



Federal Shariat Court
Annual Report 2003

FEDERAL SHARIAT COURT

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1 FOREWORD



(In the name of Allah, Most Beneficent, Most Merciful)

It is my pleasure to present the second annual report of the Federal Shariat Court. The format of the report this year is somewhat different from that presented last year in the first report. Last year, among other matters, an important section of the report presented a survey of cases in which various laws were examined by the Court from the Islamic legal perspective. The survey covered the cases right from the inception of the Court up to the present times. This year the focus, besides an enhanced presentation of judicial statistics, is on a few significant judgements that reflect the complexity and the significance of the task undertaken by the Court.

The future of Islamic law in Pakistan cannot be left to chance. Islamic law must be applied and developed in a systematic manner so as to be functional in the modern world. The Federal Shariat Court is a vital, and perhaps the most important, institution that has been equipped to undertake this noble task. Over the years the Court has developed an elaborate system for the performance of its functions. First, the Court maintains a balance between the Judges trained in the common law tradition and the Ulama' Judges, who are experts in the Islamic legal tradition, with the result that each issue presented before the Court is shaped and refined in a unique way by the two traditions before a final decision is rendered. Silently, swiftly, but surely *ijtihad* is being undertaken in a new way. The Court is still young, having been born in 1980, yet it has effectively addressed a huge array of diverse questions ranging from the criminal law to contracts and commerce, from family law to issues of *ribā*, and from inheritance to intellectual property. Second, within the elaborate structure developed by the Court is the all-important department that deals with research on issues of Islamic law. Each issue is well researched from a variety of aspects in the light of the fundamental principles of the Shari'ah and the research is placed before the Judges for their consideration. Translations of Islamic legal texts in the original Arabic are also provided when needed by competent staff employed by the Court.

I am enormously proud that the Court has, during its short life, generated a wealth of information on Islamic law, information that needs to be systematically studied and organised so that all those concerned in any way with Islamic law may benefit from it, but especially those who appear before this Court on a regular basis. The information can also be usefully employed by our law schools and research institutions. It is, therefore, my endeavour to commence the organisation of this material through the medium of annual reports of this Court. This will not only help in reporting on the activity of the Court and the service it is rendering in this important area, but also make the report a highly useful document that can be benefited from in many ways. The most important of these benefits will be to understand the functioning of the

Court so that citizens who wish to bring matters before this Court may be able to do so in an effective manner

It is an honour for me to thank my learned brother Judges who serve the goals of this Court with dedication and painstaking devotion. The achievements of the Court are their achievements and arise from their deep commitment. I would also like to thank the entire staff of the Court, specifically the members of the Editorial Board, for contributing in various ways towards the preparation of this report.

Justice Ch. Ejaz Yousuf
Chief Justice
Federal Shariat Court

**THE FEDERAL SHARIAT COURT
AND ITS ORGANISATION**

FEDERAL SHARIAT COURT



2 THE FEDERAL SHARIAT COURT AND ITS ORGANISATION

2.1 Introduction

1. This holy land was liberated in the name of Islam on the basis of the two-nation theory. Before the creation of Pakistan, the Muslims of the Sub-continent were right in thinking that by achieving independence and creation of a separate home land they would be able to order their lives in accordance with the dictates of the the Holy Quran and the Sunnah of the Holy Prophet (PBUH). They were also sanguine that their lives, properties and rights would be protected in the Islamic State and no one would dare to transgress thereon.

Keeping in mind these objectives, the Muslims of the Sub-continent, under the dynamic leadership of the Quaid-e-Azam, succeeded in establishing Pakistan, and in the process countless believers laid down their lives besides suffering irreparable loss of honour and property.

2. The founder of the country had promised that Pakistan would be an ideological State to be organised and administered in accordance with the Injunctions of the Holy Quran and the Sunnah. The Objectives Resolution passed by the Constituent Assembly affirmed the main objectives set-forth for the creation of Pakistan.

3. The Objectives Resolution was incorporated in all the successive Constitutions. It is now enshrined in the 1973 Constitution of the Islamic Republic of Pakistan. Initially, it remained merely a preamble having no binding legal force on the proceedings and judgements of the Superior Courts in the country.

4. Article 227 of the 1973 Constitution mandates in clear terms that all existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and the Sunnah. It, however, contained an explanation that as regards the application of Article 227, the personal law of any Muslim sect, the expression “Quran and Sunnah” would mean the Quran and Sunnah as interpreted by that sect.

5. With a view to implementing the mandate of Article 227, the Council of Islamic Ideology was constituted.

It is a matter of record that the said Council has, over the last many years, made numerous recommendations in writing to amend certain existing laws so as to bring them in conformity with the Holy Quran and the Sunnah, but no serious effort has been made, so far, to implement the same.

6. On the promulgation of Martial Law in July 1977, the Government declared it a matter of policy that the Islamisation of laws would be given top priority on its agenda. The Council of Islamic Ideology was re-activated to achieve this objective. It prepared and codified the Hudood Laws, which were enforced, and they hold the field up to date.

7. In 1979, a constitutional amendment was effected to set up the Shariat Benches comprising three Judges in each High Court of the four Provinces. The Shariat Appellate Bench comprising similar number of Judges in the Supreme Court of Pakistan was also formed.

8. The Shariat Benches of the High Courts were conferred powers to examine and decide petitions brought before them for scrutiny of any existing law on the touchstone of the Injunctions of Islam, except (i) Muslim Personal law, (ii) any law relating to procedure of the Court or Tribunal until expiration of ten years period from June, 1980, and (iii) any fiscal law or law relating to levy of Zakat, taxes and fees. Unfortunately, the process of Islamisation could not be speeded up despite the creation of the Shariat Benches in the High Courts.

9. Keeping this situation in view, the Federal Shariat Court was established in May, 1980. It started functioning by opening its registry in a residential accommodation in Islamabad. So far, it has succeeded in examining large number of Federal and Provincial laws, not only on its own motion but also by disposal

of Shariat Petitions, filed before it by citizens of Pakistan, challenging various laws or certain provisions thereof, as being repugnant to the Holy Quran and the Sunnah.

10. Simultaneously, a large number of criminal appeals, revisions and review petitions, in Hudood Laws were also disposed of.

JURISDICTION (HISTORY AND NEW DEVELOPMENTS)

11. The Federal Shariat Court was conferred original, criminal and suo moto jurisdiction by the Constitution, apart from revisional powers, and these have been exhaustively dealt with in the Court's annual report of 2002. To avoid repetition, only a historical background and some new developments in respect of its jurisdiction are highlighted hereinafter.

12. Under the 1973 Constitution, the law relating to procedure of a Court or Tribunal and Muslim personal law, besides the provisions of the Constitution, were immune from scrutiny by the Federal Shariat Court. Under Article 203B (c), a ten-year embargo had been placed on its jurisdiction to examine fiscal laws or any law relating to levy and collection of taxes and fees, banking or insurance practice and procedure.

After the expiry of the above mentioned period of ten years in 1989, as many as 115 Shariat petitions, mostly pertaining to interest-based laws, were filed before the Federal Shariat Court for adjudication as being in conflict with the Islamic Injunctions.

13. The Federal Shariat Court declared interest, in all its forms, as repugnant to the Injunctions of the Holy Quran and the Sunnah, vide judgement reported as *Dr. Mehmood-ur-Rehman Faisal and others v. Federal Government and others* (PLD 1992 FSC 1).

The matter was taken up before the Supreme Court of Pakistan and this judgement was upheld (PLD 2000 S.C. 225).

14. Later on, however, a review petition was filed before the apex Court of the country, and the Court reviewed its judgement recalling the same with the result that the case was remanded to the Federal Shariat Court for fresh examination, keeping in view the directions/observations contained in the remand order (PLD 2002 S.C. 800). This matter will be taken up by the Federal Shariat Court in due course.

15. Dealing with the question of embargo placed on the Federal Shariat Court, regarding examination of procedural laws, the majority of Jurists and lawyers had been of the view that when the rights of individuals are involved in matter of procedure then the law prescribing the procedure cannot be treated to fall outside the pale of jurisdiction of the Federal Shariat Court, and the Court can scrutinise the same by treating it as substantive law. The overwhelming view that has prevailed in the past was that the provisions of Criminal Procedure Code fell within the domain of Federal Shariat Court's jurisdiction for examination in the light of Islamic Injunctions.

16. As regards the adjudication of statutes pertaining to Muslim personal law, it was treated as being beyond the scope of the jurisdiction of the Federal Shariat Court. It is pertinent to mention here that this question came up for consideration before the then Shariat Bench of the Peshawar High Court and the impugned provision of the statute relating to Muslim Personal Law was declared repugnant to Islamic Injunctions. The case is reported at PLD 1980 Peshawar 47.

The Shariat Appellate Bench of the Supreme Court has, however, set aside this judgement on the ground that "Muslim Personal Law" fell outside the purview of the jurisdiction of Shariat Courts. The details are available in *Federation of Pakistan v. Mst. Farishta* (PLD 1981 SC 120).

17. The bar of jurisdiction imposed upon the Federal Shariat Court to examine the vires of "Muslim Personal Laws" was partially lifted by the apex Court of the country in its celebrated judgement reported as *Dr. Mehmood-ur-Rehman Faisal v. Government of Pakistan* (PLD 1994 SC 607). This judgement laid

down that the expression Muslim Personal Law” has to be interpreted in a manner that enlarges the scope of scrutiny of all codified and statute law, not strictly falling within the meaning of “Muslim Personal Law.”

It would be advantageous to quote, in the matter, the relevant observations of the Supreme Court:

In our humble view, this aspect of the case needs reconsideration and to that extent the view expressed in *Mst. Farishta’s case* requires to be reviewed by us. After carefully considering the various provisions of the Constitution in the light of the submissions at the bar, we are of the view that the expression “Muslim Personal Law” used in Article 203-B (c) of the Constitution, while defining “law” did not mean all codified and statute law or provision of a law which exclusively applied to Muslim population of the country as a class.

18. Relying on the above dictum of the Supreme Court, the Federal Shariat Court proceeded to examine the provisions of Muslim Family Laws, Ordinance, 1961 on the touchstone of Islamic Injunctions in its judgement reported at PLD 2000 FSC 1, whereunder sections 4 and 7 of the Ordinance were declared to be repugnant to the Islamic Injunctions.

Presently, this judgement is subject matter of appeal before the Shariat Appellate Bench of the August Supreme Court.

19. Though the jurisdiction of the Federal Shariat Court has been considerably enlarged, as a result of the rule of law laid down in *Dr. Mahmood-ur-Rehman Faisal’s case*, by the August Supreme Court, the fact remains that the general public, even the educated segment of the society which includes lawyers and jurists, is still ignorant about jurisdiction of Federal Shariat Court, in this behalf.

20. Another important development with regard to the enlargement of jurisdiction of the Federal Shariat Court that took place in the meantime is that clause 4 of section 10 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 was deleted from the Schedule of the Anti-Terrorism (Amendment) Ordinance XXXIX of 2001. As a result, the Appellate Jurisdiction now stands conferred on the Federal Shariat Court against a judgement delivered by a Special Court constituted under the Anti-Terrorism Act, with regard to offence relatable to section 10(4) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979.

21. It will not be out of place to refer to a judgement delivered by this Court reported as *Muhammad Safeer v. The State and another* (2004 SD 142) relating to the jurisdiction of Federal Shariat Court in Hudood cases. Despite the fact that under Article 203(DD) of the Constitution of the Islamic Republic of Pakistan, revisional jurisdiction in Hudood cases is vested in the Federal Shariat Court, different High Courts in the country have been entertaining revision petitions against interlocutory matters/orders arising out of pending Hudood cases before trial Court. Not only that, the High Courts have sometimes even interfered in the pending proceedings of the Hudood cases in the exercise of its writ jurisdiction under Article 199. This Court, after a thorough examination of the Constitutional provisions and the relevant case-law, has ruled that in Hudood cases a High Court can neither interfere under its writ jurisdiction nor can it lawfully exercise revisional jurisdiction *qua* orders/proceedings passed/taken by the trial Courts, seized of Hudood cases, in the purported exercise of its power under section 439 or 561-A of Code of Criminal Procedure.

It is a matter of concern that some litigants rush to High Courts for redressal of their alleged grievances by filing revision petitions/writ petitions and succeed in obtaining favourable orders in Hudood cases pending before trial Courts.

2.2 Mr. Justice Ch. Ejaz Yousaf, Chief Justice Federal Shariat Court

Mr. Justice Chaudhary Ejaz Yousaf was born at Quetta on 7th January, 1952. He completed his primary education at Quetta; studied at Municipal High School Depalpur, Government High School, Mianwali and Central Model School, Lahore; obtained Secondary School Certificate from Punjab Board; did Intermediate from Islamia College, Karachi; Graduated from the University of Balochistan; obtained degrees of Bachelor of Laws and Masters in Economics from the University of Balochistan in the year 1974 .

He was enrolled as an Advocate with the Sindh & Balochistan Bar Council on 31.5.1976 and as an Advocate of the High Court on 12.8.1978; enrolled as an Advocate of the Supreme Court of Pakistan on 15.6.1991.

He has been an Honorary Lecturer in the University Law College Quetta from 1983 to 1992.

Has been Legal Advisor to: the Quetta Development Authority from 1985 to 1992; Balochistan Water and Sanitation Authority from 1986 to 1992; Retainer for United Bank Limited from 2.1.1985 to 1992; has been on the panel of Advocates for the National Bank of Pakistan from 1984 to 1992, National Development Finance Corporation and Regional Development Finance Corporation from 1985 to 1992, Water and Power Development Authority of Pakistan from 1985 to 1992.

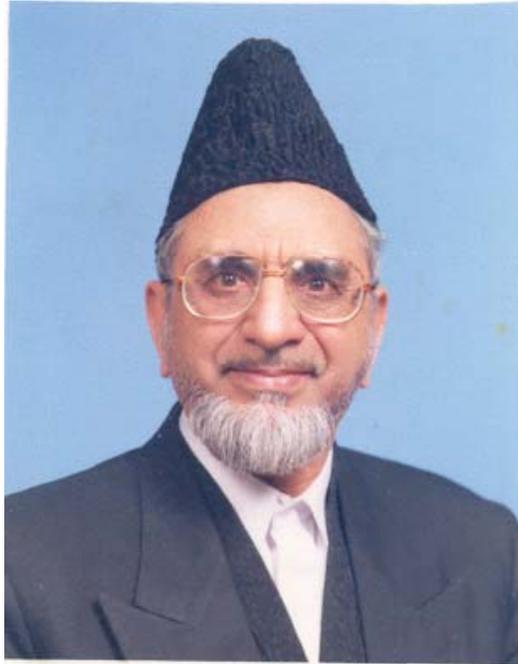
Appointed as Special Law Officer by the Ministry of Law, Justice & Parliamentary Affairs in the Speedy Trial Courts, as well as the Supreme Appellate Court in the year 1992; appointed as Special Prosecutor for Pakistan Narcotics Control Board and the Anti-Narcotics Force, Balochistan in the year 1990 by the Government of Pakistan.

