

APPROVAL SHEET

**RIGHT OF ACCESS TO JUSTICE IN PAKISTAN AND INTERNATIONAL
HUMAN RIGHTS STANDARDS: AN ANALYSIS**

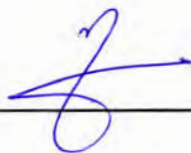
By

Sehrish Saba

**Accepted by the Faculty of Shariah and Law, International Islamic University
Islamabad (IIU) in partial fulfillment of the requirements for the award of
the Degree of LL.M (Human Rights Law)**

Master's (LL.M) Committee:

Supervisor



Dr. Naseem Razi

Associate Professor, Department of Law, FSL, IIU

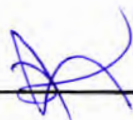
Internal Examiner



Dr. Sadia Tabassum

Assistant Professor, Department of Law, FSL, IIU

External Examiner



Abdur Rauf Khatana

Assistant Professor, Department of Law,

Bahria University, Islamabad Campus



Accession No TH17190 ^{Wm}



MS

344.03258

SER

Legal assistance - Pakistan

Justice in Pakistan

Judicial system - Pakistan

DECLARATION

I, **Sehrish Saba**, hereby declare that this dissertation is original and has never been presented on any other institution, I moreover, declare that any secondary information used in this dissertation has been duly acknowledged.

Student: Sehrish Saba

Signature:



Date:

03-06-2016

Supervisor: Dr. Naseem Razi

Signature:



Date:

Dedicated to

My visionary Grandfather

Late Nazeer Ahmed

My beloved Mother

Balquees Tabassum

&

My Zealous Father

Jamashed Ahmed

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With this humble submission of my intellect, I submit myself to Allah, the Magnificent and the Ultimate Bearer, Holder, Bringer and of all knowledge who enabled me to have a drop from the ocean of His wisdom.

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ABSTRACT

Right of access to justice is not only a human right in itself but a comprehensive terminology preserving in itself numerous other human rights. Almost all the international human rights instruments guarantees this right in one form or the other. Similarly, in Pakistan this right has attained pivotal position among fundamental rights. Unless practical provision and preservation is not ensured mere Constitutional guarantees are like a sea shell without pearl.

The thesis is an attempt to provide an insight into the concept of access to justice as a fundamental right and its historical development followed by the analysis of international human rights instruments guaranteeing this right. It also brings on record the enforcement of right of access to justice in Pakistan, attempts made to facilitate its enforcement, role of ADB in this regard, efforts of National Judicial Policy Making Committee, critical analysis of National Judicial Policy 2009 and avenues it remained failed to achieve with the help of legal protections available in statutes, leading cases and statistics available / gathered by National Judicial Policy Making Committee for the last six years.

The thesis points out that goals set by National Judicial Policy of Pakistan has not been achieved yet. There are many reasons for failure of implementation of subject policy. Firstly, during these six years of implementation of subject policy, instead of the provision of swift remedies for grievances through judicial institutions the major focus of the judiciary remained to prove its efficiency by way of clearing the backlog of cases. Secondly, judicial independence without financial independence of this institution has

proved to be a mere fanciful slogan. Thirdly, for expeditious justice, it was essential to define and elaborate the term 'misconduct', which on the other hand is merely a sketchy concept in the subject policy. Lastly, though Eradication of Corruption cells could have made the access to justice program more effective, but unfortunately they are not effectively performing their role. The subject study recommends that to meet international human rights standards, there is a need to remove these hurdles in implementation of national judicial policy of Pakistan.

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ACRONYMS

ADB	Asian Development Bank
ADR	Alternate Dispute Resolution
AJP	Access to Justice Program
ATJ	Access to Justice
CAT	Convention Against Torture
CERD	Convention on Elimination of all Forms of Racial Discrimination
CEDAW	Convention on Elimination of all Forms of Discrimination Against Women
CR.P.C	Criminal Procedure Code
ECHR	European Convention of Human Rights
EEA	European Economic Area
EU	European Union
ICCPR	International Convention on Civil and Political Rights
NJPMC	National Judicial Policy Making Committee
TAs	Technical Assistance
SC	Supreme Court
UNDP	United Nations Development Program
UDHR	Universal Declaration of Human Rights
UNHRC	United Nations Human Rights Council
UIDHR	Universal Islamic Declaration of Human Rights

INTRODUCTION

Provision of human rights remained unfulfilled promises throughout the world, despite their recognition at international and national levels.¹ Right of access to justice is not only declared as a fundamental human right but also considered as an enabler and protector of other human rights.² Therefore, violation of this right is not only a violation of human rights in itself, but it also becomes the cause of the violation of several other rights.³ Right of access to justice is not limited to access of the people to the courts or judicial system of the country but it also covers effective access of the litigants to the system of law, judicial record, case information etc.⁴ Access to justice is not only a basic human right but an important means to fight against poverty and to avoid the conflicts.⁵

Right of access to justice is a protected fundamental right, guaranteed to the people of Pakistan, enshrined in Article 9 of the Constitution of Islamic Republic of Pakistan, 1973.⁶ This right is based on the doctrine of due process of law⁷ whereby, it can be enjoyed only in the presence of independent and vibrant judiciary,⁸ having strong judicial system with proper mechanism to ensure its implementation. The judicial system in Pakistan is still in its evolutionary phase. The same is strengthened by the contribution of Asian

¹ Charles Olufemi Adekoya, "Human Rights Enforcement by People Living in Poverty: Access to Justice in Nigeria", *Journal of African Law* 12(2010): 258-282.

² Deborah L. Rhode, *Access to Justice* (New York: Oxford University Press, 2004), 7.

³ United Nations human Rights Office of the High Commissioner for Human Rights, *Access to justice by people living in poverty* (OHCHR, 2012), 21.

⁴ Arlene S. Kanter, *The Development of Disability Rights under International Law: From Charity to Human Rights*, (New York: Routledge, 2014), 221.

⁵ UNDP, "Access to Justice Practice Note", (2004), 3

⁶ *SH. Liaquat Hussain and others Vs Federation of Pakistan* PLD 1999, SC 504.

⁷ *Muhammad Nadeem Arif Vs Inspector-General of Police, Punjab, Lahore* SCMR 2011, 408.

⁸ *Chief Justice of Pakistan Iftikhar Muhammad Chaudhry Vs President of Pakistan* PLD 2010, SC 61.

Development Bank in the shape of its largest loan facility extended to any country.⁹ There is a general perception that in Pakistan, the lengthy court processes leads to backlog in resolution of issues instead of resolving matters quickly.¹⁰ General world standards also suggest that these processing times are lengthy¹¹ but there are numerous factors behind it like lack of required number of judges and court staff in association with the population, non- applicability of system of case flow management and non- implementation of procedural laws in their true spirit increases the the work load on judges.¹²

Some of the major problems of judicial administration in Pakistan are, low number of judges, deficiency of qualified staff, lack of system of case management and delay reduction along with infrastructure.¹³ Moreover, expeditious disposal of cases and provision of inexpensive justice is one of the major objectives to be considered by the nations in order to provide this basic human right of access to justice to all.¹⁴ In Pakistan, Constitution of Islamic Republic of Pakistan 1973, through its Article 37(d) has enjoins upon the state of Pakistan to ensure inexpensive and expeditious justice for its people.¹⁵ To improve the efficiency of courts in Pakistan provision of justice at the door step is vital to the situation.¹⁶

⁹ Asian Development Bank (ADB), Independent Evaluation Department, "Special Evaluation Study on ADB Technical Assistance for Justice Reform in Developing Member Countries", Reference Number: SES: REG 2009-06, (2009) 17.

¹⁰ Osama Siddique, *Pakistan's Experience with Formal Law: An Alien Justice* (Cambridge University Press, 2013) 306.

¹¹ USAID/ PAKISTAN, "Pakistan Rule of Law Assessment- Final Report", 2008, 11.

¹² Pakistan, National Judicial Policy 2009, 8.

¹³ ADB, "Report and Recommendation of the President to the Board of Directors on Proposed Loans and Technical Assistance Grant to the Islamic Republic of Pakistan for the Access to Justice Program", (2001) 15.

¹⁴ Ineke Van De Meene and Benjamin Van Rooij, *Access to Justice and Legal Empowerment*, (Leiden University Press, 2008), 9.

¹⁵ *Liaquat Hussain Vs Saudi Air Line* CLC 2011, 314.

¹⁶ ADB, "Completion Report, Pakistan: Access to Justice Program", (December 2009) 15.

The need for the provision and access of this fundamentally guaranteed right to the people of Pakistan was addressed first time in the year 1958 in the form of constituting law commission for its suggestions to simplify the procedure.¹⁷ The process and growth of law reforms continued in different forms until recently in the year 2001 when the same was financed by the ADB¹⁸ and National Judicial Policy Making Committee (NJMPC) came on the surface as the only national body and mechanism ever in Pakistan for the provision and preservation of the right of access to justice.¹⁹ The AJP covers national judicial policy for the country, judicial administration, delay reduction projects, improved ATJ, training for judges and staff, commercial dispute resolution and legislative amendments.²⁰

Numerous efforts has been made in order to improve the condition of the above mentioned objectives along with provision and implementation of the concrete judicial policy in order to secure this Constitutional assurance for the citizens of Pakistan. The existing efforts of Government of Pakistan along with ADB are criticized as well, due to the fact that numerous avenues are not taken under consideration by the authorities.

Though certain efforts were made and various projects were started under ADB-AJP but it is seen that several policy and legal changes proposed by the ADB, have not been completely executed.²¹

¹⁷ Abdus Sattar Asgher, "Simplification of Exhaustive and Cumbersome Procedures", *All Pakistan Legal Decisions*, 10 (2011): 9-12.

¹⁸ ADB, "Pakistan: Access to Justice Program Completion Report", (December 2009), 15.

¹⁹ Justice Zafar Ahmed Khan Sherwani, "Role of District Judge in Implementation of National Judicial Policy" *All Pakistan Legal Decisions* 58 (2009): 55-59.

²⁰ Justice Ejaz Afzal Khan, "Workshop on Access to Justice Development Fund" *All Pakistan Legal Decisions* 94 (2010): 94-98.

²¹ *Ibid.*

In Pakistan, generally people resort to the courts for the resolution of their disputes. This glaringly indicates that litigation, is most utilized form of dispute resolution here.²² Despite the introduction of new Alternation Dispute Resolution (ADR) methods and institutional informal justice systems²³ along with existing old methods of out of court settlements like settlement of controversies through *Punchayats* and *Jirgas*, which have strong roots in our culture since centuries,²⁴ it is observed that people believe in courts more than other methods of dispute resolutions due to certain reasons. One perception is that ADR does not work for everyone and in all situations. There are many dispute scenarios which do not lend themselves well to the ADR process.²⁵ Another view is that all the systems of ADR's do not allow equal protection of law to all rather it is a mechanism designed to favour the rich, having position to bargain and to afford.²⁶ Therefore, effective system of courts is essential to the people of Pakistan.

Although the problem of backlog of cases is common to every country having system of common law but the reasons of such backlog may be different hence uniform remedial measures cannot be a solution.²⁷ Therefore, before blindly following others and taking a radical shift from our present system of administration of justice it is important to consider our local needs first.

²²Osama Siddique, *Pakistan's Experience with Formal Law: An Alien Justice* (Cambridge University Press, 2013) 264.

²³ Unicef, "Study on Informal Justice System in Pakistan, Sindh Judicial Academy, Karachi, Pakistan – Funded Project, Evaluation Report", 12.

²⁴ Osama Siddique, *Pakistan's Experience with Formal Law: An Alien Justice* (Cambridge University Press, 2013) 32.

²⁵ Adam Thierer, "*Judgment Day The Case for Alternative Dispute Resolution*", (Adam Smith Institute 1992), 20.

²⁶ Ibid, 22.

²⁷ Justice A.M. Ahmadi, Former C.J. of India, "ADR and Court Automation", on the occasion of Pakistan Supreme Court Golden Jubilee Celebrations on Completing 50 Years, 2 <http://www.supremecourt.gov.pk/ijc/Articles/7/6.pdf> (accessed November 11, 2015).

An emerging thought among our legal fraternity over the issue is, that application of law reforms and ADR mechanism in our judicial system is the only way out to curtail this case backlog, provision of expeditious disposal of cases and speedy justice but there is need not to forget another important avenue which is regulating the current existing situation in the courts of Pakistan and that is independence of judiciary. Lack of Independence of judiciary in Pakistan is not only a major issue in the weak administration of justice in Pakistan but also key hindrance in the provision of fundamental right of access to justice in Pakistan. Judicial independence has always been guaranteed under the Constitutions of Pakistan but always been interfered through different supra-constitutional measures. It is important to realize that fundamental rights and constitutional liberties would be not more than an ornamental pieces in the Constitution if not enforced in the true spirit by the independent and impartial judiciary.²⁸

Right of access to justice is widely recognized human right as well as fundamental right around the globe yet it remained unable to attain the pivotal position it deserves.²⁹ The complexity of the legal process can itself be categorized as denial of access to justice.³⁰ History shows numerous attempts has been made during the last six

²⁸ Justice Rana Bhagwandas, Judge Supreme Court of Pakistan, "Independence of Judiciary" <http://www.supremecourt.gov.pk/ijc/Articles/2/1.pdf> (accessed December 13, 2015).

²⁹ Asian Development Bank (ADB), "ASIAN DEVELOPMENT BANK Independent Evaluation Department, Special Evaluation Study on ADB Technical Assistance for Justice Reform in Developing Member Countries" (2009), 5.

³⁰ Jeremy McBride, "Access to Justice and Human Rights Treaties", *Civil Justice Quarterly* 238 (1998): 235- 271.

decades for the promotion and provision of the right of access to justice in Pakistan but none of them succeeded due to superficial approaches adopted.³¹

In May, 2009 the first National Judicial Policy of Pakistan was prepared by the NJPMC in order to build a more responsive system for the people of Pakistan. It was claimed that this National Judicial Policy of Pakistan is equipped with all sorts of measures for smooth functioning of Court's business.³²

HISTORICAL PERSPECTIVE OF JUDICIAL REFORMS

It is wrong to assume that the problems to administration of justice and obstacles towards the provision of access to justice had never been discussed before the technical assistance program provided by ADB in the year 1999. In fact, all the previous commissions and committees, from S.A Rehman Law Reform Commission, 1958 till Pakistan Law Commission's Reform on Criminal Justice System, 1997, discussed in their reports the reforms and amendments required to be made for the administration of justice.³³ Almost all the governments have worked for judicial reforms through numerous Commissions and Committees. These includes Commission on Marriage and Family Laws, 1956, S.A. Rehman Law Reform Commission, 1958, Justice Hamoodur Rehman Law Reform Commission, 1967, High Powered Law Reform Committee, 1974, Law Committee for Recommending Measures for Speedy Disposal of Civil Litigation, 1978, Secretaries' Committee set up by the President to Examine the Recommendations of the Law

³¹ Justice S.A Rabbani, "National Judicial Policy 2009, Some Suggestions", *All Pakistan Legal Decisions* 12 (2009): 10-14.

³² Lord Geoffery Chales Vos, 'Access to Justice in the Context of Constitutional Requirements: A Constitutional Perspective' (Conference Paper, International Judicial Conference, Islamabad, Pakistan, April 18-19, 2014)

³³ Law and Justice Commission of Pakistan, "Criminal Justice System," http://www.ljcp.gov.pk/Menu%20Items/Reports_of_LJCP/03/22.pdf (accessed March 12, 2016).

Committee set up for Recommending Measures for Speedy Disposal of Civil Litigation, 1979, Committee to Formulate Concrete Proposals for Simplifying the Present Legal Procedure³⁴, Committee on Islamization of Laws and Establishment of Qazi Courts 1980³⁵, Pakistan Law Commission (PLC) 1981 and Commission on Reform of Civil Law 1993.³⁶

These commissions and committees shared their observations and proposed number of recommendations in order to make the right of access to justice a reality for the people of Pakistan. Only some of the recommendations of the above mentioned Commissions and Committees have been realized like establishment of Pakistan Law Commission. Similarly, recommendations related to amendments in Muslim Family Laws Ordinance were also realized.³⁷ However, other essential recommendations related to shortage of judicial officers, lack of court rooms and allied formalities, insufficient conditions for service of judicial officers, delay in submission of challan, corrupt system of process serving, lack of training for judges and staff, non-attendance of witness, lack of witness protections mechanism, non-production of under trial prisoners, unnecessary adjournments, lack of strict supervision, court facilities, buildings, salaries of the judges etc. had not been realized. ³⁸

In order to strengthen the institutional capacity for judicial and legal reform a ground break technical assistance program was proposed by the ADB in the year 1999. The same was approved and extensive studies on judicial reforms in Pakistan were made

³⁴ Justice Javed Iqbal, "The Role of the Judiciary As A Catalyst of Change" <http://www.supremecourt.gov.pk/ijc/Articles/9/1.pdf> (accessed August 10, 2014).

³⁵ Law and Justice Commission of Pakistan, "Criminal Justice System".

³⁶ Ibid

³⁷ Foqia Sadiq Khan, "The Way Forward: Access and Dispensation of Justice", *SDPI Research and News Bulletin*: (2004), Vol. 11, No 2-5.

