

## Scenario 7

### **Judiciary in 1979-80:**

#### ***Militarized Islamic Laws & Shariat Court:***

On **1<sup>st</sup> January 1980**, interest-free counters were opened at all the 7,000 branches of the nationalized commercial banks in Pakistan. Within the framework of *Islamization of economy*, the National Investment Trust (NIT) and the Investment Corporation of Pakistan (ICP) were asked by the military regime to operate on equity basis instead of decades old routine interest as of 1<sup>st</sup> July. However, interest-bearing National Savings Schemes were allowed to operate in parallel.

The **Zakat and Ushr Ordinance** was promulgated on 20<sup>th</sup> June 1980 to empower the government to deduct 2.5 per cent Zakat annually from mainly interest-bearing savings and shares held in the National Investment Trust, the Investment Corporation of Pakistan and other companies of which the majority of shares were owned by the Muslims. Foreign Exchange Bearer Certificate scheme that offered fixed interest was exempted from the compulsory Zakat deduction. This ordinance drew sharp criticism from the Shia sect which was later exempted from the compulsory deduction of Zakat. Even Sunnis were critical of the compulsory deduction and the way Zakat was distributed. Still the Zakat Secretariat is considered the most lucrative in the provincial and federal governments.

On **9<sup>th</sup> February 1979**, Gen Ziaul Haq, through a presidential order, promulgated '**The Offence of Zina** (Enforcement of *Hudood*) **Ordinance 1979**' which introduced concepts of fornication (voluntary sexual intercourse between two unmarried persons) and adultery into criminal law. The Pakistani Penal Code had not afforded any recognition to fornication as a crime, and adultery was only defined as an offence under section 497 if a man had intercourse with the wife of another man without his permission; the woman involved bore no criminal liability. The *Zina* Ordinance provided for severe penalties for committing adultery or fornication, and reiterated the classical distinction between married and unmarried parties in determining punishments.

Thus, the *hadd* punishment for a married person convicted of *zina* is *rajm*, stoning to death, a penalty that has not been carried out by the state till today, and the *hadd* for an unmarried person found guilty of *zina* is one hundred lashes in a public place. The Ordinance also makes a distinction between *ta'zir* and *hadd* punishments for *zina*.

It is widely believed that Gen Ziaul Haq had made a fool of the nation by introducing his half baked set of *Hudood* Laws through above mentioned ordinance of 1979. Introduction of Islamic laws was good but he **did not purposefully implement** even the basic principles of Islamic judiciary; Law of Evidence, infrastructure of *Qazi* Courts to execute the Islamic *Hudood* Laws and other administrative atmosphere in which the whole lay down of Islamic jurisprudence could be put into operation and practice for the welfare of the people of Pakistan.

As noted by one researcher **Rahat Imran** in '**Legal Injustices**' (2005) available at the internet that:

*'While no Muslim disputes the authenticity or authority of the Qur'an, there is little doubt that the Qur'anic text can lend itself to variant interpretations that may reflect cultural biases, societal norms and social attitudes. Differences in the connotative and denotative usages of the language also opened the door to several interpretations*

*and may at times result in "stripping the text of its meaningful connotations" as Najah Khadim, a British scholar of Islam suggests'.*

It is therefore difficult to understand the Qur'an's true spirit unless one is familiar with the historical circumstances surrounding a particular injunction. The linguistic intricacies of Qur'anic Arabic must be thoroughly understood before laws are formulated or viewpoints established. Gen Ziaul Haq had deliberately ignored these principles.

According to The Human Rights Commission of Pakistan (HRCP), every two hours a woman was raped in Pakistan and every eight hours a woman were subjected to gang rape in 2002. Gen Musharraf's government had to formulate a Commission to reconsider the *Hudood* Laws promulgated by his brother General & dictator in 1979.

The HRCP also held that the frequency of actual rapes was in reality much higher. The combination of social taboos, discriminatory laws and victimization at the hands of the police were (and still are) key reasons for why many rapes remained unreported.

