.[353] Similar procedural tools with much detail and wider procedural options can be devised in case of Pakistan.

Here it is suggested that the procedure must provide a binding process in the preliminary stage of a case for the courts to invariably consider the following crucial points:

- Hearing the parties directly through oral examination and asking questions inquisitively to get the stance clarified and compared with written submissions to see if these vary, and if so to what effect.
- Understanding the nature of the controversy, its seriousness, its apparent veracity, and whether it is justiciable.
- Finding and applying the best possible ways to resolve it without a trial by the most efficient use of time and resources of the court and litigants.
- If the trial is indispensable, what minimum but sufficient evidence is required for material issues and how that can that be procured.
- Which party shall bear what cost during the pendency of the case and what provisional temporary arrangements need to be in place?
- How default and other behaviour causing delay shall be treated during the pendency.
- What fore-warnings need to be given to the parties as to possible legal consequences if the findings are against them?

With this frame of mind, the initial scrutiny must be rigorous, based on a clear vision and a just approach; it must be binding on the judges and absolutely necessary irrespective of parties' choice. However, the initial scrutiny must be done in such a planned way to consume minimum possible time avoiding 'front loading'. We cannot save judicial time by spending more on such weeding out process. Procedural tools need to be designed in such a way to materialise this objective practically. Critics of the Woolf reform argued that pre-trial requirements and measures would have the effect of front-loading eventually giving rise to higher costs.[354] But this notion assumes that preliminary scrutiny would consume the

[353] Zuckerman on civil procedure: principles of practice 2013 (n 62) 631.

[354] Michael Zander, *The state of justice* (Sweet & Maxwell, 2000).

same or more time and resources as the main trial. Though it needs empirical study to compare pre-CPR and post CPR average duration of the life of cases, it can safely be assumed that full hearing of a case and its decision on merits would take more time and resources as compared to the time and resources initially spent on the case to identify the core issues and narrow down the scope of inquiry.

### *6.3.4 Practicability of Preliminary Scrutiny*

One practical way of making preliminary investigation effective, result-oriented and binding can be to formulate a checklist or questionnaire which the court must fill or answer in all circumstances in the initial hearing of the case and invariably providing that non-compliance to this procedural requirement would result into a disciplinary proceeding against the judge. This checklist of necessary measures may contain, among others, the following questions:

a. Whether the written claim (a) presents facts alleged by one party and denied by the other, and (b) these disclose a violation of a legal right? If so, what legal right is violated and what possible legal remedies can be granted?
b. Whether the nature of alleged violation and magnitude of resultant damage is serious enough to warrant judicial interference? If not, what alternative and amicable methods of settlement can be adopted in consultation with parties or without it?
c. If the case requires a judicial determination of facts and application of the law at all, what is the best and most efficient way among the processes provided by law to reach such determination?
d. Whether the case can be determined summarily given the pleadings of the parties, their oral statements, documentary evidence already available on record or officially obtainable documents etc.?
e. If further evidence is required, who will produce it in what time and who will bear the cost and how the party adversely affected due to that time-consuming activity would be compensated?
f. What temporary arrangement during the pendency of the suit needs to be made to save the party suffering from the adverse impact of time?

g. In the event of winning or losing the case, which party shall be compensated and to what extent, if it is found that one of them acted under malice and with vexatious motives?

When a judge is legally bound to answer all these questions through a reasoned order, he would definitely go deep into the case and apply judicial mind and incorporate necessarily various procedural tools for just and speedy resolution of a matter. Hence, under such a strict regime of law, expedition and efficiency are ensured by default. In Singapore experiment, law provides for initial scrutiny of cases to look for suitable alternate dispute resolution and courts play a *proactive and facilitative role* through mediation conferences under the district judges. In 1998 it was found that more than 98 per cent of civil disputes are resolved through these mediation processes and only 1.7 per cent of civil cases were pushed into the trial stage.[355]

In the CPR, early identification of issues is a necessary step for active case management. CPR 1.4(2) (b) to (d) binds the court to identify the issues at an early stage, sifting those which can be summarily decided and others which require trial and that in which order these should be resolved. Similarly, under CPR 3.4(2) if a case discloses no reasonable ground of making or defending a claim, it should be struck out. The court may summarily decide a case without a trial. CPR 24.2 provides that if claimant or defendant has no real prospect of succeeding on the claim or defence or issue and there is no reason to send the case for the trial stage, the court may determine the case or an issue through summary judgment. A research study on pre-trial case management conferences in 2005 suggests that litigation culture changed and there is more co-operation between parties and between parties and courts.[356] Introduction of the pre-action protocol (i.e. pre-trial hearing and conference) in the CPR involves the court at the very beginning of the case. It is observed:

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[355] Karen Blochlinger, "Primus inter pares: is the Singapore judiciary first among equals." *Pac. Rim L. & Pol'y J.* 9 (2000): 591.

[356] Peysner, John, and Mary Seneviratne. "The management of civil cases: the courts and the post-Woolf landscape." (2005) referred in Malleson, Kate, and Richard Moules. *The legal system*. Vol. 2. Oxford University Press, 2010 at p105

> Creation of pre-action protocol recognizes that there is a stage of litigation, hitherto neglected and largely unregulated….English law is right to have made this bold entrance into a zone which has, traditionally, been largely left to private negotiation and adversarial posturing'.[357]

*Recommendation*

The new civil procedure under the NCPF model must set the preliminary hearing of the case a binding indispensable legal pre-requisite for the commencement of judicial proceeding with specific objectives, steps and measures for the judge. It should involve a complete scanning of the pleadings of the parties, their oral examination on oath under warnings, considering alternate dispute resolution, bringing on record the real controversy, early identification of issues, applying suitable procedures for their resolution, and narrowing down scope of inquiry and then recording of only necessary evidence, if required.

### *6.3.5 Planning, Scheduling and Pre-warning*

Empirical data analysis in chapter 4 showed that frequent adjournments were a significant cause of delay. To ensure certainty, procedural law may require the courts to plan things ahead and prepare the entire script of the case in consultation with the parties where necessary. Planning is a crucial aspect of court and case management system; all common and foreseeable eventualities which may cause disruption or discontinuance of court proceedings must be accounted for beforehand, and preparation must provide flexible scheduling. A court may show leniency and facilitative environment to the litigants, lawyers, and other officials at this initial stage. This consultation process needs to be meaningful and should result in a clear timeline and scheduled activity.

*Strict Execution and Compliance Approach*

Under the CPR courts are endowed with management and compliance powers in addition to inherent powers to prevent abuse of court process which are identical to the pre-CPR procedural regime.[358] However, these powers are mostly discretionary as courts can

[357] Andrews, *English civil procedure: fundamentals of the new civil justice system* (n 266).

[358] Zuckerman on civil procedure: principles of practice 2013 (n 62) 527.

excuse defaults, extend time, and condone non-compliance. For instance, under CPR 3.10 a defective step cannot invalidate the proceedings and court can rectify the error. Also, even after expiry court may extend time under CPR 3.1(2)(a). Though CPR provides that such condoning powers may be exercised to further the overriding objective, but in practice court's leniency towards defaults tends to undermine the overriding objective. It is pertinently observed that:

> …the success of CPR system of court control of litigation depends on the court's ability to secure better standards of compliance…..Unfortunately, the experience of the CPR's first decade was not promising. All too often the court tended to show leniency towards defaulting litigants which was not warranted by the overriding objective and thereby undermined its success.[359]

In view of the issue of tolerating defaults, amendments were introduced in the CPR. For instance, CPR 3.9 was amended in 2013 under which courts while dealing with non-compliance are obliged to consider the issue with much care. Amended CPR 3.9 reads:

> 3.9 (1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders.
>
> (2) An application for relief must be supported by evidence.