³⁸ Law and Justice Commission of Pakistan, "Criminal Justice System" http://www.ljcp.gov.pk/Menu%20Items/Reports_of_LJCP/03/22.pdf (accessed March 12, 2016).

before initiating the Access to Justice Program (AJP), in Pakistan.³⁹ Later on, upon the basis of statistics collected through Technical Assistance's (TA's) the AJP was formally and effectively introduced in 2001 which was considered as first ever external supportive reformatory attempt in the justice sector by any donor in Pakistan.⁴⁰

COMPLEXITY OF THE ISSUES

Many legal issues related to provision and preservation of right of access to justice need careful study. The primary issue is that, in what terms right of access to justice has been considered around the globe, whether there exist any unanimously accepted definition of the term "right of access to justice"?

Another fundamental issue is scope and ambit of right of access to justice in international human rights instruments. Whether it is considered as a human right or not?

Similarly, the question of protection/ safeguards provided to right of access to justice under the Constitution of Islamic Republic of Pakistan 1973 and efforts made by Pakistan to ensure enjoyment of this right is important. Whether AJP significantly achieved its purpose? What are the major effects of AJP on the judicial administration of Pakistan?

³⁹ ADB, "Proposed Technical Assistance to the Islamic Republic of Pakistan for Strengthening of Institutional Capacity for Judicial and Legal Reform", 6 (September 1999).

⁴⁰ Mukhtar Paras Shah, "Why did Access to Justice Program Fail in Pakistan? Why did Justice Plan fail; Story of an ADB intervention in Pakistan" (Research assignment, National Graduate Institute of Policy Studies, Tokyo, Japan), 6.

The issue of enactment of first ever national judicial policy of Pakistan and its implementation is of great significance. Whether National Judicial Policy of Pakistan has sufficiently ensured the protection of right of access to justice to the citizens of Pakistan? The effects it created on the judicial administration of Pakistan during these six years of its enforcement are important topics for further discussion.

LITERATURE REVIEW

Mauro Cappelletti who wrote a book titled "Access to justice and the Welfare State"⁴¹ published in the year 1981 was one of the early writings on the subject. It comprehensively provided the historical concept of access to justice. It elaborated the preliminary issues attached to the concept of access to justice. It also provided historical access to justice movements on the subject along with future prospects.

The book "Access to Justice and Legal Empowerment"⁴² written by Ineke Van De Meene and Benjamin Van Rooij in the year 2008. The author elaborated the concept of access to justice and legal empowerment as innovative approaches towards legal development and focuses on the reform of legislation and State institutions. The writers discussed the influential organizations in the area of conceptualizing access to justice and legal empowerment reforms along with some simple questions about this new trend in legal development cooperation. The writer had discussed some very basic concepts like importance of access to justice and legal empowerment, obstacles through the legal system, reforms proposed along with framework for programming reforms.

⁴¹ *Access to Justice and the Welfare State*, ed. Mauro Cappelletti (Italy: European University Institute, 1981).

⁴² Ineke Van De Meene and Benjamin Van Rooij, *Access to Justice and Legal Empowerment*, (Leiden University Press, 2008).

Deborah L. Rhode's book "Access to Justice",⁴³ published in 2004, gave the detailed insight on the situation of access to justice in American legal system. The book expounded the reasons to care about access to justice. It concluded that practically, American legal system has failed to protect its citizens falling under the category of poor and moderate class.

Vivek Maru through his review paper "Access to Justice and Legal Empowerment: A Review of World Bank Practice"⁴⁴ written in the year 2009, presented in a very comprehensive manner the efforts of World Bank for promotion of right of access to justice. The paper was an attempt to provide directions to the World Bank for their justice reform interventions. It recommended the World Bank to take into consideration social context and specific needs of that society whose justice sector is going to be reformed. The paper also suggested that evaluation of access to justice projects should be on the basis of their impact on society and public at large.

M. Elvira Mendez Pinedo through an article "Access to Justice as Hope in the Dark in Search for a new Concept in European Law"⁴⁵ published in 2011, provided a concept of access to justice and its analysis under European Law. The author pointed out the shortcomings of the concept of access to justice in European Law. According to author European laws focus more on procedural access to justice and consider the expression in limited terms of access to courts and effective remedies only.

⁴³ Deborah L. Rhode, *Access to Justice*, (Oxford University Press, 2004).

⁴⁴ Vivek Hansraj Maru, "Access to Justice and Legal Empowerment: A Review of World Bank Practice", *World Bank Justice & Development Working Paper series 9/2009*, (2009)

⁴⁵ M. Elvira Méndez Pinedo, "Access to Justice as Hope in The Dark in Search for a New Concept in European Law", *International Journal of Humanities and Social Science*, 18, Vol. 1 No. 19(2011):9-19.

A series of papers published in 2012, on access to justice by Zoila Hinson and Dianne Hubbard titled "Access to Justice in Namibia: Proposals for Improving Public Access to Courts"⁴⁶ carries discussion about protection of this right in Namibia. In part A of the series, article titled as "Access to Justice as a Human Right" is provided. The article consist of topics of access to justice in the Namibian Constitution, international law on access to justice and factors obstructing access to justice. The article elaborated the provisions provided under the Namibian Constitution regarding access to justice. Under Namibian Constitution access to justice is taken as a mean for the enforcement of other rights. The article express right of access to justice as enabler of other rights only, therefore, needs improvement. Meaning thereby, the article is more inclined to the procedural access to justice than its substantive side.

The book titled "Access to Justice in Pakistan"⁴⁷ published in 2003, was written by Former Justice of Supreme Court, Justice (R) Fazal Karim for the guidance of bench and bar under one of the project of ADB. Through this publication minimum standard of judicial fairness had been brought in writing in order to facilitate and disseminate the true concept of access to justice. The scope of the book is procedural access to justice only and is silent about substantive access to justice.

The book "Access to justice in Transnational B2C E-Commerce: A Multidimensional Analysis of Consumer Protection Mechanism",⁴⁸ published in 2015, is one of the latest work on the topic of access to justice. It provided concept of effective

⁴⁶ Zoila Hinson and Dianne Hubbard, "Access to Justice in Namibia: Proposals for Improving Public Access to Courts, Access to Justice As a Human Right, Paper No.1", *Legal Assistance Center* (2012).

⁴⁷ Justice (R) Fazal Karim, *Access to Justice in Pakistan*, (Lahore: Pakistan Law House, 2003).

⁴⁸ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce, A Multidimensional Analysis of Consumer Protection Mechanism*, (New York: Springer International Publishing Switzerland, 2015), 46.

provision of access to justice to consumers in the context of e-commerce. The book provided guidelines for consumer protection in borderless E-Market and tried to identify possible solutions for preservation of right of access to justice in the online market. The book provided historical debate on access to justice from the work of 19th Century authors on the subject. It also provided contemporary debates on access to justice along with enhancing mechanisms for consumer protection in e-commerce.

The book "The Art of a Lawyer and Access to Justice"⁴⁹ consists of many articles related to art of advocacy edited by Emmanuel Zafar was published in the year 2011. The book is a guideline for young lawyers to learn how to act in their professional career. The book is collection of views of legal luminaries of different countries. Overall, the work of the author is in terms of art of advocacy and not from the perspective of right of access to justice available to the citizens.

Ishfaq Ali wrote a book titled "Right to Access to Justice",⁵⁰ published in 2014 is a unique compilation of case-laws on the topic of access to justice. The writer has gathered case laws on almost all the terms and phrases used for access to justice. The book is neither discussing the procedural access to justice nor elaborated substantive access to justice. It is providing compilation of case laws on the topics like due process of law, independence of judiciary and role of judiciary in disseminating justice.

⁴⁹ Emmanuel Zafar, *The Art of a Lawyer and Access to Justice* (Lahore: Khyber Publishers, 2011).

⁵⁰ Ishfaq Ali, *Right to Access to Justice*, (Islamabad: Islamabad Law Book House, 2014).

OUTLINE OF THESIS

To discuss the issue of the provision and promotion of right of the access to justice in international instruments, efforts made by Pakistan to safeguard this right, role of ADB in its endorsement and still existing lacunas of our judicial system, this thesis is structured into three basic chapter, followed by a conclusion and recommendation section.

First chapter discusses the recognition of right of access to justice as a fundamental human right around the globe and international instruments safeguarding this right.

Second chapter discusses a background of "Access to Justice Program" in Pakistan, historical growth and constitutional recognition of this right along with obstacles to effective enforcement of this right in Pakistan, effects of AJP on the judicial system of Pakistan and role of ADB in this program.

Third chapter presents a critical analysis of the features of the national judicial policy adopted by Pakistan since 2009 till to date with its amendments.

Conclusion adequately accommodates all the important findings of the thesis. Notably, three Annexures are annexed with this part, which illustrates the yearly statistics of almost all the major heads of National Judicial Policy.

Chapter One

ACCESS TO JUSTICE AND INTERNATIONAL STANDARDS OF HUMAN RIGHTS

Human rights are those liberties either recognized through custom or by international agreement and are standard to be adopted by all the nations.¹ United Nations defines human rights as rights inherent to all human beings without prejudice to their colour, nationality, language, residence or any other status.² Access to justice is also one of these human rights safeguarded through various human rights instruments discuss under this chapter.

1.1 DEFINITION OF ACCESS TO JUSTICE

It is rightly said that “Access is the first weak point in the law machine”³. Access to justice lacks any unanimous or widely acceptable definition under international law rather it is articulated through different terminologies⁴ and expressions in human rights conventions. The term been used in numerous ways under different perspectives. Conventionally, it was an expression indicating the formal systems and structures of the law to the vulnerable segment of society⁵ but now the concept has been diversified and is used in its broader sense. Underhand is presented some of the definitions of access to justice disclosing the terminologies in which it exists.

¹ Maurice William Cranston, *What are Human Rights?* (California: The University of California, 1963), 60.

² Roger Stenson Clark, *A United Nations High Commissioner for Human Rights*, (Netherlands: Springer, 2013) 16.

³ Marcel Berlins and Clare Dyer, *The Law Machine*, 5th ed. (England: Penguin Books, 2000) 1.

⁴ Terminologies used for the term access to justice in international law are: right of fair trial, right to have effective remedy, right to access to courts, right to have legal assistance etc.

⁵ Sahar Maranlou, *Access to justice in Iran: Women, Perceptions and Reality* (Cambridge University Press, 2014), 170.

Sometimes, it is considered much easier to define the term in negative connotation i-e to express what access to justice is not rather than what it is. In other words it is easy to figure out denial of access to justice than its achievements.⁶ For instance, backlog of cases defines denial of access to justice in a more appropriate manner than expeditious disposal of cases which is an expression of attaining access to justice.

Throughout its evolution, many intellectuals have offered numerous explanations of the term 'access to justice' but no single all-inclusive and unanimously acceptable definition could be coined till today. One of its simplest definition is presented by Stefan Wrbka. According to him, "The term of access to justice consists of two parts: *access* and *justice*. In its literal meaning, *access* stands for the chance to reach or accomplish something, whereas *justice* refers to fairness and reasonableness and embodies the concepts that everybody's rights are safeguarded".⁷ Wrbka defines access to justice in terms of fairness, reasonableness and equal protection of law.

Stephen Bottomley⁸ and Simon Bronnitt⁹ has defined access to justice in terms of formal system of justice. According to them, "Access to justice is usually taken to mean access to formally constructed, political impartial courts and administrative agencies".¹⁰ This definition excluded all the informal systems¹¹ of attaining justice prevailing around the globe.

⁶ Dr. Eilionoir Flynn, *Disabled Justice? Access to Justice and the UN Convention on the Rights of Persons with Disabilities*, revised ed. (Ireland: Ashgate Publishing Ltd., 2015) 12.

⁷ *Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interests?*, ed. Stefan Wrbka, Steven Van Uytsel and Mathias Siems (USA: Cambridge University Press, 2012), 27

⁸ Stephen Bottomley is Dean and Professor of Commercial Law in the ANU College of Law at the Australian National University.

⁹ Simon Bronnitt is a Professor of Law at TC Beirne School of Law, The University of Queensland.

¹⁰ Stephen Bottomley and Simon Bronnitt, *Law in Context*, 3rd ed. (Sydney Australia: Federation Press, 2006), 83.

¹¹ Informal systems of justice includes traditional, tribal, religious courts or community based systems of resolving disputes having different names under different regions like panchayat, jirga, lok adalat, arbitration by clan leaders etc.

A much broader definition of the term has been presented by Mauro Cappelletti¹² and Bryant Geoffrey Garth¹³. According to them access to justice is “A system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state. It consists of guaranteeing equal access and achieving just outcomes. It could also simply refer to ‘mechanisms by which an individual may seek legal assistance’”.¹⁴

As compared to previous definition given by Bottomley and Bronnitt, Cappelletti and Garth has defined access to justice in a much broader way. This definition has covered all the existing systems of ADR like Jirga systems¹⁵, Lok adalat and other formal and informal systems of dispute resolutions recognized and permitted by the State. Moreover emphasis of this definition is on the point of reaching to the just and fair results of this exercise.

Another comprehensive explanation of the term access to justice is presented by UNDP. UNDP expresses it as “The ability of people to seek and obtain a remedy through formal or informal institutions of justice, in conformity with human rights standards”.¹⁶ UNDP has elaborated this concept in terms of right of a person to *seek* and *obtain* a remedy when aggrieved. This definition on the one hand covers all the formal and informal systems of justice around the globe and on the other hand provides a comprehensive set of rules to be followed in the shape of human rights standards.

¹² Mauro Cappelletti was a Professor of Law at the University of Florence, Italy.

¹³ Bryant Geoffrey Garth is Professor of Law, University of California-Irvine.

¹⁴ Cappelletti, M., and Garth, B., *Access to Justice - A World Survey*, (1978), 6, quoted in Lola Akin Ojelabi Dr, “Improving Access to Justice Through Alternative Dispute Resolution: the Role of Community Legal Centers in Victoria, Australia”, *Civil Justice Research Online*, (September 2010): 10, <http://www.civiljustice.info/access/20/> (accessed July, 05, 2014).

¹⁵ A jirga is a traditional assembly of leaders that make decisions by consensus.

¹⁶ UNDP, Access to justice Practice Note, 2004.

1.2 COMPONENTS OF ACCESS TO JUSTICE

As the term access to justice do not find any unanimous definition therefore academic and legal experts attempted to establish its parameters. Andre Tunc, distributed it in three broad components. These are “access to legal justice”, “access to machinery of justice specific to welfare state” and “access to Justice”¹⁷. According to Tunc, the first component *access to legal justice* means enforcement of a legal right existing under current legal system of any state and removal of barriers from obtaining legal remedies available to aggrieve. Its second component, *access to machinery of justice specific to welfare state* is related to the protection of new legal rights available to the subjects due to modern machinery like rights of employees, right to environmental protection, consumer rights etc. whereas, the third component *access to Justice* with capital “J” is indicative of the concept that the term access to justice is not restricted to access to judicial process only but concepts of legal awareness, equality and achievement of social justice is also enshrined in it.¹⁸

Similarly, Dr. Eilionoir has distributed access to justice among three components that are substantive access to justice, procedural access to justice and symbolic component of access to justice.¹⁹ He elaborated, *Substantive* access to justice in terms of assessment of the rights claimed included therein, all stages of judicial process, available to those who seek a remedy. *Procedural* access to justice is defined in terms of opportunities and barriers which come in the way of getting justice like access to court and lawyer, reasonable time etc. Whereas, *Symbolic* component of access to justice is defined in terms of general

¹⁷ Andre Tunc, “The Quest for Justice” in *Access to Justice and the Welfare State*, ed. Mauro Cappelletti (Italy: European University Institute, 1981) 315-16

¹⁸ Sutatip Yuthayotin, Central Intellectual Property and International Trade Court, Bangkok, Thailand, *Access to Justice in Transnational B2C E-Commerce, A Multidimensional Analysis of Consumer Protection Mechanism*, (New York: Springer International Publishing Switzerland, 2015), 46

¹⁹ Dr. Eilionoir Flynn, *Disabled Justice? Access to Justice and the UN Convention on the Rights of Persons with Disabilities*, revised ed. (Ireland: Ashgate Publishing Ltd., 2015) 18.

promotion and preservation of access to justice like legal empowerment and awareness of citizens of a particular state.²⁰

Access to Justice Advisory Committee appointed by the Government of Commonwealth in 1994 also defined three key features of the term 'access to justice' the same includes 'Equality of access to legal services', 'National equity' and 'Equality before the law'.²¹

'Access to justice' is also defined in terms of different challenges and barriers of justice like provision of legal services and legal aid, reasonable time, cost of litigation, settling of small claims, financial responsibility and competence of the party to recognize a claim or defense,²² parallel opportunity to access the system and to enforce existing rights or laws.²³

On the basis of definitions and expressions discussed above, terminologies related to access to justice are presented below through fig.1.

²⁰ Ibid.

²¹ Natalina Nheu and Hugh McDonald, *By the People, for the People? Community Participation in Law Reform*, Volume 6 (New South Wales: Law and Justice Foundation, 2010) 11.

²² Sidney B. Jacoby, review of *Access to Justice* by M. Cappelletti; B. Garth; J. Weisner; K.-F. Koch, in *The American Journal of Comparative Law*, Vol. 29, No. 3 (Summer 1981): 532-535. This review paper is based on five different books of the above mentioned writers.

