

IN THE FEDERAL SHARIAT COURT.  
( Original Jurisdiction )

PRESENT

Mr. Justice Aftab Hussain	Chief Justice
Mr Justice Ali Hussain Qazilbash	Judge
Mr. Justice Ch Muhammad Siddique	Judge
Mr Justice Maulana Malik Ghulam Ali	Judge

IN RE

S S M NO.84/82	The Pakistan Armed Forces Nursing Services Act, 1952
S S M NO.85/82	The Pakistan Army Act, 1952.
S S.M.NO.100/82	The Pakistan Air Force Act, 1953
S S.M.NO.160/82	The Pakistan Navy Ordinance, 1961.

- 1) Brigadier Imtiaz Ahmad Waraich,  
Judge Advocate General Pakistan Army  
G.H.Q., Rawalpindi.
- 2) Air Commodore M Aslam Beg,  
Judge Advocate General Pakistan Air  
Force, Peshawar
- 3) Commodore Hafiz Abdul Majid Malik,  
Judge Advocate General Pakistan Navy,  
Islamabad
- 4) Mr Iftikhar Hussain Chaudhary,  
Standing Counsel for the  
Federal Government.

Date of Hearing - 5.4.1983 and 6.4.1983.

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JUDGMENT

AFTAB HUSSAIN, CHIEF JUSTICE:

The Pakistan Army Act, 1952 and the Pakistan Air Force Act, 1953 were notified for public opinion on the question of their repugnancy to the Quran and Sunnah in various Newspapers of the country on 15-11-1982 . While examining these Laws, it was found that the provisions of the Pakistan Navy Ordinance, 1961 were in pari materia with the above mentioned two Acts relating to two other services, while Armed Forces Nursing Services Act, 1952 applied the provisions of the three Acts <sup>to</sup> officers employed in the different services. It was, therefore, considered advisable to examine the four laws together.

2. The laws relating to the Army, Airforce and the Navy provide for the organization and government of the three forces and establish judicial hierarchy different from the hierarchy of the civilian Courts. In this separate judicial system the offences are triable through the Courts Martial which can try them and their procedure is described in detail. One important feature of the procedure is that appeals are completely barred against the findings of the Courts (S.133 Army Act, S.162 Air Force Act and S.140 Navy Ordinance). This deficiency is sought to be repaired with the provisions of confirmation of sentences by higher authorities, and of Revision/Review of finding and sentence (Chapter X, Army Act, Chapter XII Air Force Act and Chapter XII Navy Ordinance). Very wide powers of pardon, remission or commutation of sentence have been conferred, on the Government, The Chief of Staff and the officers are empowered in this behalf (S.143 Army Act, S.177 Air Force Act and S.153 Navy Ordinance).

3. The Judge Advocate Generals of the three Services i.e., The Army, The Air Force and The Navy were invited to assist the Court and were given a hearing. Mr. Iftikhar Hussain Chaudhary the counsel for the Federal Government also argued the matter.

4. The main points mooted out before the Judge Advocate Generals were as follows;-

- 1) Whether the offences and their sentences, whether of Hudood or Tazir in the four Hudood Laws may not be incorporated in these laws.
- 2) Whether right of appeal should not be given to the convicts under these laws and
- 3) Whether in cases in which the prescribed person pays to a next of kin money under S.154 of the Army Act, S.190 of the Air Force Act and S.165 of the Navy Ordinance, it may not be made necessary for him to obtain a bond from the payee undertaking to distribute that money amongst the legal heirs of the deceased.

5. The Judge Advocate General of Pakistan Navy agreed with all these points. He filed on 24th February, 1983 a petition that the Naval Headquarters had already prepared a draft for the amendment of the Pakistan Navy Ordinance enabling Court Martial to award Hadd punishment in <sup>an</sup> ~~the~~ appropriate case and for providing an appeal in cases in which Hadd punishment has been awarded. Regarding the third point it is stated in that petition, that the objective can be achieved by the amendment of the Pakistan Navy Rules 1961, requiring the person receiving the property to execute a bond in the presence of the Commanding Officer to the effect that property shall be distributed amongst legal heirs according to the Shariat Laws. On a query from me he submitted that after the second World War orders of conviction passed by Court Martials were made appealable and Appellate Courts were established in America as well as United Kingdom for hearing of such appeals.

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6. The Judge Advocate General of the Army, however, raised an objection that there is no provision of appeal in Sharia and moreover if appeals against conviction other than those under the Hudood Ordinances are provided, it will affect the discipline of the Army. He dealt at length on the importance of the Office of the Judge Advocate General and its role ensuring that complete justice may be meted to all and sundry and many a persons are acquitted on the report submitted by that office during the Revisional proceedings and proceedings of confirmation of sentence. He also opposed the provision about the bond and said that this might increase the work load of the Army Officers for the small amounts which are given out of the fund of the deceased to their <sup>next</sup> of kin for relieving their distress.

7. The Judge Advocate General of Pakistan Air Force agreed with the Judge Advocate General of the Army.

8. We are cognizant of the fact that the Army can function only if discipline of the strictest kind is maintained in the organization and it is ensured that orders of the superior officer are implicitly obeyed without any hesitation. Any disobedience must, therefore, be followed by strict disciplinary action and by subjecting the offender to punishment. To meet this end the superior officers must be vested with the requisite authority. In some cases this objective can be achieved by summary punishment of simple nature, which may be administered without any unreasonable delay. Such punishment must be provided in every law governing the government of military personnel to whatever branch of the Military, Army, Air Force and the Navy they may belong.

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9. Discipline also adds to the efficiency of the Force which should be the ideal of all Armed Forces. It is to achieve this that the Military Management is always separated from the Civil Management. Law governing the military is a specie by itself and is different from the Civil and Municipal Law.

10. The discipline of the Armed Forces can not be achieved simply by punishment and compulsion. Every service man for this reason is made conscious during his training and education, of his duty to his home land and that this duty cannot be discharged without implicit obedience of the Commander's Order.

11. In Islam also strict discipline was maintained among the Mujahids and the best illustration of this is furnished by the withdrawal of Command from Khalid Bin Waleed by order of Hazrat Umar and appointment of Abu Obaida as the Commander of the Muslim Army. The Muslim armies were on active service at that time. Khalid Bin Waleed did not raise any objection to his removal and thereafter served in the Army, which he once commanded, as ordinary Mujahid under Abu Ubaida (See Tarikh-e-Tabari Vol. II, page 282).

