

P L D 2010 Federal Shariat Court 191

*Before Haziquil Khairi, C.J., Allama Dr. Fida
Muhammad Khan, Salahuddin Mirza
and Syed Afzal Haider, JJ*

Dr. MUHAMMAD ASLAM KHAKI---Petitioner

versus

FEDERATION OF PAKISTAN through
Ministry of Justice and Parliamentary
Affairs, Islamabad---Respondent

Shariat Petition No.2/I of 2006, decided on 28th May, 2009.

Per Allama Dr. Fida Muhammad Khan, J, Haziquil Khairi, C.J.
agreeing**(a) Islamic Jurisprudence---**

---Prohibition of intoxicant drinks---Four specific Injunctions, regarding intoxicating drinks, which were gradually revealed detailed---Clear and decisive verdict is given on intoxicating drinks and gambling which have been equated with greatest sin like that of associating partners with God---Degree of prohibition of intoxicant drinks mentioned in Qur'anic Verses and Ahadith recorded. [pp.196, 198, 200; 202] A, et seq, D, et seq, E, et seq, F & G, et seq

(b) Islamic Jurisprudence---

---"Sin"---Meaning---Sin does not mean only "harm"---Muslims have been ordained to avoid sin in any form, whether open or secret. [p. 198] B & C

(c) Islamic Jurisprudence---

---Prohibition of intoxicant drinks---Punishment---Hadd or Tazir---Whipping---Scope---"Khamr"---Literal meanings---"Khamr" which was morally used for wine, literally means what obscures the intellect and thus it includes other intoxicant drinks made from wheat, barely, raisins and honey---Prohibition of wine was extended to all intoxicants in any form---Taking any intoxicant is a major sin in Islam and is, therefore, strictly prohibited---Islamic State was duty bound to enforce its prohibition and considering it a heinous offence inflict punishment by way of whipping or, in the alternative, imprisonment as provided by law---Whatever causes intoxication when used in large quantity was prohibited, even in a small quantity---If a large quantity of something caused intoxication, to drink even a palmful of it was prohibited---Court while convicting an accused is to take into consideration the overall condition of society at large, the quantity of intoxicant liquor

(i.e. taking a sip or swallowing barrels), commission of other offences in drunk condition, like causing harassment in public, attempting to inflict damage to the persons/honour of other citizens, making nuisance, uttering abuses, using filthy language, being persistently habitual with previous history, causing collateral damage to the property or inflicting injury to some person, trespassing other's house, outraging modesty, committing rape and depending on the nature of proof required for Hadd/Tazir etc. award the punishment accordingly--- Court could not remain oblivious to the overall attending circumstances and is therefore, duty bound to consider all conditions and, if any offence was established beyond any doubt, award Hadd or Tazir punishment accordingly. [pp. 205, 206, 207] H, I & L

Bukari, 'Wudu', 71 'Maghazi', 60, 'Ashribah', 4, 10, 'Adab', 8, 'Ahkam', 22, Muslim, Ashribah, 67-9; Abu Da'ud 'Ashribah', 5, 71; Ibn Majah; 'Ashribah', 9, 13, 14; Darimi, 'Ashribah', 8, 9; Muwatta', 'Dahayat', 8; Ahmad b. Hanbal, Musnad, Vol. 1, pp.274, 289, 350, Vol. 2, pp.16, 158, 171, 185, 329, 501; Vol. 3, pp.66, 112, 119, 361, Vol. 4, pp.4, pp.41, 416; Vol. 6, pp.36, 71, 72, 97, 131 and 226—Ed); Abu Da'ud, 'Ashribah', 5; Ibn Majah, Ashribah, 10; Ahmed B. Hanbal, Musnad, Vol.2, pp.167, 179 and Vol. 3, p.343—Ed); Bukhari, Tirmidhi, Abdu Daud, Ibn Maja; Umdatul Qari, Tafheemul Qur'an, Al Thashriul Jinaee Vol. I) and Vol. I, p.437 of Encyclopedia Britannica ref.

(d) Islamic Jurisprudence---

---Crime and punishment---Sentence of whipping---Mode of execution--- Sentence of lashes in Shariah is not severe, its purpose is just to awaken in the convict a realization of his wrong so that he may repent his misdeeds---Shariah also makes sure that neither humiliation takes place nor it remains a permanent scar on him because the execution of sentence followed by repentance washes out the stigma and guarantees the purification of the convict and it is in this light that the sentence, which is obligatory in Islam in some cases, has to be seen. [pp. 206, 207] J, et seq & K, et seq

(e) Prohibition (Enforcement of Hadd) Order (4 of 1979)---

---Art. 8---Prohibition of intoxicant drinks---Punishment---Award of whipping eighty stripes as punishment to the one found guilty of "drinking" liable to "Hadd" when the requisite proof thereof was available before the court is not in conflict with Qur'an and Hadith. [p. 209] M, et seq

(f) Prohibition (Enforcement of Hadd) Order (4 of 1979)---

---Arts. 8 & 25---Constitution of Pakistan (1973), Art. 203-D---

Articles 8 and 25 of Prohibition (Enforcement of Hadd) Order, 1979 being not in conflict with any Verse of Qur'an and Sunnah was not repugnant to Injunctions of Islam. [p. 209] N

Per Haziqul Khairi, C.J., Salahuddin Mirza, J agreeing

(g) Prohibition (Enforcement of Hadd) Order (4 of 1979)---

----Art. 8, proviso---Constitution of Pakistan (1973), Art.13(a)---
Proviso to Art.8, Prohibition (Enforcement of Hadd) Order, 1979
suffers from many ambiguities and defects: Firstly, it is presumed that
in every case the convict shall prefer an appeal or apply for bail; in
case he does not, he shall remain in prison till the time of filing of
appeal expires; secondly, imprisonment shall operate as double
punishment not provided for either in Qur'an or Sunnah and is in
violation of Art.13(a) of the Constitution. [p. 210] O, et seq

(h) Execution of Punishment of Whipping Ordinance (IX of 1979)---

----S. 4---"Whip"---Meaning. [p. 211] P

12:25; 12:32; Black's Law Dictionary (8th Edn.) and BBC
English Dictionary (First Edn. 1992) ref.

