IN THE FEDERAL SHARIAT COURT
(Original Jurisdiction)

PRESENT

MR. JUSTICE AGHA RAFIQ AHMED KHAN
MR. JUSTICE SYED AFZAL HAIDER
MR. JUSTICE SHAHZADO SHEIKH

SHARIAT PETITION NO.01/I OF 2007

Mian Abdur Razzaq Aamir .... Petitioner

Versus

Federal Government of Islamic Republic of Pakistan .... Respondent

SHARIAT PETITION NO.03/I OF 2007

Ch. Muhammad Aslam Ghuman .... Petitioner

Versus

Federation of Pakistan and others .... Respondents

SHARIAT PETITION NO.01/I OF 2010

Abdul Latif Safi .... Petitioner

Versus

Federation of Pakistan and others .... Respondents

Petitioners .... Mian Abdur Razzaq Aamir

Ch. Muhammad Aslam Ghuman and Abdul Latif Sufi.

For the Federal Government .... Sardar Abdul Majeed, Standing Counsel for Federal Government, Mr. Tariq Ali, Advocate for Federal Government, Mr. Muhammad Israr, Advocate on behalf of Sardar Abdul Majeed, Standing Counsel Syed Hasnain Haider, Advocate for Federal Government and Syed Azmat Ali Bukhari, Standing counsel for Federal Government/Attorney General.

For the Punjab Province .... Mr. Shafaqat Munir Malik, Additional Advocate General, Punjab and Ch. Saleem Murtaza Mughal, Assistant Advocate General Punjab.

For the Sindh Province .... Mr. Fareed-ul-Hassan, A.A.G. Sindh.

For the N.W.F.P/ Khyber Pakhtoon Khaw .... Mr.Muhammad Sharif Janjua, Advocate on behalf of Advocate General, N.W.F.P. and Mr. Aziz-ur-Rehman, Advocate on behalf of Advocate General, Khyber Pakhtoon Khaw.

For the Balochistan .... Mr. Salahuddin Mughal, Advocate General Balochistan, Mr. Tariq Ali Tahir, Additional Advocate General Balochistan, Mr. Muhmood Raza Khan, Additional Advocate General Balochistan and Mr. Muhammad Sharif Janjua,

		Advocate on behalf of Advocate General Balochistan.
Jurisconsults	...	Hafiz Muhammad Tufail and Dr. Muhammad Hussain Akbar
Amicus curiae	....	Raja Muqsit Nawaz Khan and Syeda Viquar-un-Nisa Hashmi
Dates of Institution	....	1-2-2007, 17-3-2007 and 04-01-2010 respectively.
Places of hearing	...	Islamabad, Lahore and Karachi
Dates of hearing	....	29-1-2008, 13-3-2008, 25-3-2008, 7-5-2008, 18-11-2008, 5-1-2009, 20-1-2009, 11-2-2009, 2-4-2009, 29-3-2010, 19-4-2010, 17-5-2010, 26-5-2010, 5-7-2010, 6-7-2010, 26.10.2010 and 23.11.2010
Date of Decision	....	22-12-2010

.....

JUDGMENT

SYED AFZAL HAIDER: JUDGE

بسم الله الرحمن الرحيم

وَمَن لَّمْ يَحْكُم بِمَا أَنزَلَ اللّهُ فَأُوْلَـئِكَ هُمُ الْكَافِرُون ○

وَمَن لَّمْ يَحْكُم بِمَا أَنزَلَ اللّهُ فَأُوْلَـئِكَ هُمُ الظَّالِمُونَ ○

وَمَن لَّمْ يَحْكُم بِمَا أَنزَلَ اللّهُ فَأُوْلَـئِكَ هُمُ الْفَاسِقُونَ ○

وَأَنزَلْنَا إِلَيْكَ الْكِتَابَ بِالْحَقِّ مُصَدِّقًا لِّمَا بَيْنَ يَدَيْهِ مِنَ

الْكِتَابِ وَمُهَيْمِنًا عَلَيْهِ فَاحْكُم بَيْنَهُم بِمَا أَنزَلَ اللّهُ ...○

Those who do not judge by what Allah has revealed are indeed the *Unbelievers*. (5:44)

Those who do not judge by what Allah has revealed are indeed the W*rong-doers*.(5:45)

And those who do not judge by what Allah has revealed are the *Transgressors*.(5:47)

Then We revealed the Book to you, (O Muhammad), with Truth, confirming what-ever of the Book was revealed before, and protecting and guarding over it. *Judge, then, in the affairs of*

men in accordance with (the commandment) what Allah has revealed.(5:48)

AND

وَمَا آتَاكُمُ الرَّسُولُ فَخُذُوهُ وَمَا نَهَاكُمْ عَنْهُ فَانتَهُوا

وَاتَّقُوا اللَّهَ إِنَّ اللَّهَ شَدِيدُ الْعِقَابِ ○

Take whatsoever the Prophet (Muhammad PBUH) gives you and abstain from whatever he forbids and fear Allah: verily Allah is Most stern in retribution
Ayat 7, *Sura* 59, *Al-Hashr*, The Holy Quran

EXHORDIUM

2. This Judgment will dispose of the following three connected Shariat Petitions:

i. Shariat Petition No.1/I of 2010.

ii. Shariat Petition No.3/I of 2007.

iii. Shariat Petition No.1/I of 2007.

Shariat Petition No.1/I of 2010, at serial number i, seeks to challenge sections 5,6 and 7 of the Protection of Women Act, 2006 (Act No.VI of 2006); while Shariat Petition No.3/I of 2007, at serial number ii impugns the same sections as well as the entire Act VI of 2006; whereas Shariat

Petition No.1/I of 2007, at serial number iii, calls into question sections 5 and 7 of Act VI of 2006 whereby section 376, 496-B and 496-C have been added in the Pakistan Penal Code. Act VI of 2006 entitled Protection of Women (Criminal Laws Amendment) Act, 2006 impugned in these petitions, will be referred to in this judgment as *the Act*. Three petitions at serial i, ii and iii were clubbed together by an order of this Court dated 29.03.2010. The order reads as follows:-

> "According to the office report Shariat Petition No.1 as well as Shariat Petition No.3/I of 2007 was dismissed for non prosecution on 25.03.2008. The present Shariat Petition No.1/I of 2010 has a nexus with the said two petitions. We are inclined to restore the said two Shariat Petitions i.e. No.1 & 3/I of 2007 to the same numbers so that they are also linked up with this petition for disposal.
>
> Learned counsel inter-alia contends that the addition of new sections 5, 6 and 7 in the Protection of Women (Criminal law Amendment) Act, 2006, including the omission of the first proviso to section 20 of Ordinance VII of 1979 is not only repugnant to the Injunctions of Islam but is also violative of the constitutional provisions contained in Article 20-DD(i). The Federal Shariat Court has, it is urged, exclusive jurisdiction in any case decided by any

criminal court under any law relating to the enforcement of Hudood

The learned counsel also states that according to the Injunctions contained in Ayat 4 of Sura 24 i.e. Sura Noor of Holy Quran, every person who indulges in calumny against chaste women looses his legal capacity to give evidence in any court of law. The points raised are substantial and need consideration. Admit. Notice. A copy of this order be sent to respondents No.1 and 2 with the direction to file written statements within two weeks. The case be fixed in the third week of April, 2010."

Initially Shariat Petition No.9/I of 2004, pending disposal in this court for the last six years, was ordered to be heard along with the other three petitions as common legal instruments were impugned in these petitions. Written statement had also been submitted by answering respondents in Shariat Petition No.9/I of 2004 which was duly amended in November, 2008 to include simultaneous challenge to *the Act*. Arguments on all the four petitions were heard on 16 dates over a period of almost three years. Last date of hearing was 26.10.2010. However on 23.11.2010 petitioner in Shariat Petition No.9/I of 2004 submitted that he would not like his case to be bracketed with the other three Shariat Petitions because the point raised

by him was of "first impression" and further that during the last fourteen centuries wrong interpretation had been put on the word *Shahadah* occurring in Holy Quran. He claimed to be son of Prophet Syedna Yaqoob A.S. and claimed that his interpretation of the *Ayaat* of Holy Quran will revolutionize the criminal law all over the Muslim world. His prayer to separate out his petition was not opposed by the answering respondents. Consequently his request was allowed with a direction to the office to delink Shariat Petition No.9/I of 2004 with further direction that his petition be fixed separately at some appropriate time. In this view of the matter this judgment will dispose of the three other Shariat Petitions mentioned in the title.

CONTENTS OF THREE PETITIONS

3. The points urged in the aforementioned three petitions may be summed up as under:-

(a) **Shariat Petition No.1/I of 2007**

Mian Abdur Razzaq Aamer, has through this petition, challenged sections 5 and 7 of *the Act* which have added three new

provisions i.e, sections 376, 496-B and 496-C relating to Rape and Fornication, in Pakistan Penal Code. It is contended that the impugned provisions are violative of the Injunctions of Islam.

(b) **Shariat Petition No.3/I of 2007**

Ch. Muhammad Aslam Ghuman has, through this petition impugned sections 5, 6, 7 of the Protection of Women (Criminal Laws Amendment) Act, 2006 as being repugnant to the Injunctions of Islam

(c) **Shariat Petition No.1/I of 2010**

Mr. Abdul Latif Sufi through this petition has also assailed sections 5, 6, 7 of the Protection of Women (Criminal Laws Amendment) Act, 2006 and prayed that the same be declared to be repugnant to the Injunctions of Islam and ultra vires the Constitution of Islamic Republic of Pakistan, 1973.