12. There is a direct Quranic order in respect of obedience in Q.4-59.

"O ye who believe! Obey Allah, and obey his messenger and those of you who are in authority."

The injunction to obey those "of you who are in authority" is with the object of generating sense of discipline in the Muslim Ummah for all times to come. After the Holy Prophet the responsibility of implementation of the laws of the Quran and the Sunnah and of

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leading the Muslim Ummah according to Sharia rests upon the persons in authority among the Muslims. There is no doubt that implementation of a law in letter and spirit depends upon observance and obedience by those who are governed by it. No good can be achieved from any order issued by a person in authority if it is ignored or disregarded by the persons to whom it is issued. If each individual is allowed to act according to his own judgment and leanings it will be the end of the Ummah or state or a centralised body. Condonation of disobedience is fatal to the inculcation of the sense of discipline among the people which is the corner stone of the Islamic polity. The Holy Prophet was so emphatic on the inculcation of the sense of discipline in the Ummah that he directed them to appoint from among themselves an Ameer even if two or three of them were going on a journey.

13. There are a number of traditions which make it incumbent upon the Muslims to obey the person in authority. It is reported from Hazrat Umar that the Holy Prophet addressed a group of his companions and enquired: "Do you not know that I am undoubtedly the Messenger of Allah and have been sent to you". The companions said: "There is no doubt about it and we are witnesses that you are a Messenger of Allah." The Holy Prophet said: "Do you not know that the truth is that whoever obeys me, obeys Allah and obedience to me is rendering obedience to Allah?" They replied affirmatively, "undoubtedly rendering obedience to you amounts to rendering obedience to Allah." The Prophet then said: "Yes, undoubtedly to obey me amounts to obeying Allah and obedience to me lies in obedience to your Ameers (persons in authority). If your Ameers offer prayer

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while sitting you should also follow them and offer your prayer similarly " Hayat Ul Sahaba by Maulana Muhammad Yousuf Vol:II page 72).

14. It is reported from Hazrat Umar that the Holy Prophet said that you obey your Imam even if he be a noseless negro slave, forbear if he causes loss to you and comply with his orders. Endure patiently if he deprives you of gifts or is cruel to you. But if he shows his intention to interfere in your religion, then tell him that you would shed your blood for the preservation of your Deen (faith). (Ibid page 74).

15. It is reported from Anas bin Malik that the Holy Prophet said " obey (your Ameer) even though he be a negro slave with a small head." (Fathul Bari, Vol:13, page 121).

16. Ibn-e-Abbas is reported to have said that the Holy Prophet observed that whoever sees in his Ameer anything which he does not like, should be tolerant. A person who isolates him from the Ummah even in ordinary things, and dies in that state, dies the death of a person in the age of jahilya (Fathul Bari, Vol.13, page 121).

17. Abdulla bin Omar said that the Holy Prophet said that obedience to the Ameer is the duty of a Muslim in all matters whether he likes them or dislikes them. (However) there is no obedience in Commands involving sin. If the Ameer passes an order for commission of sin, no obedience to that order is due to him (Fathul Bari Vol.13, page 121).

18. The reference to a negro slave with small head or with his nose cut suggests that an Ameer should be obeyed even if his appearance and his earlier status may rouse contempt or dislike. The duty to obey is subject to one exception only.

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19. Thus all orders of the Imam which do not violate the Injunctions of the Quran and the Sunnah must be obeyed (Islam Ka Nizam-1-Hukumat by Maulana Hamid-ul-Ansari, page 381).

20. A Muslim should not falter in his obedience to the person in authority, and should resign himself to all injustices and tyrannies from him for so long as there is no interference in religion and no order for commission of sin is given to him.

21. The only exception when disobedience is allowed - nay, rather enjoined- is an order to commit sin. In this respect there is a difference between the degree of obedience to the Prophet and obedience to a person in authority. The obedience to the Prophet is unconditional

ما أتكم الرسول فخذوه وما نهاكم عنه فانتهوا

(Take whatever comes to you from the Prophet and restrain yourself from what is prohibited by him). All the orders and commandments of the Messenger of Allah are binding on the Ummah in perpetuity, but obedience to the order of any other person in authority is subject to the above exception.

لا طاعة للمخلوق في معصية الله

(There is no obedience to any human being in sin and refractoriness towards Allah). In such a case the divine injunction is very explicit in Q.4:59).

Q.4:59:- O ye who believe! Obey Allah, and obey the messenger and those of you who are in authority; and if ye have a dispute concerning any matter, refer it to Allah and the messenger if ye are (in truth) believers in Allah and the Last Day. That is better and more seemly in the end.

Reference to Allah and the Messenger means that one should act as directed in the Quran and the Sunnah.

They must be obeyed. But in matters in which you dispute (the order of Ameer), turn towards Allah and HIS Prophet. The verse does not mean that one should pick up quarrel to satisfy his impulse. It is only when the command of the Ameer is obviously contrary to the Quran and the Sunnah that a Muslim can and should disobey him and turn for guidance towards the injunctions in the Book. There is an apt example of this and the extent of obedience to the command of the military commander.

It is related from Hazrat Ali that the Holy Prophet assigned the command of troops to an Ansari <sup>man under</sup> and ordered his command ~~and~~ to obey him. Those persons displeased him for some reasons. The Ameer asked them to collect some firewood, which was collected by them. He ordered them to light the fire which they did. The Ameer then asked them whether the Holy Prophet had not ordered them to obey him implicitly. They replied in the affirmative. He then asked them to enter the fire. On hearing this they saw towards one another and then said that they had accompanied him only to escape fire (the fire of Hell). The answer assuaged him. The fire was then extinguished. The companions mentioned this story before the Holy Prophet on their return. The Prophet said that if they had entered the fire they would never have come out of it. No obedience is due to an Ameer in what is not good (what is a sin or what is prohibited) (ibid, page 71, Albaihaqi, Vol 8 page 163) (Fathul Bari, Vol:13 page 122). This was an order to commit suicide which is prohibited in Islam. No obedience was due to it through the Holy Prophet had directed the mujahideen (members participating in that sariya) to obey the Ameer implicitly.

