VISION 2017

SINDH JUDICIAL ACADEMY
Judges Bungalow No. 1 & 2, Ferozenana Road, Bath Island, Clifton, Karachi.
Telephone: 92-21-99250629 Fax: 92-2199250628 Email: Sindhjudicialacademy@yahoo.com
Website: www.sja.gos.pk

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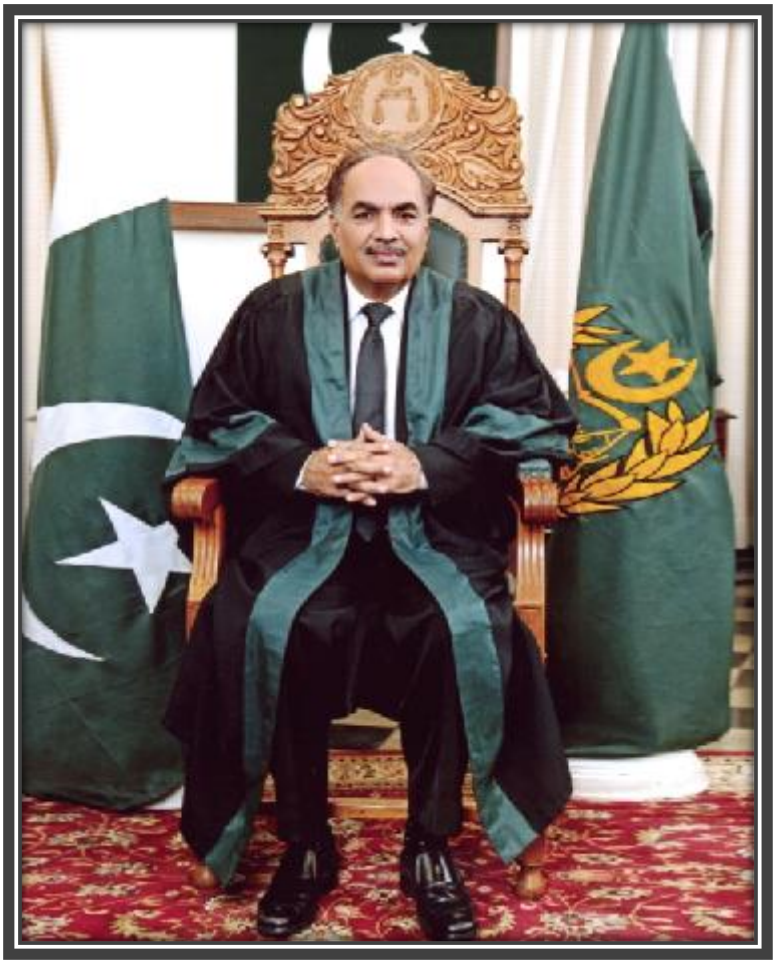


MR. JUSTICE AHMED ALI M. SHAIKH

HONORABLE CHIEF JUSTICE HIGH COURT OF SINDH

MESSAGE

Hon'ble Chief Justice, High Court of Sindh

The importance of Judicial Academies in the advancement of Justice Sector entities has been now well established throughout the world. Our province is pioneer in establishing the Sindh Judicial Academy back in 1993. I am pleased to recognize deep insight grafted by the Sindh Judicial Academy into its detailed Judicial Training Calendar for this year. Besides this, Sindh Judicial Academy has proposed an activity for setting up a process to deal with the causes of less effectiveness of our justice system and to bring consensus for paving a way towards success in the next ten years under the concept a Vision for justice 2027.

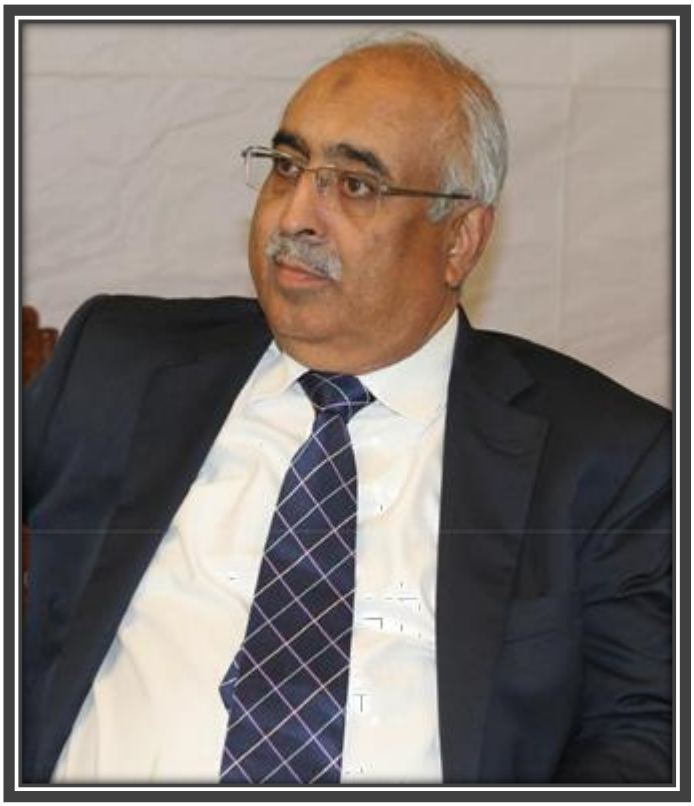
The Vision 2017-2027 was initially shared with me by the Director General, Sindh Judicial Academy. I believe it is first time in provincial judicial hierarchy whereby a log-term policy is being designed and the Sindh Judicial Academy has developed a step forward in this regard.

The Academy has shared number of soft reforms such as establishing Court Annexed Mediation Centre; suggesting amendments in the procedural and substantial laws; publication of Electronic Law Journal, research papers, law books; introducing distance learning and skills based training for judicial officers, practicing advocates, investigators and prosecutors which shall be considered in more detail in the workshop planned.

I appreciate the Academy's strategy as they before executing the ideas decided to consult with the stakeholders and thereafter on their suggestions would finalize the Vision 2017-2027.

I have been informed that Hon'ble Judges of apex court, leading advocates, high officials, media personnel have been invited. I hope the amalgam of diversified experience and intellectual approach of the worthy participants shall crystalize a productive and do able strategy to deal with the menace of justice system and upholds the mandate of our constitutional norms.

I extend my full cooperation with the Sindh Judicial Academy in this regard.



MR. JUSTICE KHILJI ARIF HUSSAIN

Former Judge, Supreme Court of Pakistan
Director General, Sindh Judicial Academy

MESSAGE

Honorable Director General, Sindh Judicial Academy

A Judicial Academy is known by imparting of judicial training at the pre-service and during service stage of services of Judges. It was long felt need to establish a Judicial

Academy in Sindh in order to improve the working and skill of district judiciary and their Staff, to achieve said purpose, the Sindh Judicial Academy was established by the Sindh Act No. IX of 1994 with the following objects:-

a) Legal orientation, training of members of the subordinate judiciary, law officers and members of the bar.

b) Continuous education of the members of the subordinate judiciary.

c) Holding of conferences, seminars, workshops for improving of judicial system and quality of judicial work.

d) Providing opinion and constitutional research.

e) To conduct departmental examination of the members of establishment of the High Court and subordinate Courts.

f) Publishing of general memorize, research papers and reports.

Sindh Judicial Academy, being the oldest Academy in Pakistan, is performing this job as per the mandate given by its Act. We have trained more than 63 batches, and participants of these batches are performing their duties with great zeal and dedication in these difficult times.

The academy was headed by prominent Judges like Z.A. Channa, Ghous Muhmmad, Saleem Akhtar, Shabbir

Ahmed and Ali Aslam Jafri. The Academy is arranging continuous judicial education programs for preservice and in service Judicial Officers of Sindh, and transferring education, knowledge, skills, and

habits of the legends of Judiciary to the next generation through teaching, training and research. It nurtures the Judicial Officers in a way that they may become 'the Judges of future" as visualized in Judge's Book published by the American National Judicial College;

"Although speculations about the judge of the future bring visions of robotic truth-assessing machines, law dispensing computers, and chemical-test-determined dispositions, human being, rather than mechanical marvels, will continue to exercise the fine art of judgment for any foreseeable future."

The Sindh Judicial Academy has developed an institutional culture by developing such syllabus of different courses and training manuals. After launching the newer version of our Website, I invite the senior judiciary from Sindh to contribute in its continuous uplifting by providing feedbacks and by writing articles and other material which can help the young Judges in performing the judicial duties. All the stake holders are also invited to use

this Website as best tool of communications, among themselves as well as with Academy.

Moreover, I would request all the respectable judicial officers and others entities of judiciary to join our Forum for their regular communication, queries and even for productive chitchat.

Justice Khilji Arif Hussain
Former Judge, Supreme Court of Pakistan,
Director General, Sindh Judicial Academy

ABOUT

Sindh Judicial Academy

In the beginning of the year 1992, the then Chief Justice and Judges of the Honorable High Court of Sindh felt the importance of judicial education and training for the judges in the province of Sindh. Thus, the Sindh Judicial Academy was set up in May 1992 under a resolution of the High Court of Sindh. In the year 1993, the Sindh Judicial Academy Ordinance, 1993 (Ordinance No. XVIII of 1993) was promulgated to provide legal cover for its working and functions. In the year 1994 Sindh Assembly repealed the Ordinance by the Sindh Judicial Academy Act, 1993 which was promulgated on 7th March, 1994 (Act IX/94). So far, SJA has trained 62 batches of judges, law officers including the officers of JAG branch of armed forces have been passed off by the Academy.

In the beginning, the Academy started functioning in a portion of the High Court Building under the able leadership of Late Justice Z.A. Channa. The Academy functioned for some time in a court room of the Annex Building of the High Court with inadequate facilities but in the year, 2003 it was shifted to the High Court Bungalow Nos.1 & 2 at Bath Island, the present location. The High Court under the direct supervision of the Hon'ble Chief Justice, Mr. Justice Sabihuddin Ahmed, Mr. Jus-tice Ata ur Rehman, Mr. Justice Musheer Alam and Mr. Justice Arif Hussain Khilji completely renovated the Academic and Administrative blocks of the Academy and provided two furnished and renovated buildings to serve as hostels for the trainee judges. The Board of Governors (B.O.G.) provided a dynamic and visionary direction to the Academy. At this crucial point, the B.O.G. requested the present Directory General to lead the Academy, who accepted this responsibility and offered to work purely on honorary basis and started functioning as such W. E. F. 02-02-2007 afternoon.