(i) Execution of the Punishment of Whipping Ordinance (IX of 1979)---

----S. 5---Whipping---Conditions and mode of execution of punishment
of whipping detailed. [p. 211] Q

(j) Execution of the Punishment of Whipping Ordinance (IX of 1979)---

----S. 4---Constitution of Pakistan (1973), Art.203-D---Held, provision
of S.4, Whipping Ordinance, 1979 is repugnant to Qur'an and Sunnah
and accordingly the President of Pakistan was directed by Federal
Shariat Court to take necessary steps for substitution of S.4, Whipping
Ordinance, 1979 as "S.4: The whip shall be a stick of palm tree
stripped of leaves with two branches"---Federal Shariat Court observed
that in case S.4 of the Whipping Ordinance, 1979 was not substituted
as directed, within six months hereof, the former shall deem to have
been substituted and shall also become effective within six months.
[p. 212] R

(k) Prohibition (Enforcement of Hadd) Order (4 of 1979)---

----Art. 8---Constitution of Pakistan (1973), Art.203-D---Held, proviso
to Art.8, Prohibition (Enforcement of Hadd) Order, 1979 is repugnant

to Qur'an and Sunnah and accordingly the President of Pakistan was directed to take necessary steps for deletion of the proviso to Art.8 of the Order---Federal Shariat Court observed that in case proviso to Art.8 of the Prohibition (Enforcement of Hadd) Order, 1979 was not deleted as directed, within six months hereof, the proviso shall deem to have been repealed and shall also become effective within six months---Federal Government was further directed by Federal Shariat Court to introduce a provision of law, whereby a person accused of taking intoxicating liquor under Hadd, shall be entitled to get bail before the Trial Court and the Appellate Court and in case Federal Government failed to do so, said directions shall deem to take effect on the expiry of six months hereof. [p. 212] R

Per Syed Afzal Haider, J. agreeing with Dr. Fida Muhammad Khan, J
"that Shariat Petition No.2/I of 2006 be dismissed" and adding his own
reasonings. [p. 213] S

Petitioner in person.

Sardar Abdul Majeed, Standing Counsel and Tariq Ali for the Federal Government.

Allama Shah Tafazul Ali, Maulana Sarfraz Mehmood, Maulana Ibrahim Musa, Muhammad Abdul Manan, Ibrahim Ishaque and Dr.Muhammad Yousaf Farooqui: Juris-consults.

Dates of hearing: 29th January, 7th May, 27th August, 22nd October, 12th November, 2008, 14th and 15th January, 2009.

JUDGMENT

ALLAMA DR. FIDA MUHAMMAD KHAN, J.---Through this Shariat Petition the petitioner, Dr. Muhammad Aslam Khaki, has challenged Articles 8 and 25 of the Prohibition (Enforcement of Hadd) Order, 1979, (hereinafter referred as "the Order"), on the ground that these are violative of the injunctions and spirit of Islam. The impugned Articles read as under:---

"Article--8.

Drinking liable to Hadd.---Whoever being an adult Muslim takes intoxicating liquor by mouth is guilty of drinking liable to Hadd and shall be punished with whipping numbering eighty stripes."

Article--25.

Punishment for attempt to commit offence punishable under this Order.---Whoever attempts to commit an offence punishable under this Order to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall be punished, in the case of an offence punishable

under Article 8, with rigorous imprisonment for a term which may extend to two years, and in other cases, with imprisonment for a term which may extend to one-half of the term provided for that offence, or with such whipping or fine as it provided for the offence or with any two of, or, all the punishments."

2. The petition was fixed for hearing on a number of dates. The petitioner was heard in person. He also filed his detailed comments. Since the question raised in this petition was highly important, therefore, some renowned scholars of the country namely Mufti Rafi Usmani, Allama Talib Jauhari, Allama Javed Ghamidi and Dr. Yousaf Farooqi were appointed, as juris-consults, and requested to assist the Court in this matter. Allama Talib Jauhari being out country could not respond. Allama Javed Ghamidi also did not appear. However, Mufti Rafi Usmani while regretting his personal attendance on account of various commitments deputed Maulana Shah Taffazzul Ali, along with a number of other scholars of Darul Uloom Karachi, and also endorsed the written comments filed by them. Dr. Yousaf Farooqi appeared in person and made detailed submissions. He also filed written comments. Sardar Abdul Majeed, Standing Counsel for the Federal Government also made submissions and filed written comments.

3. While supporting his petition, the petitioner contended that Islam has declared some specific offences as "Hadd" which are heinous but the offence of drinking is not a heinous crime as the Holy Qur'an has attributed "benefit" along with some "harm" to the act of drinking. Therefore, he contended that the offence of drinking was not absolute "Haram" (prohibited). He relied on Verse No.229 of Surah Al-Baqara. The second ground taken by the petitioner in support of his contention was that the definition of "Hadd" given in the Order reveals that it is "the punishment prescribed by Holy Qur'an and Sunnah" but neither Qur'an nor Sunnah has prescribed any punishment for it. He added that even in the time of Holy Prophet (ﷺ) there was flexibility in the punishment for drinking. He further submitted that the Sunnah reveals that the Holy Prophet (ﷺ) never punished any person accused of drinking for more than forty stripes or lashes. The main thrust of his arguments was based on the definitions of "Hadd" as provided in the impugned Order as well as in other Hudood Ordinances, promulgated in 1979, which declare only those punishments as "Hadd", which are fixed/prescribed by Holy Qur'an and Sunnah. He also submitted that drinking is not one of the major sins or heinous crimes, but is only a minor sin or crime simpliciter. He further added that Article 25 of the impugned Order, is also violative of the Injunctions of Islam for the same reasons.

4. Sardar Abdul Majeed, Standing Counsel for the Federation

strongly opposed the contentions of petitioner and submitted that injunctions regarding drinking wine have been mentioned in different places in the Holy Qur'an and it is considered a major sin for which specific prohibition is available in the Holy Qur'an and Sunnah. He placed reliance on Verse No. 219 of Surah Al-Baqara, Verse No.73 of Surah Al-Nisa, Verses Nos. 90 and 91 of Surah Al-Ma'idah, Verse No.178 of Surah Al-Imran, Verse No.2 of Surah Al-Ma'idah, Verses Nos. 62 and 63 of Surah al-Ma'idah and Verse No.12 of Surah Al-Anaam. The learned counsel submitted that the Shariat Petition may be dismissed.

5. Dr. Muhammad Yousaf Farooqi also vehemently opposed the instant Shariat Petition and contended that it should be dismissed forthwith. He quoted extensively from various books of Ahadith and submitted that the punishment provided by the Holy Prophet (ﷺ) was 40 stripes with a stick having two branches and thus the 80 stripes punishment is established by authentic Hadith. He submitted a detailed research note to this effect. The term headed by Shah Muhammad Taffazzul Ali also made similar submissions and placed reliance on several "Fatawa", with complete references on the subject. He also submitted that the petition may be dismissed.

6. We have given our anxious considerations to the points raised by the petitioner, and Jurist-Consults as well as by learned counsel representing the Federation.

7. It would be appropriate to give necessary details of the four specific Injunctions, regarding intoxicating drinks, which were gradually revealed since the advent of Islam, in the following order:--

(a) verse No.67 of Surah 16- النحل (The Bee) revealed in Makkah:

"And from the fruit of date palms and vines you derive intoxicants as well as wholesome food "(16:67)".