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23. It is from Abdulla bin Yazeed that the Holy Prophet sent a contingent for a battle under the command of Amr Bin Aas. Hazrat Abu Bakr and Hazrat Omar also were in that contingent. When they reached the site where the battle was to be fought, the commander ordered the army not to light the fire. This enraged Hazrat Omar who intended to go to Amr bin Aas (to remonstrate). Hazrat Abu Bakr restrained him and told him that the Holy Prophet had appointed Amr Bin Aas as the commander because of his superior knowledge of warfare..(Ibid, page 69, Albaihaqi Vol.9 page 411, Al-hakim, Vol 3 page 42).

24. The Holy Prophet did not discourage appeals against the order of the commander but obviously in the interest of maintenance of military discipline he did not allow even in a force consisting of volunteers only, the complainant to taunt or humiliate the commander in case his order was set aside by him. Auf bin Malik Ashjai said that he was a participant in Ghazwa Moota. A Yemeni helper accompanied him. He had only a sword with him. One of the persons slaughtered his camel and the Yemeni took from him the skin of the animal and made it into a shield. When the battle started he saw a person (Roman) armed with weapons studded with gold riding a horse in the battle field. He hid himself behind a rock and when the Roman passed him he cut his horse's hoofs. The Roman fell down on the ground. The Yemeni killed him and took his horse and weapons. After the battle was over Khalid Bin Waleed who was commanding the army asked the Yemeni to deposit this booty. Auf remonstrated on this on the ground that the Holy Prophet had ruled that the belongings of the person killed would belong to the killer. The

commander agreed that this was the ruling but said that the property was very valuable. On their return Auf and Khalid both appeared before the Holy Prophet. Auf informed the Holy Prophet about this. He asked Khalid what had prompted him to take this action. He said that the property was too valuable. The Holy Prophet ordered Khalid to restore the property. Auf then said to Khalid "Had'nt I reproached you for this." The Holy Prophet asked what was the matter. When he was informed about what had happened, the Prophet directed Khalid not to restore the property and said: "You want to reduce my Ameer to such a condition that all the credit for what is good be reserved for you and all the discredit for things which were ugly be for the Ameer. (Ibid, page 68; Musnad-i-Ahmad).

25. Another Hadees is related from Ziyad bin Kaseeb Adwi that Abdullah bin Amir led the prayer and left for his house. He wore fine clothes and his hair were combed Abu Bakra was sitting near the pulpit. He heard Mardas Abu Bilal saying to the People: " Don't you see your Ameer and Chief who wears fine clothes and makes him resemble immoral and impious persons (fasiqeen). Abu Bakra asked his son Aseelaa to call Abu Bilal. When he came there. Abu Bakra told him that he heard his talk about the Ameer. He had heard the Holy Prophet saying that whoever respects the person in authority is honoured by Allah and whoever insults him is dishonoured by Allah. (ibid, page 71; Albaihaqi, Vol:8 page 163 ).

26. In Islamic Jurisprudence the Commander of an Army is considered the delegatee of the powers of the Imam. Mawardi has given the details of ten of the important functions of the Caliph, of which the following

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are discharged by the Commander too. These functions are as follows:-

1. He should defend the country and secure it against enemy attacks so that the subjects may carry on their business or travel in the country without any danger or fear of danger ~~to~~ to their lives and property, and the lives of Muslims and non-muslims there may be protected.
2. He should establish the limits of Allah so that no one should commit an act which is prohibited. He should not allow the rights of the subjects to be destroyed. (Ahkamus Sultania by Mawardi (Urdu) pages 28-29 also see Ehkamus Sultania by Abu Yaalah pages, 39-40)
27. Mawardi and Abu Yaala both agree that the delegation by the Imam may be of plenary Powers ( ولايت عامه ) or certain specific powers ( ولايت خاصه ) (ibid Mawardi page 40, ibid Abu Yaala page 28).
28. If a commander is vested only with the powers, for example of establishment of Army and of strategy of war, he shall be taken to have been vested with Valayat-i-Khassa (specific powers) but if he <sup>is</sup> also given the power to enter into treaty with the enemy, he should be vested with Plenary Powers ( ولايت عامه ) in this respect. Generally the Commander is vested with plenary powers in the field of action assigned to him. (ibid Mawardi, page 71 and ibid Abu Yaalah, page 39).
29. In the discharge of his duty, the Commander:-
  - 1) must guard against surprise attack by the enemy,
  - 2) Select good site for his camp,
  - 3) Ensure supply of the necessary provisions and grains,
  - 4) Be watchful about the strategy of the enemy,

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5. maintain order and discipline in his own ranks,
6. send the detachments for helping his army,
7. encourage his army with hopes of victory,
8. remind them that they will be entitled, if dead, to be compensated in the hereafter with paradise and, if alive, to the booty,
9. seek counsel and advice from knowledgable, wise persons,
10. keep men under his command, subject to the Injunctions of Sharia and bind them to discharge all duties and ~~refrain~~ refrain them from doing what is prohibited, and
11. not to allow them to indulge in any business or Agriculture

30. In respect of his duty at No.10 it is explained that the Holy Prophet (PBUH) directed that the commander should keep away his men from committing mischief, to <sup>st</sup>refrain them from committing breach of trust or zina. Abu Darda said that before Jihad, the Muslims should be virtuous in their action because victory is dependent upon their good actions (ibid Mawardi, pages 83-85 and ibid Abu Yaala, pages 44-45).

31. The details of the duty of the Commanders are found in "The Muslim Conduct of the State" by Dr. Hamidullah in Appendix-A under the heading 'Instructions to the Commander'. Some of these instructions relate as to how a Commander should deal with the enemy in case of fight and in case of surrender, but I will refer to such instructions only which apply to the army personnel, and which were given by the Prophet, Hazrat Abu Bakr, Hazrat Omar and the Abbaside Caliphs.

INSTRUCTION BY THE HOLY PROPHET.

32. The Holy Prophet said to Abdur Rahman bin Auf, at the time of his appointment as Commander 'O son of Auf! take it. Fight ye all in the path of God and

combat those who do not believe in God. Yet never commit breach of trust, nor treachery, nor mutilate anybody nor kill any minor or woman. This is the pact of God and the conduct of His Messenger for your guidance". (Page 647).

