



Legal Aid Society

Access to Justice: Strengthening Legal Awareness and
the Delivery of Legal Services in Sindh

DELAY IN TRIAL

EMPIRICAL EVIDENCE FROM THE
MAGISTRATES' COURT IN KARACHI

Research Paper



In collaboration with

EDACE

Enhanced Democratic Accountability
and Civic Engagement

DELAY IN TRIAL

EMPIRICAL EVIDENCE FROM THE
MAGISTRATES' COURT IN
KARACHI

BY ANGBEEN ATIF MIRZA

Disclaimer:The views and opinions expressed in this paper are those of the author and do not necessarily reflect the official policy or position of the Legal Aid Society, DAI Pakistan or the Foreign Commonwealth Office.

COPYRIGHT © 2016 LEGAL AID SOCIETY:

The contents of this Research Paper are the exclusive Intellectual Property of the Legal Aid Society and any unauthorized reproduction, distribution, modification, use, or transmission of this work in any form or by any means, including photocopying or through any other electronic or mechanical methods is illegal and will constitute infringement of such Intellectual Property Rights.

The Legal Aid Society shall be identified as the copyright owner on any authorized reproduction, distribution, use or transmission of this work.

ABOUT THE AUTHOR

Angbeen Atif Mirza is a practicing lawyer based in Lahore. She is a founding partner at Praxis Legal, Advocates and Consultants. In addition, she is interested in academic and research work and is a member of the Adjunct Faculty at the Shaikh Ahmad Hassan School of Law at Lahore University of Management Sciences. She has been involved in human rights work in the form of public interest litigation as well as policy work. She has been a regular consultant with the Legal Aid Office and later with the Legal Aid Society since 2010.

ACKNOWLEDGEMENTS

The author would like to appreciate the guidance and knowledge imparted by Justice (Retd) Nasir Aslam Zahid, the Chairperson of Legal Aid Society, and Ms. Haya Emaan Zahid for her valuable insight.

She would like to thank Ms. Nida Paracha for being the first sounding board and Mr. Shehzad Khurram for providing her with all the data in perfectly usable form.

The author would also like to show her gratitude towards EDACE for their Technical and Financial Support.

She also like to thank Ms. Maliha Zia, Ms. Maleeha Azhar and Ms. Firasat Siddiqui for their valuable time and effort in formatting, editing and designing of this paper.

TABLE OF CONTENTS

Abstract	01
Acronyms and Abbreviations.....	03
Research Methodology	04
Introduction.....	06
Overview of a Criminal Trial.....	08
Delays in the Criminal Trial	10
Reasons for Adjournment As Recorded By the LAO	12
Absence of Prosecution's Witnesses.....	13
Miscellaneous Reasons	17
Presiding Officer on Leave	17
Failure to Produce Custody	19
Process Not Served In Time	21
Strike by a Bar Association	22
Other Reasons	24

Conclusion and Recommendations	29
Recommendations Requiring Legislative Action	31
Recommendations Requiring Executive Action.....	33
Recommendations Requiring Administrative Action	34
Recommendations Requiring Administrative/Bar Action.....	34
Annexure A.....	38

DELAY IN TRIAL

EMPIRICAL EVIDENCE FROM THE MAGISTRATES' COURT IN KARACHI

ABSTRACT:

The criminal justice system in Pakistan has garnered a dubious reputation for delayed dispensation of justice.¹ It appears that the judicial system in the country has not kept up with the increase in population and in the general awareness of the fundamental rights available to litigants, civil and criminal alike.² The criminal justice system in Sindh, like in other provinces, suffers from backlogs and delays in trials. This is due to various reasons, including a shortage of judges, overburdened courts and a general inefficiency of the system of justice.³

¹LAW AND JUSTICE COMMISSION OF PAKISTAN, CRIMINAL JUSTICE SYSTEM 7, *available at* http://www.ljcp.gov.pk/Menu%20Items/Reports_of_LJCP/03/22.pdf.

²*See id.*

³Naeem Sahoutara/Rizwan Shehzad, *In line for Justice: Thousands of cases at court still waiting to see the light of day*, THE EXPRESS TRIBUNE, August 2, 2013, *available at* <http://tribune.com.pk/story/585709/in-line-for-justice->

This paper aims to identify and understand the various causes for unnecessary and avoidable delays in the progress of a criminal trial⁴ as experienced by lawyers practicing in the District Courts in Karachi. It relies on primary data spanning almost three years collected by lawyers appearing before the District Courts, and recording reasons for adjournments on a daily basis. It proceeds to study the legal and institutional causes for these reasons. It concludes by identifying areas of further research, and with some recommendations to make the process of a criminal trial smoother and free of needless hurdles.

This paper aims to provide legal and development professionals an empirical insight into the process of a criminal trial in the District Courts at Karachi, allowing one to gauge existing malfunctions and lapses, with the intention to better inform future policy relating to case management and case process.

thousands-of-cases-at-court-still-waiting-to-see-the-light-of-day/; Staff Report, '*System's inefficiency main cause of delay in justice*', DAILY TIMES, August 20, 2015, available at <http://www.dailytimes.com.pk/islamabad/20-Aug-2015/system-s-inefficiency-main-cause-of-delay-in-justice>.

⁴ Justice (Retd.) Jawwad Khawaja, Chief Justice, Supreme Court of Pakistan at the Federal Court Reference (September 9, 2015).

ACRONYMS AND ABBREVIATIONS

LAO – Legal Aid Office

Cr.P.C – Criminal Procedure Code, 1898

FIR – First Information Report

HRCP – Human Rights Commission of Pakistan

USAID – United States Agency for International Development

UNDP – United Nations Development Program

RESEARCH METHODOLOGY:

This paper aims to identify and study the reasons for the various causes of delay in a typical criminal trial in the Magistrate's Court in Karachi, Sindh. It hopes to investigate the causes for such delays and suggest possible remedies for their reduction.

It relies on primary data collected by lawyers appearing in the District Courts of Karachi. The data comprises of a monthly record of adjournments as noted down on a daily basis by lawyers of the Legal Aid Office⁵ ("LAO") from May 2013 till March 2016. It records information for the number of times these cases were adjourned each month and the main reasons for the grant of these adjournments. It proceeds to analyse these reasons in their legal and institutional setting, raise questions and make some recommendations regarding their resolution.

In addition, it draws upon the farewell speech delivered by Justice (Retd.) Jawwad S. Khawaja at the Full Court Reference held on his retirement from the Supreme Court of Pakistan as Chief Justice of Pakistan, a USAID report on the rule of law in Pakistan in 2008, work done by the International Crisis Group on reforming the criminal justice system in Pakistan and various academic papers. It is also informed by interviews conducted with Justice (Retd.) Jawwad S. Khawaja, Justice (Retd) Nasir Aslam Zahid and a judicial Magistrate currently serving in Karachi. Finally, the paper benefits from feedback by Barrister Salahuddin Ahmad, Vice Chairman, Sindh Bar

⁵ The Legal Aid Office ("LAO") is a privately managed, government founded, non-profit organization working for the welfare of prisoners. LAO was granted permission by the Government of Sindh to set up its office and work for the benefit of inmates of the Special Prison for Women and the Youthful Offenders Industrial School in 2004. In 2010, LAO was asked to expand its mandate to include adult males and expand across Sindh. LAO works with a Government Committee called the Committee for Welfare of Prisoners. For further information, please visit: <http://www.lao.org.pk/>

Council and Mr. Tariq Mehmood Jahangiri, President Islamabad High Court Bar Association.

The reports by USAID and International Crisis Group look at Pakistan as a whole, and assess the broader rule of law situation prevalent in the country. Justice (Retd.) Jawwad S. Khawaja's speech provides a unique insight into the intricacies of the judicial system, seen from the perspective of a lawyer and judge. In their paper, Krishan and Kumar provide an overview of the Indian criminal justice system, which, like Pakistan, deals with a plethora of issues, not least of which are an overburdened prison system, delays in trials, and efforts towards improving justice delivery.

The paper adopts an empirical method of research. It is informed exclusively by the primary data relied upon. In its analysis, it explores the legal institutions and mechanisms that may be responsible for the various delays noted by the lawyers at LAO. This data spans a time period of just less than three years. Although LAO provides legal aid to prisoners across the province of Sindh, the scope of the paper is limited to the five districts of Karachi – namely, Central, South, East, West and Malir. Of these districts, the focus is exclusively on delays due to adjournments granted during trial in the Magistrates Courts. At any time during the period under study, that is, from May 2013 to March 2016, the average number of lawyers collecting data was 18; these 18 lawyers were representing an average of 533 accused persons. They would record their notes on a daily basis into a case management system maintained by the LAO.