For Pakistan, however, a much stricter approach needs to be introduced due to the magnitude of adjournments, deliberate defaults, non-compliance and misuse of the court process. A case management plan would be thwarted if a party is bent upon to cause a delay. As seen in English reform experience, the court's discretion to forgive non-compliance ultimately remains ineffective and tend to be used in such lenient way to cause delay. Therefore, it is suggested that a further sterner regime of compliance need to be enforced in case of Pakistan.

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[359] ibid 528-29.

Forewarning the litigants, lawyers and witnesses etc. as to consequences of any default or non-compliance should be an indispensable procedural requirement. Once the plan is made under the guidelines of procedural law, by a judge and after consultation with and obtaining the consent of the lawyers and litigants in relevant matters, all the actors (including the judge), must in all circumstances be bound to follow that course. There should exist little or no discretion of the court to deviate or relax the planned course of action. The consequences of non-compliance or default already communicated must be executed without fail, and the judge should be responsible for not doing so and showing any laxity.

In CPR (Para 3.1(3)) though courts have the discretion to make an order subject to conditions, including a condition to pay a sum of money and specify the consequence of failure to comply with the order. Practice Direction 28 (5.1) and 29 (7.1) also provide that the other party may apply to impose consequence of non-compliance against the defaulting party. But at the same time, courts have discretionary powers to ignore default despite specifying its consequence. This can be problematic in the case of Pakistan. Historically it is more likely that a lax regime of condonation would find roots despite clear directions to courts to use the discretion in a *just manner*. Therefore, it is proposed that the court must be under a duty to effectively convey the consequence of default or non-compliance and then must in all circumstances execute it with no discretion to condone.

*Case Schedule and Planner*

A single document produced after extensive planning and scheduling in a single case (Case Schedule and Planner) must clearly state how the case shall be processed; it needs to be handed down to and made understood by the litigants. This planner may provide dates and/or timespans within which specific activity is required, the exact time for court attendance, the venue of the court, nature of proceedings, the responsibility of the key actors (judge, lawyer, parties, other officials etc.). Importantly the penal consequence of any default must also be mentioned in it and parties and their lawyers may also be conveyed verbally. This schedule needs to be linked with an integrated digital diary system of the district to avoid overlapping and adjust the availability of judges, lawyers and other officials. An example of a single proceeding in such schedule is provided here which may be considered as a

rudimentary template for developing a formal scheduling system and planners. (See Table 19).

| **Date and Time, Court - Venue** | **Proceeding** | **Responsibility of Compliance** | **Consequence of Absence or Non-compliance** |
|---|---|---|---|
| 1-4 Sep 2019 (Day 1,2,3, and 4 - Four days)<br><br>Time: 12:00-02:00 pm (Each day)<br><br>Court No<br><br>(Address) | Examination of Plaintiff's Witnesses and Documentary Evidence.<br><br>Cross-examination by the defendant | Plaintiff shall produce his witnesses and documents.<br><br>Defendant and/or his lawyer shall cross-examine.<br><br>The judge shall ensure compliance of schedule and execute consequences of non-compliance. He shall also peruse record to understand the controversy for final decision. | If the plaintiff or his representative or/and lawyer absent or fail to comply as per column 3, case would adjourn to Day 2 and 3 respectively at cost mentioned below. Plaintiff would have to complete evidence on the said two adjourned dates. If he fails, case shall be heard on the day 4 (court shall hear parties, or their lawyers if present, peruse the record available) and then court may (a) dismiss plaintiff's claim through a judgement or (b) follow the schedule for defendant's evidence if required.<br><br>If the defendant or his representative and lawyer absent or fail for cross-examination on the first day, case shall be adjourned to 2nd and then 3rd day. If defendant fail to cross-examine on these all three days, plaintiff's evidence shall be recorded without cross-examination.<br><br>Adjournment cost for both parties Day 1, PKR 1000, Day 2 PKR 5000 and Day 3 PKR 10,000. |

**Table 19 An Instance of Planning of Proceeding - Plaintiff Evidence**

Parties and lawyers must be engaged at the initial stage to set the schedule of various proceedings and the requirements which litigants, courts, and court staff have to comply with to ensure certainty of hearing. Extensive consultation needs to be conducted through pre-

hearing conferences in a flexible and conducive way enabling the parties and lawyers to opt for convenient dates. However, in these preparatory phases, pre-warnings in definite terms as to the consequences of non-compliance must be conveyed to the parties and their lawyers. Effective enforcement of these consequences then must be strictly carried out with very little or no discretion with the judge to alter the course. The enabling provision giving discretion to the judge must have genuine, limited and clear grounds. (See Para 6.4.2 below). Non-compliance should necessarily result in cost imposition and penalties. Default or adjournment (by design, or due to negligence or lax behaviour) must be labelled as a clear violation of the law and must have consequences not only for the litigants and lawyers, and judges must only execute these consequences.

### *6.3.6 Provisional Arrangement during the Life of a Case*

Preliminary scrutiny stage of the case must also be utilised to foresee the possible impact of time on the current state of parties till the final resolution of a dispute. For instance, if a plaintiff claims ownership of a piece of land which is in the defendant's possession, the former would continue to be deprived of the benefits of the property during the pendency of the suit. On the other hand, if his claim is false, it would be unfair to ask the defendant to pay rent of the property in the court. In such practical situations, procedural law must guide very clearly how to devise a tentative arrangement catering for the adverse impact of time. The existing law on this issue needs to be more explicit and elaborate. Order XXXIX of the Code of Civil Procedure 1908 deals with "Temporary Injunctions and Interlocutory Orders". Rule 2 of this Order reads:

> **Rule 2. Injunction to restrain repetition or continuance of breach-**
> (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind …., the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of …..
> (2) The Court may by order grant such injunction, on such terms as to the duration of the injunction keeping an account giving security or otherwise, as the Court thinks fit.

At first, under this legal arrangement, a temporary injunction is issued at the instance of the plaintiff and against the defendant. Secondly, guidance for the courts granting

such injunctions is too general, wide and slightly vague. Case law in Pakistan provides certain basic principles for the courts to grant or refuse a temporary injunction. The courts shall see:

- Whether there exists *prima facie* (on its face) case in favour of the plaintiff?
- Whether the plaintiff shall suffer irreparable loss if the injunction against the defendant not granted?
- Whether the inconvenience caused to the plaintiff, in case of not granting the injunction, would be greater than the inconvenience to be suffered by the defendant if it is granted?

No doubt these principles are the basis of the proper exercise of judicial powers, yet in view of inordinate, deliberate and vexatious delay and misuse of the court process, the interim arrangement through these injunctive orders need to be based on a deeper and more elaborate inquiry. Moreover, even if no injunction application is filed, time consumed in the litigation may have some effect on one of or both the parties. It is therefore suggested that in the preliminary hearing of the case, courts must invariably assess possible adverse impact of time on the parties during the pendency of a suit and make necessary arrangements to neutralise and manage that impact in the circumstances of each case. While planning and scheduling for the trial of a case, the judge must attend to these issues and by law must record findings as to these questions:

- What was the state of facts as claimed by both parties immediately before filing the suit?
- Does something need to be restored (like possession of the property, or delivery of some goods or refund of some money etc.) to bring back the parties at the previous position?
- What would be the nature, magnitude and duration of damage or loss caused to one party if the alleged breach of a right or the status quo is allowed to be continued?
- What loss would it cause and how would it affect the other party if it is prevented from doing, having or enjoying a thing under a temporary injunction?
- What are the best way and tentative arrangement to balance the harm between the parties?