INITIAL DISCUSSION

4. During the course of preliminary arguments learned Counsel for the petitioners inter-alia maintained that:

a. The introduction of Act. VI of 2006 has adversely affected the

jurisdiction of Federal Shariat Court though in matters relating to the enforcement of *Hudood,* the Constitution had conferred exclusive jurisdiction upon this Court as was evident from Article 203 DD of the Constitution;

b. The practice of moving the Provincial High Courts for grant of pre-arrest or post arrest bails or cancellation thereof in *Hudood* matters was illegal as the appellate and revisional jurisdiction in all *Hudood* matters vested in the Federal Shariat Court alone;

c. The appellate and revisional jurisdiction against orders passed or judgments delivered by Special Court under the Control of Narcotic Substances Act, 1997 (Act No.XXV of 1997) including the power of transfer of cases from one to another Special Court, exercised by the High Court under section 49 ibid, has to be with the Federal Shariat Court as offences

relating to intoxicants are covered by the scope of the term *Hudood;*

d. The meaning and scope of the term *Hudood* should be elaborated with particular reference to the number and nature of offences and human affairs i.e, MUAMLAAT, for a proper appreciation of existing constitutional and legal provisions and future legal instruments;

e. Since all matters relating to the Muslim family are covered by the term *Hudood,* so the ultimate jurisdiction to hear appeals a revisions in such matters should also vest in the Federal Shariat Court particularly after the introduction of Chapter 3A of Part VII in the Constitution. It was therefore contended that section 14 and section 25A of Act XXXV of 1964 be also examined;

f. The overriding effect given to the *Hudood* Ordinances has been protected by the Constitution. Act VI of 2006 cannot

limit the extent of jurisdiction which had been guaranteed by the Constitution and lastly it was urged that and;

g. They would not press the objections raised in the Shariat Petitions relating to Act VI of 2006 provided matters relating to jurisdiction of this Court and allied question mentioned in the proposed issues are decided at the first instance.

Learned counsel representing respondents 1 through 5 did not controvert the above mentioned seven assertions. In fact each one of them agreed that the questions raised were substantial and required in-depth analysis in the larger interest of justice and development of law. It was urged that the issue of Muslim Family Law be also examined as the term *Hudood* as mentioned in Holy Quran covers matters relating to family laws. However it was not deemed advisable to adjudicate upon a number of legal propositions through this judgment. Decision on other matters has been left for some future date in appropriated proceedings. Consequently the respondents were put on notice that this Court would proceed to examine only a limited

number of provisions contained in the following six legal instruments in view of the statement of petitioners.

i. Section 3 of Ordinance VII of 1979

ii. Section 19 of Ordinance VIII of 1979

iii. Sections 11, 28 and 29 of Act VI of 2006

iv. Part VII and provisions relating to Bails occurring in Part IX of the Code of Criminal Practice.

v. Chapters II and V of Control of Narcotic Substances Act, 1997.

vi. West Pakistan Family Courts Act, (Section 5 read with Schedule I and II and section 14 in particular as well as sections 14 and 25-A ibid.)

Learned Counsel for respondents were advised to get instructions from respective governments on the questions raised before us. The learned counsel representing the respondents accepted notice as regards the above-mentioned subjects and it was then agreed that necessary issues be struck on these specific points in order to examine the entire gamut of legal provisions as the basic question relating to jurisdiction of this Court was involved. It was emphatically urged before us that the meaning and scope

of the term *Hudood* must be determined as this term has not been defined by the Constitution. It was also urged that the purpose of creating Federal Shariat Court be also examined from different perspectives in order to fully appreciate the extent of jurisdiction and power of this Court. Consequently the following revised consensus issues were struck for the purpose of adjudication of basic questions in relation to the subject matter under examination.

CONSENSUS ISSUES

a) What is the meaning and scope of the term *Hudood* with particular reference to clause (1) of Article 203DD of the Constitution?

b) What is the meaning of the term Jurisdiction and Judicial Power and what is the extent of jurisdiction of the Federal Shariat Court in matters relating to the enforcement of *Hudood* under Article 203DD of the Constitution?

c) Can the mandate of Article 203 DD of the Constitution, which confers exclusive jurisdiction upon the Federal Shariat Court to *examine the record of any case decided by any criminal court under any law relating to the enforcement of Hudood,* be nullified by legislative instruments like the Act of 2016;

d) Are not sections 11 and 28 of *the Act* violative of Article 203 DD of the Constitution as the overriding effect of both the

Hudood laws, duly fortified by constitutional provisions has been repealed?

e) Can the Federal Shariat Court be barred by a subordinate judicial pronouncement from granting bail to or cancelling bail of an accused before or during trial for offences covered by the term *Hudood*?

f). Are not sections 48 and 49 of Act XXV of 1997 violative of Article 203 DD in so far as the forum of Appeal and the power to transfer cases provided therein vest in the High Courts and not Federal Shariat Court?

g). Are not sections 25 and 29 of *the Act* violative of the Injunctions of Islam because the Islamic provisions of Lian as contained in sub-sections (3) and (4) of Section 4 of Ordinance VIII of 1979 have been illegally repealed apart from adding clause (VII a) Lian in section 2 of Act VIII of 1939?

h). How are punishments and offences classified according to Islamic teachings and what categories of offences are within the ambit of *Hudood* and hence within the exclusive jurisdiction of the Federal Shariat Court?

i). What is the meaning of Jurisdiction and Judicial Power with particular reference to the Federal Shariat Court as envisaged by Articles 203D and 203DD of the Constitution?

j) Conclusions;

k) Declaration by the Court.

It might as well be stated here that except the issues framed above in relation to the specific legal instruments, we do not propose considering

other legal provisions mentioned in the four Shariat Petitions. We are leaving these provision for future date whenever any questions is ra sed before the Court.

JURISCONSULTS INVITED

5. In view of the importance of the questions involved we decided to invite jurisconsults to render assistance to this Court or the above-mentioned questions. As a next step we proceeded to issue notic es to the following jurisconsults:-

i. Dr. Hafiz Muhammad Tufail
ii. Dr. Muhammad Tahir Mansoori
iii. Dr. Allama Muhammad Hussain Akbar
iv. Hafiz Abdur Rehman Madni
v. Dr. Sajid-ur-Rehman Siddiqui.

Only two jurisconsults responded to our call. Dr. Allama Muhammad Hussain Akbar from Lahore submitted written comments which were placed on record while Dr. Hafiz Muhammad Tufail from Islamabad appeared personally and apart from submitting written comments also addressed the Court.

6. Raja Muqsat Nawez Advocate and Ms. Syeda Viquar-un-Nisa Hashmi Advocate appeared to assist the Court on the aforementioned issues. The lady lawyer was encouraged for the additional reason that a female human right activist had opted to participate in these deliberations.

WRITTEN RIPOSTE OF RESPONDENTS

7. The Federal Government, respondent No.1, initially submitted written statement on 15.10.2008. This reply was focused on the contents of Shariat Petition No.9/I of 2004. However learned counsel submitted that this very reply be read in other three petitions under consideration. Respondent No.1 finally submitted additional written comments on 05.07.2010 in which various preliminary objections were raised. These objections are however not relevant for our discussion as we are not determining the questions relating to the Zina (Enforcement of Hudood) Ordinance, 1979 as agitated in Shariat Petition No.9/I of 2004.

8. Learned counsel appearing on behalf of Province of the Punjab also referred to the comments already submitted in Shariat Petition No.9/I of 2004 with the request that the same be read as reply in the connected matters under discussion in this Court. Learned Counsel appearing on behalf of the other three Provinces stated that they endorse the view point of the Federal Government and own the comments filed in Shariat Petition No.9/I of 2004. In fact the learned counsel for the respondents, on every date of hearing, stated that they had nothing else to add. The learned counsel also stated that since the question of construction of various Injunctions of Holy Quran and Sunnah as well as the question of

jurisdiction of this Court was involved in these cases so they would be seeking guidance from this Court rather than dilating upon or elucidating the Injunctions of Islam from their end. It was further submitted that they would abide by the decision given therein. It was however made clear to the learned Counsel of the five answering respondents that the comments already submitted by them related *only to* Shariat Petition No.9/I of 2004 wherein the main thrust was against Ordinance VII of 1979 but the questions requiring determination in this judgment had been condensed in the consensus issues.

9. The objection raised by learned counsel for respondent No.1 about the language employed by petitioner in paragraphs 17, 22, 23 and 25 of his Shariat Petition No.9/I of 2004 is valid. The objection is upheld. The office is directed to delete the objectionable lines from the text of the petition. The petitioner is present in court. He has been told that irrelevant and irresponsible matters should be eschewed in solemn proceedings.

10. Respondent No.2 Province of Balochistan did not file any written comment. Oral arguments were also not advanced. It was stated by the learned counsel for the Province of Balochistan that the comments submitted by Federal Government have also been adopted by them.

11. Mr. Aziz-ur-Rehman Khan learned Counsel representing Respondent No.3, Khyber Pukhtoon Khwa, in the written statement dated 17.05.2010 submitted that Shariat Petition No.9/I of 2004 merits dismissal as it has raised hypothetical questions.

12. Respondent No.4, Province of the Punjab, in the written comments, submitted in Shariat Petition No.9/I of 2004, inter-alia raised the preliminary objections that the provinces are not necessary parties and that the petitioner has completely ignored the *Ahadis* of Holy Prophet PBUH and that self coined meanings have been given by the petitioner to various legal provisions which are contrary to judicial pronouncements.

