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# NEWS, VIEWS AND LAW NOTES

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### Global Law News:

#### **Lahore High Court Quashes Musharraf's Death Penalty**

Pakistan's Lahore High Court declared "unconstitutional" the formation of the special court that sentenced former military ruler Gen (Retd) Pervez Musharraf to death in the high treason case and quashed its proceedings.

A three-judge special court had convicted Musharraf for high treason on Dec 17, 2019 and handed him the death penalty on five counts in a 2-1 split decision. The case was filed in 2013 by the

then government against, General Musharraf for suspending the Constitution on Nov 3, 2007, while imposing the emergency rule in the country.

The Lahore High Court in its short orders ruled that the special court was not constituted as per constitutional and legal requirements, that the amendments made to Article 6 of the Constitution could not be implemented retrospectively, besides setting aside Section 9 of the Criminal Law Amendments (Special Courts) Act, 1976. The High Court observed that “there can be no retrospective punishment for something which was not an offence at the time it was committed<sup>1</sup>”.

[Source: The Tribune: January 14, 2020]

### **Pakistan Court Sentences Former Military Dictator to Death**

A Special court in Pakistan sentenced former military dictator General Pervez Musharraf to death on December 17, 2019. A three-member bench of a special court, headed by judge

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<sup>1</sup> Constitution of Islamic Republic of Pakistan 1973 has conferred a discretionary jurisdiction on High Courts to issue writs and the provisions states that a writ will be issued where no other adequate remedy is available.

Waqar Ahmad Seth who happens to be the Chief Justice of Peshawar High Court along with two other judges namely, Justice Nazar Akbar of Sindh High Court and Justice Shahid Karim of Lahore High Court found General Musharraf guilty of high treason under Article 6 of Pakistan's Constitution and meted out the death penalty.<sup>2</sup>

### **Supreme Court of Spain Declares that Workers are Entitled to Christmas Hampers.**

In an interesting case the Supreme Court of Spain found that workers are entitled to a Christmas hamper as a condition of their employment. The case arose from a labor dispute against Fujitsu Technology Spain. The company had eliminated gifting the Christmas hamper from the budget back in 2013. A Christmas hamper is a packaged assortment of wine, cheese, oils, and meats. It is often gifted to employees in Spain. The court reasoned that employees gained the right to the Christmas hamper from

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<sup>2</sup> Article 6 defines high treason as an act committed by a person who, "abrogates or subverts or suspends or holds in abeyance, or attempts or conspires to abrogate or subvert or suspend or hold in abeyance, the Constitution by use of force or show of force or by any other unconstitutional means." The punishment for high treason is death or imprisonment for life, according to Section 2 of the Pakistan's High Treason Act of 1973.

longstanding tradition and acquired a legitimate expectation to the items. [December 17, 2019]

## **WTO News**

### **US CHALLENGES WTO RULES**

United States Government has threatened to withdraw recognition of the special status of "developing nation" to China and other relatively rich countries. The US believes that WTO uses an outdated dichotomy between developed and developing countries which allows some WTO members to gain unfair advantages.

### **SOUTH KOREA CLAIMS COMPENSATION FROM US**

South Korea seeks \$350 million in claims from United States in an Obama-era dispute over tariffs on steel pipes. South Korea had challenged the said action before the WTO in 2014 by contending that U.S. tariffs levied on oil country tubular goods (OCTG), a type of steel piping used in the energy industry was an illegal action. Washington contested the claim by asserting that

Korea's tariffs were aimed to export the product at unfairly cheap prices but lost.

### **PERUVIAN LAW ON MERGER CONTROL**

The Peruvian congress adopted a law on merger control to complement its competition law to combat anticompetitive practices. This all happened with the support of UNCTAD. The law has authorized the country's competition and consumer protection authority, INDECOPI, to control mergers that shape the structure of markets. Peru now stands at the same level as most countries in Latin America in terms of competition legal framework. The new step is going to help the country to improve its economy.

### **JAPAN COMPLAINS AGAINST INDIA**

Japan has complained at the World Trade Organization about India's duties on mobile phones, base stations and routers, and the circuit boards and other components that go into them. Japan pleaded that India seeks to foster domestic production by

adjusting various taxes including customs duties, by launching the "Make in India" campaign.