### *6.3.7 Pre-determining Liability of Final Outcome of the Case*

The court must be obliged to clearly convey to the parties what would be the legal consequences if one or the other party wins and the decision attains finality. The outcome and further legal course of action of possible eventualities when conveyed to the parties, may make them withdraw, settle or make a decision as to the risks involved. For instance, if both parties are informed that in case their stance is disproved and the decision attains finality, cost of the suit and compensation to the other party to the tune of a certain amount (tentatively assessed) will have to be paid by the losing party. This will make both parties weigh the risk of these legal consequences. The party who is clear as to the falsehood or weakness of its case in its mind, may avoid contesting the suit and withdraw or settle it forthwith.

Existing law does not bind the court to assess and pre-determine such liability nor to convey it to the parties. This requirement, if introduced would make the courts to evaluate beforehand cost of the suit in consultation with the parties and their lawyers and calculate tentatively and approximately the amount of compensation to be awarded to the losing party. Parties going into the trial stage would then take a 'calculated' risk and informed decision without any surprise element. When this financial impact is pre-conveyed, the party having a genuine case would further hold its position and be eager to contest while it would unsettle the party who knows about its case being 'weak' of 'frivolous'; the later may see it as disincentive and find his way out conceding or settling the matter.

### *6.3.8 Applying Preliminary Scrutiny Regime on Hypothetical Cases*

Here it shall be shown how some of the recommendations would work practically in the following hypothetical case where a court shall conduct a detail preliminary hearing digging deep into respective averments of the parties and will find a way out to resolve the matter as efficiently and justly as possible. Under the NCPF model and the new civil procedure, the judge would forewarn both the parties that if their claims are proved to be false, what exactly would be the penal and financial consequences. Both parties shall also be heard in person about their respective stance. An attempt shall be made during the oral examination for mediation through elders of the family or the vicinity for an amicable and swift resolution of dispute due to parties being siblings. They shall also be persuaded to get it privately resolved or consider the court's suggestion for amicable dispute without a trial. The

judge may also offer the incentive to both parties that if they settle the dispute by making reasonable offers, the cost of the litigation and time may be saved.

**Case A: Claim of Ownership of Property - X v Y**

Plaintiff X claims in 2019 one-third share of an agricultural piece of land based on her inheritance right accrued to her since 2015 when father of the parties died; that the property is in possession of her brother/co-sharer Y (defendant). X claims that Y continued giving the plaintiff one-third share of the profit/yield annually in 2016 and 2017 but discontinued it in 2018. Y defendant in his written reply avers that father of the parties gifted the property to Y in 2013 (well before his death in 2015) through a registered gift-deed and handed over the possession to him. Y denies giving any profit of proceeds of the land to X for two years. X prays for a decree of title to the extent of her one-third share, partition and handing of possession order and annual profit of the land for 2018 and onward. Y prays for dismissal of suit and allowing him to convert the land during pendency of suit into residential property and selling the same.

If all these attempts fail, the judge shall then determine what factual inquiry is needed to resolve the dispute. For instance, X may be asked in what form and when exactly annual profit was paid to her by Y and what evidence is there to prove this. X is obliged to state on oath and under a clear pre-warning that if she lies, this may bear criminal proceedings against her; she then states that on both occasions Y himself gave the profit in cash to her while they were alone and her own statement is the only evidence she has. The judge asks Y whether on these two dates she paid cash to X and he states (under oath and warning) that this is false. Then Y is asked when the gift-deed was executed by father of the parties, before whom and in what circumstances. Y states that it was drafted by a notary public and was then executed by his father before two witnesses in the office of an authorised land record official who then officially registered it.

The court may then ask the defendant to produce his two attesting witnesses and would also call for the official record of the land registry as to the registered gift deed. At this occasion, the court may also record that (a) if gift deed is proved to be genuinely executed by the father of parties after that evidence, plaintiff's claim shall be dismissed without further

proceedings. If it is not so proved, situation (b) claim shall be allowed forthwith. Court plans and decides that in both situations (a) and (b), there is no need to let plaintiff records her statement on oath as a sole *self-serving* witness for the reason that in case (a) documentary evidence and the official record supports defendant's version while plaintiff has got no independent evidence. In situation (b) there is no need to record her statement, the claim would be allowed based on her inheritance right (when the gift is not proved).

All this affords an opportunity to the judge to engage with the parties, going deep into the facts of the case with the objective of finding the truth and core points of disagreement, determining nature of evidence required, the time required for that and narrow down the scope of inquiry. It is also an opportunity to divert the case to alternate and swift resolution mechanism or settling the dispute there and then. Forewarnings as to false statements, the final consequence of the decision etc. may have the effect of withdrawal of the case at the initial stage or compromise and settlement. Scheduling after a thorough consultation and taking consent of the litigants and lawyers, would not only apprise the parties what is to be done, by whom and when exactly; this would also justify any stringent action taken against a party who failed to comply with the schedule. In case of final determination against a party, the cost of suit, compensatory cost etc. would be no surprise to it as already conveyed.

### 6.4 Stringent Neo-Proceduralist Approach of Proceedings – 3rd Pillar

In Woolf reform experiment, party control and adversarial practices were considerably dissuaded by giving more powers to the judges to guide the pace of proceedings. Courts are obliged to pursue the overriding objective, i.e. dealing with cases justly and at proportionate cost. Such dealing includes equal treatment, saving expense, proportionate treatment as per requirements of a case and other cases, expedition, and compliance enforcement.[360] For these ends extensive general and specific case management powers are given. CPR Rule 1.4 imposes a duty on the court to actively managing to attain an overriding

[360] CPR 1998 Rule 1.1(2).

objective. These managerial tools include persuading parties to co-operate, clarifying issues at an early stage and their swift resolution, playing an active role in ADR or settlement, cost-benefit analysis of the proceedings, using technology and issuing orders to ensure expeditious effective progress of the case.[361] Hence, one major development under Woolf's reform was that judges were made to achieve the overriding objective of the civil justice (i.e. accuracy, efficiency, and proportionality aspects of litigation) through managerial tools, modern technology and extant room to use discretionary powers for that end.

Under Woolf's scheme, the pace of litigation and control were shifted from the litigants and lawyers to the judges. In the case of Pakistan, however, it is suggested to give control to the law which must dictate the course of proceedings with penal consequences of non-compliance and the judge must only execute that scheme. (Refer Para 5.3.1). Code of Civil Procedure 1908 provides ample powers to conduct the proceedings in a 'just' way and 'as the court deems fit'. Firstly, these discretionary powers are too *general and vague;* and secondly, these are based on the equitable principle of doing away with formalities and achieving substantial justice which approach is also supported by the case law in Pakistan. However, it can be clearly observed in the empirical findings that deliberate prolongation of the litigation, and causing delay for vexation was rampant and despite having extensive necessary powers to check these practices under the existing law, misuse of the court process and delaying gimmickry could not be effectively arrested.

The systemic failure may be due to several institutional as well as external factors. For instance, the judges either abstain from using these powers under the pressure of political clout of the lawyers and at their level trying to avoid their onslaught; or else they may not find any incentive and motivation to employ the controlling tools and expedite proceedings; at times they themselves are instrumental in letting delays happen. Also, there is no deterrence for the judges for not using these powers. Besides these, there can also be other reasons and factors involved. Whatever be the institutional and external causes of such non-use of powers, the argument is that despite abundant powers in law, delays and defaults could not be

[361] CPR 1998 Rule 1.4.

effectively checked in practice; courts are slow to invoke these powers and reluctant to use these.