²³ Louis Schetzer, Joanna Mullins, and Roberto Buonamano, *Access to Justice & Legal Needs A project to identify legal needs, pathways and barriers for disadvantaged people in NSW* (New South Wales: Law & Justice Foundation of New South Wales, 2002) 24.

1.3 ACCESS TO JUSTICE AND RELATED TERMINOLOGIES



Fig.1

From the above discussion, the term access to justice can be divided into two categories i-e in broader and narrower sense. In broader sense, it can be further divided into two categories namely Procedural and Substantive access to justice. Here term procedural access to justice includes opportunities and barriers in getting ones claim into court or tribunal. Whereas, substantive access to justice indicates receiving of a fair and just remedy for violation of one's rights or an assessment of the rights claims that are available to those who seek a remedy. To further elaborate the concept, fig. 2 is presented below.

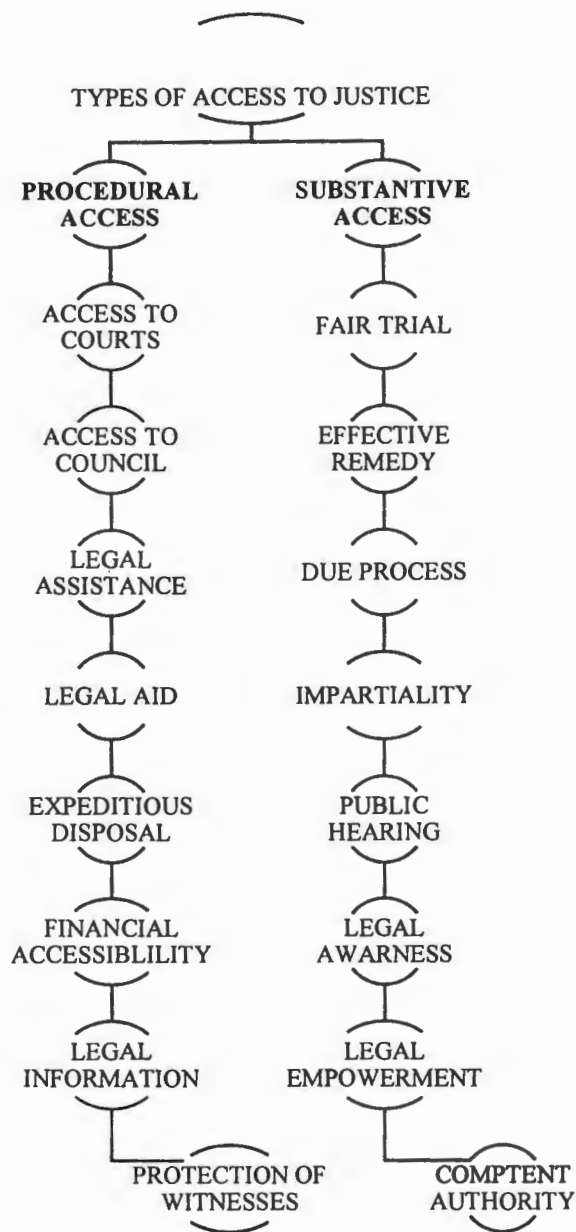


Fig. 2

Whereas, in narrow sense the access to Justice is persistently recognized as: a right to a fair and proper trial, right to an effective remedy/ access to legal process, access to court, right to due process of law, financially affordable judicial system, right to have impartial courts,

independence of judiciary and right to have expeditious dispensation of justice. These terms can also be considered as offshoots of procedural and substantive access to justice.

1.5 ACCESS TO JUSTICE AND HUMAN RIGHTS INSTRUMENTS

The right of 'Access to Justice' was kept preserved in almost all the human rights instruments under different expressions of access to justice. Although it was Convention on International Access to Justice 1980, that introduced the terminology of access to justice but Convention on the Rights of Persons with Disabilities 2006, elaborated first time access to justice as a conclusive right. Following is presented some of the human right's instruments preserving the right of access to justice.

1.5.1 UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR) 1948

Although, the term Access to Justice has never been coined at the time of promulgation of UNHRC but the fundamental concept of the same has been secured very carefully since inception of human rights preservation efforts. Therefore, in 1948 some terms having meaning to access to justice were placed under this charter.

UNHRC also known as UDHR, under Article 1, declares the right of access to justice as a fundamental right to all. Whereas, Article 7 of the instrument provides for right of equality before law and equal protection of law. Similarly, Article 8 of the Charter enumerates the right to an effective remedy as determined by the courts for fundamental rights ensured by the Constitution or by law.

Article 10 of the Charter provides a combination of various rights covered under the right of access to justice, including right of equality before the law, right to a fair and proper trial, right of public hearing and right to have impartial court and tribunal.

1.5.2 EUROPEAN CONVENTION OF HUMAN RIGHTS (ECHR) 1950

Generally at some forums, right of fair trial and public hearing guarantees regular procedures. Whereas, at European Court of Human Rights it is taken in broader meanings and also includes a right to access to the courts. Article 6 of the Convention provides not only right to a fair and public hearing but also provides expeditious disposal from an independent and impartial tribunal as a fundamental right. Whereas, Article 13 of the ECHR guarantees the right to an effective remedy for the aggrieved in case of violation of his rights and freedoms provided under ECHR. It provides an explicit assurance towards the right to access to justice in the sense that it states that the aggrieved "shall have" an effective remedy when any grievance may cause to him.

1.5.3 INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (CERD) 1965

Article 6 of the CERD highlights the right of access to justice in terms of right of effective remedy through competent tribunals. Here the term competent tribunal is used in wider sense including all the forums of provision of justice i-e all the formal or informal systems of justices. It also includes the right of free, fair and impartial trial through independent tribunal which is ultimate aim of provision of right of access to justice.

1.5.4 INTERNATIONAL CONVENTION ON CIVIL AND POLITICAL RIGHTS (ICCPR) 1966

The International Covenant on Civil and Political Rights (ICCPR) under Article 2 preserves right of access to justice in terms of right to effective remedy. Whereas, under Article 14, Convention remarkably ensures equality before the law and equal protection of

the law along with fairness of procedure, due process of law and impartiality of adjudicating authority. Similarly, in its Article 26, ICCPR reiterates the guarantee of equality before the law and equal protection of the law without any discrimination.

1.5.5 CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW) 1979

CEDAW under its Article 2 requires States parties to the Convention, to ensure the provision of right to an effective remedy and equality before the law. It necessitates a rectifier to ensure this right through competent tribunals and other public institutions giving protection to the women against any act of discrimination.

As per CEDAW, no discrimination would be acceptable towards the women with regard to their right of equality before the law and ultimately their right to access to justice.

1.5.6 CONVENTION ON INTERNATIONAL ACCESS TO JUSTICE 1980

Convention on international access to justice 1980 was promulgated in order to facilitate access to justice to the citizens of the States signatory to this Convention at international level.

The Convention's purpose is not to harmonize domestic laws, but ensure protection of the Convention to the right of access to justice to those alien to a State. The Convention safeguards such people from discrimination on the ground of either their being non-resident of a State or lacking domicile of the state. According to the Convention the mere status as an alien or the absence of residence or domicile in a State should not disallow a person from seeking redress of his grievances and legal assistance.²⁴

²⁴ HCCH, "Outline Hague Access to Justice Convention", *Hague Conference on Private International Law* (December, 2007).

Article 1, of the Convention provides assurance of legal aid to non-resident of the contracting states. It safeguards from discrimination to those alien to the State but in a limited sense because it protects legal aid for "court proceedings" only and not for other forums. Similarly, it specifies that legal aid is to be provided in the matters of "civil and commercial" nature. Whereas, Article 2, of the Convention provides assurance of "legal advice" to the person seeking. Similarly, Article 12 of the Convention secures expeditious and timely disposal of the applications made under Convention for legal aid.

Title of the instrument reveals its enrichment as a comprehensive Convention upon the subject but the detail study is not impressive because it provides for only the right to legal aid, security for cost, copies of entries and decisions and physical detention and safe conduct. Overall, the Convention is not adequately dealing with the concept of access to justice and miserably failed to do justice to its title adopted by the contracting States.

1.5.7 UNIVERSAL ISLAMIC DECLARATION OF HUMAN RIGHTS (UIDHR) 1981

Article 4 and 5 of UIDHR expressly deals with access to justice in terms of right to justice and right to fair trial. Article 4 of the declaration is unique in its perception and the same not in existent in any other instrument or declaration. As this Article is not only creating right to justice but also obligating upon the individual to practically exercise this right. This Article also provides for free and fair trial along with independence of judiciary and impartial trial.

Whereas, Article 5, clause (a) & (b) discusses Right to Fair Trial. According to it no individual shall be held guilty of an offence and made liable to punishment except after proof of his guilt is established before an independent judicial tribunal.

1.5.8 CONVENTION AGAINST TORTURE (CAT) 1984

The CAT pledges a right to redress for acts of torture. In a broader sense, the Convention indicates about the right to access to justice in cases of torture. Article 13 of the convention provides for right to complain or right to claim which is ultimate guarantee of right to have an effective remedy. Similarly, Article 13 also provides for prompt and neutral examination of one's case by competent authorities that includes right of due process of law. One of the distinct protection provided under Article 13 of CAT is protection to the complainant as well as the witnesses of the matter concerned.

Similarly, Article 14 of the Convention requires States parties to ensure that victims of torture are able to obtain redress via their legal systems and have "an enforceable right to fair and adequate compensation", which covers right of fairness in judicial adjudication whether related to some suit before legal forum or some administrative matter before an authority.

1.5.9 CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS 1998

Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998 in its preamble aims to improve the system of accountability and transparency in making decisions. It also intended to reinforce the public support for decisions on the environment.²⁵

Through Article 9, the Convention allows the public to access to justice, i.e. the right to seek redress when environmental law is infringed and the right to access review

²⁵ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, (Aarhus, Denmark, 25 June, 1998).

procedures to challenge public decisions that have been made without regard to the two other pillars of the Convention.

This Article has established number of rights to the public. The same starts from provision of right to information and goes on with all other inter-related rights, including due process of law, right to have effective and inexpensive justice through independent and impartial tribunal and expeditious disposal.

1.5.10 CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES 2006

The Convention on the Rights of Persons with Disabilities²⁶ requires under its Article 13, from States parties to “ensure effective access to justice for persons with disabilities on an equal basis with others”. It provides for the provision of right of access to justice to those with disabilities along with acceptance of their equality before the law. This is second international instrument after Convention on International Access to Justice, 1980 that categorically refer the comprehensive expression of right of access to justice.

It is important to mention here that the Convention attained highest number of signatures on its opening day, which makes it remarkably unique in history to a UN Convention. Similarly, it is considered as a first comprehensive human rights treaty of the 21st century and is the first human rights convention to be open for signature by regional integration organizations.

²⁶ Convention on the Rights of Persons with Disabilities 2006.

1.5.11 MAGNA CARTA OF JUDGES, 2010

The Consultative Council of European Judges (CCJE) of the Council of Europe adopted the Magna Carta of Judges (Fundamental principles) on 18th November 2010²⁷.

The purpose of the instrument is to promote the role of judges, improvement in their efficiency and independence, as well as to elucidate their duties and responsibilities.²⁸ This instrument brings to limelight all fundamental principles regarding judges and judicial system. According to Article 23 of the instrument, the principles provided in the instrument “shall apply mutatis mutandis to judges of all European and international courts”.

Magna Carta of Judges includes access to justice as one fundamental pillar of the rule of law. Under Clause 15 of the instrument it requires from judges to play their effective and responsible role towards the provision of access to justice.

Whereas it's Clause 16 provides for the right of public hearing and right to information to the litigants, right of expeditious disposal of cases along with utilization of efficient case flow management.

Clause 17 of the instrument provides for enforceability of right of fair trial. According to it “The enforcement of court orders is an essential component of the right to a fair trial and also a guarantee of the efficiency of justice”.

Magna Carta, 2010 is one of the pioneering instruments highlighting the role and responsibilities at the shoulders of judges for the preservation of the right of access to justice.

²⁷ Magna Carta of Judges (Fundamental Principles), (Strasbourg, 17 November 2010 CCJE (2010)3 Final).

²⁸ Council of Europe, Committee of Ministers, Minister Deputies, CM Documents, 1098 Meeting (October 2010).

1.5.12 AMERICAN CONVENTION ON HUMAN RIGHTS 1969

American Convention on Human Rights, comprehensively provides for right of access to justice in both of its terms i-e procedural and substantive access to justice.

The Convention demonstrates the right to access to justice under the expression of right to access to the courts, which has become an international norm. Through Article 8, the Convention introduces a concept in terms of right to be heard, expeditious disposal, right of fair trial, independent and impartial forums to adjudicate upon the matter and right of legal assistance. As all these terminologies are prerequisites to the procedural access to justice.

Article 25(1) of the Convention provides this guarantee from another aspect of “Right to Judicial Protection”. According to this Article everyone is entitled to recourse “to a competent court or tribunal for protection” for violation of his fundamental rights. The same is indicating the substantive access to justice in terms of competency of the adjudicating authority to handle the matter.

Similarly, Article 25(2) obligates upon a contracting party to “ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state”, “develop the possibilities of judicial remedy” and “ensure that the competent authorities shall enforce such remedies when granted”.

1.5.13 THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS 1981

The African Charter on Human and Peoples' Rights (also known as the Banjul Charter) was adopted in 1981 and entered into force in 1986.²⁹

²⁹ African Charter on Human and Peoples rights, Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

The Charter contains the most explicit guarantee of access to the courts under its Article 7(1). It states that “Every individual shall have the right to have his cause heard”. Through this Article enormous rights have been discussed that are expressions of access to justice, like right to claim, right to public hearing, expeditious dispensation of justice and legal assistance.

Article 26 of the Charter directs the States party to the Charter, preservation of the right of access to justice by assuring the independence of the judiciary. This Article obligates the States party to the Charter, assurance of the independence and impartiality of the courts in order to preserve and promote the rights and freedoms guaranteed under the Charter.

Article 3 of the Charter, the same provides that every individual “shall be entitled to equal protection of the law”. According to the African Charter a legal system which fails to provide meaningful access to justice to individuals in a society, regardless of their financial status, actually dissents from its responsibility of equal protection of the law.

1.5.14 AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS 2001

In 2001, the African Commission on Human and Peoples’ Rights adopted a set of Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa³⁰. The guidelines provided under the commission includes public hearing through independent and impartial tribunals, appropriate education and training of judicial officials, guarantee of right to an effective remedy, public access to court records and information related to judicial proceedings, access to lawyers, mechanism of legal aid and assistance and expeditious disposal of cases.

³⁰ African Union, African Commission on Human & Peoples’ Rights , “Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa”, DOC/OS(XXX)247.

The commission considers right to fair trial, provision of legal assistance and access to courts as the means of promotion and preservation of right of access to justice. According to it, everyone is entitled to bring before “judicial bodies” his grievance upon the violation of human right, which is once again authenticating the concept that access to justice is not only a right in itself but means to protect other human rights as well.

1.5.15 SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC) PROTOCOL ON GENDER AND DEVELOPMENT

The Southern African Development Community (SADC) Protocol on Gender and Development recognizes access to justice both as a means of securing other rights and a right in itself that women must share on a basis of equality with men.

The Protocol provides in Article 7, “Equality in Accessing Justice” that States Parties must put in place measures that secure “equality in the treatment of women in judicial and quasi-judicial proceedings, or similar proceedings, including customary and traditional courts”; “equal legal status and capacity in civil and customary law”; “the provision of educational programs to address gender bias and stereotypes and promote equality for women in the legal system”; and “accessible and affordable legal services for women.”

The protocol discusses equality before the law especially of the women, provision of accessible and affordable legal services including legal assistance.

1.5.16 ACCESS TO JUSTICE IN EUROPEAN LAWS

There was no common concept of access to justice in European Law that included European Union (EU) law, European Convention on Human Rights (ECHR) and European Economic Area (EEA) law, till the commencement of Treaty of Lisbon 2007.

The Treaty of Lisbon was adopted in order enable several EU policies to be reformed. It was signed at the European Council of Lisbon on 13 December 2007 and it has been ratified by all Member States.³¹

Before the Treaty of Lisbon, Access to justice was usually taken in the meanings of application and enforcement of rights in the European Union legal system, both at national and European level.³²

Under Title V of TFEU namely “Area of Freedom, Security and Justice” Article 67.1 provides general legal basis for the EU to legislate in the field of (access to) justice.³³ The treaty makes it mandatory that the contracting parties, through ‘TFEU as amended by Treaty of Lisbon’ shall provide facilitation to the right of access to justice under its Article 67(4) of Part I. according to it: “The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters”.³⁴

Similarly through Article 81 (e) of Part I, Chapter III namely Judicial Cooperation in Civil Matters, TFEU as amended by Lisbon Treaty, provides for cooperation for provision of “effective access to justice.”

Along with these articles in the main EU Treaties, the EU Charter of Fundamental Rights (EU CFR) that has gained the same legally binding status as the EU Treaties provides for the right to an effective remedy and to a fair trial under Article 47 EU CFR.