13. Learned counsel for respondent No.4, challenged the petitioner's contention which pertains to Ordinance VII of 1979. As stated above we are not examining the provisions of that Ordinance. As regards the objection relating to *LIAN,* the plea of Province of the Punjab was that "the grounds of divorce are the subject-matter of Dissolution of Muslim Marriages Act, 1939, therefore the provision relating to *lian* were deleted from *Hudood* Laws and were made part of Dissolution of Muslim

Marriages Act, 1939 and the said statutory amendments have not violated any fundamental rights guaranteed by the Constitution."

14. Learned counsel for Respondent No.5, Province of Sindh, submitted that he had adopted the comments filed by respondent No.4, Province of the Punjab. However written comments on behalf of Sindh Government were received only in Shariat Petition No. 9/I of 2004. These comments consist of the three following lines:-

> "It is respectfully prayed that the Respondent No.5 adopts the comments filed by Respondent No.4 in the above petition".

AREAS OF CONTENTION

15. Learned counsel appearing on behalf of petitioners in other three petitions raised the following contention:-

a). That the omission of sections 3,4,6,10,16,18, and 19 of Ordinance VII of 1979 and amendments effected in sections 8,9,17 and 20 ibid as well as omissions of sections 10 through 13, 15,16 and 19 of Ordinance VIII of 1979 and amendments in sections 2,4,6,8,9,14,16 and 17 ibid as well as insertion of new sections in the Pakistan Penal Code by virtue of sections

2 through 8 of Act VI of 2006 and corresponding amendments in Schedule II of the Code of Criminal Procedure is violative of the Injunctions of Islam.

b) That the purpose achieved by these amendments was to limit the jurisdiction of the Federal Shariat Court which decided appeals/revisions against conviction/acquittal recorded under Ordinances No.VII and VIII of 1979 in relation to the offences stipulated originally in the four Hudood Ordinances. These amendments it is urged, contravene Constitutional provision contained in Article 203DD apart from being mala-fide;

c). That the words "The High Court" occurring in (i) subsection (3) of section 5, (ii) clause (9) of subsection 1 of section 14 and the words "the High Court" occurring in clause (1) and the words "the Supreme Court" occurring in clause 2(b) of section 25(a) of the West Pakistan Family Courts Act, 1964 be substituted for the words "Federal Shariat Court." It was also contended that the provisions of Muslim Family Laws are covered by the meaning and scope of the term *Hudood* as is evident from various *Ayaat* of Holy Quran.

d). That sub-section 5 may be added in section 14 of the West Pakistan Family Courts Act 1964 to empower the Federal Shariat Court to exercise revisional jurisdiction within ninety days over the appellate orders passed by the District Court in any cases as provided in clause (h) of submission (1) of

section 14 (ibid). A provision be also added to transfer all the appeals, pending in the High Courts, to the Federal Shariat Court.

e). That appeals against convictions, recorded under the Control of Narcotic substance Act, 1997 (Act No.XXV of 1997), should lie before the Federal Shariat Court as the sale, purchase, manufacture and use of narcotics was hit by the mischief of Prohibition as envisaged by Hudood Laws.

f) That the practice of invoking the jurisdiction of High Courts in the event of grant or refusal of pre-arrest and post-arrest bail application during investigation and trial stage was violative of Article 203 DD of the Constitution; and

g) The scope of the term *Hudood* is very wide and covers not only all categories of offences relating to property, human body, human dignity and honour but also family matters of a civil nature. In this context it was urged that the categories of offences as well as civil matters relating to family life, be also identified which fall within the ambit of the term *Hudood.* It was asserted that the purpose of creating Federal Shariat Court be also examined, and lastly it was maintained;

h. That the above mentioned points have been raised additionally for the reason that Article 203-DD of the Constitution stipulates that the Federal Shariat Court shall have such other jurisdiction as may be conferred on it by or under any law.

As stated above we made it clear to the learned counsel for petitioners as well as petitioner in Shariat Petition No.9/I of 2004 that this judgment will dispose of the questions enumerated in the consensus issues. Challenge to the other provisions will be taken up in appropriate proceedings at some other occasion if so required.

16. The Jurisconsult, in addition to the seven pages opinion expressed in the written comments, made the following submissions:-

(i) That the purpose of amending the *Hudood* Laws through Act VI of 2006 was only to deprive the Federal Shariat Court of its constitutional jurisdiction;

(ii) That the amendments introduced in *Hudood* laws are motivated by extraneous considerations;

(iii) That the Protection of Women Act, 2006 (Act No.VI of 2006) should be adjudged as being violative of the Injunctions of Islam;

(iv) That the scope of the term *Hudood* is wide enough to cover various categories of offences affecting human body, property, qazf, honour, including extra-marital activity and

(v) That the institution of Federal Shariat Court has not only to be preserved but strengthened with additional power.

17. After hearing contentions of the parties certain questions were posed. Raja Muqsit Nawaz Khan, Advocate and Syeda Viquar-un-Nisa Hashmi, Advocate as well as the representatives of the parties and the jurisconsult, in response to the questions posed by the Court on 26-10-2010 agreed that:-

i. Exclusive Jurisdiction conferred by constitutional provisions can neither be curtailed nor regulated by subordinate legislation;

ii. The determination of meaning and scope of the term *Hudood* as well as the exercise to identify the categories of offences and civil matters regarding the life of Muslims which fall in the ambit of *Hudood* is the sole preserve of Federal Shariat Court;

iii. All the matters connected with or the steps leading upto the commission of offences covered by *Hudood ipso facto* fall within the jurisdiction of the Federal Shariat Court;

iv. The Federal Shariat Court, as mandated by Article 203D of the Constitution, is the only forum to examine any law or provision of law or any custom or usage having the force of law on the touch stone of Injunctions of Islam; and

v. That adjudication upon bail matters in cases covered by *Hudood* is certainly ancillary to the trial, appellate and revisional jurisdiction and hence cognizable by Federal Shariat Court.

18. It may be mentioned here that the second round of arguments in this case was necessitated on account of the sudden demise of Justice Doctor Mahmood Ahmad Ghazi. The Bench was therefore reconstituted by the Hon'ble Chief Justice. Fresh notices were issued to the parties for 26-10-2010. The rehearing took place at the principle seat on 26.10.2010 and also on 23.11.2010. The parties recapitulated briefly the various arguments already advanced by them along with fresh input which has been duly noted for consideration.

SCOPE OF DISCUSSION

19. Before proceeding to discuss the consensus issue it may be reiterated that out of the four Shariat Petitions, linked with each other for disposal, Shariat Petition No.9/I of 2004 was delinked on the request of petitioner. It will be heard separately at some future date. The three remaining Shariat Petitions are being disposed of in this judgment only on matters enumerated in the consensus issues. Cognizance is not being taken of the other legal provisions agitated in these petitions. Questions beyond the consensus issues are being left with the consent of parties for a future date in appropriate proceedings as and when situation arises. I therefore proceed to analyze and discuss the issues framed with the consent of parties.

ISSUES No. (a, and c)
HUDOOD: MEANING AND SCOPE

20. Issues (a) and (c) relates to determination of the meaning and scope of the term *Hudood* and the nature as well as extent of the mandate contemplated in Article 203DD. The reason to formulate and discuss these

issues is evident from the text of Article 203 DD of the Constitution of Islamic Republic of Pakistan itself. The said Article reads as follows:-

> "(1) The Court may call for and examine the record of any case decided by any criminal court *under any law* relating to the enforcement of *Hudood* for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed by, and as to the regularity of any proceedings of, such court and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.
>
> (2) In any case the record of which has been called for by the Court, the Court may pass such order as it may deem fit and may enhance the sentence:
>
> Provided that nothing in this Article shall be deemed to authorize the Court to convert a finding of acquittal into one of conviction and no order under this Article shall be made to the prejudice of the accused unless he has had an opportunity of being heard in his own defence.

(3) The Court shall have such other jurisdiction as may be conferred on it by or under any law".

(Emphasis added)

21. An analysis of Article 203DD indicates that:

i. the Federal Shariat Court has *the exclusive jurisdiction to call for and examine* the record of;

ii. *any case decided* by any *criminal court under any law* relating to the *enforcement of Hudood*;

iii. for the purpose of satisfying itself as to the correctness, legality or propriety of any *finding, sentence or order* recorded or passed by and as to the regularity of any proceedings of such Court;

iv. the order under examination by the Federal Court or challenged before it may be in the nature of grant or refusal of bail by the trial Court;

v. and the Court may for that purpose *call for the record* of the case;

vi. while so doing the Court may *suspend execution* of the sentence;

vii. direct *release on bail* or on his own bond if the accused is in confinement pending examination of record; and further;

viii. the Federal Shariat Court may, as a result of examination of record *pass such order as it may deem fit;*

ix. *and may even enhance the sentence* subject of course, to notice.

22. It is therefore clear that the exclusive jurisdiction of the Federal Shariat Court, mandated by the Constitution, revolves around the term "the enforcement of *Hudood.*" For this reason we now proceed to discover the meaning and the scope of the term *Hadood* as well as *Tazir* as both the terms have throughout centuries been employed in the criminal administration of justice in Islamic polity.

23. The word "*Hudood*" is plural of the word *Hadd.* Literally *the word Hadd* means *prevention, impediment, barrier, bounds* and *limit.* In the Holy Quran this word has been used in a very wide sense covering various aspects of our mundane life. This word occurs a number of times in the sacred texts and with the passage of time it has acquired the status of a legal term particularly in the field of administration of criminal Justice. It is now a well recognized component of the chapter relating to crime and punishment in Islamic Jurisprudence. This term, in its essence, connotes Divine Injunctions which prescribe parameters for human action in certain spheres of life. These injunctions have consequently the effect of regulating

the areas of human choices and freedoms. There are zones of human activity where the lawgiver has allowed choice or what may be termed as freedom of action to human beings and in other places the addressee of the commandment i.e, the obligee is required to strictly follow the mandated provision.

