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SEMINAR REPORT

**SUCSESSES & FAILURES OF
THE SHAR'AI NIZAM-E-ADL REGULATION, 2009**

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In the name of Allah, the Most Gracious, the Ever Merciful

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Abstract

This report documents the proceedings of Seminar, ‘‘Successes & Failures of the Shar’ ai Nizam-e-Adl Regulation, 2009’ held in Swat, on November 29, 2014. The seminar is a sequel of the Academy’s previous two workshops on the same subject. This time, however, the theme was only confined to the successes and failures of the Nizam-e-Adl Regulation vis-à-vis its objectives. This report is divided into three main parts i.e. Introduction, Proceedings and Annexure. The Introduction Part is further divided into Introduction and the Concept Note. The Proceedings Part covers the Sessions, Consolidated Recommendations, Wrap Up and Conclusion. The Annexure Part contains the list of the participants as Annex A and Photographs as Annex B.

Part One: Concept Note

Background

The tribal status and the post insurgency situation with regard to the system of administration of justice in Malakand Division remained a focused area for the Research and Academic Wings of Khyber Pukhtunkhwa Judicial Academy (Academy), since its very inception. In this connection, the Academy had earlier arranged a daylong seminar in 2012, on the prevailing Shar’ ai Nizam-e-Adl Regulation, 2009 [Regulation]. Besides, the Research Wing has done three quantitative research studies focused on the justice system of Malakand. Prior to the said studies, a one-day Stakeholders Workshop was arranged by the Academy on July 30, 2013. Another seminar entitled as ‘‘Stakeholders Policy Dialogue on the Contemporary Legal Order of PATA’’, was organized by the Academy in Swat Valley, earlier this year. All these activities have been duly documented and solid recommendations have been forwarded to the policy makers. The present activity is yet another step in that direction. In most of these endeavours, the Academy has the support of the UNDP, which runs a magnificent project- Strengthening Rule of Law in Malakand (SRLM). Through this seminar, the Academy aims to reach to the real actors of the justice sector in Malakand to explore their input in the efforts for better implementation of the law.

Introduction

Chapter 3 of the Constitution of Pakistan not only specifies the tribal areas but it also provides a *modus operandi* for the administration of these areas^{*}. This special status has been given on

^{*} Art. 246-247 of the Constitution of Pakistan, 1973.

account of distinct history, diverse culture and unique customs and traditions that have been prevailing in these areas since time immemorial. British legacy also played significant role in giving a separate rank to these areas. Tribal areas such as Swat, Buner, Chitral, Shangla, both districts of Dir and protected area of Malakand Agency are, now, collectively known as Malakand Division. Presently, Shar'ai Nizam-i-Ad'l Regulation 2009 operates here as Special Law; Special by area and special by subject.

The Regulation is enforced now for the last five years. While, it may have befriended many, there might be many who would be its bitter critics. To provide a platform to the different actors like judicial officers, lawyers, police, investigation, who are working under the Regulation, the Academy intends to arrange a third seminar. The single theme of the seminar is:

- successes and failures of the *Shar'ai Nizam-i-Ad'l Regulation 2009*

The moderator would highlight the objectives of the seminar. The participants would be from various disciplines of justice sector and shall include honorable judges of District Judiciary, representatives of the District Administration & Bar Associations, Prosecution, Government Pleaders and notables from all walks of life. Heterogeneous groups shall be formed. Group discussion and open house debates shall be conducted. The Faculty Assistant shall record the proceedings.

The tentative program would be as per schedule below

Session	Activity
1	a. Preliminaries i. Introduction of the participants ii. Highlighting the objective of Seminar (by Moderator of the Program).
2	a. Group discussion and preparation of Presentations. b. Reading out Presentations.
3	Concluding Remarks of the DG Academy.
4	Open House deliberations & recommendations
5	Concluding Address by Hon'ble Chairman/Chief Justice PHC. [subject to confirmation]

Part Two: Proceedings

Session I

The programme started with the recitation of some verses from the Holy Quran, by Qazi Ataullah. The participants were formally welcomed by Mr. Hayat Ali Shah, the Director General (DG) of the Academy. Dr. Adnan Khan, Advocate, made a presentation on the Objectives of Nizam-e-Adl Regulation, 2009 [Regulation]. He presented the following to be the objectives of the Regulation.