To realize the vision and direction of the B.O.G. far reaching steps were taken to transform Academy in a Center of Excellence. The entire academic activities were carried out with the assistance of visiting faculty members but now a permanent faculty has been added to the Academy. In this respect, the Access to Justice Program (AJP) has assisted the Academy and Civil Law Expert, Criminal Law Expert and Curriculum Development Experts have been appointed. Now the training is imparted by the permanent faculty members and visiting experts who comprise of retired judges and leading advocates. Previously the academic and hostel for the trainee judges were situated in the same premises but now besides the two separate blocks reserved for administrative and academic

activities; two separate hostels are in operation. It was noticed that the output of the staff was at the minimal but due to proper organizational approach and orientation in the administrative set-up the output of the staff has increased. Some new posts have been created and now the Academy is running as an institution heading towards its goal of transforming into a Center of Excellence.

BOARD OF GOVERNORS

1 Hon'ble Mr. Justice Ahmed Ali Sheikh,
Chief Justice, High Court of Sindh,
Chairman Sindh Judicial Academy, Karachi.

2 Hon'ble Mr. Justice Irfan Sadat Khan,
Senior Puisne Judge, High Court of Sindh, Vice Chairman,
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3 Mr. Khalid Jawed Khan,
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4 Mr. Justice Nasir Aslam Zahid,
Former Judge Supreme Court of Pakistan

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12 Mr. Ghulam Rasool Summo,
Registrar, High Court of
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13 Mr. Justice Khilji Arif Hussain
Former Judge, Supreme
Court of Pakistan
Director General, Sindh
Judicial Academy, Karachi.

THE JUDICIAL SYSTEM A PRAGMATIC VIEW

By:

MR. JUSTICE (R) S.A. RABBANI

Former Judge, High Court of Sindh

We religiously believe that the systems given by the Britishers are not challengeable and are free from all sorts of defects. Sufferings of the people at the hand of our judicial system for the last seventy years in Pakistan have not been able to change the view. Those sitting at the places where they could do some better always concluded that the system is absolutely flawless and the fault lies with those implementing it and the fault can be removed by increasing the number of judges. It is, however, an open secret that increase in number of judges at all levels made a number of time has shown no improvement. On the contrary, the fanciful solution caused loss in efficiency and competence, and a fall in integrity level.

Objective of the System:

The primary deficiency in the system is that its objective is not justice, but it is only disposal of cases according to law. With the judicial system, we inherited a tradition of oath by superior courts judges as an essential requirement for elevation to the bench. This oath of a judge never required that he would do justice. The Constitutions so far introduced in the country never provided categorically that the job of a judge is to provide justice.

Govt. of India Act, 1935 was the first document that was adopted as a constitution of Pakistan. Under it, a judge had to affirm simply that he would faithfully perform his duties of office to the best of his ability, knowledge and judgment. The oath did not include a pledge to do justice.

Then came the constitution of Pakistan 1956. The oath of a judge under this constitution also did not mention that a judge was supposed to do justice. 1962 Constitution given by president Mohd Ayub Khan mentioned in the oath of a judge that he would do justice. But this justice was to be done ‘according to Law. Justice

according to law simply means implementation of law. Implementation of law is not justice in all cases as sometimes law itself is unjust. The words in oath under the present constitution in this respect are such that they indicate that the word 'justice' has consciously been avoided. The

words in the oath are 'in all circumstances, I will do right to all manner of people according to law...' 'Doing right according to law' simply means correct implementation of law. So, the judges never took oath to do justice to the people. It is not requirement

and objective of the system. The judges do not have to do justice, but they have only to pretend that they are doing justice. This is why it is expected that justice should not only be done but it should also seem to have been done. This is obviously a deception. Judges are always concerned about the number of cases disposed of and disposal of large number of cases is supposed to be a great achievement. Judges are never worried about the number of cases in which they failed to provide justice due to tyranny of the requirements of the system.

Delay in disposal of cases:

Another colossal defect in our judicial system is delay in disposal of cases. This is a disease at all levels of the system. Ordinarily the system has inherent causes that cannot be cured till the system remains in its present shape. It is not a requirement of the system that the judges should have a faculty or power of decision despite the fact that their whole function is to make decisions. Since it is not a requirement, most of the judges lack this faculty. Consequently they need more and more time for a decision, sometimes years.

Apathy is that there is no feeling that the faculty of decision in a judge is essential for his job. Judges of this system are perhaps the last in the list of those who have to make quick decisions. By multiplying the number of judges lacking faculty of decision, the problem of delay cannot be solved. The history of the problem in the country for the last seven decades is a witness of the fact that the increase in the number of judges has always failed to reduce delay in disposal of cases.

The National Judicial Policy, 2009, addressed the problem of

delay in disposal of judicial cases. The shape and style of the policy suggests that the underlying principle was that problems could be solved by issuing orders and directions. An attempt was made to curtail delay in various categories of cases by specifying the period for disposal of cases of each category. A long list of the categories of cases has been given in the Policy that have been given priority for early disposal, but there is no mention of priority between these categories. When a number of cases are to be given priority, there is no priority practically.

On some occasions in the past, some persons sitting at the top of the system issued orders and instructions to expedite disposal of cases within the period specified by them. In view of such orders, the lower courts made compliance by disposing of the cases post haste without completing the legal and judicial requirements and, consequently, the cases had to suffer further delay due to remand by the appellate courts. The approach to the problem was not realistic. In case, problems could be solved merely by issuing orders and directions or by assigning a period for completion of the job, all problems in the world would have been solved and the world would have stood today without any problem.

Mostly the causes of delay in disposal of cases at the level of District Judiciary and the Superior Judiciary are different. The Superior Judiciary is powerful and, at that stage, the function of the court is just to hear the advocates, study the material on record and write order or judgment. They are in a position to reduce the delay by simplifying the procedure and management of cases for hearing. If the judges are not more interested in creating precedents and case law than deciding the disputes of the parties, at the cost effective and prompt relief to the parties entitled to, delay may be curtailed considerably. Case law is useless if the system fails to provide prompt and effective relief.

There are a number of factors responsible for delay in disposal of cases by the judges of the District Judiciary.

The system is based on mistrust. Judges are recruited usually on the basis of an examination of their memory

through questions from law courses. That is neither adequate to judge the capabilities of a candidate regarding legal education nor is it a foolproof mechanism for this purpose.

A judge is expected to possess other mental faculties beyond memory and a lot of other qualities a judge ought to have. A judge appointed without testing his merits through a foolproof mechanism, sits to preside the court, he is not trusted, with the result that, for lack of the required capability, he is afraid of everyone, the judicial administration, the advocates, the prosecution, the persons in authority and the public. Such a scared person cannot be expected to make prompt decisions and dispose of cases without delay.

The system allows such a scared person to be a judge but then binds him with procedural technical fetters.

During the last three or four decades a decline has been seen in the moral standard of the society and the judiciary and advocates are not exception. Before that the advocates used to be well behaved, respectful and graceful before the courts of District Judiciary and by paying respect they used to earn respect from the judges. Now, at this level, advocates misbehave in courts to the extent of a physical fight with the judges. Many such incidents have occurred but the judicial authorities have not so far taken effective steps to solve this problem. Either they have a leaning towards their past fraternity or they avoid to face the strong nuisance value the advocates have gained by virtue of their collective bodies. How can the judges of the District Judiciary decide cases with peace of mind and avoid delay.

The problem may now be analyzed with reference to criminal and civil judicature separately.

The most significant factor contributing delay in criminal cases is a development of law itself. According to the original concept of judicial system irrespective of criminal or civil judicature, the court used to be an impartial referee between the parties. This position stays, at least theoretically, with regards to the civil judicature, but development of case law has changed the status in case of criminal courts.

The prosecution representing the state in criminal cases is a party before the court and it should accept the whole responsibility for proving the case against accused. This responsibility includes fair and prompt investigation, presentation of a case before the court in time and production of accused as well as the witnesses before the court. Most of the burden of this responsibility has been shifted, by case law, to the court itself absolving the prosecution of their primary responsibility and now it is the duty of a criminal court to procure attendance of the prosecution witnesses, to ensure productions of the under-trial prisoners and to procure attendance of the accused persons named as absconder in the charge sheet.

A court to be an impartial referee cannot take the responsibility of the actions that are the functions of the prosecution. With the shift of the responsibilities of the prosecution to the courts, lack of effective power of criminal courts to deal with the official not properly cooperating, or disobeying the court in ensuring attendance of witnesses, accused etc. is also a major factor contributing to the problem. According to the relevant law in such cases, the court has to file a complaint before another court, or it may make a complaint to the authorities of the defaulter. It is disparaging for a court to become a complainant. Moreover, such a complaint is not a solution of the problem and does not help in reducing the delay in the relevant case.

In the civil judicature at the district level, complexity of the procedure and hesitation due to lack of faculty of decision in a judge are the basic factors contributing to the delay. In all proceedings before a civil court, one of the parties has a weak case and, therefore, likely to be adversely affected by the decision. Such a party is always interested in prolongation of the proceedings through adjournments and misuse of interlocutory provisions. This is usually managed by the advocate of that party. Here comes the role of the nuisance value of the advocates and the consequent fear in the mind of the judge. The concept of separate Execution proceedings initiated through an Execution application, is a cause of substantial delay in civil matters

without a rational justification. As soon as a court passes a decree determining the rights and liabilities of the parties, the court should be legally duty bound to order execution simultaneously, however subject to appeal. The Appellate System:

Our judicial system is based on mistrust and consequently it has an innumerable appellate stage. Although the constitution and law envisages only three vertical stages of the appellate system viz. the District and Sessions Court, High court and the Supreme court, but we have also created a number of horizontal appellate stages depending upon the number of judges in such benches. This has practically destroyed the concept of finality of the order and edict of the apex court. Eminence of the supreme Court was that its order was to be final and not appealable. Article 185 of the constitution laid down the appellate jurisdiction of the Supreme Court and it is only with regards to judgment, decrees and orders of a High Court. It does not include appellate powers against any order of the Supreme Court itself.

Article 188 of the constitution empowers the Supreme Court to review its own judgment or order, but a change of the nature affecting the concept of finality of the Supreme Court order impairs its position as an apex court in the system. Article 184 of the constitution describes original jurisdiction of the Supreme court. This is original jurisdiction and obviously it has nothing to do with the appellate powers but clause (3) of this Article has, on some occasions, been used to exercise appellate powers. Even a judgment of the appellate jurisdiction of the supreme court has been set aside by exercising powers of original jurisdiction under clause (3) of this Article. This has seriously undermined its image as a final and apex court.

The basic concept of our judicial system, as well as the scheme of the Constitution, 1973, envisages a vertical appellate structure. A horizontal appellate system destroys the justification for a vertical appellate system. There can be, absolutely, no logical reason why an appeal from a judgment, decree or order passed by a civil judge cannot be heard and decided by two or

more civil judges sitting together , if this can be done in a High Court, and if this can be done, there is, at all, no justification for existence of District Court a High court and the Supreme court in the capacity of appellate court.