24. The term *Hudood* finds mention in fourteen different *Ayaat* of Holy Quran. These *Ayaat* identify multifaceted aspects of our mundane existence. In order, therefore, to fully grasp the significance of the term *Hudood*, it will be instructive to examine the said 14 *Ayaat* of Holy Quran as well as the sayings of the Holy Prophet, PBUH, on the subject The translation of the related text, from both the sources, is being detailed below for a proper appreciation of the meaning and scope of the term *Hudood*. Part A below refers to Injunctions of Holy Quran while Part B thereafter pertains to the traditions of Holy Prophet (PBUH). Discussion on the meaning and scope of the term *Hudood* will be undertaken thereafter in

Part C entitled *HUDOOD AND TAZIR* while concluding deliberation on these issues.

PART -A

QURANIC INJUNCTIONS

25. Ayah 187 Surah 2 (al-Baqrah) Holy Quran:

> "It has been made lawful for you to go in to your wives during the night of the fast. They are your garment, and you are theirs. Allah knows that you used to betray yourselves and He mercifully relented and pardoned you. So you may now associate intimately with your wives and benefit from the enjoyment Allah has made lawful for you, and eat and drink at night until you can discern the white streak of dawn against the blackness of the night; then (give up all that and) complete your fasting until night sets in. But do not associate intimately with your wives during the period when you are on retreat in the mosques. These are the (Hudood Allah) *bounds set by Allah;* do not, then, even draw near them. Thus does Allah make His Signs clear to mankind that they may stay away from evil."

Ayah 229 *Surah* 2 *(Al-Baqrah)* of Holy Quran. The term *Hudood* has been employed four times in this *Ayat*:

> "Divorce can be pronounced twice: then, either honourable retention or kindly release should follow. (While dissolving the marriage tie) it is unlawful for you to take back anything of what you have given to

your wives unless both fear that they may not be able *to keep within the bounds set by Allah.* Then, if they fear that they might not be able to keep *within the bounds set by Allah,* there is no blame upon them for what the wife might give away of her property to become released from the marriage tie. These *are the bounds set by Allah*; do not transgress them. Those of you who transgress the *bounds set by Allah* are indeed the wrong-doers."

iii. *Ayah* 230 *Surah* 2 *(Al-Baqarah)* of Holy Quran. The term *Hudood* has been used twice here:

"Then, if he divorce her (for the third time, after having pronounced the divorce twice), she shall not be lawful to him unless she first takes another man for a husband, and he divorces her. There is no blame upon them if both of them return to one another thereafter, provided they think that they will be able *to keep within the bounds set by Allah.* These *are the bounds of Allah* which He makes clear to a people who have knowledge (of the consequences of violating those bounds)".

iv. *Ayaat* 1 through 12, 13 and 14 *Surah* 4 *(An-Nisa)* of Holy Quran:

Ayaat 1 through 12 deal with:

a) equality of human beings;

b) handing over of property to orphans;

c) marriage with orphan girls;

d) mandatory bridal gift;

e) guardianship of mentally efficient persons;

f) inheritance shares and division of estate;

g) *Zihar* and Divorce.

"These *are the bounds set by Allah.* Allah will make him who obeys Allah and His Messenger enter the Gardens beneath which rivers flow. He will abide there for ever. That is the mighty triumph."

"And he who disobeys Allah and His Messenger and transgresses *the bounds set by Him* - him shall Allah cause to enter the Fire. There he will abide. A humiliating chastisement awaits him."

v. *Ayah* 97 *Surah* 9 *(At-Taubah)* of Holy Quran:

"The Bedouin Arabs surpass all in unbelief and hypocrisy and are most likely to be un-aware *of the limits prescribed by Allah* in what He has revealed to His Messenger. Allah is All-knowing, All-Wise."

vi. *Ayah* 112 *Surah* 9 *(At-Taubah)* of Holy Quran:

"Those who constantly turn to Allah in repentance, who constantly worship Him, who celebrate His praise, who go about the world to serve His cause, prostrate themselves before Him, who enjoin what is good and forbid what is evil, and who keep *the limits set by Allah.* Announce glad tidings to such believers."

vii. *Ayah* 4 *Surah* 58 *(Al-Mujadalah)* of Holy Quran:

> "And he who does not find a slave (to free),shall fast for two months consecutively before they may touch each other, and he who is unable to do so shall feed sixty needy people. All this is in order that you may truly believe in Allah and His Messenger. *These are the bounds set by Allah;* and a grievous chastisement awaits the unbelievers."

viii. *Ayah* 1 *Surah* 65 (*At-Talaq*) of Holy Quran. The term Hudood has been used twice in this *Ayah*:

> "O Prophet, when you divorce women, divorce them for their waiting-period, and compute the waiting period accurately, and hold Allah, your Lord, in awe. Do not turn them out of their homes (during the waiting period) nor should they go away (from their homes) - unless they have committed a manifestly evil deed. *Such are the bounds set by Allah;* and he who *transgresses the bounds set by Allah* commits a wrong against himself. You do not know: may be Allah will cause something to happen to pave the way (for reconciliation)."

26. In the above mentioned *Nusoos* of Holy Quran, the term *Hudood* has been clearly and explicitly used in the sense of commandments or injunctions ordained by Allah. These injunctions have to be enforced in a Muslim society. The significant thing to be noted is that the term *Hudood* stands doubly sanctified because it has been specifically termed as

Hudood- Allah. It signifies that these limits have been prescribed by Allah. This is a reminder in the peculiar style of Holy Quran because as Creator of human specie He has honoured every human being with valuable freedoms which according to His Command have to be protected in the larger interests of human welfare, amity and peaceful social conditions. Though the entire Holy Quran is, no doubt, a revelation from Allah, yet the reason for relating this particular term to *His Own Self* was to make it emphatically clear, particularly to the agencies assigned the task of promulgation and implementation of laws and administration of justice, that utmost care has to be observed in matters relating to adjudication of human rights in an Islamic society because any violation of these rights would be tantamount to transgressing the limits prescribed by sacred texts. It is in this sense that the protect of human rights has to be appreciated because violation thereof has been made cognizable as *Hudood* offences by Holy Quran.

27. *Ayah* 103 *Surah* 10, Younas, of Holy Quran contains a Divine Commitment that *Allah will save the believers* but at the same time *Ayah* No.95 of the same *Surah* warns the believers *not to be among those who defy the Ordinances of Allah because such rejecters shall be losers in the end*. This is what is repeated in *Ayah* 47 *Surah* 30, *Ar-Rum* of Holy Quran which declares that *Allah shall help the believers* but this Divine indulgence is subject to their obedience and compliance with Injunctions of Islam. *Ayah* 182 Surah, *Al-Aaraf*, repeats the warning in the following words:

> "We lead them (the rejecters of Divine Commandments) step by step to an end (whose condition they know not)"

It is pertinent to refer to yet another principle enunciated in *Ayah* 42 *Surah* 8, *Al-Infaal,* of Holy Quran. This is a principle of universal significance. It states:-

> "That who perished might perish by a clear proof and he who survives might survive by a clear proof."

PART-B

SUNNAH OF HOLY PROPHET PBUH

28. Detailed below are the traditions of the Holy Prophet (PBUH) wherein the term *Hadood* finds mention:

i. "مَا كُنْتُ لِأُقِيمَ حَدًّا عَلَى أَحَدٍ فَيَمُوتَ فَأَجِدَ فِي نَفْسِي إِلَّا صَاحِبَ الْخَمْرِ "

(I would not feel sorry for one who dies because of *receiving a legal punishment,* except the drunk.)(Sahih al Bukhari, Kitab al Hudood,Vol. VIII, Hadith No. 769)

ii. "أَنَّهُمْ كَانُوا يُقِيمُونَ الْحَدَّ عَلَى الْوَضِيعِ وَيَتْرُكُونَ الشَّرِيفَ"

(They used to *inflict the legal punishments* on the poor and forgive the rich)
Sahih al Bukhari, *Kitab al Hudood*, Vol. VIII, Hadith No. 778. Traditions No.1916,1917 volume 2 Sahih Muslim report the same tradition on the authority of other companions. Tradition No.967 volume 3 Sunan Abdu Daud also narrates on the authority of another companion.

iii. "أَتَشْفَعُ فِي حَدٍّ مِنْ حُدُودِ اللَّهِ"

(Do you intercede (with me) to violate one of the *legal punishment of Allah.)*
(Sahih al Bukhari, Kitab al Hudood,Vol. VIII, Hadith No. 779)

iv. كُنْتُ عِنْدَ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فَجَاءَهُ رَجُلٌ فَقَالَ يَا رَسُولَ اللَّهِ إِنِّي أَصَبْتُ حَدًّا فَأَقِمْهُ عَلَيَّ

("O Allah's Apostle! I have *committed a legally punishable sin* please inflict the legal punishmen on me.) Sahih al Bukhari, Kitab al Hudood,Vol. VIII, Hadith No. 812)

v. كَانَ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَقُولُ لَا يُجْلَدُ فَوْقَ عَشْرِ جَلَدَاتٍ إِلَّا فِي حَدٍّ مِنْ حُدُودِ اللَّهِ

(Nobody should be flogged more than ten stripes except if *he is guilty of a crime the legal punishment of which is assigned by Allah.)* Sahih al Bukhari, Kitab al Hudood,Vol. VIII, Hadith No. 831)

vi. "لَا عُقُوبَةَ فَوْقَ عَشْرِ ضَرَبَاتٍ إِلَّا فِي حَدٍّ مِنْ حُدُودِ اللَّهِ"

(No punishment exceeds the flogging of the ten stripes except if one is *guilty of a crime involving a legal punishment prescribed by Allah.)* (Sahih al Bukhari, Kitab al Hudood,Vol. VIII, Hadith No. 832)

iv. لَا تَجْلِدُوا فَوْقَ عَشَرَةِ أَسْوَاطٍ إِلَّا فِي حَدٍّ مِنْ حُدُودِ اللَّهِ

("Do not flog anyone more than ten stripes except if *he is involved in a crime involving Allah's legal punishment.")* (Sahih al Bukhari, Kitab al Hudood,Vol. VIII, Hadith No. 833, 1744, 1745 and 1746. This tradition has also been reported at serial No.1966 volume 2, Sahih Muslim. Tradition No.1078 volume 3 Abu Daud has also narrated on the authority of other companions.)

viii. Traditions No.969 and 970 Sunan Abu Daud are to the effect that faults of good people may be forgiven except *Hudood*; and

ix. Tradition No.1976 volume 3 Sunan Abu Daud contains the commandment that *Hadd* punishment be not inflicted in Mosques.