Was offered the post of District and Sessions Judge in 1985 by the then Chief Justice of the High Court of Balochistan but could not accept the same due to personal reasons; was appointed as Additional Advocate-General, Balochistan on 27.8.1992 and continued as such until his appointment as Advocate General, Balochistan with the status of Minister on 13.11.1996. In the meantime, he performed duties as Acting Advocate General Balochistan w.e.f. 16.9.1993 to 2.11.1993; was the first Additional Advocate-General for Balochistan whereas, his father the late Chaudhry Muhammad Yousaf had the honour to be the first Assistant Advocate-General for the Province; has been the Ex-officio Chairman of the Balochistan Bar Council; elevated as Judge of the Federal Shariat Court on 19.2.1997; appointed as Acting Chief Justice of the Federal Shariat Court on 14.1.2003 and elevated as permanent Chief Justice of the Court on 9.5.2003; Ex-officio Member of the Chief Justices Committee; Member, National Judicial Policy Making Committee; Member, Law Commission of Pakistan; Member, Selection Board of the Law Commission of Pakistan; Member, Advisory Board of the Al-Mizan Foundation; Member, Administration Committee of Al-Mizan Foundation; Member, Board of Governors, Board of Trustees, Council of Trustees and Selection Board of the International Islamic University, Islamabad. Is also on the Board of Governors of the British Pakistan Law Council.

Delivered keynote address in the Seminar on the Islamic Criminal Justice System held from 25th to 27th September, 2003 at Johar Bahru, Malaysia.



2.3 Mr. Justice Dr. Fida Muhammad Khan, Senior Puisne Judge



Born on 21st October, 1938.

Academic Qualifications

- B.A in Ist class (with distinction), Ist Position in the University, was awarded gold Medal and scholarship;
- B.Sc. (War Studies);
- B.T;
- Diploma Course in German Language;
- M.A (Islamiyat) Ist class (with distinction);
- M.A. (Arabic) Ist class (with distinction);
- M.A. (English) Ist position (with distinction);
- Ph.D. (Islamic Law and jurisprudence);
- Lecturer in Islamiyat at Post-Graduate Level, University of Peshawar (about six years);
- Deputy Director of Education/Director of Motivation, PAF (about twenty years);
- Judge/Senior Puisne Judge, Federal Shariat Court of Pakistan, (for the last about sixteen years);
- Attended, and read papers in, many National Conferences, Seminars and delivered countless lectures on Islam; compiled several books on Tafseer, Hadith, Islamic Ideology and Islamic History;

Member

- Board of Governors, International Islamic University, Islamabad;
- Executive Council, Allama Iqbal Open University, Islamabad;
- Council Dawah Academy, International Islamic University, Islamabad;
- Council, Islamic Research Institute, Islamabad;
- Council Shariah Academy, International Islamic University, Islamabad;
- Academic Council, Allama Iqbal Open University, Islamabad;
- Board of Studies, Department of Islamiyat, Peshawar;
- Academic Programme Committee for Dawah Academy, IIU, Islamabad;
- Advisory Board, World Jurists Council;
- Former Member, Syndicate, Agriculture University, Faisalabad;
- Former Member, Syndicate, Quaid-e-Azam University, Islamabad;
- Former Chairman, Executive Committee, Allama Iqbal Open University, Islamabad;
- Former Member, Executive Council, Allama Iqbal Open University, Islamabad.

2.4 Mr. Justice S.A. Manan



Date of Birth: 6th November, 1933.

Permanent Home Address: 1-Race View, Off Jail Road, Lahore.

Academic Qualification: Law Graduate from Punjab University, Lahore.

Experience

- Graduated in Law in 1956 from Government Law College, Punjab, University, Lahore;
- Enrolled as Pleader in 1956 and gained extensive experience in all branches of the law;
- Enrolled as Advocate of High Court in 1961 and of the Supreme Court of Pakistan in 1965;
- Legal Advisor to the General Headquarters for conducting legal cases on behalf of the Border Area Committee for about seven years from 1964 to 1971 and also of A.P.P. (Associated Press of Pakistan);
- Practised law for about 35 years;
- Appointed Deputy Attorney General for the Government of Pakistan in August, 1990
- and during this period conducted accountability cases;
- Lecturer in a private Law College in 1989;
- Elevated to the Bench of Lahore High Court in August, 1992;
- Officially engaged by the Government of Pakistan to conduct military take-over case in the Supreme Court of Pakistan under the guidance of Syed Sharif-ud-Din Pirzada, Senior Advisor;
- Member of the International Bar Association, American Bar Association and Commonwealth Judges Association;

Elevated as Judge of the Federal Shariat Court on 5th June, 2003.

Visits Abroad: U.K. France, Italy, Germany, Austria, Spain, Amsterdam and Gibraltar.

2.5 Mr. Justice Saeed-ur-Rehman Farrukh



Date of birth: 1.8.1936.

Domicile: Sahiwal.

Permanent Address: 51/9, Nursery Lane, Lawrence Road, Lahore.

- Passed B.A. (Hons.) from Government College, Sahiwal in 1954.
- Passed LL.B. from Punjab University in 1956.
- Started law practice in 1956.
- Enrolled as Advocate High Court on 4-3-1959.
- Enrolled as Advocate Supreme Court on 16-6-1970.
- Elevated as Additional Judge of the Lahore High Court on 28-8-1992.
- Re-elevated on 10-10-1996.
- Elevated as confirmed Judge, Lahore High Court pursuant to the celebrated judgement in Al-Jehad Trust v. Federation of Pakistan.
- Seniority as Judge reckoned with effect from the date of original appointment i.e. 28-8-1992.
- Appointed as Judge, Federal Shariat Court on 5-6-2003.
- A Na'at-go poet.

2.6 Mr. Justice Zafar Iqbal Pasha Chaudhry



Born on 01 April 1940.

Academic Qualifications

- Graduated from University of Punjab.
- Passed L.L.B from Punjab University, Law College Lahore.
- Obtained Masters Degree from University of Punjab Lahore in Political Science.

Experience

- Enrolled as Advocate in 1962.
- Enrolled as Advocate Lahore High Court Lahore on 07th September 1964.
- Enrolled as Advocate of Supreme Court of Pakistan on 19th March 1973.

Appointments

- Appointed Deputy Attorney General for Pakistan with effect from 12th March 1995 and held this office till 18.11.1996.
- Appointed Advocate General of Punjab with effect from 18.11.1996 with Rank and Status of Provincial Minister. Elevated as Addl.

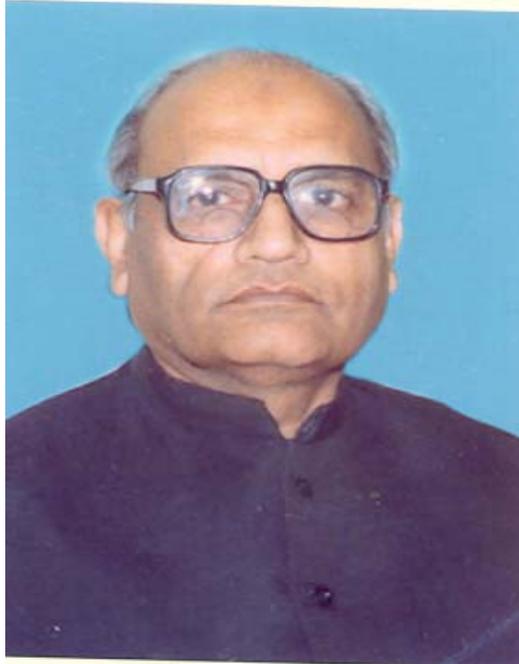
Judge Lahore High Court on 10.12.1996. Confirmed as Judge of Lahore High Court on 09.12.1997.

- Retired from High Court on 31.03.2002.
- Appointed as Chairman Pakistan Customs, Excise & Sales Tax Appellate Tribunal on 25.10.2002.
- Elevated as Judge Federal Shariat Court of Pakistan on 03.06.2003.

Extra Curricular

- Selected in International “Who is who for Professionals” for the year 1998.
- Became President of Student Union in Government College Sahiwal in 1960 and declared best English Speaker of the year.
- Annexed maximum number of trophies in all Pakistan Inter Collegiate English debates in 1961-62 secured 1st position consecutively in all this six class Law Moots in the Law College.

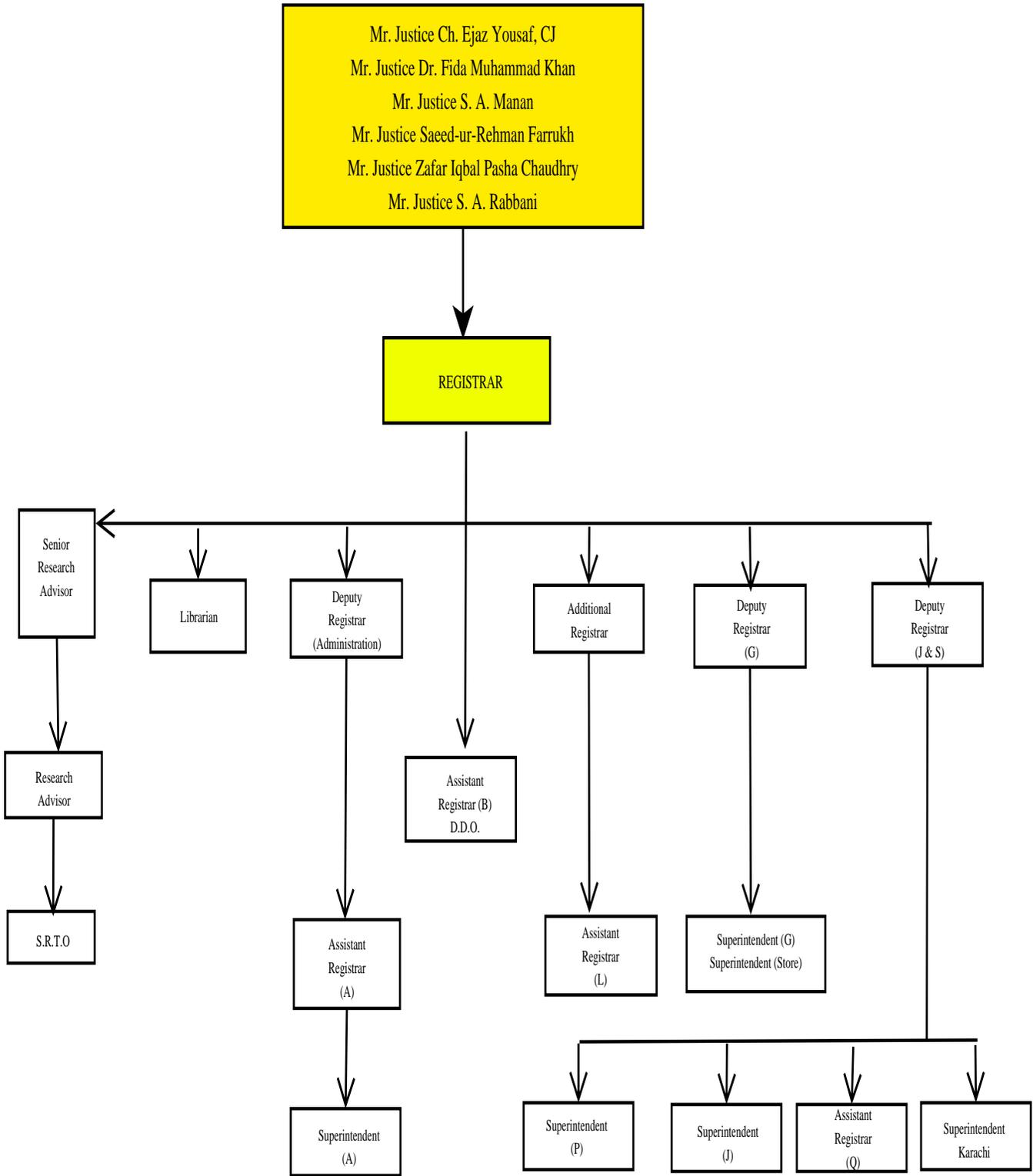
2.7 Mr. Justice S.A. Rabbani



Born at Rurky, District Saharanpur, British India in 1940.

- B.Sc. D.J.Sindh Govt. Science College Karachi.
- M.A (Pol.Sc.), Karachi University.
- LL.B Karachi University.
- M. A. (English) Punjab University.
- Training in Legislative Drafting: The Public Law Center, New Orleans, U.S.A.
- Joined Judiciary as Civil Judge in 1970 on success in P. C. S (JB) competitive examination of W. P. Public Service Commission 1968-69.
- Worked in and supervised Legislation Wing of National Assembly of Pakistan for about twelve years.
- Remained Clerk Attaché in British Parliament, London.
- Elevated as Judge Sindh High Court in April 1999.
- Retired from Sindh High Court: 5.6.2002.
- Appointed as Judge Federal Shariat Court: 5.6.2003.
- Author of the following books:
 1. Legislative Drafting Manual.
 2. Amendments in the Constitution, 1973.
 3. The Constitution of Islamic Republic of Pakistan an Analysis.

2.8 Organisational Chart of the Court



2.9 Federal Shariat Court Composition 2003

2.9.1 The Chief Justice

Mr.Justice Fazal Ilahi Khan	12.01.2000	11.01.2003
Mr.Justice Ch. Ejaz Yousaf (Acting Chief Justice)	14.01.2003	08.05.2003
Mr.Justice Ch.Ejaz Yousaf	09.05.2003	

2.9.2 The Judges of the Federal Shariat Court

Mr. Justice Dr.Fida Muhammad Khan	02.10.1988	
Mr. Justice Ch.Ejaz Yousaf	19.02.1997	13.01.2003
Mr. Justice Khan Riazuddin Ahmad	19.02.2000	18.02.2003
Mr. Justice S. A. Mannan	05.06.2003	
Mr. Justice Saeed-ur-Rehman Farrukh	05.06.2003	
Mr. Justice Zafar Pasha Chaudhry	05.06.2003	
Mr. Justice S. A. Rabbani	05.06.2003	

2.9.3 Registrar

Mr. M.R.Najmi

Significant Cases Decided by the Federal Shariat Court



Chief Justice in his Chamber

3 SIGNIFICANT SHARIAT PETITIONS/CRIMINAL CASES DECIDED BY THE FEDERAL SHARIAT COURT

3.1 Necessity to Grant Licence for Arms Ordinance and Payment of Fees

3.1.1 Abdul Majid v. Government of Pakistan (PLD 2004 FSC 1): Mr. Justice Dr. Fida Muhammad Khan

Present: Mr. Justice Ch. Ejaz Yousaf C.J., Mr. Justice Dr. Fida Muhammad Khan and Mr. Justice Saeed-ur-Rehman Farrukh. JJ.

