

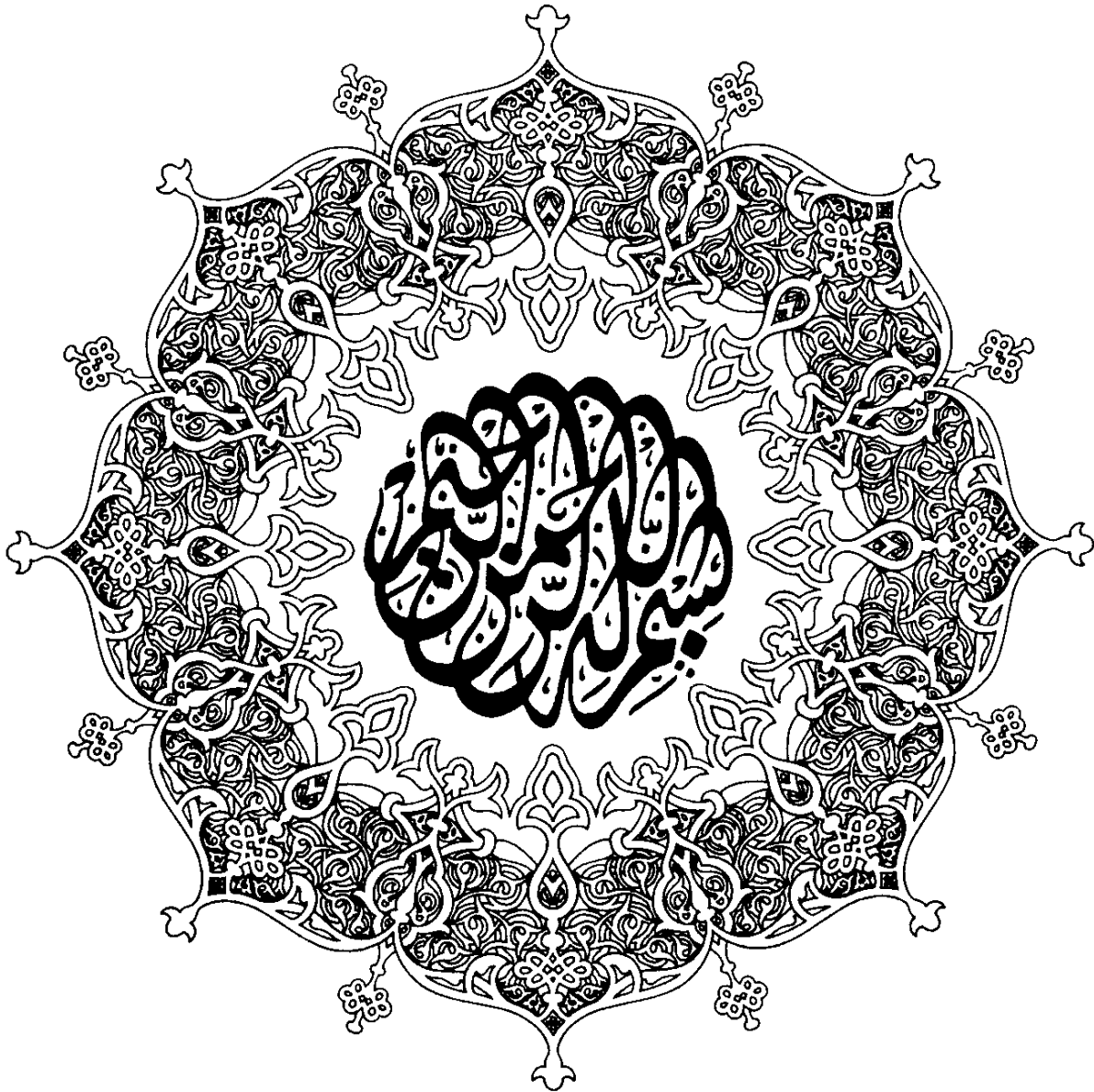
2013

ONE DAY SEMINAR ON IMPORTANCE OF JUDICIAL SENTENCING



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Foreword

I feel highly honored while writing the foreword of this report for it pertains to a subject that is not only important but sensitive as well. Sentencing, whether in shape of imposing fine, imprisonment or otherwise, must be governed by established guidelines. The gravity of the offence, the way in which the offence was committed, the history of the convict and his financial status, the factors of deterrence and reformation, and much more are to be considered. So the subject, on one side, is of great significance, and of a highly fragile nature, on the other.