29. The scope of *Hudood* is the prohibitions imposed by Allah or His Apostle PBUH. The sanctity attached to Divine prohibition is best illustrated by the following tradition recorded in Sahih Muslim in Kitab-ul-Masoqat, Bab Akhz ul Halal wa Tarkat Shubahat, contains the following Tradition.

حَدَّثَنَا مُحَمَّدُ بْنُ عَبْدِ اللَّهِ بْنِ نُمَيْرٍ الْهَمْدَانِيُّ حَدَّثَنَا أَبِي حَدَّثَنَا زَكَرِيَّاءُ عَنِ الشَّعْبِيِّ عَنِ النُّعْمَانِ بْنِ بَشِيرٍ قَالَ سَمِعْتُهُ يَقُولُ سَمِعْتُ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَقُولُ وَأَهْوَى النُّعْمَانُ بِإِصْبَعَيْهِ إِلَى أُذُنَيْهِ إِنَّ الْحَلَالَ بَيِّنٌ وَإِنَّ الْحَرَامَ بَيِّنٌ وَبَيْنَهُمَا

مُشْتَبِهَاتٌ لا يَعْلَمُهُنَّ كَثِيرٌ مِنْ النَّاسِ فَمَنْ اتَّقَى الشُّبُهَاتِ اسْتَبْرَأَ لِدِينِهِ وَعِرْضِهِ وَمَنْ وَقَعَ فِي الشُّبُهَاتِ وَقَعَ فِي الْحَرَامِ كَالرَّاعِي يَرْعَى حَوْلَ الْحِمَى يُوشِكُ أَنْ يَرْتَعَ فِيهِ، أَلا وَإِنَّ لِكُلِّ مَلِكٍ حِمًى أَلا وَإِنَّ حِمَى اللَّهِ مَحَارِمُهُ أَلا وَإِنَّ فِي الْجَسَدِ مُضْغَةً إِذَا صَلَحَتْ صَلَحَ الْجَسَدُ كُلُّهُ وَإِذَا فَسَدَتْ فَسَدَ الْجَسَدُ كُلُّهُ أَلا وَهِيَ الْقَلْبُ –

(صحیح مسلم:جلد دوم:حدیث نمبر 1600)

(Nu'man b. Bashir (Allah be pleased with him) repo ted: I heard Allah's Messenger (May peace b upon him) as l aving said this (and Nu'man pointed towards his ears w th his fingers): what is lawful is evident and what is unla vful is evident, and in between them are the things dc ubtful which many people do not know. So he who guards a gainst doubtful things keeps his religion and honour blar ieless, and he who indulges in doubtful things indulges in fact in unlawful things, just as shepherd who pastures his a imals round a preserve will soon pasture them in it. **Be ware, every king has a pasture (preserve) and the p asture (exclusive domain) of Allah is His Ordina ce of prohibition.** Beware, in the body there is a piece c f flesh; if it is sound, the whole body is sound, and if it is c orrupt the whole body is corrupt, and hearken it is the hea t.

PART C

HUDOOD AND TAZIR

30. The term *Hadd* and its plural *Hudood,* as used in th e above mentioned traditions of the Prophet of Islam (PBUH), indicates th at it has been employed in the sense of punishment prescribed by the Mess enger of

Allah (PBUH). The essence of the well known Hadith of the Holy Prophet (PBUH) reported in Sahih Bukhari, and other authorities is that:

> "Earlier nations had perished simply because punishment *(Hadd)* was imposed only when a lowly commoner had committed a crime but influential persons were spared the agony of punishment."

In this Hadith, the term *Hadd* very clearly refers to the general punishments for different categories of offences. This aspect establishes, in turn, that the word *Hadd* in the administration of criminal justice in an Islamic society includes (any) specific punishment awarded or prescribed under or in pursuance of an Injunction of Holy Quran or Sunnah. It may be profitable to refer to a Tradition quoted by Hazrat Umar R.A. recorded by Muslim as Hadith No.269 in *Kitab Salat ul Musafareen wus Qasarha.* According to this report many nations were exalted because they followed the ordinances prescribed in the Book while many nations perished on account of non-observance of Divine edicts.

21. The Muslim jurists, during the period when the judicial system was evolving in the light of and on the foundation of the teachings of

Islam, deemed it expedient to classify punishments on the basis of *proof and the nature of proof for* proper and effective administration of justice. This reasoning was based upon sacred text because Holy Quran in addition to prescribing penalty also made reference to the nature of proof. This classification provided guidelines to the judges who were assigned the task of holding trials of different kinds of offences. These offences entailed punishments prescribed by Holy Quran, *Sunnah,* as well as any punishment *prescribed by State in matters related with Hudood* or ancillary or akin thereto. The first category was called *Hadd* par excellence, while the latter came to be known as *Tazir*. The purpose of assigning a new title to the latter category of punishment was only to emphasize the standard and immutable nature of the punishments under the title *Hudood,* as ordained by Holy Quran and Sunnah.

32. This classification of punishments into *Hadd* and *Tazir* was made primarily for pedagogical purposes. This classification was never meant to be taken to limit the wider scope of the term *Hudood*. The *Sunnah*

provides ample evidence to establish the broad space the term *Hadd* commands, as is evident also from the sayings of the Holy Prophet (PBUH) quoted in Part-B supra. This classification of punishments into *Hadd* and *Tazir* cannot be separated administratively or dissociated at academic level. This is because punishments are interrelated and provisions dealing with one crime and its consequent punishment is dove-tailed with other punishments related to the same matter or same transaction. A person may be found guilty of multiple crimes in the same episode. Similarly if the standard of proof required in a particular category of offence is not forthcoming but the facts and circumstances of the case are a conclusive pointer towards the guilt of the accused, then punishment by way of *tazir* in a matter relating to *Hudood* or akin thereto may be awarded. In such a situation it is not practicable to remand the case for a fresh trial to a court specially created only to award *Tazir* punishment. Similarly it would be futile to prosecute an accused under parallel laws in separate jurisdictions or under two parallel systems. This is neither judicially viable nor is it in

the interest of justice. Such a thing would work to the serious disadvantage of accused and would certainly be a source of delay, irritation, unnecessary embarrassment as well as uncalled for harassment for the accused. The witnesses for the prosecution will suffer equally on account of multiple litigation. This methodology of altering the finding while maintaining or reducing the sentence is now a universally recognized principle which finds mention in the criminal jurisprudence of Pakistan in the shape of sections 423(i) and 439 of the Code of Criminal Procedure.

33. It will thus be appreciated that it is because of sanctity of human body that punishment is inflicted only when transgression takes place. Islam therefore proposes punishments in certain cases to set a precedent that whenever a penalty is to be proposed in future, in the uncovered field, it must have legal sanction i.e, it must be prescribed by an authority competent to impose the punishment. It is in this situation that the penalty can become a legal punishment which in turn will be covered by

the term *Hadd/Hudood*. Reference the principle of *Hablin minum Nass* as enunciated in *Ayat* 112 *Sura* 3, Ale-Imran of Holy Quran.

34. This explains the reason why the jurists enlisted a limited category of offences within the scope of the term *Hadood*. It is meaningful to note that the chapters dealing with *Hudood* in the juristic literature relating to *Hadith and Fiqh* do not deal exclusively with offences whose punishment has been fixed by Holy Quran, Sunnah or Consensus. The unequivocal mass of traditions and consequent legal opinion of jurists as well as the judge made law, spread over centuries, deal with all kinds of punishments whether ordained by Holy Quran, Sunnah, Ijma or enforced by temporal authority through the instrument of State, judicial hierarchy and legal experts. It is therefore abundantly clear that any federal or provincial law which authorizes any court, other than Federal Shariat Court, to exercise appellate/revisional jurisdiction in matters relating to or akin to *Hudood* would be violative of Article 203DD of the Constitution and every decision or order passed by such a court would be *coram non*

judice. The term *tazir*, whenever applied in relation to the offences which partake of *Hudood* offences or are analogous to or auxiliary or supplementary to *Hudood* offences would also be covered within the scope and definition of *Hudood*. The reason is obvious: Had the requisite evidence, prescribed for *Hadd*, been made available to the prosecution in relation to a matter which, for some reason, has to be treated as a *tazir* case or in another situation had the impugned action been completed, that would have certainly been dealt with and punished as a *Hadd* case.