Shariat petition No: 1 of 2003: Through this petition, the petitioner assailed Pakistan Arms Ordinance No XX of 1965 and Arms Rules 1924, on the ground of being repugnant to the Islamic injunctions, as contained in the Holy Quran and Sunnah of the Holy Prophet P.B.U.H. The contention of the petitioner was that: every citizen of the country should be allowed to keep any kind of weapon for the sake of protection of his life, honour and property. According to the petitioner, there was no need to issue licence for keeping firearm weapons and levying annual fees in this regard. He placed reliance on Quranic Verse No 59 of Sura Al-Nisa:— يا أيها الذين آمنوا أطيعوا الله وأطيعوا الرسول وأولي الأمر منكم

The Federal Shariat Court was pleased to order that: The Ordinance and Rules Place no embargo on keeping of weapon for the purpose of self protection as well as protection of honour and property. The purpose of this Ordinance appears to regularise the possession of weapons etc and to check the misuse of the same, so that the lives and properties of innocent people are properly safeguarded. Secondly, the Shariah empowers the authority in power to make legislation in matters that are not specifically covered by the injunctions of Islam in the light of commands, as contained in the Holy Quran and Sunnah of the Holy Prophet. Where there is no explicit provision in the Holy Quran and Sunnah, the legislative body may enact laws in respect of the same while keeping in view the general principles and spirits of Islam. Legislation in Islam, in fact, is mainly based on public welfare (Maslaha). The principle of Maslaha defines the limit where the rulers can exercise their administrative and political authority and take measures for the protection of the rights and freedom of the citizens, to establish law and order and maintain justice. In Shariah, the power granted to the ruler is based on the welfare of the subject— (تصرف الامام على الرعية منوط بالمصلحة)

Another principle of Islamic law is: (Gaining public interest and warding off harms). While implementing this legal maxim, Warding off the harm or mischief has priority over gaining interest. The Court also elaborated the principle of *Sadduzzara'a* (سد الذرائع) under which, if a permissible act becomes a source of trouble and harm to the public, it will be declared as prohibited in the interest of the general public. In view of above, the conclusion arrived at was that: The impugned law and Rules were declared as not repugnant to the injunctions of Islam. This law and rules thereunder were made in the interest of general public and for the security of the Umma at large. As far as the imposition of fees in respect of licence is concerned, the Court held that: the State or the man in authority is empowered to impose tax to meet the financial requirements of the State as held in Shariat Petition No 11/L of 1990, Fazl-ur-Rehman Vs Federation of Pakistan. (PLD 1992, FSC 329). The petition was thus, dismissed in limine.

3.2 Jurisdiction of the Court

3.2.1 Muhammad Safer v. Mst. Zaria Bibi and the State (2004 SD 142): Mr. Justice Saeed-ur-Rehman Farrukh

Ss.3, 7 Offence of Qazf (EOH) Ordinance, 1979 (Ordinance No. VIII of 1979); Art.199 of Constitution of Pakistan.

High Court stands denuded of powers to exercise jurisdiction under Art.199 in respect of any matter falling within exclusive jurisdiction of Federal Shariat Court.

Any order passed by High Court Under Art.199 in Hudood case, would be nullity in law and any superstructure raised on such void order of High Court would also fall to ground along with void order of High Court. In Hudood Cases exclusive jurisdiction, appellate as well as Revisional, vests in Federal Shariat Court, exercise whereof can be assailed only Before Supreme Court either under Art.203-F (2A) or 203-F (2B). Adjudication of declaratory suit relating, inter alia, to Qazf allegation was eminently called for before decision of complaint case under Ss.3, 7. Conviction/sentence recorded by Trial Court against accused under S.7 without waiting decision of Civil Court was set aside by Federal Shariat Court by accepting appeal of convict with direction to parties to wait decision of Civil Court.

3.3 Direction to the Subordinate Courts

3.3.1 Abdul Sattar v. Sher Amjad & another (SBLR 2004 FSC 27): Mr. Justice S. A. Rabbani

Present: Mr.Justice Zafar Pasha Chaudhry. Mr.Justice S.A.Rabbani. JJ. S.367 Cr.P.C.

The Hon'ble Court has given the following observation.

“We have noticed that an other serious violation of section 367 Cr.P.C. is being committed almost in all judgements of the trial courts under the jurisdiction of Lahore High Court and Peshawar High Court. This violation is also there in the present case. The Court will not remand this case for this violation because, for the same reason, every case will have to be remanded. For future guidance, we point out that section 367 Cr.P.C. requires that a judgement shall contain the points for determination, the decision thereon, and the reasons for the decision. This is a mandatory requirement, but the practice appears to be that, without mentioning as to what are the points for determination in the case, the trial courts discuss the evidence of witnesses whereafter they give a finding that the charge is proved, or is not proved. Mere discussion of the evidence does not logically prove or disprove the charge. The trial courts should mention the relevant points for determination in a judgement and should give their findings on each point. It is only the cumulative effect of the decision and findings on these points that may prove or disprove the charge. We expect that the Lahore High Court and Peshawar High Court, supervising the trial courts in their jurisdiction, will guide the trial courts for writing judgements in criminal cases in accordance with the requirement of section 367 Cr.P.C.”

For the reasons mentioned above, Federal Shariat Court did not see a need to interfere with the judgement of the trial Court in the case. The appeal was dismissed accordingly.

3.4 Cases Regarding Offence of Zina

3.4.1 Muhammad Iqbal V. Mst. Siani and another (2004 P.Cr.L.J.193): Mr. Justice Zafar Pasha Chaudhary

Present : Mr. Justice Zafar Pasha Chaudhry and Mr.Justice S.A.Rabani, JJ.

S.10 (2) Offence of Zina (EOH) Ordinance, 1979 (Ordinance No.VII of 1979); Ss.468/471 PPC; Art.203DD Constitution of Pakistan. (Appeal against acquittal).

Parties were married having grown-up children from their respective marriages. Marriage of the accused inter se had been duly solemnised and registered with the relevant Union Council. Finding of acquittal of accused by the Trial Court was supported by cogent reasons and relevant circumstances. Complainant had set up his claim of marriage with the female accused after an extremely long period with malicious intention in order to satisfy his personal vendetta. Said marriage admittedly was never consummated. According to the appellant/Complainant he was married to respondent about 26/27 years prior to filing of the complaint. Both the parties were minor and marriage was solemnised through their respective guardians. Filing of the suit by the female accused seeking declaration that she was not wedded wife of the complainant was in a way an exercise of option of puberty by her. Islamic Law required very strict proof for adultery, which was totally lacking in the case. Convicting the accused for adultery would amount to declare her children as illegitimate. Acquittal of accused by Trial Court was not only unexceptionable but was also just and equitable. Appeal was dismissed accordingly.

3.4.2 Muhammad Asghar v. The State (2004 P.Cr.L.J.201): Mr. Justice Zafar Pasha Chaudhary

Ss.10 (2) & 10(3) Offence of Zina (EOH) Ordinance, 1979 (Ordinance No. VII of 1979).

Statement of the victim regarding her having been subjected to sexual intercourse was supported by medical report. Vaginal swabs of the victim were found stained with semen. Victim girl did not appear before the Investigating Officer for more than six days and no marks of violence were found on any part of her body. No weapon was recovered from the accused. Cumulative effect of the said facts and circumstances could lead to the only inference that the victim was a consenting party to the commission of zina and she having attained puberty was adult within the meaning of S.2 (a) of the said Ordinance. During course of investigation a number of Investigating Officers found the victim to be a consenting party. Conviction of accused under S.10 (3) of the said Ordinance was consequently altered to S.10 (2) and his sentence was reduced to the imprisonment already undergone by him in circumstances which was more than two years.

3.4.3 Ghulam Shabbir v. The State (2004 SD 32): Mr. Justice Saeed-ur-Rehman Farrukh

Present: Mr.Justice S. A. Manan and Mr.Justice Saeed-ur-Rehman Farrukh, JJ.

Ss.10 (2) (3) & 11 Offence of Zina (EOH) Ordinance, 1979 (Ordinance No.VII of 1979).

Allegation of Zina-bil-jabr against accused would not be established when victim of zina did not have any marks of violence and according to medico-legal report she was habitual to intercourse and her vagina admitted two fingers easily with hymen torn. Element coercion on victim of zina would not be established when she moved freely with accused from place to place. Acquittal of accused of charge U/Ss. 10,11 would be fully justified in view of finding that Abductee had eloped of her own free will. The Court upheld acquittal in the case and dismissed complainant's revision petition filed to challenge acquittal.

3.4.4 Tariq Masih v. The State (2004 SD 443): Mr. Justice Saeed-ur-Rehman Farrukh

Ss.10 (2) & 16 Offence of Zina (EOH) Ordinance, 1979 (Ordinance No. VII of 1979).

Appeal to Federal Shariat Court against conviction and sentence recorded by Trial Judge against convicts under Ss.10 (2) and 16. Federal Shariat Court finding that Trial Judge had not only misdirected himself so to the core of controversy involved in the case but had also displayed lack of knowledge of law applicable on the subject. Federal Shariat Court holding that Christian marriage between convicts stood

dissolved/annulled as result of their conversion to Islam and they having married as proved by duly proved Nikahnama they could not be convicted/sentenced under Ss.10 (2) and 16. Federal Shariat Court accepted appeal, setting aside conviction/sentence against convicts and ordered their acquittal.

3.4.5 Shaukat Ali and another v. The State (SBLR 2004 FSC 53): Mr. Justice Zafar Pasha Chaudhry

S.10 (2) Offence of Zina (EOH) Ordinance, 1979 (Ordinance No. VII of 1979); Ss.468 & 471 PPC.

According to the complainant, his sister was married and had three daughters-while visiting her sister, the complainant found her missing in the morning, and was stated to have been seen proceeding with her neighbour, Appellant had alleged kidnapping. The sister alleged that she has been divorced by her husband, and has married the appellant, with whom she was living as his wife. The prosecution had denied the validity of divorce, and alleged adultery.

Validity of Divorce: Material question for determination was the validity of divorce by her former husband. Onus no doubt lies on the prosecution and offence must be proved beyond any reasonable doubt. Oral talaq followed by written divorce : Husband admitted having affixed his thumb impression on the stamp paper, observed such a document is accepted as valid unless the same was obtained under duress or through deceit.

Marriage before expiry of Iddat Period : Marriage allegedly, solemnised before expiry of Iddat period, observed that under Muslim Law, marriage during the Iddat period is only irregular and not void. In view of the above discussion, the prosecution has failed to prove its case against the accused/appellant; therefore, by accepting both the appeals; the appellants were acquitted of the charges.

3.4.6 Mst. Sitara Bibi v. The State (2003 P.Cr.L.J.402): Mr. Justice Ch. EJaz Yousaf

Ss.10, 11 & 19 Offence of Zina (EOH) Ordinance, 1979 (Ordinance No. VII of 1979); S.426 Cr.P.C.

Contention of the female accused was that since a suckling child had been kept in jail where he was suffering for want of proper care and medical facilities as the Jails in Pakistan did not cater for the needs of infants and sentence recorded against the accused was short, therefore, pending decision of her appeal, the accused was released on bail.

3.4.7 Javed Iqbal v. The State (PLJ 2003 FSC 54): Mr. Justice Zafar Pasha Chaudhry

S.10. Offence Of Zina (EOH) Ordinance 1979 (Ordinance No. VII of 1979); S. 302PPC; S. 7 Juvenile Justice System Ordinance, 2000.

The petitioner challenged the jurisdiction of the Court as he was minor within the meaning of Juvenile Justice System Ordinance, 2000 and his trial could be held only by Juvenile Justice Court established under Section 4 of the Ordinance. To determine age of an accused whether he is child or major is a question of fact which has to be determined by trial Court. In event of any dispute or controversy regarding which inquiry is to be made to determine age, learned trial Judge has to follow provision of Section 7 of the Ordinance. Finding in this regard, therefore, neither arbitrary nor against record. Petitioner, in order to take his case out of pale of jurisdiction of ordinary Court, was legally bound to discharge onus which has not been done, on contrary apart from Medical Board, there are number of documents which indicate that petitioner was not child at the time of occurrence. Revision Petition thus had no force, same was accordingly dismissed.

3.4.8 Mst. Nasreen Akhtar v. Husnain Mehdi and 6 others (2003 P.Cr.L.J.1321): Mr. Justice Ch. Ejaz Yousaf

Present: Mr. Justice Ch. Ejaz Yousaf. C.J. Mr. Justice Khan Riaz-ud-Din Ahmad.J.

Ss.10 (3), & 11 Offence of Zina (EOH) Ordinance, 1979 (Ordinance No.VII of 1979); S.7 Offence of Qazf (EOH) Ordinance, 1979 (Ordinance No.VIII of 1979); Ss.200, 202, 265-C, 265-D & 436 Cr.P.C.

Trial Court while deciding fate of the complaint had primarily relied upon the statements of the Court witnesses and had failed to assess or apprise the statements of the witnesses produced by the complainant and had discarded the same simply by saying that a Court could not give preference to the statements of witnesses over the statements of the Court witnesses. While enquiring into a complaint, full and ample opportunity, even at a preliminary enquiry stage, has to be given to the complainant to prove the allegation and such opportunity is all the more necessary where persons complained against are public servants especially the police officer. Impugned order/Judgement of the Court could not be sustain and had to be set aside. However, having regard to the provision of S.436, Cr.P.C., Federal Shariat Court, remanded the cases to the Trial Court with the direction that at first, statements of the rest of the witnesses, whose names had been mentioned in the schedule of witnesses annexed with the complaint, be recorded and thereafter the complaint be processed with, in accordance with law. Cases of Qazf were, however, stayed till fate of the complaint was decided.

3.4.9 Wahid Iqbal v. The State (2003 P.Cr.L.J.1928): Mr. Justice Ch. Ejaz Yousaf

Ss.10 (3) and 11 Offence of Zina (EOH) Ordinance, 1979 (Ordinance No. VII of 1979); Arts. 23 and 2(c) Qanun-e-Shahadat Order, 1984.

Allegation of kidnapping, abducting or inducing a girl to compel for marriage and zina. Accused being admittedly not previously known to the Abductee nor had she seen him before occurrence, and abductee in her statement, having confirmed that accused had never come across her nor had she seen his photograph and prosecution witnesses as well.