This was the first indication to the Muslims whereby making them conscious of the actual position, intoxicants were placed in opposition to the wholesome sustenance. This first step was, however, no more than firing a shot in the right direction:--

(b) Verse No.219 of Surah 2: البقرة (The Cow), revealed in Madina which reads as follows:

"They ask you about intoxicants and games of chance. Say: In both there is great sin although they have some benefits for people; but their sin far exceeds their benefit." (2:219).

The suggestion herein is very clear; since the sin of this

particular act is far greater than its benefit, it is better to abandon it altogether. Actually there is hardly anything which is totally devoid of benefit, but its permissibility or prohibition depends on how far its evil outweighs its benefit.

This was the second step taken addressing the Muslim Community to awaken and motivate their moral and religious consciousness through legislative logic.--

(c) The third step broke the habit of drinking and put it incompatible with attending to obligatory prayers. Here we have the Verse No.43 of Surah 4: (Women): revealed in Madina. It reads as under:---

"Believers, do not attempt to pray when you are drunk, (but wait) until you know what you are saying." (4:43).

Since Muslims have to offer five obligatory prayers every day, with a close time-range between them, this instruction practically restricted the times available for drinking as the time in-between prayers was too much insufficient to get drunk in and then regain sobriety to be able to offer the mandatory prayers. This, in fact, put an end to the habits of mid-morning and mid-afternoon drinkings, which were daily routine of people of pre-Islamic Arabia. In this way, it became practically impossible for a Muslim to attend to his prayers on time, and also to keep on drinking at his usual times.

(d) The fourth and final stage was the categorical prohibition which was promulgated after people had become fully prepared to accept it. It needed only a clear specific order and the Muslims were then sure to obey it in letter and spirit, without any least hesitation. This prohibition is contained in verses Nos.90 and 91 of Surah No.5, (The Table) revealed in Madian. These Verses read as mentioned hereinunder:--

"(90) Believers! Intoxicants, games of chance, idolatrous sacrifices at alters, and divining arrows are all abominations, the handiwork of Satan. So shun wholly away from it so that you may attain to true success.

(91) Satan seeks only to stir up enmity and hatred between you by means of intoxicants and games of chance, and to turn you away from the remembrance of Allah and from Prayer. Will you not, then, desist?"

As soon as Hazrat Umar heard these verses, he immediately responded "We do desist, our Lord! We do desist" (Hdit related by al-Nasai, Abu Dawud, al-Tirmidhi and Ibn Majah).

The verse at S.No.(b), above, was the first injunction

concerning intoxicating drinks and gambling. As is evident, drinking was not prohibited thereby forthwith but was impliedly disapproved severely, by declaring it as "great sin" which was described comparatively greater than the benefit contained therein. Here we may point out that (إِثْمٌ) (sin) does not mean only "Haram", as stated by the petitioner, but it is translated as "sin" and regarding "sin" verse No.120 of Sura 6 Al-Anaam (i.e. The Cattle) is very clear and implicit. It reads as mentioned hereinunder:---

وَذَرُوا ظَاهِرَ الْإِثْمِ وَبَاطِنَهُ إِنَّ الَّذِينَ يَكْسِبُونَ الْإِثْمَ
سَيُجْزَوْنَ بِمَا كَانُوا يَقْتَرِفُونَ (سورة الانعام: آيت ١٢٠)

"Abstain from every sin, be it open or secret. Indeed those who commit sins shall surely be requited for all they have done."

Similarly, Verses No. 2, Nos. 62 and 63 of Sura Al-Ma'idah besides so many other verses on the subject clearly establish that Muslims have been ordained to avoid sin in any form, whether open or secret.

8. We may mention that it was within the context of legislation, permissibility and prohibition, as well as the moulding of the Muslim community in Madina, and purging it from all remaining traces of past traditions of the dark days, that a clear and decisive verdict is given on intoxicating drinks and gambling which have been equated with greatest sin like that of associating partners with God.

9. Drinking, gambling, idols worship and divining arrows were important aspects of pre-Islamic Arabia. They were closely related in both practice and tradition. The Arabs used to drink and considered in their vanity that drinking was a prestigious act which afforded the people great distinction. They often mentioned drinking in their poetry as a practice to be proud of or to praise others with.

10. It is notable that Islam did not address such traditions in the beginning, because they were based on mistaken beliefs. To try to reform them at the surface level before establishing the right foundation of faith was bound to be a wasted effort. Islam began its reform with the paramount question for every human being, namely, faith. It alone could uproot the very basic ideological concepts of ignorance in order to put in its place the Islamic concept, which is in complete harmony with human nature. It explains to people how grossly mistaken their concepts of God are and guides them to recognize their true Lord and creator. Once they knew him (God) and His attributes and got aware of their accountability to Him, only then they begin to listen with great attention to find out what pleases and displeases their Lord. Prior to this they are not even ready to listen or obey an order or commandment.

11. It may be pertinent to point out that it was for this reason that Islamic method of reform did not start at the outset with abruptly correcting the customs, conventions, deviations and abominations of the dark ages, or *Jahiliyyab*. First of all it addressed the question of faith, beginning with the declaration that there is no deity save God alone Who is the Creator, Ruler and Lord of the whole universe and He alone deserves to be worshiped at all levels and to Whom everyone shall be accountable on the Day of Resurrection. It took around 13 years to establish this concept of God's oneness, with all that it entails, in the hearts of the early Muslims. In that period, the only aim was its indoctrination, so that people could know their Lord and submit themselves to His authority. When faith was clearly established in their heart and they recognized that they could have no choice other than what has been chosen for them by God, then the next phase of outlining their duties, including worship, began. This was combined with the process of eradicating the social, economic, moral and behavioural traces of ignorance. It began in effect at the moment when God's order could be obeyed without hesitation because people realized that God alone could order them to do what is good for them. Once the Gordian knot of unbelief had been cut, it was easy to unfasten the other knots that bound them. Once the Prophet had opened their hearts to Islam, he did not have to struggle at each step to make them reject the Wrong and accept the Right. They had entered into the new faith with devotion and dedication and submitted themselves without demur to what the Prophet decreed. It is remarkably astonishing to note that they unhesitatingly confessed before the Prophet even such crimes, entailing severe capital punishment, as were not known to anyone but themselves. If they committed any crime, they voluntarily submitted themselves for punishment.

12. Thus as mentioned above, the prohibition of intoxicants and games of chance did not come as a surprise. As stated above, before this categorical prohibition, some steps were taken to loosen and break the hold of such social traditions which were closely intertwined with personal moral habits as well as with economic practices. Indeed, this was the third or fourth step which Islam took to solve the problem of intoxicant drinks. The under-mentioned verses of Surah Almaidah were the last verses that finally prohibited the intoxicating liquor:--

"Believers, intoxicants, games of chance, idolatrous practices and divining arrows are abominations devised by Satan. Therefore, shun them so that you may be successful Satan seeks only to stir up enmity and hatred among you by means of intoxicants and games of chance, and to turn you away from the remembrance of God and from prayer. Will you not, then desists? (Sura Almaidah Verse 90-91)."