35. I am consequently of the considered view that all those acts, preparatory or otherwise, which contribute towards the commission of a *Hadd* crime, for which specific punishment has not been provided in Shariah, also becomes cognizable as a *Hadd* offence. All tributary streams leading to the reservoir of *Haraam* have been plugged by Islam. The term *La Taqrabu* i.e. *donot even go near:* has been used by Holy Quran at number of places in relation to *Hudood*. *Ayat* 15 *Sura* 6, *Al-Anam* says:

> And do not even draw near *Al-Fawahish* (the shameful things) be they open or secret.

All extra-marital sexual relationships, sodomy, nudity, false accusations of unchastity, and taking a woman as a wife who had been married to one's father, are specifically reckoned as "shameful deeds." According to *Hadith,* theft, taking intoxicating drinks and begging have been characterized as *Fawahish,* like several other brazenly indecent acts. Man is required to abstain from them both openly and in secret *Ayat* 32 *Sura* 17, *Bani Israeel* may also be perused in this context:

> *Do not even approach* Fornication for it is an outrageous act, and an evil way.

Ayah 43, *Surah* 4, *An-Nisa* directs the believers not to draw near to the Prayer while they are intoxicated.

36. The words used in Article 203 DD are: "relating to the enforcement of *Hudood.*" Like the words "in respect of" or "with reference to" employed in some statutes, these words have a wider meaning and connotation. The words "relating to" includes all those matters which pertain to the realm of preparation, intention, attempt and all conceivable steps taken towards the commission of an offence. Such steps and actions on fulfillment, have the potential of being covered by the penalty of

Hudood if the requisite evidence, prescribed for proof of *Hadd,* is made available. Short of that proof the action complained of becomes punishable as *tazir* for an offence which is of the specie of *Hadd. Tazir* punishment is in lieu of *Hadd* and is not the consequence of a separate category of offence.

37. The basic reason for retaining the offence of fornication etc in the *Hudood* laws of 1979 was that *Tazir* as punishment is invariably awarded in such cases because the proof in these offences depends either upon circumstantial evidence or upon production of less than four adult male Muslim witnesses without undergoing the process of *Tazkia al Shahood.* Such an eventuality presupposes that the case is either of the category of circumstantial evidence or less than the required oral testimony. There may be no direct evidence which however would not be conclusive proof that the offence of *Zina* had not taken place. It is the mode and manner of proof of the offence alone that determines whether the *punishment* has to be awarded as *Hadd* or *Tazir.* An occurrence of rape, brought to the notice of the Holy Prophet PBUH, was decided on the solitary statement of the victim and the punishment provided for *Hadd* was awarded even though the case fell clearly under the category what we now call *Tazir.* It therefore follows that whether it is a case of consensual extra-

marital sexual activity, or rape or incestuous adultery or any related pursuit ancillary and akin to or leading upto extra-marital sexual activity the investigation, enquiry or trial of such a matter is covered within the scope of the term *enforcement of Hadd* and hence in the exclusive jurisdiction of Federal Shariat Court.

38. A legal instrument which bars a court from taking cognizance of offences or hearing appeals and revisions not only affects the jurisdiction of the court but seriously jeopardizes the fundamental right of an aggrieved person to have access and recourse to speedy justice. Jurisdiction conferred by a constitutional provision cannot be erased by ordinary piece of legislation. It is an accepted principle of law that jurisdiction of superior court cannot be taken away except by express words. In particular a jurisdiction or power conferred by constitutional apparatus can be taken away only through an express constitutional amendment and nothing short of that. An ordinary statute cannot take away powers of a superior court conferred by Constitution. Such a statute is ex-facie discriminatory.

39. On the civil side the term *Hudood* includes

a) Marital life,

b) the mandatory bridal gift commonly known in our country as *Haq-e-Mehr*.

c) Inheritance,

d) Guardianship of person and property of minors and persons with defective legal capacity,

e) Marriages (in particular polygamy),

f) Divorce including *Khula* and *Ziher* and

g) Inheritance.

From amongst these matters we have taken suo moto notice only of sections 5, 14 and 25A of West Pakistan Family Court Act, 1964 as well as section 29 of Act VI of 2006 whereby new clause *vii a, lian* has been added in section 2 of the Dissolution of Muslim Marriages Act, 1939.

40. In this view of the matter it is being held that those offences, whose punishment was either prescribed or left undetermined but it relates to acts forbidden or made cognizable by Holy Quran, Sunnah, Consensus or by subsequent legislative instruments including all those acts which according to the Statute Book of Pakistan are akin, auxiliary, analogous or supplementary to or germane with *Hudood* offences including preparation or abetment or attempt to commit such offences, would, without fail, fall within the meaning and scope of the term *Hudood*. Proceeding arising out

of a private complainant, crime report registered with police as FIR, information laid before a Magistrate by a person other than a police officer or upon its motion by a judicial officer or judicial proceedings arising out of an interim order or final verdict of acquittal or conviction in relation to an offence covered by the term *Hudood*, whether in the form of an appeal, revision or reference, would fall within the jurisdiction of Federal Shariat Court. The category of offences that are covered by the term *Hudood* will be determined in detail while discussing issue (h) in this judgment. It may be stated here that the fact that legislation in Muslim societies in the uncovered field has been made permissible as is evident from the principle ***Hablin Min un Naas*** enunciated in *Ayat* 112 of *Sura* 3 ***Ale Imran***. The word Habal does not only mean **rope** but it also means **Command** and **mandate.** The State is therefore competent to promulgate laws to implement and enforce Injunctions of Islam.

ISSUE No. (d)

OVERRIDING CLAUSES OMITTED

41. Section 11 of Act VI of 2006 has omitted section 3 of Ordinance VII of 1979. Section 3 before repeal read as follows:-

3. **Ordinance to override other Laws.**---The provisi n of this Ordinance shall have effect notwithstanding anyt ing contained in any other law for the time being in force."

Section 28 of the said Act has omitted the similar text contained in se tion 19 of Ordinance VIII of 1979. Both the omitted sections had given overriding effect to the provisions of Ordinances VII and VIII of 979. These were *Non-obstante* clauses which had created exceptions. This protective cover to the *Hudood* laws of 1979 was further strengthen d by Chapter 3A part VII of the Constitution which had introduced Articl 203-A in the Constitution from 26th May, 1980. Thereafter Article 203-DD in the present form, was incorporated in the *Constitution* in the year 1982. Section 3 and section 19 of the said two *Hadood* Ordinances thus ac uired constitutional protection which could not have been repealed/omit ed or even amended by Act VI of 2006. Moreover the effect of sections 1 and 28 of *the Act* is to curtail the constitutional jurisdiction guarant ed in Article 203-DD of the Constitution and this step cannot be egally undertaken through ordinary legislation. The effect of constit itional protection can be altered only through constitutional amendment and not otherwise. As a result thereof the introduction of sections 11 and 2 of *the Act* is an unwarranted inroad in the legislative domain and conse quently

an unlawful interference in the enforcement of *Hudood*. Hence it is being held to be repugnant to the Constitution as well as Injunctions of Islam. Section 3 of Ordinance VII of 1979 and section 19 of Ordinance VIII of 1979 shall be deemed not to have been repealed and are hereby declared as valid and essential part of the two *Hudood* laws.

ISSUE NO. (e)
JURISDICITON IN BAIL MATTERS

42. Bail matters in *Hudood* cases, during investigation or during trial, are initially decided by the Court of Sessions which is seized of the matter. An order granting or refusing bail was, as per practice after 1980, challenged before the High Courts. The reason for not moving the Federal Shariat Court, the Court which had appellate and revisional jurisdiction in all *Hudood* cases, was the existence of a judgment delivered by a learned single judge of the Lahore High Court in the case of *Muhammad Rafiq and others Versus The State, PLD 1980 Lahore 708* at page 718 wherein the extent of jurisdiction of the High Court under Section 498 Cr.P.C. in matters relating to *Hudood* offence was discussed. It was held that jurisdiction of the High court was not ousted by any specific provision or by necessary intendment. The learned single judge had essentially

relied upon the erstwhile text of Article 203-DD of the Constitution which, on 8th September 1980 i.e., the date of announcement of the said High Court single judge judgment, was to the following effect:

> "The Court shall have such other jurisdiction as may be conferred on it by or under any law."

This Article was, however, substantially amended subsequently. The amended text, reproduced in an earlier paragraph of this judgment, was introduced in the Constitution with effect from 22nd March 1982 by virtue of Constitution (Second Amendment) Presidential Order No.5 of 1982 whereby the above-mentioned original text of Article 203DD was retained as clause three in the amended Article 203DD. Consequently this precedent, on account of the said constitutional amendment of a later date lost its relevance as from 22nd March, 1982. The case of Muhammad Rafique, supra, ought to have been revisited in the light of the constitutional amendment. It was not done. Anyhow it is being over-ruled now to make thing clear. The ouster of jurisdiction particularly of a superior court has to be stated in very clear terms. The jurisdiction vesting in a court by virtue of constitutional provisions undoubtedly stands at a higher level. It cannot be curtailed by routine

legislation. Moreover the constitutional bar mandated by Article 203G of the constitution needs careful consideration. According to this Article "*no court or tribunal including the Supreme Court and a High Court, shall entertain any proceedings or exercise any power or jurisdiction in respect of any matter within the powers or jurisdiction of the court*". The word used in this Article is "*proceedings*". This word has been interpreted in the case of Zahoor Elahi Versus State PLD 1977 SC 273 wherein it was held that "*proceedings*" do not mean proceedings which have already been concluded. The word "*proceedings*" includes all matters connected with or ancillary to the trial of a person charged before a special tribunal including the matters relating to grant of bail. It was further found that when "*proceedings*" conclude, they result in an "order" or "sentence". In this context it is worth mentioning that Article 203DD has employed the following four words:

a) finding,
b) sentence,
c) order and
d) proceedings.