**Ayesha Jalal** in her book titled '**The State of martial Rule**' at Page 323 had rightly concluded that 'Zia's attempt to make the legal system of Pakistan more Islamic was based largely on political motives.' Thus the first National Commission on the Status of Women was set up in 1999 to advise on eradicating laws discriminatory to women, which had submitted a detailed report and recommendations on *Hudood* laws in 2003. The Commission observed that the said Ordinance along with other four similar laws were hurriedly drafted and equally hurriedly enforced. In fact, a number of sections from the Pakistan Penal Code (PPC) lifted from and incorporated in the *Hudood* Ordinances with certain additional provisions, which were otherwise supposed to be in accordance with the injunctions of the *Quran & Sunnah*.

The introduction of these Ordinances was meant to give an Islamic appearance to the State and not to provide actual justice on the basis of Islamic commands. However, after the introduction of these Ordinances it was found that instead of remedying social ills, these Ordinances led to an increase in injustice against women and, in fact, became an instrument of oppression against women.

There were hundreds of incidents where a woman subjected to rape, or even gang rape, was eventually accused of Zina and thereby subjected to wrong and unjust harassment and great suffering.

More and more women were subjected to agony and torture because of these laws and the incidents of rape increased as time went by and the jails had gone filled with women on trial under the *Zina* Ordinance.

*Qazf* Ordinance which was meant to eliminate incidents of false accusation against women could not bring even a single conviction in 32 years. Apart from Zina and Qazf Ordinances, the Ordinance regarding property too, was of no avail in curbing incidents of theft and robbery and failed to control the spread of narcotics and illegal spirits in the country.

If we go further back; since 1983, a number of Commissions and Review Committees had examined and critiqued Gen Ziaul Haq's legacy of these laws. **Commission of Inquiry on Women, headed by Justice Nasir Aslam Zahid**, had recommended the repeal of the *Hudood* Ordinances in 1997 but PML(N)'s Nawaz Sharif, being a coward and weak administrator from inside, could not find courage to face and convince *Ulemas*. No action was taken on any recommendation.

The Commission of Inquiry, headed by the above named serving Justice of Pakistan's Supreme Court, had noted that:

*'The argument that every law can be misused may be correct to some extent. But, thus stated, it addresses the wrong question. The relevant test is not whether a piece of legislation can ever be misused but rather whether it is worth enacting at all given the potential for its abuse and the results which its enforcement would produce. This Commission is strongly of the opinion that the Zina Ordinance fails this test. Abun-*

*dant data testifies that the result of this law has been the victimization rather than the protection of people, and that the law has had a particularly adverse effect on the least privileged members of society.'* (**Commission Of Inquiry Report 1997 p 70**)

Furthermore, the said **Commission of Inquiry on Women 1997** was convinced that:

**Firstly**, all the *Hudood* laws were conceived and drafted in haste. They were not in conformity with the injunctions of Islam.

**Secondly**, these laws were in direct conflict both with the Constitution (such as of Article 25) and its international commitments (as made at the 4th World Conference on Women at Beijing under UN Convention on Elimination of All Forms of Discrimination Against Women).

**Thirdly**, in practical terms too, these laws had demonstrably failed to serve their purpose. They had not been any deterrent against crimes rather only led to proliferation of complaints in the courts, which had mostly been false or unjustified and caused undue hardship.

Thus it was recommended that:

- The Hudood laws should be immediately repealed.
- The repealed provisions of the Pakistan Penal Code 1860 should be re-enacted with an amendment to make rape a penal offence and to impose a severer punishment for rape on a minor wife.
- If the Parliament considered it necessary to make any further laws in this area, it should be done after serious debate and by reaching a consensus that the proposed laws should be in accordance with the teachings of the Holy Qura'an, Sunnah and other injunctions of Islam.

As the PML(N) government had not taken any action on the various recommendations of the Commission of Inquiry Report of 1997, the women organizations were constantly out on roads to check rising number of injustices done on the pretext of *Hudood* Laws.

Another **National Commission on the Status of Women** was constituted in 2002, to re-examine these laws with a view to determine whether or not these Ordinances ought to be repealed or whether these Ordinances could be improved through amendments. The Commission and a select Committee made by it started its job with its first meeting held in Karachi on 27th May 2002.

During the year long proceedings, it was felt that considerable confusion arose because of certain sections of PPC being lifted and included as part of the Ordinances. After receiving written comments from the Committee members, a final meeting was held in Karachi on 16<sup>th</sup> August 2003, where the members authorized Justice (R) Majida Razvi and Justice (R) M. Shaiq Usmani to draft the Report and the Recommendations of the Committee.