Under the NCPF model, a neo-proceduralist approach in the main trial stage of the cases may help resolve the issue. In dealing with the proceeding of the cases, especially in the trial stage, certain fundamental modifications need to be introduced in the procedural law regarding discontinuance or adjournments of proceedings, treating defaults, preventing deliberate misuse of the court process and avoiding delay and disruption of proceedings.

### *6.4.1 Contours of New Civil Procedure Law for the Trial Stage*

The neo-proceduralist approach seems to be a possible panacea to the dilemma of failure of the system to arrest delay and misuse of the court process. Instead of giving powers to the courts to act, procedural law needs to lay down material requirements binding the judge to execute these. Strict procedure and legal necessities, and not the judges, must dictate the pace and progress of litigation. Civil procedure rules may be designed and reformulated in such a way that important procedural requirements and scheduled timelines (already planned in consultation with the parties) must be adhered to not only by the litigants and their lawyers but also by the judges and other concerned. Law must provide for the consequences of any infringement of these requirements and it should not be left at the discretion of the judges who need only to implement these consequences, having consequences for themselves in case they fail to do so. Hence, the law must dictate the course of action with no or very little power with the judge to avoid it.

The new civil procedure law must be based on the assumption that litigants would misuse or avoid the process to prolong the case for their own interests or to vex the opponents; lawyers would do so to serve their financial interests and professional survival; and the judges would be reluctant, not motivated enough and have no deterrence to prevent these ailments. Though the conduct of the lawyers and judges can also be checked through regulatory and disciplinary laws, yet the civil procedure itself is the best tool providing a straitjacket of the legal framework within which all the actors have to act with no room to escape. Though it is believed under the non-formalistic and equitable perspective, as Lord Phillips SCP in *NML Capital Ltd v Argentina* observed that ‘procedural rules should be the

servant not the master of rule of law'.[362] However, in the context of instant discussion and in view of the scale of delay and misuse in case of Pakistan, it can be argued that procedural law and legal compliance requirements should act like the able generals tasked by the master (the rule of law) to execute its sanctions through the workforce (judges and court administrators) among the subjects (lawyers and litigants). Rules need to be strong and resilient enough to dictate the terms of their master; armed with sophisticated weaponry, their non-compliance should be effectively punished causing substantial deterrence among the key actors of the justice system.

The new CPR under Woolf reform tried to equip the court with more powers and control through managerial tools and setting a direction in the shape of the overriding objective. This is a substantial improvement and maybe a successful solution to English litigation issues. However, what if, the similar regime is replicated in Pakistan and managerial tools are still not employed by the courts? As was discussed in detail in chapter 5 and earlier in this chapter that district courts in Pakistan are slow to use general but extant powers. To cater for this functional inertia and non-use of available tools, it is suggested to let the *law* dictate; instead of asking and expecting the courts to treat the cases justly in a general way and to proceed as it deems fit, the new civil procedure must instruct authoritatively and specifically how to act in certain situations. Though it may be difficult to cater for all situations; however for the most common and frequently occurring situations during the proceedings, the law must contain a resounding dictating posture.

Procedural law at first needs to be improved and modernized extensively as is done in England and following the approaches of Woolf and Singapore; but then for Pakistan it may be designed in such a way to ensure *compliance* not only by the litigants and lawyers but importantly also by the judges who must have no or very little discretion to do away with material requirements. Any deviation from the procedural requirements must have penal consequences as a necessary deterrent for *all*. Hence, a direction under the NCPF model is to look beyond Woolf – i.e. way forward to shift control from the courts to the law.

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[362] [2011] UKSC 31, [74]

### *6.4.2 Existing Law on Adjournment etc. and Way Forward*

The Code of Civil Procedure 1908 of Pakistan provides certain powers to the civil courts to deal with adjournments, defaults, and condonation of delay. These legal provisions appear to be useless, ineffective, inadequate and outdated to deal with issues of deliberate defaults, delaying gimmicks and misuse of the court process. For instance, a civil court has the discretion to with defaults by condoning it with or without cost and proceed with the case *as it thinks fit*. The Code places the judge in an elevated position where *he can* choose to act under the law and check default or else take a lenient view and condone non-compliance.

Three main existing legal provisions dealing with the issue shall first be analysed here identifying the gaps before making proposals for amendments. The main body of the Code (primary legislation part sections 1-158) does not at all contain any provision regarding defaults, non-compliance, wilful delay or adjournments during the proceedings of the case including trial. The only provision in this part of the Code is section 148 which provides that the Court may, in its discretion, extend the time for anything fixed by law or the Court even after its expiry.[363] Detail rules part of the Code (First Schedule) deals with the issue in Order IX (Attendance of Parties and Consequences of Non-Appearance) and Order XVII (Adjournments). These provisions need to be analysed one by one.

The first important provision is section 148 which reads:

> Sec 148.-- **Enlargement of Time** -Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code the Court may, in its discretion, from time to, time, enlarge such period, even though the period originally fixed or granted may have expired.

As said earlier, the primary legislation part of the Code does not contain anything to deal with defaults of procedural requirements, non-compliance of court orders or time-bound activity. Section 148 is the lone provision in this part and that too empower the court to extend time. In this part comprehensive provisions are required providing that litigants, lawyers, court officials, witnesses and judges all shall invariably be bound to comply with the material procedural requirements, important court orders and timelines set by the law or fixed

[363] Code of Civil Procedure 1908 s. 148 [Pakistan]

by the court after consultation with the parties and after conveying warnings of the consequences of non-compliance. The judge shall in all cases is under an absolute duty to communicate to the litigants, lawyers and others in writing as well as orally as to what exactly is required to be done, when or within what time and by whom; consequences of non-compliance may also need to be clearly communicated and brought on record.

The rules part of the Code contains Order XVII dealing with adjournments. Before proposing the new scheme of amendments, Order 17 shall be analysed here. Rule 1 of Order 17 reads:

> **Rule 1. Court may grant time and adjourn hearing. --**(1) The Court may, if sufficient cause is shown at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit.
> **Costs of adjournments .-- (2)** In every such case the Court shall fix a day for the further hearing of the suit, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment: Provided that, when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded.
> **(3)** Where sufficient cause is not shown for grant of an adjournment under sub-rule (1) the Court shall proceed with the suit forthwith.[364]

Sub-rule 1 appears to be in line with section 148 as discussed above dealing with the court's powers to extend time. These provisions liberally cater for adjournments of hearing of the suit from time to time upon 'sufficient cause' being shown. The wordings of this rule are too general, soft and throw a clear impression that adjournment of hearings is a 'normal' phenomenon and permissible in routine. Courts have unbridled powers to grant adjournment from 'time to time' and can determine subjectively the adequacy of the reasons for adjournment. It appears too *conducive an arrangement* for adjournments and a breeding ground for the delay. Discontinuance of hearing has to be an exception rather than a readily permissible procedural mechanism.

[364] Code of Civil Procedure 1908 [Pakistan] O. XVII Rule 1

Sub-rule 2 also appears to be quite unrealistic as it assumes that courts have abundant and free days ahead which can be lavishly allocated to the adjourned cases. The rule seems to come from a euphoric utopian mind-set; it is oblivious to the ground realities that courts have a number of cases and proceedings for judicial treatment fixed in a particular order on the days available. The arrangement assumes that adjournment has no substantial effect on the case at hand and on other cases; but in practice, adjournment not only halts the process of that one case but may upset the whole scheme of allocation of time to other cases. For instance, a court has a free day only after three months (as other cases are fixed in between), a case simply adjourned would in effect is delayed for three months. It also causes wastage of time, resources and energy on the pre-fixed day of proceedings when it is adjourned.