The word *order* includes both final and interlocutory order (p.310 of the said report). Since an order, whether final or otherwise, of the

Sessions Court, trying a *Hudood* matter, can be challenged under constitutional provision before the Federal Shariat Court alone, the remedy to move the Federal Shariat Court by way of appeal was consequently made available under *Hudood* laws to a person aggrieved of an order of trial court. He could file an appeal against final order and a revision in certain other matters before the Federal Shariat Court because the Sessions Court was holding or had held the trial relating to *Hudood* offence. It may be profitable also to refer again to page 313 of the said report wherein it was held that the jurisdiction conferred upon the courts by constitution overrides all laws. Reliance was placed on the case of Malik Ghulam Jilani Versus Government of Pakistan PLD 1967 Supreme Court 373 and Government of Pakistan Versus Begum Agha Abdul Karim Shorish Kashmiri PLD 1969 SC 14. It can therefore be rightfully stated that the power exercised by the Federal Shariat Court under the constitution overrides all laws. Article 203A states that the provisions of Chapter 3A of Part VII of Constitution *shall have effect notwithstanding anything contained even in the Constitution.*

43. The matter of bail is related with the offence. Bail is applied for by an accused only when an offence is alleged to have been committed. If an offence is covered by *Hudood* the trial takes place under the law relating to *Hudood.* The appeal or revision in such proceedings is therefore within the cognizance of Shariat Court. The order of grant or refusal to grant in such offence is therefore part of *proceedings* of trial of *Hudood* cases and hence cognizable by Federal Shariat Court alone.

44. As a consequence of what has been stated above issue (e) is answered in the negative. The result of the discussion is that an order on an application for grant or refusal of bail by trial court in all categories of offences within the ambit of *Hudood* is covered by the term *proceedings,* as employed in Article 203 DD and hence within the scope of the term *"any case", "any criminal court"* and *"under any law"* and therefore can be impugned only before the Federal Shariat Court which has the exclusive jurisdiction in all sorts of matters related with enforcement of *Hudood.* No other court, including a High Court, will, in future, entertain proceeding relating to bail in offences covered by the term *Hudood.*

ISSUE NO.(f)
STATUS OF ACT XXV OF 1997

45. Sections 9, 48, 49 and 51 of the Control of Narcotic Substances Act, 1997 (Act XXV of 1997) are also under consideration of this Court. The reason for examining these provisions is because of the fact that cultivation of narcotic plants or possession, sale, purchase, use, import, export, and manufacture of narcotics is covered by the term *Hudood* as all categories of intoxicants are prohibited on account of Injunctions of Islam. A larger Bench of this Court in the case of Muhammad Aslam Khakhi vs. Federation of Pakistan PLD 2010 FSC 191 at page 205 (Paragraphs 18 and 19) held as under:

> "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 (PBUH) extended the prohibition of wine etc. to all intoxicants, in any form*. In this regard we find innumerable categorical statements from the Prophet (PBUH) mentioned in so many Traditions. (See Bukari, 'Wudu', 71 'Maghazi', 60, 'Ashribah', 4, 10, 'Adab', 8, 'Ahkam', 22, Muslim, 'Ashribah' 67-9; Abu Daud, 'Ashribah', 5, 71; Ibn Majah, 'Ashribah', 9, 13, 14; Darimi, 'Ashribah', 8,9; Muwatta", 'Dahayat',

8: Ahmed 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 2?6-Ed). (Emphasis added)

As stated above, the Prophet (PBUH) further enunciated the following principles:

a. whatever causes intoxication when used in large quantity is prohibited, even in a small (sic).
b. If a large quantity of something causes intox cation, to drink even a palmful of it is prohibited; (See Abu Daud, 'Ashribah', 5; Ibn Majah, Ashribah;, 10; Ahmed B. Hambal, Musnad, Vol. 2, pp.167, 179 and Vol.3, p. 343-Ed)."

Section 2(s) and (t) of Act XXV of 1997 defines "narcotic drug" and "opium." Section 4 through section 9 as well as setions 48, 49 and 51 of this Act make provision as follows:-

i. Section 4: Prohibition of cultivation of narcotic plants;
ii. Section 5: Punishment for contravention of section 4;
iii. Section 6: Prohibition of Possession of narcotic drugs etc.
iv. Section 7: Prohibition of import or export of narcotic drugs etc.
v. Section 8: Prohibition on trafficking or financing the trafficking of narcotic drugs etc.
vi. Section 9: Punishment for contravention of Section 6, 7 and 8:
vii. Section 48: Appeal;
viii. Section 49: Transfer of cases;

ix. Section 51: No bail to be granted in respect of certain offences;

Section 48 states that an appeal against the order of a Special Court comprising a Sessions Judge or an Additional Sessions Judge shall lie to the High Court whereas section 49 *ibid* confers the power to transfer (within its territorial jurisdiction) a case from one Special Court to another Special Court. It has already been held in this judgment exclusive jurisdiction was conferred upon Federal Shariat Court in all matters relating to enforcement of *Hudood under Article* 203 DI of the Constitution. Chapter 3A in part VII of the Constitution relates to the Federal Shariat Court. The first Article of this Chapter is *non obstante* in nature. Article 203G states that "no court or tribunal including Supreme Court and a High Court shall entertain any proceedings or exercise any power or jurisdiction in respect of any matter within the power or jurisdiction in respect of any matter within the power or jurisdiction of the Court."

46. Section 48 *ibid* provides that an appeal against conviction by a Special Court would lie in the High Court. But offences relating to narcotics/intoxicants falls within the ambit of *Hudood*. This is an anomalous position and not capable of rational justification. This

incongruous aspect is well illustrated in the case of Muhammad Boota etc. versus The State 2002 SD 887, decided by a Division Bench of the Lahore High Court on an appeal against conviction recorded by Special Court Sargodha constituted under the Anti-Terrorism Act, 1997 when the charge framed was for abduction and *Zina bil Jabr* under section 10(4) read with section 11 of Offence of Zina (Enforcement of Hudood) Ordinance, VII 1979. The offences in this case are obviously related to *Hudood* but the appeal against the final judgment delivered by Special Court ATA, Sargodha was moved before the High Court under section 25 of Anti Terrorism Act, 1997. The appeal had in-fact to be filed before the Federal Shariat Court because Constitution has conferred exclusive jurisdiction upon Federal Shariat Court in all *Hudood* related offense. The Federal Government, however in exercise of it power under section 34 of Act XXVII of 1997, amended the Schedule vide Notification No.SRO 663(i)/97 dated 21.8.1997 and brought certain *Hudood* offences within the jurisdiction of the Special Court without corresponding amendment in section 25 of Act XXVII of 1997 by adding a proviso that appeals in *Hudood* matters would lie before the Federal Shariat Court. This omission violated the constitutional provision contained in Article 203DD. In this view of the matter it becomes crystal

clear that the offences relating to narcotic drugs are within the purview of *Hudood* and consequently an order, final or interim including grant or refusal of bail, passed by any court, special or ordinary, under any law, regarding an offence relating to *Hudood* is within the jurisdiction of the Federal Shariat Court and no other court, including a High Court, has the power to entertain bail matter or an appeal or revision in any such matter. Consequently the text of sections 48 and 49 of Act XXV of 1997 has now to be suitably amended to restore jurisdiction of Federal Shariat Court in matters relating to enforcement of *Hudood*. No legal instrument, other than constitutional amendment, as stated earlier, can limit or ignore the exclusive jurisdiction of Federal Shariat Court mandated under Article 203 DD of the Constitution. Similarly if an offence of the nature of *Hudood* is tried under Anti Terrorism Act, 1997 (Act No. XXVII of 1997) the appeal in all such cases under section 25 of Act XXVII of 1997 or for that matter bail under section 21D *ibid* shall lie before the Federal Shariat Court and not a High Court. Consequently the following two steps will have to be taken to set the matter right:

a. words Federal Shariat shall be substituted for the words High Court occurring in Sections 48(i) and 49(i) of Control of Narcotic Substance Act, 1997 (Act XXV of 1997) and

b. a rider will have to be put in section 25 of the Anti-Terrrorism Act, 1997 (Act XXVII of 1997) to state that appeal in cases relating to *Hudood* shall lie to the Federal Shariat Court. Any order, interim or final, passed by a Terrorist Court constituted under Act XXVII of 1997, in relation to a *Hadd* offence, shall be appealable or revisable only before the Federal Shariat Court. The wordings of section 25 Act XXVII of 1997 should be suitably amended to make it clear that a High Court shall have jurisdiction in all cases under the Act except *Hudood* matters. The above findings shall become operative after the specified period. The basic reason is that no legal instrument other than a Constitutional provision can limit the jurisdiction of Federal Shariat Court

47. In this view of the matter and for reasons recorded under Issues (a) through (d) as well, this issue is answered in the affirmative. Sections 48 and 49 of Act XXV of 1997 and section 25 of Act XXVII of 1997 are hereby held to be violative of Article 203DD to the extent that the jurisdiction of the Federal Shariat Court is ousted in

matters relating to grant of bail or hearing appeals or ordering transfer of cases from one court to another court in cases registered or charged with *Hudood* offences.

