PAPER PRESENTED

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ON

NATIONAL JUDICIAL POLICY SUGGESTIONS FOR REFORM

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NATIONAL JUDICIAL POLICY
SUGGESTIONS FOR REFORM

1. There is a negative public perception in regard to the judicial system, especially the subordinate judiciary, on account of systemic delays in disposal of cases and the fact of endemic corruption. From time to time many procedural changes have been made which have no doubt improved the speed of justice. However the reality remains as it was: a huge back-log in all the courts and a number of years before the average case passes through each level of the judicial hierarchy. It is time to think of more radical reforms, more fundamental changes. Why should we not convert to a uniform 3-tier system: trial court, appellate court, Supreme Court. The 3-tier system is already there for a number of special laws e.g. banking laws, labour laws, environmental laws. Let us abolish the civil courts and start the first tier with additional district judges recruited through a competitive examination process open to B.A. LL. Bs between 35 to 45 years of age with not less than 10 years practice or comparable legal experience. The appellate court should be the High Court. The civil revision jurisdiction could go. To cope with the back-log a sufficient number of additional district judges could be recruited on contract for, say, 5 years till the number of pending cases had been reduced to acceptable levels. Senior lawyers could also be appointed for a fixed 5 year term as ad hoc judges of the High Courts for tackling the back-log. The target should be for the average case to pass through the trial court stage within one year, and again not more than one year at the appellate stage. Inevitably there will be transitional provisions in moving from the current 4-tier system to the proposed 3-tier one but surely they can be overcome. The 3-tier system will cut years from the final disposal of the average case. It will also greatly improve the quality of judgments because the trial court level will be manned by far more experienced judicial officers.

2. Even if a uniform 3-tier system is not possible or feasible the NJPMC should cause an exercise to be made as to how many additional civil court judges, additional district judges and high court judges are required on the yard-stick that the average case should pass through each of these three levels within not more than one year at each stage. Parliament should then be asked to allocate funds accordingly keeping in mind that speedy access to justice for all is a fundamental pre-requisite for good governance. The shortage of judges in the subordinate judiciary was Supreme Court brought to the notice of Parliament and the Government through Supreme Court Suo Moto Case 3 of 2001 (PLD 2001 SC 1041) wherein it was inter alia observed "After separation of the Judiciary from the Executive more man-power is required. A Civil Judge is not only a Civil Judge but Rent Controller as well as Family Court and he has also been burdened tremendously with the disposal of criminal cases. This is not fair and this is one of the causes of delay." Ten years having passed without adequate response it is time that an order be passed for affirmation action in this matter on the basis of the above proposed exercise.

3. There are many many honest capable and hard-working officers in the subordinate judiciary. But the overwhelming public perception is that justice at this level is delivered on the basis of money or influence or both. Corruption in the subordinate

judiciary, whether actual or perceived, erodes respect for those who have the high duty to adjudicate civil disputes, to punish the guilty and to exonerate the innocent. It alienates the common man and instills in him an ingrained feeling of injustice. It negates good governance. An in-depth discussion of the various forms and manifestations of corruption and the very many steps required to cope with this cancer is beyond the scope of this paper. Nevertheless, without amplifying, a few suggestions are offered which may over time alleviate this grave and continuing threat to the integrity of our judicial system. These proposals, which may sound simplistic, are based on two premises. The first is that it is far easier and cost-effective to try and prevent corruption than to punish the corrupt, and the second is that corruption is, to a significant extent, a crime of opportunity. If you close or squeeze the window of opportunity, or make it dangerous to climb through this window, you can reduce corruption.

4. The first of these proposals is that when a case is ripe for arguments the District Judge should transfer the case to any other court of competent jurisdiction including transfer from his own court if any of the parties applies for transfer. On such application, in which no reasons need be given for seeking the transfer, the transfer order should also direct the hearing of arguments and final order by the transferee court within, say, the next 10 days. This proposal, if implemented, could be coupled with an announced policy of taking administrative action in cases where more than a specified number of such transfer applications are received against a particular presiding officer.