INSTRUCTION BY HAZRAT ABU BAKR:

33. Hazrat Abu Bakr said to Usamah, when he was proceeding against Palestine "People ! stop. I enjoin upon you ten commandments. Remember them: Do not embezzle, do not cheat, do not break trust, do not mutilate, do not kill a minor child or an old man of advanced age or a woman, do not hew down a date-palm nor burn it, do not cut down a fruit-tree, do not slaughter a goat or cow or camel except for food. May be you will pass near people who have secluded themselves in convents; leave them and their seclusion. And it may be that you pass near people who will bring to you dishes of different goods. If you eat one after the other, then utter the name of God over them. And you will meet people the dressing of whose hair looks as if the devil has made a nest on the top around which they have something like turbans. So pierce them with swords". Then he stood before the Army and said "I enjoin upon you the fear of God. Do not disobey, do not cheat, do not show cowardice, do not destroy churches, do not bleed animals, do not cut down fruit-trees, do not kill old men or boys or children or women..." (Page 649).

Hazrat Abu Bakr similarly gave the following instruction to Yazid ibn Abi Sufyan while he was proceeding to Syria:-

"O Yazid! you will soon arrive in a country where people will bring to you all kinds of

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food, so utter the name of God at the beginning and at the end. Further, you will come across people who have secluded themselves in convents; leave them and their seclusion. But you will also come across people on whose heads the devil has taken his abode - that is the Shamamishah - so strike their heads off. But do not kill any old man or woman or minor or sick person or monk. Do not devastate any population. Do not cut a tree except for some useful purpose. Do not burn a palm tree nor inundate it. Do not commit treachery, do not mutilate, do not show cowardice, and do not cheat. God shall surely give victory to those who help His cause and also to His Messenger, for God is Strong and Powerful. I commit you to the care of God, and bid you farewell." (Page 651)

INSTRUCTIONS FROM HAZRAT UMAR.

34. "Whenever Umar despatched armies, he enjoined upon their commanders to fear God, and then used to say, at the time of handing over the colours:

"With the name of God and with the help of God! March with the assistance of God and victory. Persevere in right conduct and endurance. Combat, in the path of God <sup>with</sup> those who disbelieve in God, yet do not transgress, because God does not love those who transgress.

"Do not show cowardice in an encounter. Do not mutilate when you have power to do so. Do not commit excess when you triumph. Do not kill an old man or a woman or a minor, but try to avoid them at the time of the encounter of the two armies, and at the time of the heat of victory, and at the time of expected attacks. Do not cheat over booty. Purify Jihad from worldly gain. Rejoice in the bargain of the contract ye have made (with God), and that is the great success." (Page 652).

INSTRUCTIONS BY ABBASIDE CALIPHS.

35. The form of instruction given by Abbaside Caliphs to the commander of land and sea forces inter alia consisted of the following instructions:-

"He has commanded him to have the fear and dread of God in his inner as well as outward affairs, to act in His obedience,

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and to have the best of relations between him and God by means of pure actions and agreeable behaviour. And he has commanded him to take care of his own person in order to have a clean conduct to observe the religious duties, to justify the trust put in him, and to believe that there is no might and no power except by God in each and every of his actions and movements.

"The task with which the Commander of the faithful has charged him has not been done except in the hope that he has the capacity, the sufficiency, the terror and the discipline to inspire awe in the minds of evil-doers and mischief-mongers, even as causing prosperity for the people and the country.

He has commanded him to abstain from things causing anger of God, from things forbidden by him, from transgressing His injunctions and things declared by Him as vice, he has commanded him to prevent his troops and his entourage from attempting to oppress any of the subjects or to do him harm through injury, to persuade them to remain always upright, to march on the path of obedience and of striking the enemies of God in the countries; to prepare for them the best of provisions and necessities.

He has commanded him to behave in the best of manners with regard to his troops and to those who follow him, to be solicitous of them when sending them in detachments, to parade them frequently in order to find out (the condition of) their animals and their weapons; to compel them to keep these (military) things in the best and the finest conditions. For it is in this way that God makes the well-behaving people to be increasingly mindful of it, and the evil-doers to abstain from the mischief

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"He has commanded him not to prosecute anybody on mere accusation or charge unless he be a suspect and a person known for bad conduct, nor to punish him on mere suspicion unless clear proofs are adduced and manifest indications are

produced; and not to hold responsible people of good conduct for the crimes of mischief-mongers and evil-doers.

"He has commanded him to give quarter to those who come to him in peace, and not to use it as a means of treachery with regard to them; and to take care not to have the bad reputation of deceiving and using ruses, for this habit would be countered by evasion even of the rightful duty.

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"He has commanded him not to pass any defined penalty (Hudood) and not to execute the decision of decapitation and talion for death before obtaining the opinion of the Commander of the Faithful; he should await the reply to act upon and to take cognizance of

"He has commanded him to prevent his troops from staying in the houses of any subject and to participate it along with the family of that (subject) except if it is by his permission and willingness, and also from trampling on the cultivated fields and making them treaded by animals or rendering them a path to reach his destination. He should not take straw for fodder from those who possess it except on the payment of the price and the willingness of the owners.

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.....(Page 653 pages 306-308)

36. It will be appreciated that the duties of a Commander viz-a-viz his army personnel and in respect of the enemy are a lot more extensive as compared to the duties of a Commander-in-Chief of a secular State who does not care if his troops after victory are on a rampage. He had not only to look to the material welfare and material well being of the personnel but also to their morals. He had to take steps to <sup>the</sup> implementation of the Sharia limits. He had also to see that his men do not commit any act in respect of enemy which is disapproved or prohibited in the instructions given by the Holy Prophet, his companions and later Caliphs and that every one was dealt

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with justly according to the principles of natural justice. He had to be careful that his troops do not commit breach of trust, treachery nor mutilate anybody or kill an old man, a minor or woman, do not destroy church or disturb churchmen or hermits, do not burn cultivation, destroy palm or fruit trees or even inundate them, do not take even straw for fodder without payment, do not stay in another persons's house without willing permission of the owner. He is not to prosecute except those who are in fact suspected of offence and not to execute Hadd punishment of decapitation, and talion for death without confirmation of the sentence by the Caliph. His duty was, therefore, much more onerous and though implicit obedience to the order of Commander is a must generally, but it is required more emphatically in the case of Commander of a Muslim army.