The secondary research material provides insights into the role of the criminal justice system in the rule of law, and highlights the human rights at stake in the process of a trial. Finally, the interviews conducted were meant to substantiate the author's understanding of the working of the criminal justice system in practice and bolster the recommendations made. The interviews were semi-structured in

nature, and the interviewees were selected vide convenient sampling – all parties were personally known to the author.

A limitation faced was the fact that the data relied on was not collected by the author. It was collected by lawyers who were appearing in these cases themselves. It was, therefore, not collected by disinterested parties. Due to limitation of space, the paper relies on limited literature, and leaves scope for further research.

INTRODUCTION:

It is a well-known adage that justice delayed is justice denied⁶. The concept of a legal system is based upon prompt redress of wrongs, both civil and criminal⁷. This is why every legal system in the world specifies a time limit within which a claim must be filed in a Court of law. It also specifies a certain amount of time within which an appeal against a decision is to be filed. These time limits are meant, in part, to provide predictability to court procedures. What the law does not usually specify, however, is the time it takes for a Court to decide a claim that lies before it. Some laws, such as the National Accountability Ordinance, 1999⁸ require that a trial be heard on a day to day basis and be finished within 90 days, but such provisions are difficult to enforce and rarely implemented. This is because no law can possibly provide for all the circumstances which may cause delay in a trial. The best that the law can do is lay down the procedure as clearly as possible, and from there on, it is up to the Court and its officers to ensure that a case proceeds as efficiently as possible.

⁶LAW AND JUSTICE COMMISSION OF PAKISTAN, *supra* note 1, at 7; Jayanth K. Krishnan & C. Raj Kumar, *Delay in Process, Denial of Justice: The Jurisprudence and Empirics of Speedy Trials in Comparative Perspective*, 42 GEO.J.INT'L L. 747, 747 n* (2011).

⁷LAW AND JUSTICE COMMISSION OF PAKISTAN, *supra* note 1, at 7.

⁸The National Accountability Ordinance, 1999, *available at* <http://www.nab.gov.pk/Downloads/nao.asp>.

Pakistan's legal system is notorious for its delays and inefficient management of case proceedings⁹. Pakistan was ranked 98 out of 102 on the World Justice Project's rule of law index in 2015.¹⁰ Its criminal justice ranking was 94 out of 102¹¹. When a plaintiff files a suit, unless it is for a very minor issue, she does not typically expect it to be resolved in a reasonable amount of time. According to a UNDP report published in 2012, participants of their focus group discussions found delay to be the most damaging factor of the judicial system.¹² The report found that in Sindh, 43% of cases filed took at least 5 to 10 years to achieve resolution¹³. The situation is no different in criminal matters, with prisoners languishing in jails for years while their cases remain pending with no resolution in sight. Couple this with the fact that an accused is innocent until proven guilty the conclusion is that innocent people are made to suffer in jails needlessly and unjustifiably for years. According to a rough estimate provided by the then Justice Javed Iqbal in his article titled '*The Role of the Judiciary as a Catalyst of Change*', of the total population in jails in Pakistan, two-third are still under trial.¹⁴ This means that 7 out of 10 people in jail have not been found guilty. This indicates the dismal speed at which trials proceed, while suspending many accused individuals' liberties for months and even years on end. It is also worth mentioning the burden this puts on an already sagging prison system. The International Crisis Group reported that in 2010, a major prison in Lahore with a capacity for 1,050 prisoners was accommodating 4,651 prisoners instead. It further reported that in August 2008, the prison population in

⁹ See *supra* note 4; Editorial, *Court cases backlog, suffers common Pakistani*, DAWN, July 21, 2010, available at <http://www.dawn.com/news/548409/court-cases-backlog-suffers-common-pakistanis>.

¹⁰THE WORLD JUSTICE PROJECT, RULE OF LAW INDEX 6 (2015), available at http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf.

¹¹ See *supra* note 10 at 31.

¹²UNDP & INSAF NETWORK, VOICES OF THE UNHEARD – LEGAL EMPOWERMENT OF THE POOR IN PAKISTAN 101 (2012).

¹³*Id.*

¹⁴ Justice Javed Iqbal, *The Role of the Judiciary as a Catalyst of Change*, paper for the International Judicial Conference, available at <http://www.supremecourt.gov.pk/ijc/Articles/9/1.pdf>; As pointed out by Krishnan and Kumar in *supra* note 6 at 750, the term '*under trial*' is specific to the Indian subcontinent and is used to describe all non-convicted accused people currently in the process of their criminal trial.

the province of Sindh was over 20,000 people, which was reduced to 18,234 prisoners by September 2010. However, the capacity in all prisons together was only 9,541. Of these prisoners, only 2,641 were convicts, the rest were all under trial.¹⁵ Many prisoners are kept under trial for periods which are longer than the sentence for the crime under which they have been accused – in such a situation, it makes more sense for them to plead guilty, receive a sentence, show that they have already served that sentence while under trial, and go home rather than rot in jail for many more years waiting for their trial to end.

OVERVIEW OF A CRIMINAL TRIAL:

A criminal trial most often begins when a Magistrate takes cognizance of an offence – either through a police report or upon information received by any person other than a police officer.¹⁶ The Magistrate may either proceed with the trial himself/herself or forward the matter to the Sessions Court or the High Court depending on the nature of the offence and the Court specified for such offence in column 8 of Schedule II to the Code of Criminal Procedure, 1898 ("**Cr.P.C**").

When a Magistrate takes cognizance for an offence triable by a Magistrate's Court with enough evidence to proceed to trial, the Magistrate will issue a summons or a warrant, depending on the nature of the crime.¹⁷ The accused person appears, either in person or through a pleader if allowed to do so by the Court.¹⁸ The accused person is provided with copies of the prosecution's witness statements and the inspection note recorded by the investigation officer.¹⁹ The charge is framed.²⁰ If the accused person pleads guilty, he is sentenced and the case comes

¹⁵INTERNATIONAL CRISIS GROUP, REFORMING PAKISTAN'S CRIMINAL JUSTICE SYSTEM 8 (2010).

¹⁶ Code of Criminal Procedure S. 190 (1898).

¹⁷ Code of Criminal Procedure S. 204 (1898).

¹⁸ Code of Criminal Procedure S. 205 (1898).

¹⁹ Code of Criminal Procedure S. 241-A (1898).

²⁰ Code of Criminal Procedure S. 242 (1898).

to a close.²¹ If the accused person pleads not guilty, then the matter proceeds to trial.²² In trial, the Magistrate will record evidence and decide the matter according to the law.

When a complaint is made to a Magistrate, either through a First Information Report ("**FIR**") filed in the relevant police station, or through a complaint filed directly with the Magistrate, the prosecution/complainant also gathers information from witnesses. Police officers are empowered to orally examine persons those who may have information relating to the facts and circumstances of the case. These statements do not have value as witness statements, but aid the police in preparing a case against the accused.²³

Witnesses are important when the trial reaches the evidence stage. They are expected to appear before the Magistrate and have their statement recorded in open Court. The Magistrate makes a memorandum of the substance of the evidence and makes it part of the case record.²⁴ At any stage after the prosecution's witnesses have been examined and before he/she is called on for defence, or at any stage of the trial, the Magistrate may question the accused regarding the case against him/her²⁵. Although the law protects the accused person's right to remain silent, it allows the Magistrate to draw inferences from the accused person's refusal to answer any question²⁶. An accused who does not plead guilty is required to give evidence on oath to disprove the charges made against him/her.²⁷ When the accused is examined by the Magistrate, his/her evidence is read out to him/her to

²¹ Code of Criminal Procedure S. 243 (1898).

²² Code of Criminal Procedure S. 244 (1898).

²³ Code of Criminal Procedure S. 161 (1898).

²⁴ Code of Criminal Procedure S. 355 (1898).

²⁵ Code of Criminal Procedure S. 342 (1898).

²⁶ Code of Criminal Procedure S. 342(2) (1898). S. 342(2); This provision may be seen to be in conflict with the constitutional protection from self-incrimination provided in Article 14 of the Constitution of the Islamic Republic of Pakistan, 1973.