The Abductee had only fleeting glimpses of the accused, non-holding of identification test parade was fatal to the prosecution case. When accused was charged in FIR and in statements under Section 161 Cr.P.C. by the description of their structure, then identification in a formal parade was a “must.” Prosecution having failed to make out its case against the accused beyond any shadow of doubt, Federal Shariat Court, accepted the appeal of the accused and acquitted him of the charge.

3.4.10 Mustafa v. The State (2004 P.Cr.L.J. 188): Mr. Justice Zafar Pasha Chaudhary

Ss. 10(3) read with 18 of Offence of Zina (EOH) Ordinance, 1979 (Ordinance No.VII of 1979).

Statements of the prosecutrix and her brother coupled with the recovery of torn clothes and the result of investigation had proved the case against the accused beyond any doubt. Compromise between the parties had, no doubt, taken place which had been attested by them and their counsel, but offence under S.18 read with S.10 (3) of the Offence of Zina Ordinance, 1979, being not compoundable, no order of acquittal could be passed merely on account of compromise. Parties were related inter se and a lenient view in the case could help in reducing the bad blood between them. Conciliation and repentance expressed by the accused was treated as a mitigating circumstance. Sentence of five years’ R.I. awarded to accused was reduced to two years’ R.I. in circumstances.

3.4.11 Gulsher etc. v. The State (2004 SD 159): Mr. Justice S.A. Manan

Present: Mr. Justice Ch. Ejaz Yousaf. C.J. and Mr. Justice S.A. Manan. J.

S.10 (3) Offence of Zina (EOH) Ordinance, 1979 (Ordinance No. VII of 1979); S.103 Cr.P.C.

Sole testimony of victim of zina would be sufficient to prove zina case against accused when defence was not able to shatter the veracity of victim's statement. Delay of 5 days in medical examination of victim of zina would not evaporate semen, as according to medical opinion semen remains active and alive upto 17 days at the best. Conviction recorded by trial Court on basis of victim's statement maintained by Federal Shariat Court with reduction of sentence from 18 years R.I. to 15 years R.I.

3.4.12 Zahoor Ahmad v. Mumtaz Khan etc. (2004 SD 166): Mr. Justice Zafar Pasha Chaudhry

Present: Mr. Justice Zafar Pasha Chaudhry and Mr. Justice S.A. Rabbani, JJ.

Ss.10 (3), 11 of Offence of Zina (EOH) Ordinance, 1979 (Ordinance No. VII of 1979).

Charge of kidnapping and zina-bil-jabr with victim would stand proved against accused when statement of victim under Ss.164, 364, Cr.P.C before Magistrate was in conformity with her statement recorded before Trial Court and was amply corroborated by the medical evidence on record. Acquittal of accused recorded by Trial Court on basis of inadmissible evidence of ASI which was not part of evidence and had not come on record in any manner would not be sustainable in law to carry out investigation is legal duty of police or other authorised agencies. This power cannot be delegated to any private person or body. Acquittal of principle accused recorded by Trial Court set aside by convicting sentencing acquitted accused under Ss.10 (3) & 11. Acquittal of accused on charge U/S 10(3) & 11 recorded by Trial Court would be unquestionable when victim had herself stated that neither of the acquitted accused accompanied principle accused to Jungle or committed any other offence. Federal Shariat Court up holding acquittal in the case and dismissed complainant's appeal filed to challenge acquittal.

3.4.13 Muhammad Zafar Naeem v. The State (2004 SD 352): Mr. Justice Zafar Pasha Chaudhry

S.10 (3) Offence of Zina (EOH) Ordinance, 1979 (Ordinance No. VII of 1979).

Conviction/sentence for zina-bil-jabr with girl of 11/12 years of age would be unassailable when P.Ws. made consistent statements and supported/corroborated each other on all material points. Mere fact that tears of hymen were found to be old does not in any manner mean that victim was not subjected to zina-bil-jabr as stated by her. Statement of victim of zina-bil-jabr who is young girl of 11/12 years which is confidence inspiring would be sufficient for recording conviction/sentence under S.10 (3). Omission to produce shalwar, qameez and dopatta of victim of zina-bil-jabr would not be fatal to prosecution case under S.10 (3), which cannot be thrown away for such omission by prosecution. Federal Shariat Court upheld the conviction/sentence and dismissed appeal filed to challenge it.

3.4.14 Shabbir alias Kakku & other v. The State (SBLR 2004 FSC 35): Mr. Justice Saeed-ur-Rehman Farrukh

Present: Mr. Justice S.A. Manan and Mr. Justice Saeed-ur-Rehman Farrukh, JJ.

Ss.10 (3) & 16 Offence of Zina (EOH) Ordinance, 1979 (Ordinance No. VII of 1979); S.7 Offence of Qazf (EOH) Ordinance, 1979 (Ordinance No. VII of 1979); Art.203D Constitution of Pakistan; S.439 Cr.P.C. & S.34, 343 PPC.

It is well settled that conviction can be based, in rape case, on the solitary statement of the victim if the same is found truthful and confidence inspiring. Proceedings in Qazf case are nothing but abuse of process of the Court and their continuation would result not only in wastage of public time and money but also cause uncalled for harassment to the accused though, at the end of the day, there is no possibility of conviction being recorded; proceedings were quashed. In the circumstances of the case, the punishment

awarded under S.10 (3) and 16 of the Hudood Ordinance is reduced from 7 to 4 years. However conviction under S.343 PPC was maintained with benefit of Sec.382-B Cr.P.C.

3.4.15 Khan Said and 3 others v. The State (2003 P.Cr.L.J.531): Mr. Justice Ch. Ejaz Yousaf

Present: Mr. Justice Fazal Ilahi Khan, C.J. and Mr. Justice Ch. Ejaz Yousaf, J.

Ss.10(3) & 11 Offence of Zina (EOH) Ordinance, 1979 (Ordinance No. VII of 1979); Ss.149 & 345 Cr.P.C.

Victim girl as well as her father (complainant) had forgiven the accused and compromised the matter and prayed for reduction in the sentences awarded to accused by Trial Court. Federal Shariat Court keeping in view the submission made by the counsel for the parties, facts of the case and better future relations of both sides, maintained the conviction of accused, but substantially reduced their sentences from 15 years R.I. to 4 years R.I. and from imprisonment for life to that of already undergone with reduction of fine. Appeals were disposed of accordingly.

3.4.16 Mst. Riffat Yasmeen v. Sarfraz Hanif etc. (2003 SD 611): Mr. Justice Ch. Ejaz Yousaf

S.10(4) Offence of Zina (EOH) Ordinance, 1979 (Ordinance No. VII of 1979); Ss. 200, 202 & 203 Cr.P.C.

Non-summoning of persons arrayed as accused in complaint without assigning any reason for such non-summoning would be violative of provisions of Ss.202 and 203, Cr.P.C. Court, after inquiry, shall be competent to dismiss the complaint as a whole or against any or some of accused persons under S.203. However, it cannot be done unless statement of complainant on oath and result of inquiry, if made, are considered, reasons are recorded and the Court in its own independent judgement, comes to conclusion that there was no ground to proceed further. Revision petition of the complainant was accepted with direction to Trial Court to decide complainant's application for summoning of accused in accordance with law.

3.4.17 Muhammad Faisal, etc. v. The State (2003 SD 678): Mr. Justice Saeed-ur-Rehman Farrukh

Present: Mr. Justice S. A. Manan and Mr. Justice Saeed-ur-Rehman Farrukh, JJ.

S.12 Offence of Zina (EOH) Ordinance, 1979 (Ordinance No. VII of 1979); S.377 PPC.

Prosecution story as to sodomy would be rendered open to serious doubt when penetration had not taken place and there was no medical examination of victim of sodomy, which could show marks of violence on his body in case of his resistance. In case a youngster, whether a boy or a girl, is subjected to sexual harassment, in the natural course of human conduct, parents either personally make report to Police or accompany victim to police and thereafter actively participate in investigation so that culprits are brought to book. Prosecution case under S.12 would be doubtful when this is not done and no explanation for this lapse is forthcoming from prosecution side. Conviction recorded by trial Court under S.12 and 377 PPC against convicts set aside by accepting appeal of convicts with order of their acquittal.

3.4.18 Asad Khan v. The State (2004 P.Cr. L. J. 246): Mr. Justice Ch. Ejaz Yousaf

Present: Mr. Justice Ch. Ejaz Yousaf C.J. and Mr. Justice Fida Muhammad Khan, J.

S.12 Offence of Zina (EOH) Ordinance, 1979 (Ordinance No. VII of 1979); S.337 PPC; Art.203DD Constitution of Pakistan.

Accused, in the present case had been charged under the substantive provision of S.377 PPC only. Where neither the accused had been charged under any of the provisions of the Offence of Zina Ordinance, 1979 nor had he been convicted or tried thereunder, an appeal against the order/judgement of the Court

of the first instance shall not lie to the Federal Shariat Court. Appeal being not maintainable before this Court, the same was returned to the appellant for its presentation before the proper forum.

3.4.19 Nadeem Iqbal and three others v. The State (2004 SD 18): Mr. Justice Zafar Pasha Chaudhry

S.12 Offence of Zina (EOH) Ordinance, 1979 (Ordinance No.VII of 1979) read with S.377 PPC.

Four persons accused of sodomy with boy of 14/15 years of age cannot be held guilty when ocular evidence is not supported by medical evidence and eye witness account of occurrence is negative by negative report of Chemical Examiner. Non-detection of semen on anal swabs would create serious doubt in prosecution case of sodomy against four accused persons when it is inconceivable that four persons would have committed sodomy upon victim one after the other and victim would be examined on that very date just a few hours after occurrence but no semen was found. Non-detection of semen on the anal swabs creates serious doubt in the prosecution story. Conviction/Sentence recorded by trial Court U/S 12 read with 377 PPC against four accused persons, set aside by this Court by accepting their appeal.

3.4.20 Farooq Hussain etc v. The State (2004 SD 87): Mr. Justice Zafar Pasha Chaudhry

Present: Mr. Justice Zafar Pasha Chaudhry and Mr.Justice S.A. Rabbani, JJ.

S.12 Offence of Zina (EOH) Ordinance, 1979 (Ordinance No. VII of 1979).

Solitary statement of victim of sodomy, which is not supported by medical Evidence or Chemical Examiner's report cannot be made basis of conviction U/S 377 PPC. In case of sodomy or rape, medical evidence or report of Chemical Examiner is of vital importance. Mere recovery of pistol from accused, which was not fired would be inconsequential in a case U/S 377 PPC. Conviction sentence recorded by trial Court U/S 377 PPC on such statements was set aside by the Court by accepting appeal of convict.

3.4.21 Pathan etc. v. Naseer Muhammad and the State (2004 SD 414): Mr. Justice S. A. Rabbani

Present: Mr.Justice Zafar Pasha Chaudhry and Mr.Justice S.A.Rabbani, JJ.

Ss.12 Offence of Zina (EOH) Ordinance, 1979 (Ordinance No. VII of 1979) and 377 PPC.

Evidence of complainant corroborated by medical evidence and Chemical Examiner's report would prove that complainant was subjected to sodomy. However conviction/sentence U/S 12 would not be sustainable when according to evidence of complainant himself, no charge of kidnapping or wrongful confinement was proved on record. Federal Shariat Court acquitted the accused U/S 12 but convicted U/S 377 PPC with reduction of sentence awarded by Trial Court to sentence already undergone.

3.4.22 Muhammad Afzal alias Kaka v. The State (SBLR 2004 FSC 20): Mr. Justice S. A. Rabbani

Present: Mr.Justice Zafar Pasha Chaudhry and Mr.Justice S.A. Rabbani, JJ.

S.12 Offence Of Zina (EOH) Ordinance, 1979 (Ordinance No. VII of 1979); Ss.302, 377 PPC.

Accused was tried for an offence U/S 302, 377 PPC and S.12 Offence of Zina. It was alleged that minor son of the complainant was abducted to a "dera" where from the accused was seen running away, and later on naked body of the minor boy was found lying dead. To determine evidence on record to connect the accused with the commission of offence, the recovered stained clothes were sent for chemical examination. Report found lacking to mention human blood; items were sent to serologist to determine the origin of blood and semen grouping. Serologist report mentions that grouping could not be done because specimen was insufficient, observed such report is of no consequence and therefore, does not help

the prosecution case. Prosecution evidence to connect the accused with the offence was defective and inadequate, and charge was not proved beyond reasonable doubt, accordingly, conviction was set aside.

3.4.23 Muhammad Ashraf and 2 others v. The State (PLJ 2003 FSC 33): Mr. Justice Zafar Pasha Chaudhry

S.12 Offence of Zina (EOH) Ordinance, 1979 (Ordinance No. VII of 1979); Ss.361, 362 and 377 PPC.

Victim has made categorical statement that all three appellants, committed unnatural offence with him. This part of his statement can safely be relied upon because he has no motive or reason to falsely implicate appellants and also in this respect, medical evidence amply supports his statement, that victim was subjected to sodomy. Observation is further supported by fact that anal swabs obtained by Medical Officer at time of his examination, were found to be semen stained.

S.12 has two ingredients, firstly kidnapping or abduction of a person; and secondly intention or purpose that he may be subjected to unnatural lust of any person. On proof of these two ingredients sentence has been prescribed. Word “kidnapping” or “abduction” has not been defined in the Ordinance. Even if whole statement of victim is believed, it cannot be found that any force or deceitful means was employed to compel him to accompany appellant/accused. All three appellants were stated to be first offenders. Conviction and sentence of one offender U/S 12 of Offence of Zina Ordinance was already set aside. However, all three accused were convicted U/S 377 PPC. Taking lenient view sentence of 10 years each reduced to sentence of 5 years R.I to each one. Appeal was partly allowed.

3.5 Cases Regarding Offence of Qazf (EOH) Ordinance, 1979 (Ordinance No. VIII of 1979)

3.5.1 Muhammad Arshad Naseem v. The State (PLJ 2003 FSC 59): Mr. Justice Ch. Ejaz Yousaf

Ss.3 and 7 Offence of Qazf (EOH) Ordinance, 1979 (Ordinance No. VIII of 1979); Ss.221, 222 & 223, 236 & 237 of Cr.P.C.

Appellant was charged U/S 3 of Qazf Ordinance but convicted U/S 7 of the Qazf Ordinance. Since S.3 of the Ordinance merely contains definition of “qazf” and does not provide for penal consequences whereas, the offence of qazf is punishable under Section 7 thereof, therefore, the learned trial Judge, notwithstanding the fact that the complaint itself was filed under Section 3 of “the Ordinance,” ought to have charged the appellant under Section 7 of “the Ordinance” if he had decided to proceed against him. Since both the learned counsel for the parties, had agreed to remand of the case and the Court was also convinced that trial, in the instant case, had not been conducted in the proper manner, therefore, the impugned judgement passed by the learned Additional Sessions Judge, was set aside and the case was remanded to the learned trial Judge for its decision afresh.