**Justice (rtd) Majida Razvi** placed her opinion on record that:

*'Hudood Laws are full of lacunae and are badly drafted. These do not reflect the correct principles of Islamic criminal law and are not in accordance with the teachings of the Holy Qura'an & Sunnah and other Islamic injunctions. These have caused great misery to women and ought to be repealed and the original laws be restored.'*

**Justice (rtd) M. Shaiq Usmani** said that:

*'Due to numerous defects and lacunae in the Hudood Ordinances promulgated by Gen Ziaul Haq in 1979, a number of anomalies have been created which have led to injustice, particularly to women, in the implementation of Zina and Qazf Ordinances.'*

*The defects in the Ordinances are so basic that amending these would serve no useful purpose and may bring about more injustice. The experience of the last 24 years (till 2003) has shown that these Ordinances have been counter-productive and have*

*added to the misery of the people in general and women in particular. Thus he was of the view that the Hudood Ordinances ought to be repealed.'*

**A veteran lawyer Syed Afzal Haider** said that:

*'After the enforcement of these Hudood Ordinances, the incidents of gang rape have increased; there are many defects as loopholes in the Hudood Ordinances and that the Ordinances ought to be repealed and the original laws be reinstated.'*

**Dr Faqir Hussain** said that:

*'The Special Committee may assist the Government and Parliament by stating in the Report the reasons for its repeal and the principles of alternative legislation. The said Ordinance is not in accordance with the injunctions of Islam and as such should be repealed. Instead, on the pattern of Qisas and Diyat law, the offence of Zina (adultery and fornication) may be added to the Pakistan Penal Code. Most of the offences in the said Ordinance, having been borrowed from the PPC, may be reverted back to the said Code.'*

**Justice (rtd) Nasir Aslam Zahid** gave his opinion that:

*'The Hudood Ordinances of 1979, in particular the Zina Ordinance, have been (mis)used as an instrument of injustice mostly against women and helpless poor persons in the country. Consequently, these Ordinances ought to be repealed at first available chance.'*

In the light of the above discussion, the Special Committee had categorically recommended that all the four Hudood Ordinances of 1979 should be repealed and the original laws with regard to the offences be restored in PPC (Pakistan Penal Code).

However it took three more years to reach the Parliament floor. The **Protection of Women (Criminal Laws Amendment) Bill 2006**, also informally called the Women's Protection Bill, was passed by the National Assembly on 15<sup>th</sup> November 2006 and by the Senate on 23<sup>rd</sup> November 2006. Gen Musharraf, as President granted assent to the Bill on 1<sup>st</sup> December 2006. This Bill made significant amendments to the *Hudood* laws and other criminal statutes, the most important that, the revisions or appeals in *Hudood & Zina* cases ceased to be referred to the Federal Shariat Court of Pakistan.

### **Federal Shariat Court: What Use?**

A controversial provision in the Constitution has been the transfer of a judge from one High Court to another without his consent or after consultation with the Chief Justice of Pakistan or Chief Justices of the concerned High Courts. The original 1973 Constitution made such a transfer subject to such consent as well as consultation. A proviso added by the Constitution (Fifth Amendment) Act 1976 empowered the President to order such transfer for a period not exceeding one year, and the President Order No. 14 of 1985, issued by Gen Ziaul Haq extended that period from one to two years.

Gen Ziaul Haq, to prolong his dictatorial rule, had put the guns of his vicious wishes on the shoulders of Ulema, especially of the Jama'at e Islami (JI) by keeping the religious cum political parties and religious scholars at his right hand side.

In 1979, Hudood Ordinance was promulgated to introduce Islamic system of punishments and to deal with the appeals against the verdicts on those ordinances from lower courts, the government brought Federal Shariat Court (FSC) in being making its principal seat, registry and the only campus at Islamabad under the Constitution (Amendment) Order 1980, which started functioning on 27<sup>th</sup> May 1980. However, it was not a new development in Pakistani jurisprudence, see the details.