In order to sensitize all sectors related to the administration of criminal justice in general and sentence-awarding forums in particular, the Academic Wing has done wonderful job by arranging a workshop on the subject. I also appreciate the interest and performance of the learned judges. Results of the workshop are encouraging. We also intend to organize a series of workshops in this regard for remaining judicial officers across the province and for other officials of the related departments such as Police, Prosecution, Correction Personnel and Parole/Probation officers. The Academy is quite ambitious to extend its capabilities to the law-making institutions, regarding legislation on the subject. It would, certainly add to the improvement of our Criminal Justice System. Our system really needs necessary guidelines for sentencing.

حد چاہئے سزا میں عقوبت کے واسطے
آخر گناہگار ہوں، کافر نہی ہوں میں

Hayat Ali Shah
Director General

Faculty Note

Sentencing plays significant role in Criminal Justice System. Criminal trials terminate either in acquittal or in conviction. Sentencing follows the later. A necessary distinction should always be drawn between punishment and sentencing, for it is not the punishment which matters rather it is the mode of punishing which complements Criminal Justice System and speaks about its validity, workability, utility and above all its compatibility with the needs of the society. The discretion of judicial authorities, while sentencing a convict, is itself an evidence of the fact that whatever the quantum of a penalty may be, it should be awarded in a justifiable mode, giving due care to the age (Juvenile Sentencing), health and conduct of the convict, the seriousness of the offence and the extent of its effect on the society, the element of deterrence and lastly the objective of reforming of convict. A minor cannot be sentenced as a major. A chocolate stealer from a tuck shop and the thief of foreign currency from State Bank could not be convicted equally. Besides, a judge must bear in mind that the liberties of a person can be disrupted in extraordinary circumstances only. Punishment is, therefore, substantive in nature whereas sentencing is less substantive and more procedural.

Possessing the above significance, the subject has drawn the attention of authorities on international level. United States, England and Wales have developed special guidelines on the subject. In US, sentencing is governed by guidelines framed under Sentencing Reform Act 1984*. In England and Wales, courts, while sentencing, follow the guidelines framed by Sentencing Council, created in April 2010, under the Coroners and Justice Act 2009†. In Islamic Republic of Pakistan, only few sections in the Code of Criminal Procedure are available on the subject. These sections are highly inadequate for they either classify the sentences in respects of court's hierarchy or at the most describe the consecutive and concurrent nature of the sentence.‡ No doubt some guidelines could be found in Pakistan Penal Code; nevertheless, they are also

* Available at http://www.ussc.gov/Research/Working_Group_Reports

† Details available at <http://sentencingcouncil.judiciary.gov.uk/>

‡ See Chapter III, Part B, ss. 31-35, Code of Criminal Procedure.

insufficient for the purpose.[§]So what is needed is that, these sections should be revisited and separate legislation should be made on the subject. This will enable the judges to pass almost equal and appropriate sentences in identical and similar cases. If the issue is left unnoticed and no sufficient guidelines are provided, and the process of sentencing is continued to be governed by a few sections and sole discretion of the court, the desired objectives would never be achieved. This will bring another scar to our Criminal Justice System.

To tackle the above situation and to draw the attention of the concerned authorities, the Academy, with the support of World Bank arranged one-day first ever workshop on the subject. A number of 27 judicial officers participated. Resource person Mr. Rai Muhammad Khan, learned judge of District Judiciary, Lahore High Court, delivered a lecture on “Sentencing Jurisprudence of Pakistan; Overview, Challenges and their Solutions”^{**}. Qazi Ataullah, Director Instructions of the Academy delivered lecture on “The Concept of punishment in Islamic Jurisprudence”. Synopses of both lectures form part of this report. Feedback of the participants in the shape of graphic scales, attached to this report, indicate the quality of lectures, both in content and delivery. I hope the reading of this report would be very useful for all concerned.

Qazi Ataullah
Director Instructions

[§] See Pakistan Penal Code, chapter III, ss.53-75, that provide for limits of solitary confinement, reasonability of amount of fines, limit of imprisonment in default of fine etc.