3.5.2 Muhammad Munawar v. Kausar Parveen and another (2003 P. Cr.L.J.1816): Mr. Justice Saeed-ur-Rehman Farrukh

Present: Mr. Justice S.A. Manan and Mr. Justice Saeed-ur-Rehman Farrukh, JJ.

Ss.7 and 17 Offence of Qazf (EOH) Ordinance, 1979 (Ordinance No. VIII of 1979); S.417(2) Cr.P.C.

Where a private complaint under the offence of Qazf Ordinance, is rejected, then the only remedy left for the complainant is to file a petition for Special leave to appeal before the Federal Shariat Court. Direct appeal against the acquittal Judgement in a complaint case is not competent. Complaint filed by the petitioner was motivated only to malign and intimidate the respondent so as to dissuade her from seeking

her remedies before Civil Courts. Revision petition was consequently dismissed both on the ground of non-maintainability as well as on merits.

3.6 Cases Regarding Offences Against Property (EOH) Ordinance, 1979 (Ordinance No.VI of 1979)

3.6.1 Amjad Pervez v. The State (2004 SD 323): Mr. Justice Dr. Fida Muhammad Khan

Present: Mr. Justice Ch.Ejaz Yousaf, C.J., Mr.Justice Dr. Fida Muhammad Khan and Mr. Justice Saeed-ur-Rehman Farrukh, JJ.

Ss.7 & 17(3) Offences Against Property (EOH) Ordinance, 1979 (Ordinance No.VI of 1979).

Tazkiat al-shuhood is a mandatory requirement for imposition of Hadd punishment under S.17. Tazkiat al-shuhood shall be conducted in all cases where sentence of Hadd is awarded irrespective of fact whether accused raises any objection about probity and credibility of a witness or not. Court is bound to conduct an open or secret inquiry for this purpose. It would be desirable if witnesses were scrutinised through credible witnesses preferably of the same walk of life to which witnesses belong. Hadd punishment of amputation of right hand from wrist awarded for offence of Haraba would not be sustainable in law when Hadd punishment was awarded without conducting Tazkiyah-al-Shuhood in accordance with requirements of S.7. Federal Shariat Court set aside Hadd punishment in the case and substituted it with sentence of ten year's R.I. under S.397, PPC.

3.6.2 Zaman v. The State (2004 P.Cr.L.J. 78): Mr. Justice Ch. Ejaz Yousaf

S.17 (3) Offences Against Property (EOH) Ordinance, 1979 (Ordinance No. VI of 1979); S.365 PPC.

This Revision was directed against the judgement passed by learned Additional Sessions Judge, Quetta whereby, he while convicting the accused persons for the charge U/S 17(3) of the Offences Against Property read with S.365 PPC had also ordered for confiscation of vehicle allegedly used in the crime. Neither any notice before passing the impugned order was issued or served on the petitioner, nor any attempt was made by the Trial Court to find out as to who was owner of the vehicle. Trial Court had failed to adopt the proper procedure and had passed the impugned order without affording opportunity of hearing to the affected person. Order of Trial Court to the extent of confiscation of the vehicle was consequently set aside and the case was remanded to the Trial Court with consent of parties for its decision afresh in accordance with law.

3.6.3 Ashraf and others v. The State (PLJ 2003 FSC 50): Mr. Justice Ch. Ejaz Yousaf

S.17(4) Offences Against Property (EOH) Ordinance, 1979 (Ordinance No. VI of 1979); S.342 Cr.P.C.

Compliance with provision of S.342 Cr.P.C, in accordance with its terms, is essential and departure there from is not permissible, if some prejudice is shown to have been caused to accused. Use of word 'shall' in later part of sub-section (1) of Section 342 denotes that examination of accused is mandatory and not discretionary. Section 342 Cr.P.C has two parts. First part gives a discretion to Court whereas second part is mandatory. Under first part Court may put such questions to accused which may be deemed appropriate in arriving at a just conclusion whereas, under second part examination of accused is a must because purpose is to point out salient points appearing in evidence against him and ask for an explanation. In the instant case, trial Judge has not adopted mandatory procedure in conducting trial and has failed to question appellants on material points of case including recovery of weapons within purview of Section 342 Cr.P.C., therefore, case was remanded.

3.6.4 Shuja-ur-Rehman and others v. The State (2003 P.Cr.L.J.1212): Mr. Justice Ch. Ejaz Yousaf

Present : Mr. Justice Ch. Ejaz Yousaf, C.J., Mr. Justice Dr. Fida Muhammad Khan and Mr. Justice Khan Riaz-ud-Din Ahmad, JJ.

S.17 (4) Offences Against Property (EOH) Ordinance, 1979 (Ordinance No. VI of 1979); Ss.302/34 PPC; Ss.37, 91, 117 & 119 Qanun-e-Shahadat Order, 1984.

Confession made by an accused would be irrelevant, only if, making of the same appeared to the Court to have been caused by any inducement, threat or promise in the evidence before it. An accused person who, at the trial, retracts his confession, alleging that it was the outcome of ill-treatment must prove his allegation because Arts.117 & 119 of the Qanun-e-Shahadat Order, 1984 require that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence. Findings recorded by the Trial Court had the support of evidence and were well-reasoned, therefore, impugned judgement called for no interference; since on the basis of evidence on record it could not have been definitely concluded that any particular accused was responsible for the crime but the murder was the outcome of various acts committed by all the accused persons, therefore, sentence of the accused could not be enhanced. Consequently, Criminal Appeals and Revisions filed for enhancement of sentences were dismissed and the impugned judgement was maintained.

3.6.5 Mst. Perveen Iqbal v. The State (PLJ 2003 FSC 45): Mr. Justice Ch. Ejaz Yousaf

S.395 PPC; S.426 Cr.P.C. (Suspension of sentence)

Accused a woman with an infant. Offence U/S 395 PPC. In famous case of “Ghamidiyyah” Holy Prophet Muhammad (PBUH) was pleased to suspend sentence passed on a pregnant woman not only till delivery of child but for period of “Raza’at” as well, basically for welfare of child. Superior Courts of Pakistan passed many a Judgements in which sentences passed on female convicts were suspended for betterment of children. Following decision made by Holy Prophet Muhammad (S.A.W) in case of “Ghamidiyyah” as well as dictum of Superior Courts judgements, Court was inclined to allow application. Resultantly, operation of impugned judgement was suspended and applicant/appellant was released on bail.

3.6.6 Khawand Bakhsh alias Khawando v. The State (2004 SD 434): Mr. Justice Saeed-ur-Rehman Farrukh

S.392 PPC.

In order to sustain conviction based on retracted confession, corroboration from other direct or circumstantial evidence is called for. Conviction U/S 392 PPC based on uncorroborated retracted confession would be illegal and not sustainable in law. One of the condition for validity of confession in Islamic Criminal Justice System is that it must be made before competent authority. Federal Shariat Court accepted appeal of convict in the case and set aside conviction/sentence.

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Judicial Activity and Statistics



4 JUDICIAL ACTIVITY AND STATISTICS

4.1 Court Performance During the Year 2003

4.1.1 Category-wise Consolidated Position During the Year 2003

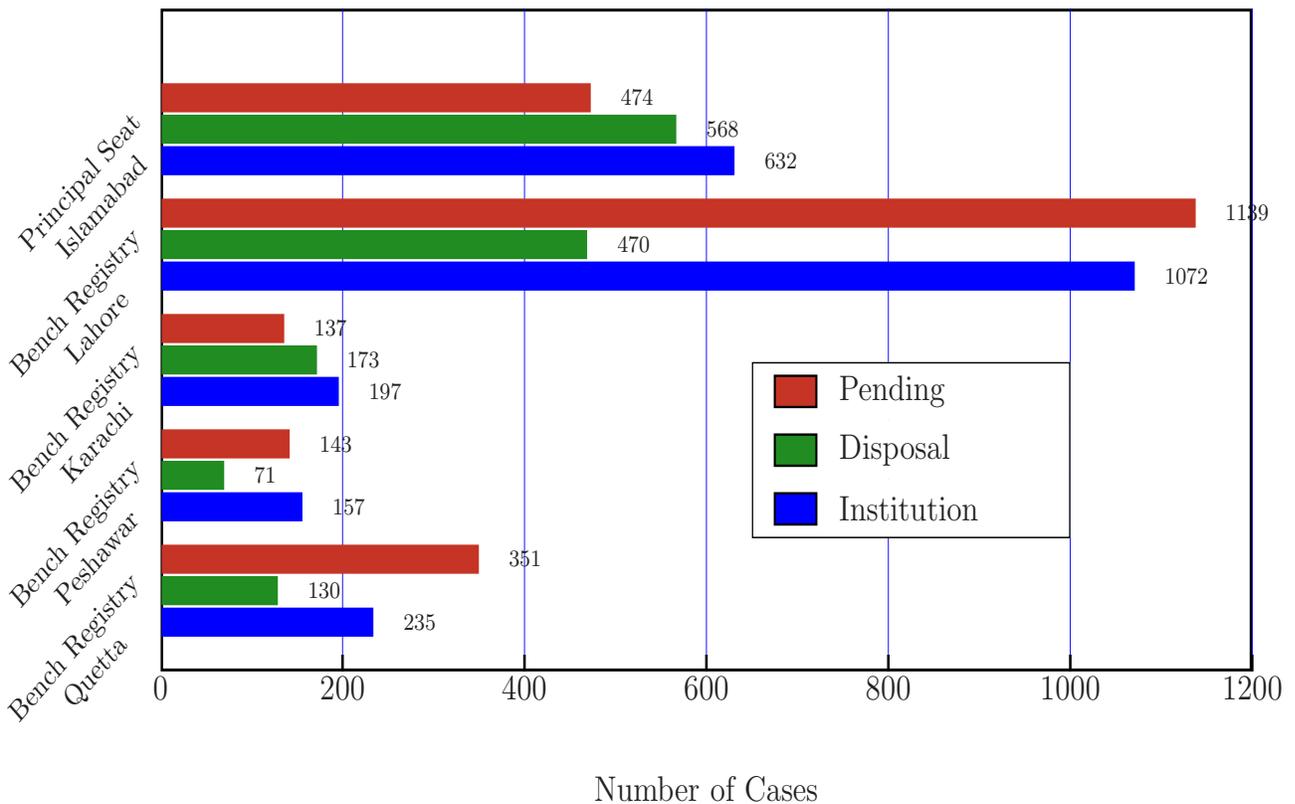
S.No.	Category of Cases	Pendency on 1.1.03	Institution from 1.1.03 to 31.12.03	Total	Disposal from 1.1.03 to 31.12.03	Balance as on 1.1.04
1	Cr. Appeals (Against Conviction)	603	785	1388	539	849
2	Cr. Appeals (Against Acquittal)	395	163	558	40	518
3	Cr. Revisions (Against Conviction)	10	5	15	2	13
4	Cr. Revisions for Enhancement	84	48	132	47	85
5	Cr. Revisions other matters	29	133	162	49	113
6	Cr.P.S.L.A.	13	21	34	6	28
7	Cr. Murder Reference	40	41	81	7	74
8	Hadd Reference	5	-	5	1	4
9	Cr. Suo Moto.	8	6	14	1	13
10	Cr. Review.	-	2	2	1	1
11	Cr. Misc.	176	1089	1265	719	546
12	Shariat Matters	262	98	360	78	282
	Total	1625	2391	4016	1490	2526

4.1.2 Consolidated Position at Principal Seat and Bench Registries During the Year 2003

S.No.	Principal Seat & Benches	Pendency on 1.1.03	Institution from 1.1.03 to 31.12.03	Total	Disposal from 1.1.03 to 31.12.03	Balance as on 1.1.04
CRIMINAL MATTERS						
1	Principal Seat Islamabad	410	632	1042	568	474
2	Bench Registry Lahore	537	1072	1609	470	1139
3	Bench Registry Karachi	113	197	310	173	137
4	Bench Registry Peshawar	57	157	214	71	143
5	Bench Registry Quetta	246	235	481	130	351
SHARIAT MATTERS						
6	Principal Seat Islamabad	194	88	282	78	204
7	Bench Registry Lahore	41	10	51	-	51
8	Bench Registry Karachi	18	-	18	-	18
9	Bench Registry Peshawar	8	-	8	-	8
10	Bench Registry Quetta	1	-	1	-	1
	Total	1625	2391	4016	1490	2526

4.1.3 Consolidated Position for Criminal Matters at the Principal Seat and Bench Registries During the Year 2003

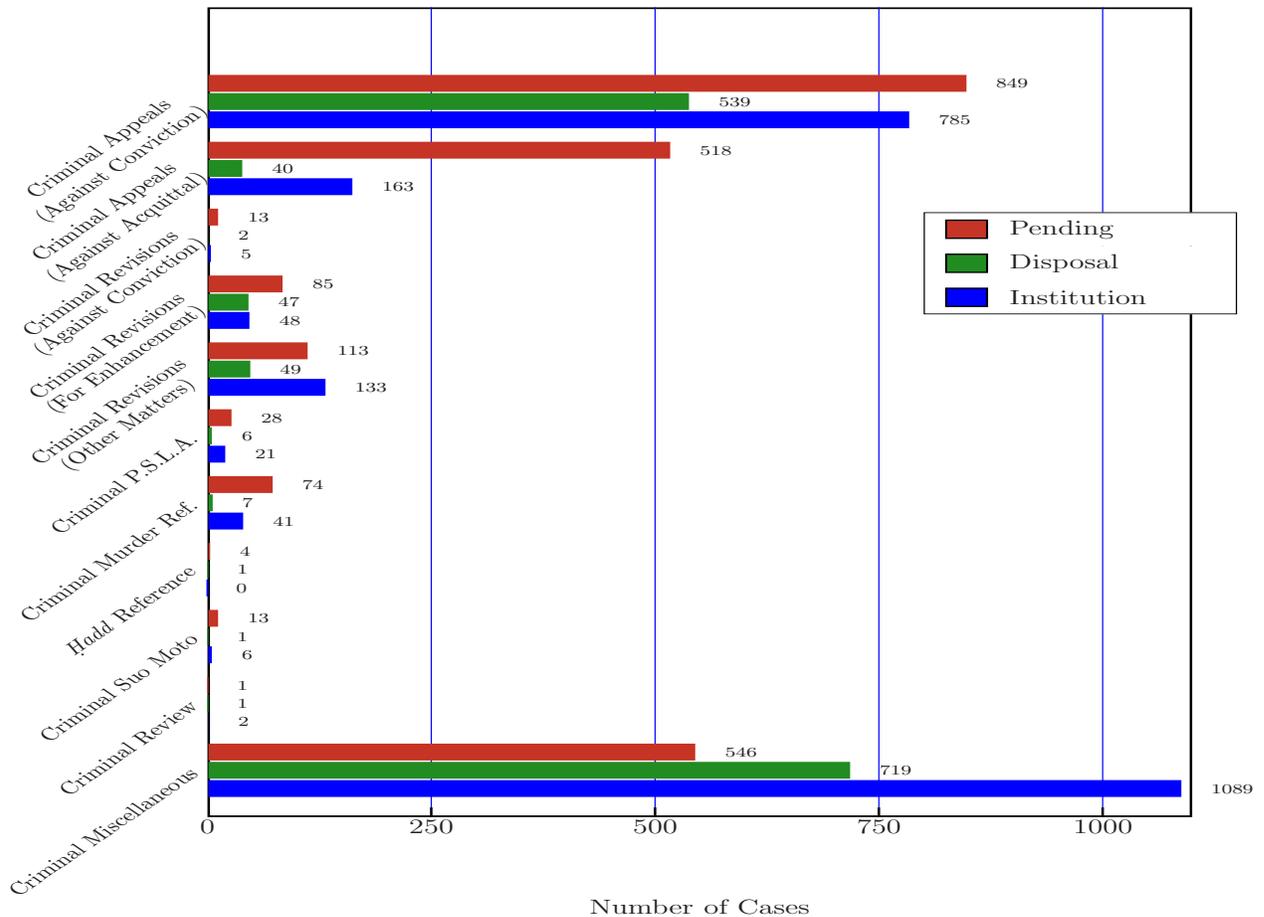
S.No.	Principal Seat & Benches	Pendency on 1.1.03	Institution from 1.1.03 to 31.12.03	Total	Disposal from 1.1.03 to 31.12.03	Balance as on 1.1.04
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3	Bench Registry Karachi	113	197	310	173	137
4	Bench Registry Peshawar	57	157	214	71	143
5	Bench Registry Quetta	246	235	481	130	351
	Total	1363	2293	3656	1412	2244