In the case of Malik Feroz Khan Noon v The State {PLD 1958 Supreme Court (PAK) 333 } it was observed by Mohammad Munir, C.J. :

"The court that functions in exercise of the original criminal jurisdiction or in exercise of appellate jurisdictions, under section 411-A, is the same court viz: The High Court, and not two different courts; The respective powers possessed by the judges while functioning in two different capacities being the powers of the same court and the distribution of those powers being no more than an internal arrangement among the judges of the same Court."

It was further observed that since original bench is not sub-ordinate, the case cannot be remitted to it for retrial.

The observations reproduced here are significant; first that the High court is one court and secondly, that exercise of original and appellate jurisdiction in such matters is an internal arrangement of a High court. This Supreme Court view is practically a non-recognition of a horizontal appellate system in a High Court.

An internal arrangement by a High court for rectification of error in its order or judgment is unexceptionable, but it can't include an appeal which, in its legal parlance, is a prayer be-fore a higher authority. Unfortunately, we have a tendency to sacrifice law on convenience.

Our horizontal appellate system is based on a myth that the wisdom increases with number of minds but, unfortunately, this idea has been disproved many times when a single mind achieved what millions of minds could not achieve working together. Almost all inventions, during the last three centuries, were made by single individual instead of a group of persons. It is merely a myth that increase in number of minds increases wisdom proportionally. A mob is normally insane in its acts and decisions.

Best judgment is that made by a single judge, if it is made honestly after thorough use of mind. Judgment of a bench of two judges has a lesser quality

because responsibility is divided into two. Responsibility is divided according to the number of judges in the bench, and it has adverse effect on the quality accordingly.

The basis of the system, which is mistrust, has been a cause for creation of a number appellate stages, constitutional or extra constitutional, but it has not been established that the highest appellate stage always comprises persons who are infallible. If this is a truth, the appellate stages ad infinitum will suffice only.

Corruption:

On many occasions during my judicial carrier I felt that the two categories of the judiciary viz: the superior judiciary and lower judiciary have been established just for one purpose; which is, where there is something negative for the judiciary it should go to the lower judiciary; such as when there is an allegation about corruption, it should go to the lot of lower judiciary and one is allowed to make such allegations, against lower courts without a fear of a rebuke or action. Where there is something positive like praise and privilege or a pat on the back, it should go to the superior judiciary. Otherwise, there appears no reason for categorizing like this, as courts at all stages are doing the same task i.e. deciding disputes of the parties.

Judges sitting at all levels are not ordinarily involved in corruption, with some exceptions of those who, not being fit for the job by the virtue of their character, get the entry due to flawed mode and criteria for selection of the judges. They are ordinarily offices of the courts where corruption is normally found. Inadequate salaries and more undeclared authority in their functions, may be a cause of this corruption. Advocates are also responsible for this corruption as, to get facilities and favor in their cases they arrange bribe and since they don't have to pay it from their pocket they are very generous in such payment. They direct their clients to make such payment.

There are three types of the human societies. Best is one where man is respected, just as a human being. Rule of law is safe in such a society where rule of law has no odds and works effectively; it is in a position to control corruption. Corruption is always inversely proportional to rule of law. Another human

society is that where a man is respected according to his status. In such a society rule of law has odds to combat and it is always under pressure of status. As a principle, rule of law admits no exception as equality of human beings is the fundamental principle. In such a society, despite its all efforts, rule of law fails to control corruption due to status as an exception to the rule of law.

There is yet another deteriorated form of the society where the rule of law practically abdicates usually for multiplicity of exceptions. The vacuum is filled in by nuisance value rule. The rights privileges as well as respect in a society run under this rule depend upon the nuisance value. One is entitled to the respect and privileges in proportion to one's nuisance value in the society. A race for nuisance value thus becomes the order of the day. There are three modes of gaining nuisance value.

One may acquire an official position by virtue whereof he gets capability to cause harm to others or to give favor and advantage. Police job according to ranks is one example. Another way to acquire nuisance value is acquisition and show of physical force. You carry weapons and you get respect as well as what you want to take.

Those who cannot choose these two ways are left with one mode only, and that is opulence. In a perverted society everything can be purchased if you have money. When you acquire wealth through corruption or any such means, you can buy respect or anything you want. This society has conducive environment for corruption.

Another cause of growing corruption in our society is the slogan to raise standard of living. We start on the slogan with rush to raise standard of living for which we need money. Easy and much money can be earned only through unlawful means. Morality and legal mechanism are too weak to resist charm of the slogan. Every time this slogan is raised, it accelerates the race of corruption. You have to earn by any means, lawful or unlawful, as without that standard, you have to face humiliation for your failure in the race.

As a first important step towards eradication of corruption we need conversion of prevailing nuisance value rule

to the rule of law. This can be done only by the authorities through surrender before law without exception.

Judicial ethics and conduct:

Dignity of a court is the foremost imperative of the system. A judge should stand on his dignity. Dignity of the judge maintains decorum in the court. A judge ought to have total control on his tongue. In the court, a judge should utter a word only when it is extremely necessary and ineluctable.

Integrity is the most significant requirement and quality of a judge. It is the human nature that one chooses the path of honesty and righteousness only out of fear. That makes the difference is whom or what one is afraid of. If one is fearful of worldly creatures and environments, he is oversensitive about his reputation. A large majority, of judges in our judicial system belong to this category.

Such an honest man usually develops some harmful traits, which may be lack of confidence, cowardice, jealousy, short sightedness, miserliness, and whimsicality. A person, especially a judge, of this category is always extra careful about his reputation in the mind of the people around him.

Fear of the surroundings and the people around impairs his confidence and he becomes slow in judgment as he preconceives adverse reaction and comments of a section of the people on each of his findings on either side, and that makes him hesitant in his judgment. This is one of the major causes of delay in judicial functions. This reflects lack of confidence. A judge sensitive about his reputation becomes a coward because he is always scared of every person and activity around him. A spotless reputation is his ultimate aim and its protection is the total endeavor. Craving for a good reputation makes him craven. Frailty of the ultimate end viz. a good reputation makes intellectual vision myopic and also expresses it in the form of miserliness and whimsicality.

To get rid of these moral diseases, the only way is the fear of God instead of the fear of the people. A person, especially a judge who chooses the right path just for fear of God is free from all these negative traits.

Intellectual maturity is also an essential quality of a judge. Use of tongue by a judge unnecessarily and expression of indignation is indignity. Giving remarks during proceedings just for publicity reflects immaturity. An unfavorable news or information, however strong and damaging, should not disturb a judge, if it is not true. An intellectually mature judge is not supposed to get infuriated in court.

Strength of character is always a high ideal, but for judges it is almost a necessity. If one is always fair and open in conduct, with an honesty of intention, one is not to be afraid of any-body or anything. Logic and reason support one in strength of character.

How to make it useful:

We can never solve a problem without removing the actual causes that are responsible for the problem. Substitution of the real causes of the problem, unknowingly or for any motive, by different causes, always leads to a farce.

A systematic scientific analysis of the problem is necessary to find out a solution. First, the problem should be identified clearly. Next is the stage to ascertain actual factors causing the problem. After the real causes of the problem are identified clearly, comes the stage of finding ways to remove said causes. When the real causes of the problem are removed, a solution is achieved.

We ordinarily start with a myth that a system is free from all defects and the fault lies with the implementation and the people doing the job. This is the place where we lose the track leading to the solution of the problem. Achievement of a solution is possible only after an admission of the actual situation where the fault lies.

The formula to find out the location of the fault is that in case some persons or a minority is committing the wrong, the fault lies with them, but if a large majority is committing the wrong in functioning in a system, the fault lies with the system itself.

Our legal or judicial system is independent of and separate from, moral and religious systems. Being a system not having any connection with religion or moral system, it should not look for assistance of religion or morality with regards to its implementation or execution. The legal system

must have an inbuilt mechanism to get itself implemented according to letter and spirit. Our legal system lacks such a mechanism hopelessly. We are not justified to seek help of religion or morality for implementation of law. An investigation officer or any other person involved in execution of laws cannot be warned with justification that he will go to hell if he does not implement the law honestly and correctly. A legal system without an inbuilt mechanism for its implementation or execution is a farce and our legal system has already proved it, although we are not prepared to accept it in view of some vested interests, or our incapability to create a better substitute.

The most important change needed in the system is that justice should be its objective instead of the disposal of cases according to law. As a natural consequence, the criteria as well as the mode of selection of judges will have to be changed. The system will need judges whose capabilities with regards to the mental faculties and caliber as well as strength of character can be trusted. For production of such judges a suitable system, separate from the profession of advocacy, will have to be developed.

Qualifications and qualities of judges have not been prescribed and determined by law. As regards to the superior court judges, eligibility has been given in the constitution but educational qualifications and studies to develop mental faculties have not been made a requirement. Practically education equal to graduation in law is the requirement at all levels of judges, from the lowest to the top. It is assumed that the judges appointed in the superior judiciary have more experience. This experience is usually in the capacity of an advocate, which is obviously different from the experience as a judge. In these circumstances, there is no logical justification for our appellate system. A man sitting in appeal must be necessarily more qualified and more discerning, sagacious and wise, than the person whose action and decision is subject of the appeal.

A substantial decrease in the number of the appellate stages is a logical requirement for the fact that judges of almost equal

qualifications are sitting at all stages from lowest to the top.

The conditions in the system supposed to provide relief to the people in their disputes awfully demands a complete re-view. To do that job a full time Law Commission is needed comprising those who have given a substantial period of their lives involving in the affairs of the system and also have a vision and imagination on the subject.

Since long we have a law commission that comprises chief justices and some professional lawyers. Almost all these persons are already overburdened by their official and professional functions and it is beyond prudence to expect them to do anything substantial with regards to the duties of this commission. The task needs physical and mental capability, vision, imagination, will, sincerity, and enough time to be devoted to the job.

We are unfortunately a backward nation. In fact a backward nation is one that, for their decision and solution of the problems, look backward i.e. the decisions made and solutions found in the past. People in such a nation don't want to waste their brain's faculties. Capabilities of brain have been given by God to all human beings but some of them save their capabilities and don't waste them under a view that what others have achieved; discovered and invented by use of their capabilities is enough for them to get benefit. To use the decision and result of actions in the past for a benefit is not exceptionable but what is harmful is total dependence upon them. Modern nations also take the benefit of past actions and decisions but they do not prohibit the use of fresh mind for a decision. In the case of the countries that got independence in the last century, some nations opted to remain loyal to the erstwhile rulers and adopted their law as constitution retaining the provisions of binding nature of the decisions about questions of law or giving principles of law. This is practically an edict not to use brain. Restrictions on use of brain are not imposed by mentally independent nations. Decisions and edicts of Superior courts are always respected, and followed for their benefit, but such constitutional bindings are not found in the constitutions of modern nations. They always encourage use of brain.