Sub-rule 2 bars adjournment in a case when evidence is started to be recorded and then it shall go from day to day until all present witnesses are examined; however, the court has the power to adjourn it for the reason to be recorded. Again, the rule assumes that the court has no other case on that and the following days. Moreover, it shows proceeding of the case and recording of evidence in an unplanned manner not calculating beforehand how much approximate time evidence would take.

Sub-rule 3 again gives vast powers to the court to 'proceed with the case forthwith' if no sufficient cause of adjournment is shown. The words 'proceed with' are quite vague which do not tell the judge or the parties how the case shall go on if there is no reasonable cause to postpone. The law should be very clear what exactly would happen if a party is causing discontinuance by default, deliberately or by simply non-attendance. If the consequences are known, the defaulting party would calculate risk and the court would readily go that way if the party is willing to take the risk.

This rule needs to be completely revamped. Firstly, all cases must go through a rigorous process of detail scheduling and pre-planning effectively communicating the responsibilities of the parties and consequences of default as discussed in detail in previous sections. Once pre-planning is done, adjournment or discontinuance should be an exception and only in circumstances clearly laid in the law. The court must also be bound by the scheduled hearings and must have no or very little power to adjourn and that too only in the

circumstances prescribed by the rules. The law must also provide that in case of non-compliance, the court shall assess whether the prescribed circumstances exist, and whether it was inevitable and beyond the control of the party and unforeseeable in the normal course of events. It shall also be decided whether the party took all necessary measures to avoid these and acted most vigilantly and actively. The court may determine even tentatively whether the party is acting wilfully, negligently or carelessly. It must see whether things just went wrong for a party in an unimaginable, exceptional and unforeseeable way and it was not at all within the control of it. In case the court finds no such circumstances, it must straightway execute the penal consequences of non-compliance. As of rule, all defaults shall be met with by imposing these consequences unless said exceptional situations are shown. It is pertinently observed that 'time requirements laid down by the rules and directions given by the court are not merely targets to be attempted; they are rules to be observed'.[365]

### *6.4.3 Failure to Produce Evidence or Do an Act*

In case of failure to produce evidence or do any act by the parties, courts are empowered under the existing law to decide the case notwithstanding such default. Order 17 Rule 3 reads:

> **3. Court may proceed notwithstanding either party fails to produce evidence, etc.--**. Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding each default, proceed to decide the suit forthwith.[366]

Here again, the powers are too general and vague. It is not understandable how the entire case on its detail merits and intricate legal matters shall be decided merely on the basis of a single default. The rule does not provide how the failure would be related to the merits and just decision of the case and how non-compliance shall be dealt with. In practice, judges are without any clear instructions and guidance whether the rule implies that delinquent party

[365] Pinsler, "Principles Governing the Court's Discretion to Extend Time" (n 286) 1.

[366] Code of Civil Procedure 1908 [Pakistan] O. XVII Rule 3

shall be penalised by deciding the case against it and how the default would be placed while discussing and deciding the case on its merits. Moreover, further course of action and nature of the decision of the case is not only unclear to the judge but also to the parties and their lawyers. For instance, a party needs to submit a document which contains information that may *help* identify existence of particular state of mind of a person (being an ancillary matter and not the core issue of the case); upon its failure to produce the document, if the judge proceeds to dismiss its whole claim (not entirely dependent on the said document), it will be unjust and disproportionate treatment and an utter surprise to the party. The rule also does not qualify failure, i.e. whether it is deliberate, due to negligence, or under some unavoidable compulsion or inability.

To avoid all these complexities, the rule needs first to be linked with the scheduling process and prior consultation with the parties extensively and effective communication to the parties containing clear fore-warnings as to the consequence of a failure of doing a particular act. The consequences must not only be pre-determined but also proportionate to the failure which the judge should enforce in all circumstances except in situations provided by law. For instance, the law may provide that only in the event of the death of a party or severe accident or injury, the consequence may not be imposed.

Two next existing rules of Order 17 (Rule 4 and 5) deal with situations when parties appear in the court but either it's a holiday or the presiding officer is absent. These rules read:

> **4. Appearance of parties on the day next after holiday.--** Where a suit or proceeding is set down for a day which is a holiday, the parties thereto shall appear in the Court on the day next following that day, or, when two or more successive days are holidays, on the day next following the last of such successive days, and the Court may then either proceed with the suit on such day, or fix some other day thereafter.
>
> **5. Appearance of parties on the day when presiding officer is absent.--** When on day the presiding officer of the Court is absent by reason of illness or any other cause, the parties to the suit or proceeding set down for that day (notwithstanding the knowledge that the presiding officer would be absent) shall appear in the Court in the |Courthouse on that day and the ministerial officer of the Court authorized in that behalf shall hand over to the parties slips of paper specifying the other date fixed for proceeding with the suit or proceeding and signed by him.

Both these legal provisions appear to be based on the assumptions that a case may be fixed on a day which later turns out to be a holiday or a judge may be absent on that day. The existing law assumes, wrongfully that these eventualities could not be managed at all beforehand. At first, all holidays must in all circumstance be on exact dates, pre-determined and pre-scheduled; courts must be closed only on these dates and on no other occasion. If at all on some days, holidays are expected (e.g. religious festivals where dates are not exactly known like Eid holidays), on these days cases may not be fixed; rather other judicial work (i.e. writing judgments, inspections and meetings etc.) may be scheduled.

Rule 5 caters for the situations where the judge himself is absent. Absence of presiding officers has emerged as major cause of adjournments in the cases in Pakistan as was shown in the empirical survey in chapter 4. The eventuality catered for in this rule assumes a system of *personalised* courts, i.e. each court of the district belongs to a particular judge during his tenure of posting in that district and its functioning is dependent on his or her physical presence. This individualised system of courts needs to be switched to the institutionalised arrangement where courts may be provided with judges permanently as well as temporarily. At first and most preferably, judges need to pre-plan their holidays and not get cases fixed on those dates; in cases of emergency, district administrative judge may make alternate arrangement as far as practicable to provide alternate judges to work in temporarily vacant courts. At administrative level, things need to be pre-planned quite early as to all predictable situations. For instance, transfer of judges from the districts may be planned in such a way not to let any court vacant by providing alternative arrangements, i.e. visiting temporary judges. For every 3 to 4 adjoining districts, a spare judge may be allocated to quickly attend and preside over the courts which are temporarily vacant to unforeseen situations.

The rule also binds the parties to necessarily appear in the court even if they know as to absence the presiding officer. If no proceedings are going to be conducted why the parties should be made to appear only to collect information as to next date. In this age of digital communication, they should be conveyed as to cancellation of hearing and next dates if at all this is inevitable. Hence, rule 5 may be completely scrapped and re-built on these lines.

### *6.4.4 Prevention of Misuse of Court Process*

As was seen in chapter 4 misuse of court process was much complained of phenomena employed for vexatious motives and to exhaust the other party. The term 'abuse of the process of the court' only appears once in the Code of Civil Procedure 1908 (section 151), but it has never been defined anywhere in the Code. Section 151 reads:

> **151. Saving of inherent powers of the Court.--** Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.[367]

No doubt these powers are extant and more than sufficient for the courts to check misuse and issue any order for just processing of the case. But quite in contrast to this legally empowered and robust court with that effective weapon, on the ground no significant presence of such court could be seen in empirical evidence. There can be two possible reasons for this phenomena: one, judges may be reluctant or not motivated enough to use these powers due to a number of reasons, i.e. political pressures, cultural factors and personal preferences; two, the powers are too wide, general and vague making it impracticable and difficult in specific situations to take *bold* decisions. Here this former internal aspect shall be discussed as it relates to the procedure and internal court functioning.