5. Another proposal is that counsel for both parties should invariably be required to file their written arguments or at least a summary of arguments. This should effectively dissuade lower courts from not noticing arguments when writing judgments on other than the merits of a case. The proposal has the further advantage that it will save court time and eliminate disputes in appellate courts about whether a particular ground was urged in the court below. Hopefully this will also improve the level of assistance from the Bar. This proposal, like the previous one, could be coupled with a policy directive that whenever an appellate court comes to the conclusion that the reasoning of the lower court was perverse or in deliberate ignorance of law the appellate court shall report the matter to the competent authority for appropriate proceedings against the concerned presiding officer. Further to expedite the recording of evidence and disposal of cases, the oral evidence i.e. Examination-in-Chief should be allowed to be recorded through Affidavits and cross-examination through Interrogatories and after such exercise where it is required by Court or parties that cross-examination of witnesses should be done in person then the further cross examination should be done in front of the court.

6. The perceived damage to the integrity of the judicial system has not left untouched the superior judiciary. Suffice to stress, in this behalf, that the independence of the judiciary depends, in the first instance, on the public conviction that the judges of the superior courts are models of integrity in all its forms, and the consequential need for the Honourable Judges to devise and enforce transparent accountability mechanisms for themselves. Pertinent mention may also be made of the imperative of ensuring continuance, on a lasting basis, of the much improved Bench-Bar relations. Nothing damages the image of the judicial institution in the public eye quite so much as that of a House divided against itself.

7. Our national vision is enshrined in the Objectives Resolution which forms a substantive part of our Constitution by virtue of Article 2-A. It is evident from this Resolution that for the people of Pakistan good governance requires that the State should be exercising powers through its elected representatives, that there should be full observance of the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam, that the people should be enjoying all their fundamental rights including equality of status, equality of opportunity, equality before law, social economic and political justice and freedom of thought, expression, belief, faith, worship and association, and that there should be a fully secured independent judiciary able and capable of securing for them these principles and rights.

8. Good governance requires strong institutions. The message to build strong institutions was given to us more than 1400 years by Almighty Allah when through verse 159 of Sura Al-Imran He made it obligatory on the Holy Prophet (Peace Be Upon Him) to seek counsel in all affairs. Strong institutions create a system which automatically produces the leadership for the continued growth of these institutions. The economic and social success of the West, of Japan and of many of the East Asian and South-East Asian states is based on the strength of their institutions and not their leaders. In the context of our Islamic Republic our institutions need to be built and strengthened on the basis of Adl wal Ihsan. Adl represents the rule of law and regulates selfishness and self-interest. Ihsan blends the rule of law with equity and acts to protect against injustice and to help those in need. In building institutions based on the principles of Adl wal Ihsan we travel a step beyond good governance. We enter the realm of good humane governance.

9. The role that has been and continues to be played by the superior courts of Pakistan including, in particular, the Supreme Court, in judicial review of administrative acts is central to the role of the judiciary in providing good humane governance. This is a multi-faceted role. One vital part of it is the regulation of the power or discretion of Government and its functionaries to distribute largesse including jobs, contracts, quotas, licenses and the like. The grant of such largesse must be structured on the basis of rational, relevant and non-discriminatory standards and norms and this is precisely what the Executive was ordered to do in the landmark judgment of the Supreme Court in the Chairman RTA case (PLD 1991 SC 14). The Supreme Court held that:

> "Wherever wide-worded powers conferring discretion are found in a statute, there remains always the need and the desirability to structure the discretion. Structuring discretion means regularizing it, organizing it, producing order in it, so that decision will achieve a higher quality of justice. The seven instruments that are most useful in the structuring of discretionary power are open plans, open policy statements, open rules, open findings, open reasons, open precedents, and fair informal procedure. When legislative bodies delegate discretionary power without meaningful standards, administrators should develop standards at the earliest feasible time, and then, as circumstances permit, should further confine their own discretion through principles and rules. The movement from vague standards to definite standards to broad principles to rules may be accomplished by policy statements in any form, by adjudicatory opinions, or by exercise of the rule-making power. When legislative bodies delegate discretionary power without

> meaningful standards, administrators should develop standards at the earliest feasible time, and then, as circumstances permit, should further confine their own discretion through principles and rules."

This historic decision was ultimately incorporated as Clause 24-A in the General Clauses Act. This is good law and can be said to be the first pillar of good governance BUT who is to ensure its compliance. The task of ensuring enforcement, the second pillar of good governance, is that of the Executive but sadly the Executive often and again fails to do so. The task of ensuring enforcement has then to be transferred to the superior courts in exercise of their power of judicial review.