In our system all emphasis is upon how the judges should be selected and appointed. None appears to be conscious about the necessity of a law determining the qualities and capabilities of a judge.

A serious problem in the judicial functions of the district judiciary is lack of effective powers to deal with the functionaries involved in the process of court functions. Under the law these courts have to become a complainant before other court or authorities in case a functionary chooses not to cooperate or defies in performance of his functions. It is essential that the law should empower these courts to deal with the defaulter themselves.

A judge at this stage is appointed through an easy process but after that legal fetters and legal incapacity are applied for a check but this arrangement is a serious impediment to the effective functioning of the courts. According to the original law a session judge used to hold sessions for hearing and disposal of session cases, and a case used to be decided within two or three days session. It was possible because all witnesses and everything necessary for the trial used to be produced by the concerned magistrate with the help of the police. The law reforms made in 1976 changed the procedure and a session judge is not in a better position than a magistrate. Now there is no provision in law about such sessions and practically a sessions judge or a sessions court is a misnomer. Unfortunately, whenever reforms were brought in any field in this country, they made the things worse instead of an improvement. The reason is that reforms are always imposed without a thorough study about their results and adequate deliberations on pros and cons. We have seen the results of education reforms, reforms in working in offices i.e. section officer's scheme made in 1960s and Law reforms made in 1972 and 1976. Those who saw these changes noted that the systems before reforms were better. All reforms only increased inefficiency, incompetence and malfunctioning. We can solve a problem only if we are not shy away from accepting the actual causes of it and if we have audacity to remove those causes.

INTERNATIONAL ARBITRATION

By:

MR. JUSTICE KHILJI ARIF HUSSAIN

Former Judge, Supreme Court of Pakistan,

Director General, Sindh Judicial Academy

Alternative Dispute Resolution (ADR), that is, a process for the resolution of disputes outside the courts, has been gathering momentum throughout the world as a means of resolving disputes in a less formal environment and provide for a speedy resolution of disputes where possible. ADR is a collective term for the ways that parties may settle disputes, with (or without) the help of a third party.

2. Over the years, there has been an ever-increasing need and demand for alternate means of dispute resolution not only for international commercial transactions but also for inter-country disputes.

3. There are essentially two major forms of ADR, one is negotiation and the other is arbitration.

4. Mediation is essentially a search for solution by the parties to the dispute themselves under the guidance of a third party. The basic underlying motive of edition is to provide the parties with an opportunity to negotiate, converse and explore options aided by a neutral third party, the mediator, to exhaustively determine if a

5. settlement in possible. The common factor of negotiation and mediation is that both are based on the consent of the parties. However, while mediation addresses the interests of the parties, arbitrations specifically focuses on the rights of the parties.

6. While mediation has been gaining a lot of importance over the past several years throughout the world including Pakistan which now has three centers for the provision of mediation services, one being the National Centre for Dispute Resolution (NCDR) Pakistan Mediator Association at Karachi, and the other being the Lahore Centre for Dispute Resolution (LCDRL I would like to focus in this presentation primarily on arbitration.

7. Arbitration as a form of dispute resolution has existed in Pakistan for many centuries at the village and community level and was first formalized in Pakistan through the Civil Procedure Code in 1908 and thereafter for international disputes through the Arbitration (Protocol and Convention) Act 1937 and for local arbitrations through the

Arbitration Act 1940. More recently, provision for international dispute resolution has been provided for through the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral) Awards Act 2011 ("Foreign Arbitration Act 2011") and for investment disputes though the Arbitration (International Investment Disputes) Act 2011 ("Investment Disputes Act 2011").

8. After partition, in 1958, Pakistan signed the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, most commonly known as the New York Convention. However, it was not until 2005 that Pakistan ratified the signing of this convention and proceeded to implement its terms through the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral) Awards Ordinance 2005. Unfortunately, due to delays on the part of Parliament to pass appropriate legislation several Presidential Ordinances were passed for the implementation of the New York Convention, the last of which Presidential Ordinance lapsed in 2009 following the momentous decision of the Supreme Court In which the constitutional amendments made in 2007 were set aside and as a consequence thereof the Presidential Ordinance lapsed as it was not ratified within the time provided by the Supreme Court for ratification of such laws. Finally, on 15 July 2011 the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral) Awards Act 2011 (Act of 2011) was promulgated after having been passed by both Houses of Parliament.

8" The New York Convention was adopted by the United Nations diplomatic conference on 10 June 1958 and entered into force on 7 June 1959 and has been ratified by 149 countries, including most major countries involved in significant international trade and economic transactions. The New York Convention requires contracting states to recognize and enforce international arbitration agreements and foreign arbitral awards issued in other contracting states, subject to certain limited exceptions. The provisions of the New York Convention, together with the large number of contracting states, has created an international legal regime that significantly favours the enforcement of international arbitration agreements and awards. The parties to international agreements (belonging to countries that have signed and ratified the New York Convention) can decide to site their disputes in a neutral country, knowing that the eventual arbitral award can be easily enforced in any country that is a signatory to the New York Convention.

9. The Investment Disputes Act 2011 has also had a chequered history for its enactment. The legislation for settlement of investment disputes

was first introduced in
2006 and implemented in Pakistan under the Convention on the Settlement of Investment Disputes between States and Nationals of other States which came in to force on October 1966 and to which 157 countries are signatories.

10. It is unfortunate that in the past, arbitration as a means of dispute resolution has not been very effective in Pakistan. This has certainly changed considerably in the case of international arbitration since 2005 but has not changed in the case of local arbitration.

11. As regards local arbitration, the Arbitration Act 1940 has not been effective in ensuring that arbitral awards attain finality and are immediately enforceable. For this reason, Pakistan has for some time under consideration, the adoption of new legislation modelled on the UNCITRAL Model Law which provides a model for a national law of arbitration. The adoption of such new legislation will greatly facilitate local arbitration and would facilitate early resolution of disputes both for commercial and non - commercial transactions.

12. Generally, as regards international arbitration, the Court in Pakistan have been reluctant to interfere with the arbitral process or to overturn the arbitral award.

13. In order for the parties to resolve disputes through arbitration, they are required to have entered in to an Arbitration Agreement which forms the contractual basis for the resolution of disputes by the arbitration process. An Arbitration Agreement may be a clause in the contract by which the parties agree to refer future disputes under the contract to arbitration that is the arbitration clause, or it may be a separate agreement to refer to an existing dispute
that is the submission agreement.

14. However, the terms of the Arbitration Agreement ‘” must be clear and certain. The clarity and certainty of the Arbitration Agreement is assessed in the same way as the validity of any contract and as such an Arbitration 6 Agreement would be held to be void if its terms are uncerta in or there is no clear reference to arbitrations.

15. Over the years, a number of institutions have come up which provide support and facilitates arbitration by adopting a set of rules and administrating such rules.
Examples of such institutions are the International Chamber of Commerce (ICC), the London International Court of Arbitration (LClA), the Singapore International Court of Arbitration (SCIA) and World Intellectual Property Organization (WIPO). These institutions manage and oversee the entire process of arbitration from the appointment of the arbitrators to the issue of arbitral awards and ensuring that such awards are of high quality.

16. As mentioned earlier, in order to enforce the agreement of the parties

to refer their disputes to arbitration and to enforce arbitral awards, the Foreign
Arbitration Act 2011 has been enacted and provision of the New York Convention have been enforced in Pakistan.

17. Section 4 of the Foreign Arbitration Act, 2011 relates to the enforcement of arbitration agreements in Pakistan. This section provides that where a party to the Arbitration Agreement against whom legal proceedings have been brought in respect of the matter which is covered by the Arbitration Agreement, upon notice to the other party to the proceedings may apply to the Court In which applications have been brought to stay the proceedings in so far as they concern that matter. Moreover, the Court is the parties to the agreement ... were} under the law applicable to them) under some in capacity) or the said agreement is not valid under the law to which
the 7 obligated to stay the proceedings unless it is determined that the Arbitration Agreement is null and void, inoperative or incapable of being performed. As a result, Courts in Pakistan have allowed such applications and have held the parties to their bargain and referred the dispute to arbitration.

18. As regards the enforcement of foreign arbitral awards section 6 of the Foreign Arbitration Act 2011 directs the court to recognize and enforce foreign arbitral award in the same manner as it would a judgment or order passed by a court in Pakistan, and provides that a foreign arbitral award shall be treated as binding for all purposes on the parties as between whom it was made, and may accordingly be relied upon by the parties by way of defence, set off or otherwise in any legal proceeding in Pakistan.

19. Section 7 of the Foreign Arbitration Act 2011 provides that the recognition and enforcement of a foreign arbitral award shall not be refused except in accordance with the provisions of Article V of the New York Convention, that is only if the party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) 8 parties have subjected it or) failing any indication thereon) under the law of the country where the
award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration) or it contains decisions on matters beyond the scope of the submission to arbitration) provided that) if the decisions on matters submitted to arbitration) can be separated from those not so submitted) that part of the award which contains decisions

on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties/ or/ failing such agreement was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties or has been set aside or suspended by a competent authority if the country in which or under the law of which, that award was made.

20. In the case of Mis. Eckhardt & Co. Vs. Muhammad Hanif (PLD 1993 SC 42), Hon'ble Mr. Justice Ajmal Main by a separate note observed that while dealing with an application for stay of suit proceedings on the ground of foreign arbitration clause, rule that the court should not lightly release the parties from their bargain. In the case of Hitachi (1998 SCM R 1618) after taking in consideration number judgment of different jurisdiction, including Pakistan, Supreme Court of Pakistan dismiss the applied u/s 5, 11 & 12 of the Arbitration Act filed by the party for the removal of the English Arbitration in the Foreign Arbitration.

In the case of Hub Co. (PLD 2000 SC 841) while dealing with the question of corruption etc. three members of the Bench held that allegation of corruption would render the contract documents to be void. While other two learned Judges held that allegations were capable of being determined in arbitration proceedings.

In the case of Abid Associated Agencies International (Pvt.) Ltd. Vs. Azeva (2015 MLD 1646) the learned High Court after holding the agreement was capable of performance for the purposes of Section 4 of Recognition and Enforcement (Arbitration Agreements and Foreign Awards) Act, 2011, stay the proceeding.

High Court of Sindh in the case of Cumins Sale and Ser- vice(Pakistan) Ltd. Vs. Cumins Middle East FZE (2013 CLD 291) held that pre-conditions for refusing stay of proceedings was the arbitration agreement was null and void, inoperative or incapable of being 10 performed and the words null and void, inoperative or incapable if being performed should be read keeping in view the rule of ejusdem generis.

