

## **A Critical Analysis of Judicial Reforms: Through the Prism of National Judicial Policy, 2009**

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### **Abstract**

The judicial system of Pakistan, inherited from the colonial era, has been plagued with serious issues in providing timely justice to the common people culminating into law and order problems as well as the trust deficit among general public of the country. Various judicial reforms initiated by various Governments to combat the issues prevalent in the system and meet the changing legal requirements of the society yielded no substantial results. Since developing an understanding about why the previous reforms have not been able to deliver the desired results is a good initiative for building a more result oriented and robust policy (Bullock, Mountford & Stanley, 2001), this study aimed to explore the reasons for the lack of success or partial success of these reforms in the light of the Theory of policy diffusion and the Game theory of policy implementation by taking 'National Judicial Policy, 2009' as a case; which was the latest and most extensive effort to reform Pakistan's judicial organ. This qualitative research attempting to gain insight into the phenomenon of judicial reforms through semi-structured interviews of a purposive sample of 15 Judges and lawyers from all the three tiers of judiciary i.e. Supreme Court, High Court and Session Courts has uncovered some interesting factors pertaining to policy making and implementation process of judicial reforms. In view of the respondents of this research, the influence of a foreign transactional institute and the lack of political will obstructed the implementation of this reform initiative. This study contributes to the policy making and implementation literature by way of explicating policy making and implementation process in the developing countries like Pakistan and helps identify the indigenous issues / problems in the process of various reform initiatives.

**Keywords:** Judicial Reforms, the Game Theory, Theory of Policy Diffusion

### **Introduction**

#### **Background**

Although Pakistan inherited a formal and well developed judicial system from its colonial rulers but the process of dispensation of justice in Pakistan has always been slow and cumbersome. Lengthy and complicated procedures, manipulation of laws by elite, delaying tactics used to pressurize the opponents by stakeholders such as litigants, lawyers, court staff etc., false litigations and corruption are some of the oft repeated features of this system. Cases both criminal and civil usually take decades to

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be decided by the courts, which often lead the litigants to ultimately try to settle the issue by out-of-court compromise usually at the cost of justice and the right of weaker party; as most criminal cases finish up in exoneration. Out of the total expenses incurred on litigation, half of the amount is spent on illegal fees and bribes (Khan, 2004). According to the World Justice Project (WJP, 2016) Rule of Law Index Pakistan stands at 106th place among the 113 countries included in the survey and in South Asia it stands at 5th place among the six countries in the region showing a poor public perception of rule of Law in the country.

The sluggish pace of case disposal has led to a hoarding up of huge amount of cases in the courts. The grand total of pending cases both in superior and subordinate judiciary as per annual judicial report, 2014, is 1,777,184 (NJPMC, 2014). A number of factors reportedly contribute to this huge backlog of cases, most prominent among them is the trend of filing false suits in order to pressurize and blackmail the opponents. The courts in Pakistan seldom take any serious action against the tendency of false litigation thus the practice of using the law for revengeful purposes is very common and is used with great adroitness (Hamdani, 2015). The act of prolonging court proceedings deliberately by one of the litigating parties through delaying tactics is pretty common; like not providing witnesses, distorting evidence, bribing police to delay the submission of chalan in court and taking unnecessary and long dates through lawyers. The expertise of a lawyer is judged on his/her capability of using deliberate delaying tactics to force the other party to knee-down in front of the rivals and settle the dispute on their conditions. Judges seem to facilitate the lawyers in such activities by granting unnecessary and countless adjournments (Hamdani, 2015). Another important hurdle in the achievement of 'justice for all' is the expense of legal procedures, which makes it almost impossible for less privileged class to approach the courts. According to a survey by Shinwari (2015), 98.2 per cent of the sample population perceives that the poor do not have access to formal justice due to high legal fees charged by the lawyers. Most of the people especially in rural areas do not have enough knowledge about their legal rights and/or the judicial mechanism in the country so they are alienated from this system. According to Singh and Zahid (2009) 'the formal judicial system in Pakistan, India and Bangladesh is complex, rigid, multilayered and expensive. The poor and vulnerable classes of this region are alienated from this colonial heritage legal system and thus tend to approach the informal local justice imparting bodies like Jirgah, Panchayat etc. due to their easy approach, easy comprehension and inexpensiveness'. These informal systems are neither authorized nor supported by the Government for the dispensation of justice

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and many a times have proven to decide cases with ruthless and brutal punishments to the innocents thus increasing insecurity and crime in the society (Shinwari, 2015).