37. Mawardi and Abu Yaala therefore, specifically deal with the duties of army personnel, which are (1) Safeguarding the rights of Allah and (2) discharging one's duty towards his Commander.

38. In the first category are included:

- a) to fight bravely and courageously, the enemy even equal to double of their number and not to retreat.
- b) to fight in the name of Allah and with the intent that Jihad is not for material uplift or well being but is for the ascendancy of Islam as a Deen (faith)
- c) not to misappropriate from the booty even the most trifling thing and
- d) not to show partiality towards a relative, however near in degree, if he be a polytheist.

39. In the second category is intrinsigially included the complete obedience of the Commander as is enjoined in verse Q.4:59 (obey the person in authority) and it is incumbent upon the members of the forces to obey the Commander in what he directs and in what he prohibits. If he thinks that the Officer or Commander

has not taken into consideration any point of policy or expediency he can only give him advice but the ultimate decision rests with the Commander. Disobedience is an offence for which the Commander can punish him though generally his behaviour shall not be severe (Ehkam us Sultaniya by Mawardi (urdu) pages 85-91, Ehkam us Sultaniya by Abu Yaala pages 45-47).

40. As stated above, the position of a Commander of the Army is that of a delegatee of the Imam or Amir. Generally he holds what is known as 'ولاية عامة' (plenary powers). Consequently one of his functions is that every one in his command should act according to the laws of the Holy Quran and the Sunnah. He is bound to discharge the functions of the Imam not only in respect of guarding the country against enemy attacks but also that no one should commit an act which is prohibited by Allah nor should the rights of any human being be trampled by him. He is bound in-Shariah to implement inter-alia the laws of Hudood

41. Hadd punishment are necessary to be provided in these three Laws relating to forces since they are specifically promulgated and fixed by the Quran and the Sunnah of the Holy Prophet. Offences under the Hudood Ordinance may be tried by Courts Martial.

42. There is a Hadith in which the Holy Prophet said: "Hands should not be cut during war" which means that the Hadd sentence can be suspended during actual war. On this basis Imam Abu Hanifa was of the view that when offences are committed by the members of the Forces during war, sentences should not be executed till after return of the Armies to the Muslim country. (Attashri -ul-Jinai Islami by Abdul Qadir Auda, Vol 1 page 282).

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43. In Abu Daud and Nisai, the Hadith is so worded that hands will not be cut during journey. Only in Tirmizi the words "غـزـو" is used. (Fathul Qadeer, Vol:V page 46). This is, however, for the State to take advantage of this opinion of Imam Abu Hanifa or enforce a different law in this respect.

44. The next question is whether the <sup>State</sup> is also bound to enforce the laws of Tazir as provided in our Hudood Laws of 1979.

45. The laws of Hudood of 1979 provide for sentence of Tazir to a person who has committed any offence described therein as an offence of Hadd, in case the evidence required for passing Hadd sentence is not forthcoming but the criminality of the accused is established beyond any shadow of doubt from other evidence, ocular or circumstantial.

46. The alternative sentence of Tazir <sup>is</sup> provided in these laws on account of the juristic opinions given in their favour on account of the difficulty faced by the Qazis, in obtaining and collecting evidence necessary for passing the Hadd sentence. The principle behind the enforcement of alternative Tazir sentence is that the person committing the offence should not go scot-free and the rights of the Ummah are not left unprotected.

47. The provisions of Taazir in the four Hudood Laws have to be made part of the Laws relating to forces on the basis of equality before law and equal treatment of law. This principle will be dealt with in connection with the law ~~and~~ appeal in Islam.

48. It may be stated that the three Laws do contain certain provisions about Taazir for the same or similar offences. S.27 of the Army Act provides

upto 14 years Rigorous Imprisonment for theft. Section 40 of the same Act lays down the punishment of theft of Government property or property of either of the three forces upto five years only. But Section 52 of the Air Force Act and Section 63 of the Pakistan Navy Ordinance provide for the latter category of theft cases, only long imprisonment.

49. Section 43 of the Army Act provides for the punishment of intoxication and lays down more severe punishment for those who commit offences while on active service.

50. It discriminates between officers and other ranks. The officer is punishable by dismissal or by such punishment as is mentioned in the Act while members of other ranks with rigorous imprisonment upto six months or with less punishment as mentioned in the Act

51. The Air Force Act provides for officers the punishment of dismissal; for the others short imprisonment and when offence is committed in active service, but not on duty, the sentence of six months.

52. The Navy Ordinance in its Section 58 defines intoxication and the criterion for its being an offence is only one's unfitness for the duty or to perform duty or disorderly or unruly behaviour or a behaviour likely to bring discredit in the service. It does not deal with complete prohibition.

53. As regards punishment, Section 59 thereof provides on active service or under orders of active service or on duty, for short imprisonment and in any other case, in case of officers, for dismissal and in cases of other sailors, for detention.

54. Section 59 of the Army Act, Section 71 of the Air Force Act and Section 78 of the Navy Act provide for

civil offences and lay down that a person governed by any such law committing such an offence under the respective law in or beyond Pakistan shall be guilty of that offence under the law. This provides for reduced sentences for other offences. Offence punishable with death, shall be liable to punishment as provided in the respective law. Similarly in other matters also lesser punishments are provided for.

55. However if the offence of murder, or culpable homicide not amounting to murder or rape is committed against such a person who is not subject to these three laws relating to forces, he shall not be deemed to be guilty of any offence under these laws unless the offence is committed while on active service, or at a place outside Pakistan or a place notified by the Government.

56. The tazir sentences in the four Hudood Laws are quite severe while those in relation to the service in some cases lean towards triviality. There is no reason why this discrimination be maintained. It is necessary that the taazir sentences in the four Hudood Laws be made equally applicable to the members of the services though the tazir sentence to an offender while on active service may be made more severe. The sentence of dismissal as provided may, if the legislature thinks fit, be added as a part of departmental action.