These two verses which make intoxicants absolutely forbidden were revealed in the third year of the Islamic calendar, shortly after the Battle of Uhud, when the Islamic State was fully established and the prohibition did not require anything more than sending some one around the places of people's gathering just to announce: "All intoxicants are forbidden." The announcement had marvelous reaction in the public to the extent that everyone who had taken up a glass of wine in his hand, to drink, threw it and everyone who was in the actual process of drinking threw out what was in his mouth and, strangely enough, as reported, those who had swallowed a portion thereof forced their fingers in the throat to get that vomited as much as was possible. Barrels and bottles of wine and other intoxicants were broken into pieces and the streets of Madina were observed overflowing with the intoxicating liquor. The whole matter was thus over and it seemed as if the people had never before drunk any intoxicant.

This consequently followed the decisive statement on the nature of those practices which admit no counter argument: "Intoxicants, games of chance, idolatrous practices and divining arrows are abominations devised by Satan." (Verse 90). These are, then, foul practices and cannot be included among good and wholesome things which God has permitted. Moreover, they have been devised by Satan, man's old enemy. It is sufficient for a believer to know that something devised by Satan was to make it totally repugnant to him. E

At this point, the prohibition is issued, but is combined with the prospect of attaining success, which itself has its profound effect on the human mind: "Therefore, turn away from them so that you may be successful," (Verse 90). The Qur'anic verses go on to further expose Satan's scheme behind the devising of these abominations. "Satan seeks only to stir up enmity and hatred among you by means of intoxicants and games of chance, and to turn you away from the remembrance of God and from prayer." (Verse 91) Satan's aim and the purpose of his scheming are thus exposed before every Muslim. Satan seeks nothing except the stirring up of enmity and hatred among believers so as to turn them away from their worship. What a wicked scheme!

Satan's aims can easily be recognized in our practical life after we have accepted them as true, since God has stated them so. It does not take anyone with an open mind long to recognize how Satan actually stirs up enmity and hatred, utilizing for this purpose intoxicants and gambling. Intoxicants weaken one's consciousness and self-control, heighten tempers and stir up whims and impulses. Gambling all games of chance leave people with a sense of loss and grudges. It is natural that a losing gambler nurses a strong grudge against the winner who takes away his money from under his nose and leaves him empty handed. It is only

natural that such matters stir up enmity and hatred, regardless of the impression of happiness they initially give off.

The fact that intoxicants and gambling do turn people away from their remembrance of God and from prayer is too clear to require elaboration. Drinking makes people forget and gambling makes them oblivious to everything else. Indeed, games of chance keep gamblers in a state of intoxication which is not dissimilar to that produced by drinking. The world of a gambler is akin to that of a drunk tables, glasses and a strike of fortune and misfortune.

The lack of consciousness, whichever intoxicant produces it, is diametrically opposed to the state of alertness which Islam required of every Muslim so that he consciously feels his link with God at every moment, making sure that all his thoughts and actions are of the sort that pleased God. By being so alert and conscious, the Muslims play positive role in the proper development of life and protecting against weakness and corruption. He further protects himself, his property and honour and he helps to protect the Muslim community and its system and law against all types of aggression. A Muslim is not allowed so that he may care only for himself of enjoyments. On the contrary, at every moment he has duties to fulfil which required that he be always alert. These include duties towards his Lord, himself, his family and the Muslim community of which he is a member and towards humanity at large. Every when he enjoys the wholesome pleasures Islam permits, he must retain his full consciousness so that he is not enslaved by any type of pleasure or desire. He is in control of all his desires and he fulfills them as one who is totally in control. Drunkenness is the opposite state.

Moreover, avoiding such consciousness is simply an attempt to escape from the reality of life at a particular moment in time and a preference for the sort of visions which accompany drunkenness. Islam disapproves of all this because it wants the people to see the realities as they are, to look them in the face and to conduct their lives on the basis of reality, not imagination. It is through facing reality that man proves his willpower. To escape to the realm of imagination is to prove one's weakness and lack of will. Islam wants its people to have a strong will, unfettered by habit or addiction. From the Islamic point of view, this is enough reason to forbid intoxicants and all drugs. All these are abominations devised by Satan and their effect is only the corruption of human life. (FI ZILAL ALQURAN).

14(sic). To sum up Verse No.219 of Al-Baqara was in fact a preliminary step adopted to prepare the minds of the people for their other Injunctions those were yet to follow.

The second Injunction regarding prohibition of intoxicating

liquor (i.e. 4:43) was revealed afterwards wherein the performance of prayer in drunk condition was prohibited. This was again another step to create and increase consciousness of the believers who had not left drinking so far or had converted to Islam in the near past after revelation of the first verse, referred to herein above. The believers were made to realize that the habit of drinking was to be curtailed as it was a hindrance to understand the nature of supplications offered during the prayers.

Finally verses Nos.90 and 91 of Surah Al-Maida, mentioned above, were revealed which specifically prohibited the intoxicants. The degree of prohibition of intoxicant drinks mentioned in these verses can be easily judged from the following facts:--

- (a) The intoxicants are equated with:
 - (i) the games of chance,
 - (ii) Idolatrous Practices designed for the worship of others besides God.
 - (iii) polytheistic divination by arrow shooting.
- (b) The intoxicants are termed as unclean, dirty, impure, abomination, detestable, loathsome, abhorrent and disgusting (various meaning of "Rijsun").
- (c) Handiwork of Satan.
- (d) The text of the verse ordains the Believers to shun totally from intoxicants and afore mentioned other sins.
- (e) Only by doing so the believers are expected to become truly triumphant.
- (f) Specifically it is added that by means of intoxicants and games of chance Satan seeks to create enmity and hatred between the believers and wants to turn them away and prevent them from remembrance of Allah Almighty and Prayer; and finally
- (g) The Believers are asked to avoid drinking and obey the command by emphatically adding in the end:-- "will you then not desist?"

15. The following Ahadith further highlight the nature and degree of prohibition of intoxicants.

- Abdullah Ibn Umar narrates that the Holy Prophet (ﷺ) said, "Every intoxicant is liquor and every intoxicant is Unlawful (Haram). The person who leaves this world consuming liquor and does not repent, he will be deprived

of the wine of Heaven; (Jannah) [i.e. he will not enter Heaven (Jannah)] [Muslim V.2, p.168].