## **PUBLIC OPINION**

### **Three Magic Words That Can Change Your Law Life BY JAY REEVES**

If you want to supercharge your Law Life, three little words can make all the difference.

"I need help."

They're not always easy to say. We lawyers tend to be self-starters and overachievers. We're trained to have all the answers.

And yet, over the course of my 40 years in the profession, I can say without exception that the very best lawyers I've met—the men and women whose Law Lives were filled with purpose, profits, and peace of mind—knew when and how to ask for help.

It takes intention. It takes courage. And sometimes, I'm sad to report, it takes crashing into a wall, though I'd strongly recommend a kinder, less-painful path.

All of which brings to mind a lawyer I once represented whose career was skyrocketing until one day she found herself in the parking lot outside my office saying, “It’s over, it’s all over, how in the world has this happened?” and “Why me?”

### **Life in the Fast Lane**

This was, back when I was in private practice, defending lawyers in state bar ethics and disciplinary cases. Lawyers were mostly blue-chip clients. By that I mean, they were usually feeling blue and had a chip on their shoulder when they came to see me.

But occasionally I’d get a call from one who would utter the three magic words that could summon the rainbow from the gloom.

“I need help,” said the voice on the other end of the line.

This particular client had been a rock star since elementary school, where she won a statewide oratory contest in fifth grade and showed flashes of the athletic prowess that would soon have colleges recruiting her for softball and swimming. She breezed

through law school and landed a job at a good firm, where she became a top producer and made partner in record time.

“It all happened so fast,” she said. “One day I was a new associate and the next day I was on the management committee.”

“It’s not by accident,” I said. “You work hard. You’re a good lawyer. Your firm is lucky to have you.”

“Yeah, right,” she said, and glumly picked up a piece of paper from the conference table where we sat. “Real lucky.”

The document was why she was here. It was a notice of grievance from the state bar, alleging she had neglected a case and failed to communicate with her client.

### **The Sweet Victory of Surrender**

She thought this paper—which she waved in the air like a white flag of surrender—could be the end of her career. When I suggested it could be a beginning instead, she looked at me like I was nuts.

And before I could explain, she glanced at her watch and hopped up, saying she was late for a meeting, and rushed out of my office. I stooped to pick something up from the floor and followed her outside.

“Now what?” she said, as I approached her car.

“You dropped your glasses,” I said.

“Thanks,” she said, taking them. “I’d be lost without these.”

For a while, she just looked down at her eyeglasses. And then—as if suddenly she could see more clearly just by holding them in her hand—it all came tumbling out:

The crushing pressure she felt almost every waking hour of her life, the deadlines and drama and demands at work, the busyness at home with her husband and young children, the never-ending stress. How she’d never wanted to be on the management committee, too busy already, but of course she’d said yes because it was such an honor. Not to mention insomnia and no time for exercise, and, worst of all, she’d had a panic attack in district

court, the humiliation of having the judge stop the proceedings and everyone rushing over in concern.

### **A Still, Small Voice**

This was in the spring, which in Chapel Hill is the loveliest season. There in the parking lot, with the dogwoods ablaze and the scent of clover in the air, I scribbled the phone number for the North Carolina Lawyer Assistance Program on the back of an envelope, which I gave to my client.

“Call them,” I said. “They can help.”

She did, and they did, because we all have our cracked places. And the cracks are how the light comes in.

Those words are from Leonard Cohen. And while I don't think the sole purpose of life is to go around gabbing about how cracked we are, I believe growth can't happen if we aren't honest with ourselves, and healing won't begin until we ask for help.

The good news is that we're surrounded by people friends, family, colleagues, co-workers who want to help. It's the reason we were called to this profession in the first place.

"Lawyer Assistance Programs are most well-known for helping lawyers and judges with drug and alcohol problems, as these problems tend to be more visible," says Robynn Moraites, director of the N.C. Lawyer Assistance Program. "Less visible, but equally as debilitating, are issues of anxiety, burnout, depression, and work-life imbalance. The many lawyers we have worked with over the years can attest to the fact that not only do they remain successful—or become even more successful—but their overall quality of life is improved to where they actually enjoy their practices."