^{**} Judge Khan is writing his doctoral dissertation on Sentencing Jurisprudence in Pakistan.

Concept Note

Sentence is the ultimate product of a criminal trial resulting in conviction. Commentators (Edward, 1961: 61) argue that the sentencing of convicted offenders has been a subject of great concern among jurists and criminologists. Sentencing is a difficult process in a criminal trial. If a criminal trial concludes in conviction, due and proper care is required to be taken, having regard to attending circumstances of the case (such as the proportionality principle) and the high values of human life and liberty. Explaining the difficulty of sentencing process, a judge (Mackenzie, 2005: 14) has observed: “sentencing is an attempt to juggle object of various sizes while walking a tight rope which is being shaken at both ends.” As emphasis on importance of sentencing is evident in other jurisdictions, Pakistan’s Supreme Court also appears to be alive to it. In a 2010 case (SCMR, 949), the Court aptly observed: “[the] question of sentence demands utmost care on the part of the court dealing with the life and liberties of [an] accused person. Earlier, in a 1995 (SCMR, 1525) case, the Court said that Pakistan’s Arms Ordinance, 1965, is “the only legislative contribution to the sentencing policy in the context of tariff”, as it “provides the maximum and the fixed minimum sentence of imprisonment”. While this approach of the Court is of great significance, perhaps there is a growing need of adopting it on a more regular basis.

Penal laws are based on the theories of deterrence, incapacitation, denunciation, reparation and rehabilitation. The notion behind these theories can only be brought in to practice if sentencing process is given due importance in the administration of criminal justice. All criminal justice service providers, in general, and Judges, in particular, shall always be sensitive to serious issues of human liberty and freedom such as long painful years of life behind the bars and the stigma of conviction, including the execution of death penalty.

Though there is no bar on pre-sentence hearing but rarely the question of proper sentence is taken up practically in the courts at the time of heated arguments of the parties. This leaves the matter of sentencing at the discretion of the court. Pakistan’s penal laws provide huge swing of discretion to the criminal courts in the matter of sentencing. This discretion is neither guided by any legislation, nor by sufficient case law. The non-existence of sentencing guidelines has serious implications for the right to a fair trial—now a constitutionally guaranteed fundamental right in Pakistan’s 1973 constitution (article 10-A). Huge discretion in sentencing matters, if not

properly structured, contributes towards disparity in sentencing which results in defeating the fundamental right to a fair trial.

There is evidence that many developed countries are paying due heed to sentencing, as a key issue in criminal justice system. For example, the United States introduced the Sentencing Reform Act, 1984 and Federal Sentencing Guidelines, 1987. The United Kingdom has addressed this issue very recently. It has introduced the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the Criminal Justice Act, 2003 and the Powers of Criminal Courts (Sentencing) Act 2000. These statutes provide detail mechanism of sentencing which is supplemented by sentencing guidelines of Sentencing Council and guideline judgments of Court of Appeal.

In this background there is a wide scope of addressing this issue through academic sensitization of judges, prosecutors, defence attorneys and investigators. The Khyber Pakhtunkhwa Judicial Academy is organizing a one-day seminar—the first of its kind in Pakistan—to address the issue of sentencing. It aims at first, providing a platform for initiation of an academic discourse of all concerned with criminal justice system. Second, it seeks to help generate some energy for legislation and spur a more proactive approach of judges in sentencing process. Third, it also aims at exploring further scope of training and research by the KP Judicial Academy in this otherwise neglected area of our criminal justice system. Key topics for discussion in the seminar include:

- The role of investigators in determination of proper sentence
- The role of prosecutors in achieving fair sentence
- Responsibilities of defence counsel qua sentencing
- Adjustment of pre-sentence hearing in the present legal set up
- Addressing sentencing in judgments: points to be considered
- Alternative sentencing and its parameters
- The concept of victim compensation in sentencing process
- The principle of proportionality in sentencing
- The perspective of Islamic jurisprudence

References

Green, Edward (1961), *Judicial Attitudes in Sentencing: A Study of the Factors Underlying the Sentencing Practice of the Criminal Court of Philadelphia*, Macmillan.

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2010 S C M R 949.