- Jabir reports that a person from Yemen asked the Holy Prophet concerning a drink prepared in his region from millet. The Holy Prophet asked him whether it was intoxicating. When he replied in the affirmative, the Holy Prophet said, "Every intoxicant is Unlawful (Haram)".
- Jabir narrates that the Holy Prophet (ﷺ) mentioned that whatever intoxicates in large quantities, a small quantity of it will also be Unlawful (Haram). [Abu Dawud V.2, p.162.]
- Abdullah bin Umar reports the statement of the Holy Prophet (ﷺ) who said, "Allah has cursed liquor, its consumer, server, seller, buyer, manufacturer, the one who has it manufactured, the one who transports it and the one to whom it is transported". [Abu Dawud V. 2, p.161]
- Jabir reports that the Holy Prophet (ﷺ) instructed, "The person who believes in Allah and the last day should not sit at the table where liquor is served." [Bayhaqi].
- The Holy Prophet (ﷺ) mentioned that liquor is the conglomeration of all sins [Mishkat P.444]. It is no secret that intoxicants lead the addicts to many vices and evil.
- Abu Darda reports that his friend, the Holy Prophet (ﷺ) advised him, "Never ascribe partners to Allah even though you may be cut into pieces or burnt. Never forgo Salah intentionally. Never drink liquor for it is the key to all evils." [Mishkat p.51].
- Daylam Himyari narrates that he queried from the Holy Prophet, (ﷺ) "We live in a cold area and engage in intensive labour. As a result of this, we drink a drink of wheat whereby we attain the strength for our work and protection against the cold.": When the Holy Prophet (ﷺ) asked him whether the drink was intoxicating, he replied in the affirmative. The Holy Prophet (ﷺ) instructed him that they abstain from it. He mentioned that his people would not abstain, whereupon the Prophet (ﷺ) told him: "then fight them." [Abu Dawud].
- Abu Umamah narrates that the Holy Prophet (ﷺ) said, "The person who causes distress to his parents, the gambler, the one who reminds others of his favours to them and the habitual drunkard will never enter Heaven (Jannah)." [Darmi V.2, p.31].

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--- Jabir reports that he heard the Holy Prophet (ﷺ) say upon the occasion of the conquest of Makkah, "undoubtedly Allah" and His messenger have forbidden the trade of liquor, carrion, swine and idols." [Bukhari V. 1, p.298]

--- Anas narrates that he was serving wine to some guests in the home of (his stepfather) Abu Talha when they heard the instruction from an announcer outside that liquor was unlawful (Haram). Anas says that he went outside and then returned with the news that the announcer was proclaiming, "Beware! Liquor has been made Unlawful (Haram). Upon hearing this, Abu Talha instructed Anas to dispose of all the liquor that they possessed. Anas reports that he complied and the streets of Madinah were flowing with disposed wine.

--- Many Companion (Sahaba) were concerned with regard to the plight of all those Muslims who died with wine in their bellies (i.e. They passed away before the prohibition of liquor). With report to this concern Allah revealed the above verse viz "There is no sin upon those who believe and do righteous deeds for what they have eaten...." [Bukhari V.2, p.664].

--- The above incident is also recorded in "Darrul Manthur" where Anas says that he was serving wine to Abu Talha, Abu Ubaidah Bin Jarrach, Mu'adh Bin Jabal, Suhail Bin Baydha and Abu Dujanah. The jug was full and he was filling the glasses of each of them when they heard an announcer proclaiming, "Be aware that indeed liquor has been forbidden!" When they heard this, they all immediately dropped the wine, breaking the utensils before anyone could enter or exit the house. As a result of such actions on the part of all the Companion (Sahaba) he says that the streets and alleys of Madina were flowing with wine. [Durrul Manthur v. 2, p.221 and abridged in Muslim v. 2, page 163].

16. It may be mentioned that before the revelation of the last injunction many companions of the Holy Prophet (ﷺ) had put an end to drinking of intoxicants on the ground of being a sinful activity. The Holy Prophet (ﷺ) then also warned the Believers that intoxicants were highly displeasing to Allah almighty and had earlier hinted at the possibility of that being prohibited. He had advised the people to dispose of the intoxicants if they had any. After revelation of these last verses the Prophet (ﷺ) proclaimed, as stated above, that those who had intoxicants should neither consume nor sell them, but rather immediately destroy them and, consequently, intoxicating liquors were poured into the streets of Madina. He did not

allow it to be given in gift to the non-Muslims even. He also ordained to throw it away rather than turn it into vinegar. While responding to a query raised by a believer whether or not an intoxicant could be used as medicine, the Prophet (ﷺ) replied that far from being a remedy for any malady it was in itself malady. Some persons who were residing in a very cold region and had to work very hard sought permission to consume intoxicating liquor to combat exhaustion and cold, whereupon the Prophet (ﷺ) inquired if the drink under reference caused intoxication. On being told that it did cause intoxication, he said that they must abstain from it. He further asked them to fight those who would not accept this order. As reported by "Abd Allah Ibn Umar the Prophet (ﷺ) also said: "God has cursed Khamr (wine) and him who drinks it, him who provides it to others and him who buys or sells it, him who squeezes (the grapes) into wine and him who causes others to squeeze grapes (in order to make wine), him who carries it and him to whom it is carried. '(In addition to other references mentioned in para. 15 above, also see Ahmad Bin Hanbal, Musnad, Vol. 2, p.97; Vol 1, p.316; Abdu Daud Ashribah", 2—Ed.)

17. According to another authentic Hadith referred to above the Prophet (ﷺ) advised not to eat even at the table where intoxicating drinks were being served. Initially the Prophet (ﷺ) even forbade the use of vessels in which intoxicating drinks had either been made or served. Later on, when the Injunctions about prohibition of drinks were completely observed, the Prophet (ﷺ) however relaxed the order regarding the use of these vessels. (See Abu Da'ud, At'imah', 18; Tirmidhi, 'Adab', 43; Darimi, 'Ashribah', 15; Ahmad Bin Hanbal, Musnad, Vol. 1, pl.20; Vol. 3, p.339—Ed).

18. It may be mentioned that though the word "Khamr" which was normally used for wine, literally means what obscures the intellect and thus it includes other intoxicant drinks made from wheat, barely, raisins and honey. The Prophet (ﷺ) extended the prohibition of wine etc. to all intoxicants, in any form. In this regard we find innumerable categorical statements from the Prophet (ﷺ) mentioned in so many traditions. (See Bukari, 'Wudu', 71 'Maghazi', 60, 'Ashribah', 4, 10, 'Adab', 8, 'Ahkam', 22, Muslim, 'Ashribah', 67--9; Abu Da'ud, 'Ashribah', 5, 71; Ibn Majah, 'Ashribah', 9, 13, 14; Darimi, 'Ashribah', 8, 9; Muwatta', 'Dahayat', 8; Ahmad b. Hanbal, Musnad, Vol. 1, pp.274, 289, 350, Vol. 2, pp.16, 158, 171, 185, 329, 501; Vol. 3, pp.66, 112, 119, 361, Vol. 4, pp.4, pp.41, 416; Vol. 6, pp.36, 71, 72, 97, 131 and 226—Ed).