²⁷ Code of Criminal Procedure S. 3402) (1898).

ensure that he/she understands what is being recorded. This is then added to the case record.²⁸

After recording the evidence presented, the Magistrate is to arrive at a reasoned conclusion, that he records in a judgment, which is also announced to the parties.²⁹ This, in essence, forms the basic procedure followed by a criminal trial before a Magistrate.

DELAYS IN THE CRIMINAL TRIAL:

Research work has been done on the working of the judicial system as a whole, accessibility to justice, corruption in the various stages of the judicial process as well as the relationship between the judiciary, the executive and the rule of law.³⁰ This paper focuses particularly on the process of a criminal trial and aims to note and understand the various junctures which lend themselves to delay and the ways in which these lacunae are misused by the actors using the system.

Article 37, in the chapter on principles of policy in the Constitution of the Islamic Republic of Pakistan, 1973 states in clause (d):

“The State shall ensure inexpensive and expeditious justice.”

In addition to the overarching principle enshrined in the Constitution, Chapter 1, rule 4 of Volume III of the Rules and Orders of the Lahore High Court states as follows:

“4. Speedy disposal of cases. - Magistrates shall give priority to criminal cases when an accused person is in custody. A criminal case shall be

²⁸ Code of Criminal Procedure S. 364 (1898).

²⁹ Code of Criminal Procedure S. 366 (1898).

³⁰ See generally, USAID, PAKISTAN RULE OF LAW ASSESSMENT – FINAL REPORT (2008) and THE INTERNATIONAL CRISIS GROUP, *supra* note 15.

proceeded with from day to day as far as practicable and disposed of quickly. Witnesses, who are present, should be examined promptly and shall not be detained longer than may be absolutely necessary. Adjournments, when necessary, shall be as short as the circumstances permit.”

These rules are directions to the District Judiciary, specifically the Magistrates who most often form the trial Court for criminal cases. It is worth noting that while this provision encourages speedy disposal by requiring a daily hearing, it does not impose a strict time limit, which would be hard to implement in practice. Although the rule quoted above is from the Rules and Orders of the Lahore High Court, the general principle enshrined applies across the country, especially in light of Article 37 of the Constitution.

The primary reason for delays in obtaining justice is the ease with which matters are adjourned. This is a deep rooted trend in our judicial system, and now litigants almost expect their cases to be prolonged in this manner. Data collected by lawyers at the Legal Aid Office from May 2013 to March 2016 shows that out of the cases scheduled to be heard during this time, 58.65% were adjourned³¹. In simple terms, this means that on an average day, more than half the cases fixed for the date are not heard. Not only does such a frequency of adjournments lead to a distrust of the judicial system, it also recreates itself by allowing lawyers to come to court *expecting* their case to be adjourned and therefore not preparing for their case in any real manner.

³¹ Primary data collected on a daily basis by lawyers of the Legal Aid Office from May 2013 till March 2016.

REASONS FOR ADJOURNMENTS AS RECORDED BY THE LAO:

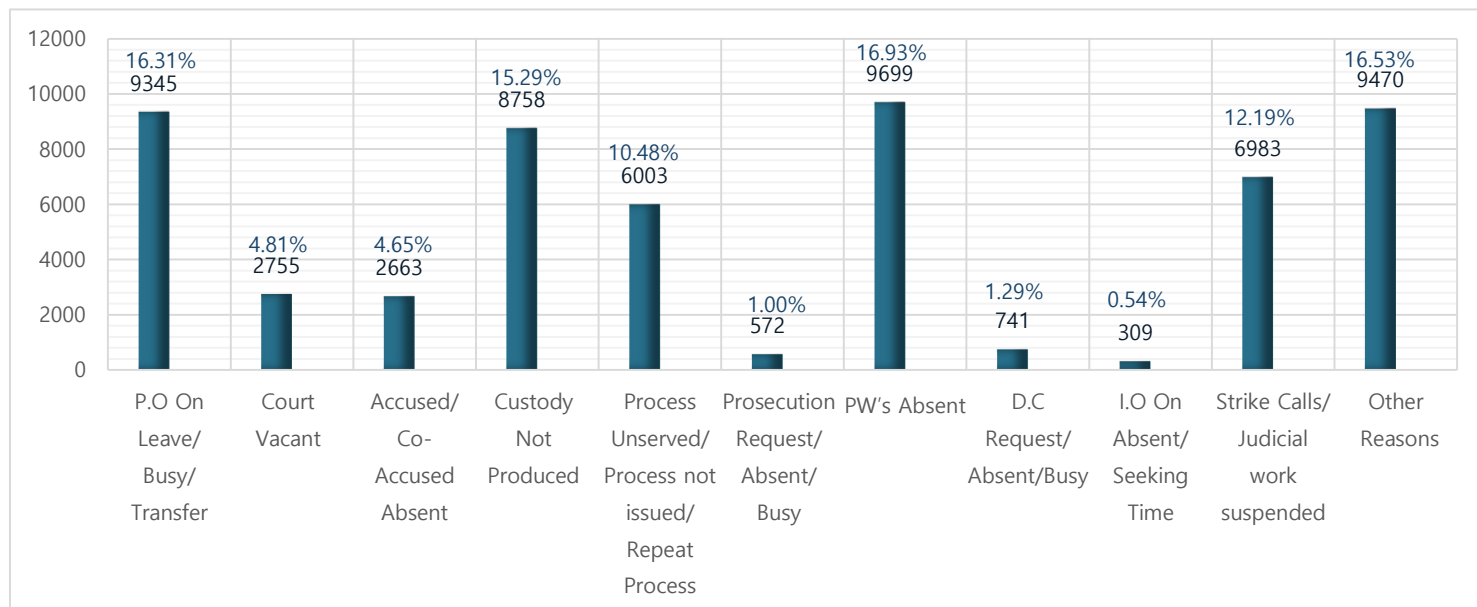


Chart depicting reasons of adjournment of hearings of All LAO cases in Sindh as of May 2013 to March 2016

The major reasons for adjournments of cases as recorded by the lawyers of the Legal Aid Office were as follows: the presiding officer was on leave, the court was vacant, the accused was absent, the custody (of an accused in prison) was not produced, process had not been served as scheduled, the prosecution requested an adjournment, the prosecution’s witnesses, the investigation officer or the defence counsel were absent or the lawyers bar had declared a strike. There were many other reasons in addition to the ones listed here, details of which are provided in Annexure A. The reasons discussed in this section are those that occurred most commonly.

ABSENCE OF PROSECUTION'S WITNESSES:

As indicated in the graph above, according to the data collected the most frequent cause of adjournment is the absence of the prosecution's witnesses.

When a Magistrate receives a list of witnesses from the prosecution, he/she may summon these witnesses to provide testimony for the prosecution/complainant.³² The witnesses listed by the police officer in the challan may also be bound to appear by the Magistrate.³³ The law requires evidence to be recorded in the presence of the accused.³⁴ Witnesses are to be summoned by the Magistrate and their evidence recorded. As noted by the lawyers of LAO, many adjournments take place because witnesses do not appear on the scheduled date.

Witnesses are crucial to a prosecution's case. They form the basis upon which a case is made out against an accused person. Needless to say then, it is imperative for witness evidence to be recorded in order for a trial to proceed in a just manner. The law also vests the Court with the power to summon witnesses that the Court deems essential to the resolution of the case.³⁵ Courts are empowered to question witnesses in addition to their testimony³⁶. While a witness may be summoned using the procedure provided in Chapter VI of the Cr.P.C, the law does not lay down in any certain terms what penalty may be imposed for failure to appear upon being summoned by the Court. Therefore, in practice, when a witness does not appear on the date of the case for evidence, the matter is adjourned. If witnesses do not appear on several dates, they may cause a trial to be postponed by weeks or even months. For an under trial prisoner, this means many more months of suspension of their liberty. One solution to this problem would be to release prisoners on bail.

³² Code of Criminal Procedure S. 162 (1898).

³³ Code of Criminal Procedure S. 175(3) (1898)

³⁴ Code of Criminal Procedure S. 353 (1898)

³⁵ Code of Criminal Procedure S. 540 (1898)

³⁶ Qanun-e-Shahadat Order Art. 161 (1984)

This would lighten the burden on the prison administration, it would protect under trial prisoners from mingling with convicts in the prison, and it would not place the accused individual's liberty in complete suspension. According to the director of the Human Rights Commission of Pakistan (HRCP), Mr. I. A. Rahman, "*For years, the courts have been saying that bail should be easy, the bonds should be light.*"³⁷ Despite the law allowing for this solution, a report published in 2010 by the International Crisis Group states that of the approximately 81,000 prisoners occupying the country's jails today, only 27,000 have actually been convicted. The rest are all under trial.³⁸

Although the law on bail must be made more flexible, the provisions regarding witness appearance must also be reviewed. While concluding their report, the International Crisis Group also included recommendations regarding witness protection in the following terms.