Many efforts in the form of reforms have been made to address these serious issues in the dispensation of justice during the last 70 years such as ‘The Law Reform commission 1958’, ‘The Law Reform Commission 1967’, ‘High Powered Law Reform Committee Report, 1974’, ‘Pakistan Women’s Rights Committee, 1976’, ‘Law Committee for Recommending Measures for Speedy Disposal of Civil Litigation, 1978’, ‘Secretaries’ Committee Report, 1979’, ‘Committee on Islamisation of Laws and Establishment of Qazi Courts, 1980’, ‘Commission on the Status of Women Report, 1985’, ‘Commission on Reform of Civil Law, 1993’, ‘Commission of Inquiry for Women Report, 1997’. All these reforms tried to address various lapses in the judicial organ of Pakistan. Most of the recommendations related to changes in laws were accepted and endorsed by the Government but improvements in infrastructure facilities and resources were ignored. Some of the reforms were completely shelved without implementation and the others were partially implemented.

This research, in an attempt to investigate and identify the factors that have restricted the desired results from the successive judicial reforms leading to continuous inefficiency and ineffectiveness of the judicial system in the country, has taken National Judicial Policy 2009 as a case and examined its extent of success (or lack thereof) through probing deeply into the policy making and implementation aspects. Developing an understanding about why the previous reforms have not been able to deliver the desired results is a good initiative for building a more result oriented and robust policy (Stanley, 2001).

National Judicial Policy (NJP) 2009, the latest and most extensive effort at reforming Pakistan’s judicial system, mainly focused on the twin problems of huge backlog of cases and delay in court proceedings as main issues of concern. It set many short, medium and long term goals to enhance the efficiency of judiciary such as optimum utilization of present judicial resources, further capacity building of the judiciary, accelerated settlement of some important categories of cases and increased judicial accountability especially of lower courts to combat corruption (Siddique, 2011).

The policy has divided the problem areas into four different categories namely:

















- Independence of Judiciary from executive
- Misconduct of judges and judicial staff
- Eradication of Corruptions at all judicial levels

▪ Expeditious disposal of cases

NJP 2009 came in to effect on 1st June 2009. It was later revised in 2012 in the light of its implementation results by the national judicial policy making committee and published in 2012 under the title of ‘National Judicial Policy revised edition 2012’. NJP 2009 does not seem to have achieved its target of ‘expeditious disposal of cases’, as is apparent from the increasing rate of backlog of cases in Supreme court and all the High Courts of Pakistan (Table–1). The number of pending cases shows a steady increase over the years from 150530 in the year 2009 to 304838 in the year 2014. The statistics do indicate a gradual increase in the number of cases disposed-off every year; except for 2010 where there is a dip in the number of cases disposed however, the parallel increase in number of new cases being instituted is contributing to offset the overall effect on cases pending. The situation is more cramped at the lower levels of district judiciary.

**Table 1**

*Analysis of Overall Filing and Disposal of Cases at the Superior Judiciary (Supreme Court & High Courts)*

Year	Pendency	Institution	Disposal	Balance
2009	150530	173780	162430	161880
2010	161880 	190990 	158536 	194334 
2011	220229 	214855 	171081 	264003 
2013	271770 	215228 	181887 	305111 
2014	304838 	231836 	227676 	308998 

*Source: National Judicial Policy Making Committee, Judicial Statistics of Pakistan, Islamabad*

**Literature Review**

Rutter (2011) emphasizes that good governance depends on good policy making. Strong policy making is very important not only for the Government but for the country too and in case of policy failure both have to pay a cost either in monetary or other forms such as deterioration of the system in question (Rutter & Hallsworth, 2011). Policymaking requires a strong and deep study of the system; its various