10. Public interest litigation on the basis of simple individual applications or suo moto notice taken by the Supreme Court itself has provided a speedy and effective remedy for violation of fundamental rights. Also, and very importantly, it has fostered the concept of participative justice, another key ingredient of good governance. There are, however, obvious practical limits to the number of cases that the Supreme Court, or even the High Courts, can entertain and adjudicate upon in exercise of such jurisdiction and consequently the emphasis has to be on judicial directions for remedial legislation and/or the exercise of executive power in a manner that promotes the public interest. Reference may be made in this behalf to the decision of the Supreme Court in the Darshan Masih case (PLD 1990 SC 513) in which the Court directed the enactment of a self-contained enforceable law with regard to bonded labour being cognizant of the fact that it is impossible for the superior courts to intervene in all the acts of injustice that take place in this domain throughout the country. At the end of the day there is no substitute for changes in the attitudes and practices of the Executive organ of the State as a consequence of judicial directions, laws enacted by Parliament and the Provincial Assemblies, pressure of the media and other opinion-makers, because only such basic changes at all levels of public administration can ensure better and good governance for the people as a whole.

11. All the threads that have been identified in this paper were woven together by the Supreme Court in the Ikram Bari case (2005 SCMR 100) in which, while dilating on the doctrine of good governance in public administration, the Supreme Court held as under:-

> ".... the Bank did not issue formal letters of appointment or termination to the employees so as to preclude them to have access to justice. There was no equilibrium of bargaining strength between the employer and the employees. The manner in which they had been dealt with by the Bank was a fraud on the Statute. A policy of pick and choose was adopted by the Bank in the matter of absorption/regularization of the employees. By Article 2-A of the Constitution which has been made its substantive part, it is unequivocally enjoined that in the State of Pakistan principle of equality, social and economic justice as enunciated by Islam shall be fully observed which shall be guaranteed as fundamental right. The principle of policy contained in Article 38 of the Constitution also provide, inter-alia, that the State shall secure the well being of the people by raising their standards of living and by ensuring equitable adjustment of rights between employers and the employees and provide for all citizens, within the available

> resources of the country, facilities for work and adequate livelihood and reduce disparity in income and earnings of individuals. Similarly, Article 3 of the Constitution makes it obligatory upon the State to ensure the elimination of all forms of exploitation and the gradual fulfillment of the fundamental principle, from each according to his ability, to each according to his work. It is difficult to countenance the approach of the Bank that the temporary Godown staff and the daily wages employees should be continued to be governed on disgraceful terms and conditions of service for an indefinite period. In view of section 24-A of the General Clauses Act 1897, the National Bank was required to act reasonably, fairly and justly. An employee being jobless and in fear of being shown the door had no option but to accept and continue with the appointment on whatever conditions it was offered by the Bank."

It is as certain as certain as can be that departure from legal norms and the consequential violation of individual rights would be far more extensive but for this central pivotal role played by the superior courts to ensure good governance.

12. When told that the Pope in Rome was a powerful force Joseph Stalin, the unlamented dictator of the defunct Soviet Union, is famously reported to have remarked "How many guns does the Pope have?" Like the Pope the Supreme Court does not have any guns but like the Pope it has great moral authority. It is this moral authority, even more than the command contained in Article 190 of the Constitution and Article 204 and the contempt of court law, that makes for acceptance of the Courts' orders and ensures compliance. It is this moral authority that is pivotal for the Courts' role in ensuring the rule of law and better governance. The continuance and strengthening of this moral authority requires unity within the Court, harmonious relations between the Bench and Bar, the firm public perception that the decisions of the Court are fair and just and wholly uninfluenced by any consideration or pressure other than the Constitution and the law, and the further perception that the Judges are role models. Moral authority based on these foundations has to encompass the High Courts and, in time, all the subordinate courts. In the hands of the entire judiciary Almighty Allah has placed a sacred trust which has to be discharged in terms of the command contained in verse 58 of Sura Al-Nisa:-

> "Allah doth command you to render back your Trusts to those to whom they are due; and when ye judge between man and man that ye judge with justice; verily how excellent is the teaching which he giveth you! For Allah is He who heareth and seeth all things."