"Reforms to the Cr.P.C must also address the lack of protection to witnesses, judges and prosecutors. A robust witness protection program is urgently needed. None exists currently. Given the widespread and unchecked proliferation of arms, and the reach of criminal and terrorist networks – including collusion with corrupt local officials – witnesses are understandably reluctant to risk their lives by testifying in major criminal cases. Between 1 January– 30 September 2010, the prosecution failed to achieve convictions in 306 high-profile terrorism cases in Punjab province because witnesses retracted their testimony out of "fear, distrust of police, social pressure and compromise between the parties through political and influential people", according to Punjab's chief public prosecutor."³⁹

³⁷ See *supra* note 15 at 9.

³⁸ *Id.*

³⁹ See *supra* note 15 at 20.

There are various reasons why a witness may choose to not appear before a Magistrate. In more serious matters, witnesses may be afraid for their safety. To counter this, the Sindh Assembly enacted the Sindh Witness Protection Act, 2013. Although the Sindh Witness Protection Act has been in force for over two years now, its implementation is yet to be seen.⁴⁰ No witness protection programme has been instituted till date. The National Assembly enacted the Protection of Pakistan Act, 2014 which also contains provisions for protection of judges, prosecutors and witnesses.⁴¹ However, the Protection of Pakistan Act, 2014 has been the subject of much criticism due to its vast potential of overriding human rights. It is appropriate to conclude that there is no real witness protection programme in the country. A similar situation prevails in neighbouring India, Bangladesh and Nepal where there the need for witness protection has been recognized but a law is yet to be enacted in this regard.⁴²

In smaller matters, witnesses may not appear due to their lack of interest in the matter. Furthermore, there is a general distrust of the justice system in Pakistan, and witnesses may not deem it worthy of their time to appear in Court for a matter that they do not expect to be resolved in any meaningful manner. Field research done by the Network Publication concluded that much needless delay was caused by the prosecution, which in one case took three years to present its evidence and

⁴⁰Hafeez Tunio, *No Implementation Policy: Witness Protection law yet to see light of day*, THE EXPRESS TRIBUNE, March 27, 2014, available at <http://tribune.com.pk/story/687739/no-implementation-policy-witness-protection-law-yet-to-see-the-light-of-day/>.

⁴¹ Protection of Pakistan Act S. 13 (2014).

⁴²Ashabur Turan, *Need for witness protection law*, THE DAILY STAR, February 02, 2016, available at <http://www.thedailystar.net/law-our-rights/rights-advocacy/need-witness-protection-law-210934>; UNODC, *Bangladesh, Nepal: Call for strengthening legislative framework on victim and witness protection in terrorism cases*, UNODC, available at <https://www.unodc.org/southasia//frontpage/2014/Sept/bangladesh-nepal-call-for-strengthening-legislative-framework-on-victim-and-witness-protection-in-terrorism-cases.html>; Pradeep Thakur, *Deaths continue but witness protection law still a far cry*, THE TIMES OF INDIA, July 15, 2015, available at <http://timesofindia.indiatimes.com/india/Deaths-continue-but-witness-protection-law-still-a-far-cry/articleshow/48077837.cms>.

the prosecution witnesses were absent during eighteen hearings.⁴³ It reported that "on average, it took over eleven months for the prosecution to present evidence in the cases sampled. This period is longer than any other stage of a criminal case".⁴⁴

This lack of appearance often results in extended delay in the trial, and a corresponding delay in release of a potentially innocent under trial prisoner. This cause of delay is another example of a primarily institutional failing in addition to a secondary, legal one. The law empowers a Magistrate to summon witnesses, however, there is no way for a Magistrate to compel the presence of a witness, making it difficult to proceed with the trial in an efficient manner. The lack of trust in the justice system creates a catch-22 situation where witnesses will generally fail to appear as scheduled, resulting in a delayed trial, even when a Magistrate tries to proceed without delay. Courts must begin to function in a reliable and organized manner for the general population to vest enough trust in the system to want to assist in trial.

While witnesses are important, it is equally, if not more important to retain focus on the liberty of the accused individual who continues to languish in jail due to the non-appearance of prosecution witnesses. This point becomes even more relevant when one considers that according to primary data, this is the most common reason for delay in a trial. The law of criminal procedure allows the Court to put questions to the accused after witnesses have been examined.⁴⁵ A judicial officer must always remember his duty to dispense justice. And while the law places a very strong reliance on the testimony of witnesses, the language of the statute does not make it mandatory for a decision to be made only after all witnesses have been heard. Section 344 vests in the Court the power to adjourn proceedings due

⁴³ See *supra* note 52, at 30.

⁴⁴ *Id.*

⁴⁵ Code of Criminal Procedure S. 342 (1898).

to the absence of a witness if the Court is of the opinion that it is advisable to do so. Since the language of this provision is permissive and not mandatory, it follows that a judge may also decide to *not* adjourn proceedings due to the absence of a witness. This power is important and must be exercised in the interest of justice.

MISCELLANEOUS REASONS:

The second most frequent cause for adjournments includes a variety of reasons, such as the court file being missing, the matter being reserved for judgment, the reader of the Court being absent, the lawyer's power of attorney not being filed, etc. Details of adjournments due to these miscellaneous reasons are provided as Annexure A to this paper. Justice (Retd.) Nasir Aslam Zahid was of the opinion that the miscellaneous reasons for adjournments were all due to a lack of coordination between the different branches of state. If the judiciary and executive were to identify and address these reasons at a policy level, they would be easily resolved.⁴⁶

PRESIDING OFFICER ON LEAVE:

The third major reason for adjournments noted by the lawyers of LAO was that the presiding officer was on leave. This matter is governed in detail by the Sindh Civil Servants Leave Rules, 1986, which provides for various types of leaves that may be availed by civil servants. The scope of this paper does not extend to an analysis of the process governing civil servants leave; therefore, this reason shall not be discussed in detail.

However, it is pertinent to mention various points. As aptly pointed out by Barrister Salahuddin Ahmad, the data used for this paper lumps together the following three categories: a presiding officer being on leave, a presiding officer's transfer and the presiding officer being 'busy'. He noted that while absence and transfer means that

⁴⁶ Interview with Justice (Retd.) Nasir Aslam Zahid, retired judge of the Supreme Court of Pakistan (11 May 2016).

there is no one sitting in Court on that date, being 'busy' could mean anything – including that the presiding officer is in his chamber otherwise occupied and therefore unable to take up a matter. Therefore, it would be appropriate to separate the category of 'busy' from the other two.⁴⁷ A preliminary separation of the data suggests that of the entire number of adjournments, roughly 13% were due to the presiding officer being 'busy', whereas the remaining 87% were due to a transfer or leave.⁴⁸

When a presiding officer is transferred or is on leave, that officer's cause list for the day is not cancelled. It is placed before a link judge –another judge of the District Court who hears these matters once he/she is done with their own list for the day. However, practice indicates that when a presiding officer is on leave, the matter is often just adjourned till the next day and the lawyers do not push for it to be heard by the link judge. It is reasonable to conclude that while the law provides a practical solution to a party, it is often the lawyers or even the link judge who are not willing to put in some extra hours in order to hear each and every matter scheduled to be heard on that date. In other cases, the link judge may be hesitant to pass an order in another judge's case and grant an adjournment instead.

A possible solution to this uncomplicated problem is to appoint more judges, so that the work is better distributed and no one is overburdened by their own cause lists for the day. Another solution would be to appoint a permanent link judge for each district.⁴⁹ The job description for this position could be to hear matters for judges who have been transferred, or are on leave, or on election duty, or who are unable to proceed with their cause list for any reason.⁵⁰ This way, no judge would

⁴⁷ Barrister Salahuddin Ahmad, Vice Chairman, Sindh Bar Council, Response to a working edition of this paper at the national launch of research papers by LAS (May 24, 2016).

⁴⁸ Primary data from May 2013 till September 2015.