³¹ House of Lords, *The Treaty of Lisbon: An Impact Assessment*, Volume I, Report (London: The Stationary Office Limited, 2008), 189.

³² Méndez Pinedo, Vol. 1, 9.

³³ Martin Trybus and Luca Rubini, *The Treaty of Lisbon and the Future of European Law and Policy* (USA: Edward Elgar, 2012), 142.

³⁴ “Consolidated Reader-Friendly Edition of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) as amended by the Treaty of Lisbon (2007)”, ed. Jens-Peter Bonde, (Foundation for EU Democracy, 2008), ISBN: 87-87692-72-4

Article 47 guaranteed the provision of right to an effective remedy, right to fair and public hearing, expeditious disposal of matter, impartial and independent tribunal and free legal aid to those who deserves. According to Article, the provision of these rights ensures the protection and preservation of right of access to justice. Moreover, the third paragraph of Article 47 specifically refers to legal aid as an element of access to justice, but the term “access to justice” which inspires the article in its entirety is neither defined nor explained.

Although the right of access to justice remained present in one form or the other in almost all international human rights instruments but the use of the exact terminology was first time introduced in Convention on International Access to Justice, 1980. Later on several other international and regional instruments adhered the same terminology in order to comprehensively express numerous fundamental rights including right to fair trial, right to council, right to have due process of law, right to public hearing etc.

Correspondingly, international organizations also played a distinguished role in protection and preservation of this right. They, under their mandates, enshrined judicial reforms and institutional strengthening of the Bar & Bench in order to promote and preserve right of access to justice. Due to these organizations this right has come to lime light and attained such a milestone today.

Chapter Two

ACCESS TO JUSTICE IN PAKISTAN

Access to justice is not only an independent human right but enabler of other human rights as well.³⁵ Pakistan has staggered from one constitutional crisis to another³⁶ since its independence and at last in 1973, this constitutional problem came to an end when Pakistan adopted its first democratic Constitution³⁷. All the four Constitutions of Pakistan guaranteed fundamental rights provided in the Declaration of Human Rights. Through numerous amendments, it progressively guaranteed an impressive set of new rights as fundamental guarantees to the citizens of Pakistan.

As “Law on its own is meaningless unless it can be channeled through an effective legal machinery”³⁸ therefore, these substantive guarantees under Constitutions of Pakistan, without proper enforcement mechanism, were proving to be merely a set of empty promises. In order to fill this gap, under AJP first ever National Judicial Policy of Pakistan was devised in 2009³⁹. The chapter underhand is going to discuss the historical growth of right of access to justice under the Constitutional history of Pakistan. Similarly, efforts made by Pakistan to ensure the enjoyment of this fundamentally guaranteed right of access to justice before enforcement of Judicial Policy 2009 has also been discussed.

³⁵ Francesco Francioni, *Access to Justice as a Human Right*, (UK, OUP Oxford, 2007), 25.

³⁶ M.Mahmood, *The Constitution of Islamic Republic of Pakistan, 1973*, 10th ed. (Lahore: Pakistan Law Times Publications, 2011), 1.

³⁷ Kalim Bahadur, *Democracy in Pakistan: Crisis and Conflicts*, (Delhi: Har-Anand Publication, 1998), 13

³⁸ Marcel Berlins and Clare Dyer, *The Law Machine*, 5th ed. (England: Penguin Books, 2000) vii

³⁹ Osama Siddique, *Pakistan's Experience with Formal Law: An Alien Justice*, (Cambridge University Press, 2013), 344

2.1 ACCESS TO JUSTICE IN THE LIGHT OF CONSTITUTIONAL FRAMEWORK

Provision of expeditious justice to its subjects is primary responsibility of the state.⁴⁰ Right of access to justice, reflected under different expressions like due process of law, financially accessible judicial system, right of fair trial, access to legal process etc. remained a paradigm for the State of Islamic Republic of Pakistan since its very inception. It leads to an assumption that in Pakistan "Right of Access to Justice" remained present under different terms, mentioned above though not specifically as a term "Access to Justice".

Pakistan has its unique history of Constitutions as it was not drove by a single Constitution. Democratic Governments, in Pakistan, could not serve the country uninterruptedly due to military interventions.⁴¹ Since its birth i-e 1947, four Constitutions were promulgated⁴² in the Country. Moreover, it has witnessed three martial laws⁴³ during the 67 years of its existence. However, during the intervals of democratic governments, constitutional guarantee for the provision of access to justice remained intact under different names and expressions. All the four Constitutions of Pakistan have had envision of specific provisions for the due process of law, independence of judiciary and access to courts. Underhand is presented provisions securing right of access to justice in all the three abrogated Constitutions of Pakistan.

⁴⁰ Abdul Quddoos Sial, "Implications of Assorted Constitutional Principles on Administration of Justice in Pakistan", *Pakistan Journal of Social Sciences (PJSS)* 234, Vol. 31, No. 2 (December 2011), 227-239.

⁴¹ Talib H. Rizvi, *Complete Digest on Constitution of Pakistan 1973* (Lahore: Gems Law Publisher, 1994), xvi

⁴² Four Constitutions of Pakistan are, Constitution of Pakistan 1956, 1962, 1972 and 1973.

⁴³ Three martial laws faced by Pakistan are: October 7, 1958, March 25, 1969, and July 5, 1977.

The abrogated Constitution of 1956, through its Article 5 provided few clauses preserving the right of access to justice in terms of equality before law, equal protection of law and due process of law. Whereas, Article 30 of the Constitution provided security to independence of judiciary, impartiality, non-partisan and transparency in decisions. Article 151, 169 and 175 (2) of the Constitution also provided preservation to judicial independence.

The abrogated Constitution of Pakistan, 1962 through its Preamble provided insurance to the observance of principle of equality, preservation of the independence of judiciary along with security to some other fundamental principles. Through its Article 2 the Constitution comprehensively secured right of access to justice under the title 'right of individuals to be dealt with in accordance with law etc.' whereas, 'equality of citizens before law', 'entitlement of equal protection of the law' and 'equal treatment had been secured under Clause 2 of 'Principles of Law Making''. Similarly, Article 8 of the Constitution contemplated for the right of access to justice in terms of "due Process of Law". Whereas, Part III, chapter 5 of the Constitution provided for security of tenure of office and other conditions in order to secure independence of judiciary.

The Interim Constitution of Pakistan 1972, through its preamble provided safeguard to numerous fundamental rights including 'equality before law' and 'independence of judiciary'. Article 3 of the Constitution ensured legal protection along with guarantee of due process of law. Similarly, Chapter I, of the Constitution, provided for the fundamental rights guaranteed under the Constitution in general. Whereas, Article 9 of the Constitution provided specific provisions for administration of justice in terms of procedural access to justice. Through its Article 22, the abrogated Constitution provided

for equality before law and equal protection of law without any discrimination on the basis of sex. Similarly, in order to secure and maintain independence of judiciary removal of judges of superior courts had been properly provided under Chapter VIII.

2.2 ACCESS TO JUSTICE UNDER THE CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN 1973

Currently, Constitution of Pakistan 1973, is prevailing in Pakistan. Although the Constitution of Pakistan 1973 do not contain any specific provision safeguarding any right named as 'access to Justice' but several provisions are repeatedly giving the impression and endorsement for the preservation and protection of right of access to justice as it is entwined in those provisions. Under its different expressions like due process of law, expeditious dispensation, equality before the law etc. this right is rejuvenated even in the Constitution of 1973. Similarly terms like right to be treated according to law, right to have fair and proper trial and right to have an impartial court or tribunal are also present in Constitution to guarantee right of access to justice in Pakistan.

The preamble of the Constitution of 1973 guarantees fundamental rights including 'equality before law'. It also envisages that "the independence of the judiciary shall be fully secured". Whereas, Article 4 of the Constitution provides for doctrine of equality before law or equal protection of law. In *Aftab Shahban Mirani VS President of Pakistan and Others*⁴⁴, Supreme Court of Pakistan elaborated the concept of access to justice in terms of due process of law, fair and proper trial and impartial tribunal of competent jurisdiction. SC held that "It (due process of law) is intrinsically linked with the right to have access to

⁴⁴ *Aftab Shahban Mirani Vs President of Pakistan and Others*, SCMR 1998, 1863.

justice, which this Court has held inter alia in the above report as a fundamental right. This right inter alia includes the right to have a fair and proper trial and a right to have an impartial Court or Tribunal”.

Article 9 of the Constitution has been interpreted by the SC of Pakistan in case titled *Aftab Shahban Mirani Vs President of Pakistan and Others*⁴⁵ as a comprehensive Article providing right of access to justice to all. The SC held that “The right of ‘access to justice to all’ is a well-recognized inviolable right enshrined in Article 9 of the Constitution. This right is equally found in the doctrine of ‘due process of law’. The right of access to justice includes the right to be treated according to law, the right to have a fair and proper trial and a right to have an impartial Court or Tribunal.”

Similarly, the full bench of Supreme Court of Pakistan in case of *Riaz Ul Haq Vs. Federation of Pakistan* case⁴⁶ with reference to case of *Baz Muhammad Kakar Vs. Federation of Pakistan*⁴⁷ again interpreted Article 9 in terms of right of access to justice. The SC held that “Right of access to justice and independent judiciary is also one of the most important rights of the citizens and if there is any threat to the independence of judiciary, it would be tantamount to denial of access to justice, which undoubtedly is a fundamental right under Article 9 of the Constitution”.

The right of access to justice is equally found in the doctrine of “due process of law” that is provided under Article 4, 9 and Article 10-A of the Constitution of Pakistan 1973. Though the concept was already covered in Article 4, 9, 10 and 25 of the Constitution of Pakistan, 1973 but Article 10-A has been specifically added as a fundamental law in the

⁴⁵ Ibid.

⁴⁶ *Sh. Riaz Ul Haq and another Vs. Federation of Pakistan through Ministry of Law and others*, PLD 2013 SC 501.

⁴⁷ *Baz Muhammad Kakar Vs. Federation of Pakistan*, PLD 2012 SC 92.

Constitution.⁴⁸ According to one of the judgment of Lahore High Court⁴⁹, courts and tribunals should adopt due process of law because it is fundamental to preserve access to justice as adoption of due process is synonym to the concept access to justice. The same judgment relates the concept of access to justice and due process of law. It held that “Access to justice is a fundamental right, anything to the contrary is not permissible and the tribunals of limited jurisdiction are required to follow due process of law.”

Article 10 of the Constitution provides for right of access to justice under criminal justice system. According to it a person arrested cannot be detained in custody unless his right of access to justice in terms of ‘right to be informed’ of the grounds of arrest and detention, ‘right to consult’, ‘right to defend’ and ‘right to have counsel’ be fully secured as provided under the Constitution.

Right of fair trial is a new insertion through 18th Amendment 2010, under the Constitution of Pakistan. Through Article 10-A, access to justice in terms of fair trial has been inserted in our Constitution. This right is considered as mother of all fundamental rights and central point of any legal system in democratic setup.⁵⁰ Insertion of Article 10-A in the Constitution of 1973 provides not only right of fair trial in criminal proceedings but in civil matters as well.

Through Article 25, the Constitution doubtlessly elaborates equality of all citizens before law and their entitlement to have equal protection of the law. It further reinforce that on the basis of gender there ‘shall be’ no discrimination / divergence from this constitutional guarantee.

⁴⁸ *Ahmed Hassan Bucha Vs. Chairman, NADRA and others*, PLC 2015, 381.

⁴⁹ *Muhammad Umer Rathore Vs Federation of Pakistan*, PLD 2009 Lahore 268.

⁵⁰ Syed Ali Zafar, Barrister-at-Law, Advocate, Supreme Court, “Fair Trail--- Prospects and Implementation” *Pakistan Legal Digest* 54 (2014), 54-60.

Provision of access to justice is of no use if the same expands on years of precious time of the aggrieved and devalue his rights. It is as important to achieve ends of justice on time as to achieve justice itself. Therefore, expeditious disposal of cases is crucial to the provision of right of access to justice. As interpreted by Judgments of superior courts "Delay defeats ends of justice and could seriously undermine possibility of fair trial"⁵¹. Article 2-A i-e Objective Resolution and Article 37(d) of the Constitution guarantees right of access to justice in terms of inexpensive expeditious disposal of cases. According to Article 37(d) the state shall: "ensure inexpensive and expeditious justice".

2.3 ACCESS TO JUSTICE PROGRAM IN PAKISTAN

Judicial and legal reforms are intrinsic to the progress and development of a country.⁵² In order to execute suggestions, made previously in almost all the reports of legal reform commissions and committees and to bring good governance and rule of law in Pakistan, the Ministry of Law, Justice, and Human Rights (MOL) invited the ADB to assist in reforming the judicial sector in Pakistan. The ADB responded positively and approved six advisory TAs of worth \$6.8 million. These TAs supported work preparatory to the loan and its utilization / implementation.⁵³

Initially, a small-scale TA was provided in 1997 as a justice reform assistance to strengthen the Government Legal Services and Subordinate Judiciary. After six months of first TA a larger advisory TA was granted for a Legal and Judicial Reform Project.

⁵¹ *Imran Masood Vs. The State*, PCrLJ 2015, 259.

⁵² David M. Trubek and Alvaro Santos(Ed.), *The New Law and Economic Development: A Critical Appraisal*, (UK: Cambridge University Press, 2006) 275.

⁵³ ADB, Independent Evaluation Department, "Special Evaluation Study on ADB Technical Assistance for Justice Reform in Developing Member Countries" Reference Number: SES: REG 2009-06, 2009, 8.

In the year 1999, when the military government announced its seven policy priorities including access to justice and decentralization, ADB got a chance to develop a comprehensive judicial reform program for a country by utilizing its results achieved in earlier TA's.⁵⁴

In the year 1999, in order to secure better results from the judicial reform program, ADB was requested to provide advisory TA first for strengthening the institutional capacity of justice sector of the country. Later on, in the year 2000, upon the reports prepared under the TAs program, the Government of Pakistan and ADB designed a comprehensive reform program for the justice sector of the country.⁵⁵

After the completion of Technical Assistance (TA's) projects, Government of Pakistan (GOP) and ADB signed the Loan Agreement for Access to Justice Program (AJP) on 20 December, 2001.⁵⁶ The AJP included two policy loans. One is from ADB's ordinary capital resources (OCR) for the equivalent of \$243.2 million and the other is from the Asian Development Fund (ADF) for the equivalent of \$86.8 million, a technical assistance (TA) loan for the equivalent of \$20 million from the ADF for Institutional Development for Access to Justice, and a TA grant of \$900,000.⁵⁷ Total outlay of the loan was \$350 million and it was considered as the first ever intervention in the justice sector by any donor in Pakistan.⁵⁸ The program was largest legal and judicial reform program ever by Asian

⁵⁴Ibid, 12.

⁵⁵ Asian Development Bank (ADB), "Proposed Technical Assistance to the Islamic Republic of Pakistan for Strengthening of Institutional Capacity for Judicial and Legal Reform", TAR: PAK 3202, (September 1999), 1.

⁵⁶ Paras Shah, 8.

⁵⁷ Asian Development Bank (ADB), "Completion Report, Pakistan: Access to Justice Program", (December 2009), 10.

⁵⁸ Paras Shah, 8.

Development Bank.⁵⁹ The Access to Justice Program was initially approved for the time period of three years from December 2001 to December 2004⁶⁰ but remained in field till July 2009.⁶¹ Overall, the AJP was rated as partly successful. Its categorization was based on/ evaluated on the ground of three heads, firstly, judicial reforms, which were rated as successful, secondly, police reforms, which were rated as partly successful and finally, Institutional Capacity Building through TA Loan, which disappointed very much and rated as unsuccessful because less than 17% of the loan was utilized despite significant needs for capacity building and a 3-year extension of this loan.⁶²

2.4 OBSTACLES TO EFFECTIVE ENFORCEMENT OF RIGHT OF ACCESS TO JUSTICE - HIGHLIGHTED BY ASIAN DEVELOPMENT BANK

In order to explore important areas for reforms a diagnostic study of judiciary, administrative justice, prosecution and judicial policy making was conducted under advisory TA for Legal and Judicial Reform Project. Issues like delay in proceedings, expensive/ high cost of litigation, lack of trust on judiciary, absence of system of court management nonexistence of any regulatory authority for judicial sector and lack of any judicial policy were highlighted by the advisory TA⁶³ before provision of financial assistance by ADB. Later on the same were properly addressed through access to justice program financed by ADB as its largest financial support to any country around the globe.

⁵⁹ Geerth H.P.B. Van Der Linden, "Challenges in Law Reform", *Report from the ADB Symposium on Challenges in Implementing Access to Justice Reforms*, (January 26-28, 2005), 12-13, 12.

⁶⁰ ADB, "Report and Recommendation of the President to the Board of Directors on Proposed Loans and Technical Assistance Grant to the Islamic Republic of Pakistan for the Access to Justice Program", (November 2001), iii.

⁶¹ Asian Development Bank (ADB), "Completion Report, Pakistan: Access to Justice Program", (December 2009), ii.

⁶² Ibid, 17.

⁶³ Ibid, 12.

Underhand are discussed these obstacles highlighted by ADB in provision of right of access to justice in Pakistan.