Principal Seat and Registries: Criminal Matters

4.1.4 Category-wise Consolidated Position for Criminal Matters During the Year 2003

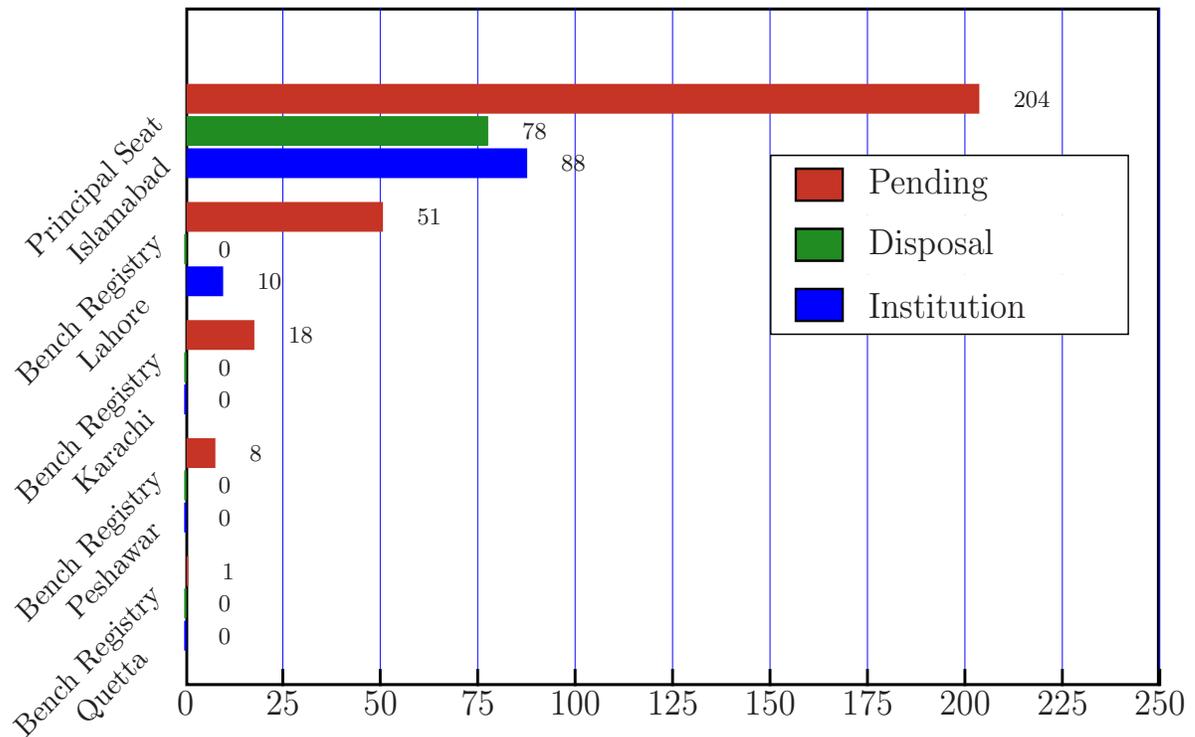
S.No.	Principal Seat & Benches	Pendency on 1.1.03	Institution from 1.1.03 to 31.12.03	Total	Disposal from 1.1.03 to 31.12.03	Balance as on 1.1.04
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8	Cr. Suo Moto.	5	-	5	1	4
9	Cr. Review.	8	6	14	1	13
10	Cr. Misc.	-	2	2	1	1
11	Total	1363	2293	3656	719	2244



FSC Consolidated: Criminal Matters Category-wise

4.1.5 Consolidated Position for Shariat Matters at the Principal Seat and Bench Registries During the Year 2003

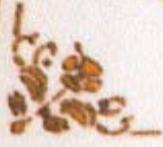
S.No.	Principal Seat & Benches	Pendency on 1.1.03	Institution from 1.1.03 to 31.12.03	Total	Disposal from 1.1.03 to 31.12.03	Balance as on 1.1.04
6	Principal Seat Islamabad	194	88	282	78	204
7	Bench Registry Lahore	41	10	51	-	51
8	Bench Registry Karachi	18	-	18	-	18
9	Bench Registry Peshawar	8	-	8	-	8
10	Bench Registry Quetta	1	-	1	-	1
	Total	262	98	360	78	282



Number of Cases

Principal Seat and Registries: Shariat Matters

Interaction With International Judicial Institutions



سنة ١٤٢٤
 سبتمبر ١٤٢٤
 سبتمبر ١٤٢٤



INTERNATIONAL SEMINAR
'ISLAMIC CRIMINAL JUSTICE SYSTEM'

25-27 AUGUST 2003 / 27-29 JAMADIL AKHIR 1424H

SEKUTERA, LANGKAT, PERAK

A.B. DATO' SERI ABDULLAH BIN HAJI AHMAD BADAWI
 DEPUTY PRIME MINISTER OF MALAYSIA

STATE GOVERNMENT
 INSTITUTE OF ISLAMIC UNDERSTANDING

MALAYSIA



5 INTERACTION WITH INTERNATIONAL JUDICIAL INSTITUTIONS

PROMULGATION OF AN APPROPRIATE ISLAMIC CRIMINAL JUSTICE SYSTEM IN A MULTI-RELIGIOUS ISLAMIC COUNTRY: PROBLEMS AND CHALLENGES IN THE ISLAMIC REPUBLIC OF PAKISTAN

Keynote Address Delivered by

**Mr. JUSTICE CHAUDHARY EJAZ YOUSAF,
CHIEF JUSTICE,
FEDERAL SHARIAT COURT OF PAKISTAN.**

(This Article was read in the International Seminar on the Islamic Criminal Justice System held on 25th to 27th September, 2003 at Johor Bahru, Malaysia)

Pakistan came into existence on 14th August 1947 as a result of the partition of the Indian Subcontinent. Prior thereto India was ruled both by Hindu and Muslim rulers and lastly by British. Since Pakistan emerged as a result of the struggle of the Muslims of Indian subcontinent who, being a separate nation having their own culture, civilisation, customs, literature, religion and philosophy were determined to have a separate and independent homeland of their own wherein they could have ordain their lives in accordance with Quran and Sunnah, therefore, ever since the inception of freedom the people of Pakistan were endeavouring hard to promote the letter and spirit of Islam in all sphere of their lives. Keeping in view the very object in mind, founding father of Pakistan, while sitting in the Constituent Assembly, which under the Indian independence Act of 1947 was authorised to make provision for the constitution of the new dominion, passed the Objective Resolution, the grund norm of its constitution, thereby declaring and resolving, inter-alia, that since the sovereignty over the entire universe belongs to “Allah Almighty” alone and the authority which he has delegated to the State of Pakistan, through its people for being exercised within the limits prescribed by him is a sacred trust, therefore, the Assembly would frame a Constitution for Pakistan wherein the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed and Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and the Sunnah. Besides, providing adequate provision for the minorities thereby enabling them to profess and practice their religions and develop their cultures and that provision shall also be made to safeguard the legitimate interests of minorities and backward and depressed classes so that the people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the world and make their full contribution towards international peace and progress and happiness of humanity. The resolution enunciated the principles on which the future constitution of Pakistan was to be formed and it thus served as the basis of all constitutional structure worked out and introduced in the country. The Objective Resolution, later on, was added as a preamble to the Constitution and the position continued up till 1985 when by way of Article 2-A it was provided that the principles and provisions set out in the Objective Resolution shall be the substantive part of the constitution and shall have effect accordingly.

It would be pertinent to mention here that since Muslims of India struggled for Pakistan not simply for the sake of independence but they wanted to establish an Islamic society in their homeland and they were also desirous to have an Islamic criminal justice system at home, therefore, notwithstanding the fact

that intention was conveyed through the Objective Resolution, appropriate measures, in this regard, were yet to be taken. Challenges were many, of which paramount importance, of course, were inter alia, firstly; to see that in future no law contrary to the Holy Quran and Sunnah of the Holy Prophet Muhammad (PBUH) is enacted, secondly; to ensure that the current laws are amended and brought in conformity with the Injunctions of Islam and thirdly; to guarantee that non-Muslim citizens though treated at par with other citizens concerning the matters of property, life, freedom of speech, movement, gatherings, earning their livelihood etc, their right of freedom of worship, cultural affinities and religious education is fully preserved and that they are free to decide their personal matters according to their own laws and traditions.

It would be worthwhile to mention here that the first challenge, referred to herein-above, was immediately met with as it was provided in all the successive Constitutions, enforced in the country in 1956, 1962, and 1973 that in future no law contrary to the Holy Quran and Sunnah would be enacted, however, there was a great confusion with regard to the second challenge i.e. as to how and by which means the existing laws should be brought in conformity with the Injunctions of Islam. In order to achieve the very end, in the Constitution of 1956 it was provided that every citizen would have a right to take a decision from the Court as to whether or not a certain law was in accordance with the Shariah? And if any law was found against the principles of Shariah the Court was bound to annul the same. In the 1962 Constitution, however, though it was incorporated that the existing laws would be amended according to the principles of Islam and un-Islamic practices like usury, adultery, gambling, drinking and the use of intoxicating drugs would be discouraged, yet no way out was provided. In the 1973 Constitution, however, a step further was taken and it was, under Article-228 provided that a Council of Islamic ideology shall be constituted to make recommendations to the Government on the points, “as to whether or not a proposed law was repugnant to the Injunctions of Islam? And that “as to what measures for bringing the existing laws in conformity with the Injunctions of Islam” should be taken.

Accordingly, on the recommendations of the Council of Islamic Ideology, the following Ordinances amending the existing Laws relating to certain offences were promulgated in February, 1979.

These Ordinances were: -

(i) Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 modifying the existing Law relating to Qazf thereby providing punishment of Offences of Qazf liable to Hadd and Tazir.

(ii) Offence of Zina (Enforcement of Hudood) Ordinance, 1979 promulgated with a view to bring in conformity with the Injunctions of Islam the existing Law relating to Zina, thereby providing punishment for zina-bil-jabr liable to Hadd and Tazir, Kidnapping, abducting or inducing a woman to compel for marriage, or any person for unnatural lust or buying or selling persons for the purpose of prostitution etc.

(iii) Offences Against Property (Enforcement of Hudood) Ordinance, 1979, enforced to make provisions for the punishment of offences of theft and Haraabah liable to Hadd and Tazir.

(iv) The Prohibition (Enforcement of Hadd) Order, 1979. By means of which the existing Laws relating to prohibition of intoxicants were modified and Islamic punishments provided for the offences, e.g. for importing, exporting, transporting manufacturing, selling or buying or keeping in possession any intoxicant, were introduced.

(v) Another Ordinance i.e. “Execution of the Punishment or Whipping Ordinance, 1979” was also promulgated but it was subsequently abolished.

Need to amend these Laws necessitated because, in the Sub-continent, though the Islamic Criminal Laws, in original form, were prevalent up to 1772, yet, it were substantially changed by the British Rulers, as to them, some of the provisions of the Islamic Criminal Law particularly with regard to Hadd and Qisas including its waiver and compromise by the heirs of the victim appeared to be at variance and inconsistent with the common law of England. The same, therefore, were gradually done away with, through certain regulations. It would be worthwhile to mention here that under the common law of England the State

had direct control over offences and trials particularly concerning the human body and property. Even power to launch or withdraw prosecution and compounding or compromising the offences, before or after conviction or to reprieve and pardon the offender vested in State and its functionaries and the victim of a crime or his heirs had no say in the entire process. Whereas, under the Islamic Law the position was other way round. There under, the victim and his heirs were in charge of the proceedings. From the beginning of the prosecution to the end they had effective control over the crime and the criminal. It was their choice to report the matter or keep quiet, it was also at their sweet will to prosecute the offender or not. It too, was within their competence to abandon the prosecution at any stage of the trial, or enter into compromise with the offender or waive the right of Qisas or pardon the offender even just before execution of sentence and the process could not have been impeded by the State rather it was bound to facilitate the victim or his legal heirs in achieving their object. On 3rd December, 1790 therefore, on the basis of a minute of Lord Cornwallis, the discretion left to the next of kin of a murdered person, to remit the penalty of death on the murderer, was taken away. In 1791, the Government resolved that punishment of mutilation should not be inflicted on any criminal. In 1797, under Regulation IV of 1797, the law officers were directed to give their Fatwa in all cases of willful murder on the assumption that the Qisas was claimed, when it was not. In case, where, otherwise, law prescribed the payment of Diyat, the Judges were directed to commute the punishment to imprisonment. By Regulation VIII of 1799, all cases of homicide in Muslim Law were declared liable to capital punishment. Capital sentence was also prescribed in cases of homicide, which were previously exempted from retaliation on sole ground e.g., the prisoner being one of the ancestors of the deceased. Through Regulation VII of 1801 different types of accidental homicide were distinguished and provision for expiatory compensation in cases of involuntary homicide in the prosecution of lawful intention, e.g., shooting at a mark and accidentally killing a man, was removed. Changes were thus introduced to effectively punish the offenders as in the opinion of the British rulers, the offender had ample opportunities to escape punishment under the Islamic Law.