57. The Military Law differs from the general law of the land in respect of the provisions of appeals. While Section 132, Army Act, Section 162, Air Force Act and Section 140 Navy Ordinance provide for a complete bar of appeal, the criminal law of the country provides at least one appeal except in petty

cases (Section 413 and 414 Cr.P.C.). The orders in which no appeal is provided are also revisable by higher Courts. Where the appeal is to a Court subordinate to the High court, the latter can interfere with the appellate Order in exercise of its Revisional Jurisdiction. In addition, petition for special leave to appeal is competent before the Supreme Court against the order of the High Court and if special leave is granted by the Supreme Court; the Petition for special leave is converted into an appeal. The Constitution thus provides for another appeal also though it is subject to the permission of the Supreme Court. 5f.

It was urged by the learned Judge Advocate General of the ARMY that in Islam there is no provision of appeal. This argument is fallacious. From the several traditions reproduced above, it may be clear that after the fight was over, in some cases, the decision of the Commander was challenged before the Holy Prophet and he set aside the order of the Commander. There is another tradition which was related by Salem on the authority of his father. The Holy Prophet sent Khalid b. al-Walid to Banu Jazima. He invited them to Islam but instead of saying "We embraced Islam", they started joking by saying sabana, sabana (We got out from one religion to another religion). So Khalid started killing them and making them prisoners. He handed over to every person his prisoner and ordered that every one of us should kill his prisoner that very day. I (relater) said, "I will never kill my prisoner nor any of my companion, will kill his prisoner." Then we came to the Holy Prophet and informed him of the situation. The

Contd. ....24.

Prophet raised his hands and said, "Oh Allah! I am not responsible for what Khalid did in this matter He said so twice." (Fathul Bari Vol·VIII pages 56.57)

59. There is yet another tradition that two persons came to the Holy Prophet, One of them charged the other that the latter's cow had killed his donkey The Holy Prophet ordered Hazrat Abu Bakr to decide this case. Hazrat Abu Bakr decided that animals do not incur any liability for their acts, The Holy Prophet then ordered Hazrat Umar to decide the matter but he decided according to the same principle as enunciated by Hazrat Abu Bakr. Then the Prophet ordered Hazrat Ali to decide. Hazrat Ali asked the complainant whether both the animals were tethered. He replied in the negative. He then asked whether the cow was tied and the donkey free He again answered in the negative. He then enquired whether the donkey was tied and the cow was free. This was admitted to be the case by both the parties. Hazrat Ali decided that the owner of the cow was liable (for damages). (Adab-ul-Qazi by Mawardi, Vol·VI page 388 printed at Baghdad, 1972)

60. The Hadith amply justifies appellate jurisdiction since the Holy Prophet acted as an appellate court by setting aside the judgments of Hazrat Abu Bakr and Hazrat Umar and approved of the judgement of Hazrat Ali. It also justifies the remanding of the case for retrial by the appellate Court since the Holy Prophet had remanded the matter twice when it was decided first by Hazrat Abu Bakr and the Hazrat Umar.

61. The Islamic judicial history is very rich rather full of cases in which appeals were filed against the orders of the Qazis before the Amir,

Sultan or Caliph by whatever name the Head of the State be called.

62. The right of appeal also emerges from Q.4:59 in which it is laid down that in case of dispute with the "الامير" (the person in authority) the matter is to be referred to Allah and His Prophet. This reference is nothing but an appeal to the law of the Quran and Sunnah.

63. The above argument of the learned Judge Advocate General of the Army was addressed because no statutory appellate Court was formed during those days but that itself is no reason to hold against the appellate jurisdiction. The formality may not be there but as stated above, if the Holy Prophet acted as an appellate Court in matters of dispute inter-alia against the order of the Commander, no objection can be taken to the establishment of appellate Courts.

64. The establishment of appellate Courts in the Army is also necessary on the principle of equality. This principle is deducible in no uncertain terms from the Holy Quran and the Sunnah. In fact Islam has given the principle of "سواء" to a world in which the class and group conflicts reigned supreme.

65. The test of equality lies in each Muslim individual being nominated in the Quran as Khalifat Ullah. (Q 6-165; Q 7-69, Q.7-74). It is interesting to note that the first caliph, Hazrat Abu Bakr declined to accept the title of Khalifat Ullah presumably because each individual Muslim is the holder of that title. He adopted the title of Khalifat, Rasul Allah. Allah says 'O mankind, we have created you from a male and <sup>a</sup>female "which means that all human beings are brothers inter-se irrespective of

any distinction of colour, race or nationality. They are the progeny of the same parents. The outward differences of colour, race, tribes, and nationality are no more than references for mutual introduction and recognition. The sole criterion for superiority of one over the others is piety, nobility and the quality of being God-fearing.

Q.49:13 "O mankind! Lo! We have created you from a male and a female, and have made you nations and tribes that you may know one another. Lo! the noblest of you, in the sight of Allah, is the best in conduct. Lo! Allah is knower, Aware."

This brotherhood between man and man is implied in the following verse:-

Q.4:1 "O' mankind! be careful of your duty to your Lord who created you from a single soul and from it created its mate and from them twain hath spread abroad a multitude of men and women....."

In Q.49:10 it is specifically stated that "The believers are naught else than brothers. Therefore make peace between your brethren and observe your duty to Allah that haply ye may obtain mercy."

66. There are several traditions of the Holy Prophet in support of this proposition.

67. The Prophet said that الناس سوا سية كاسنان المشط  
(People are like the teeth of a comb) (Address at the last Haj or Hajjatulwidaa).

68. This simile is very apt since if the teeth of the comb be of different size or be unequal the hair cannot be combed but the head shall be injured. The simile thus exemplifies the effect of inequality too. In the same address the Prophet said;

لا فضل لعربي على اعجمي ولا لاجمعي على اسود الا بالتقوى

"No Arab has any superiority or excellence over a non-Arab and no red-coloured man has any superiority or excellence over any black coloured man, save in respect of piety and fear of Allah."

In Sahih Muslim this Hadees is reported in the following words :-

لا فضل لعربي على اعجمي ولا لاعجمي على عربي ولا  
لا بين على اسود ولا لا سود على ابيض الا بالتقوى

"No Arab has any superiority over a non-Arab, nor any non-Arab over an Arab nor any white man over a black man, nor a black man over a white man, save in respect of piety and fear of Allah."