In the case of Travel Automotive (Pvt.) Ltd. (2006 CLD 497) it was held that after the enforcement of Ordinance XX of 2005 radical changes have been made in law and discretion of court which was available under section 34 of the Arbitration Act. 1940 apparently is no more available to court.

The question on which earlier, while exercising discretion under section 34 of the Arbitration Act about convenience or inconvenience of the parties, availability of evidence on a

place other than the place of arbitration, whether to stay proceedings or not was within the discretion of the court, however, while dealing with the matter under section 4 of the Ordinance XX of 2005 the court has no such discretion except where cases fall within exception categories mentioned in the section itself. It is interesting to note that section 3 of the Ordinance, 2005 opens with the non-obstante clause that notwithstanding anything contained m any other law for the time being in force the court shall have exclusive jurisdiction to adjudicate and settle matter related to or arising from the Ordinance. On reading subsection (2) of section 4 with Article II of United Nations Convention, it is clear that on filing of an application by any party to the proceeding the court has to stay the proceeding unless it finds that the agreement is null and void or inoperative or incapable of being performed.

21. In conclusion, resolution of disputes through arbitration has over the years become an effective means of securing an early resolution of such disputes, although it should be recognized that delays may be possible even where the parties have adopted institutional arbitration. Also, arbitration processes will in most cases be more expensive than court processes, but the speed with which disputes are resolved outweigh the costs thereof. Also, in disputes which require technical or very specific knowledge, are more effectively resolved through arbitration as the parties are able to appoint specialized arbitrations.

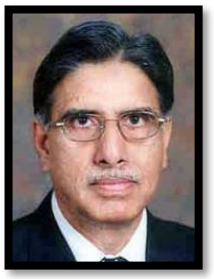
22. As mentioned earlier, the Courts in Pakistan have been forthcoming in enforcing the provisions of the New York Convention through the Foreign Arbitration Act 2011 and this will continue to give comfort to foreign investors and foreigners trading with business in Pakistan that in the event of a dispute if the parties have agree to arbitration their disputes will be referred to arbitration and the arbitral award will be enforced In Pakistan provided the requirements of New York Convention have been complied with.

23. It IS important for the growth of any country and in order to reduce the burden on our court to implement an effective law of arbitration applicable to local disputes which has similar provisions as Foreign Arbitration Act 2011 with regard to stay of proceedings and enforcement of. Arbitral awards. This is certainly the need of our times in Pakistan.

COMPETITION LAWS IN PAKISTAN & EU

By:

FORMER JUSTICE QAZI KHALID ALI
FOUNDING VICE CHANCELLOR OF SHAHEED ZULFIQAR ALI BHUTTO UNIVERSITY OF LAW



I have been asked to speak on the "Competition Laws in Pakistan & E.U". This topic does not occupy purely a juridical field. Its inter-face with economics and sociology is paramount.

2. Conceptual Paradox Before I proceed to discuss the contemporary competition laws of our country a conceptual paradox is required to be understood in its true perspective.

2.1 In a purely capitalistic set-up the market forces are allowed to operate freely without any pertinent checks. This is what the economists call a "perfect competition" or "laissez faire" economy. The idea is

that there are no checks on the stake-holders, and the economy is principally unplanned or unregulated. However, the economists confirm that even in as

competition there comes a point when certain factors hinder a "laissez faire" state of affairs; and unless and until those factors are checked by statutory or executive regulation, a "laissez faire" state cannot prevail. The great economist Paul A. Samuelson, as quoted by S.M. Dugar in his book "Commentary on MRTP Law Competition Law and Consumer Protection Law" (2006, 4th Edition, Vol.I), confirms this in the following words:-

"By laissez faire one does not automatically get perfect competition. To reduce imperfections of competition, a nation must struggle perpetually and must ever maintain its vigilance."

2.2 This means that a monopolistic situation can deter free competition or a "laissez faire" state. Therefore, to create a better level playing field for free competition the state is called upon to legislate 'competition', 'antimonopoly' or 'anti-trust' (as known in the USA) laws. Sometimes the rai-son de etre for the promulgation of competition laws is to the desire create a welfare state so as to hamper the con-centration of wealth into a few hands.

2.3 while in practice it makes no difference as to whether the competition laws are brought about

with the objective to create a laissez faire economy or whether the intention is to create a welfare state, the basic objective behind such a legislation can, however, be important to gauge the national fabric of the society.

2.4 In my opinion any anti-monopoly or competition law can validly function within the dispensation prescribed by the Constitution of Pakistan, 1973. Article 18 of the Constitution protects the right to enter into lawful profession, occupation or conduct any lawful trade or business, how-ever, as per article 18(b) nothing shall pre-vent "the regulation of trade, commerce or industry in the interest of free competition therein." Again article 38 of our Constitution provides that the state shall, inter alia, prevent "the con-centration of wealth and means of production and distribution in the hands of a few to the detriment of general interest..." Article 18 and 38 of our Constitution reflect the same paradox which is at the heart of the economic debate in introducing competition laws i.e. article 18 of the Constitution prescribes regulation so as to provide a better and free competition in business, whereas article 38(a) of the Constitution provides for taking steps which would hamper concentration of wealth into a few hands.

2.5 I leave this paradox to be resolved by our policy or law-makers!

3.0 History of Competition Laws in Pakistan

3.1 On 18th April, 1947 the Government of United India promulgated the Capital Issues (Continuance of Control) Act, 1947. This Act was adapted on 14.8.1947 by Pakistan upon independence. The idea behind this statute was to regulate the issuance of capital with a view to control accumulation of wealth in a few hands. In order to relax the control the legislature subsequently promulgated the Capital Issues (Exemption) Order, 1967 with a view to exempt certain entities from the vigours of the Capital Issues (Continuance of Control) Act, 1947. But the basis of the formal anti-monopoly laws in Pakistan is the budget speech of the then Finance Minister for the fiscal year 1963-64, when for the first time in Pakistan he announced the intention of the legislature to promulgate "antimonopoly laws". For such purpose an "Anti Cartel Law Study Group" was brought about, which prescribed the draft of the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance 1969. The said draft was published in the Gazette of Pakistan

on 28.6.1969 for the purposes of eliciting public opinion. After consideration the comments received from the public, industry, financial institutions and academics on 26.2.1970 the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 (hereafter: "the 1970 Ordinance" was promulgated. This law was enforced on 17.8.1971, on which date the Federal Government also constituted the Monopoly Control Authority Vide SRO 315(I)/1971 dated 17.8.1971. Soon after the appointment of the Authority, rules regarding the procedure, fees and other matters for carrying out the purposes of law were notified in the gazette on 31.12.1971. These rules were termed as the Monopoly Control Authority Rules, 1971, Rule 10 of the said Rules provided that undertakings, individuals and agreements which attracted the provisions of the registration were asked to get themselves registered with the Authority by 15.1.1972 or within 15 days of the date when such undertakings, individuals or agreements became registrable under law.

3.2 Between 1972 and 1977 the major industries of the country were nationalized in view of this shift in the economic policy to regulate the economy and discourage private ownership. Thus the 1970 Ordinance was not put into much application. However, post 1977 the government again encouraged private enterprises as a result of which there has been both legislative amendments to and court cases arising out of the 1970 Ordinance.

3.3 The fundamental approach of the 1970 Ordinance was to expressly prohibit unreasonable growth in the following situations:-

a) Undue concentration of economic power;

b) Unreasonable monopoly power;

c) Unreasonable restricted trade practices.

(See PLD 2008 Karachi 583 titled Exide Pakistan Ltd Vs Malik Abdul Wadood, authored by Speaker for High Court of Sindh as he then was a Judge)

3.4 The 1970 Ordinance did not per se prohibit the above three situations, as was prescribed in the American Anti-Trust Laws (see "Competition in British Industry" by Swaun, Brien, Maunder and Howe, 1974). Instead the 1970 Ordinance stipulated a case to case approach and under it each situation was to adjudged on its own merits through the test of reasonableness. The anti-monopoly law as pre-scribed through the 1970 Ordinance in Pakistan was largely based upon the

British legal system as it prevailed then. In the British system, prevalent from the 1960s to the 1980s no practice was regarded as illegal or even presumed contrary to the public interest (see "The Law of Restrictive Trade Practices and Monopolies" by Lord Wilberforce, Allan and Neil, 1966).

3.5 As stated above, after 1977 there has been a plethora of case law developed by the Pakistani courts with regards the 1970 Ordinance. In Haji Ismail Dossa v. Monopoly Control Authority PLD 1984 Karachi 315 a learned Single Judge of the Sindh High Court was pleased to observe that the 1970 ordinance was an economic legislation intended to create an economic system which would not result in the concentration of economic power, monopolization and create unreasonably restricted trade practice. Writing for the Court, Saleem Akhtar J, as he then was, observed as follows:-

"From its very nature the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 imposes restrictions on trade, commerce and business. The object of the Ordinance is to prevent concentration of wealth in the hands of a few and to curb monopolistic and expansionist tendencies in trade, commerce, industry and business. It prohibits undue concentration of economic power, unreasonable monopoly power and eliminate unreasonably restrictive trade practices from the market. It also discourages such trade practices which prevent, restrain or lessen com-petition. The Ordinance is designed to restrict and prohibit. In public interest, dealings, agreements, arrangements and practices which create monopoly and economic power and unreasonably control the business, undertaking and market. These economic evils as specified in the Ordinance have been considered detrimental to public interest therefore, the Ordinance has provided measures to regulate, check or eliminate them."

In re: Islamization of Law PLD 1985 FSC 193 a full bench of the Federal Shariat Court was pleased to observe that the objects of the 1970 Ordinance advanced the objectives of Sharia. It was observed that the main object of the 1970 Ordinance was to ensure that the wealthy did not become wealthier and the poor did not get poorer in view of the entities acquiring monopoly in their respective fields and in-creasing prices so as to control market and restrict supplies. Reference is also invited to a judgment of the Division Bench of the Sindh High Court reported as Habib Bank Limited v.