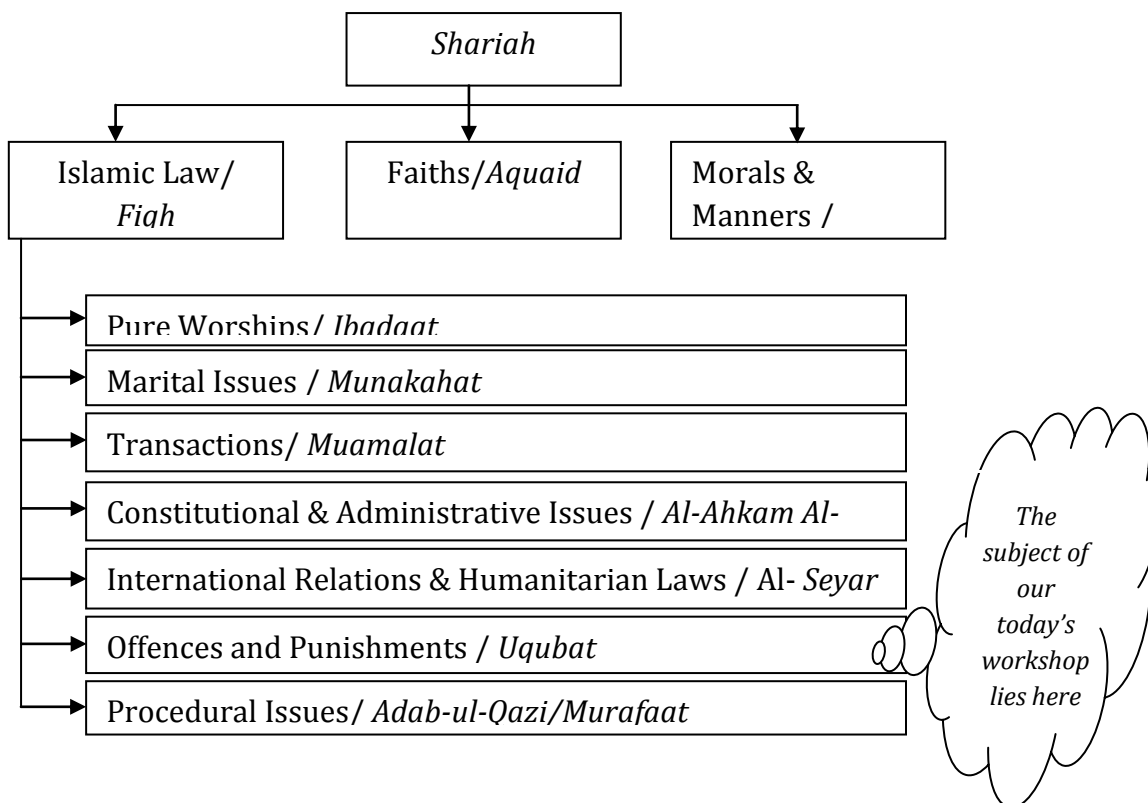
1995 SCMR 1525.

The Constitution of Islamic Republic of Pakistan, 1973.

Synopses of Lectures

The Concept of Punishment in Islamic Jurisprudence

By Qazi Ataullah^{††}



- General Presumption: No punishment without explicit legal provision.
- Punishment / *uqubah* :Literal and technical meanings.
- Sin/*maasiyyah* and offence/*jarimah*: difference of.
- Kinds of punishment; Eternity punishment/ *uqubah ukhrawiyyah* and Worldly punishment/*Uqubah duniyawiyyah*
- Punishment given by state: *Hudud*, *Qisas* and *Taazir*

^{††} Director Instructions, KP Judicial Academy; Civil Judge; PhD scholar, International Islamic university, Islamabad.

- *Hudud, Qisas and Taazir*; Distinction of.

Had

Had; literal and technical meanings

- Kinds of *Hudud*; *had-ul-sariqa*, *had-ul-zina*, *had-ul-shurb*, *had-ul-harabah*, *had-ul-qazf*, *had-ul-riddah*.

Objectives of *Shariah*

- security of life
- Security of religion
- Security of property
- Security of intellect
- Security of generation

Relationship between *hudud* and objectives of *Shariah*.

