[**Implementing the law**](https://www.dawn.com/news/1679237/implementing-the-law)

[Basil Nabi Malik](https://www.dawn.com/authors/1164/basil-nabi-malik)Published March 10, 2022

The writer is a lawyer based in Karachi

IT is a well-established principle of law that the judiciary shall only pass orders which are capable of being implemented. This legal principle is seen by many as something that is quite evident and frankly a bit commonsensical. So commonsensical that in reading this, you may be thinking that who in their right mind would ever want to pass an order which is impossible to bring into effect.

But what if I told you that our history is replete with such examples? What if I further told you that the line between ‘implementable’ and ‘wishful thinking’ is a fine one? And that determining how to mould one’s decision to fit the circumstances, if it fits at all, is much trickier than it may look, and the enforceability of a decision may not be as obvious as we may think?

In order to explain why, it is imperative that we take an overall look at how decision-making is carried out. On the whole, our judicial apparatus may be roughly divided into two types of decision-making approaches. In one approach, orders or judgements are moulded to ensure that they are sensitive to the prevailing circumstances, thereby making certain that they are implementable. In the other approach, orders are passed irrespective of such realities and under the impression that the non-conforming circumstances shall give way to the majesty of the law.

In relation to the first approach to decision-making, we have many examples in our chequered national history. However, for the purposes of this discussion, and to further my point, one instance would suffice. In the Zafar Ali Shah case, where Gen Musharraf had already taken over power through the barrel of the gun, the Supreme Court was being positioned by the powers that be as a much-needed stamp of legitimacy for military rule. Alas, it was unsurprising that the court ultimately sanctified a military takeover and gave sweeping powers to a military dictator.

The line between ‘implementable’ and ‘wishful thinking’ is a fine one indeed.

In doing so, however, the court was possibly attempting to do two things. Firstly, it was seeking to protect and preserve for itself a certain degree of power and relevance, thereby not ceding all of its jurisdiction or its ability to review executive actions. Essentially, it was willing to live to fight another day. Secondly, it was adjusting its decision, right or wrong, to the existing ground realities so as to ensure it could be implemented, as such implementation would contribute to the partial preservation of the judiciary’s status and position in society.

This analysis in no way seeks to condone the decision itself, which was clearly bad in law, but rather attempts to showcase the prevailing tension between the law, its implementation, and the demands of the prevailing circumstances. Bluntly put, the Supreme Court did not see a way out, but only a way to partially stay in.

We do not have to look too far back in history to find examples for the other approach in decision-making either. Justice Gulzar Ahmed, the previous chief justice of Pakistan, had passed various orders in relation to building violations across Karachi. Amongst those orders were those directing the demolition of Nasla Towers and Tejori Heights. Various authorities acted in implementation of such orders. However, just before his retirement, justice Gulzar had passed another order as well, which had directed the razing of a mosque that was alleged to have been constructed illegally. To date, that has not taken place.

Other than that, recently, a judgement of the Islamabad High Court held that, amongst other things, the marriage of girls below the age of 18 is illegal. The decision sought to do away with much of the ambiguity regarding the age of marriage, despite the fact that existing societal norms appear to encourage such ambiguity, if not downright approve of it.

Both these orders/ judgements are examples of judicial decision-making which aren’t made to justify an existing ground reality, but rather serve as a judicial application of mind to change the circumstances through the reasoning of the court. This judicial application attempts to cut its way across such realities to a new normal. It seeks to position itself safely and snugly under the umbrella of the proverb that declares the pen to be mightier than the sword.

Implementation has not been possible in the demolition case. I suspect it will also remain an issue in the matter of underage marriage. And this is why the legal principle of passing implementable orders is not as commonsensical as we may often assume it to be.

In situations where decision-making either mirrors or follows ground realities, implementation tends not to be a problem. But when there is an attempt to implement the law against the way of the wind or the grain of societal norms, or if there is an attempt to evolve it, whether by clearing the ambiguity or otherwise, there is always the risk of non-implementation. The US supreme court faced similar issues in the Brown vs Board of Education case, in which racial segregation was supposedly banished from public schools. In fact, what is often not mentioned is that the landmark decision faced much resistance, so much so that it failed to be properly implemented for years on end.

Whatever approach is adopted by a judge may be a function of the overall inclinations of the judicial officer towards the issue at hand, how compelled he or she feels to venture out of their comfort zone, and how immediate the need for such a decision is. However, one thing is for sure. Passing orders that can be implemented is not commonsensical or obvious. It is the result of a painstaking effort by a judge to either preserve the authority of the court or further it.

*The writer is a lawyer based in Karachi*

[**basil.nabi@gmail.com**](http://mailto:basil.nabi@gmail.com)

**Twitter:** [**@basilnabi**](https://twitter.com/basilnabi)

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