At first, the law may define misuse of the process of the court to clarify to the judges, lawyers as well as litigants what exactly would come under its purview. Since abuse is a negative act and has penal consequences in the administration of justice, it needs to be clearly defined on the same principle as in criminal law where an act is well-defined to qualify to be an offence. If this vagueness is left as it is, litigants, lawyers and judges may have their own subjective interpretations of the abuse in practice. For instance, at a belated stage after recording evidence, a plaintiff seeks to amend his pliant to correct a typographical error; on its face, the error exists but it may not go to the root of the material issue; however, the plaintiff thinks *innocently* that it does. The judge may interpret it as a deliberate act to abuse the process and an attempt to prolong the litigation through satellite applications. In such

[367] Code of Civil Procedure 1908 [Pakistan] s.151

circumstances, the law may provide that while considering applications during the proceedings of the case, the court must ensure:

(a) Application is moved in proper time.
(b) It relates to the material aspect of the case and cannot be ignored.
(c) The applicant is acting in good faith, in a vigilant and natural way on the face of it.
(d) It contains a matter which the applicant was not aware or had not the opportunity to bring forth any earlier.
(e) The move does not appear to be a deliberate attempt to tease the opponent.
(f) How adversely it will affect the opponent if allowed, or the applicant if refused.

These guidelines incorporated in the law would clarify to all the actors what may be declared abuse of the court's process. In another instance, where a party difficultly brings with him five witnesses and the opponent move an adjournment application on the ground of absence of his lawyer; the judge may grant an adjournment in routine or under pressure of lawyers' clout. Here, the law must provide that if some period or days are fixed for oral evidence, and witnesses are procured by one party, it shall amount to the abuse of the process of the court for the other party to be unprepared for cross-examination.

Here it is suggested that after a systematic empirical study of real cases pending and decided in the district courts of Pakistan, causes of all adjournments may be analysed, grouped and sifted to identify common abusive practices. Based on this study, amendments may be proposed, and law may clearly provide, so far as it is practicable, for all such possible and frequent situations. For instance, the law may provide that absence of a party and/or its lawyer for cross-examination of a bunch of witnesses produced by the opposite party, shall be assumed as abuse of the court process unless exceptional circumstances (like death or serious injury) are otherwise established. Taking undue adjournments, moving miscellaneous applications, being absent on important hearing dates on flimsy grounds, not submitting information on time, and various tactics other tactics for deliberate prolongation of litigation may clearly be laid down as abuse of the process of the court.

Secondly, the existing law provides open-ended powers, i.e. court may issue 'such orders as may be necessary' for the ends of justice or to prevent abuse of the court process. No guidelines and limits of these powers are clearly laid down for a serious problem which is

central to the litigation culture of Pakistan and has enormously caused delay, vexation and wastage of time and resources in thousands of cases. In view of the enormity of the issue, the legal system must respond to it with equal force and seriousness.

A judge sitting in the district and overburdened with the workload, may find it difficult and impracticable to first label certain act or common practice in the courts as abuse and then devise a mechanism to prevent and punish it. For instance, non-appearance of lawyers on hearing dates on the ground that they are engaged in other courts or the practice of simply informing the court on a crucial hearing date by a party that it has changed the lawyer and seeks adjournment are common practices which the litigation culture of Pakistan has adapted to. Such practices are hard to break by individual judges unless the law ventures to clearly lay down these as clear abuses of the process and how to cope with these. Judge's individual courage to curb such practices would not suffice, nor is he expected to do so. The legal system must take all these issues and try to bring all the actors within the loop of regulated patterns of behaviour. Hence, the law must provide an elaborate regime of punitive measures and actions to check the abuse of the court process providing various options, guidelines and instructions for the judges to consider and follow.

### *6.4.5 Cost of adjournment and default, cost of the suit and vexatious claims*

In a country like Pakistan where poverty is rampant and the income level is low, the financial burden of litigation plays a crucial role in many respects. It may act as a disincentive for the potential litigants who choose not to go to the courts even for their genuine grievances. The well-off may use court cases to engage and tease their opponents by making them spend on litigation. Ideally, the financial aspects of litigation may have such an arrangement to grant relief to the party wronged without any cost and put the entire burden on the party who is at fault. However, a weak legal regime would not be able to achieve this objective and let the practice of vexatious claims creep in and used as a tool to serve the personal interests of the powerful and wealthy. If it is ensured through a robust system that the party having a genuine claim shall be of substantially compensated while hitting the pocket of other party hard enough for its unfounded case, litigation may have the chance of early settlement or not even filed in the courts at first place.

An effective cost imposition regime may work as an effective deterrence against bringing false cases in the court, vexatious defence against a genuine claim and misusing court process. One reason for misuse of the court process and deliberate prolongation of cases can be the poor legal and administrative arrangement of laying the financial burden on the defaulting party at the right time and in correct proportion. Existing provisions of Code of Civil Procedure 1908 dealing with (a) cost of suit, (b) compensatory costs for false claims or defences and (c) costs of adjournments shall be analysed here with specific suggestions.

*Cost of Adjournments and Defaults*

As discussed earlier CPC 1908 Order 17 (Adjournments) Rule 1 provides that court may grant time and adjourn hearing and 'make such order as it thinks fit with respect to the costs occasioned by the adjournment' and 'where sufficient cause is not shown for grant of an adjournment --- [it] shall proceed with the suit forthwith.[368] Rule 3 of Order 17 provides that where a party fails to produce his evidence or do anything required, 'the Court may, notwithstanding each default, proceed to decide the suit forthwith'.[369] These are the *only* provisions which deal with the default and empower the courts to impose costs as to adjournments; mere perusal of these legal provisions reveal their scantiness. As against the culture of deliberate prolongation of cases and abuse of court process, the law needs to be equally comprehensive and robust enough to combat these practices. Existing law treats the issues of default and adjournment through cost too briefly and insufficiently. It merely endows powers to the courts to order as to costs in one-liner without providing further necessary instructions and guidelines.

Amendments may be introduced in the Code to provide principles of determining costs when a party seeks adjournment or defaults in attendance or producing evidence or doing an act required by law or the court. As elaborated earlier, at the planning stage, all actions required to be done by the parties must invariably be scheduled providing sufficient

[368] Code of Civil Procedure 1908 [Pakistan] O. XVII Rule 1

[369] Code of Civil Procedure 1908 [Pakistan] O. XVII Rule 3

time to the parties after effective communication of the timelines and clear consequence of non-compliance which must include costs in terms of the exact amount. Law may require courts to determine the cost of non-compliance or adjournment at the time of scheduling in pre-trial conferences in exact terms so that the parties are forewarned as to financial burden of non-compliance.

In fixing the costs law may provide criteria and factors to be considered by the courts i.e. loss of income of the parties due to engagement in the court, travelling and other expenses based on distance from their residence to the courthouse, duration for which parties are engaged in litigation, and other factors specific to the parties. Secondly, the cost for further defaults and repetitions may have an extra amount of costs and this too must be clearly known by the parties beforehand.

*Cost of the Suit*

Section 35 of the Code provides that costs of suits shall be in the discretion of the Court to determine its magnitude and by whom these are to be paid. After endowing these enabling powers, the Code especially its detail rules part (secondary legislation) is completely silent as to how this aspect shall be dealt with by the courts. In the first part of the rules concerning pleadings of the parties, their oral examination, first hearing and identifying issues (Orders VI to XV), the law does not bind the parties to submit their claim of expected costs of the suit. Nor does the later trial part of the rules concerning the recording of evidence and judgement and decree (Orders XVIII to XX) lay anything as to costs of the suit and in this respect responsibilities of the parties and the court.