This fraternity and equality is not only a matter of form but is indeed a matter of substance. It goes to the extent of equality before law and equal protection of law. In respect of equality before law Sharia does not make any distinction between a citizen and a head of the State. The head of the State cannot claim any immunity from prosecution or from appearance in Court during the tenure of his office. There is no discrimination in the administration of justice between man and man. Politically every Muslim being the member of the same Ummah he cannot be denied any right, nor any juridical right can be reserved for any particular group on consideration of wealth, purity of blood, caste or colour.

69. The best example of equality before law and equal treatment and protection of law is furnished by the reaction of the Prophet to a recommendation made by a companion in favour of a woman thief against the imposition of the severe sentence of Hadd. The Prophet

Said:-  
والله لو ان فاطمة بنت محمد سرقت لقطعت يدها

"By Allah if Fatima daughter of Muhammad (PBUH) had committed theft, I would have certainly cut off her hand. (agreed)

Contd. ....28.

70. The verse Q.5.32 equates killing of <sup>a</sup>man with the killing of all mankind and saving of <sup>a</sup>man with the saving of all mankind. The laws of Hudood and Taazir are equally applicable to all and the Holy Prophet condemned in the above Hadees about recommendation in the theft case, the ways of the earlier people who had different criteria of punishment for those who were wealthy and influential among them and those who were not and were poor. The relevant words of the Hadees are

" ثم قام فاحتطب فقال انا هلك الذين من قبلكم انهم كانوا اذا سرق فيهم الشريف تركوه واذا سرق فيهم الضعيف اتقا مواعديهم الحد "

(Jamul Fawaid by Muhammad bin Suleman Maghrabi vol:1, page 499)

"The Holy Prophet then stood and addressed the congregation and said 'No doubt the earlier people were destroyed as they left unpunished those among them who committed theft but were influential, and imposed Hadd on those among them for commitment of theft who were weak."

71. Equality before law and equal protection of law is the main principle inherent in the Islamic law and polity. It is one of the fundamental principles of Islam which cannot be ignored.

72. There is provision of appeal in the Criminal Procedure Code as well as in the Hudood Laws. The Supreme Court in addition has the power to grant special leave to appeal. The Constitution further provides for appeals to the Supreme Court against the decision of the High Courts in the exercise of its original jurisdiction. A whole hierarchy of Courts is there to review a judgment passed in exercise of criminal jurisdiction whether by way of appeal or

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revision or again special leave to appeal, if a civilian is punished for a criminal offence.

73. But the Army Act, 1952, the Air Force Act, 1953 and the Pakistan Navy Ordinance, 1961 do not provide for an appeal. There is thus discrimination between a civilian convict and convict sentenced under either of these three laws, for which there is not the slightest justification.

74. May be that the Branch of the Judge Advocate General acts impartially and justly so that a person may not wrongfully suffer for what he has not done but that by itself cannot be a substitute for appeal which is by right and in which the appellant has the right to be heard before the appeal is decided.

75. I enquired from the three Judge Advocate Generals whether the provision of appeal in these laws is likely to disturb the strict discipline that must be maintained in the Forces, but they could not justify this on any ground. There can be no ground for such an apprehension. In the three laws there are provisions for revision of the finding and sentence and, as stated by the Judge Advocate General of the Army, there are numerous cases in which the order, finding or sentence are set aside after the examination by the office of the Judge Advocate General and on their recommendation. If the discipline of the Army does not suffer from the quashment of finding and sentence by the revisional authority, I do not see why it should suffer if Courts of appeal are established and right of appeal is given. Such right has been granted and appeal has been provided after the 2nd World War in the United Kingdom. (See The Courts Martial (Appeals) Act, 1951,

14 and 15 GEO. VI Ch; 46. The recent Act dealing with appeals is Courts Martial (Appeals) Act, 1968. The later Act repealed Sections 1-29 of the Act of 1951. But it continues the existence of Courts Martial Appeals Courts established by the Act of 1951 for the purpose of hearing appeals from Naval-cum-Army and Airforce courts as a Supreme Court of Record. Section 2 provides for appointment of civilian Judges of the Appeal Court. The Act of 1968, therefore gives a right of appeal against the convictions of Courts Martial of either of the three Forces and confers the appellate power on civilian Judges.

In the United States also Courts of Military Review and Courts of Military Appeals have been set up. The following extracts from American Jurisprudence vol:54, Section 263 entitled 'Military and Civil Defence' (at page 96) is reproduced in support of this proposition"

" 263. Court of Military Appeals. When after the Second World War, Congress became convinced of the need to assure direct civilian review over military justice, it deliberately chose to confide this power to a specialized Court of Military Appeals, so that disinterested civilian judges could gain a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces. Thus with the enactment of the Uniform Code of Military Justice in 1950, Congress established a Court of Military Appeals, which is located, for administrative purposes, in the Department of Defence. The Court consists of three judges appointed from civil life by the President, by and with the advice and consent of the Senate, for a term of 15 years. Not more than two of the judges may be appointed from the same political

Contd..... 31.

party and each judge must be a member of the bar of a Federal court or the highest court of a state. Each judge is entitled to the same salary and travel allowances as provided for judges of the United States Court of Appeals and is eligible for reappointment. The judges may be removed by the President for neglect of duty or malfeasance in office, or for mental or physical disability, and for no other cause. The proceedings of the United States Court of Military Appeals are published in the United States Court of Military Appeals Reports.

The Court of Military Appeals reviews the record in all cases in which the sentence affects a general or flag officer or extends to death, all cases reviewed by a court of military review which the Judge Advocate General orders<sup>are</sup> sent to the Court of Military Appeals for review, and all cases reviewed by a Court of military review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted a review. An appeal by the accused must be taken within 30 days from the time he is notified of the decision of a Court of military review, and the Court of Military Appeals must act upon a petition for appeal within 30 days of the receipt thereof. The Court of Military Appeals can take action only with respect to matters of law."

76. If there had been any possibility of the introduction of indiscipline in the Army by the setting up of appellate Courts, the laws establishing such appellate courts against Court Martials would not have been enforced in the United Kingdom and the United States of America. In fact these two countries went to the extent of appointing civilian judges for hearing appeals against the orders of Courts Martial. In view of this it is necessary that these three

laws governing Army, Airforce and Navy should be so amended as to provide for appeals against the orders of the Court Martials.