2.4.1 WEAK GOVERNANCE AND ADMINISTRATION

According to ADB, to develop legal and judicial policy, the judicial administration in Pakistan is lacking any centralized coordinating body. Similarly, system of statistics collection and analysis do not exists in the Country. Consequently, judicial system of Pakistan lacks any concept of performance evaluation and recommendation of reforms.⁶⁴

2.4.2 LACK OF PROFESSIONAL MANAGEMENT

ADB highlighted that modern management systems and techniques of administration of justice has not been utilized by the judicial system of Pakistan. There is no concept of professional managers in the courts to handle budgeting etc. Similarly, use of technology, techniques of case flow management and court management procedures are unknown to the judicial system of Pakistan. System of record- keeping is also deficient and defunct that impede the efficiency of courts, resultantly, in delivery of justice.⁶⁵

2.4.3 LACK OF CLIENT FOCUS.

ADB pointed out that in judicial system of Pakistan, litigants and clients were always ignored. There basic needs and requirements were never viewed as important. They always face difficulty towards access to information about the litigation pending adjudication before the courts. No adequate steps were taken to improve the necessities to the clients like public waiting areas, facilities for women, public toilets, provision of drinking water

⁶⁴ Asian Development Bank (ADB), "Proposed Technical Assistance to the Islamic Republic of Pakistan for Strengthening of Institutional Capacity for Judicial and Legal Reform", TAR: PAK 3202, (September 1999), 3.

⁶⁵ Ibid.

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for them etc. There seems insensitivity to the needs of the public in our system of administration of justice.⁶⁶

2.4.4 LACK OF BUDGET RESOURCES

In terms of financial independence, judicial sector never remained self-sufficient and have continuously suffered on account of shortage of funds. Its chronic under-funded condition impaired quality of judicial services rendered by this sector. Allocation of funds for judiciary in annual budget remained negligible to the extent that not even 1% of Federal/Provincial budget is allocated for this third pillar of the State.⁶⁷ According to ADB Pakistan is spending one of the lowest expenditure on administration of justice. Since 1993/94, the annual budget for the administration and delivery of justice has been reduced in real terms.⁶⁸

2.4.5 ISSUE OF BACKLOG AND DELAYS

One of the major causes of inefficient working of judicial administration is aggravation of two basic issues also called as 'twin problems'. These are problem of "backlog" and "delays".⁶⁹ These issues are so intrinsic to the judicial mal-administration of Pakistan that even removal of all other obstacles could not facilitate until these basic issues may not be resolved. Similarly, by addressing these two issues expeditious dispensation of

⁶⁶ Ibid, 3.

⁶⁷ Pakistan, National Judicial Policy 2009, 6.

⁶⁸ Asian Development Bank (ADB), "Proposed Technical Assistance to the Islamic Republic of Pakistan for Strengthening of Institutional Capacity for Judicial and Legal Reform", TAR: PAK 3202, (September 1999), 3.

⁶⁹ Pakistan, National Judicial Policy 2009, 2.

justice can automatically be achieved.⁷⁰ Due to this monstrous backlog chronic delays of five, ten, even twenty years can be seen at all level of judiciary.⁷¹

2.5 EFFECTS OF ACCESS TO JUSTICE PROGRAM ON THE JUDICIAL SYSTEM OF PAKISTAN

In order to provide equal protection of law to all and to strengthen the trust/ confidence of people on institutions like judiciary, the AJP was initiated to assist the Government of Pakistan in improving the system of access to justice.

The AJP contributed to this aim by supporting five interrelated governance objectives that includes provision of legal basis for judicial reforms, improving the efficiency in judicial services, supporting accessibility of the vulnerable segment of the society, improving fiscal and human resource allocation along with enhanced transparency and accountability in the performance of judiciary. Whereas, widest scope of AJP is consisting upon three performance based outcomes that are policy and legal provisions, institutional performance, and budget/expenditure management.⁷²

AJP was not devised for improvement in Judicial Sector merely; but overall improvement in the provision of fundamental human rights in the country. The focus of the thesis is to disentangle the notions of judicial sector reforms and their outcomes towards the society as general and poor-vulnerable segment of the society in special. The predominant approach of the program is management-oriented.

⁷⁰ Pakistan, National Judicial Policy 2009, 6.

⁷¹ Paras Shah, 8.

⁷² Asian Development Bank (ADB), "Reports and Recommendation of the President to the Board of Directors on Proposed Loans and Technical Assistance Grant to the Islamic Republic of Pakistan for the Access to Justice Program", iv (November 2001).

In order to improve the judicial administration, some of the key features of AJP are focus on removal of backlog of cases, introduction of case flow management techniques, increase in remuneration of judges, provision of better enabling environment for judges, provision of facilities to the litigants and induction of more female judges.⁷³

2.6 INITIATIVES TAKEN BY ACCESS TO JUSTICE PROGRAM IN PAKISTAN

After the completion of project of access to justice program in Pakistan, ADB published its completion report in December 2009 by the title of "Pakistan: Access to Justice Program". Through this report ADB presented complete project details, allocation of funds, its utilization and complete list of activities undertaken by AJP during its implementation phase. These activities have been described by ADB as their achievements. Following is presented some of major activities of ADB for the provision and preservation of access to justice in Pakistan.

2.6.1 INFRASTRUCTURE DEVELOPMENT:

A sum of Rs.3459 million was utilized for renovation and construction of 110 Court Rooms and 81 residences for judges in various districts of Khyber Pakhtunkhwa. In order to improve the working conditions of the lower judiciary more than 150 litigant sheds, Bakhshi Khanas and lavatories in various districts as public facilities for litigants and general public were constructed. Construction of six judicial Complexes and two bar rooms was also part of infrastructure improvement efforts being undertaken under the Program.

⁷³ Sadiq khan, Vol. 11, 2-5.

The land for the judicial complexes in Hazara, Malakand, Southern Region and Haripur was acquired with the expenditure of Rs.64 million.

Whereas, in Baluchistan a sum of Rs 1,008 million were released by AJP for works on uplift schemes in the province. In judiciary, total 18 schemes with an estimated cost of Rs 258 million were carried out. Moreover, 35 court rooms and buildings, 27 residences for judicial officers, 16 litigant sheds with amenities, a judicial complex and a bar room were constructed and money was spent on the purchase of land for these works.

Similarly, Punjab was extended Rs. 6132 million under AJP and around 342 schemes were carried out with this amount. As part of this plan, 178 Court rooms and buildings, 329 residences for judicial officers, 52 buildings with amenities for litigants, 21 judicial complexes, 2 bar rooms, land acquisition at 8 places and 8 projects for raising the capacity of departments with information technology equipment were installed. The Law Department Punjab also utilized Rs.94 million on various infrastructure schemes in the province. The Home department in the province also spent Rs.13 million on the centralized automated record management on child protection & data base for prisoners, crime situation, law and order.

2.6.2 PROCUREMENT OF COMPUTERS

AJP procured 1461 computers for courts throughout the country for the automation of judiciary throughout Pakistan. Out of this lot, 600 computers were distributed in all the courts in Punjab whereas 317 machines were installed in courts in Sind. Similarly the share of KPK and Baluchistan for these digital equipments was 207 and 82 respectively. The computers were also given to 67 Bar Associations around the country to equip Bars technologically.

2.6.3 PUBLIC AWARENESS

AJP spend millions of rupees on publishing a varied range of simplified material on legal matters. The 227 booklets printed were meant for dissemination among the public and users of justice sector. The documents focused on themes of legal education and empowerment of the common people covering topics relevant to justice sector problems faced by the public in day to day life. AJP also published and disseminated 25 guidelines for the people on issues such as; how to acquire a National I D Card; how to register an FIR; how to register complaint against highhandedness of police officials; laws about consumer rights; legal cover for the rights of bonded labor and the like. These booklets were written in Urdu and effort was made to reach out to the common people and impart the legal information through simplified messages. The material was disseminated at large scale through District Councils, Tehsil Councils, Union Councils, libraries and Public Information Kiosks established at District Courts.

2.6.4 CONSUMER COURTS

Eight Consumers Courts were established in Punjab that was headed by District and Session Judges. The concept of setting up consumer courts was to discourage the sub-standard articles of daily use and defective services to the masses.

2.6.5 ACCESS TO INFORMATION

AJP understood that citizen's inability to acquire timely and accurate information hinders their claim to fundamental entitlements. AJP launched a nationwide public campaign on right to freedom of information. This campaign aimed at educating public to use their right to obtain information held by the public authorities. AJP's constant advocacy and lobbying

with provincial governments and holding of activities with concerned stakeholders moved the provincial governments to enact Freedom of Information law.

Five capacity building workshops – one in Islamabad and four in provinces were held. To further strengthen institutional mechanism computers were provided to the courts along with designing and installation of information management system to facilitate litigants' as well legal community to take information about exact status of their cases.

2.6.6 CAPACITY BUILDING

Capacity building has been the most misleading aspect of project implementation. It is worth mentioning that Rs.77 million were spent in Khyber Pakhtunkhwa Province for the capacity building of staff in courts of Additional and Session Judges and Rs.58 million were earmarked for the up-gradation and improvement of Civil Courts in the Province. Under these schemes, around 57 Additional Session Judges, 50 Civil Judges and more than 1242 sub-ordinate staff was recruited. These courts have also been provided with computers and other necessities to run the day to day affairs effectively.

2.7 ROLE OF ASIAN DEVELOPMENT BANK IN ACCESS TO JUSTICE PROGRAM IN PAKISTAN

ADB played great role through AJP in the judicial sector of Pakistan. It focused on enactment of new laws and created or reformed organizations that empower citizens to assert their rights. As a result of its efforts another important human right, namely, right to know/ right to be informed, has been provided to the citizens of Pakistan by adding in constitution of Pakistan 1973. It strengthened ombudsman laws in Pakistan which streamlined processes to better enable citizens to obtain redress against government maladministration. It also provided a reformed contempt of court law which allows greater

freedom of expression. Provision of consumer protection laws empowered citizens in the market place. ADB also played a great role in enhancing the capacity of judges, lawyers, and government servants who deal with the public.⁷⁴

All the abrogated Constitutions of Pakistan contained the provisions guaranteeing right of access to justice in one form or the other. Constitution of 1973 also protects this right under numerous Articles but practically, provision and preservation of the same was made executable by AJP financed by ADB. Through its largest legal and judicial reform program known as access to justice program, ADB contributed in judicial system of Pakistan. The AJP strengthened the system of justice by providing justice to weak and vulnerable segments of the society at their doorsteps.⁷⁵

⁷⁴ *Focus Asien: A Handbook on the Asian Development Bank: The ADB and its Operations in Asia and the Pacific Region*, ed. Dorothy Guerrero (Asienstiftung/ Asienhaus, 2003) 47.

⁷⁵ Justice Ejaz Afzal Khan, "Workshop on Access to Justice Development Fund," *All Pakistan Legal Decisions* (2010): 94-98, 94.

Chapter Three

NATIONAL JUDICIAL POLICY – A CRITICAL ANALYSIS

In order to provide a forum for systematic development and reform of laws in Pakistan, Mr. General Zia-Ul-Haq, the then President of Pakistan, through an Ordinance No. XIV of 1979 established “Law and Justice Commission of Pakistan” (LJC).⁷⁶ Whereas, through Ordinance No.1, XXI of 2002,⁷⁷ the former President of Pakistan Mr. General Pervaiz Musharraf, established “National Judicial (Policy Making) Committee” (NJPMC), the same provided first ever national judicial policy to the judicial sector of Pakistan⁷⁸.

Section 3 of The National Judicial (Policy Making) Committee Ordinance, 2002 provides for establishment of National Judicial Policy Making Committee. According to the said Ordinance the Chief Justice of Pakistan is to be the Chairman of the Committee whereas, the Chief Justice Federal Shari’ at Court and Chief Justices of four Provincial High Courts are to be its members. The Secretary, Law and Justice Commission of Pakistan is designated as the Secretary to the Committee. The Secretariat of the Commission is to provide secretarial advices to the Committee.⁷⁹

Functions of the Committee are enunciated under Article 5 of the Ordinance 2002. The Committee is endowed to improve the administration of justice in terms of capacity and performance. The Committee has been given task of capacity building of judiciary

⁷⁶ Ordinance No. XIV of 1979, “Ordinance to Establish a Law and Justice Commission of Pakistan”.

⁷⁷ Ordinance No. LXXI of 2002, “National Judicial (Policy Making) Committee Ordinance”.

⁷⁸ Osama Siddique, Pakistan’s Experience with Formal law: An Alien Justice (UK: Cambridge University Press, 2013), 344.

⁷⁹ Section 3, NJPMC Ordinance No. LXXI of 2002

by providing better conditions of service to judicial officers and staff. Whereas, by introducing a set of performance standards for judges and staff there is an attempt to create a check on their performance. The Committee is also responsible for publication of yearly books, annual or periodic reports of Apex Court along with all other judicial or administrative forums.

3.1 OBJECTIVES OF NATIONAL JUDICIAL POLICY

National Judicial Policy is the outcome of the unflinching efforts of National Judicial Policy Making Committee (NJPMC) with the object of coordinating and harmonizing the said policy within the court system and implementation of the same in collaboration with the Law & Justice Commission of Pakistan.⁸⁰ Although the first ever judicial policy making committee was inaugurated in the year 2002, through an Ordinance but till the year 2009 no positive steps for achieving the objectives could be undertaken by the committee.

The year of 2009 in Pakistan was celebrated as the year of Justice to be brought at the Grass root Level.⁸¹ In May 2009 meetings of the NJPMC were convened in order to provide the detail layout and the strategies of the Law & Justice Commission of Pakistan regarding First National Judicial Policy of Pakistan which took its effect from June 2009.

The main objectives of the National Judicial Policy are to ensure the judicial independence by way of its separation from the executive, eradication of corruption from the judiciary and expeditious disposal of cases. In the Policy, high goals were set with the intention to initially reduce, and ultimately eliminate, backlog at all the level of courts, and further, to fix time frame for disposal of civil and criminal cases. Writs for protection of

⁸⁰ Section 4, NJPMC, Ordinance No. LXXI of 2002.

⁸¹ Pakistan, National Judicial Policy 2009, 3.

fundamental rights i.e. right to life, liberty, fair trial, equality, property and freedom of thought, conscience, association, etc. were also given priority/ due regard. Whereas, financial/rent matters and family/juveniles cases were also given preference.⁸² Main features of National Judicial Policy, 2009 are elaborated below.

3.1.1 INDEPENDENCE OF JUDICIARY

Principle of Independence of judiciary has been accepted in almost all the instruments ensuring human rights. UDHR, ICCPR, UN Basic Principles on the Independence of the Judiciary 1985, The Council of Europe's Recommendation on the Independence of Judges 1994, the African Commission on Human and People's Rights 1981, the Beijing Principles 1995 and The Universal Charter of the Judge 1999, all primarily recommend the independence of judiciary as an indispensable condition towards the provision of justice.⁸³

In Constitutional Government's regime the role of judiciary is to interpret and apply the law. Similarly, to adjudicate upon the controversies between citizen and State, citizen and citizen and Federating units and the protection of the Federation is responsibility of the judiciary. In order to discharge its responsibility judicial independence is integral. Only an independent judiciary can manage the administration of justice of the highest quality.⁸⁴

The concept of independence of judiciary is not confined to expeditious disposal of cases and discharging of judicial functions by the judges rather efficient, neutral and impartial functioning of institutions from executive and legislature.⁸⁵

⁸² Pakistan, National Judicial Policy 2009, 3.

⁸³ International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: A Practitioners' Guide*, (ICJ, 2009), 28, ISBN 978-92-9037-118-8.

⁸⁴ Justice Rana Bhagwandas, "Independence of judiciary", (Paper, International Judicial Conference, Supreme Court of Pakistan, November 09, 2004).

⁸⁵ *Accountant General, Sindh v. Ahmed Ali U. Qureshi*, PLD 2008, S.C 522.

other important requirements also without which this independence is imaginary. In our Constitution on one side, the Constitution of Pakistan envisages trichotomy of State power on the other, it makes the judiciary subservient to the Executive. It empowers the Executive to make appointments in judiciary, including the Chief Justice of Pakistan. Similarly, Appointment of Judges of subordinate Courts is at the hands of Provincial Executive. Meaning thereby, our judicial system can never achieve true independence until constitutional flaws be removed. Judiciary, which is considered to be third pillar of the state was neither given administrative independence (in case of appointments) nor provided with financial independence, both of which are pre-requisite of independence for any institution.

Second point, taken up in judicial policy is the issue of misconduct which is also taken up in narrow sense. The term "misconduct" is to be elaborated in terms of "Judicial Misconduct" or "Judicial Negligence" in order to make it distinct from the term "Misconduct" provided under the Constitution of Pakistan. Any act of the judge in vires of law should be termed as judicial misconduct and he should be held accountable for the same.

Third point, considered in judicial policy is Eradication of corruption. All the focus of the policy in eradication of corruption is on subordinate judiciary. There is no doubt that in order to eradicate the corruption evil should be nip from the bud and subordinate judiciary is the only institution at the vast access of the litigants, where cases originates and maximum time of the litigation is made but the same position of subordinate judiciary never vindicate the other tires of judiciary from accountability. Corruption in judiciary has

fundamental rights i.e. right to life, liberty, fair trial, equality, property and freedom of thought, conscience, association, etc. were also given priority/ due regard. Whereas, financial/rent matters and family/juveniles cases were also given preference.⁸² Main features of National Judicial Policy, 2009 are elaborated below.