Direct Objectives:

1. **Establishment of peace and good governance:** A. 247 of the Constitution of Pakistan provides that Regulations are mainly promulgated by the President of Pakistan or Governor of a province, for peace and good governance in a tribal area.
2. **Nifaz-e-Nizam-e-Sharia'h:** As per its Preamble, the Regulation is for enforcement of Shariah through Courts.
3. **Delay Reduction in the Disposal of Cases:** The Regulation provides time periods for speedy disposal of different kinds of cases including review, revisions and appeals. It also encourages disposal of cases through Alternative Dispute Resolution techniques.
4. **Inexpensive Justice:** The Regulation aims at providing inexpensive justice to the locals of Malakand Division.
5. **Justice at door step:** The Regulation mandates the establishment of Dar-ul-Qaza and Dar-ul-Dar-ul-Qaza [benches of PHC and SC] in Malakand Division.

Indirect Objectives:

1. Enduring peace through justice
2. Eradication of evils (Munkaraat) through Shariah: As an indirect objective, the Regulation aims at blocking the means to the evils [Saddu Zarai jenayat].

Session II: Group Activity

The participants, including judicial officers, lawyers, prosecutors and government pleaders, were divided into three groups, to come up with diverse deliberations and recommendations.

Session III: Group Presentations & Recommendations

After the group activity, one participant from each group presented the collective recommendations of his group. A brief sketch of the said presentations is drawn below:

Group A

1. Group A was represented by Mr. Dost Muhammad Khan, Aala Illaqa Qazi/ Senior Civil Judge Buner. He forwarded the following recommendation on behalf of his group:
 - Rule of law is the foremost requirement for the insurance of peace. It is not only for the judiciary or the legal fraternity to be law abiding rather all the state institutions would be required to be law abiding.
 - The wide gap between the Executive and the general public needs to be lessened. Direct communication with the masses is necessary so that they should have feeling that the executive officers are their own people.
 - Executive officers should not be vested with judicial powers.
 - There is lack of confidence in the judicial system. The main reasons are delay in disposal of cases, alien and formal nature of the system. Reforms are needed.
 - Nizam-e-Shariah: The judicial officers working under the Regulation are not qualified in Shariah as a judicial system. They are not given any special training before or after they are posted in this area. This issue should be resolved.
 - The reluctance on the part of the judges, belonging to the District judiciary, is one big problem. They feel that if they decide in accordance with the Shariah, their decision are most likely be reversed from the higher forums. The system enforced in this area needs ownership from the superior courts as well.
 - The Regulation has not brought any substantive change in the system. Only procedural changes have been introduced. Legislature should work on the substantive part of the Regulation.
 - The Regulation has burdened the litigants financially. For instance, the requirement of affidavits with the plaint and the minimum cost for adjournment has made the system more expensive.
 - There is no mechanism for implementation of the Regulation.

- All technicalities should be removed from the Regulation.

Group B

2. From Group B, Mr. Fazal Ghafoor Advocate, President High Court Bar Association Swat, put forward the following recommendations:
 - 1) Lawyers charge excessive fee on services rendered in the Courts. The Regulation should be amended to regulate this fee as well.
 - 2) The Executive officers are vested with judicial powers, however, there is no appellate forum from their decisions. These powers should be withdrawn, for they are ideally incompetent to render executive and judicial services from the same office.
 - 3) The Regulation is plaintiff oriented. All bars and sanctions are against the defendant. Defendant should also be given some relief in the Regulation.
 - 4) The judicial officers should also be made bound to abide by the Regulation because it is not only meant for the lawyers.
 - 5) The condition of annexing affidavits to a plaint is futile and has wrong implications. For instance, when a suit is filed, the adversary contact the plaintiff's witnesses to persuade or intimidate them not to depose against them.

A second member from this Group, Mr. Kausar Hussain Advocate recommended that:

- 6) There is no clarification in the Regulation as to who would declare a certain provision(s) as un-Islamic. Legislation should be done to introduce this clarification in the Regulation.
- 7) For the proper implementation of the Regulation, serious efforts should be made to codify the Islamic Law, otherwise, it will remain a rhetoric only that Shariah is enforced as a system of law in this area.
- 8) The higher judiciary should support the District Judiciary to decide cases in accordance with the injunctions of Shariah, otherwise the reluctance on the part of the latter would remain as it is.
- 9) The provisions relating to the ADR should be religiously followed by the judges to reduce the delay in disposal of the cases.