### **Asked and Answered**

My client was one of those success stories. The grievance was resolved. Her career blossomed even brighter than before. She was fortunate to work at a firm that recognized her intrinsic worth and wanted her to be healthy and happy.

Through the LAP, she joined a peer support group. She saw a counselor for coping with anxiety and setting boundaries. And she began swimming again, which she said was a type of meditation.

The last time I saw her was at a local bar meeting, where she was being installed as an officer. Addressing the group, she said her priority was wellness for every lawyer in the district.

“If you need help,” she said, strong and centered a terrific lawyer.

“Just ask.”

[Source: LACBA: Law Practice Today]

## ESSAY

### **John Dickinson’s<sup>3</sup> Views on Administrative Common Law**

John Dickinson is an authority on Administrative Justice which emerged from the complexity of modern life, as the social and political developments have authorized a wide range of administrative bodies to decide issues emerging from

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<sup>3</sup> John Dickinson [1894-1952] received his law degree from Harvard Law School in 1921 and was a law professor at University of Pennsylvania Law School from 1929-1948.

implementation of procedural rules and instructions issued by such administrative bodies. The decisions of these administrative authorities attracted the attention of legal profession and courts and these decisions became subject to judicial review.

The basic idea which the administrative bodies have had to work with, as Mr. Dickinson shows, is the old idea of the supremacy of law which Coke invoked in his contest with James I and which is at the bottom of the American Courts' power to review the constitutionality of legislation. In limiting for themselves the extent to which they will review administrative decisions, the courts have drawn the large distinction between questions of law and questions of fact and have attempted to enumerate other classes of questions which they will or will not review after an administrative official or body has determined them. The classifications thus made form the subject matter is what has come to be known as administrative law.

But before the inquirer studies the problems of administrative law it would be well for him to examine the

fundamental question of whether the idea of the supremacy of law has any value today; for the old notion that there really was a detailed metaphysical law brooding over the world has pretty largely been given up along with the belief that the courts are in any exclusive sense its mouthpieces. Instead we have democratic government building and applying law, with judges as officials more or less like the rest, and with all danger of royal despotism removed. Under these conditions it is a fair question to ask whether the courts really have anything to contribute which justifies the belief that they should in any case have the power to overturn what other officials, presumably acting in good faith, have done. Mr. Dickinson thinks they have, in the form of a law which transcends immediate situations. He recognizes, of course, that a mathematically certain rule of law has never been possible and is less possible now than ever before. There is much that must be left to discretion. But there can and must "be constructed a legal system which, although far from attaining the inexorable and absolute certainty once thought possible, yet introduces a degree

of beneficial order into a world that would be much worse off without it." Necessarily such a system must be unified and, that being true, "the law ought to be applied by an agency whose main business is to know the law, rather than to enforce some part of it." Mr. Dickinson is obviously and properly thinking of the appellate courts rather than of the courts as a whole. He points out also that the courts should have the last word because they have been trained to adjudicate, that is, to determine the rights and duties of individuals, rather than to get things done, which is the primary function of administration. When it comes to examining the specific doctrines of administrative law, Mr. Dickinson emerges with three suggestions among others: that it be definitely recognized that the field of governmental activity in which a given administrative agency is operating has and should have an influence upon the rules which shall govern court review of its determinations; that it be consciously realized that the distinction between law and fact is based upon considerations of policy which determine whether a legal rule is to be applied to a

given situation or whether the solution is to be left to the discretion of officials as many questions in ordinary cases are left to the jury; and that the procedure for obtaining court review be made simple and definite so as to eliminate as far as possible miscarriages of justice resulting from procedural accidents. These conclusions seem thoroughly sound.

In his view a successful system of court review is a real appreciation by the judges of the facts underlying the cases, which in the last analysis determine the policy that differentiates between "law" and "fact." Such a requisite involves a broadening of the training that makes the lawyers that make the judges.

### ESSAY REVIEW

#### **TACKLING TAX HEAVENS**

In this article, the author reminds us that till 2008, tax heavens were an acceptable commodity, hailed and praised as instrument of economic development and an important instrument of growth. However, this view now stands completely changed, as per author because:

- Tax heavens cost governments around the world 500 to 600 billion dollars each year.
- Low income economies are hard hit.
- The present share of investment in off shore heavens by US companies stands at 2.6 trillion dollars.