Monopoly Control Authority 1986 CLC 2489. In this decision it was observed that the aims of the 1970 Ordinance was to break the monopolies and avoid concentration of economic power. It was held that one of the modes of avoiding undue concentration of economic power was to break or at least weaken such associations which were commonly managed but had semblance of separate entities. Right from the inception till date we have seen in Pakistan that the economic power or concentration of wealth has been in the hands of the few. During the days of Ayub Khan it was a known fact that the entire concentration of wealth was in the hands of 22 families of Pakistan. In Rafan Maize Product Company Limited V. Monopoly Control Authority PLD 1986 Lahore 346_it was recognized that the objectives of the 1970 Ordinance was to, inter alia, distribute the economic power which was concentrated in the hands of individual and their families. It was further observed that the idea behind the law was to eliminate such narrow family oriented attitudes of the entrepreneurs and the subsequent establishment of professional management to control enterprises, which are in turn managed and controlled by big business family groups. In Sanaullah Woolen Mills V. Monopoly Control Authority PLD 1987 SC 202 the Supreme Court of Pakistan expounded the criteria to judge "concentration of economic power." It was held that the magnitude of the undertaking had a direct nexus with "concentration of economic power". The manner in which the 1970 Ordinance prescribed norms and actions is very ably analyzed in a judgment of the Lahore High Court reported as Pakistan Industrial Promotors Limited v. Monopoly Control Authority 1990 CLC 1008; a relevant excerpt from the judgment of Abdul Majeed Tiwana J, as then he was, is underscored for convenience as follows:-

7. "The purpose of the Ordinance is stated in section 3 thereof which prohibits undue concentration of economic power, unreasonable monopoly power, and unreasonably restrictive trade practices because these factors give rise to uneven distribution of wealth amongst different sections of society, ultimately leading to unrest, strife and conflict amongst them, thereby regarding economic growth and impairing its general welfare. To achieve this object the Ordinance creates a body known as Monopoly Control Authority which administers this law and in that context exercises many power and performs various functions. The first step in this direction is the collection of

necessary information and data from those engaged in business and commerce in the private sector and that is done through the process of registration as embodied in section 16 of the Ordinance and the rules made thereunder. After completing this step, the Authority begins the process of inquiry and if it prima facie finds that the provisions of section 3 ibid have been or are likely to be contravened it passes an order under section 12 after following the procedure laid down in section 11 and keeping in view the guidelines given in sections 4, 5 and 6 of the ordinance. Section 19 thereof empowers the Authority to impose penalty if its order is not complied with or any person or undertaking does not himself or itself registered under the Ordinance. In nutshell this is the scheme of the Ordinance".

In Arshad Mehmood V. Government of Pakistan PLD 2005SC 193 the Supreme Court of Pakistan found a franchise to be a privileged contract aimed at creating a monopoly and popularly known as a "CARTEL". This judgment also lays down tests as to how reasonableness of restriction with regards the fundamental right pertaining to freedom of trade, business or profession has to be adjudged.

4. The Competition Ordinance, 2007

4.1 The Competition Ordinance, 2007 (hereafter: "the 2007 Ordinance") (reported in PLJ 2008 Federal Statutes 292) was promulgated on 2nd of October, 2007. Vide section 59(a) the 2007 Ordinance repealed the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970. The said 2007 Ordinance came into force on the date of its promulgation mentioned above. The 2007 Ordinance was repealed by the section 61 of the Competition Act, 2010, which was published in the Gazette of Pakistan, Extra-Ordinary Part I dated 13-10¬2010 from pages 645 to 677 (Hereafter Act XIX of 2010). This law has made a clear departure from the standards which were prescribed in the 1970 Ordinance. As mentioned above, under the 1970 Ordinance every action was tested on the touch-stone of reasonableness. In striking contrast under the 2007 Ordinance and Act XIX of 2010 clear standards are provided as to what would be permissible and what would be impermissible. As such, in term of providing legal certainty the Act XIX of 2010 is a definite improvement.

5. The Competition Act, 2010 (Act XIX of 2010)

5.1 Under section 3 of the Act XIX of 2010, no person shall abuse "dominant position" [see section 3(1)]. I n turn it has been provided

that "dominant position" shall be deemed to have been brought about if there are "practices" which prevent, restrict, reduce or distort competition in the "Relevant market" [see section 3(2)]. Section 3(3) defines that the expression "practices" shall include and not be limited to the following situations:-

(a) "Limiting production, sales and unreasonable in-crease in prices or other unfair trading conditions;

(b) Price discrimination by charging different prices for the same goods or services from different customers in the absence of objective justifications that may justify different prices;

(c) Tie-ins, where the sale of goods or services is made conditional on the purchase of other goods or services;

(d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage, have no connection with the subject of the contracts;

(e) Applying dissimilar conditions to equivalent trans-actions on other parties, placing them at a competitive disadvantages;

(f) Predatory pricing driving competitors out of a market, prevent new entry, and monopolize the market;

(g) Boycotting or excluding any other undertaking from the production, distribution of sale of any goods or the provision of any service; or

(h) Refusing to deal. "The term "dominant position" has been defined in section 2(e) as follows:-

"2(e) 'dominant position' of one undertaking or several undertakings in a relevant market shall be deemed to exist if such undertaking or undertakings have the ability to behave to an appreciable extent independently of competitors, customers, consumers and suppliers and the position of an undertaking shall be presumed to be dominant if its share of the relevant market exceeds forty percent."

5.2 Apart from the abuse of dominant position the Act XIX of 2010 prohibits the execution of certain agreements in section 4. According to section 4(1) of the Act XIX of 2010 an undertaking and associations of undertaking are prohibited from entering into any agreement calculated to be a decision in respect of the production, supply, distribution, acquisition or control of goods or the provision of services, which have the object or effect of preventing, restricting or reducing competition

within the relevant market, unless exempted under section 5 of the Act XIX of 2010. Again section 4(2) provides that the prohibited agreement shall include and not be limited to the following:-

"(a) fixing the purchase or selling price or imposing any other restrictive trading conditions with regard to the sale of distribution of any goods or the provision of any services;

(b) Dividing or sharing of markets for goods or services, whether by territories, by volume of sales or pur-chases, by type of goods or services sold or by any other means;

(c) Fixing or setting the quantity of production, distribution or sale with regard to any goods or the manner or means of providing any services;

(d) Limiting technical development or investment with regard to the production, distribution or sale of any goods or the provision of any service, or

(e) Collusive tendering or bidding for sale, purchase or procurement of any goods or service;

(f) Applying dissimilar conditions to equivalent trans-actions with other trading parties, thereby placing them at a disadvantage; and

(g) Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

5.3 It is clearly provided in section 4(3) of the Act XIX of 2010 that any agreement in violation of section 4 of the Act XIX of 2010 shall be void.

5.4 An important feature of section 3(3) and section 4(2) of the Act XIX of 2010 is that the definitions of "practices" and "prohibited agreements" are not exhaustive, the two definitions being inclusive. This is an important aspect of the statute since the law-makers cannot possibly foresee and add to these lists all the possible eventualities, there-fore the two lists have been left flexible.

5.5 The statute provides for individual exemption from the Act XIX of 2010 which can be granted by the Commission under section 5 and for block exemption from the operation of the Act XIX of 2010 in section 7 thereof.

5.6 Very importantly the Act XIX of 2010 in section 10 denounces deceptive marketing practices. In other words, the law regarding misrepresentation has been reiterated.

5.7 An important feature of the Act XIX of 2010 in section 11 thereof which clearly provides that no

undertaking shall enter into a merger which substantially lessens com-petition by creating or strengthening dominant position in the relevant market. The term "relevant market" has been defined in section 2(k) of the Act XIX of 2010 in terms of both a "product market" and a "geographic market".

5.8 For the purposes of monitoring the Act XIX of 2010 the said statute provides for the establishment of a Com-mission which is to comprise not less than 5 and not more than 7 members, while the government is given the power to increase or decrease such membership. The members of the Commission are appointed by the Federal government for a complete term; not more than 2members of the Com-mission shall be from the federal government. This is to ensure that the Commission is represented by persons from the private sector as well.

5.9 The Commission has been made financially independent by creation of a fund so as to meet the charges and its expenses including salaries of its members and staff. The Commission is required to keep proper accounts and shall be subject to audit and has to file an annual report.

5.10 Under section 33 of the Act XIX of 2010 the Commission is given the same power as a civil court under the Code of Civil Procedure 1908 (Act V of 1988) and the proceedings are deemed to be judicial proceedings within the manner of the Pakistan Panel Code (Act XLV of 1860) and the Criminal Procedure Code 1898 (Act V of 1898). The Commission has the power to enter and search premises, force entry, call information and undertake enquiries and studies.

5.11 The hallmark of the Act XIX of 2010 is provided in section 29 which caters to promote awareness. The Com-mission is empowered to impose penalties in case of contravention under section 30, while under section 31 it has powers to issue orders which fall under the following broad categories:-

(a) In case of abuse dominant position the undertaking can be required to take certain steps so as to re-store competition;

(b) In case of prohibited agreements the commission can either annul the agreement or require the undertaking concerned to amend the agreement;

(c) In case of deceptive marketing practices the Com-mission can confiscate, forfeit or destroy the property or product or the guilty party can be directed to restore the previous market position;

(d) In case of merger it can either authorize them, un-conditionally or conditionally or review them.

5.12 Under section 32 the Commission has the power to grant interim orders. Section 38 of the Act XIX of 2010 allows the Commission to impose penalties whereas u/s 39 the Commission can afford leniency.

5.13 An order of a single member of the Commission is appealable before the Appellate Bench (section 41), while an order of two or more members of the Commission or the Appellate Bench , as the case may be ,is appealable before the Competition Appellate Tribunal Act XIX of 2010.

5.14 An order of Competition Appellate Tribunal, is appealable before the Supreme Court under 44 of the Act XIX of 2010.

6. Selected Foreign Competition Regimes:

6.1 The American Sherman Act, 1890 is reckoned to be started point of modern competition or antitrust laws. Senator Sherman of the USA himself recognized that the American Sherman Act, 1890 was based in part on the Constitution of Zeno, Emperor of the East from 474 to 491 AD. According to Mark Furste in "Competition Law of the EC and UK" Sixth, Edition, 2008, this is not a correct statement. Ac-cording to him the Roman Legislation dealt with anti-monopoly laws even some 500 years before the Constitution of Zeno.

6.2 Be that as it may, at the time of Magnacarta, 1215 legislation provided that all monopolies were contrary to the law as they had a bearing on individual freedoms. In modern times the two contemporary statutes which govern competition laws in the UK are the Competition Act, 1998 and the Enterprise Act, 2002.

6.3 Article 81 and 82 of the European Treaty provide for the control anti-competitive agreements scheme and dominant firm abuses.

6.4 In India the Monopoly and Restrictive Trade Practices Act, 1969 had principally provided a similar anti- monopoly regime which was provided under our 1970 Ordinance,. In India the anti-monopoly law was brought about in view of recommendations given by the Monopolies Inquiry Com-mission which was set up by the Government of India in 1964. The Indian anti-monopoly law was principally based upon the UK legislation in particular the Restrictive Trade Practices Act, 1956 the resale prices Act, 1964 and the UK fair Trading Act, 1973. Anti-Trust Legislation in USA notably the Sherman Act, Clayton Act and the Federal Trade Com-mission Act, as also the Australian and Canadian legislation on the subject have also

been a guide in framing the Indian legislation (see S.M. Dugar, cited as above at page1)

6.5 EU COMPETITION LAW

Together with its public services, the Europe Union's market economy, which competition law aims to protect from un-fair trade practices and private monopolization generates GBP 14.303 trillion in 2013.