A whole new Order needs to be introduced in this part of the Code dealing with this important issue. In pre-trial conferences, parties must be aware of what actual costs of the suit the opposite party is expected to incur and which it must pay in case of a verdict against it. In the very initial stages of the case a tentative assessment of such costs needs to be determined by the courts in consultation with respective parties. Law may provide complete guidance for the judges on how to determine the amount of

these costs. For instance, expenses incurred by the parties in attending the courts, procuring documentary and oral evidence, engaging lawyers, loss of income while engaged in litigation and other ancillary matters.

*Compensatory Cost*

Section 35-A of the Code of Civil Procedure 1908 provides that upon objection by a party that the claim or defence of other party is vexatious, and the claim or defence is disallowed, the court may award compensatory costs up to an amount of twenty-five thousand rupees. At first, it is the objector (one of the parties in litigation) who may invoke this power of the court and that too at an earliest possible opportunity. This law needs to be amended to necessarily make the court express its opinion, and after giving an opportunity of hearing to the party against whom such order is made, award compensatory costs. Those against whom a vexatious claim is made may not *always* choose to seek this relief for a number of social and political reasons. Moreover, the underlying assumption of the existing legal provision is that one of the parties suffer due to the deliberate and false litigation and it is vigilant enough to object on time. Private parties are not the only sufferer of such frivolous cases; time and resources of the judicial administration and public funds also are wasted. It also causes a delay in genuine cases by eating up the court's time and energy. Therefore, this aspect needs to be taken quite sternly by imposing substantial financial cost which may proportionately go to the exchequer as well as the suffering private party.

An empirical study is required to see in what percentage of cases the issues of frivolity, deliberate misrepresentation of facts and vexation are taken up by the courts in Pakistan while finally determining the cases and whether under section 35-A compensatory costs are awarded or not. Since data is not available at the moment, however, empirical evidence presented in chapter 4 clearly suggest that this legal tool is most rarely used in practice. Again, there can be a number of cultural and political reasons for the parties as well as for the judges to abstain from taking such cases head-

on. Therefore, the law needs to make it binding on the judges to necessarily take up this issue and record their findings while finally determining the case.

Besides section 35-A of the Code, there exist nothing in the rules part to guide how this power is to be exercised. Detail instructions need to be formulated and made part of the rules part of the Code laying down criteria for determining the (a) nature of vexatious claims or defences, making false statements knowingly or deliberate concealment of material facts etc., (b) magnitude of compensation relative to sufferings and (c) portion of compensation to go to the exchequer as fine. If this stern mechanism of punishing false litigation is in place and effectively used in practice, it can surely deter the vexatious litigants and reduce the burden of the court system.

### *6.4.6 Final Judgement, Effective Relief and Certainty of Execution*

Order XX of the Code deals with 'Judgment and Decree' providing for the contents and form of the final determination. Fundamental objectives of this stage of the litigation are that court's decision must be just, based on objective evidence, applying correct law to the true facts, and providing sufficient reasons touching all important facets of the case. Existing law, however, mostly deal with the form of the judgement and decree and leave out certain important aspects. Therefore, the following recommendations can be considered in this respect.

The judgement and its relief part must cover all aspects of the parties' circumstances relating to the controversy, their respective sufferings, and their rights and liabilities. The relief part may be dealing with substantive rights and obligations of the parties as well as the effects of litigation on them. For instance, under a decree a plaintiff is to repossess his property, the relief part may state that how long litigation prevented him from enjoying the possession and how this can now be compensated. It may also calculate the cost of the suit as well as financial loss due to litigation. As discussed earlier, in the initial stage of the case, courts need to calculate the expected adverse impact of time to be consumed in the litigation; in the final stage that effect may be reviewed and made part of the final decree.

Law may provide that in addition to the factual and legal issues framed and decided in the final judgment in terms of legal relief, courts are required to invariably also consider, analyse and determine following matters:

a. Which of the parties suffered more due to litigation and how it can be compensated?
b. What was the actual cost of suit and which party is obliged to pay it and how?
c. Which party suffered due to the deliberate, negligent or careless conduct of the other and how it can be compensated?
d. Whether claim or defence was frivolous and vexatious? If so, what compensatory cost is to be paid by one party and how?
e. Whether on the basis of the record of the case, a party or witness etc. appear to have committed an offence against administration of justice (i.e. false information, deliberate concealment of facts in the court etc.)? If so, why the matter should not be sent for criminal proceedings to criminal court?
f. After having the decree final (lapse of time for appeal or confirmation of decree in appeal etc.), how the relief is going to be executed, in what timeframe and what would be the arrangements till final execution?

All these issues, not relating to the substantive rights and liabilities of the party as to the controversy, are most important for the execution and the administration of justice, and fair trial. Substantive rights are mere aspirations and meaningless if the justice mechanism either fails altogether or delays considerably or involves a huge cost to enforce these. The final judgment, therefore, needs to cater for all crucial aspects of the trial.

# Chapter 7. Conclusion

Starting from a normative enquiry into the fundamental attributes of a well-functioning court system and means to measure these, it is shown that one of the attributes of sound court service is expedition and economy, and for that end, the court process needs to be efficient and well-managed. One way to attain that objective is to drastically improve court procedures and modernize case management. A sound regime of court processes and management can be instrumental in providing judicial relief within a reasonable time and at minimum possible cost. The empirical analysis of the work of district courts of Pakistan from 2002 to 2014 indicate negative performance in terms of delay, abuse of process, low CCR, ever-increasing backlog and poor end-user satisfaction. To achieve the ideal of efficient courts, and given the existential issues of underwhelming performance of Pakistan's district courts, a new approach under the New Civil Procedure Framework (NCPF) is introduced which envisages at the same time various essential aspects of court service for the efficiency-enhancing objective.

In order to contain the said problem issues and infuse efficiency, expedition and economy in the court service, the proposed NCPF model for Pakistan, at theoretical level, starts with a paradigm shift deviating from the existing substantive justice and equity-based approach; the traditional approach views justice in a narrow individualised context, i.e. delivering factually and legally correct finding in a justiciable matter based purely on the merits of the case and avoiding procedural technicalities. The NCPF model, however, draws on the Woolf's reform thinking and presents an overarching approach where court service needs to be provided by balancing the key imperatives of justice, i.e. accuracy, expedition, proportionality and economy given the time-resource constraint reality.

Since justice system has to deal with a number of cases, a distributive and proportionate justice approach (as against the substantive or individualised justice) is indispensable; decision in one case is expected to be accurate, within reasonable time, and affordable, but it must also be arrived at through proportionate allocation of time and resources in view of and relative to other cases. Hence, the NCPF model is based on the paradigm shift where the scope of 'justice' is expanded: the aim is not limited to substantive justice in one case, but the agenda is distributive and proportionate justice in all cases.

Therefore, the first and foremost recommendation under the NCPF model is to make this direction-setting agenda - a mission statement – an integral part of the new civil procedure law of Pakistan. All rules, court processes, judge's powers and functions must emerge from this fundamental construct.

Though Woolf's overarching approach helped in challenging and dismantling the traditional substantive approach of the civil justice system in Pakistan, and then replacing it with the new balancing approach, the NCPF model, however, looks beyond Woolf and additionally suggests a neo-proceduralist dimension due to peculiar circumstances of Pakistan. Under this neo-proceduralist approach, it is recommended that the law must dictate the pace and process of litigation while the litigants, lawyers and judges all must follow the course set by the law. They must be under a strict obligation to comply with material procedural requirements and pre-planned timelines in a case and the judges are there only to *execute* that scheme. All proposals of the NCPF model revolve around this central strategy. Justice on merits of the case and avoiding technicalities (an equitable approach) ruled the civil justice system for quite long; but not the wind of change is bringing the strict compliance regime back on the centre stage.