Taazir

- *Taazir*; literal and technical meanings.
- Kinds; *taazir* wherein right of state dominates and *taazir* where right of the aggrieved person dominates.
- The effect of compromise in each kind of *taazir*.
- Differences between kinds of *taazir*.

General Questions

- Can *taazir* exceed *had* punishment?
- Can imprisonment be considered as mode of *taazir*?
- Can retrospective effect be given to *taazir*?
- Is there any difference between *taazir* and *tadib*?
- What is the legal status of Fine; *Taazir bil mal*?

- What are the objectives of *Shariah* from imposition and enforcement of punishments?
- Whether *siyasah al-shatiyyah*/policy punishment differs from *taazir*?

Sentencing Jurisprudence of Pakistan

Overview, Challenges and their Solutions

By Mr. Rai Muhammad Khan^{‡‡}

Sentencing powers of judges?

Judges are powerful people. The way they use their power affects us all, directly or indirectly.

Yet most of us have never thought about how judges approach the strange job of measuring their distaste for offender into punishment_years,pounds or hours

(The Psychology of Judicial Sentencing)

What is Sentence?

- ▶ The judgment that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer. Black's Law Dictionary Ninth Edition)
- ▶ A judicial sentence is expression of power on part of society, through judges.

(Psychology of Judicial sentencing)

- ▶ It is the ultimate goal of any justice delivery system.
 - (State of Punjab v Prem Sagar & Ors. SC of India in 2008)

^{‡‡} (Civil Judge 1st Class / Judicial Magistrate)Research Officer, Research Center Lahore High Court, Lahore, Ph.D Law(Scholar)IIU Islamabad

What is Conviction?

- ▶ Conviction is the act or process of judicially finding someone guilty of a crime; the state of having been proved guilty.(Black's Law Dictionary Ninth Edition)
- ▶ Relationship of conviction and sentence?
- Sentence succeeds conviction and is not the same thing as conviction nor both are a merger or a mixture
- ▶ As conviction and sentence are separate entities so treating both in the same breath may lower the emphasis on either and in our case on latter
- ▶ After conviction starting point for determination of proper sentence is consideration of aims or purposes of sentence
- ▶ What are aims or purposes of sentencing ?

Six Aims of Sentencing

- retribution, (eye for eye, retrospective)
- deterrence, (general,specific,prospective)
- denunciation, (society's disapproval of criminal activity)
- incapacitation, (preventive in nature)
- rehabilitation (roll back to society)
- Reparation (compensatory and restitutive)

Importance of sentencing

- ▶ No aspect of the administration of criminal justice has aroused as much concern among jurists and criminologists as the sentencing of convicted offenders. (Edward Green)
- ▶ The question of sentence demands utmost care on the part of the court dealing with the life and liberties of the accused person. (SC of Pakistan, 2010 SCMR 949)

Importance of sentencing

- ▶ The Courts are not supposed to be mechanical at the time of awarding sentence.
- ▶ They are supposed to think and consider what a proper sentence ought to be.

2006 P Cr. L J 1431

Nature of sentencing process

Is sentencing an easy process?

OR

A difficult stage for a judge?

At least a sentencing judge says this

- ▶ Sentencing is an attempt to juggle object of various sizes while walking a tight rope which is being shaken at both ends. (Queensland judge)

Types of sentences

- ▶ Indeterminate sentences
- ▶ Determinate sentences
- ▶ Mandatory or fixed sentences
- ▶ Discretionary or variable sentences
- ▶ Individualized sentencing

Types of sentences in Pakistan

- ▶ Determinate sentences(with some mixture of rehabilitative process)
- ▶ Mandatory thresh-hold sentences (394,395 PPC)
- ▶ Mandatory absolute sentences(302(a) PPC)
- ▶ Discretionary sentences(457 PPC)

Individualized Sentencing

- ▶ Sentencing for Juveniles
- ▶ Sentencing for Women
- ▶ Sentencing for Mental Health Patients

Treatment of sentencing in Pakistan

- ▶ No specific sentencing statute in Pakistan
- ▶ No separate provision for pre-sentence hearing
- ▶ No separate procedure to get pre-sentencing reports
- ▶ No specific statutory sentencing guidelines except of a few