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⁸² Pakistan, National Judicial Policy 2009, 3.

⁸³ International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: A Practitioners' Guide*, (ICJ, 2009), 28, ISBN 978-92-9037-118-8.

⁸⁴ Justice Rana Bhagwandas, "Independence of judiciary", (Paper, International Judicial Conference, Supreme Court of Pakistan, November 09, 2004).

⁸⁵ *Accountant General, Sindh v. Ahmed Ali U. Qureshi*, PLD 2008, S.C 522.

Independence of judiciary is a cardinal feature of Constitution of Pakistan 1973 but all rights and liberties may look like ornamental pieces in the Constitution if these are not enforced in its true letter & spirit by the Courts. In Pakistan, this third pillar of the State is neither financially independent⁸⁶ nor in the sense of its appointments which is totally at the hands of the Executive and makes it subservient to the Executive.⁸⁷

According to Supreme Court of Pakistan “independent judiciary represents the difference between civilization and savagery”.⁸⁸ As effective access to justice in absence of an independent and vibrant judiciary would be mere illusion.⁸⁹ Therefore, the judicial policy 2009, targeted the internal independence of judiciary from Executive.

The judicial policy 2009, disallowed any future appointment of judges as acting Governor of a Province. Similarly, the deputations of judges against executive posts in Federal and Provincial Government Departments was also banned. Policy also suggested repatriation of judges currently working on executive posts. It places all special courts/tribunals under the control and supervision of the judiciary from the Executive including their appointments/postings but to the extent of recommendation of the Chief Justice of concerned High Court and not on the only decision of Judiciary. Similarly it banned involvement of judiciary in the conduct of elections, as it distracts the judicial officers from judicial commitments and complaints of corrupt practices tarnish the image of judiciary.

⁸⁶ *Accountant General, Sindh v. Ahmed Ali U. Qureshi*, PLD 2008, S.C 541.

⁸⁷ Justice S.A. Rabbani, “National Judicial Policy, 2009, Some Suggestions,” *All Pakistan Law Decisions*, (2009): 152- 157.

⁸⁸ *State Vs Tariq Aziz MNA and 6 others*. SCMR 2000, 751, 752.

⁸⁹ *Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan*, PLD 2010 S.C 61.

3.1.2 MISCONDUCT

Article 209(5)(b) Constitution of Pakistan 1973, provides for the forum and procedure for the removal of judges of the superior courts on the ground of misconduct. The Supreme Judicial Council, consisting of the senior judges of the Supreme Court and High Courts, on its own or on a reference made by the President, after inquiring the matter, may recommend the removal of a Judge. Thus, the Constitution on the one hand ensures the freedom, independence and impartiality of the judiciary⁹⁰ and on the contrary provides for a complete mechanism for eradication of corruption or corrupt practices from judicial sector of the country.

For implementation of Article 209 of the Constitution and to regulate all inquiries required to be undertaken and all other ancillary matters which need to be addressed there under, “The Supreme Judicial Council Procedure of Enquiry 2005”⁹¹ was announced. Section 3(1) of the procedure defines the meaning of misconduct liable to be prosecuted. According to section 3(1) of the procedure conduct of any judge that is improper being judge or inconsistent with the Code of Conduct provided under Article 209(8) of the Constitution of Pakistan 1973 or showing him inefficient or ceasing him to be efficient will be termed as misconduct on the part of that judge.

Presently in Pakistan, judges of the superior judiciary are observing “Code of Conduct for Judges of the Supreme Court and High Courts” framed by the Supreme Judicial Council

⁹⁰ Dr. Faqir Hussain, *The Judicial System of Pakistan*, (Islamabad: Supreme Court of Pakistan, 2011), 10.

⁹¹ The Supreme Judicial Council Procedure of Inquiry, 2005.

under Article 128(4) of 1962 Constitution of Pakistan and frequently amended under Article 209 (8) of the Constitution of Islamic Republic of Pakistan 1973.⁹²

Whereas, subordinate judiciary observers Judicial Estacode,⁹³ framed firstly by Peshawar High Court in 2006 and whose final edition was launched in 2011. Lahore High Court adopted the same, whereas, Sindh and Baluchistan were suggested under the Judicial Policy 2009, to adopt the same.

Judicial policy 2009, discussed the problem of judicial misconduct only to the extent of expeditious disposal of cases and placed rest of the burden on the Chief Justices of concerned High Courts and Supreme Judicial Council, to adopt the process already prescribed under Article 209 of the Constitution of Pakistan 1973. Similarly, nothing is categorically mentioned about the subordinate judiciary corrupt practices, misconduct and appointment issues.

The Judicial Policy 2009 transpires that backlog of cases on the part of a particular judge has also been added under the head of "Misconduct" but judicial misconduct is not made equivalent to judicial accountability.

3.1.3 ERADICATION OF CORRUPTION

Systemic corruption within the justice system is commonly defined as the use of public authority for personal gain that results in an improper delivery of judicial services and legal protection for citizens.⁹⁴

⁹² Supreme Judicial Council and Judicial Commission of Pakistan, Annual Report 2010-11, 222- 225, 222

⁹³ Judicial Estacode, second Edition 2011.

⁹⁴ Mary Noel Pepys, *Corruption and the Justice Sector* (Washington: Management Systems International, 2003) 2.

Some of the possible causes of corruption in judiciary include, low remuneration and the administrative responsibilities of judges, unbridled discretionary powers granted to them; and ineffective monitoring of the execution of those powers. Moreover, a non-transparent database system without its regular updating adds to the causes of corruption in legal system.

The indicators of such corruption are delay on the part of court in execution of its own orders, unjustifiable granting and rejection of bails, non-presentation of prisoners for hearing, abnormal disparities in sentencing, stereo type judgments, prolonged service of a judge on a particular position or station and inclination of judgments in favour of the executive.⁹⁵

Judicial policy of Pakistan 2009, neither discussed the existing/ prevailing position of corrupt practices in judicial sector of Pakistan nor taken the judiciary as a whole rather bifurcated the judicial system of Pakistan in superior and subordinate judiciary. All the instructions provided under the policy address the subordinate judiciary that transpires an image that in Pakistan all the corruption is done at lower level and superior judiciary is clean from all these evils.

The judicial policy 2009, has introduced identical code of conduct for subordinate judiciary of all the provinces. A "Cell for Eradication of Corruption from Judiciary" has also been introduced in all the High Courts of the Country. The cell will work under the supervision of Chief Justice of each High Court through the office of Registrar. An office of MIT's has also been maintained by every High Court to examine the judgments of judicial officers, to make surprise inspections and to highlight the incidents of corruption,

⁹⁵ Petter Langseth, and Oliver Stolpe, "Strengthening Judicial Integrity Against Corruption" (Paper, Global Program Against Corruption, Vienna, December 20, 2000).

biases and improper conduct of judges. Some other administrative measures like posting of judges on other stations than their home town, making them OSDs during disciplinary proceedings against their person are also provided under the policy.

The MIT's are not only made to handle the cases of judicial corruption of judges and court staff but corrupt practices of Naib Courts and other prosecution staff also comes under their jurisdiction. Similarly, complaints of corrupt practices and professional misconduct against the Bar are also addressed in MITs. Policy also suggests incentives for those judicial officers, working hard with honesty, due diligence and efficiency.

3.1.4 EXPEDITIOUS DISPOSAL OF CASES

Provision of inexpensive and expeditious justice is responsibility of the state which is clearly mentioned in Article 37 (d) of the Constitution of Pakistan 1973. It follows that State is constitutionally required to establish and maintain a judicial system that can be accessed speedily and that is monetarily affordable by the aggrieved for redressal in cases of violation of this mandate.⁹⁶

The phenomenon of backlog of cases and delay in dispensation of justice is historical and universal.⁹⁷ The position has become alarming in Pakistan regarding this dual dilemma. National Judicial policy 2009, addressed this issue effectively and made an attempt to curtail delay in various categories of cases by specifying period for disposal of cases of each category.

In bailable cases, strict time frame has been provided to follow by the courts. Late submission of challan, which was termed as one of the major reasons of delay in criminal

⁹⁶ Nasir Aslam Zahid, "The Role of Judiciary in Protecting the Rights of the People- Judicial Activism", (Paper, International Judicial Conference, Supreme Court of Pakistan, November 9, 2004),1.

⁹⁷ Ibid, 3.

cases by all the commissions and committees in their reports, is strictly required to be submitted within a period of 14 days as per mandatory provision of section 173 Cr.P.C. Whereas, in case of non-completion of investigation, an interim report is required to be submitted. Similarly time of remand granted by the court is also reduced to maximum 15 days period.

Time frame has also been fixed for criminal cases to be adjudicated per severity of their punishments. Issue of production of prisoners before courts is also addressed. Judicial policy also introduced the concept of provision of legal aid through Legal Aid Committees of the Provincial Bar Councils and Pakistan Bar Council in order to avoid the delay caused by non-representation of accused through his Counsel. To curtail the culture of false and frivolous litigations, the courts are given discretion to take penal action against the party initiating the proceedings.

Policy also suggested for extension of benefits of Probation of Offender Ordinance 1960 and Good Conduct Prisoners Probation Release Act 1926 to the prisoners. Similarly, constitution of special benches, as per the need of the hour, has also been recommended by the judicial policy in order to clear the backlog under different categories.

Time frame has also been specified even in civil matters. According to policy, Writ petitions are to be decided within 60 days whereas, stay matters under Order 39 rule 1&2 are to be dealt within 15 days. For rent cases period is fixed as 4 months, for Appeals, Writ Petitions and other miscellaneous petitions pertaining to rent matters 60 days whereas, Revision petitions under CPC arising out of interlocutory orders are to be dealt within 3 months.

For Family cases time period is given as within 3-6 months, whereas, appeals arising out of family cases, custody of minors, guardianship cases, succession and insolvency cases are to be dealt within 30 days. Banking, tax, duty, levy and cess cases are to be decided within 6 months. Review applications within 30 days and the trial of cases instituted after 1st January 2009 should be completed within 6 months. Negotiable Instrument cases which are decided through summary procedure as provided under Order XXXVII of the Code of Civil Procedure 1908 should be decided in 90 days.

In order to curtail the backlog, Jurisdiction of ADR is recommended to be invoked under The Small Claims and Minor Offences Courts Ordinance 2002. Case flow management techniques were also suggested to be adopted at High Court and Supreme Court level. Imposition of heavy fines and penalties for initiating false and fabricated litigation, bifurcation of civil and criminal functions of the courts and issuance of cause list in advance are also highly recommended suggestions of the policy.

Corrupt system of process serving has also been addressed by the policy. The policy suggested to adopt all the prevailing new techniques of service of summons. It is recommended that adherence of latest technology in courts like Computers, networking and Video Conferencing facility between the courts and jails should be used for early disposal of cases.

3.2 LEGAL ANALYSIS OF NATIONAL JUDICIAL POLICY

After the introduction of National Judicial Policy, NJPMC organized initially National Judicial Conferences and later on International Judicial Conferences on annual basis. The aim of organizing these conferences was to provide a forum for interaction of all the stake

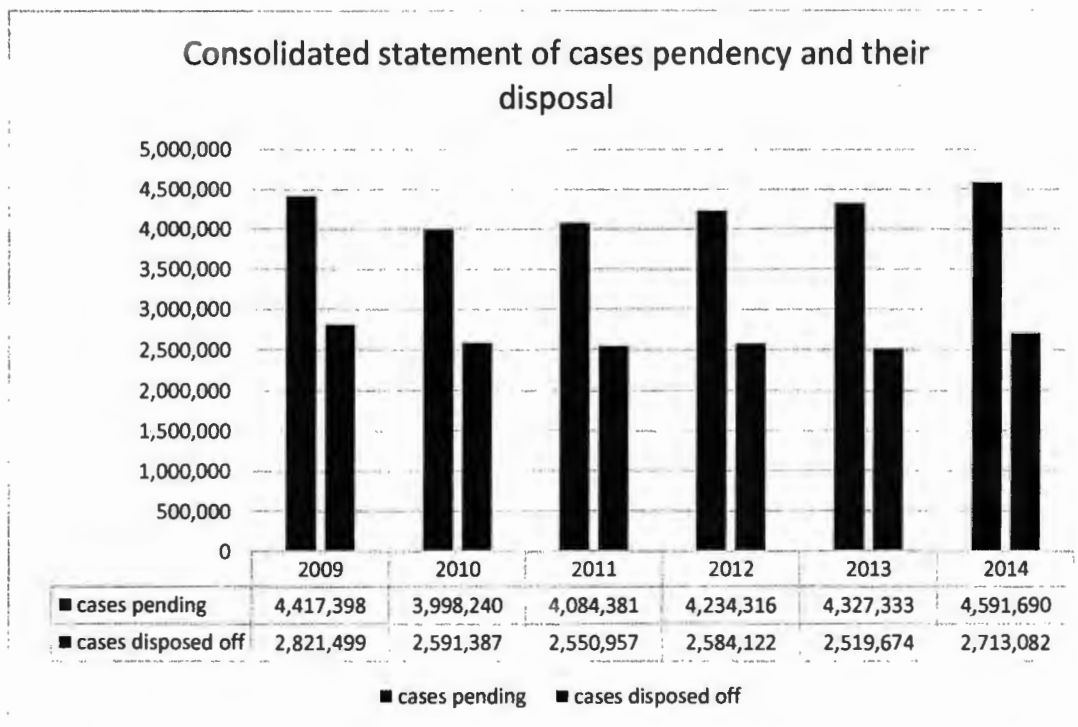
holders of the judiciary. Through these annual conferences, the NJPMC not only tried to achieve its mandate of coordination and harmonization of judicial policy within the country but also provided a platform to formulate appropriate reforms for implementation of policy and improving the system of judicial administration in Pakistan. Now, after 6-years of introduction of National Judicial Policy of Pakistan it is high time to analyze the outcomes of the Policy upon the judicial system of Pakistan and fruits it bears for the people of Pakistan.

3.2.1 EFFECTS ON PENDENCY OF CASES:

Major focus of the policy implementation seems to be on the expeditious disposal and other things revolving around. In order to elaborate the effect of access to justice program and national judicial policy over the huge backlog of cases, statistics has been collected from Law and Justice Commission of Pakistan from the year 2009 to the year 2014. These statistics are presented below through graphical presentation. The same is to analyze the outcomes of six years of implementation of the judicial policy on the crucial issue of backlog of cases.

The diagram below is going to present the pendency of cases from the year 2009 i-e the year from where national judicial policy was initiated till the year 2014. The diagram also presents disposal of the cases on yearly basis in order to have an idea about the ratio of pendency and disposal per year. A more detailed data regarding the cases pending and their disposal before all the district courts, high courts and Supreme Court has also been attached through Annexures at the end of the chapter. Annexure A, A/1 to A/5 are presenting six year data regarding pendency of cases. The tables are presenting number of cases pending during the year, institution of fresh cases of the year, disposal and the

backlog. Whereas, Annexure A/6 is a consolidated statement of all the six years data on the issue. The consolidated statement is presenting pendency of cases during the year, fresh institution and disposal of cases in millions. The same consolidated statement also presents disposal of cases in percentage in order to provide an easy understanding of the data. The percentage disposal of consolidated statement helps to conclude that the implementation of national judicial policy could not bring results more than 64% that was also in the year 2010. Meaning thereby, success rate of national judicial policy remains 64% for these six years, in terms of clearance of backlog of cases.

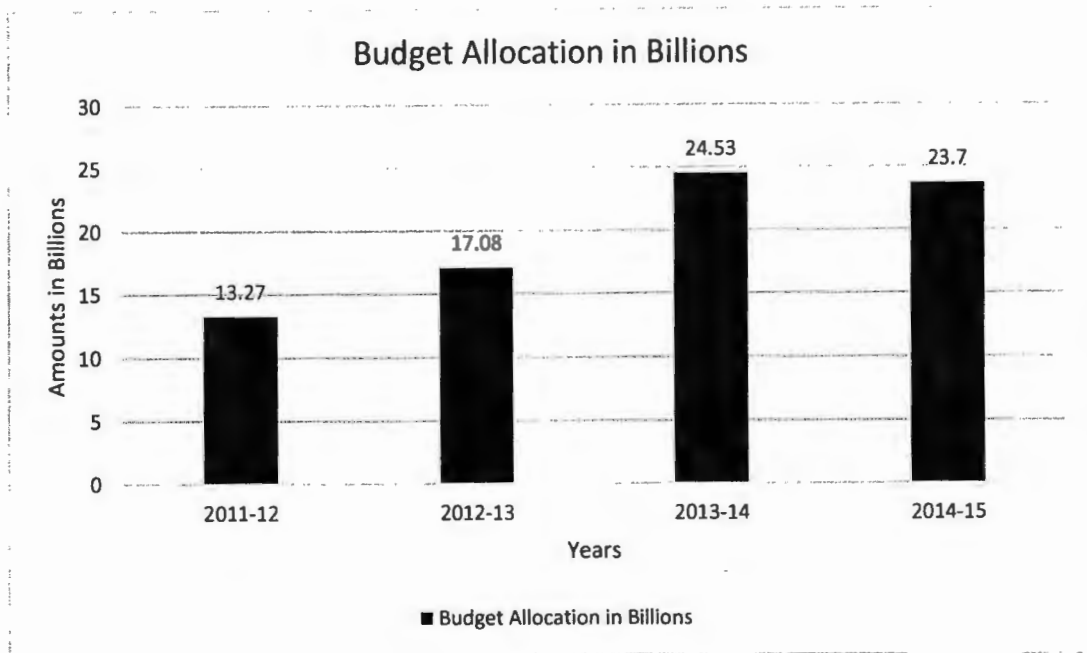


3.2.2 EFFECTS ON JUDICIAL INDEPENDENCE:

The term judicial independence has been defined in terms of financial independence of judiciary, appointments of judges at the hands of Executives, involvement of judiciary in conducting the elections, appointment of judges as acting governors, deputation of judges against executive posts and repatriation of judges from their current executive posts.