19. As stated above, the Prophet (ﷺ) further enunciated

the following principle: 'whatever causes intoxication when used in large quantity is prohibited, even in a small (sic).

If a large quantity of something causes intoxication, to drink even a palonful of it is prohibited; (See Abu Da'ud, 'Ashribah', 5; Ibn Majah, Ashribah, 10; Ahmed B. Hanbal, Musnad, Vol.2, pp.167, 179 and Vol. 3, p.343-Ed).

20. Consequently a person found drunk used to be punished. In the time of the Prophet (ﷺ) no specific/fixed punishment had been laid down for drinking. In the beginning the offender would be struck with shoes, fists, and whips made of twisted cloth and palm sticks. The number of lashes awarded to any person found guilty of the offence of drinking extended to forty but the palm stick, stripped of leaves, used for this purpose, carried two branches and as such the number of strikes amounted to eighty stripes. (See Bukhari, Tirmidhi, Abu Daud, Ibn Maja). It was in this view of the matter that Hazrat Umar, by consensus of all companions of the Holy Prophet (ﷺ) fixed the Hadd punishment as eighty lashes to provide a deterrence to root out this evil and put an end to the confusion in this respect. Thereafter, this was considered the prescribed legal punishment for drinking. Prominent Muslim Jurists like Imam Malik and Imam Abu Hanifah, and Imam Shafi unanimously hold the same view. (For further details see Umdatul Qari, Tafheemul Qur'an, Al Thashrul Jinace Vol. I).

21. In fact though the intoxicants are forbidden in any quantity, but the courts while convicting an accused are to take into consideration the overall condition of society at large, the quantity of intoxicant liquor (i.e. taking a sip or swallowing barrels), commission of other offences in drunk condition, like causing harassment in public, attempting to inflict damage to the person/honour of other citizens, making nuisance, uttering abuses, using filthy language, being persistently habitual with previous history, causing collateral damage to the property or inflicting injury to some person, trespassing other's house, outraging modesty, committing rape, and depending on the nature of proof required for Hadd/Tazir, etc. award the punishment accordingly. That's why punishment varying in degree and severity corresponding to the nature and gravity of offence were passed by the Holy Prophet (ﷺ) in different cases. It is well known that Hazrat Umar suspended award of theft punishment during the days of famine. This fact shows that in all criminal offences the courts cannot remain oblivious to the over all attending circumstances and are therefore, duty-bound to consider all conditions and, if any offence is established beyond any doubt, award Hadd or Tazir punishment accordingly.

22. Here we consider it necessary to highlight that the sentence of

whipping which figures conspicuously in the Hudood laws is misunderstood in the country as well as abroad. The law about whipping in the Hudood Case is different from the law which was initially introduced in the pre-partition period. While the old law in this respect aimed at extreme physical torture of the accused, the nature of whipping in Hudood laws lays more stress on the reformation of the convict rather than on causing to him physical injuries. According to the mode of execution laid down under the old law the lashes were required to be inflicted on the bare buttocks only (with a fine disinfectant piece of cloth on it) by a strong, healthy and well built person, who was to stand at a considerable distance and run to the victim fixed and tied up to a frame (i.e. ^{مجلس}) and beat him severely with much force at his command as possible. It is worth-noticing that the Whipping Act of 1909 was mainly introduced to eliminate offences against property and sex including abduction, kidnapping, theft, robbery and dacoity for which inter alia, some of our Hudood Laws have been enforced. But the severity of sentence prescribed according to the Act of 1909 and executed according to the rules framed by the Provincial Governments bear no analogy to or comparison with the lightness of sentence of whipping in Shariah. Under the Execution of the punishment of Whipping Ordinance IX of 1979, the whipping is supposed to be administered on clothed body of a convict whose offence is established by the most reliable evidence leaving absolutely no room for any iota of doubt. The lashes are to be inflicted by a person standing nearby the convict and the strikes are required to spread over the entire body except the head, face, stomach, chest or the delicate parts of his body. The convicts are not to be tied down while whipping. The male is made to stand while the female has to sit. The length and thickness of the cane or branch of tree shall not exceed 1.22 and 1.25 c.m. respectively. While being struck it is not to be taken aloft the head of the person striking it. Thus minimal force is to be used which can cause little injury. Despite this, it is provided that the lashes will be given by use of moderate force only and that the cane once used shall be raised slightly but the armpit shall not be revealed. The lashes cannot be administered in too cold or too hot weather. If the convict is too old or too weak the number of stripes shall be applied in such a manner and with such interval that his life is not in danger. For this purpose the presence of the medical officer is to be ensured. Special care, leniency and utmost regard has been provided to maintain the dignity of a female convicted accused.

Thus, it is evident that the sentence of lashes in Shariah is not severe. Its purpose is just to awaken in the convict a realization of his wrong so that he may repent his misdeeds. The Shariah also makes sure that neither humiliation takes place nor it remains a permanent scar on him because the execution of sentence followed by repentance washes out

the stigma and guarantees the purification of the convict. It is in this light that the sentence, which is obligatory in Islam in some cases, has to be seen.

23. It is noteworthy that in Islamic Injunctions, punishments prescribed for various offences are punitive, reformatory and deterrent in nature. The wisdom contained in such a prohibition is obviously one of the main objectives of Islamic Injunctions i.e. to preserve the jurisdiction of reason and morality. It has kept morality immune to all that might vitiate its judgment, logic and fair-play in matters pertaining to high ethical values in social set up. That's why it has regarded all intoxicants as well as gambling as the pispuration of devil. Even though they might bring some advantage in their wake, their sin, crime and evil far exceeds their advantage. Here we may refer to Encyclopedia of Religion and Ethics which highlights the connection between Alcoholism and crime. It says; "There is universal testimony as to the close relationship between excessive drinking and breaches of the moral law and the laws of the State. This is a direct consequence of the paralysis of the higher faculties, intellectual and moral, and the resulting free play given to the lower inclinations. Alcohol is not only a direct cause of crime, but it acts powerfully along with other conditions, such as hereditary nervous weakness or instability of the brain. Again, crime may be due to loss of work, poverty, and starvation, so often the results of indulgence in alcohol." (Vol. I, P.301).