- ▶ Purposes of sentencing not specifically stated
- ▶ Huge discretion despite bench trial
- ▶ No sentencing commission
- ▶ No permanent body to monitor post sentencing effects
- ▶ No mechanism to ensure uniformity in sentencing or study disparities in sentencing process

Sentencing provisions in Cr.P.C

- ▶ Ss. 31 to 35 (Sentencing powers of courts)
- ▶ Passing of sentence by magistrate S 245(2)
- ▶ Procedure in case of previous conviction, S 245-A

Above section envisage recording of evidence after conviction for purpose of sentence

- ▶ Parallel provisions for session trial are 265-H, I
- ▶ S. 367 (5)
- ▶ Procedure of sentence of Death 368
- ▶ Confirmation of death sentence S 374

- ▶ Postponement of sentence 382-A
- ▶ Consideration of during trial custody 382-B
- ▶ Scandalous, false and frivolous pleas in defense to be considered while sentencing S.382-C
- ▶ Suspension of sentence of imprisonment for non-payment of fine S-388
- ▶ Whipping sentences Ss. 390 to 395
- ▶ Concurrent sentence of offender already sentenced for another offence S.397

Important judgments

Expectancy of life, death penalty not the only normal sentence for murder

- Hassan v The State, PLD 2013 SC 793

In narcotics Sentence linked to quantity

Ameer Zeb v The State, PLD 2012 SC 380

Kinds of sentences

- Saleemuddin v State 2011 SCMR 1171

Question of sentence demands utmost care

- Israr Ali v State 2007 SCMR 525

Hesitancy of courts to award death penalty

Muhammad Sharif v Muhammad Javed, PLD 1976 SC 452

Role of police in sentencing

- ▶ Collection of evidence
- ▶ Circumstances of accused
- ▶ Circumstances of victim
- ▶ Criminal history of accused

Role of prosecutor

- ▶ Scrutiny of police file
- ▶ Framing of charge
- ▶ Fair presentation of circumstances
- ▶ Request for proper sentence

Indian jurisdiction

Pre-sentence hearing is provided in S 235(2) Cr.P.C.1973, in a trial before court of Sessions

- ▶ Magisterial courts are guided by S 248 Cr.P.C to accord hearing before sentencing
- ▶ But still Indian SC says, there is no proper guidance on sentencing except observations

and there is no sentencing policy (Prem Sager Case referred above)

SENTENCING LEGISLATION IN THE UK

Criminal Justice Act 1991

Crime and Disorder Act 1988

Powers of Criminal Courts (Sentencing) Act 2000

Criminal Justice Act, 2003

Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Purposes of Sentencing in UK

As per Criminal Justice Act, 2003 purposes of sentencing in UK are:

- (a) The punishment of offenders,
- (b) The reduction of crime (including its reduction by deterrence),
- (c) The reform and rehabilitation of offenders,
- (d) The protection of the public, and
- (e) The making of reparation by offenders to persons affected by their offences

Australian Statutes

- ▶ Australian Capital Territory Crimes (Sentencing) Act 2005
- ▶ New South Wales Crimes (Sentencing Procedure) Act 1999
- ▶ Northern Territory Sentencing Act 1995
- ▶ South Australia Criminal Law (Sentencing) Act 1988 etc.

United States Sentencing regime

- ▶ THE SENTENCING REFORM ACT OF 1984 (U.S.)
- ▶ Sentencing Commission has been set Up
- ▶ Sentencing guidelines are provided
- ▶ Judicial discretion is structured
- ▶ Uniformity and consistency in sentencing is stressed
- ▶ Fair Sentencing Act of 2010
- ▶ Smarter Sentencing Act of 2013(Bill)

Way Forward

- ▶ Training and sensitization of justice sector
- ▶ Optimum use of present legislative provisions and available guiding principles
- ▶ Increased guidance from superior courts
- ▶ Legislative aid...in how many ways?

References

Geraldine. 2005. How Judges Sentence. Annandale, NSW: Federation Press

Ashworth, Andrew. 2010. Sentencing and Criminal Justice. 5th Ed. Law in Context. Cambridge ; New York: Cambridge University Press.

Cross, Rupert. , Punishment, Prison and the Public. London: The Hamlyn Trust,

Judicial Attitudes in Sentencing: A Study of the Factors Underlying the Sentencing Practice of the Criminal Court of Philadelphia. Macmillan, 1961.