The statistics gathered by the Law and Justice Commission of Pakistan under the head of judicial independence are in terms of finances / budget allocation to the judiciary only. The same presents only an overview of judicial independence in terms of financial independence. All other factors pointed out in judicial policy are not available in terms of statistics. Therefore, the data presented in the form of graph below is presenting budget allocation to this institution. A more detailed statistics have been presented through Annexure - B at the end of the chapter in a tabulated form. Annexure –B presents budget allocation to all the tiers of judiciary since 2011- 2015. The same is then presented in billions. Budget allocation for the year 2009 to 2011 were not published/ revealed by the NJPMC, Law and Justice Commission of Pakistan in their yearly publications/ reports by the name of “Judicial Statistics of Pakistan 2009” and “Judicial Statistics of Pakistan 2010”.

The below graphical presentation helps to conclude that overall budget allocation to the judicial sector has been increased but still the same is insufficient in terms of financial independence of judiciary.

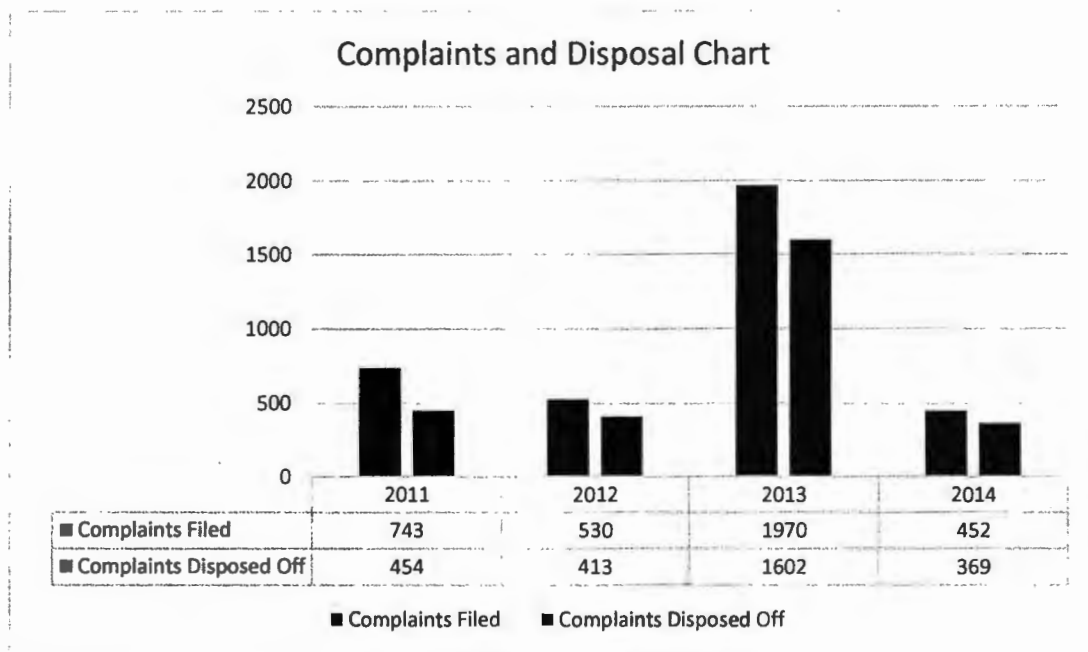


3.2.3 EFFECTS ON ERADICATION OF CORRUPTION:

The judicial policy has provided for “A Cell for Eradication of Corruption from Judiciary”. Policy provides for establishment of “Cell for Eradication of Corruption from Judiciary” in order to entertain the complaints related to the matter. Establishment of MITs is also one of the valuable step in order to guard against the evil of nepotism, favoritism and corrupt means. Under the head of eradication of corruption not only the judges are made accountable but all the judicial staff including the lawyers are made held accountable for their corrupt practices and professional misconduct. Along with accountability suggestions are also made to introduce incentives for all those who work efficiently in order to create an environment of competition. Complaints to the cell and their disposal are statistically provided by the Law and Justice Commission of Pakistan through its annual reports. The data collected under this head has been attached as Annexures after the chapter. Annexure C, C/1 to C/3 presents number of complain and their disposal along with major and minor

punishments awarded in numbers. Whereas, annexure C/4 presents consolidated statement of number of complaints filed and disposed off during the year.

The data presented below through graph is in terms of complaints instituted against the judges and judicial staff and their disposal per year from the year 2011 to 2014.



3.2.4 EFFECTS ON MISCONDUCT:

As National Judicial Policy has elaborated judicial misconduct in terms of expeditious disposal of cases and complaints registered in this regard, therefore, no separate collection of data is collected for this category. Meaning thereby, misconduct on the part of judiciary, to the extent of Judicial Policy, can also be assess from the data previously shown through figures and tables.

3.3 CRITICISM ON THE IMPLEMENTATION OF NATIONAL JUDICIAL POLICY IN PAKISTAN

The right of access to justice to all is guaranteed under numerous Articles of the Constitution of Pakistan 1973, reflected through different expressions like due process of law, financially accessible judicial system, and right of fair trial, access to legal process, equality before law and the right to have an impartial court or tribunal. National Judicial Policy of Pakistan has been promulgated under Access to Justice Program funded by Asian Development Bank to promote and preserve right of access to justice and to streamline the judicial system in the country and make it responsive to the present day requirements of the society.

Soon after the announcement of the Policy, the heads covered under the policy were criticized from different perspectives by the superior judiciary. One of the criticism on the policy was made by Justice S.A Rubbani through his article titled as "National Judicial Policy 2009, Some Suggestions".⁹⁸ According to him like previous efforts of judicial reforms the judicial policy 2009 also lacks practical approach. Issuance of directions to the lower judiciary for early disposal would prove to be denial of justice. Consequently, the cases had to suffer further delay after they were remanded by the Appellate Courts.

First point of the policy is 'independence of judiciary' that has been taken in narrower context i-e in terms of 'separation' only. Separation of judiciary from the executive may be an important step towards independence of the judiciary, but there are

⁹⁸ Justice S.A. Rubbani, "National Judicial Policy, 2009, Some Suggestions," *All Pakistan Law Decisions*, (2009): 152- 157.

other important requirements also without which this independence is imaginary. In our Constitution on one side, the Constitution of Pakistan envisages trichotomy of State power on the other, it makes the judiciary subservient to the Executive. It empowers the Executive to make appointments in judiciary, including the Chief Justice of Pakistan. Similarly, Appointment of Judges of subordinate Courts is at the hands of Provincial Executive. Meaning thereby, our judicial system can never achieve true independence until constitutional flaws be removed. Judiciary, which is considered to be third pillar of the state was neither given administrative independence (in case of appointments) nor provided with financial independence, both of which are pre-requisite of independence for any institution.

Second point, taken up in judicial policy is the issue of misconduct which is also taken up in narrow sense. The term "misconduct" is to be elaborated in terms of "Judicial Misconduct" or "Judicial Negligence" in order to make it distinct from the term "Misconduct" provided under the Constitution of Pakistan. Any act of the judge in vires of law should be termed as judicial misconduct and he should be held accountable for the same.

Third point, considered in judicial policy is Eradication of corruption. All the focus of the policy in eradication of corruption is on subordinate judiciary. There is no doubt that in order to eradicate the corruption evil should be nip from the bud and subordinate judiciary is the only institution at the vast access of the litigants, where cases originates and maximum time of the litigation is made but the same position of subordinate judiciary never vindicate the other tiers of judiciary from accountability. Corruption in judiciary has

more forms than commonly understood. Undue favours to the sibilings of judges of superior courts in the form of their face value and in shape of reliefs to their clients create environment of monopoly.

Next point taken into account is Expeditious Disposal of cases in which short term and long term measures have been taken. Short term measures have been further divided into criminal and civil cases in order to minutely cater the issue of expediting the cases.

Short term measures both for criminal as well as civil cases, given by the policy reveal that the major cause of delay in disposal of cases is non-provision of compulsory time period for disposal. It is important to note here that a lot of cases / laws already contain statutory time period fixed for their disposal which can never be observed due to undue burden of cases on the subordinate judiciary. Therefore, if that statutory time period is made enforceable strictly, a lot of issues would be settled down automatically.

The long term measures listed in the policy do not refer to any specific problem. Some are about prisons. Others are related to provision of funds for infrastructure support along with adequate staff, libraries, computers and enhancement of salaries and allowances of the judicial staff. Similarly, utilization of modern technology and techniques for case flow management, provision of right of access to information and video conferencing facility between courts and jails is also recommended.

Practically, implementation of the National Judicial Policy can be seen in terms "Expeditious Disposal of Cases" only. In the name of efficiency and at the cost of fairness, justice is going to be disappeared from our society. Due to undue pressure for clearance of

backlog of cases, disposal of cases on technical grounds has increased. Similarly, civil cases/ old cases which were ordered to be disposed off within three years are kept in red files in their last year of litigation and during the last months/ near to dead line immense pressure has been applied upon the lawyers to finalize the same which resulted into haste and miscarriage of justice.

Another aspect of the matter is when litigants feel dissatisfied from the decisions of subordinate judiciary either they discontinue further litigation or approach to the superior courts/ higher forums. As a result backlog at higher forums have been increased and ultimate aim of expeditious disposal still remained unaddressed.

No doubt National Judicial Policy 2009, is the first ever comprehensive policy to regulate the judicial system of Pakistan. The policy sets out three major goals of strengthening judicial independence, eradication of corruption and elimination of backlog of cases with the aim of achieving better future impact on good governance, rule of law, economic growth and peace and security in society. NJPMC in Law and Justice Commission of Pakistan is regulatory body monitoring the implementation of the Policy. Whereas, Commission collect's and publish the yearly statistical reports upon the implementation of the policy. Similarly, Commission conducts international judicial conferences on yearly basis and provides a chance to all the stake holders to share their experiences with the current judicial system of the country and also to analyze the outcomes of the judicial policy. During these six years of implementation of policy a lot of major changes can be witnessed in the shape of buildings and structures of the judiciary, especially at district level but continuous efforts are required to change the existing

behaviours of the judges, judicial staff and lawyers. There is need to sensitize all of these stakeholders at the executing end to realize the responsibility at their shoulders.

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSION

Right of access to justice occupies pride of place among all the human rights. It remained protected in international treaties such as UDHR, ICCPR, CAT and UIDHR. Its protection is also featured in regional human rights covenants like European Convention on Human Rights 1950, American Convention on Human Rights 1981 and African Commission on Human and People's Rights 2001. Almost all human rights instruments provide safeguard to this fundamental right under different terms and terminologies.

Pakistan also provided Constitutional protection to right of access to justice. Since independence of Pakistan i-e 1947 various Commissions and Committees, through their recommendations, remained working for preservation of right of access to justice to the people of Pakistan. The table was turned in the year 2001 when, ADB extended its largest loan facility to Pakistan in the shape of AJP. This was first ever intervention in the justice sector by any donor in Pakistan. The efforts brought their results when AJP comprehensively started working in judicial sector of Pakistan and in the year 2009, Pakistan devised its first ever judicial policy to provide a vision and guideline to judicial sector of Pakistan.

During these six years of implementation of national judicial policy 2009, a lot has improved but continuous efforts are still required to achieve that milestone. The statistics collected under the head of "Legal Analysis of National Judicial Policy" in Chapter three of the thesis, provides a glimpse of improvement but not at the pace required for Pakistan.

Financial and administrative independence is a backbone of judicial independence. Judiciary cannot attain impartiality unless free from the influence of those having control over the purse strings. Therefore, a greater degree of independence from clutches of financial constraints is needed to preserve judicial independence.

Expeditious disposal of cases, no doubt, causes relief to the litigants and also remove the burden of backlog of cases from the judiciary but the current practice of justice in haste by the judges is defeating the ends of justice resultantly, denial of access to justice.

Eradication of corruption from judiciary is as important as from any other department of State in order to re-build confidence of the people upon the judiciary, as only fair and impartial judicial system can guarantee rule of law in a society and ultimately preservation of all the other fundamental rights of the citizens. Therefore, this point of the national judicial policy needs further consideration.

RECOMMENDATION

- 1- Modern technology is required to be utilized in order to resolve the issue of cost effectiveness and time management along with delay reduction. Issues like management of cases, notices to the parties, availability of counsel's and matters ancillary to the same can better be resolved through adopting case flow management techniques prevailing around the globe.
- 2- The Process agency is to be provided access to the software of NADRA, so that court notices and summons can be sent to litigants on all the addresses available with NADRA record. Moreover, all the SIMs connected to CNIC can also be approached through telephonic conversation and SMS.

- 3- The financial independence of any institution is integral to its independent stature amongst other pillars of State. This fact is neglected from the very inception in Pakistan regarding judicial economic independence. No doubt Government Exchequer receives a colossal financial benefit from this institution in terms of court fee but is reluctant to share its fruits. If this institution may start working on its financial independence and keeps its assets / business concerns to be utilized for its betterment there will remain no need for any foreign funding and influence of executive can also be diminished.
- 4- In Pakistan, rate of fresh institution of cases is very high thus increasing burden upon the courts. As there is no system of check and balance for false and frivolous litigation therefore, issue of backlog of cases arises. In order to stop false and frivolous litigation, recommendation of the National Judicial Policy regarding imposition of heavy penalty and fines to the party pleading falsely need to be implemented. Consequently, issue of backlog will automatically settled down. It is not out of place that remedies by way of tort must be liberally granted e.g. damages especially in case of malicious prosecution in order to curtail this tendency of frivolous litigation.
- 5- There is need to interpret the term "Misconduct" provided under the National Judicial Policy and to provide heavy punishment for this act. Malpractices at the hands of judges, judicial staff and lawyers are required to be congregated under this term of misconduct in order to penalize the culprits. This judicial negligence at the part of members of bar and bench, is not only causing huge loss to judicial integrity but also tarnishing the confidence of the people of Pakistan upon this institution.

- 6- Implementation of all the Laws in their true spirit can be more significance than to introduce new regulations and to complex the system.
- 7- There is no empirical database in Pakistan from where the actual causes can be objectively identified and addressed. Therefore, a database is required for constant improvement and uplift of this institution.
- 8- The Bar councils are not only required to play their role as a bridge between bench and bar but to assist the legislators in legislative tasks and to work as a watchdogs for the executives to implement these legislations.
- 9- Bar Associations are required to put a stop to the culture of strikes. An uninterrupted working of courts will prove to be more effective in removing of backlog of cases than decisions in haste at the cost of fairness.
- 10- The establishment of the concept of law firms is to be appreciated in order to promote the professional mechanism. Not only young lawyers will get more opportunity to work but time wasted due to engagements of senior lawyers before superior courts will also be saved, as competitive environment based upon merit along with transparency will lead this profession towards unprecedented success in Pakistan.
- 11- Concept of judicial clerk to be implemented at all levels of judiciary. It is observed that most of the academia in developed countries worked as judicial clerk. The same practice will not only help judges to deliver good and timely judgments but will also raise the standard of judgments in Pakistan.
- 12- There is need to harmonize the relationship between professionals and academia. As their joint venture will prove to be better judicial administration in Pakistan.

- 13- Judicial seminars and conferences are required to be held frequently in order to share present experiences and novel ideas, to build more comprehensive policies and to examine the outcomes of existing policies.
- 14- Appropriate working environment is required to be built where, every stake holder can perform its best with focus to have better outcome of the policy.
- 15- The concept of taking adjournments by the counsels as a matter of right is required to be discouraged. There is need to introduce the concept of imposition of fines with gradual enhancement on every next adjournment sought by either of the party to the suit. This will not only bring the matters towards expeditious disposal but will also serve the purpose of compensation to the party bringing its witnesses to court.
- 16- The establishment of Arbitration/ Mediation centers for disposal of cases may be adhered to so that the burden on the litigation may be lessened. There is need to implement the law of ADR already available in Civil Procedure Code 1809.

