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**Judicial governance**

Ultimately, the accountability of the judiciary is a more serious matter than the accountability of the executive branch (and this is true all over the world) as the judiciary is not elected unlike parliament and cabinet.

The right to life (Article 9), the right to property (Article 23) safeguards as to arrest and detention, fair trial and due process of law (articles 10 and 10A) and inviolability of the dignity of a person and privacy of the home (Article 14) are based on the timely adjudication of civil and criminal cases. These fundamental rights exist in our constitution and the constitutions of all civilized nations.

It is a fact that more than 90 percent of the pending 2.1 million cases in the district and superior courts pertain to offences against person (life), offences or claims for or against property, arbitrary arrest and detentions including enforced disappearances, the violation of the privacy of the home and acts of indignity and defamation to the person.

Rule of law ordains that all state organs, as well as governments including federal and provincial, work within their own domain. Due to long spells of martial law – with its tendency to invoke the ‘law of necessity’ – the boundaries between the various state organs have been erased, fudged or deliberately misinterpreted. Various institutions and governments have overstepped their legal mandate on the pretext of eradicating corruption, with misplaced patriotism opaquely alluding to the “betterment of the country”.

What seems to be deliberately glossed over is the fact that the very concept of patriotism and “betterment of the country” requires above everything else adherence to the constitution and rule of law.

When law and constitution are subordinated to ‘necessity’, for any imperative (such as the building of dams) an executive function is arbitrarily and whimsically taken over by another organ of state. Rule of law and constitution can thus be made subservient to the whims of any individual – judge or general.

The executive and the judiciary have a symbiotic co-existence: the executive has to ensure that the lives, property and honor of the people are protected and the judiciary tries offences against the person, property and honor of a citizen. They must both fully do their jobs to create a safe society.

It’s this improvement in judicial governance that should be the focus of judicial leadership, not the encroachment into the executive domain of building dams or the encroachment into parliament’s job of disqualifying legislators.

Improved judicial governance could see the introduction of a Case Management System that could be introduced at the high, sessions and magistrates’ courts to somewhat alleviate the tribulations of a litigant public.

In Pakistan’s constitution there is a clear division of powers within the judiciary. All provincial high courts have original jurisdiction under Article 199 of the constitution to enforce fundamental rights and supervise and control the subordinate judiciary and tribunals established in the Province.

The Supreme Court has original jurisdiction of trying disputes between provincial governments and the federal government; it can also hear appeals from the final orders of the high courts. Additionally, it may also pass orders in cases of public importance which involve the enforcement of fundamental rights (this last jurisdiction, however, is very restricted as these powers are originally invested in the provincial high courts).

It is pertinent to note here that there is no administrative nexus between the provincial high courts and the Supreme Court as both are enumerated as subjects of the provinces and the centre respectively. Since the subordinate judiciary is under the administrative control of high courts (not the Supreme Court) they have to deal with a higher volume of matters than the Supreme Court.

Unfortunately, and notwithstanding the high pending case load, at times the judiciary has not only ploughed into the executive domain but by excessive invocation of article 184(3) the jurisdiction of high courts has been affected too. Instead of being independent fora for the enforcement of fundamental rights and improved governance in subordinate judiciary, they remain subdued.

The initiative of improving governance in subordinate courts should have come from the high courts as they control the lower judiciary and the tribunals where cases have piled up. Our constitution envisages a horizontal and federal scheme for the judiciary where there is a division of powers between all federal and provincial organs of the state. Unfortunately, efforts to make this relationship vertical began with the establishment of the Law and Justice Commission under an ordinance in 1979 issued by General Zia, and concluded in the framing of a National Judicial policy in 2009.

The former eroded the distribution of powers scheme between the federal and provincial organs and the latter aimed at granting administrative directions to the high courts. Both are ultra vires to the constitution.

It is in the best interest of the federation that the judiciary, the executive and parliament as well as the federal and provincial governments adhere to rule of law instead of the ‘law of necessity’ to improve governance.

For example, the recently announced scheme to construct five million houses and establish an Island City on Sindh’s provincial Islands crosses these boundaries. Under the constitution, housing is a purely provincial subject. To invoke necessity over law and constitution, and thus have the federal government indulge in real-estate development, is ultra vires to the constitution.

Each organ of state must concentrate on their own governance rather than interfere in each other’s domain.

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