The said fundamental theoretical constructs (i.e. balancing theory, distributive justice approach and the neo-proceduralist approach) are pivotal to the NCPF model. Other proposals, strategies and practical reform measures are in tandem with, rather sprout from these approaches. Rigorous preliminary scrutiny of the cases is the first most important step in that direction which allows the court to assess the judicial treatment a case deserves. It would enable the court to prioritize a case in view of its facts relative to other cases, look for amicable alternative ways for its settlement, shrink the scope of enquiry and allocate only necessary procedures, time and resources. It also affords an opportunity to communicate the parties forewarning as to penal consequences of frivolous litigation or deliberate default or abuse of court process.

The second most significant strategy is active case management. Though it appears to be toeing Woolf's and CPR's line where courts are obliged to further the overriding objective by actively managing the cases. However, under the NCPF for Pakistan, the scope of this management regime is expanded considerably and it is posited in the neo-proceduralist

and strict compliance approach. It is suggested that the law shall lay down the specific course of action and a scheme of compliance to achieve the principal objective of civil justice. Court's discretion to control the pace of litigation is at the minimum, and it shall only execute the scheme of law, material procedural requirements and pre-scheduled timelines *mechanically*. Use of information and digital communication technology must be substantially employed in the case management system for enhanced efficiency and economy.

As to the implementation issues of the NCPF model, the organic context of the target jurisdiction, i.e. Pakistan with its socio-economic and cultural peculiarities and other factors influencing the legal institutions, may be taken into account with a reasonable degree of alertness. Besides that, in a comparative context, the principle of functional equivalence may be employed; commonality of problems and their causes may be traced before considering foreign solutions for the local issues. Both the reform measures and local conditions may not be considered as fixed constants; the measures can be modified and customised for the local needs; conducive environment and necessary conditions may also be developed to let the new regime of civil procedure work. A heuristic and pragmatic approach is most viable under which workable solutions, which may not be perfect, can be tried. The new regime may also be given enough time and opportunity for gradual adaptation and settling in.

Based on the said foundational theoretical constructs and specific strategies, practical reform measures are also recommended at the end to complete the NCPF model for Pakistan. These are grouped under three main headings, i.e. Macro Level Initiatives, Preliminary Treatment of Cases and Stringent Execution of Procedure. All these measures are interconnected and necessary for implanting the whole scheme of the NCPF model which envisages triggering the reform process and continue it by constant reviewing and development from time to time permanently. These proposals can be summarised as under:

- Judicial leadership of Pakistan, by making use of the legal forum of NJPMC, may take the ownership of the reform process by designing, implementing, monitoring and reviewing it as an ongoing project. For that end, the superior judiciary may work in collaboration with the concerned institutions, executive government, international agencies, foreign judiciaries and other stakeholders.

- A comprehensive policy document may be formulated at first, namely New Civil Procedure Reform Policy for operationalising the NCPF model which may consist of the new direction, leading strategies, and a roadmap for constructing a robust case management system and a new civil procedure law regime.
- By implementing the reforms in a phased manner with an incremental approach, NJPMC may formulate yearly planners setting execution targets of activities at the macro and micro levels, monitoring their impact and reviewing the entire process. This reform process may be an ongoing project where the impact of change, the performance of courts and problem areas are continuously monitored, evaluated and improved.
- In the proposed new civil procedure law, at the very beginning the agenda of civil justice system may be set in explicit terms i.e. the principal objective of civil justice is to resolve civil disputes accurately, expeditiously and by most economical and proportionate use of time and resources, by employing efficient management tools and affordable digital technology and by preventing abuse of court process.
- A robust case management system needs to be designed in law and implemented on the ground at three levels: (a) handling all cases in a district by the district administrator judge, (b) managing cases by a single judge pertaining to his court and (c) managing the process of an individual claim by a court during its proceeding. The system may have its basic and detail structure in the primary as well as in the secondary legislation, while its immediate functional aspects may be dealt with in the manual of detail instructions and yearly planners.
- For operationalisation and execution of the new case and court management system, change management is required under which the existing personnel may be trained and motivated, and fresh experts may be hired for specialist managerial tasks. Availability of presiding officers of the courts may be ensured all the time in all courts through administrative orders and pre-emptive planning and measures to avoid adjournment on this pretext.
- Reform process and development of the system need to be consistent and institutionalised through regular up-gradation and reviewing. Academic and comparative research, empirical scrutiny, consultation with justice reform experts and

feedback of all the key stakeholders (i.e. district judiciary, local bars, litigants, and other government agencies etc.) are recommended in this respect. The process may be subjected to the empirical and rigorous evaluative process based on in-depth analysis of judicial data, litigants' experience and comparative research.

- Judiciary need to open up its ties with other executive agencies, local organizations, international justice entities, judiciaries of other countries for cross-jurisdictional cooperation and collaboration. It also needs to interact with the local population and litigants through court service user committees at the local level.
- Modern management tools and digital technology may be effectively incorporated to make the litigation process, scheduling and case handling most efficient, cost-effective and timesaving. Court and case management software, integrated scheduling and diary system, digital access to the record, communication between the court system and outside world, and distance hearings through electronic means may be considered as necessary steps.

The second and third pillars of the NCPF model comprise proposed measures which are related directly to the way courts would handle the workload of cases and judicial proceedings. Various recommendations would require amendments in the procedural law and certain administrative arrangement. Main suggestions of pillars 1 and 2 are as follows.

- Under the new civil procedure law and case management system, initial scrutiny and management of cases may be incorporated as the most important and indispensable step for filtering, extensive planning in consultation with parties and lawyers, scheduling, pre-trial pre-emptive actions and fore-warning as to consequences of non-compliance. All these steps must be the obligatory pre-requisites of the litigation process.
- The judge must be bound to conduct preliminary hearing of the case, scanning through pleadings of the parties and their oral examination and coming up with a judicial finding identifying the core controversy and the best economical and expeditious way to resolve it. Considering the alternate method of resolution, applying minimum, inexpensive and suitable procedures, narrowing down the scope of inquiry and recording only required evidence are main steps in this regard.

- To prevent abuse of court process, frivolous litigation and delay, it needs to be binding by law on the judge to first fore-warn and then to execute penal consequences of such gimmicks. Under a neo-proceduralist approach, the judge must have no or little discretion to condone the delay, do away with material procedural, and pre-planned schedule. Law, and not the court's broad discretion, must have a dominant role; judges must only execute the scheme of law.
- Existing law on adjournments and condonation of non-compliance may be completely overhauled and changed. Pre-planned schedules must be strictly adhered to and discontinuance must be an exception only in circumstances clearly laid in the law. Instead of general and vague powers of the court to deal with non-compliant behaviour as it deems fit, the law must lay down clear, predictable ways and guidance of dealing with these issues.
- Civil procedure law also needs drastic insertions as to the cost regime. Cost of adjournments and for non-compliance, against vexatious claims or defences and as to the litigation expenses must be pre-determined and communicated to the parties to enable them to weigh the risk and make a cost-benefit analysis of their actions during the proceedings.
- The civil procedure must also require that besides determining core controversy in a case, the final judgment may also deal with and provide adequate relief as to the process of litigation. It must cater for the individual suffering of the parties, cost of the suit and its responsibility, and vexation and corresponding compensation. Also, if a party or its witness committed an offence (i.e. false information, deliberate concealment etc.), the matter may be referred to the criminal court for proceeding under the penal law.

This project is a humble effort to improve the court service in Pakistan, trying to alleviate the sufferings of millions of its people.

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