6.6 European competition law promotes the maintenance of competition with the European Union by regulating anti-competitive conduct by companies to ensure that they do not create Cartels and monopolies that would dam-age the interest of society. With a history that traces back to the prohibition on the restraint of trade, and influenced by the experience of the United States Sherman Act, 1890, and the Clayteon Act, 1914, European Competition law to-day derives mostly from article101 to 109 of the treaty on the functioning of the European Union, as well as series of Regulations and Directives. Four main policy areas includes:-

a. Cartels, or control of collusion and other anti - competitive practices under article 101 of the treaty of the functioning of the European Union (TFEU).

b. Market dominance, or preventing the abuse of firm's dominant market position under article 102 TFEU.

c. Mergers, control of proposed mergers acquisitions and joint ventures involving companies that have a certain, defined amount turnover in the EU, according to the merger regulation.

d. State aid, control of direct and in-direct aid given by member's states of the European Unions to the Companies under TFEU article 107.

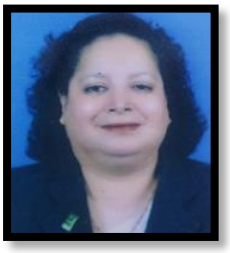
This last point is a unique characteristic of the European Union Competition Law regime. As the European Union is made up of independent member's states, both competition Policy and creation of the European Single market could be rendered ineffective, were member states free to support national Companies as they saw fit. A 2013 Civitas report list some of the artifices used by participants to the state aid rules on procurement. Primary authority for applying Competition Law within European Union rests with European Commission and its Directorate General for Competition, although state aids in some sectors, such as transport, are handled by other Directorate General. The Directorates can mandate that improperly given state aid be repaid, as was case in 2012 with Malev Hungarion Airlines.

7.0 Corporate Veil

7.1 The discussions will not be complete unless some-thing is also said about the concept of "veil of incorporation" in company law. One of the important aspects of any competition law is to explore as to whether there exists a fit case for piercing the veil incorporation. In the classical Pronouncement of Salomon V. Salomon case (1897) AC 22 it was held that a company is an entity distinct from its members. This concept found in English Company Law is very much recognized in Pakistan. The Courts in Pakistan following the English Law have also expounded tests as to when the corporate veil would be pierced. In Union Council V. Associated Cement (Pvt) Ltd 1993 SCMR 468 the Supreme Court of Pakistan found that in certain events the veil of incorporation could be lifted. One of such instances was fraud. Earlier, the Supreme Court of Pakistan in the President v. Justice Shoukat Ali PLD 1971 SC 585 was pleased to pierce the veil of incorporation so as to determine the true relationship of the share-holders with the company.

LEGAL EDUCATION AND ROLE OF JUDICIAL ACADEMIES

By:
MS. NUZHAT ARA ALVI,
District & Sessions Judge,
Senior Faculty Member,
Sindh Judicial Academy



Judicial Academies are the nurseries where new talent is polished, and those who are in the field their capabilities are enhanced.

"Adl" is one of the attributes of God the first 'Wahi' 'Revelation' which was revealed on Holy Prophet Hazrat Muhammad (SAW) was "Iqra" which means read "iqra bismay rabiqal lazi" read in the name of God, from which we can deduce that "education" is the first pillar of Islam to attain education is obligatory both on men and women. On the basis of education nations progress. If you want to destroy any country, destroy its educational system.

We are fortunate enough Holy Quran has given guidance regarding every sphere of life, there is specific Surah-e-Nisa, which exclusively deals with rights of women. Holy Quran gives guidance regarding rights of husband and wife, and they are clothing for each other, guidance is given which regard to contracts to be reduce in writing and there should be witnesses of same, will, divorce, rights of orphans, right of parents and the verses of Holy Quran are explained, and the conduct of Holy Prophet Hazrat Muhammad (SAW) which is second source of knowledge.

The Judges need to be trained regarding Islamic principles justice along with latest laws which are enacted basic the principle of Islamic law is "no one should be contempt unheard".

Judicial Academies have now become Almameter for the learned Judges of subordinate judiciary. The Judicial Academies are playing a pivotal role in enhancing the capabilities, and also polishing the skills, attitudes and attitudes of the judges towards the litigant public. The most important segment in the judicial system is the "NOBODY" litigant, for whom all the laws are framed but unfortunately the

criminal law favours the accused and protects his rights more than that of the complainant, as 'accused is the favourite child of the Court', Civil litigation drags upto Hon'ble Supreme Court and generation have wait for final adjudication. "NOBODY" that is the litigant is the most ignored person in Civil and Criminal litigation, as we are following adversarial system of justice, which we inherited from the Britishers who were ruling in India, and the laws were enacted in 18th Century and only by changing the title the same laws are being followed by us.

The Judicial System should emphasis to protect the "NOBODY" that is the litigant who comes to Court for justice has to suffer the most, he has to run from pillar to post to get justice. The Judicial Academies approach may be to enhance and educate the Judges and other stakeholders associated with justice sector, also need to be sensitized regarding the rights of the "litigant" and protecting the rights of the "NOBODY" that is the litigant, and in the new millennium the Judicial Academies should play an active role in training the Stakeholders relating to justice sector in getting expeditious disposal of cases which is not possible only with the efforts of the Judges but the learned advocates also have to play an important role in conducting the cases expeditiously.

The Sindh Judicial Academy is pioneer in this aspect of protecting "NOBODY" by taking the views of all stakeholders by holding Conference titled as "Vision for Justice, 2027" the said conference was presided by Hon'ble Chief Justice, Mr. Ahmed Ali M. Shaikh and Hon'ble Judges of Apex Court, Senior Lawyers, NGOs, Head of various Departments and foreign delegates associated with Justice Sector actively participated and gave their input in five sessions, and a Declaration was adopted 20th May, 2017.

Sindh Judicial Academy was established in 1992 by an Act of 1993 which was published in the Gazatte after approval from Governor Sindh in the 1994.

Sindh Judicial Academy had been fortunate as first Director General of the said Academy was icon of judiciary, Mr. Justice Z.A. Channa and was established in a Court Room of Sindh High Court, the Director Generals who later on gave their able guidance to Sindh Judicial Academy were Justice Dr. Ghous Muhammad, Justice S.A. Rabbani,

(Late) Justice Saleem Akhtar, Justice Shabbir Ahmed, District & Sessions Judge Dr. Zafar Ahmed Khan Sherwani, Mr. Justice Ali Aslam Jafri. Former Judge Supreme Court, Mr. Justice Khilji Arif Hussain now the present Director General of Sindh Judicial Academy, luminaries of Judiciary, each of whom have contributed to enhance the acumen of Judges.

The Sindh Judicial Academy is not only training the learned Judges of subordinate judiciary but have signed memorandum of understanding (MOU) with Sindh Police, Institute of Business Administration (IBA) to train the Judges on Islamic Banking System which is gaining ground and the learned Judges of Banking Courts, and the learned District Judges have been given training regarding the said aspect for expeditious disposed of cases pertaining to Islamic Banking Financing. The Academy has also signed MOU with Khyber Pakhtunkhwa Judicial Academy, Research Society of International Law (RSIL), Legal Aid Society (LAS).

The Academy is training final year students of law of interior of Sindh by conducting Mock Courts, and the Advocates of Interior Sindh who have done LLB are trained at the Sindh Judicial Academy as Internees for three months, with regard to drafting, conducting cases are also trained with regard to ethics of the profession, how to conduct Civil and Criminal trials in Court, and the lady Advocates are also given training. We are proud that the said concept was floated by Hon'ble Chief Justice of High Court of Sindh, Mr. Justice Ahmed Ali M. Shaikh who is also Chairman, Board of Governors of Sindh Judicial Academy and I dedicate the poetry from Reverret Poet Alama Muhammad Iqbal to the invitees of Interior Sindh.

"Zara Num ho to yeh mitti bari zarkhaiz hai
Nahi hai na umeed Iqbal apni kashtay viran say"

And also

"nahi tera nasheman kasray sultani kay gumbat par
To shaheen hai basaira kar paharon ki chatanoon par"

The Advocate of interior Sindh have lot of talent and potential and by polishing them with the skills of the advocacy, and "Know Thy Judge" we have trained them and efforts have been made to train them in the skills of Advocacy by conducting Mood Court Trials and they prepared Booklets in Sindhi & Urdu for guidance of citizens which will be

step towards expeditious disposed of cases.

The Judges are trained to dispose of cases expeditiously on merits with "quality" of judgements and "not quantity" of Judgements.

As already mentioned above "Adl" Justice is one of the attribute of God, although it is not possible for human beings to do Justice but only with the help of Allah Almighty the training is given to Stakeholders associated with Justice Sector remaining within four corners of law, applying principles of "Salah-e-Rehmi" (justice tempered with mercy), equity in the interest of justice. We are fortunate enough the guidelines has been given in Holy Quran by Allah Subhanatala, and Holy Propher Hazrat Muhammad Mustafa (SAW) when he appointed a Qazi at Yaman and inquired from him how he will decide the cases, he replied by taking guidance from Holy Quran, and was asked if he did not find any guidance there, he replies then he will take guidance from "Sunnah", and was inquired if he did not get answer from both, than he replied then I will decided the cases on my reasoning (Ijetehad).

We get guidance from our religion Islam regarding role of Qazi in administration of justice, and the criteria prescribed is Qazi is not answerable to Head of State and can even call him in his Court to answer the allegations levelled against him by ordinary citizen, no immunity is provided to Head of State, and the status of Qazi even above the Head of State, and he should be paid handsome salary so that he is self-sufficient.

The above-mentioned methods are the models on the basis of which the Judicial Academies should train the Judicial Officers to keeping in view the above guidelines, and to decide the cases "without fear and favour" and "justice should be done though heavens may fall".

Now we are fortunate that all the provinces have judicial academies and they are training the learned Judges and other stakeholders associated with the justice sector are trained in sensitizing them and with their assistance to expeditiously dispose of the cases and to have empathy with the litigants in deciding the cases.