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attributes and problems expected in the process before entering into the formulation phase. A successful policy should be future oriented, innovative and interconnected with other policies of the system (Hallsworth & Parker, 2011). The Theory of Policy Diffusion is a process in which the “knowledge about policies, administrative arrangements, institutions in one time and/or place is used in the development of policies, administrative arrangements and institutions in another time and/or place” (Dolowitz, & March, 1996, p.344). The four dimensions of policy diffusion, according to Shippan and Volden (2008) are learning from earlier adopters, economic competition, imitation and coercion, Due to globalization, the world economy has changed not only in the ways of production and trade but the transactional institutions now have more power to exert their influence on policies of different countries globally to match their own needs and desires. This scenario has constrained the power of national policy makers to make policies according to their own agendas (Parsons, 1996). Non-Governmental Organizations (NGOs) are manipulating global governance up to some extent and have become a major player in the process of setting agendas and acting as agents of coercive policy transfer (Weiss, 1996). Such policies usually focus on the donors’ agenda and tends to ignore public needs and desires (Marr, 1998).

From the last decade of twentieth century into the new millennium, Asian Development bank (ADB) has introduced and executed extensive law and justice development programs in many member countries including Pakistan, China, Afghanistan, Mongolia, Indonesia, Georgia, Philippines etc. Asian development bank has launched an intensive law and justice reform program in Pakistan with the name of ‘Access to Justice program’ at the end of year 2001 with a huge loan amounting to U.S. \$350 million. The policy has a contradictory approach in the sense that it tends to take multiple contrasting approaches to enhance the working of the judicial system, On one hand, taking free market, economic growth and foreign direct investment as the reform initiatives and on the other hand talking about poverty reduction and legal empowerment of vulnerable classes of the society, making it all the more difficult for this program to set any coherent goals or attain any rational results (Armytage, 2011). The access to justice program by ADB seems to consider the judicial empowerment of the vulnerable and poor groups of society as a byproduct of a more efficient and pro-market judicial system, instead of considering or analyzing the effectiveness of this system (Siddique, 2011).

One of the outputs of this access to justice program is the establishment of National judicial policy making committee (NJPMC) in Pakistan to provide leadership within the judicial institution as well as incorporate uniformity in judicial policymaking. The committee formulated the National Judicial policy 2009 with key aims of expeditious disposal of cases, eradication of corruption and misconduct of judicial officers and staff and independence of the judicial organ from the executive (ADB, 2009). With all the key attributes of the 'Access to justice program' by ADB, NJP 2009 also considers enhancing the efficiency of the judicial organ through infrastructure, technological and procedural improvements which would automatically ensure access to justice and equitable justice to the poor and vulnerable groups of the society (Siddique, 2011).

According to European Commission Directorate-General for Employment (2015) policy implementation should be thoroughly incorporated in the policy making process to avoid the problems arising in the process of implementation. Policies need to be thoroughly designed to make sure that actions planned would actually be able to achieve the desired goals of the policy (Hallsworth & Parker, 2011). Policy makers usually give inadequate attention to the features of policies and programs, which are necessary to ensure their implementation (Grindle, 1980).

Grindle and Thomas (1991) argue that policy reform is an ongoing process, which can be revisited and changed at any level to match the desires of stakeholders to generate desired results. According to the literature, policy implementation is ensured only if all the stakeholders are taken onboard. Lipsky and Hills (1993) argue that people working in street level bureaucracies such as schools, lower courts, welfare departments, legal offices etc. are the real actors who finally have the burden of implementing a policy in their everyday routine. They are not merely devices, which would automatically implement the policy in its true spirit instead several factors like time constraints; their knowledge, power, understanding and acceptance etc. affect their actions and may change the policy implementation and its outcomes. Participation of all the stakeholders in policymaking process, including lower level implementers and policy recipients, creates a sense of ownership among the stakeholders and makes the implementation process smooth (Marr, 1998). Similarly, if the Government is alienated from the policy changes then more likely it would be reluctant in implementing that policy as compared to the policies owned by the Government (Marr, 1998). The political regime in which a policy is pursued is very important particularly in third world countries (Grindle, 1980).

Reich (1995) emphasizes the importance of political will in the success of a policy change or reform as politics affect a policy from the stage of its inception to all its

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phases until implementation. To justify his view, Reich (1995) relates three models: 'political will model', 'political factions model' and 'political survival model'.