*[The Presidential Order 1980 was based on provisions already available in the Constitution of Pakistan 1973 Chapter 3-A titled as Federal Shariat Court. This court was successor to the Shariat Benches of Superior Courts Order of 1978 which was created*

*by an administrative command of Gen Ziaul Haq through President's Order no: 22 of 1978 dated 4th December 1978. This Order was originally consisting of twelve Articles.*

*Article 4 mandated that there would be constituted a Shariat Bench in each High Court. Each Shariat Bench was to consist of three Muslim Judges of the High Court to be appointed by the President of Pakistan on the recommendation of the Chief Justice of that High Court. Article 5 created Shariat Appellate Bench in the Supreme Court of Pakistan while Article 6 stipulated Powers, Jurisdiction and Functions of Shariat Bench and Shariat Appellate Bench. The Shariat Benches were provincial as they were constituted in every provincial High Court.*

*At that time the Ulema around the military ruler had suggested him that the nature of the work assigned to the Shariat Benches demanded one Shariat Court at Federal level and not many Shariat Benches at provincial level. As a result thereof President's Order 22 of 1978 was substituted by President's Order No.3 of 1979 i.e, Constitution (Amendment) Order of 1979 dated 7th February 1979 whereby a new Chapter 3A entitled Federal Shariat Court was incorporated in Part VII of the Constitution.]*

Article 203-C (4) of the Constitution, added by the Presidential Order of 1980 also provided that a judge of a High Court could be transferred to act, for up to two years, as a judge of the Federal Shariat Court, and in the event of refusal, would be deemed to have retired from the service under provisions of Article 203-C (5) of the Constitution. Ever since this amendment, the transfer provisions had been a subject of intense criticism: rightly so as the provisions were seldom used in public interest.

FSC's Justice Sh Aftab Hussain, in an interview published in the ***daily 'Jang' of 25<sup>th</sup> July 1992***, told an interesting fact that:

*'Gen Ziaul Haq had raised the FSC within one night to drag me out of Lahore High Court. I was member of that bench which was hearing petition of Air Marshal (Rtd) Asghar Khan against martial law and the bench was headed by CJ LHC Maulvi Mushtaq Hussain with Justice Zakiuddin Pal as another member. Someone told Gen Ziaul Haq that the LHC bench was going to give verdict against his martial law. The General then planned to avoid the announcement of that judgment by breaking the bench. Chief Justice Maulvi Mushtaq Hussain was sent to the Supreme Court as an ad-hoc judge and I was sent to head the said Federal Shariat Court.*

*Astonishingly, I was removed in the same like sudden event. I was sent to Sudan to attend a Shariah Conference. In my absence, when I was on Umrah on my way back, I was told that I've been removed from the FSC and made an advisor to the President. It was a political slot which I had refused to join and preferred to go home.*

*Both the events, of my sending to and of removing from the FSC were accomplished through promulgation of Ordinances making Constitutional Amendments; I feel proud.'*

The provisions had often been misused or abused for pressurizing the judges by the civil and military rulers so as to obtain from them favourable opinions or judgments or punish them for their upright behaviour. The Supreme Court in the case of ***Al-Jehad Trust v Federation (PLD 1996 SC 324)*** had examined this provision in the context of independence of judiciary and concluded that no judge would be transferred to the Federal Shariat Court against his own wish. Salute to the then Chief Justice of Pakistan Sajjad Ali Shah, the ill intentioned practice stands discontinued since then.

The Court consists of 8 Muslim Judges including the Chief Justice, appointed by the President from amongst the serving or retired Judges of the Supreme Court or a High Court or from amongst persons possessing the qualifications of a Judge of the High Court. Of the 8 Judges, 3 are required to be Ulema who are well versed in Islamic law. The Judges hold office for a period of 3 years and the President may further extend such period. Till the last day of 2008,

there was a pendency of 1365 criminal appeals against convictions & acquittals and 207 cases or appeals were pending for revision.

The Court, on its own motion or through petition by a citizen or a government (Federal or provincial), may examine and determine as to whether or not a certain provision of law is repugnant to the Injunctions of Islam (Article 203-D). Appeal against its decision lies to the Shariat Appellate Bench of the Supreme Court, consisting of 3 Muslim Judges of the Supreme Court and not more than 2 Ulema, appointed by the President (Article 203-F).