⁴⁹ *Id.*

⁵⁰ *Id.*

feel like they are carrying the weight of another, nor would they be required to work beyond hours to complete the work of two Courts. And litigants would not have to suffer unnecessary delay.

FAILURE TO PRODUCE CUSTODY:

The fourth main reason for an adjournment was a failure to produce custody. In simple terms, this means that the jail authority that was supposed to bring an accused to his trial failed to do so. According to a minister of the provincial assembly of Sindh, in 2009, there were 155 prison vans and 13,000 under trial prisoners who were to be transported to court.⁵¹ This points more to an institutional problem than one that might be resolved by a stricter implementation of laws. This was also reported as a major cause of delay by primary research carried out by the Network Publications.⁵²

However, let us take a look at the law governing the production of the accused i.e. custody in Court to identify any potential flaws that may be rectified. The Pakistan Prison Rules (the '**Rules**') contain provisions for the treatment and detention of trial prisoners⁵³ (in Chapter 15). A reading of the Rules indicates that an under trial prisoner is taken to Court on his date of hearing by a police escort. According to Rule 393, all costs incurred in transporting the prisoners to and from Court are to be borne by the police escort. This means that officers from two different executive bodies, prison and police, are responsible for ensuring that the custody is present in Court on his/her date of hearing. Custody is escorted from jail to Court by the Court police. If a custody is not presented before a Magistrate on the day of hearing, the Magistrate may serve a show cause notice upon the jail authorities

⁵¹ Editorial, *Plight of Under trials*, DAWN, JAN.29, 2010, available at <http://www.dawn.com/news/841620/plight-of-undertrials>.

⁵² THE NETWORK PUBLICATIONS, JUDICIAL SYSTEM IN PAKISTAN 30 (2004).

⁵³ Chapter 15, Pakistan Prison Rules.

asking them why proceedings should not be initiated against them for failing to send the accused in custody to Court on his/her date of hearing. According to a judicial officer serving in Karachi, this check is used quite frequently by the judicial Magistrates. Many a time the explanation is a shortage of police escort vans, due to which reason the jail authorities only send people who must appear for urgent matters.⁵⁴ Clearly, such an excuse means that the jail authorities decide what is 'urgent' for the purposes of selecting an accused and sending him/her to Court on the appointed date. This leaves room for the jail authorities exercising their own discretion, something which finds no place in the law. Needless to point out, it creates room for corruption and preferring some prisoners over others.

There are further checks built into legislation with the purpose of ensuring efficient justice delivery. Rule 395(i) of the Rules makes every Session Judge of the relevant district as well as the officer in charge of the prosecution responsible for visiting the prison once a month to meet the under trial prisoners who fall within their jurisdiction in order to ascertain which cases are being delayed. This rule places responsibility on two additional officers, namely the prosecutor and the judge, to identify cases of delay. However, the primary responsibility seems to be placed upon the Superintendent of Jails, who, under rule 395 (ii) is to prepare a list of all the cases of prisoners who have been incarcerated for more than three months, and provide this list to the Sessions Judge of the District, the officer incharge of prosecution as well as the Inspector General of Prisons. Once this list has been provided, these officers may work towards eliminating this delay and concluding cases as fast as is reasonably possible. It appears that the law provides multiple checks in order to ensure that cases proceed through trial in an efficient manner. However, there is little or no information available on whether these provisions are

⁵⁴ Interview with Nadir Burdi, Judicial Officer, Karachi (Dec. 30, 2015).

implemented in practice. It is a lack of oversight and a practical failure to implement the law that results in unnecessary delay in a criminal trial.

The law appears to place primary responsibility on jail officials to ensure that each accused is present in Court on his/her date of hearing. It is institutional failings and lack of coordination between government departments which results in issues such as a shortage of police escort vans due to which accused individuals are unable to be present in Court on their date of hearing. This institutional disconnect creates room for manipulation of the law and the larger system of justice. As a result, under trial prisoners are exploited and treated in the same manner as sentenced criminals, leading to a failure of the justice system.

PROCESS NOT SERVED IN TIME:

Another major reason for adjournments was due to issues with process – either that process was not served in time for the accused to be present in court, or it had not been issued at all, or it had been issued but had not been delivered to the accused. Without the accused present in Court, the trial cannot proceed. The law lays out a clear process for issuance of summons, *inter alia* in section 204 of the Cr.P.C.⁵⁵

The fact that 6,003 adjournments over the course of less than three years were due to lack of issuance of process points to a mismanagement of this procedure. This

⁵⁵**204. Issue of process.** (1) If in the opinion of a [Court] taking cognizance of an offence there is sufficient ground for proceeding and the case appears to be one in which, according to the fourth column of the second schedule a summons should issue in the first instance, [it] shall issue its summons for the attendance of the accused. If the case appears to be one in which, according to that column, a warrant should issue in the first instance, [it] may issue a warrant, or, if, [it] thinks fit, a summons for causing the accused to be brought or to appear at a certain time before such Court or (if [it] has no jurisdiction [itself]) some other Court having jurisdiction.

(2) Nothing in this section shall be deemed to affect the provision of section 90.

(3) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid, and, if such fees are not paid within a reasonable time, the [Court] may dismiss the complaint.

may be in part due to the fact that Courts are overburdened with cases and staff may not be able to keep up with the many procedural steps involved with each individual trial. Another reason this may be the case is that the law governing process belongs to the previous century. It makes no provision for service via an SMS on a mobile phone, or a fax message or email. The law has to be brought up to speed with the times in order for these anachronistic problems to cease.⁵⁶ A further study may be required to understand the administrative steps through which process is served to an accused party and how that aspect of the trial may be made more effective.

STRIKE BY A BAR ASSOCIATION:

The last major cause for adjournment on any given day was a strike call by the bar. In recent years' lawyers have garnered a reputation for being kind of a pressure group. A cursory look at the figures noted by the lawyers of LAO indicates that this reputation is well founded. A total of 6,983 cases were adjourned due to a refusal by lawyers to appear in Courts. In criminal matters, this means that potentially innocent under trial prisoners had to spend an extra few weeks in prison because of the fact that their case was adjourned once. Couple this with the frequency of strike calls noted in the data, and one is forced to conclude that strike calls have resulted in a serious denial of liberty for hundreds of under trial prisoners who are waiting in overcrowded jails for their trials to proceed.

Frequent strike calls by the bar are not only a cause for adjournments, over the years this has become a cause for distrust of the justice system, and a loss of reputation for the lawyer community. Some are of the opinion that self-regulation by the bar has failed and lawyers will have to be regulated by an independent body in order for legal services to be delivered properly. In his farewell address to the

⁵⁶ Tariq Mahmood Jahangiri, President Islamabad High Court Bar Association, Response to a working edition of this paper at the national launch of research papers by LAS (May 24, 2016).

Supreme Court of Pakistan Chief Justice (Retd.) Jawwad S. Khawaja pointed out various shortcomings in the judicial system, the fault for which he placed on the joint shoulders of the superior judiciary and the legal community. He noted that Article 37 of the Constitution of the Islamic Republic of Pakistan, 1973 promises speedy and inexpensive justice to the people of Pakistan, a provision that he said, was not being implemented. With regard to speedy justice, he pointed out that on average it takes 25 years for a civil matter to travel from the court of first instance to its final conclusion in the Supreme Court. He said that the time taken for criminal matters was not much different and that under trial prisoners often spend a substantial part of their lives behind bars while their families suffer due to the loss of their presence and the cost of pursuing justice.⁵⁷

With regard to the frequent strikes, he said that when he joined the legal profession 40 years ago, there was no concept of striking and non-appearance before the courts. Fast forward to 2014, and according to a report based on the figures in District Islamabad, from 1 January 2014 till December 2014, 50 working days were lost due to a strike call by the lawyers. This meant that in the judicial working year, approximately every fourth day was a strike.⁵⁸ This and other reasons, such as absence of one of the parties, resulted in delay in 50% of the cases fixed on any day. A similar situation prevails in other districts.⁵⁹ If the reason the bar strikes is to register their protest against a certain action, or a situation, then Justice (Retd) Nasir suggested that they suspend work after 1:00 pm on a working day instead of wasting the day altogether.⁶⁰ This would draw a balance between the right to protest and the litigant's right to have their trial proceed in a timely fashion.

⁵⁷ See *supra* note 4 at 3.

⁵⁸ See *supra* note 4, at 5.