Group C

3. Mr. Muhammad Javed Advocate represented Group C. He forwarded the following recommendations:
 - a) The Regulation provides a supplementary procedure for enforcement of Shariah and lacks any exhaustive procedure. It helps in delay reduction only. For Nifaz-e-Shariah [enforcement of Islamic Law], exhaustive procedure should be incorporated through legislation.
 - b) The Regulation focuses on technicalities, while for substantive justice technicalities should be removed.
 - c) The legal machinery, comprising of judges, lawyers, prosecutors, government pleaders, working in this special area are not having proper Shariah education or comprehensive training on the subject. They should be at least given thorough trainings on Shariah as a judicial and legal system.
 - d) If inexpensive justice is one objective of the Regulation then it has on the contrary increased those expenses. This issue needs attention of the authorities concerned.
 - e) The Dar-ul-Qaza should interpret the provisions of the Regulation in the first instance, and then monitor its implementation through an active team.
 - f) All the justice sector institutions should be made answerable to the monitoring team of the Dar-ul-Qaza in regard to the implementation of the Regulation.

Consolidated Recommendations

It was generally observed by almost all the participants that the Regulation vis-à-vis its objectives has failed to shatter the status quo and bring any substantial change. No success could be pointed out after the promulgation of the Regulation. Following are the observations and recommendations of the participants in terms of the objective of the Regulation.

1. Objective: Peace and Good Governance

Observation: Rule of law is the fundamental prerequisite for enduring peace. Peace has not been fully restored in Malakand Division so far, as it is still supported with the military might. The fear of lawlessness and violence even now loom large and in the restoration of peace, there is no role of the Regulation. The general perception is

that the state organs and other stakeholders have no will to implement the Regulation in letter in spirit.

Recommendations:

- a) A mechanism is required to be introduced to see the implementation of the Regulation in the perspective of peace and good governance. Since Regulation mainly focuses on the justice system, which is the sole subject of judiciary and for that matter of the Worthy High Court, therefore it is recommended: (1) Monitoring and evaluation system may be evolved at Dar-ul-Qaza, which shall have an oversight on the working of different institutions, functioning under the Regulation, (2) All the institutions shall be required to submit periodical reports to the Monitoring Team [Dar-ul-Qaza], with regard to the implementation of Regulation, (3) Special performance indicators need to be set for evaluation of performance of the justice sector institutions working in Malakand.
- b) The judicial powers should be withdrawn from the executive machinery for both peace and good governance. It goes against the very scheme of trichotomy of powers enshrined in the Constitution of Pakistan and the spirit of Shariah.

2. Objective: Nifaz-e-Nizam-e-Shari'ah

Observation: The Regulation has failed to enforce Shariah as a system of law and private lives of the locals. There are certain anomalies in the very content of the Regulation, which need to be removed through interpretation by the higher courts.

Recommendations:

- a) As a system of law in Malakand Division, the legislature needs to codify Shariah.
- b) Qualified and competent judicial officers need be appointed in this area.
- c) Comprehensive training on Shariah for all the existing judges and the executive officers with judicial powers should be arranged and participation therein should be made mandatory for all concerned.
- d) The superior judiciary should not only extend its support to the local judiciary, rather encourage them for making decisions in accordance with the injunctions of Shariah. This will help remove the reluctance on the part of the judicial officers, who may desire to follow Shariah but cannot for fear of lack of support from their high ups.

- e) For true implementation of Shariah as a system of law, the government should first try to address the issues of social injustices, free quality education, unemployment and law and order. Shariah is not only confined to the judicial system, it covers all spheres of human life.
- f) Interpretation of the provisions of the Regulation and other laws extended through it, in the light of the injunctions of Shariah is the need of the hour. For this purpose a larger bench of the PHC should be constituted and assistance of prominent lawyers and religious scholars as amicus curiae may be sought.

3. Objective: Delay Reduction

Observations:

Though the Regulation provides time frames for disposal of different categories of cases, delay is still a major cause of the litigants' grievance against the judicial system.