In case of Political factions model, the politicians seek to serve the desires of different interest groups (political parties, political approach of bureaucrats etc.) and reform is only successful when it corresponds to a preferred distribution of benefits to specific constituent groups of the government leaders (Reich, 1995). The model incorporates the interest group approach to policy making. The Political survival model implies that Government officials seek to protect individual interests (as power-holders) in order to maintain or expand their existing control over resources. It assumes that politicians operate in the logic of opportunistic politics, in which decision-makers manipulate policies to achieve desired means. Reform occurs when it serves the personal political survival or the personal interests of political leaders (Reich, 1995).

This phenomenon can be further understood by the 'Game Theory' as it focuses on the reactions of rational individuals in conflict situations to attain their desired aims (Firestone, 1989). According to Bardach (1977) the process of policy implementation is a part of political game from the beginning; that is from policy perception or adoption where different actors at different levels try to manipulate the implementation process to attain their interests. Winter (2003) further explains that this type of manipulating games distract implementation from the originally aimed goals. It explains how different actors from the phase of policy formulation to policy implementation try to manipulate the policy in order to safeguard or promote their personal interests. It also explains that how policy makers and the global powers like ADB try to endorse their personal interests in the policy making process which is further followed in the hierarchy of officials involved in the policy implementation process. All the actors at all the levels of a reform try to manipulate it according to their own needs and interests thus leading reform towards ineffectiveness.

In the light of above discussion, this study has attempted to investigate the policy formulation and implementation process of judicial policy 2009, in order to probe and understand the factors responsible for the lack of success of various judicial reforms in the country, through the following research questions:

- RQ1**                    To what extent NJP 2009 has been able to achieve its intended goals?
- RQ2**                    What factors, in the view of the stakeholders were responsible for the success/failure of policy implementation?

## Research Methodology

### Population / Sample

Qualitative research strategy was deemed appropriate in order to get a deep insight of the issue under discussion in the light of the opinions and expressions of the stakeholders. Semi-structured, in depth interviews of a purposive sample of fifteen legal professionals of different seniority levels from all the three tiers of judiciary was taken. It included 3 former High Court Chief Justices, 1 former Federal Shariat Court Justice, 2 Session Court Judges, 2 Supreme Court advocates, 2 High Court Advocates, 3 Civil Court advocates and 2 Criminal Court advocate. The respondents at high judicial level were selected on the basis of their experience and knowledge. While in case of respondents belonging to lower judicial level, their firsthand knowledge of the implementation process and how much they have witnessed the implementation process has been considered. The interviews were conducted till the saturation point where no new information was divulged by the interviewees.

### Data Analysis

Thematic analysis has been employed as a tool of data interpretation in this research study. The transcribed data were read and re-read a number of times to generate open / axial / selective codes for analyzing, comparing and contrasting important factors and drawing logical inferences. Unit of analysis for this study was individual legal officials including Justices, judges and lawyers from all the three tiers of judiciary who qualified for the participation criteria.

The major themes arising out of the primary data of this study, in the perspective of research questions, are presented and discussed in the following sections:

#### ➤ **Extent of achievement of intended goals of National Judicial Policy 2009**

There was a complete consensus of the respondents on the point that the NJP has failed to achieve its targets. In the words of the respondents: "... this policy has completely failed, there is no practical implication of this policy". And "this was just a paper work, no actual steps have been taken to actually repair the system". Talking about the major goal of NJP of decreased backlog or speedy disposal of pending cases they substantiated their opinion with the statistical evidence in the official annual judicial reports by NJPMC, which clearly show an increase in pending cases. Many of them doubtful of the accuracy of the official figures considered actual situation to be even worse. An interesting aspect unveiled by the interviewees on this aspect was that in the quest for scoring one point for deciding oldest cases within one month's time



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and half a point in case of dismissal, the judges are dismissing such cases due to difficulty in gathering evidence etc. However, this leads to a negative impact in two dimensions: firstly, it spoiled the quality of justice being imparted in urgency and secondly it further increased litigation as most of the times such cases are re-filed and the procedure starts all over again. It was also emphasized that the policy did not give a due emphasis to the problem of frivolous cases, comprising 40% of the total litigation load on the courts, and a few minor penalties that were set to combat this issue are not practically implemented contributing to increase the backlog further.