⁵⁹ *Id.*

⁶⁰ See *supra* note 46

OTHER REASONS:

Another reason the judicial system is weighed down is the onslaught of frivolous cases that are filed each day.

*"At the start of 2010, excluding those before special courts and administrative tribunals, there were more than 177,000 cases pending in the superior courts, including the Supreme Court, the provincial high courts and the Federal Shariat Court; and more than 1.3 million in the subordinate judiciary". Around 900 magistrates with civil and criminal jurisdiction for a population of roughly 160 million handle around 75 per cent of all criminal cases.*⁶¹

Part of the reason is that cases are used as a pressure tactic by the powerful against the weak. Once a case is filed, related costs must be incurred, which helps create pressure over a vulnerable target. If an interim order obtained in their favour, powerful parties are interested in delaying litigation and maintaining the status quo.⁶²

Lawyers also tend to encourage litigation, since they are able to charge their clients' money for cases filed. In Pakistan, the legal profession has failed to develop a culture of charging for legal advice in itself. Fees are based on cases filed, or formal opinions rendered. If lawyers began charging for their time in the true sense, they might be more amenable to giving honest advice, which might often lean away from filing a case for every dispute.⁶³ USAID in its report titled 'Pakistan Rule of

⁶¹ See *supra* note 15, at 8.

⁶² USAID, PAKISTAN RULE OF LAW ASSESSMENT – FINAL REPORT 16 (2008)

⁶³ Interview with Justice (Retd.) Jawwad S. Khawaja, Ex-Chief Justice of the Supreme Court of Pakistan, (Dec. 28, 2015).

Law Assessment' noted that lawyers were able to control the rate at which a case progressed through trial and were primarily responsible for delays in trials. It stated:

"The general tenor and pace of litigation in Pakistani courts reflects a system in which the lawyers determine when cases are heard and decided. In general, judges allow lawyers to adjourn cases for any or no reason. Lawyers take advantage of this lack of enforcement of any deadlines by the court. Since lawyers are generally paid by the appearance, they have an incentive to ask for adjournments whenever possible, thus significantly lengthening cases and increasing delays. Witnesses and defendants may or may not appear at scheduled hearings. Moreover, frivolous cases are filed largely as a litigation tactic to keep matters tied up in court proceedings indefinitely. It is fair to say that the general perception of the court system in Pakistan is that of a process aimed at delaying resolution of disputes instead of getting matters resolved promptly. Persistence of delay also maintains the opportunities for corruption that have long characterized the justice system. Lawyers may pay judges or court staff to slow down or speed up the progress of a case. Lengthy pendency of cases also gives lawyers more time to approach judges to influence decisions improperly. Lack of an effective disciplinary system for either judges or lawyers diminishes the likelihood that such behaviour will be curtailed or discouraged."⁶⁴

In criminal matters, the role of the prosecution and police also factors into delay and distrust of the justice system. A poor and ineffective prosecution system⁶⁵ is a major cause of bad case management. The importance of the prosecution system cannot be overemphasized. In Karachi, the Office of the Prosecutor General of Sindh is responsible for prosecuting crimes on behalf of the State. Officials from

⁶⁴ See *supra* note 62, at 22.

⁶⁵ See *supra* note 52, at 29.

the Prosecutor General's office are often unprepared for their case and follow a generic strategy for each trial instead of understanding each case separately. According to Mr. Tariq Mehmood Jahangiri, President of the Islamabad High Court Bar Association, in his experience, the prosecution could be termed the worst government authority; high level prosecutors are political appointees and the lower level prosecutor positions are filled by lawyers who are too incompetent to maintain their own practice.⁶⁶ While his experience related to Islamabad, it is safe to suggest that a similar situation and opinion prevails across the country.

Police officials can also play a role in delaying court proceedings.⁶⁷ They are responsible for investigation and the initial preparation of a case; it is the prosecutions' job to decide whether a case is made out once the entire evidence is presented to them by the police. Instead of reviewing the weaker cases prepared by the police and discontinuing them before they go to trial, the prosecution often allows all cases to go before a Magistrate. According to a senior lawyer, Hina Jilani, *"Prosecutors generally have no confidence to tell the police to back off, that this challan will not work"*.⁶⁸ Couple this with poor evidence collection and preservation, and the result is that a large percentage of cases filed have no evidence to back them.

Due to poor investigation procedures and the general inefficiency of the police, a criminal trial proceeds at what may be called a snail's pace. The police are unable to gather enough information for the prosecution to make out a strong case, and Court's rarely exercise their habeas corpus powers to determine where there is sufficient basis for continued detention of a defendant.⁶⁹ The fact that the police force is bound to work under laws dating back to the 1800s does not improve

⁶⁶ See *supra* note 56.

⁶⁷ *Id.* At 30.

⁶⁸ See *supra* note 15, at 18.

⁶⁹ See *supra* note 62, at 24.

matters. Investigation methods provided in the Code of Criminal Procedure, 1898 envisage an entirely different universe. The police has to improvise to meet antiquated provisions and hardened criminals are acquitted in the process.⁷⁰ Furthermore, police officers are transferred at an unpredictable rate. This makes it hard for one police officer to see a trial through from the charge till the sentence. Such a lack of continuity hampers investigation and preparation of a solid case.⁷¹ Transferring police officers from investigation to traffic to escort duty also prevents specialization in the field of investigation.⁷²

According to Justice (Retd.) Nasir Aslam Zahid, a retired Supreme Court justice and former Chief Justice of the Sindh High Court, "Very few cases – not even 1 percent– are decided on merit, where the prosecution and the defence have adequate opportunity to present evidence and argue".⁷³

Another avoidable reason reported by Ms. Foqia Sadiq Khan in her work for the Network Publications is the inability of the presiding officer to separate the trial for the accused that are present from the accused who are absconding. She states, "One of the main causes that delays criminal proceedings is the inability of the judge to separate the accused present from the absconding ones. Generally, the practice in courts is that criminal cases cannot proceed unless all the accused individuals are present. The way around this is for the court to separate the case of the attending accused from the ones absent and to proceed. However, courts do not follow this approach."⁷⁴ She stated that this inability often results in delays of 8 to 10 years. In one example, separating the trial for various accused individuals

⁷⁰ See *supra* note 56.

⁷¹ *Id.*

⁷² *Id.*

⁷³ See *supra* note 15, at 12.

⁷⁴ See *supra* note 52, at 29.

took twenty adjournments, resulting in a delay of 20 months in the trial.⁷⁵ The report concluded that:

*"In substantive criminal cases, the proceedings drag on for years for various reasons and end up in the acquittal of the accused. A few cases end in out-of-court settlements. The trend clearly points to the inefficiency of the prosecution and the courts, and involves both the police and the judiciary..."*⁷⁶

This finding was corroborated by a Judicial Magistrate serving in Karachi who said that the only time a trial can be separated is at the outset. This ability too, is not provided by the law but by a precedent set by the Sindh High Court. He said that the law makes no provision for separation of trial if a co-accused absconds during trial and no precedent has been established for this situation yet. Presiding officers must go through the process of issuing summons, etc. while the accused party that is present in Court must suffer through this delay.⁷⁷

In a report by the Asian Development Bank, the primary cause of shortcomings in the justice system was not in the law, but related to governance and administration, court information systems, human resources and infrastructure.⁷⁸ The Asian Development Bank report identified various problems. Of note is the fact that judgments do not enjoy voluntary compliance. It is an almost predetermined fact that each case will be appealed till its final conclusion in the Supreme Court. And this process, as identified by Justice (Retd.) Jawwad S. Khawaja, takes almost 25 years today.⁷⁹ One case spawns an entire progeny of cases.⁸⁰ Furthermore, while an appeal is meant to review the legal aspect of a case, in Pakistan each court

⁷⁵*Id.*

⁷⁶ See *supra* note 52, at 30.

⁷⁷ Follow up telephone interview with Nadir Burdi, Judicial Officer, Karachi. (17 May, 2016).

⁷⁸ See *supra* note 52, at 45.

⁷⁹ See *supra* note 4, at 3.

⁸⁰ See *supra* note 63.

tends to try the matter all over again, rather than examining the case file prepared by the trial court.⁸¹

These are some of the problems that plague the justice system and cause distrust amongst the masses. As discussed above, many of the issues that cause this inefficiency in the system are institutional, and may be resolved by better oversight. Even in the absence of a change in the law, there are concrete steps that may be taken to improve the progress of a case through the criminal justice system.