Having felt that establishment of the Council of Islamic Ideology alone was not sufficient to cater the requirements laid down by the Objective Resolution as well as the Constitution and the object could not be achieved without doing away with the laws opposed to the Injunctions of Islam, in February 1979, Shariat Benches were established in the Supreme Court and High Courts and they were authorised to strike down the Laws found contrary to Islamic faith. However, in May 1980 the Shariat Benches of the High Courts were abolished after the establishment of the Federal Shariat Court. A new Chapter i.e. 3-A was added to the Constitution and by means thereof the “Federal Shariat Court” was authorised to examine and decide as to whether or not any law or provision of law was repugnant to the Injunctions of Islam as laid down in the Holy Quran and Sunnah of the Holy Prophet (PBUH). It was further provided that such law or provision shall, to the extent, to which, it was held to be so repugnant by the “Federal Shariat Court,” shall cease to have effect and that the decisions of the Federal Shariat Court will be binding upon all the High Courts and Courts subordinate to it.

The Federal Shariat Court, soon after its formation, started examination of the existing laws, including the Criminal Laws and in the case Muhammad Riaz etc. vs. Federal Government etc, reported as P.L.D 1980 FSC-1 declared certain provisions of the Pakistan Penal Code as well as the Criminal Procedure Code as repugnant to the Injunctions of Islam. Reasons for the decision, inter-alia, were that sections 299 to 338 of the PPC which dealt with the offences against human body, did not provide for the Qisas in cases of Qatl-al-amd (deliberate murder) and Jurooh-al-amd (deliberately causing hurt), for Diyat in cases of Shibh-ul-amd and Khata of both qatl (murder) Jurh (hurt), for compromise between the parties on agreed compensation when they make Sulh (compromise) in cases of Qatl and Jurh and also did not provide that the offender may be pardoned by the victim in the cases of Jurh (hurt), and by the heirs of the victim in the cases of Qatl (murder). It further did not exempt a non-pubert and an insane offender from the

sentence of death in cases of murder and also did not define the different kinds of Qatl and Jurh (murder and hurt) in accordance with their respective punishments prescribed in the Holy Quran and Sunnah. Certain provisions of the Criminal Procedure Code were also declared repugnant to the Injunctions of Islam as under the Islamic Laws, Central or a Provincial Government were not empowered to pardon the offenders or commute or remit the sentences in cases, violating Huqooq-ul-Ibad. Section 345 Cr.P.C, was also found repugnant in so far as it did not include some of the offences against human body in the table of compoundable offences. Section 381 Cr.P.C, too, was found repugnant, as it did not provide that the heirs of the deceased in case of murder were competent to pardon the offender or enter into a compromise with him even at the last moment before execution of sentence, upon which execution could not have taken place. Provisions of sections 337 to 339-A Cr.P.C, in so far as they permitted tender of pardon to an offender without reference to and without permission of the victim, were also found repugnant. The above decision of the “Federal Shariat Court” was upheld by the Shariat Appellate Bench of the Hon’ble Supreme Court of Pakistan in the case Federation of Pakistan vs. Gul Hassan Khan, reported as PLD 1989 Supreme Court 633, thus the said provisions, to the extent, to which, it were declared repugnant to the Injunctions of Islam, ceased to have effect.

In pursuance of above decision sections 299 to 338 of the Pakistan Penal Code were accordingly, substituted by sections 299 to 338-H, initially by way of Ordinances and subsequently by the Criminal Law (amendment) Act (II of 1997), commonly known as the Qisas and Diyat Act. Provisions of the Criminal Procedure Code, declared repugnant too, were amended through the above act. Thus the changes introduced in the Criminal Laws, by the British in the colonial days, were annulled and it were brought in accordance with the Injunctions of Islam. The Evidence Act, 1872 was also repealed and substituted by the Qanun-e-Shahadat Order, 1984 in order to incorporate the directions of the “Federal Shariat Court” contained in the above referred judgement delivered in Muhammad Riaz’s case, referred to hereinabove.

With regard to the third and foremost challenge as to how the interest of the minorities was to be safeguarded, though provisions were made in all the three Constitutions that non-Muslims would enjoy all rights guaranteed under the Constitution as well as the Islam yet, special care was taken while amending the existing Laws concerning the rights of the minorities especially in criminal matters because the concept of crime in western society is somewhat different from Islam.

Though it is difficult to define what is criminal or distinguish a crime by definition from a tort because the same act or omission may give rise to both civil as well as criminal liability, yet for the purpose of understanding the subject it is necessary to find answers to certain questions such as What is a crime? What purpose or function does the criminal law serves? Are some human behaviours inherently bad or evil so that they are universally condemned and as to whether the criminal laws are intended to protect individual victim or to protect society as a whole. It is also hard to come up with definition that encompasses all crimes because every jurist and scholar of criminal law as per his own philosophical approach has, defined the “crime” differently keeping in view the prevalent social conditions in a particular society, yet there appears to be unanimity of opinion on the point that crime is a wrong to society involving the breach of a legal Rule which has Penal consequences attached to it. The criminal law thus seeks to identify and control the types of behaviour, which the community finds unexceptionable.

All crimes, however, can conveniently be classified into two categories represented by the Latin terms “malum in se” or “Mala in Se” and “Malum Prohibitum” or “Mala Prohibita.” Where the term “Malum in Se” simply means “bad in itself” whether prohibited by human laws or not and this class includes offences such as murder, robbery, perjury, injury to persons and destruction of property etc, the term “Malum Prohibitum” denotes “bad because it is prohibited” and this classification symbolise the religious origin of the ideas about crime.

Anthropologists are of the opinion that modern humans are biologically very young, having emerged only a few hundred thousand years ago. There is substantial controversy about the exact origin and development of the human species but probably humans originated in Africa and spread across the earth over the millennium, differentiating into various social, ethnic and cultural groups that now make up the human family. By the evolution of society however, certain laws and rules were inducted so that rights and obligations, arising amongst the members of the society could be determined and adjusted and social equilibrium could be maintained. Though different civilisations ranged from ancient empires of Sub-Saharan Africa, to the many cultures that arose in China and Central Asia to the variety of societies of the Indian Sub-continent and South-East Asia and Maya and Aztecs in the Americas flourished time to time and they also created rules of conduct to regulate their lives yet, the fact remains that from all the ancient human variety we ironically have only three major kinds of legal systems in the world today i.e. Common law, based on the law of England. Civil Law, based on modern continental European law codes derived from the ancient Roman Law system and the Islamic Law, based of course upon the Holy Quran and Sunnah of the Holy Prophet Muhammad (PBUH). The Fourth system i.e. the socialist law existed for about 70 years yet, it, more or less, vanished with the death of communism after the collapse of the Soviet Union. The reason for this situation is that in the last 500 years European countries, created, exploited and then relinquished a colonial system that subjugated most of the other countries of the world. Along with their economic, political and military systems, the Europeans brought their law, which was either imposed upon or adopted by the native people. Even countries that were never colonised, such as Japan and Thailand, voluntarily adopted European style legal systems. Islamic Law naturally was taken initially by Military conquest and later by appeal of the religion to the parts of the world, which are now predominantly Muslim.

However, the fact remains that where the English speaking countries have common law legal system because they used to be English colonies such as the United States, Canada, Australia, New Zealand, Nigeria, India and Kenya, the Islamic law though only exist in its pure form in homogeneously Muslim countries such as Saudi Arabia, is the foundation of Islamic criminal justice system, while more secular matters are being governed by a common law or civil law system, left over from colonial days.

A minute study of all these systems, however, reveal that where, in the Islamic countries the Holy writings have the force of law, in the other countries where the system is based on common law, the Holy writings, though do not have the force of law, still provide moral guidance for the believers. Fundamental idea of all the religious writings, however, appears to be one and the same i.e. that violation of moral rules specified in the Holy books demand that transgressors and wrong doers who threatens the fundamental rules upon which a society is founded must be punished.

Though there has been some criticism regarding severity of punishments prescribed by the Islamic laws yet, ironically the very fact has been ignored that Islamic Laws have not introduced any new or strange punishment for any crime as all these offences were also culpable in Pre-Islamic days and similar, rather severe, punishments were provided therefor.

The earliest written code of conduct prescribed by any society, as we know, is the code of Hammurabi from the city of Babylon in Mesopotamia over 4,000 years ago. It is written on a large black stone, which is now housed in the Louvre in Paris. A study thereof reveals that in the ancient times, even, sanctions were placed on the offenders by the society as its disapproval and abhorrence against crimes and also for the infringement of moral values. For instance it was provided therein that if in a lawsuit damning evidence was given by some one and the word that he had spoken was not justified, then, if the suit was a capital one, that man had to be slain and that if a man had stolen an ox or a sheep, or an ass or a goat, then he had to pay thirty-fold or if the thief had nothing to pay, he had to be slain or if a son had struck his father, his hands had to be cut off or if a man had destroyed the eye of a man his own eye had to be destroyed or if he had broken the bone of a man his bone had to be broken.

In the Holy Bible* too, the offences of like nature were made culpable and severe punishments therefore, were provided.

In Chapter 21 it has been laid that “He that smiteth a man, so that he die, shall be surely put to death,” “And, he that smiteth his father, or his mother, shall be surely put to death,” And, he that stealeth a man, and selleth him, or if he found in his hand, he shall surely be put to death,” “And, he that currseth his father, or his mother, shall surely be put to death,” “If men strive, and hurt a woman with child, so that her fruit depart from her and if any mischief follow, then thou shalt give, life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound and stripe for stripe. In Chapter 22 it has been further provided that if a man steals an ox, or a sheep, and kills it, or sells it he shall restore five oxen for an ox, and four sheep for a sheep and with regard to false evidence it has been in Chapter 23 laid as under:-

“Thou shalt not raise a false report; put not thine hand with the wicked to be an unrighteous witness.”

A perusal of verse 13 of Sura Shura and verses 85 to 88 of Sura Al-Inaam, translation whereof is given here under, reveals that the commandments contained in Holy Quran are not only identical but are in continuation of the messages conveyed by “Allah” through his Messengers, earlier.

“He had ordained for you that religion which He commanded unto Noah, and that which we commanded unto Abraham and Moses and Jesus saying; establish the religion and be not divided therein.” (42/13)

“And we bestowed upon them Issac and Jacob. Each of them We guided, and Noah did We guide Aforetime and of his seed (We guided) David and Solomon, and John and Joseph, and Moses, Aaron. Thus do we reward the good. And Zechariah and John and Jesus and Elias each one of them was of the righteous. And Ismail and Elia, and Jonah and Lot. Each one of them did We prefer above (Our) creatures. With some of Their forefathers, and their offspring and their brethren, and We chose them and guided them Unto a straight path.” (6/85 to 6/88)

From the above discussion it implies that not only the Codes of conduct evolved by the society from time to time are based primarily, on the divine Laws but all the Holy Books carry the same message which was revealed by “Almighty” to the human beings, through his Prophets, for the betterment of mankind. However, development of this Law kept pace with the advancement of the society and its needs and was perfected with the advent of Islam. Shariah, which means spending of life in accordance with the commandments of “Allah” however, remained the same, throughout. Majority of the non-Muslims therefore, feel no discomfort with the application of these Laws because their religious belief is near to it.

As stated above, the Islamic Laws were introduced in Pakistan more than two decades ago and since then no problem or difficulty has been experienced because there under, non-Muslim citizens are well protected against any discrimination rather they are exempted from various punishments for instance under the Zina (Enforcement of Hudood) Ordinance, a non-Muslim citizen guilty of the offence of Zina liable to Hadd cannot be stoned to death, likewise under the Prohibition (Enforcement of Hadd) Order, a non-Muslim is immune from prosecution for keeping in possession reasonable quantity of intoxicating liquor, kept for the purpose of consumption, on or about the time of his religious ceremony.

Having applied and experienced the Islamic Laws in Pakistan it can be safely concluded that Islamic Criminal Justice System can conveniently be introduced in a multi-religious country/society.

Court Administration and Budget



6 COURT ADMINISTRATION AND BUDGET

6.1 The Office of the Registrar Federal Shariat Court

The Registrar Federal Shariat Court is the executive head of the office of the Court, and has been appointed controlling officer. All cases are registered, and court orders implemented, through the Registrar. All rosters and cause lists for court sittings are issued with the signature of the Registrar. The Registrar may, with prior approval of the Chief Justice, allocate functions to the officers of the Court. Every notice is to be signed by the Registrar or by another officer authorised by the Chief Justice.

The Registrar is the appointing authority for employees in the B-1 to B-11 categories, and he exercises supervisory and disciplinary control over all the officers and employees of the Court. All cases, pertaining to administrative and judicial matters, requiring approval of Chief Justice, are submitted through the Registrar.

In the absence of the Registrar, due to illness or any other cause, the Deputy Registrar authorised by the Chief Justice exercises the powers and functions of the Registrar according to the rules of procedure.

6.2 Mr. M. R. Najmi, Registrar Federal Shariat Court

Mr. M. R. Najmi is the Registrar of the Federal Shariat Court. He was born on 4th April, 1949. He possesses a B.Com. and a Law Degree. He joined the Federal Shariat Court on 16.06.1980. He was elevated as Registrar (B-20) on 11.03.2000 and moved to the next grade, Registrar (B-21), on 17.01.2001 in which capacity he is performing his functions at present.



Mr. Najmi's address and telephone numbers are given below for the convenience of the readers.

Home Address	House No.592, street No.44, G-10/4, Islamabad.	
Telephone	051-2293881, 2294568	(Residence)
	051-9203091	(Office)
	0300-8560978	(Cellular)
E- mail	fsc@isb.paknet.com.pk	

6.3 Introductory Remarks About the Court by the Registrar

1. The Federal Shariat Court was constituted on 26th May, 1980, under Article 203 (C) Chapter 3-A of the Constitution of The Islamic Republic of Pakistan 1973. Under this Chapter the Federal Shariat Court is empowered to examine any law as defined in Article 203-B(C) and also to decide the question as to whether or not any law or provision of law is repugnant to the Injunctions of Islam. Appellate as well as Revisional jurisdiction has also been conferred on the Federal Shariat Court to hear appeals and revision petitions in Hudood Cases, decided by the trial Courts.

2. Federal Shariat Court, since its establishment, had been functioning in a Bungalow at Margalla Road, F-6/3, Islamabad. The Court building consists of three small Court Rooms which are quite insufficient to cater the requirements of the present strength of Judges. The remaining rooms that have been left for the administrative staff, are also inadequate to accommodate all the establishment/Branches.