Besides corporations, individual investors are also beneficiaries from the Tax heavens and around 8.7 Trillion dollars stood invested by individuals. One may ask why individuals and companies invest in these places, because this kind of investments earns a very high margin of profits. And these tax heavens provide benefits in the shape of:

- Tax exemptions;
- Escape from financial regulations;
- Escape from disclosure and criminal liability etc.

Financial institutions and multinationals use these tax heavens to gain more profits, as these instruments are used for higher gains and hiding of illicit activities of elite.

The fact is that investments in tax heavens lead to financial instability in the developing countries, as tax benefit seekers use instrument of off shore subsidiaries. The top three such heavens amongst other include, British virgin island, Bermuda, and Cayman Islands, all these happens to be the British overseas Territories.

The system is gradually growing. For example share of US multinationals who shift their profits to such jurisdictions has now increased from the erstwhile 5% to 30%.

The international corporate Tax system as being applied today was developed by the League of Nations, and multinationals were treated as loosely connected separate entities. However, this view was faulty as the experience now shows that multinational are in the shape of unitary institutions heaving power and prestige, thereby deflating all the notions above them. These institutions manipulate through:

- Transfer pricing;
- By using their affiliates; and

- Shifting income from high tax zones to low or free tax zones.

Transfer pricing is based on the principle that transactions must be at arm's length, but in fact these transactions are manipulated. For example, nobody knows what is the actual price of a jet engine and often the declared value is the value claimed by the firm's accountants.

It is believed that the holes in the existing international tax system can be improved and plugged if a unitary tax system is used. In the unitary tax system a multi-national is considered a single entity and profits are apportioned geographically according to a formula reflecting real economic activity; it may be a mix of sales, employment and tangible assets. It is generally believed that this system defeats tax havens, however, in practical terms, this system also suffers from technical difficulties.

In many jurisdictions, there are reformatory movements, such as asking the multinationals to break down and to publish their accounts on a country-by-country basis which may provide

relevant data to defeat on going tax evasion. Recently, released panama papers and Luxemburg leaks have revealed the size and magnitude of tax manipulation in off shore tax heavens.

Accordingly, OECD initiated reformatory steps. These steps include common reporting standards (CRS). However, the system contains many lope holes like gaining passport to claim residence in a tax heaven rather than in a country where they live. Similarly, USA obtains information from other countries about its tax-payers, yet it does not disclose anything about foreign tax evaders investing in USA.

It is believed that CRS has given some fruits. As per OECD 70 counties shared information on accounts and bank deposits in tax heavens which has led to increased tax revenues.

Another big initiative is base erosion and profit sharing (BEPS). Through the use of BEPS OECD realized more revenues while keeping in mind the doctrine of economic substance white affecting arm's length principle at the same time. The measure has also improved transparency.

USA has also now recognized the fact that shifting tax rights towards the places where sales occurs makes a sense. These changes are now moving towards formula apportionment.

OECD has publicly conceded a need for solution to the problems confronting the international tax system which goes beyond arm's length principle and the organization has urged for a fundamental 'rethink'. Although this view has been rejected by IMF as being harmful to low income and less develop counties. These developments are proposing to consider, where levy of tax should be imposed and on what basis. Secondly, what portion of profits is to be taxed? These steps are forcing a rethinking and four core demand are emerging which call for automatic exchange of financial information across borders, public registration of beneficial ownership of financial assets, country by country reporting and a unitary tax with formula apportionment.

All concerned are required to understand how off shore system works. Banking secrecy in Switzerland is a case in hand. However, the Swiss authorities released information about US

account holders. In fact these facts call for an effective international response and imposition of sanctions against enablers including accountants and lawyers particularly where a criminal activity is observed.

These instruments are helping interest groups and benefits are also being enjoyed even by tax heaven jurisdictions. In order to confront these challenges, a continuous research is needed to understand the pros and cons of these developments around the globe.