High Court Rules & Orders

Bench books

Recommendations

- I. The provisions of Pakistan Penal Code and Code of Criminal Procedure, pertaining to sentencing should be re-visited. In order to keep them improved, updated and answering, necessary amendments should be introduced.

- II. A workshop or seminar may be sufficient for general awareness; nevertheless, it will not serve the purpose as far as judicial profession is concerned. A separate week-long training is, therefore, be arranged for all sentence-awarding forums, across the province.

- III. Law making institutions should be approached for framing guidelines on the subject.

- IV. The KP Judicial Academy should extend its capabilities and resources to the law making institutions, for sensitizing the law makers on the subject.

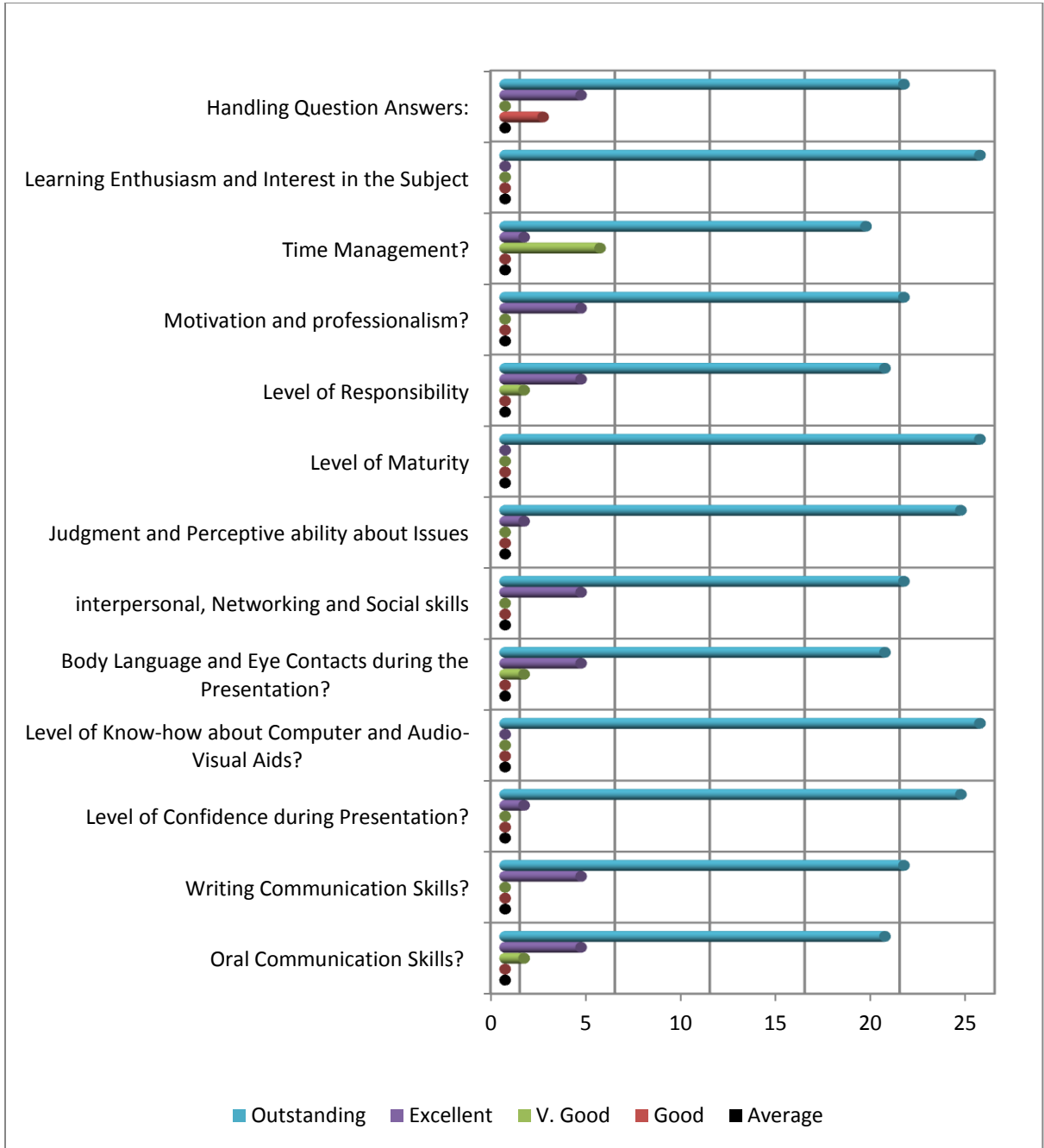
- V. The Academy may also organize seminars/ workshops and trainings, for legislative authorities.