The Court also exercises appellate revisional jurisdiction over the criminal courts, deciding Hudood cases (Article 203-D). The decisions of the Court are binding on the High Courts as well as subordinate judiciary (Article 203-G). The Court appoints its own staff and frames its own rules of business and court procedures.

Astonishing to note here that consistent injustice resulting from the *Zina* sections of the *Hudood* Ordinances (1979) once led the Federal Shariat Court to reach a conclusion that:

*"We are constrained to make observations that such reckless allegations are being brought so frequently that something should be done to stop this unhealthy practice. The prosecution agencies before putting people on trail for offences of zina on flimsy allegations should be mindful of injunctions of the Holy Qur'an and the message conveyed through the decisions from the early period of pious Caliphs."* [1991 PCr. LJ 568 FSC]

Referring to ***The Muslim, Islamabad, 9<sup>th</sup> March 1993***, the reckless misuse of this law was evident from the fact that superior courts acquitted 95% of all women accused in *Hudood* cases, said Justice Mohammad Afzal Zullah. The judge further told that:

*'The law is a tool of exploitation in the hands of law enforcing agencies and 'family members' of women who are perceived to defy 'norms' of society by exercising their legal rights.'*

Based upon his personal experience as a sitting judge, he had observed that most FIRs were filed either:

- by mostly the under educated parents because their daughter had married someone of her own choice or
- by former husbands on the remarriage of their previous wives.

The Commission of Inquiry's review of 60 cases reported in the Pakistan Annual Law Digest of that year had found that:

- 15 pertained to the class of people who had married against the wishes of their families [mostly fathers or brothers] or guardians.
- A woman was accused of *Zina* despite possessing and producing records of the Family Court and High Court proving she was legally divorced before she remarried.
- Police officials collude with families and those seeking to abuse women through law to the extent that they had registered cases and started investigations on the basis of allegations of *Zina* received by post.

[On 18<sup>th</sup> March 1987 the Federal Shariat Court acquitted a man and a woman arrested by the police from their home on 3rd May 1980, registering a case of 'attempted *zina*' which is no crime even under the *Hudood* laws. Yet, after the couple spent seven years in prison, the Additional Session Judge South Karachi sentenced both to 5 years rigorous imprisonment and 10 lashes in January 1987. (***Pakistan Criminal Law Journal 2321***)]

When the Constitution guarantees life and liberty for all citizens (save in accordance with law), and that every citizen has the right to a good reputation, who is to be held accountable for the seven years of imprisonment, indignities and humiliation suffered by this couple?

Referring to a write up of **Dr Faqir Hussain, Registrar Supreme Court** of Pakistan, available at [www.Paklegal.org](http://www.Paklegal.org) the fact remains that ever since its establishment in 1980, the Federal Shariat Court had been the subject of criticism and controversy in the society. Created as an Islamisation measure by the Military Regime and subsequently protected under the controversial 8<sup>th</sup> Amendment, its opponents question the very rationale and utility of this institution. In fact this Court merely duplicates the functions of the existing superior courts.

The composition of the Court, particularly the mode of appointment of its judges and the insecurity of their tenure, is another negative point. It is alleged, that this Court does not fully meet the criterion prescribed for the independence of the judiciary, hence, is not immune to pressures and influences from the Executive.

**Asia Report N°160, on 'REFORMING THE JUDICIARY IN PAKISTAN'** published on 16th October 2008 categorically stated:

*'Laws that discriminate on the basis of misusing religion and gender and misinterpreting the Holy Qura'an & Sunnah, including the Hudood Ordinances and Qisas (retribution) and Diyat (blood money) law, are part of the legacy of military rule (widely misused and mis-applied by the then military dictator Gen Ziaul Haq).'*

*'Given constitutional cover by military rulers and legal sanction by superior courts unwilling to uphold fundamental freedoms, these laws had undermined the rule of law, encouraged vigilantism and emboldened religious extremists. These extremists used them to advance a radical ideology of exclusion, curtail freedom of expression and discriminate against women, religious and sectarian minorities.'*

To what extent the above statements are true, intelligentsia and researchers should guide us, but the history tells us that before 1996, the Federal Shariat Court was mostly used as a dumping ground for the 'unwanted' judges of the higher judiciary and validation of the controversial *Hudood* Laws; especially the *Rajam* (stoning to death) was criticized because no male was punished.