CONCLUSION AND RECOMMENDATIONS:

Article 37 of the Constitution of Pakistan, 1973 reads as follows:

37. Promotion of social justice and eradication of social evils.

The State shall:

...

(d) Ensure inexpensive and expeditious justice;

As pointed out by Justice (Retd.) Jawwad S. Khawaja in his reference speech, the state has failed to ensure inexpensive and expeditious justice for the masses. Some of the reasons have been identified above. Courts, especially the District Judiciary is overburdened with more cases than can be handled by the existing number of judicial officers. A report on the rule of law in Pakistan prepared by USAID in 2008 estimated that there were nearly 2,000 judges in Pakistan at all levels of the lower and superior judiciary for a population of approximately 160 million.⁸² It further noted that the post of a judge was generally not attractive for the more successful

⁸¹ See *supra* note 62, at 23.

⁸² *Id.* at 20.

members of the bar, since salaries and working conditions leave much to be desired.⁸³

“Working conditions in the Subordinate Courts observed are generally inadequate, as these courts sit in small, un-cooled courtrooms with antiquated equipment and furniture. ... Subordinate courts may have one computer in a court, generally used by either the stenographic officer to record case results or by the judge. Subordinate court judges rarely are promoted to the superior courts: entering the Subordinate courts at the lowest level in effect limits their advancement to, at most, the position of District and Sessions Judge, which may require 30 years to reach.⁸⁴”

Based on the research and primary data studied and elaborated upon above, various fields of intervention may be identified. A multi-pronged approach addressing each field with a separate strategy is the ideal way to proceed. Some interventions, such as the absence of prosecution’s witnesses may require a change at the legislative front, whereas other problems, such as a shortage of prison vans, require an executive decision to make a budget allocation.

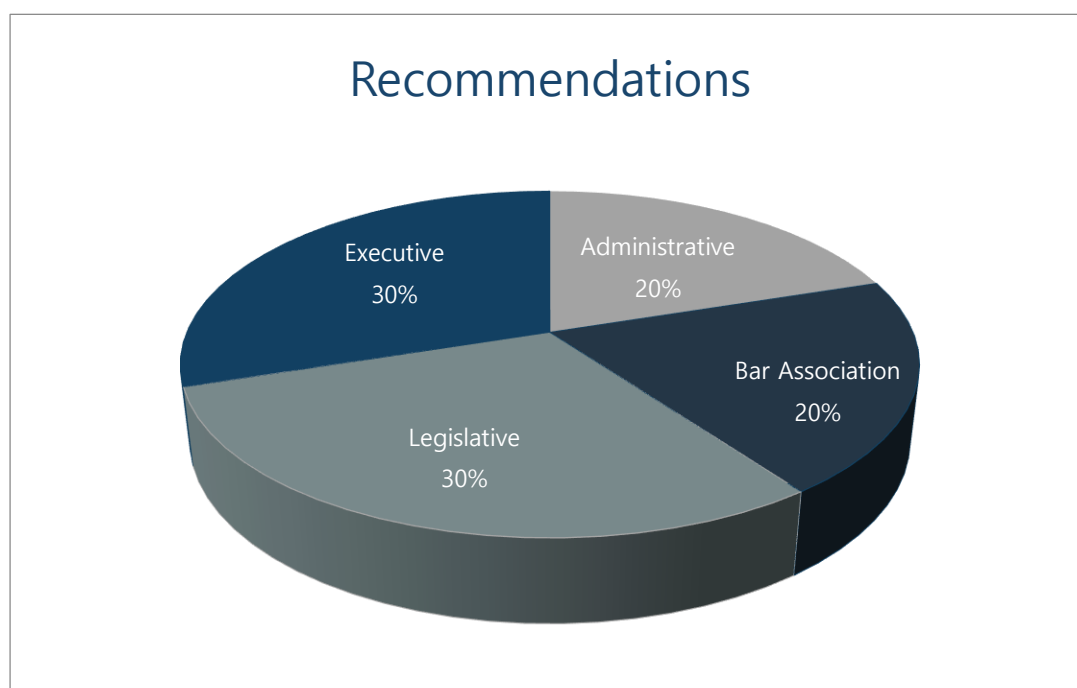
It is worth stating that each of the reasons for delay empirically found to be most common in the primary data are complex and the primary purpose served by this paper has been to highlight these reasons and broadly identify where the roots of each lie. Much more detailed research and analysis is required in order to work out the intricacies of the best and most efficient solution. It is further worth mentioning, at the cost of repetition, that the data informing this paper is based on a minute sample, and represents an atom’s worth of the caseload currently being dealt with by the District Court’s in Karachi. However, the purpose being to raise important questions relating to delay, the data has been put to its best use and may claim to present a fair picture of the situation in most trials in Karachi. In fact, there is a dire

⁸³*Id.*

⁸⁴*Id.*

need for a similar study relating to civil disputes in order to prepare informed policy on case management on the civil side.

Classified by category, following are some steps that may be taken to improve the management of a criminal trial through the justice system.



RECOMMENDATIONS REQUIRING LEGISLATIVE ACTION:

1. The post of a judge in the District Courts as well as the superior judiciary must be a coveted position for competent candidates. Currently, lawyers look to join the District Judiciary for the prestige of the post. However, as described above, the working conditions and the enormous backlog of cases expected to be adjudicated upon by the members of the judiciary acts as a disincentive for competent lawyers to give up their practice with its promise of a lucrative future. According to a report by the UNDP, in 2012 a general perception of corruption was associated

with the lower judiciary.⁸⁵ The working conditions, salary structure and support staff provided to members of the judiciary must all be revised in a manner that makes it an attractive option for intelligent, hardworking legal minds who will improve justice delivery. Based on the figures reported by USAID in 2008⁸⁶, it is but obvious that a drastic increase in the number of judges is a prerequisite to any kind of reform.

2. The second major institution in the criminal justice system is the prosecution service. This suffers from the same problems as those faced by the District Judiciary. Being a prosecutor must also be a position of respect. It has to be well paid, and working conditions must be improved. While the prosecution service may enjoy de jure power to reject cases brought by the police, research shows that in fact, this power is not exercised, in large part because it does not de facto exist. Furthermore, while other actors of the criminal justice system are governed by federal statutes, the office of the Prosecutor General is provincial, thereby making it an anomaly in the criminal justice system. The International Crisis Group recommended, *inter alia*, that the criminal prosecution services be strengthened. It also recommended strengthening of police and prosecutor coordination. With regard to rejection of weak cases, the report suggested providing security of tenure to prosecutors which would encourage them to review FIRs properly, and reject those which did not make out a case.⁸⁷ This would free the Courts up to focus on real cases.
3. Working alongside the prosecution is the police. Currently the police are not practicing modern methods of evidence collection and preservation.

⁸⁵ See *supra* 12, at 72.

⁸⁶ See *supra* 82.

⁸⁷ See *supra* note 15, at iii.

In a system where cases proceed very slowly, preservation of evidence becomes even more important. Therefore, efforts must be made to invest in and modernize investigations by the police. Trainings in this regard must also be organized. Although outside the scope of this paper, it is worth mentioning that the police, especially in Sindh, are known to be corrupt⁸⁸ and may be open to outside influence which may encourage them to hamper evidence and investigation material.

RECOMMENDATIONS REQUIRING EXECUTIVE ACTION:

1. Police officers working in the investigation department must not be transferred during the pendency of a case. The investigation department should be independent from the rest of the police force so that specialization may take place and cases are not hampered due to the possibility that the investigating officer might be transferred to a distant district during trial.⁸⁹
2. A floating link judge should be appointed to ensure the cases are heard on their appointed date. Accused individuals should not have to return to jail without their trial proceeding due to the absence of a presiding officer.
3. Another major problem identified above was the absence of custody. In this regard, some measures have been suggested by the International Crisis Group in its report titled "Reforming Pakistan's Criminal Justice System". The report suggests improving prison facilities so that under trial

⁸⁸TRANSPARENCY INTERNATIONAL, NATIONAL CORRUPTION PERCEPTION SURVEY 15 (2010), available at <http://transparency.org.pk/report/ncps%202010/ncps2010A5.pdf>.

⁸⁹ See *supra* note 56.

prisoners are not made to suffer more than absolutely necessary and are treated as innocent till they are proven guilty. The Government must invest in enough prison vans so that no prisoner is made to miss his/her trial due to a shortage of police escort vans.⁹⁰ The procedure by which the custody is brought to trial has to be made tighter so that prison officials cannot blame a lack of police escort vans as a reason for non-appearance of the custody.