- VI. Like other developed countries, a sentencing commission should be constituted.

- VII. A separate institution should be established to monitor post sentencing situations and circumstances.

- VIII. Other necessary steps should be taken to ensure uniformity in sentencing and to eradicate disparities therefrom.

Consolidated Resource Person's Evaluation



Annexure

Director General Welcome Address

Ladies and Gentlemen! I welcome you all to this one day seminar on Sentencing Jurisprudence. This topic is not new for you people only but for us as well. You may have studied sentencing jurisprudence in your academic career but here, in this Academy, you will have a comprehensive discussion on this subject. This will also enable you to draw a clear distinction between two types of education that relate to your profession; the legal education and judicial education. The former is taught in law colleges and universities, whereas the latter could only be obtained in judicial academics.

So I welcome you once again to this great site of judicial education. I expect your active and efficient participation in the training course. Please take the benefit of this occasion and get yourselves benefitted from the vast knowledge and rich experience of the resource persons. I wish you a pleasant stay and meaningful learning.

Mr. Hayat Ali Shah

Director General

List of Participants

Name	Designation	Posting
Mr. Hussain Ali	Civil Judge/JM	Dargai (Malakand)
Ms. Saeeda Akhtar	Civil Judge/JM	Malakand
Mr. Muhammad Jamil Khan	Civil Judge/JM	Babozai (Swat)
Mr. Fazal Nasir Shah	Civil Judge/JM	Kabal (Swat)
Mr. Mohib-ur-Rehman	Civil Judge/JM	Matta (Swat)
Mr. Fahad Ahmad	Civil Judge/JM	Swat
Mr. Mirza Muhammad Kashif	Civil Judge/JM	Swat
Mr. Ishfaq Ahmad	Civil Judge/JM	Chakaiser (Shangla)
Mr. Usman Wali Khan	Senior Civil Judge	Sangla
Ms. Sanam Taj	Civil Judge/JM	Dir Lower (Timergara)
Mr. Shah Faisal	Civil Judge/JM	Dir Lower (Timergara)
Mr. Shah Hussain	Civil Judge/JM	Sheringal (Upper Dir)
Mr. Sher Aziz	Civil Judge/JM	Upper Dir
Mr. Tanveer Iqbal	Civil Judge/JM	Buner
Mr. Abdul Qayum Siddiqi	Civil Judge/JM	Buner
Mr. Muhammad Ishaq	Civil Judge/JM	Chitral
Mr. Tanveer Usman	Civil Judge/JM	D.I.Khan
Syed Zahid Shah	Civil Judge/JM	Paharpur (D.I.Khan)
Mr. Qaiser Shahzad	Civil Judge/JM	D.I.Khan
Mr. Ishtiaq Ahmad	Civil Judge/JM	Bannu
Mr. Farman ullah	Civil Judge/JM	Bannu
Mr. Zaeem Ahmad	Civil Judge/JM	Lakki Marwat
Mr. Malik Muhammad Hasnain	Civil Judge/JM	Lakki Marwat
Mr. Aftab Iqbal	Civil Judge/JM	Kohat
Ms. Faiza Gul	Civil Judge/JM	Kohat
Mr. Ahmed Iftikhar	Civil Judge/JM	Karak
Mr. Seemab Waheed Siddiqui	Civil Judge/JM	Takht Nusrati (Karak)
Ms. Farhana Tabassum	Civil Judge/JM	Mansehra
Mr. Muhammad Umar-Al-Farooq	Civil Judge/JM	Mansehra
Mr. Muhammad Hanif	Civil Judge/JM	Batagram

Photos – Class in Progress



Group Photo



KHYBER PAKHTUNKHWA JUDICIAL ACADEMY

One Day Seminar on Importance of Judicial Sentencing

28-october, 2013