Technological facilities and infrastructure improvements were considered to be a key point in NJP, 2009 to enhance the efficiency of courts' procedures and thus reduce the backlog of cases however, the dilapidated conditions of the courtrooms, lack of space and proper facilities, burden of work on judges were mentioned as an evidence of NJP's lack of success besides the fact that there was no visible reduction in corrupt practices at any judicial level. As for the first goal, many respondents considered that the judicial Organ was already working independently and there was not any specific need to address this issue while some of them reported that the measures defined in the policy to achieve this target have been partially implemented. For an instance, judges should not work as presiding officers and judiciary should not take part in the conduct of elections in the country has been implemented but some other like retired judges should not accept another public seat or disclose their previous designation while practicing as a lawyer have not been acted upon. Although respondents unanimously considered the policy a failure in terms of its implementation, there were differences in their opinion as to the reasons of this failure.

### **➤ Factors influencing the Success / failure of the policy**

Respondents had varied opinions when asked about the factors underlying the initiative of this policy. About 14% of the respondents considered that a genuine need for reforming the system initiated this policy. Half of the respondents considered that the policy was an initiative of the "Access to Justice" program of the Asian development bank (ADB) to advance their agenda of free trade and stable economic conditions for foreign investors and one third of the respondents expressed that it was just an effort to gain public attention and fame on the part of former Chief Justice of Pakistan. The latter opinion is indicative of the lack of trust on part of the stakeholders regarding the reform motives and their negative perceptions about the manipulative games of vested interests. According to one respondent, "...reforms are only aimed to gain control over developing countries and do not make any practical improvement in

the systems and this program by Asian Development Bank is no exception”. The role of NJPMC, established in the year 2002 by ADB, in the formulation of the policy under discussion was also resented by the stakeholders who raised questions on the legitimacy of the committee in the light of the constitutional provisions and considered it unconstitutional. Many respondents considered the policymaking efforts of NJPMC far removed from the ground realities of the system and therefore irrelevant to the system’s requirements. They considered it just a paper work and not a serious reform effort. The research could not find a positive view about the influence of NJPMC.

While talking about the reasons of inability of judicial reforms to generate desired results the respondents expressed multiple views discussed below:

➤ **Lack of Focus in Policy formulation**

In the context of National Judicial Policy 2009, 80% of the respondents viewed that the focus of the reform was not justifiable / realistic. It concentrated on improving efficiency through increase in number of judicial officers, infrastructure and technological improvements and ignored the aspect of improving quality of justice, provision of equitable justice to all, making access to justice easy and inexpensive. The policy was blamed not to give appropriate importance to frivolous litigation which is a major factor to increase in the backlog of cases and setting unachievable targets like clearing the backlog of cases in six months’ time after the policy is put into practice.

➤ **Lack of Political Will**

The main reason reported for the inability of successive judicial reforms, including NJP 2009, to generate desired results was the lack of political will in the proper implementation of these reforms as many such efforts in the past have either been accepted and approved in parts or completely ignored and shelved without implementing them. One respondent asserted that, “During my 40 years of service at different judicial levels, I have witnessed the successive Parliaments shelving the reform initiatives solely in pursuit of self-interest”.

Secondly, even after the reform has been approved, the requisite funds are not provided for its implementation as in the case of NJP 2009. The respondents considered vested interests of the Governments the main reason for this consistent lack of will as politicians use law and order enforcing institutions to increase their personal power and for facilitating and obliging their cliques.

➤ **Resistance to Change**

Another important factor cited as a barrier to judicial reforms was ‘resistance to change’ by almost all the stakeholders of the system. Majority of the respondents stated that the whole system is involved in corrupt practices, favouritism and nepotism and thus resists efforts at introducing transparency and accountability. One respondent stated that, “Lawyers are earning through long proceedings; people having money are using litigation as a vice against their opponents; judicial staff and up to some extent judges are making money through bribes, so who would bring change”. Besides, a general mindset of lethargy and apathy of the people is not willing to let go of the status quo.

➤ **Lack of proper Evaluation system:**

The respondents indicated a lapse in policy evaluation mechanism due to which the actual reasons for the gaps between the policy targets and policy results could not be pinpointed. This phenomenon is reportedly evident in the insufficient, irrelevant and unfocused efforts of revised additions of NJP 2009. According to the respondents, had the policy been truly evaluated some serious efforts to rectify at least the implementation issues would have been witnessed.