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The African Charter on Human and People's Rights 1981

Universal Declaration of Human Rights 1948

Universal Islamic Declaration of Human Rights 1981

Annexure A*

For the year 2009

Name of Court	Cases Pending at the beginning of the Year	Institution During the Year	Disposal During the Year	Balance at the End of the Year
Supreme Court	15,922	17,672	14,788	19,829
Federal Shari'at Court	2,357	1,003	1,695	1,665
High Court Punjab	84,704	111,463	103,052	93,115
High Court Sindh	28,608	20684	17,650	30,485
High Court Baluchistan	4,177	4,570	4,021	4,726
High Court KPK	15,287	19,452	19,494	15,245
High Court Islamabad	-	-	-	-
District Courts Punjab	1219576	1996,773	20,45,766	1094257
District Courts Sindh	142767	205,920	23,5242	112780
District Court Baluchistan	7664	28051	30,273	5442
District Courts KPK	185601	30,5147	34,9518	132655
District Courts Islamabad	-	-	-	-
Total	1,706,663/-	2,710,735/-	2,821,499/-	1,510,199/-

*Statistics collected from Yearly Reports of Law and Justice Commission of Pakistan

For the Year 2010

Name of Court	Cases Pending at the beginning of the Year	Institution During the Year	Disposal During the Year	Balance at the End of the Year
Supreme Court	15,617	17,793	14,670	20,234
Federal Shari'at Court	1665	842	663	1844
High Court Punjab	93,115	120,795	100,701	113209
High Court Sindh	30485	28020	21802	36454
High Court Baluchistan	4,726	3,417	2,697	5,446
High Court KPK	15,245	22,108	18,372	18,981
High Court Islamabad	-	-	-	-
District Courts Punjab	109,4257	18,27245	18,83458	916,428
District Courts Sindh	112780	220261	235314	97688
District Court Baluchistan	5442	30077	28789	6730
District Courts KPK	132655	221695	284921	79871
District Courts Islamabad	-	-	-	-
Total	1,505,987	2,492,253	2,591,387	1,296,885

*Statistics collected from Yearly Reports of Law and Justice Commission of Pakistan

For the Year 2011

Name of Court	Cases Pending at the beginning of the Year	Institution During the Year	Disposal During the Year	Balance at the End of the Year
Supreme Court	20,234	14,164	14,170	20,228
Federal Shari'at Court	1844	480	575	1749
High Court Punjab	113,209	125,590	102,077	130,385
High Court Sindh	36509	29442	20122	45689
High Court Baluchistan	5446	3442	3759	5129
High Court KPK	18,981	18,436	14,683	22,685
High Court Islamabad	8974	4929	3569	10398
District Courts Punjab	894,660	1900,298	1745,417	967,558
District Courts Sindh	97688	240855	232641	106141
District Court Baluchistan	6730	36808	35739	7799
District Courts KPK	79871	375304	350231	107765
District Courts Islamabad	22480	28007	27974	24116
Total	1,306,626	2,777,755	2,550,957	1,449,642

For the Year 2012

Name of Court	Cases Pending at the beginning of the Year	Institution During the Year	Disposal During the Year	Balance at the End of the Year
Supreme Court	20,228	15,939	15,853	20,314
Federal Shari'at Court	1,749	387	816	1320
High Court Punjab	130,385	147,690	122,248	155,827
High Court Sindh	45,689	28,235	196,55	542,90
High Court Baluchistan	5129	3479	3730	4878
High Court KPK	22,658	20,472	15,877	27,276
High Court Islamabad	8,805	7,547	5,863	9,166
District Courts Punjab	967,558	1959,798	1799,321	1024,517
District Courts Sindh	106141	220474	211140	114832
District Court Baluchistan	7799	38465	37759	8505
District Courts KPK	107765	312861	321506	111062
District Courts Islamabad	24,428	39,635	30,354	29,071
Total	1,448,334	2,794,982	2,584,122	1,561,058

*Statistics collected from Yearly Reports of Law and Justice Commission of Pakistan

For the Year 2013

Name of Court	Cases Pending at the beginning of the Year	Institution During the Year	Disposal During the Year	Balance at the End of the Year
Supreme Court	20314	18154	17988	20480
Federal Shari'at Court	1320	326	649	997
High Court Punjab	155827	133548	116338	173037
High Court Sindh	54290	30358	18145	66475
High Court Baluchistan	4878	3941	3896	4923
High Court KPK	27295	19878	20457	26716
High Court Islamabad	9166	9349	5063	13387
District Courts Punjab	1024517	1929236	1759600	1107634
District Courts Sindh	114832	225999	216151	124190
District Court Baluchistan	8505	27349	27410	8444
District Courts KPK	111062	309437	294726	132762
District Courts Islamabad	27797	59955	39251	30300
Total	1,559,803	2,767,530	2,519,674	1,709,345

*Statistics collected from Yearly Reports of Law and Justice Commission of Pakistan

For the Year 2014

Name of Court	Cases Pending at the beginning of the Year	Institution During the Year	Disposal During the Year	Balance at the End of the Year
Supreme Court	20480	19170	16886	22764
Federal Shari'at Court	997	346	329	1014
High Court Punjab	173037	144422	152776	164683
High Court Sindh	66475	34497	26751	70046
High Court Baluchistan	4923	4053	3697	5279
High Court KPK	26716	21760	20935	27541
High Court Islamabad	13207	7934	6631	14500
District Courts Punjab	1107634	2037110	1885534	1161524
District Courts Sindh	124190	232851	229755	127314
District Court Baluchistan	8444	30871	29857	9458
District Courts KPK	132762	315014	302992	145203
District Courts Islamabad	28789	36008	36939	27858
Total	1,707,654	2,884,036	2,713,082	1,777,184

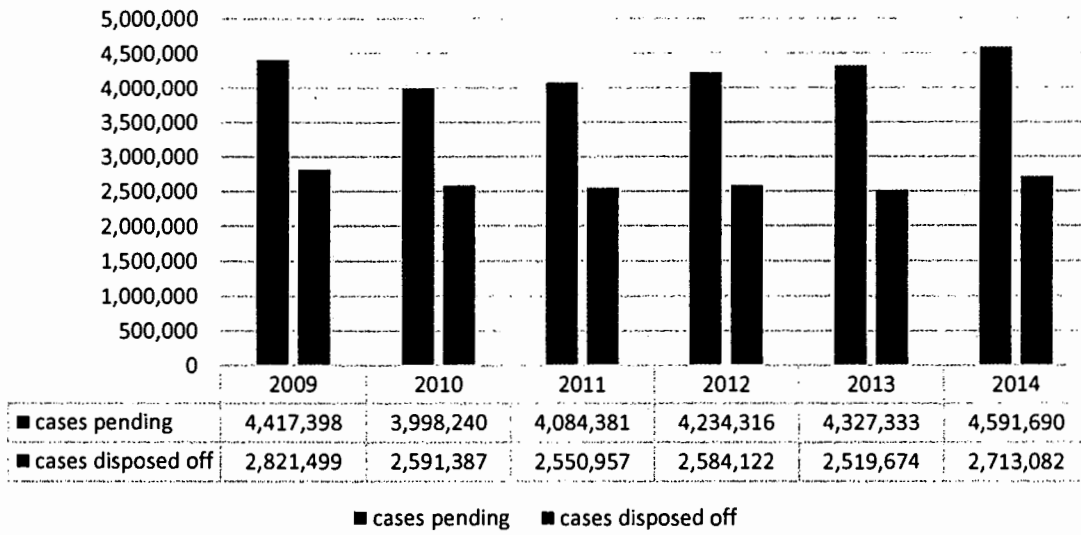
*Statistics collected from Yearly Reports of Law and Justice Commission of Pakistan

**Consolidated Statement of Cases pending, Fresh Instituted and
Disposed Off from the year 2009 to 2015 (in Millions)**

Years	Cases Pending during the year	Fresh Institution	Cases Disposed off	Disposal in %
2009	1,706,663 (1.7 Million)	2,710,735 (2.7 Million)	2,821,499 (2.8 Million)	63.87%
2010	1,505,987 (1.5 Million)	2,492,253 (2.5 Million)	2,591,387 (2.6 Million)	64.8%
2011	1,306,626 (1.3 Million)	2,777,755 (2.78 Million)	2,550,957 (2.55 Million)	62.5%
2012	1,448,334 (1.45 Million)	2,794,982 (2.79 Million)	2,584,122 (2.58 Million)	60.9%
2013	1,559,803 (1.56 Million)	2,767,530 (2.77 Million)	2,519,674 (2.52 Million)	58.2%
2014	1,707,654 (1.71 Million)	2,884,036 (2.88 Million)	2,713,082 (2.71 Million)	59.1%

*Statistics collected from Yearly Reports of Law and Justice Commission of Pakistan

Consolidated statement of cases pendency and their disposal



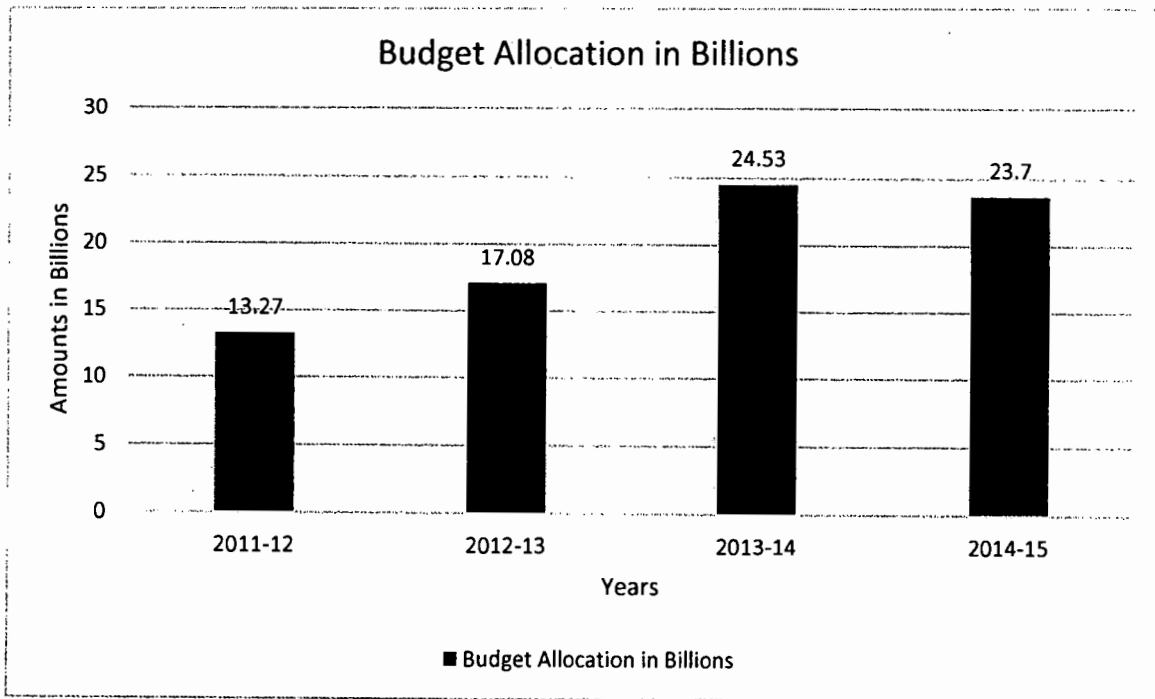
*Statistics collected from Yearly Reports of Law and Justice Commission of Pakistan

ANNEXURE B*

Financial judicial independence (Budget Allocation)

	2009 -10	2010 -11	2011-12	2012-13	2013-14	2014-15
SC	-	-	986557000/-	1,038,180,000/ -	1,113,116,000/-	1,206,470, 000/-
FSC	-	-	268634000/-	298,760,000/-	328008000/-	360180000/-
Punjab	-	-	6,372,626,000/ -	7,407,188,000/ -	10,566,925,000/ -	9,270,205,000/ -
Sindh	-	-	2,366,820,000/ -	3,354,651,800/ -	5,614,273,000/-	5,392,926,000/ -
KPK	-	-	1,972,628,652/ -	2,744,114,300/ -	3,727,760,080/-	3,864,427,252/ -
Baluchista n	-	-	1,009972000/-	1,314,730,566/ -	2,163,892,419/-	2,476422000/-
Islamabad	-	-	296,195,000/-	922,677,000/-	1,015,397,000/-	1,135,101,000/ -
Total in Rs.			13273432652/-	17080301666/-	24529371499/-	23705731252/-
Total in Billions			13.27B	17.08B	24.53B	23.7B

*Statistics collected from Yearly Reports of Law and Justice Commission of Pakistan



*Statistics collected from Yearly Reports of Law and Justice Commission of Pakistan

ANNEXURE C*

Penalties and complaints against judicial officials (Year 2011)

Name of Court	Number of Complaints	Number of Complaints Disposed Off	Dismissal from Service	Removal from Service	Compulsory Retirement	Reduction to Lower Stage	Reduction to Lower Post	Stoppage of increment	Withholding promotion	Censure/warning
S.C	22	10	1	1	0	0	0	1	0	4
FSC	0	0	0	0	2	0	0	3	0	0
Punjab	0	0	32	33	32	19	22	133	14	92
Sindh	466	222	0	0	1	0	0	0	0	0
KPK	253	221	3	12	10	3	0	27	3	102
Baluchistan	2	1	1	0	0	0	0	0	0	0
Islamabad	-	-	-	-	-	-	-	-	-	-
Total	743	454	37	46	45	22	22	164	17	198

*Statistics Collected from Yearly Reports of Law and Justice Commission of Pakistan

Penalties and complaints against judicial officials (Year 2012)

Name of Court	Number of Complaints	Number of Complaints Disposed Off	Dismissal from Service	Removal from Service	Compulsory Retirement	Reduction to Lower Stage	Reduction to Lower Post	Stoppage of increment	Withholding promotion	Censure/warning
S.C	17	1	0	0	0	0	0	4	0	2
FSC	0	0	1	0	0	0	0	2	0	0
Punjab	8	8	-	-	-	-	-	-	-	-
Sindh	327	254	0	0	0	0	0	0	0	6
KPK	158	138	0	0	0	0	0	0	0	0
Baluchistan	0	0	0	0	0	0	0	0	0	0
Islamabad	20	12	0	0	0	1	0	0	0	3
Total	530	413	1	0	0	1	0	6	0	11

*Statistics Collected from Yearly Reports of Law and Justice Commission of Pakistan

Penalties and complaints against judicial officials (Year 2013)

Name of Court	Number of Complaints	Number of Complaints Disposed Off	Dismissal from Service	Removal from Service	Compulsory Retirement	Reduction to Lower Stage	Reduction to Lower Post	Stoppage of increment	Withholding promotion	Censure/warning
S.C	3	3	0	0	0	0	0	9	0	4
FSC	0	0	1	0	0	0	0	0	0	0
Punjab	1492	1307	16	30	10	19	4	109	14	80
Sindh	225	104	0	0	0	0	0	0	0	13
KPK	202	150	0	0	0	0	0	0	0	0
Baluchistan	6	2	0	0	0	0	0	0	0	1
Islamabad	42	36	0	3	0	1	0	3	0	14
Total	1,970	1,602	17	33	10	20	4	121	14	112

Penalties and complaints against judicial officials (Year 2014)

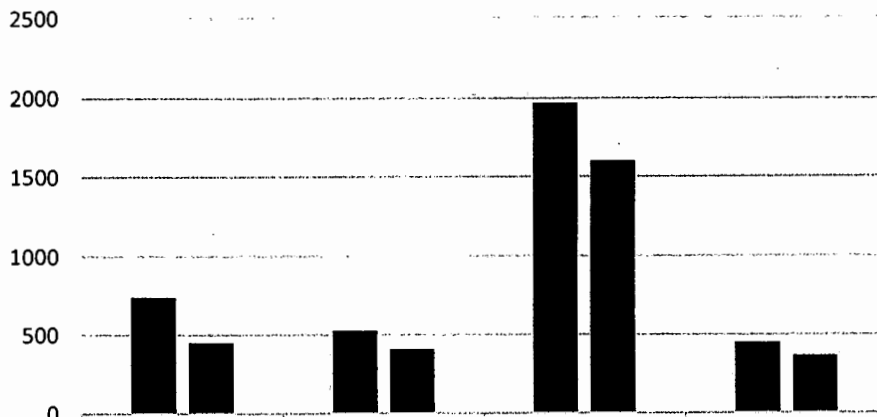
Name of Court	Number of Complaints	Number of Complaints Disposed Off	Dismissal from Service	Removal from Service	Compulsory Retirement	Reduction to Lower Stage	Reduction to Lower Post	Stoppage of increment	Withholding promotion	Censure/warning
S.C	13	13	0	0	0	0	0	0	0	1
FSC	0	0	0	0	0	0	0	0	0	0
Punjab	37	23	0	0	1	0	0	5	0	3
Sindh	381	303	0	3	0	0	0	0	0	21
KPK	-	-	-	-	-	-	-	-	-	-
Baluchistan	1	0	0	0	1	0	0	0	0	0
Islamabad	30	30	0	1	0	0	0	1	0	93
Total	462	369	0	4	2	0	0	6	0	118

*Statistics Collected from Yearly Reports of Law and Justice Commission of Pakistan

Consolidated Statement of Number of Complaints Filed during 2011 to 2014 and their Disposal

Year	No. of Complaints	No. of Complaints Disposed Off
2011	743	454
2012	530	413
2013	1,970	1,602
2014	452	369

Complaints and Disposal Chart



	2011	2012	2013	2014
■ Complaints Filed	743	530	1970	452
■ Complaints Disposed Off	454	413	1602	369

■ Complaints Filed ■ Complaints Disposed Off

*Statistics Collected from Yearly Reports of Law and Justice Commission of Pakistan