**[This essay is based on Nicholas Shaxson's article, "Tracking Tax Heaven", published in IMF: F & D September 2019 issue.]**

## **IDEAS**

### **US Supreme Court Sends IBM Case Back to appeals Court**

The US Supreme Court issued a per curiam opinion in Retirement Plans Committee of IBM v. Jander, "leaving it to the court of appeal Second Circuit whether to determine their merits,

taking such action as it deems appropriate” regarding arguments raised in the petitioners’ brief.

IBM offered employees the opportunity to invest in the company through an Employee Stock Ownership Plan (ESOP), in which respondent Larry Jander, along with others, took part. In 2013 IBM was projected to lose \$700 million. It did not disclose the losses, and instead incorrectly valued its business at \$2 billion. IBM’s stock consequently dropped by more than \$12 a share. Jander and other retirement participants had purchased over \$100 million in ESOP shares before the price dropped.

Jander brought suit in the US District Court for the Southern District of New York, arguing that the Retirement Plans Committee of IBM should have disclosed the true value of the business or at least frozen further stock investments. The district court dismissed the case, and Jander appealed to the US Court of Appeals for the Second Circuit, which reversed the district court’s decision and found that the disclosure of the true value of the microelectronics business was inevitable. The Second Circuit denied the Retirement

Plans Committee's request for a rehearing en banc, so a petition for a writ of certiorari was filed in the US Supreme Court.

The question presented in this case primarily concerned whether the "more harm than good" pleading standard, established in 2013 by the Supreme Court ruling in *Fifth Third Bancorp v. Dudenhoeffer*, could be satisfied by allegations that an inevitable disclosure of an alleged fraud generally increases harm over time. In *Dudenhoeffer*, the court held that a plaintiff must "plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it" in order to state claim for "breach of a duty of prudence" imposed on plan fiduciaries by the Employee Retirement Income Security Act of 1974 (ERISA).

The court's order noted that the IBM Retirement Plans Committee had argued that ERISA imposes no duty on an ESOP

fiduciary to act on inside information. However, the court decided not to address those issues because the lower court had not.

The court, however, determined that the Second Circuit should decide whether to “entertain these arguments in the first instance,”

### **BOOK REVIEW**

**Doing Justice: A Prosecutor's Thoughts on Crime, Punishment, and the Rule of Law: By Preet Bharara.**

Alfred A. Knopf, New York, 2019

The author has spent much of his life examining the US legal system, pushing to bring in reforms, and prosecuting those looking to subvert it. The author believes in the goodness of US legal system and openly suggests protecting it, at the same time he brings out the inbuilt flaws in the system and the way human attitudes interpret it.

The author had been serving as the US Attorney for the Southern District of New York; he accordingly presents an important perspective on the ways the US legal system works by

establishing that the 'rule of law' is an essential character of US society. The author shows the needed thought process by using precedents, law practice experience through his excellent presentation skills. He discusses in detail the requirements needed for to best achieve truth and justice by emphasizing on citizen's duty to mould their life and the society in accordance with legal system.

Through illuminating presentation, the author explains the concept of Inquiry, accusation, judgment and punishment. He establishes why the detailed analysis of documents is needed by the society to determine guilt and to achieve truth and justice in our daily lives.

The author presents and explains his views on the concept of justice through anecdotes and case histories to support success and failures of the conducted investigations. In this way he brings out the realities of legal system and the consequences of action and inaction which are needed to achieve just results.

All his arguments are inspiring and his views support rational and objectivity through fact based thinking coupled with compassion. These views can easily lead the people on the pathway of truth and justice. May be some of his thinking looks controversial leading to debate and discussions, yet his views are thought provoking suggesting the need to find enshrined human values in the American Society and its legal system.

### **NEW DEVELOPMENTS**

In 2020, state of California has imposed the following restrictions on gun sales. These restrictions will be effective after September 2020 onwards.

- One having a gun-violence restraining order will be prohibited from buying a firearm for up to five years.
- Effective September 1, 2020, an employer, coworker, employee or teacher can seek a gun-violence restraining order from a court, allowing police to remove firearms from someone making threats.