EXECUTION PROCEEDINGS IN BANKING COURTS

By:

MR. MUHAMMAD SHAHID SHAFIQ,
JUDGE BANKING COURT V KARACHI
RESEARCH ASSOCIATE: AHSAN SHAHID

Section 19 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (the Ordinance) provides a mechanism to initiate process to exe-cute decree of the court. It defines steps to be followed. Upon pronouncement of judgment and decree by a banking court, the suit is automatically converted into execution proceeding. The decree holder is not required to file separate application, however mode of execution is highlighted by the decree holder and accordingly detail of assets, if any, is pro-vided to the court. This provision of law empowers financial institution to initiate sale of mortgaged, pledged or hypothecated property. Section 19(3) & (4) of the Ordinance describes procedure to sell an immoveable property by a financial institution without intervention of the court. This mode is not in practice after declaring section 15 of the Ordinance as void by the Hon'ble Supreme Court of Pakistan in the case of Baz Muhammad Kakar and

others v. Federation of Pakistan through Ministry of Law and Justice,

Islamabad and others [PLD 2012 SC 870].

Auction process is initiated by the courts after assessing the liability judiciously. Sub-section 7 of section 19 of the Ordinance provides a procedure to entertain objection and investigate a claim of an objector/claimant within thirty (30) days from the date of filing the claim. A summary procedure is opted to decide the claim. Banking court may in its discretion proceeds with the sale of property provided that the financial institution gives a written undertaking that in the event the objections are found to be valid, or are sustained, it shall in addition to compensating the aggrieved party by the payment of such amount as may be adjudged by the Banking

Court also pay a penalty up to twenty percent of the sale proceeds.

2. Civil Procedure Code, 1908 (the Code) provides a comprehensive procedure to execute and enforce execution of a decree. Section 51 of the Code provides five modes to execute the decree, which are:

(a) By delivery of any property specifically decreed;

(b) By attachment and sale or by sale without attachment of any property;

(c) By arrest and detention in prison;

(d) By appointing a receiver; Or

(e) In such other manner as the nature of the relief granted may re-quire.

Arrest of a judgment debtor is avoided as there is limited scope when a person may be detained in prison. Section 51 of the Code elaborates circumstances when arrest can be affected. However in any case a woman is not arrested as to execute decree of a court.

3. Order XXI, Rule 11 of the Code explains information to be incorporated in execution application. It is a normal practice in the banking courts that the decree holder formally files written execution application in the manner as defined under Order XXI, Rule 11(2) of the Code.

4. In most cases those are filed before banking courts, finances are secured by executing a mortgaged deed. In a few cases finance is not secured, such as Personal Loan, Credit Card facility. In such cases for executing a decree the decree holder opts to cause arrest of judgment debtor. Or-der XXI, Rule 37 of the Code states that before issuing war-rant of arrest a notice is to be issued to call upon the judgment debtor to appear before the court and show cause why he should not be detained in prison. Under Order XXI, Rule 38 of the Code warrant of arrest is issued and object of such warrant is to recover the decretal amount and if such amount is paid his arrest is not affected.

5. In the case of unsecured loan the decree holder may request to court to attach moveable and immoveable properties of the judgment debtor. Most of the time, after attachment, objection are filed by the judgment debtor or any person having claim or interest in the property. Under Order XXI, Rule 54 of the Code courts attach immoveable property and under

Rule 58 objections are filed and decided. During pendency of such application the sale can be postponed. In such situation claimant and objector is asked to adduce evidence as to show that on the date of attachment he had a title, right or interest in the property attached. Rule 62 states that all questions relating to right, title or interest shall be decided by the executing court and no separate suit shall lie. Rule 65 states that sale will be con-ducted by an officer of the court or by such other person as the court may appoint in this behalf. It also states that sale be made by public auction. This is the reason that most of the time Nazir of the court is appointed to conduct sale. Procedure for public auction has been defined in Order XXI of the Code. A Notice under Order XXI, Rule 66 of the Code is issued which explains description of property offered for sale, its forced value and terms and conditions of sale. In the first instance the notice is served upon the judgment debtor and upon the service of the notice he is given opportunity to file objections. In case objections are filed, are examined and accordingly terms and conditions of sale are finalized. Most of the time judgment debtor disputes assessed value of the immoveable property. The court at the initial stage normally considers valuation report filed by the decree holder. In case of differences, the judgment debtor may be asked to submit valuation report or the court may itself direct to an independent valuator for re-assessment. Once the terms and conditions are finalized a public auction notice is issued through publication in two daily newspapers. Notices are also affixed at the outer door of the mort-gaged property. Banners are also affixed at the prominent places including the property going to be sold.

6. Sometimes on the day of sale or before it objections are filed with the prayer to postpone the sale. Order XXI, Rule 65 of the Code empowers the courts to stop the sale. In case sale is adjourned for a longer period than seven (7) days, a fresh proclamation notice under Order XXI, Rule 67 of the Code is made unless the judgment debtor consents to waive it.

7. In case on the fix date sale is conducted, and the purchasers/bidders deposit 25% of their bid amount; the highest bidder is asked to deposit rest of the amount with-in fifteen (15) days. In case he fails to deposit remaining amount, initial deposit may be forfeited as provided under Order XXI, Rule 86 of the Code. Sometimes

after the sale an application is filed under Order XXI, Rule 89 of the Code by an objector claiming his interest in the property sold. He, while applying under Order XXI, Rule 89 of the Code, has to deposit an amount equal to 5% of the purchase money for the purchaser and the amount specified in sale proclamation for the decree holder. Order XXI, Rule 90 of the Code also deals to set-aside sale on the ground of irregularity and fraud. For filing application under this rule, it is mandatory for the person filing application to deposit up to 20% of the sum realized the sale or furnishes such security. Once a sale is finalized, Sale Certificate is issued under Order XXI, Rule 94 of the Code on the 30th day of the sale and accordingly property is transferred by the concerned authority in favor of the purchaser. The decree holder withdraws the amount equivalent to their claim and rest is return to the judgment debtor.

shahidshafiq36@yahoo.com

PROSECUTION IN PAKISTAN VIZ-A-VIZ IN OCCIDENTAL COUNTRIES- AN OVERVIEW

By:

M. MEHBOOB AWAN 1ST ADJ

The criminal justice system is the set of agencies and processes established by governments to control crime and impose penalties on those who violate laws. Criminal law in Pakistan and the procedural codes that are followed are very different in their application from the criminal law that is followed in the developed world. For a layman, Criminal Justice System means the entire state machinery which is channelized in order to control crime in society. It consists of, the legislature / criminal procedure which regulates how an accused is tried in a criminal court for any offence; The second branch of the criminal justice system is the executive which appoints police officials who detect and investigate crimes and the prosecutors who prosecute the accused in the courts of law; The third branch are the courts which try an accused; Fourth is the lawyers who defend the accused; and Finally is the prison system where convicted and under trial prisoners are lodged.

Historical record and present statistics suggest that Pakistan is ailing in discharging justice in true spirit. There is plethora of examples that suggest that there are severe lapses in the criminal justice system of Pakistan. Multiple factors are liable to aggravate such injustice. In this regard, let's discuss the role of prosecution that literally seems to be flawed and presumes to be a leading cause of miscarriage of justice, with a comparative assessment with the western countries. A severely deficient pre-trial phase is the main cause of weak prosecution cases. Evidence is poorly recorded and stored, lost, compromised, falsified or simply inadequate; crime scenes are regularly contaminated. It is the main responsibility of police to ensure law and order and implement law in the society so it is essential for police to bring criminals/ law breakers to the court of law for justice through investigation facts. Without proper criminal investigation it is impossible to prove the crime in Court. Thus criminal

investigation has a great importance in any society of the world and so in our country. It is said that in United States has almost 18000 public law enforcement agencies at the Federal, State and local levels of governments Each of the 69 federal law enforcement agencies large and small has a specific jurisdiction, although one criminal event may involve crimes that give several federal agencies concurrent jurisdiction and conduct the criminal investigation. But in Pakistan situation is totally different and concerned police is authorized to conduct criminal investigation (inquiry) at various levels in the same department. In Pakistan when a FIR is registered at Police Station, Generally Station House Officer (SHO), who is head of the police station, would assign duty to a lower rank officer usually the rank of Assistant Sub Inspector (ASI) or to Sub Inspector to conduct the investigation, who mostly have no proper training or technical experience. What he has seen during the police job according to that experience he would conduct the inquiry and will prepare a report, regarding that crime, which is called "Challans" and it is submitted to the concerned court. Being an important task to search out truth regarding so sensitive responsibility is just nothing to do with so seriousness. Generally it is the cause that police do not get success in most of the criminal investigation and the alleged accused being the culprit gets freed just because of lack of substantial evidence. Whereas, in developed countries like USA, UK and Australia ample evidence is collected during the preliminary investigation so that the alleged accused may not receive any benefit of doubt or concession due to the lapses of prosecution. In Pakistan an Investigation Officer follows the following route to conduct the investigation i.e. i) Proceedings to spot

ii) Ascertainment of facts and circumstances of case iii) Discovery and arrest of suspected offender IV) Collection of evidence; and only an officer In charge of police station has jurisdiction to investigate a cognizable offence. On the other hand in the United States there are three major sources in which police suspicion is aroused; i) A victim or other witness complains ii) An officer on patrol observes a crime iii) Police units actively search out a crime. Hence, both the procedures are systematically contrasting and we can judge easily as to which procedure is result-oriented. There are no scientific sources introduced in the police to investigate criminal cases but still it depends on old

conventional tactics and barbaric sources to investigate the crime. The government has done very little to train police for investigation. Forensic, DNA, medical, etc. testing and investigations are outdated and ill-managed to conduct investigation. Karachi is the biggest city of the country but even there police is facing dearth of modem methods and scientific technology and rely heavily on Mukhbars (Informers) and forensic evidence is relegated to a secondary position. Statistics suggest that Pakistan has only 18 Forensic science labs with DNA facility. Low budget to police has caused lower rates of recruitment in Police. A senior investigator of Sindh Police suitably describes while saying that;

> "If you analyze the ratio of crime to the number of available investigators, you find a huge imbalance. The police force does not have a proper shift system. What you need is to distinguish between shifts (for example, day and night; urban and rural), and then determine the number of investigators you need in each shift based on population and crime rate"

RECOMMENDATIONS:-

Monitoring committee be formed at district level to keep a check over performance of prosecutors and particularly oversee the genuineness of FIRs lodged at concerned districts. Raising police and prosecutors' salaries and facilities. Providing security of tenure to prosecutors, empowering them to reject weak cases, as well as specialized training in such fields as homicide and counter-terrorism, and integrating it with related police training programs; Mandating joint police-prosecutor committees to oversee investigations; Establishing a committee within each prosecution service, headed by the prosecutor general and comprising respected jurists, to examine the number of cases an individual. Creating new vacancies and speeding up the recruitment process in police service to meet the demands. Allocations of surplus funds as other investigation agencies are provided.