With the adoption of **Protection of Women (Criminal Laws Amendment) Act 2006** the jurisdiction of the Court was considerably curtailed inasmuch as, appeals or applications for revision arising out of trial of offences taken out from the Offence of *Zina* (Enforcement of *Hudood*) Ordinance, 1979 are no longer filed before the Court. Since then they are filed before the High Court. Dr Faqir Hussain, Registrar SC had rightly opined then that '*there is a need for a serious discussion on the independence, utility and functions of this Court.*'

On **13<sup>th</sup> December 1980**, to the surprise of Gen Ziaul Haq, the F S Court declared the land reforms of 1972 and 1977 as eminently in consonance with Islamic injunctions. Then the so-called 'friends' *Ulema* were brought in who traditionally supported the landlord class. Thousands of tenants were forcibly evicted from the land in various districts. The martial law regime made it clear that it was not committed to redistributive agrarian policies and described the land reforms as ordinary politics to reward supporters and punish enemies.

Gen Ziaul Haq was basically focussing on all those steps which were considered 'pro PPP' by general perception. Though Z A Bhutto had not seriously implemented the 'land reforms', himself being a big landlord of Sindh, but people were hopeful of getting lands distributed some day. Military ruler did not want to take a chance even.

Three *Ulema* were inducted into the Federal Shariat Court and two into the Shariah Appellate Bench of the Supreme Court which reversed the FSC's able judgment later in 1990.

Justice Dr Javed Iqbal, in an interview published in **daily 'Jang' dated 1<sup>st</sup> July 1992**, had opined that '*there is no use of Federal Shariah Courts in Pakistan; the other superior courts can do the same job in a better way*'. The main reason he quoted firstly, was that for appointment of judges in all normal superior courts there are certain conditions, some under the constitution and some by rules, which have to be fulfilled before enrolment of a person for these superior courts BUT for judges of the FSC there exist no set rules or provisions; thus the element of 'likes & dislikes by rulers' make them un-acceptable.

Secondly; the judges of normal superior courts are appointed by the President but they can only be removed through Supreme Judicial Council under a process of Art 209 given in the constitution whereas the judges of FSC are appointed by the President and can be removed by the President at their whims and wishes.

In a way the FSC becomes a 'President's Court' though its name is Shariat Court because its judges are always found at the mercy of secretariats of the PM or the President, whatever the form of government it exists in. In Gen Ziaul Haq's times, two Chief Justices of the FSC were sent home with one stroke of pen because they were not inclined to write *'that decision which the General wanted to listen and see'*.

Main objective of the FSC was that it should see if all the prevailing laws were in accordance with the Islamic teachings. This job had already been completed during the tenure of CJ of FSC Aftab Hussain so the FSC is just an eye-wash court now causing extra burden on government exchequer nothing more.

Another side effect of this FSC is that it sometimes poses a threat to sovereignty of the Parliament which is a supreme institution of the country by Constitution. In the past [known and glaring example came up in Nawaz Sharif's second term 1997-1999] the FSC had sometimes given such decisions at their own that it posed threats to Pakistan's international business and debt commitments and the nation had to get embarrassed.

The Parliament was given six month's time to formulate new legislation to bring all the financial institutions in an ambit of 'interest-free banking system', which was not practically possible. As a result the Nawaz Sharif government had to twist the 'Islamic connotations' through re-defining the terms and review petitions etc.

Justice S A Nusrat, in his interview of 25<sup>th</sup> July 1999 published in media, had also said that:

*'In Pakistan's Constitution of 1973 all necessities of Islamic system of governance are available; there is no need of new amendments in the name of Islam in it. No new enactments in the name of Shariah Bill are required. Shariat Court was not needed at all; it was Gen Ziaul Haq's trick to befool the people. If a case has to come in the Supreme Court at last, then why not depend upon them whole heartedly.'*

In nut shell, enough is enough, for how long we'll be betrayed in the name of Islamic Courts and Islam. Either our rulers should come up with courage to bring true Islamic way of governance or true democracy but being truthful by all means.

A historical saying: ***'you can make some people fool for ever; you can make all the people fool for some time; you cannot make all the people fool for all the times.'***