It is but obviously visible for he mind to err in its judgment when intoxicated. It would also be useful to refer here to Encyclopedia Britannica, which throws light on another aspect of Alcoholism, which probably reflects the position of decisions taken during world War-I. It states under the heading "Legal prevention of the manufacture, sale, or transportation of alcoholic beverages with the aim of obtaining partial or total abstinence through legal means" as follows: "Some attempts at prohibition were made in Aztec society, ancient China, Feudal Japan, the Polynesian islands, Iceland, Finland, Norway, Sweden, Russia, Canada, and India, but only a few countries experimented with national prohibition. Finland, for instance, adopted it in 1919 and repealed it in 1931, and the United States adopted it in 1919 and repealed it in 1933". (Vol. I, p.233). For further details about Alcohol consumption, its physiological and psychological effects, its effects on brain, emotional behaviour direct effects on organs, the acute and chronic disease, its relations with social conditions, its history its treatment, contemporary problems and controls, etc. see further Vol. I, page 437 of Encyclopedia Britannica).

24. All what has been elaborately mentioned above establish the facts that taking any intoxicant is a major sin in Islam and is therefore,

strictly prohibited. The Islamic State is duty bound to enforce its prohibition and considering it a heinous offence inflict punishment by way of whipping or, in the alternative, imprisonment as provided by law. Keeping in view the practice during the life time of Holy Prophet (ﷺ) and orthodox Caliphate it is difficult to agree with the stand taken by the petitioner. It is definitely misconceived. No one can even imagine that anyone of them could violate the injunctions of Islam and that too by way of open legislation without opposition in the least from the public who were spread over an area covering the major portion of three sub-continent.

25. The petitioner's stand seem apparently contradicted by himself as on one hand he assails a provision of law considered by the Muslim Jurists as unquestionably Islamic and on the other hand he uses the definition of "Hadd" as the only yardstick to examine the said provision thereby, without considering the fact that the said definition was also given by the same group of Jurists, who have fully supported that legislation. It was explained to the petitioner that instead of using the said definition, he had to examine the law or provision of law only on the touchstone of Qur'an and Sunnah.

26. Here it would be pertinent to mention that no verse or Hadith could be cited by the petitioner to show that it was in conflict with the award of eighty stripes as punishment to the one found guilty of drinking liable to "Hadd", when the requisite proof thereof was available before the court. On the contrary many references given from authentic Ahadith, containing Sunnah of the Holy Prophet (ﷺ) prove on record that he awarded different punishments on such occasions and in some instances, inflicted forty lashes with a palm stick, having double spikes, thus making the total eighty in number. The same practice continued and by consensus of the companions (رضوان الله عليهم اجمعين) the same was promulgated by Hazrat Umar to avoid any confusion in the matter. Here we may mention that the Holy Prophet (ﷺ) has discouraged award of Hadd punishment as far as possible. He said "Avoid enforcing 'Hudood' as much as you can" (Ibn Majah). On another occasion he made a similar statement in these words. "Keep Hudood away from Muslims as much as possible, if there is any way to spare people from punishment, let them go. For it is must better that an 'Imam' (i.e. ruler) should err in acquitting someone rather than that he should in punishing someone who is not guilty" (Thirmidhi) we may also add that in view of the highly stringent conditions laid down for proof required for 'Hadd', no 'Hadd' punishment has so far been confirmed by the appellate forum.

27. The upshot of the above discussion is that since there is no Verse or Hadith that contradicts the impugned provision of law in any

way, we find this petition misconceived and without any substance and, therefore, dismiss it accordingly. |N

(Sd.)

DR. FIDA MUHAMMAD KHAN, J

I agree subject to my reservations in a separate note written by me.

(Sd.)

HAZIQUL KHAIRI, C J

I agree with the conclusion arrived at by my brother Justice Fida Muhammad Khan but subject to the reservation made by the Honourable Chief Justice in the separate note.

(Sd.)

SALAHUDDIN MIRZA, J

I agree that Shariat Petition No.2/I of 2006 be dismissed. Appended herewith are my reasonings.

(Sd.)

SYED AFZAL HAIDER, J

HAZIQUL KHAIRI, CHIEF JUSTICE.---I had the privilege to read the judgment of my learned brother, Justice Dr. Fida Muhammad Khan, While I entirely agree with him that in accordance with the Sunnah of our Holy Prophet (p.b.u.h.) there is punishment for a person taking liquor under Article 8 of the Prohibition (Enforcement of Hadd) Order, 1979 (hereinafter called "the Order") but I have reservations to the proviso to the said Article and also to the manner of execution of the punishment under section 4 of the execution of the punishment of Whipping Ordinance, 1979 (hereinafter called the "Whipping Ordinance") of which we took notice during the hearing of the petition.

2. Under Article 8 of the Order, an adult Muslim taking intoxicating liquor by mouth, is guilty of drinking liable to Hadd and shall be punished with whipping eighty stripes. However, the proviso to Article 8 of the Order states.: "Provided that punishment shall not be executed unless it is confirmed by Court to which an appeal from the order of conviction lies; and, until the punishment is confirmed and executed, the convict shall, subject to the provisions of the Code of Criminal Procedure, 1898, relating to the grant of bail or suspension of sentence, be dealt with in the same manner as if sentenced to simple imprisonment". It will be seen that the proviso suffers from many ambiguities and defects. Firstly, it is presumed that in every case the convict shall prefer an appeal or apply for bail. In case he does not, he

shall remain in prison till the time of filing a appeal expires. Secondly, imprisonment shall operate as double punishment not provided for either in Qur'an or Sunnah of the Holy Prophet (p.b.u.h.) and is in violation of Article 13(a) of the Constitution. O

3. Having said so, it is pertinent to note that there is no direction or even reference either in the Holy Qur'an or Sunnah of the Holy Prophet (p.b.u.h.) that Muslim should maintain prison houses for criminals or under trial prisoners. The prisons did not exist during the days of the Holy Prophet (p.b.u.h.). However, the Holy Qur'an in Surah-e-Yousaf refers to the imprisonment of Prophet Yousaf (A), the most relevant verses are as under:--

- (i) "She said: What shall be his reward, who wisheth evil thy folk, save prison or a painful doom?" (12.25).
- (ii) "I asked him an evil act, but he proved continent, but if he do not my behest he verily shall be imprisoned, and verily shall be of those brought low." (12.32).

4. Let us now examine section 4 of the Whipping Ordinance which sates as under:--

"Specifications of whip.---The whip, excluding its handle, shall be of one single piece only and preferably be made of leather, or a cane or a branch of a tree, having no knob or joint on it and its length and thickness shall not exceed 1.22 meters and 1.25 c.m. respectively."