3. Library for the Bench and Bar has been established on the ground floor. This Library comprises of law books, Islamic books, Encyclopedias and reference material for the Hon'ble Judges and Advocates. A large number of books, about thirty thousand in number, had been procured over the last 24 years. Additional books, on regular basis, are being purchased to keep the library up-to-date.

4. With a view to provide its own building to the Federal Shariat Court, a piece of land measuring 480 x 200 Sqr. Feet was allotted in 1986 by the Government at Constitution Avenue, G-5/2, Islamabad. The building is nearing its completion and, hopeful, the Court would shift into it before the end of June, 2004. It has been constructed in an elegant way with beautiful touch of Islamic architecture. This new building consists of eight Court Rooms and Chambers for the Hon'ble Judges. It is also being equipped with all the facilities required by the law officers and the Advocates, appearing before the Court, as well as the litigant public

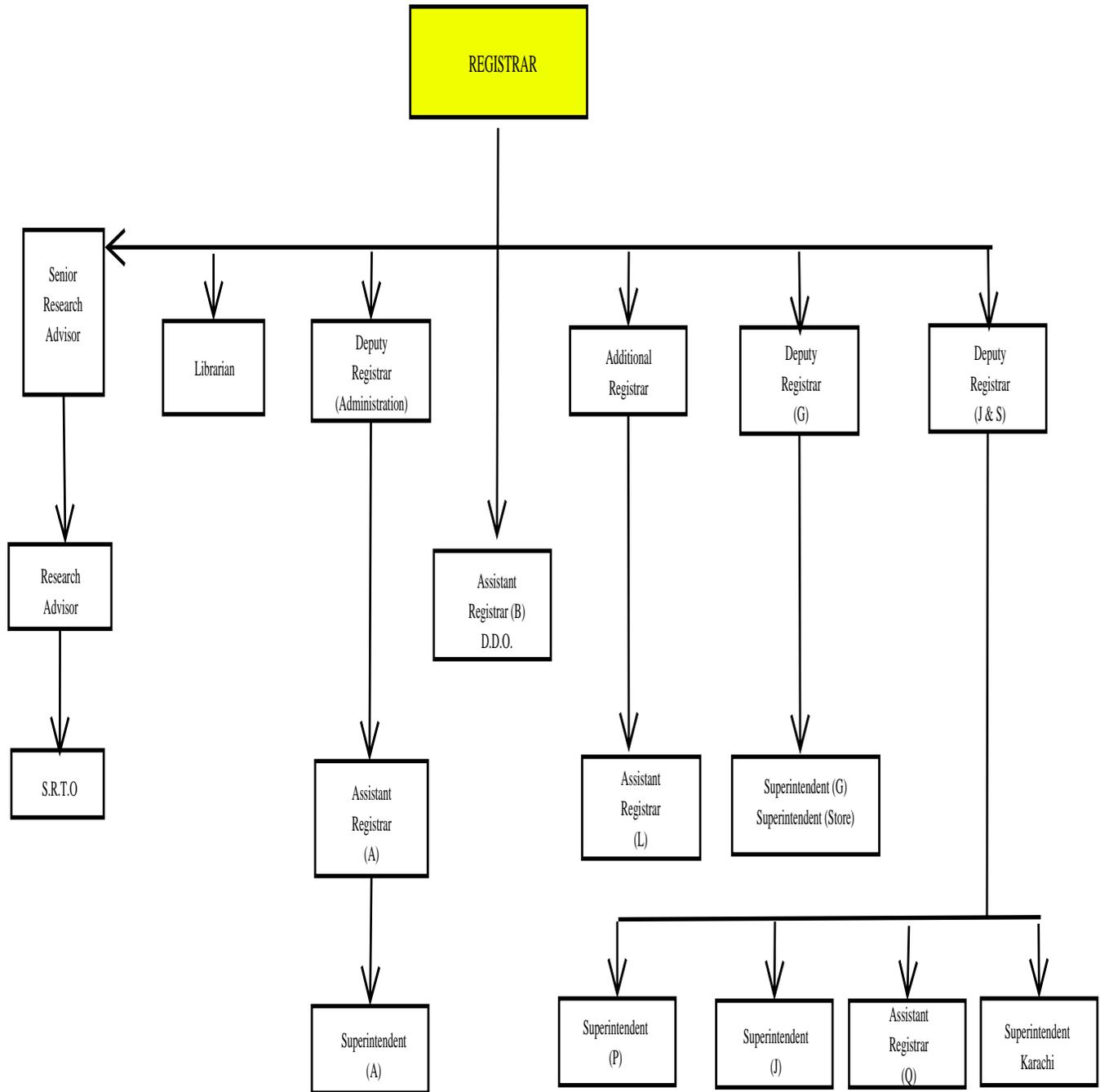
5. The Hon'ble Judges of this Court, during the year 2003, held circuit benches, at Provincial Headquarters, to dispose of criminal appeals, revisions etc emanating from the respective Provinces. These circuit benches were held in the respective High Court premises as no separate Court buildings are available for the Federal Shariat Court in the Provinces. This led to great inconvenience not only for the Judges of this Court, but also for the learned High Courts.

6. It may be mentioned that Government of N.W.F.P has earmarked a plot of 2 Kanals at Main Khyber Road, Peshawar for construction of building of the Federal Shariat Court at the Provincial Headquarter.

7. It was way back in 1990 that a building was allotted for Federal Shariat Court in Lahore by Ministry of Law, Justice and Parliamentary Affairs. At present, it is under the use of various Federal Courts. Its possession is likely to be handed over to this Court in near future. Efforts are being made to arrange separate buildings at Quetta and Karachi, with the help of the respective Provincial authorities.

(M. R. Najmi)
Registrar

6.4 Organisational Chart of the Office of the Court



6.5 The Court Budget

Details of Budget allocation and actual expenditure incurred during the financial year 2001–2002

HEAD OF ACCOUNT	BUDGET ALLOCATION	EXPENDITURE
00000-Establishment Charges	20,479,000	20,453,802
01100-Pay of Officers	7,835,000	7,832,937
01200-Pay of other Staff	5,770,000	5,764,756
02000-Regular Allowances	5,808,000	5,791,754
03000-Other Allowances	1,066,000	1,064,355
10000-Purchase of Durable Goods	406,500	405,817
11000-Transport		
12000-Machinery and Equipment	132,500	132,297
13000-Furniture and Fixture	274,000	273,520
40000-Repair and Maintenance of Goods	579,800	576,838
41000-Transportation	370,000	367,435
42000-Machinery and Equipment	175,000	174,930
43000-Furniture and fixture	34,800	34,473
44000-Building		
50000-Commodities and Services	5,576,300	5,547,442
51000-Transportation	2,993,000	2,977,322
52000-Communication	1,721,000	1,720,110
53000-Utilities	15,400	15,031
54000-Office Stationary	185,000	184,501
55000-Printing and Publication	9,200	9,050
56000-Newspaper and Periodicals	100,000	99,870
57000-Uniform and liveries	62,800	62,602
58000-Rent Royalties Rates and Taxes	15,500	15,301
59000-Other Expenditure	474,400	463,655
60000-Transfer Payments	20,400	19,949
67000-Entertainment and Gifts	20,400	19,949
90000-Misc: Expenditure	66,000	65,772
92000-Delegation Abroad	66,000	65,772
Grand Total	27,128,000	27,069,620

Statement Showing the Budget Allocation for the Financial Year 2002-2003

HEAD OF ACCOUNT 21103-05-FSC	BUDGET ALLOCATION
0000-Establishment Charges	24,167,000
01100-Pay of Officers	9,844,000
01200-Pay of Other Staff	7,605,000
02000-Regular Allowances	6,133,000
03000-Other Allowances	585,000
03100-Over time Allowance	115,000
03300-Honoraria	100,000
03400-Medical Allowance	200,000
03700-Contig: paid Staff	100,000
03800-Leave Salary	70,000
1000-Purchase of D.Goods	1,439,000
11000-Transport	940,000
12000-Machinery & Equipment	300,000
13000-Furniture & Fixture	199,000
4000-Repair & Maint. of D.Good	650,000
41000-Transport	450,000
42000-Machinery & Equipment	150,000
42000-Furniture & Fixture	45,000
44000-Building	5,000
5000-Commodities & Services	5,600,000
51000-Transportation	2,800,000
51100-Travelling Allowance	1,500,000
51200-Trans. of Goods	45,000
51300-P.O.L.Charges	1,200,000
51400-Conveyance Charges	55,000
52000-Communication	1,780,000
52100-Postage & Stamps	150,000
52200-Telephone & T.Calls	1,580,000
52400-Courier & Pilot Service	50,000
53000-Utilities	130,000
53100-Gas Charges	60,000
53200-Water Charges	10,000
53300-Electricity Charges	50,000
53400-Hot & cold Water	10,000
54000-Office Stationary	175,000
55000-Printing & Publication	60,000
56000-Newspaper & Periodical	70,000
57000-Uniform & Liveries	40,000
58000-Rent Rate & Taxes	30,000
58200-Rent for Residential Building	10,000
58600-Rate & Taxes	20,000
59000-Other Expenditure	515,000
59500-Advertisement	80,000
59600-Fee of Advocates	170,000
59000-Others/W. Dusting Allowance	265,000
6000-Transfer payment	45,000
67000-Entertainment	45,000
9000-Misc: Expenditure	200,000
92000-Delegation Abroad	200,000
GRAND TOTAL:	32,101,000

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**Former Chief Justices, Judges
and Registrars of the Court**

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7 FORMER CHIEF JUSTICES, JUDGES AND REGISTRARS OF THE COURT

7.1 Former Chief Justices of the Federal Shariat Court

S.No.	Names	From	To
1	Mr. Justice Salahuddin Ahmad (Chairman)	28.5.1980	31.05.1981
2	Mr. Justice Sheikh Aftab Hussain	01.06.1981	14.10.1984
3	Mr. Justice Sardar Fakhre Alam as Acting Chief Justice	15.10.1984	07.11.1984
4	Mr. Justice Gul Muhammad Khan	08.11.1984	08.11.1990
5	Mr. Justice Dr. Tanzil-ur-Rehman	17.11.1990	16.11.1992
6	Mr. Justice Mir Hazar Khan Khoso	17.11.1992	18.07.1994
7	Mr. Justice Nazir Ahmad Bhatti	19.07.1994	04.01.1997
8	Mr. Justice Mian Mahboob Ahmad	08.01.1997	07.01.2000
9	Mr. Justice Fazal Ilahi Khan	12.01.2000	11.01.2003

7.2 Former and Present Judges of the Federal Shariat Court

S. No.	Names	From	To
1	Mr. Justice Sheikh Aftab Hussain	28.05.1980	31.05.1981
2	Mr. Justice Agha Ali Haider	28.05.1980	14.07.1981
3	Mr. Justice Zakaullah Lodhi	28.05.1980	24.03.1981
4	Mr. Justice Karim Ullah Durrani	28.05.1980	15.02.1982
5	Mr. Justice Zahoorul Haq	01.06.1981	31.05.1983
6	Mr. Justice Ch.Muhammad Siddique	01.06.1981	31.05.1985
7	Mr. Justice Pir Muhammad Karam Shah	07.06.1981	07.10.1982
8	Mr. Justice Maulana Muhammad Taqi Usmani	07.06.1981	07.10.1982
9	Mr. Justice Malik Ghulam Ali	07.06.1981	06.06.1985
10	Mr. Justice Ali Hussain Qazilbash	01.04.1982	31.03.1984
11	Mr. Justice B.G.N. Qazi	01.06.1983	31.05.1985
12	Mr. Justice Abdul Quddus Qasmi	02.07.1983	01.07.1986
13	Mr. Justice Mufti Syed Shujaat Ali Qadri	02.07.1983	01.07.1989
14	Mr. Justice Sardar Fakhre Alam	01.04.1984	31.03.1986
15	Mr. Justice Fakhruddin H.Sheikh	03.03.1985	02.03.1988
16	Mr. Justice Muftakhiruddin	10.03.1986	09.03.1990
17	Mr. Justice Kamal Mustafa Bokhari	23.04.1986	22.04.1989
18	Mr. Justice Abdul RehmanKhan Kaif	23.04.1986	22.04.1989
19	Mr. Justice Ibadat Yar Khan	02.10.1988	01.10.1991
20	Mr. Justice Dr.Fida Muhammad Khan	02.10.1988	
21	Mr. Justice Abdul Karim Khan Kundi	29.10.1989	28.10.1991
22	Mr. Justice Abdul Razak A.Thahim	29.10.1989	28.10.1991
23	Mr. Justice Abaid Ullah Khan	09.02.1991	08.02.1994
24	Mr. Justice Mir Hazar Khan Khoso	28.10.1991	16.11.1992
25	Mr. Justice Nazir Ahmad Bhatti	28.10.1991	18.07.1994
26	Mr. Justice Muhammad Ilyas	17.11.1992	14.06.1994
27	Mr. Justice Nasir Aslam Zahid	16.04.1994	14.04.1996
28	Mr. Justice Khalil-ur-Rehman Khan	29.08.1994	14.04.1996
29	Mr. Justice Muhammad Shafi Muhammadi	17.03.1996	01.09.1996
30	Mr. Justice Sardar Muhammad Dogar	30.12.1996	29.12.2002
31	Mr. Justice Abdul Waheed Siddiqui	30.12.1996	29.12.1999
32	Mr. Justice Muhammad Khiyar Khan	19.02.1997	18.02.2000
33	Mr. Justice Ch.Ejaz Yousaf	19.02.1997	13.01.2003
34	Mr. Justice Ali Muhammad Baloch	01.01.2000	31.12.2002
35	Mr. Justice Khan Riazuddin Ahmad	19.02.2000	18.02.2003
36	Mr. Justice S.A. Manan	05.06.2003	
37	Mr. Justice Saeed-ur-Rehman Furrukh	05.06.2003	
38	Mr. Justice Zafar Iqbal Pasha Chaudhry	05.06.2003	
39	Mr. Justice S.A. Rabbani	05.06.2003	

7.3 Former Registrars of the Federal Shariat Court

S.No.	Names	From	To
1	Mr. S. A. Nizami	01.11.1980	31.03.1989
2	Mr. Aziz-ur-Rehman	01.04.1989	18.01.1991
3	Mr. Ashiq Hussain	19.01.1991	15.02.1994
4	Mr. Aziz-ur-Rehman	16.02.1994	05.11.1996
5	Mr. S. M. Tayyab	06.11.1996	11.03.2000

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The Year 2003 in Pictures

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8 THE YEAR 2003 IN PICTURES

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