➤ **Lack of Training and development**

According to the participants of the study, lack of training and development is a main ailment in the under-performance of Pakistan’s judicial organ. There are no proper criteria for taking admission in law colleges and the Government issues licenses to open private law colleges without much scrutiny and restriction aiding to a low quality of law education. Moreover, there is only a bogus criterion of publishing twenty five cases in legal digest for High Court lawyers to get license to practice in the Supreme Court which does not do any actual contribution to develop laws as the actual practice is that a lawyer who has marked attendance in court for twenty five cases can acquire a license. Respondents highlighted that the importance of quality of human resource and the development of human resource in judicial organ is as important as in any other organization and quoted the example of Japan where, “Judges, Lawyers and Prosecutors are trained in the same academy, and I think it is crucial that all the three wheels of judiciary are trained at the same place to have a common denominator, otherwise quality cannot be maintained in the system”. Moreover, the respondents expressed that the criteria for promotions of judges should be associated with further improving their legal knowledge by taking certain courses and exams to refine the quality of their work.

The respondents also emphasized the need of uniformity in the quality of law institutions in the country to ensure quality of law education. They emphasized that people taking law education from a college in rural area, where degrees are granted only on getting enrollment in the college, cannot be equivalent to a person taking law degree from an internationally recognized law university in an urban area, therefore creating a huge difference in the quality of lawyers and judges.

### **Discussion**

The main focus of this research was to gauge the extent of implementation of National Judicial Policy 2009 and investigate the factors that may have contributed to the lack of success of various judicial reforms. As per the findings of this research, NJP 2009 has not been able to achieve its targets in true spirit and is considered another failed effort to reform the system and cure its ailments. The primary data analysis of this research in the preceding section reveals about four important impediments in the successful implementation of judicial reforms in general. Firstly, in consonance with the theory of policy diffusion (David Dolowitz, 1996), the perception that the reform initiatives are not home grown or indigenous and have been ‘coerced’ by a foreign transactional institution creates a trust deficit amongst the stakeholders about the genuine need and / or the utility of such initiatives thus creating a lack of ownership and lack of interest in its true implementation. The influence of ADB in the formulation of NJP, 2009, for an instance, seems responsible for its quick discredit as a ‘paper work’ and ‘far from the ground realities’ thus a useless effort. The political will and vested interests of the political factions also contribute to the reforms’ success / failure (Reich, 1995), which in this case has evidently been reported in the form of lack of budgetary allocation / resources by the successive governments resulting into either a piece meal implementation or a complete shelving of the whole process. Capacity of the stake holders to implement the required change in a system is considered pivotal in making a reform successful, which again has been reported as missing in the primary data of this study where the judicial officials have been quite vocal about the quality of law education and the deficient training rigor of the system in general. Finally, the absence of evaluation and feedback of the reform initiatives has emerged as a significant lapse in the system, which hinders the learning of the stakeholders and their preparation for the future initiatives.

### **Conclusion and Recommendations**

The study has used explanatory research approach to understand the factors hindering the success of various judicial reforms in Pakistan. The findings of the research reveal

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that National Judicial Policy 2009, like the previous reforms, has not been able to deliver the desired results till now. Main reasons for this predicament, according to the participants of this research, can be deciphered as lack of stakeholders' ownership, deficient political will, corruption at all levels, lack of proper implementation planning, lapses in evaluation, and apathetic corporate culture.

In the light of the findings of this study, the prospects of planning and implementing reforms can be improved if the policies are home grown and indigenous and are devised in view of the ground realities of the system. The inclusion of stake holders at all levels is important to create a sense of ownership and their training for proper implementation is required to overcome the undue resistance. Proper planning for implementation should be done considering all the possible constraints and finding ways to eliminate them, at the time of policy formulation so that policy does not remain a mere paper work but achieve its targeted reforms. Availability of funds and proper evaluation mechanism to monitor the results of implemented reform is crucial to see what results policy has delivered and what needs to be reviewed and revised.

### **Limitations and Scope for Future Research**

This study has certain limitations among which the first and the foremost is the scope of this study. This research approached the respondents only from the cities of Lahore and Islamabad so it gives us the picture of policy implementation in Punjab and Federal courts. There could be a different situation in the courts of other provinces. A study on a broader scale with a larger sample size including more cities from Punjab as well as the other three provinces of Pakistan may yield more generalizable results.

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