77. There are provisions in these laws concerning treatment and disposal of property of deceased persons, deserters and Lunatics (Chapter XIII, Army Act, Chapter XV Air Force Act and Chapter XV of the Navy Ordinance).

78. The Commanding Officer shall secure the moveable property of inter alia a deceased person as well as collect all his pay and allowances. Where the Bank balance of the deceased does not exceed the amount described in S.153, Army Act Section 189, Air Force Act and Section 164 of the Navy Ordinance, the Commanding Officer may, if thinks fit, require the Bank to pay the deposit to him.

79. He shall deliver this property and money to the widow or next of kin of the deceased who is present on the spot on furnishing security for the payment of any dues or debts in the camp or quarter payable by the deceased. Alternatively he shall cause the movable property to be sold by public auction and shall pay from its proceeds, the pay and allowance and Bank deposits collected by him, the above debts and funeral expenses of the deceased. The surplus shall be paid in the case of a deceased person to his representative, widow or next of kin, if any, or in the event of no claim, such surplus shall after expiry of twelve months from the death, shall be remitted to the Prescribed Person (person to be nominated by virtue of office by the rules) (Section 153, Army Act, Section 189, Air Force Act and

Section 164 of the Navy Ordinance). If the total value of property deliverable and money payable to the next of kin does not exceed one thousand rupees and if the prescribed person thinks fit, it shall be delivered or paid to any of the representative, widow or next of kin who appears to be entitled to receive it or to administer the estate of the deceased, without requiring the production of any probate, letters of administration, succession certificate or other such conclusive evidence of title (Section 154, Army Act, Section 190; Air Force Act and Section 165, Navy Ordinance).

80. The provisions about disposal of property are also in accordance with Sharia except in respect of property or money which the Prescribed Officer may deliver or pay to the relative, widow or next of kin of the deceased without probate, letters of administration, succession certificate or other such conclusive evidence of title. The funeral expenses and debts are the first charge on the property of the deceased. Any provision for discharge of such liability is eminently just and in accordance with Shariah. Similarly there is no harm in delivering property or paying money of the deceased to a person to whom inter-alia the succession certificate is issued by a Court since the Court usually takes from him a bond undertaking to distribute the property of the deceased among his legal heirs. The provision about the property or money which the prescribed person is authorised to pay without requiring inter-alia the succession certificate probate etc. suffers from the deficiency that it does not protect the rights and interest of the other legal heirs.

It should, therefore, be provided in Section 154 of Army Act, Section 190 Air Force Act and Section 165 <sup>Navy</sup> Act that the prescribed officer shall pay the money after obtaining a bond from the payee containing an undertaking by him to pay the share thereof to each legal heir.

81 . This Court has already directed some amendments to be made in the sections of the Chapter relating to hurts in the Pakistan Penal Code. Mohammad Riaz, etc. Vs. Federal Government etc, P.L.D. 1980 FSC 1. On the principle on which Hadd punishments must be introduced in the laws relating to the forces, it is necessary to introduce the laws of Qisas and Diyat as directed on the above judgment, to these three laws. This would however be subject to the result of appeal against the said judgment which is pending before Shariat Appellate Bench of the Supreme Court.

82 . There is a chapter in each law for pardons, remissions and suspension of sentence. It will be clarified that these provisions will not apply to cases in which Hadd sentence is awarded. They shall not also apply to the sentence of Qisas & Diyat if as a result of the Supreme Court judgment in matters of Diyat and Qisas that law is enforced.

S.M.NO.84/1982.

PAKISTAN ARMED FORCES NURSING SERVICES ACT, 1952.  
( ACT NO.XXXVI OF 1952 ).

83 . By 5.9 of the Act the provisions of the Pakistan Army Act 1952, Pakistan Air Force Act 1953 and Pakistan Navy Ordinance 1961 have been applied to such extent and subject to such adaptations and modifications as may be prescribed to the officers of the Armed Forces Nursing Service who may be serving with the respective force to which any of the above Law is applicable. Since no part of this Act as such is repugnant to the Quran

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and Sunnah ~~xx~~ and the repugnance in the above mentioned three laws with the Quran and Sunnah has already been pointed out and directed to be corrected, no change or amendment in the Pakistan Armed Forces Nursing Act is required.

O R D E R

84 . We direct that the following amendments be made in each of these three laws:-

- (i) Hudood Laws ~~may~~ be made applicable to the members belonging to these three Forces though the legislature may vest Army Officers with the powers of Sessions Judge or Magistrate or provision may be made for trial of these offences, whether Hudood or Ta'zir, by the Summary Military Court, Special Military Court or Court Martial as may be considered advisable, keeping in view the nature of the sentence of any particular offence.
- (ii) Appellate Courts ~~may~~ be set up to hear appeals against the convictions under the Hudood laws as well as against their convictions under these <sup>these</sup> laws though petty punishments may be made subject of revision only.
- (iii) Section 154 Army Act, Section 190 Air Force Act and Section 165 Navy Ordinance ~~may~~ be so amended as to make it incumbent to take a bond from the next of kin undertaking to distribute the money taken by him from the assets of the deceased among all the Muslim heirs.
- (iv) In the Chapter relating to pardons, remission and suspension of sentence in each law it shall be clarified that the provisions of that Chapter shall not apply to cases in which Hadd sentence is awarded. They shall not also apply to the sentence of Qisas and Diyat if as a result of the Supreme Court judgment in matters of Diyat and Qisas , that law is enforced.

(v) If as a result of the appeal pending before the Shariat Appellate Bench of the Supreme Court against the judgment of this Court in Muhammad Riaz Vs. The Federal Government etc., P.L.D. 1980 FSC 1, the law of Qisas and Diyat is made a part of the law of the land these three laws shall be so amended<sup>as</sup> to give effect to that law.

85. The amendments directed in paras (i), (ii), (iii) and (iv) shall be made by the 29th February, 1984 while the amendment directed in para (v) shall be made within four months of the judgment of the Shariat Appellate Bench of the Supreme Court.

*NOXA-RCM*

JUDGE - I

*Handwritten signature*

JUDGE - IV

*Handwritten signature of Chief Justice*

CHIEF JUSTICE

*Handwritten signature of Judge III*  
JUDGE - III

Islamabad dated the 13.10.83  
/\*A.Salam\*/

Fit for reporting.