Recommendations:

- i) Delay reduction mechanism provided by the National Judicial Policy is being followed somehow but the provisions of Regulation for this purpose are not adhered to. The provisions of Regulation relating to the delay reduction should strictly be followed.
- ii) Due to heavy pendency of cases, disposal of cases is at snail pace. Extra judicial officers should be posted, wherever the number of cases in a court crosses the limit provided by Section 11 of the Regulation.
- iii) Abuse of the process of law with regard to appeals, revisions and writs should be discouraged. The perception that these rights cause undue delay should be removed.

4. Objective: Inexpensive Justice

Observations:

The Regulation has increased the cost of litigation by requiring the parties to send notices through registered posts with copies of the pleadings and relied documents, annex affidavits of witnesses to the plaint, attestation, and heavy costs on adjournments. This goes against the very objective of the law.

Recommendations:

- a) The Regulation should be amended to do away with the requirements of registered notices, affidavits, attestations and imposition of heavy costs.
- b) The lawyers' fee should be regulated, as in the absence of any regulation, the poor litigants are at the mercy of the lawyers to pay heavy fee.

5. Objective: Justice at door step

The Regulation is enforced for the last five years but the establishment of Darul-Darul Qaza [bench of Supreme Court] still remains an unrealized dream. This adds to the miseries of the common people.

6. Eradication of evils (*Munkaraat*) through Shariah

- i) The term Saddu Zarai' Jinayat has not been properly interpreted and sometimes it is misused by the Executive. The terms referred to should be interpreted once for all.
- ii) The real concept of the provision referred to above can bring fruitful change, provided it is properly interpreted and institutionalized.
- iii) The role of Ulama is very vital. They should be engaged by the government to educate people on this issue. Unless people are aware of the evils, they wont refrain from committing them.

Session IV:**Wrap up**

The workshop was wrapped up by Dr. Khurshid Iqbal, District & Sessions Judge/ Dean Faculty KPJA by consolidating all the observations and recommendations of the participants. The Dean also gave a recap of the previous activities and shared the finding of the three researches on this area conducted by the Academy.

Conclusion

In his concluding remarks, Mr. Hayat Ali Shah, Director General KPJA thanked all the participants for their participation and valuable recommendations. He maintained that as

a matter of fact the justice system is not functioning as per desire of the law [Regulation], which gives a wrong impression that it lacks solution for even petty matters. He said that attitude of all the stakeholders including judges, executive officers, police, prosecutors, is lethargic and has not been proactive towards the implementation of the law, whereas expectations of the litigant and general public are extremely high. The DG added that it is need of the hour that we should try to understand the system properly and apply its tools in letter and spirit. Lethargic attitude should be shun away, only then we would be able to meet the expectations of the public. He assured the participants that their recommendations would be submitted to the executive and judicial machinery of the province.

Reported by

Zia-ul-Hassan
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Part Three

Annex A

LIST OF PARTICIPANTS

S.NO	Name of Participant	Department
01	Hayat Ali Shah	KPJA
02	Dr. Khurshid Iqbal	KPJA
03	Qazi Ataullah	KPJA
04	Dr. Adnan Khan	Advocate
05	Zia-ul-Hassan	KPJA
06	Fazal Ghafoor Adv	President PHC Bar Association Swat
07	Dost Muhammad Khan	AIQ/SCJ Buner
08	Sanaullah	Advocate
09	Inayatullah	Advocate
10	Mian Kausar Hussain	Advocate
11	Hafiz Akhtar Saeed	Advocate Matta Bar Association
12	Sher Muhammad Khan	Advocate Matta Bar Association
13	Aftab Ali	Advocate Mingora
14	Muhammad Javed Khan	Advocate
15	Arshad Khan	Swat Bar Association
16	Muhammad Nisar	Advocate
17	Shahzada	Advocate
18	Ifitikhar Ahmad	Prosecution
19	Mazhar Ali Shah	Prosecution
20	Ataur Rehman	Prosecution
21	Rafiullah	Prosecution
22	Muhibullah	Advocate
23	Anwar ul Haq	Government Pleader
24	Syed Israr ul Haq	Government Pleader
25	Muhammad Sherin Khan	Advocate Malakand
26	Amjad Ali	Advocate
27	Fakhre Afghan	Advocate Malakand
28	Ataullah Khan Yousufzai	Advocate Chakdara
29	M. Saeed Khan	Advocate Chakdara
30	Hazrat Bilal	KPJA
32	Abdur Rehman	KPJA
33	Abdul Latif	KPJA

Group Photos

