[**Judging without law**](https://www.dawn.com/news/1631187/judging-without-law)

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*“A judge trying to do justice by ignoring or disregarding the law does so at the peril of shaking the very foundation of the judicial system itself as such an approach destroys certainty and predictability of judicial response.” — Former Chief Justice of Pakistan Asif Saeed Khosa*

KARACHI feels like a conflict zone. Properties worth billions of rupees are being damaged. Thousands of people are being dispossessed and thousands being rendered unemployed or seeing their businesses negatively impacted. Most importantly, the dignity of such affectees, belonging to all economic classes, has been damaged as they are labelled ‘encroachers’ and ‘land grabbers’.

What has caused this? Surprisingly, all this is the consequence of the Supreme Court’s exercise of its jurisdiction under Article 184(3), of the Constitution, in CP No.9 of 2010, known as the ‘SC Anti-Encroachment Case’.

But how did a constitutional provision like Article 184(3), whose sole purpose is the protection and enforcement of fundamental rights, such as dignity, property, a fair judicial process and protection of livelihoods, lead to damaging the very fundamental rights it seeks to protect? Is this because certain judges may have misapplied this constitutional provision? Or does the real reason lie in certain institutional defects, or omissions in this very constitutional provision, which leads certain judges to misapply it? In short, the fault lies not in individual judges but in the very structure, or lack of structure, of Article 184(3).

How did Article 184(3) end up damaging the very fundamental rights it seeks to protect?

No fair hearing: The SC Anti-Encroachment case arises out of CP No.9 of 2010 filed for the main purpose of rectifying the encroachment of amenity plots in Karachi but on any given date of the hearing of this case, more than 90 applications are fixed for adjudication dealing with everything under the sun concerning the province of Sindh, especially Karachi. This leads to a denial of the fair right of hearing primarily for two reasons.

Firstly, in view of the complexity and volume of such problems, including alleged encroachments, before the Supreme Court, the latter appears to have adopted a hurried judicial process in hearing these issues in order to achieve the desired results; at times, orders relating to demolitions and dispossession are passed without hearing the multiple persons who would be affected by such drastic orders. In short, justice becomes a victim of judicial efficiency.

Secondly, since these are complex and structural problems, the court is seen to act on preconceived (though not mala fide) notions, such as the poor encroaching on land, builders and businessmen being part of a mafia and public servants being incompetent or corrupt. In other words, cases are seen as being partially predetermined, with hearings a mere formality. Therefore, these proceedings lead to a violation of the cornerstone of all judicial systems, namely a fair hearing ie a judicial adjudication which is calm, well considered and without preconceived notions.

No procedure: An examination of Article 184(3) as well as the Supreme Court Rules shows that the apex court has yet to formulate a detailed procedure, including procedural safeguards, to conduct such crucial cases that have far-reaching impacts on people’s lives. Even though various judges over the years including Justice Faez Isa, Justice Mansoor Ali Shah and Justice Yahya Afridi in various judgements and dissents, as well as former chief justice Asif Saeed Khosa during his tenure, have emphasised the importance of following and evolving a procedure to exercise this original Supreme Court jurisdiction, till today no detailed procedure has been evolved to exercise this jurisdiction under Article 184(3).

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This is especially surprising because nearly every other judicial power exercised by the magistrate up to the appellate jurisdiction exercised by the Supreme Court itself is subjected to a detailed civil and criminal procedure as to when, how and to what ends such powers are to be exercised. Judicial procedure is critical because it gives certainty and predictability to the judicial process as well as controls the misapplication of judicial power.

No appeal: Proceedings under Article 184(3) begin and end at the Supreme Court. There is no right of appeal nor any right of challenge before any other independent judicial forum. Only a limited right of review is given before the very same judges who passed the original order. It is precisely for this reason that Justice Faez Isa and Justice Yahya Afridi in their judgements and dissents have advised caution in the exercise of this jurisdiction. Even otherwise, such judicial adjudication without the right of appeal is an anomaly in our judicial system.

Rights or desires: The sole purpose of Article 184(3) is to enforce fundamental rights in matters of public importance, and even though projects like the Karachi Circular Railway or fixing encroachment problems in Karachi may be desirable, the Supreme Court is the highest constitutional court and should not be converted into a development or anti-encroachment department, which is within the domain of the executive. More importantly, while pursuing these desired judicial projects, it is imperative that the fundamental rights of property, dignity, fair judicial process and protecting livelihoods should not be ignored. In short, judicial desires should not trump fundamental rights.

Discretionary constitution of benches: A fair decision about which judges will hear a particular case has a dramatic effect on justice in any case. Thus, Justice Yahya Afridi notes that “there is an inherent and dire need for judicial introspection; to structure the unfettered discretion of the worthy Chief Justice of the Supreme Court to constitute benches of the Supreme Court to hear and decide cases under Article 184(3), and in particular, suo motuactions,lest the exercise of such jurisdiction may be seen to have been abused”. Considering the far-reaching implications of this jurisdiction, it is imperative that such cases should be heard by a larger bench of five judges (eg as in the Indian Supreme Court), preferably by the senior-most Supreme Court judges, and furthermore, the sole power of the chief justice of Pakistan to constitute benches needs immediate reform.

No one doubts the bona fide intentions of the chief justice to reform Karachi or Sindh but in a country where there are over 51,000 cases pending before the apex court (the highest pendency in the court’s history), is it impolite to request that such reformation should begin first at the Supreme Court?

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