5. Although the word "whip" has been specified in section 4 above but the word "whipping" has not been defined. According to Black's Law Dictionary (Eighth Edition) "Whipping" is a method of corporal punishment formerly used in England and a few American states, consisting of inflicting long welts on the skin esp. with a whip. According to BBC English Dictionary (First Edition 1992) a whip is a piece of leather or rope fastened to a handle which is used for hitting people or animals. The word whipping was used as follows: "He could not possibly have endured a whipping". P

6. Reverting to 'Whipping Ordinance', section 5 thereof lays down condition and mode of execution of punishment of whipping, which inter alia states: (a) before the execution of the punishment commences, the convict shall be medically examined by the authorized medical officer so as to ensure that the execution of the punishment will not cause the death of the convict; (b) the punishment shall be executed in the presence of authorized medical officer at such public place as Provincial Government may appoint for the purpose; (c) he shall apply the whip with moderate force without raising hand above his head so as not to lacerate the skin of Q

the convict: (d) such clothes of the convict shall be left on the body of the convict as are required by the Injunctions of Islam to be put on (e) if, after the execution of the punishment has commenced the authorized medical officer is of the opinion that there is apprehension of the death of the convict, the execution of the punishment shall be postponed until the authorized medical officer certifies him physically fit to undergo the remainder of the punishment.

7. What transpires from the foregoing is that while executing punishment there shall be medical examination of the convict by an authorized medical officer, who will be present at the time of whipping on the naked body of the convict except those parts which have been exempted. However, if at any stage there would be any apprehension of the death of the convict, the execution shall be postponed. Further, the whipping has to be moderate, so as not to lacerate the skin of the convict. It would be anybody's guess whether the whipping without raising hand above head by the Executive would be moderate in effect or not, as much depends on the physique, strength and mood of the Executor. Neither the whip made of leather (with the handle) nor a cane with its length and thickness of 1.22 meters and 1.25 c.m. respectively has found place in any of the traditions of the Holy Prophet (p.b.u.h.). The only authenticated and undisputed Hadith for punishment cited to us by the petitioner, juris-consults and others, before us which is recorded in Bukhari, Tirmidhi. Abu Daud, Ibn Masa, was that there should be forty lashes by palm stick stripped of leaves with two branches totalling eighty lashes to be inflicted on the body of the convict.

8. In keeping with and following the tradition of the Holy Prophet (p.b.u.h.), in my humble view the proviso to Article 8 of the Order and section 4 of the "Whipping Ordinance" are repugnant to Qur'an and Sunnah and accordingly the President of Pakistan is directed to take necessary steps for deletion of the proviso to Article 8 of the Order and substitution of section 4 of the Whipping Ordinance" as under:--

Section 4:

"The whip shall be a stick of palm tree stripped of leaves with two branches."

9. In case proviso to Article 8 of the Order is not deleted and section 4 of the "Whipping Ordinance" is not amended and substituted as above, within six months hereof, the former shall deem to have been repealed and the later shall be deemed to have substituted and shall also become effective within six months.

10. The Federal Government is further directed to introduce a provision of law, whereby a person accused of taking intoxicating liquor

under Hadd, shall be entitled to get bail before the trial Court and the appellate Court. In case the Federal Government fails to do so, these directions shall deem to take effect on the expiry of six months hereof.

(Sd.)

HAZIQUL KHAIRI, C J

I agree.

(Sd.)

SALAHUDDIN MIRZA, J

SYED AFZAL HAIDER, J.---I had the privilege of going through the judgment proposed by my learned brother Justice Allama Dr. Fida Muhammad Khan, I fully agree that the use of intoxicating liquor is a sin as proclaimed by Holy Qur'an and Sunnah of the Holy Prophet (p.b.u.h.). The Muslim society can always declare a sinful activity to be an offence punishable as Tazir. Clause (g) of Article 37 of the Constitution of Islamic Republic of Pakistan makes it incumbent upon the State to "prevent prostitution, gambling and taking of injurious drugs, printing, publication, circulation and display of obscene literature and advertisements;" and Article 37(h) proceeds further to declare that the State shall "prevent the consumption of alcoholic liquor otherwise than for medicinal and, in the case of non-Muslims, religious purposes." (Emphasis added in both the provisions). These provisions were promulgated in 1973 i.e. six years before the enforcement of Prohibition (Enforcement of Hadd) Order, 1979.

2. I also agree that the Shariat Petition No.2/I of 2006 be dismissed. Reasons for dismissal in my view are:--

Firstly that the petitioner did not challenge the Exception contained in section 3 of the Abolition of the Whipping Act, 1996 (Act VII of 1996). Article 8 of Prohibition (Enforcement of Hadd) Order, 1979 cannot be challenged without impugning the aforementioned section 3. Article 8 cannot be read in isolation;

Secondly, that Article 25 of Prohibition Order has not been shown to be violative of any Injunction of Islam. In matters of Tazir the legislature is competent to punish attempts to commit offences:

Thirdly, Execution of the Punishment of Whipping Ordinance, 1979 and particularly section 6 of this Ordinance has also not been challenged before us. So long as these provisions are on the Statute Book of Pakistan. Articles 8 and 25 of Prohibition Order No.4 of 1979 cannot be challenged.

3. It is worthy of mention that Execution of the Punishment of Whipping Ordinance, 1979 was not repealed by the Abolition of the Punishment of Whipping Act, 1996. In fact section 3 of Act, No.VII of 1996 contains an exception that when a punishment by way of Hadd is prescribed the provisions of Act VII of 1996 will not apply; President's Order 4 of 1979 is the basic law and so long as it is applicable and in force, no challenge to Articles 8 and 25 is legally possible.

4. Under the Prohibition Order 4 of 1979 punishments by trial courts are generally not awarded under Article 8. Not a single case can be cited in the thirty years life of Federal Shariat Court. This Article alone contemplates punishment by way of whipping. The reasons is that proof for imposition of Hadd, as stipulated in Article 9 is not forthcoming. It is only under Article 11 of Prohibition Order 4 of 1979 that punishment by way of imprisonment is stipulated. In this view of the matter the question that an accused person convicted under Prohibition Law will have to undergo double punishment is misconceived.

5. I respectfully disagree with the observation made by Hon'ble Chief Justice in paragraphs 7 and 8 of the separate judgment because the Full Bench in this case never took Suo Motu notice of any other provision. The only provisions challenged before us were Articles 8 without its proviso and 25. Resultantly no notice was issued to the Federal Government as mandated by Article 203-D of the Constitution expressing the reasons for examining proviso to Article 8 of the Prohibition (Enforcement of Hadd) Order, 1979. The main judgment of Hon'ble Judge does neither mention the taking of Suo Motu notice nor any agreement of the Board that the said proviso be declared repugnant. No arguments from the Federal Government were heard on this point either. Consequently this court is not competent to declare proviso to Article 8 of Prohibition Order No.4 of 1979 to be repugnant to the Injunctions of Islam. Resultantly no direction can be issued for amending the said proviso.

6. In view of what has been stated above the impugned provisions i.e. Articles 8 and 25 of the Prohibition (Enforcement of Hadd) Order, 1979 are not violative of the Injunctions of Islam. No amendment is therefore required and hence no declaration needed. Resultantly Shairat Petition No.2/I of 1006 is dismissed.

(Sd.)

Syed Afzal Haider, J

M.A.K./72/FSC

Order accordingly.