- One can't buy guns in California if prohibited from buying guns in another state. The rule will take effect on Jan 01, 2010.
- California law enforcement agencies before Jan. 1, 2021 must develop and adopt written policies and standards regarding the use of gun violence restraining orders.
- Suicide warning labels must be on gun packages and in gun stores by June 1, 2020 under Irwin's AB 645. The handgun safety certificate test will also cover the topic of suicide.
- Effective 2023, 2024 and 2025 certain gun "precursor" parts must be sold through a licensed vendor under AB 879 by Assemblyman Mike Gipson, D-Carson.
- No more firearms and ammunition can be sold at the Del Mar Fairgrounds in San Diego after Jan. 1, 2021.
- The \$100 cap on processing fees for concealed firearm licenses is going away and county sheriffs can now charge "an amount equal to the actual costs for processing the application."

- Where there is a gun-violence restraining order against an individual, the individual can fill out a form that says that he is willing to relinquish one's guns. The law takes effect Sept 01, 2020.
- Nonprofits "that are at high risk of terrorist attack due to ideology, beliefs, or mission" can apply for state grants of up to \$200,000 from a newly formed State Nonprofit Security Grant Program to beef up their onsite security. The bill, AB 1548 by Assemblyman Jesse Gabriel, D-San Fernando Valley, was in response to mass shootings at mosques, churches and synagogues.
- Starting Jan. 1, the fees Californians pay the state when purchasing a firearm will climb to \$38.19, with the passage of AB 1669 by Assemblyman Rob Bonta, D-Alameda. The bill also updated California's legal code to reflect that gun show regulations apply to ammunition vendors.
- If one is younger than 21, one can't buy a semiautomatic center-fire rifle starting Jan 1, 2020. Law also prohibits

Californians from buying more than one semiautomatic center-fire rifle in a 30-day period beginning on July 1, 2021.

- Beginning Jan 01, 2020 the owner of any unlocked gun taken out of a home by a child or a “prohibited person” can be charged with a crime and penalized with a 10-year ban on gun ownership. The law also set gun storage requirements for nursing homes.
- The number of transactions a gun seller can make without a firearms dealer license is now limited to six per year.

[Source:

<https://www.sacbee.com/news/politics-government/capitol-alert/article238673638.html>]

## RECENT CASES

### **Babri Mosque Case Decided By Indian Supreme Court: Summary of the Verdict**

The five-judge bench of the Supreme Court of India unanimously pronounced its verdict on 9 November 2019 in the Babri Mosque case salient features of the Judgment are summarized as follows:

- The Court ordered the Government of India to create a trust to build the Ram Mandir temple and form a Board of Trustees within three months. The disputed land will be owned by the Government of India and subsequently transferred to the Trust after its formation.
- The Court ordered the entire disputed land of area of 2.77 acres to be allocated for the construction of a temple while an alternative piece of land of area of 5 acres is to be allocated to the Sunni Waqf Board for the construction of a mosque at a suitable place within Ayodhya.
- The Court ruled that the 2010 Allahabad High Court's decision, division of the disputed land was incorrect.
- The Court ruled that the Demolition of the Babri Masjid and the 1949 desecration of the Babri Masjid were in violation of law.
- The Court observed that archaeological evidence from the Archaeological Survey of India shows that the Babri

Masjid was constructed on a "structure", whose architecture was distinctly indigenous and non-Islamic.

- The ruins of an ancient religious structure under an existing building does not always indicate that it was demolished by unfriendly powers.
- The court observed that all four of the Janamsakhis (biographies of the first Sikh guru, Guru Nanak) state unambiguously and in detail that Guru Nanak made pilgrimage to Ayodhya and offered prayers in the Ram temple in 1510–11 AD. The court also mentioned that a group of Nihang Sikhs performed puja in the "mosque" in 1857.
- The Court said that Muslim parties, including the Sunni Waqf Board, failed to establish exclusive possession of disputed land. It said that the Hindu parties furnished better evidence to prove that Hindus had worshipped continuously inside the mosque, believing it to be the birthplace of the Hindu deity Rama. The Court cited that iron railings set up

in 1856–57 separated the inner courtyard of the mosque from the outer courtyard, and that Hindus were in exclusive possession of the outer courtyard. It said that even before this, Hindus had access to the inner courtyard of the mosque.

- The Court rejected the claim made by Shia Waqf Board against the Sunni Waqf Board for the ownership of the Babri Masjid.