RECOMMENDATIONS REQUIRING ADMINISTRATIVE ACTION:

1. Penalization of frivolous litigation must be strictly implemented. Section – 250 of the Cr.P.C allows, and in fact makes Magistrates responsible for identifying false, frivolous or vexatious allegations. Once such an allegation is identified, the Magistrate is empowered to release the accused, and call upon the complainant to show because why he/she should not pay the accused compensation for filing such a complaint. Magistrates are empowered to order compensation in such matters. This provision must be put to use and the highest possible compensation ordered wherever possible. It is only when used in such fashion that it will act as a deterrent for other potential litigants looking to cause vexation through a false case.

RECOMMENDATIONS REQUIRING ADMINISTRATIVE/BAR ACTION:

1. As established above, litigants are not the only people responsible for frivolous litigation. Lawyers have developed a reputation for encouraging

⁹⁰ See *supra* note 15, at ii.

litigation as a means of harassment. The legal community is the single most avoidable cause for delayed case progress. This occurs, in part due to poor ethics, and lack of oversight. Lawyers are governed by the Legal Practitioners and Bar Councils Act, 1973. This law provides for the creation of bar councils at the national, provincial and district levels, which are further responsible for enrolment of lawyers and their regulation. The Pakistan Bar Council has been made responsible for laying down a standard of professional conduct and etiquette for lawyers.⁹¹ One of the reasons for disqualification from membership of a provincial bar council is being found guilty of professional misconduct.⁹² The law also provides for a disciplinary committee which looks into complaints against lawyers, including complaints of misconduct.⁹³ Punishments include reprimand, suspension and even removal from practice.⁹⁴ In actual fact, however, few actions are taken against lawyers, and fewer still are disbarred. According to a study conducted by the Supreme Court, in previous years, as many as 7,500 complaints have been registered against lawyers in bar councils. However, no lawyers have been taken to task regarding the complaints filed.⁹⁵ In conversation, Justice (Retd.) Jawwad S. Khawaja mentioned that many complaints had been filed against lawyers who had charged enormous amounts in court fees from their clients, who later learnt that their case did not require any court fees. Bar Councils were proud to say that they had retrieved the money for the complaining clients. However, no action was taken against the lawyers for such appalling behavior. He

⁹¹ Legal Practitioners and Bar Councils Act S.13(d) (1973)

⁹² Legal Practitioners and Bar Councils Act S. 5B(c) (1973)

⁹³ Legal Practitioners and Bar Councils Act S.15 (1973)

⁹⁴ Legal Practitioners and Bar Councils Act S. 41 (1973)

⁹⁵ See *supra* note 4, at 7.

was of the opinion that self-regulation by lawyers has failed and it was time for an independent body to be set up for this purpose.

2. In the same light, bar associations must develop a code for when they are to strike. Every fourth working day in the judicial year cannot be lost to a strike. An alternative, such as discontinuing work after 1:00 pm should be considered by the bar associations.⁹⁶
3. Lastly, till such time as the system does not undergo a complete revamping, an effort must be made to alleviate conditions for those individuals languishing in jails. Jail authorities should be held accountable if they are unable to ensure separation of under trial prisoners from convicts. They must also ensure that remand prisoners are not assigned labour in a manner prohibited by law.⁹⁷ Drawing inspiration from the Supreme Court of India, Pakistani authorities may even consider the option of releasing under trial prisoners who have already served a major part of the sentence that has not even been awarded to them yet.⁹⁸

One must acknowledge that this is not the first time such recommendations are being made to improve the criminal justice system. Various Law and Justice Commission reports have been published, each making its own small contribution in terms of recommendations.⁹⁹ Some aspects of delay, such as the lack of a witness protection program, may take longer to implement than others, such as delay due to a shortage of prison vans. As very aptly stated by Barrister Ahmad, it makes most rational and practical sense to achieve what he called the 'low hanging fruit' before making the more ambitious policy and legislative leaps to end delays in

⁹⁶ See *supra* note 46.

⁹⁷ *Id.*

⁹⁸ Jayanth K. Krishnan & C. Raj Kumar, *Delay in Process, Denial of Justice: The Jurisprudence and Empirics of Speedy Trials in Comparative Perspective*, 42 GEO.J.INT'L L. 747, 761 (2011).

⁹⁹ See *supra* note 1, at 8.

trial.¹⁰⁰In this vein, he pointed out that 15.29% of the total delay was due to a failure to produce custody – a delay which appears to be primarily due to the shortage of prison vans. An administrative hurdle such as a shortage of prison vans is much easier to tackle than the multitude of reasons which might be keeping witnesses from appearing to help build the prosecution's case. If by buying a few dozen prison vans the Prison Department is able to bring this statistic down to 0, it would be a considerable leap in the right direction.¹⁰¹ He further noted that there is no legal reason for the absence of a presiding officer to automatically result in delay, yet 16.31% of all delay is due to this reason. By taking an executive decision of appointing what he termed a 'floating link judge', this matter too, may be resolved easily, thus further reducing this delay. Finally, he noted that strike calls were responsible for 12.19% of delay. This is another cause that can be done away with at little or no cost. Combined, if these three 'low hanging fruits' could be addressed in the manner described, incidence of delay would go down by 43.70% - that's almost half of all delay.¹⁰²

While some changes may be more easily incorporated than others, it must be borne in mind that the longer this system continues in its present form, the longer potentially innocent individuals will languish in jails with their liberties and fundamental rights suspended. While a few months may not seem like a long time when dealing with the case of an under trial who turns out to be guilty, it is a lifetime for the under trial who is to be found innocent.¹⁰³ Needless delays caused due to institutional failings, inadequate budget allocations, corruption endemic to the system, witness absence, absconding co-accused individuals and unsympathetic lawyers are all human rights violations for the potentially innocent accused who has to spend months and years going through the abyss that is the criminal justice system. Adopting these measures aimed at making the system more efficient in

¹⁰⁰ See *supra* note 49.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See *supra* note 98, at 765.

small ways will produce a cumulative effect of reducing unnecessary delays and making the process of going to trial less needlessly painful for litigants and especially for under trial prisoners.

ANNEXURE A

Other Reasons of Cases Adjournment since May 2013 till Mar 2016

S. No.	Other Reasons*	Total	Percentage	Average
1	Charge not framed	1236	13.05	36
2	Case transfer/waiting for transfer	1326	14.00	38
3	Copies not supplied	402	4.24	12
4	Case Property not produced/Received	344	3.63	10
5	Case not fixed/Not Listed	1091	11.52	29
6	Stenographer Absent/Leave	3	0.03	0
7	Police file, Medical, FSL, Chemical Report not present	642	6.78	19
8	Challan not submitted/Challan awaited	902	9.52	24
9	Final Arguments not heard	141	1.49	4
10	Judgment not announced/Reserved for judgment	288	3.04	8
11	Court File Missing	158	1.67	5
12	Bail Arguments not heard	609	6.43	18

S. No.	Other Reasons*	Total	Percentage	Average
13	Statement of Accused not Recorded	92	0.97	3
14	Bail/Misc. application arguments not heard	38	0.40	1
15	Notice to surety	8	0.08	0
16	Board Discharge	143	1.51	4
17	Absconding Proceeding U/S. 88/87 Cr. PC Not Complete	363	3.83	9
18	Advocate Co-accused Absent	156	1.65	5
19	Order on Bail/Misc. Application not Announced	273	2.88	8
20	Reader was on Leave/no seated	5	0.05	0
21	Paper Book not received	3	0.03	0
22	Vehicle not available	129	1.36	4
23	Vakalatnama was not filed	47	0.50	1
24	Matter Under Searched/Not Searched	249	2.63	7
25	Condonation application filed	70	0.74	2
26	Process Server Absent; Report not Submitted	684	7.22	20
27	Formal case	53	0.56	2
28	BW not served/BWs not Issued	15	0.16	1
	TOTAL	9470	100.00	268



Legal Aid Society

Spanish Homes, Mezzanine Floor, Plot No.

13/A. DHA Phase 1, Karachi

Phone: 021-99266011-4, Fax: 021-99266015

Website: co.lao.org.pk

Facebook: [LegalAidSocietyPakistan](https://www.facebook.com/LegalAidSocietyPakistan)

Call Us Toll Free for Free Legal Advice at **0800 70806**