ISSUE NO.(g)

LIAN

48. Section 25 of *the Act* has repealed sub-sections (3) and (4) of section 14, Ordinance VIII of 1979 and section 28 of *the Act* adds clause *(vii a) Lian* in section 2 of the Dissolution of Muslim Marriages Act, 1939. Both the interpolations have altered the legal composition of the institution of *Lian* which developed on the basis of express injunctions of Holy Quran contained in *Ayaat* 4 through 9 of Surah 24, An-Nur. Section 14 of Ordinance VIII of 1979 had in fact given legislative effect to an Injunction of Islam. The effect of repealing sub sections (3) and (4) of Section 14 of Ordinance VIII of 1979 is to stifle the operation of an Injunctions of Holy Quran relating to the enforcement of *Hudood* which is not only repugnant to the injunctions contained *Ayaat* 44, 45 and 47 of *Surah* 5 and Surah *An-Nur* but is also a clear violation of Article 203DD of the Constitution. Similarly section

28 of *the Act* becomes repugnant to the Quranic Injunctions beca ıse as soon as the *lian* proceedings conclude the following results ensue:

i. the husband is not liable for punishment for making false accusation,

ii. the wife is absolved of the calumny and

iii. on account of such a serious breach between the cou ɔle, the court without further proof or additional procee lings, declares the marriage to be dissolved with all legal consequences of a valid divorce.

49. It is time that attention is paid to the style in which Surah An-Noor was revealed. It opens with the words:

> *"This is a Sura which*
> *WE have revealed and the*
> *Ordinance which WE have*
> *Made obligatory .....*

The emphasis on the mode and style of revelation lends added importance to the injunctions contained in the *Surah* . This is extra-ordinary way adopted by Holy Quran. Like *Shirk* the illicit sex a ıd false accusation against chaste woman have been dealt with serious y. Even though the whole of Quran is Divine Revelation yet the revelations in Surah Nur have been specifically declared as *His* revelation In this view of the matter the repeal effected by *the Act* is in utter vio ation of the Injunctions of Islam as mentioned above.

ISSUE NO.(h)

CLASSIFICTION OF PUNISHMENTS AND OFFENCES COVERED BY HADOOD

50. This issue deals with categories of punishment that can be awarded under Islamic Jurisprudence. This issue will be discussed in two parts. Part-A will deal with classification of punishments and Part-B will deal with Offences covered by the term *Hudood.* The punishments may therefore be classified as under:-

A. CLASSIFICATION OF PUNISHMENTS

51. i. *Primary Punishments, i.e.* Punishments prescribed for homicide, fornication, adultery, theft, etc. These punishments are prescribed by *NASS* wherein the judge has no discretion in deciding the nature and quantum of sentence when the case has been proved;

ii. *Substitutory Punishments:* i.e. cases where instead of primary punishments, discretionary penalties can be sanctioned by State and awarded by courts;

iii. *Consequential Punishment:* It is in the nature of an additional penalty consequent upon commission of an independent but cognizable offence; e.g. when a killer on proof of his guilt, by operation of law, is also deprived from inheriting the estate of the victim whose death was caused by his criminal act i.e. the act of the prospective heir, or where the property

recovered from a thief is directed by the court to be restored to its real owner;

iv. *Maximum or Minimum Punishment*: i.e. a situation where the judge exercises discretion, in given circumstances and facts of a particular case not covered by primary punishments, to award maximum or minimum penalty i.e. a penalty between the two extremes;

v. *Discretionary Punishments*: i.e, instances where the Judge has the discretion even to let off an accused after administering rebuke or he may award any other appropriate sentence in the facts and circumstances of the case;

vi. Section 53 of the Pakistan Penal Code was substituted as a result of the process of Islamization of laws initiated under Article 227 of the Constitution through the medium of Criminal Law (Second Amendment) Ordinance, 1990. (Later on it became permanent law as Act 11 of 1997) and the following ten categories of punishments duly recognized by Islamic Jurisprudence, were incorporated therein.

Firstly ..... Qisas

Secondly ..... Tazir

Thirdly ..... Diyat

Fourthly ..... Arsh

Fifthly .....Daman

Sixthly ..... Death

Seventhly ..... Imprisonment for life

Eighthly .....Imprisonment of either description,

namely:-
i) Rigorous with hard labour;
ii) Simple

Ninthly .....Forfeiture of Property;

Tenthly ..... Fine.

As noted elsewhere these amendments in the Penal Code were the consequence of certain verdicts of the Federal Shariat Court and the recommendations made by Council of Islamic Ideology.

52. Section 299 occurring in Chapter XVI of the Pakistan Penal Code, entitled: Of Offences Affecting The Human Body, defines *Arsh, Daman, Ikrah-e-tam, Ikrah-e-Naqis, Qatl, Qisas and Tazir.* It is worth noting that section 299 of Pakistan Penal Code, inter alia, defines *Qisas.* The various definitions are detailed below:-

> "299 Definitions. In this Chapter, unless there is anything repugnant in the subject or context,
>
> (a) "*arsh*" means the compensation specified in this Chapter to be paid to the victim or his heirs under this Chapter;
>
> (b) "*daman*" means the compensation determined by the Court to be paid by the offender to the victim for causing hurt not liable to arsh;
>
> (c) "*diyat*" means the compensation specified in Section 323 payable to the heirs of the victim;
>
> (d) "Government" means the Provincial Government,

(e) *"ikrah-e-tam"* means putting any person, his spouse or any of his blood relations within the prohibited degree of marriage in fear of instant death or instant permanent impairing of any organ of the body or instant fear of being subjected to sodomy or *zina-bil-jabr;*

(f) *"ikrah-e-naqis"* means any form of duress which does not amount to ikrah-i-tam;

(g) *"qatl"* means causing death of a person;

(h) *"qisas"* means punishment by causing similar hurt at same part of the body of the convict as he has caused to the victim or by causing his death if he has committed qatl-i-amd, in exercise of the right of the victim of a wali. (Emphasis Added)

The definition of *Qisas* adopted by Pakistan Penal Code is indicative of the fact that the retributive punishments prescribed by Holy Quran have been *enforced as Hudood* under the criminal jurisdiction in the courts of Pakistan. In this view of the matter the appellate or revisional jurisdiction over trials in cases of injuries against human body would be the exclusive domain of Federal Shariat Court. The word *Hadd* has also been defined in the Enforcement of *Hudood* laws of 1979. Different kinds of hurts and punishments, as prescribed by Islamic teachings, are also included in this newly added chapter XVI of the Penal Code. Section 338-F ibid, occurring in this chapter, *additionally* mandates as follows:-

> "Interpretation: In the interpretation and application of the provisions of this Chapter, *and in respect of matters ancillary or akin thereto, the court shall be guided by the Injunction of Islam as laid down in the Holy Quran and Sunnah.* "(Emphasis Added)

It is in this background that the expanse of the term *enforcement of Hudood* as used in Article 203-DD of the Constitution has to be appreciated, understood and interpreted. It is now time to analyse the term *enforcement of Hudood.*

53. In the field of criminal law, the Holy Quran has employed the term *QISAS* as retaliatory punishment for certain categories of offences against human body. The punishments are mentioned in the revealed text. Hence these are *INJUNCTIONS* and have to be implemented. This is also a constitutional obligation. The following *Ayaat* of Holy Quran will illustrate the point:-

> "i *Ayah* 178 *Surah* 2 *(Al-Baqarah)*
>
> "Believers! *Retribution is prescribed for you in cases* of killing: if a freedman is guilty then the freeman; if a slave is guilty then the slave; if a female is guilty, then the female. But if something of a murderer's guilt is

remitted by his brother this should be adhered to in fairness, and payment be made in a goodly manner. This is alleviation and a mercy from your Lord; and for him who commits excess after that there is a painful chastisement."

ii. *Ayah* 179 *Surah* 2 (*Al-Baqarah*)
"People of understanding, there *is life for you in retribution* that you may guard yourselves against violating the law."

iii. *Ayah* 194 *Surah* 2 *(Al-Baqarah)*
"The sacred month for the sacred month; *sanctities should be respected alike* (by all concerned). Thus, if someone has *attacked you, attack him just* as he attacked you, and fear Allah and remain conscious that Allah is with those who guard against violating the bounds set by Him."

iv. *Ayah* 45 *Surah* 5 *(Al-Maidah)*
"And therein We had ordained for them: *"A life for a life, and an eye for* an eye, and a nose for a nose, and an ear for an ear, and a tooth for a tooth, and for all wounds, like for like. But whosoever foregoes it by way of charity, it will be for him expiation." Those who do not judge by what Allah has revealed are indeed the wrong-doers." (Emphasis Added)

54. It may be useful to refer to *Ayah* 24 *Surah* 4, *An-Nisa* of Holy Quran, at the risk of repetition, which proclaims that the commandments given by Allah in the Holy Quran have a binding force

upon the believers. This declaration comes at the end of the list of prohibitions prescribed by Holy Quran. This edict cannot be ignored and has to be taken seriously.

55. Let us now revert to the term *Hadd/Hudood* as used in various legal instruments in force in Pakistan. The term *Hudood* has been employed in Article 203-DD (1) of the Constitution but this term, it appears, has purposely not been defined therein. It indicates clearly that this question was left for the Federal Shariat Court to define because this very clause proceeds to confer exclusive jurisdiction upon this Court to deal with matters relating to *Hudood*. Moreover, the Constitution has created only one forum under the designation Federal Shariat Court which has the exclusive jurisdiction (Article 203 D) to examine the question whether any law is repugnant to the Injunctions of Islam. It is therefore the domain of the solitary constitutional institution, known as Federal Shariat Court, to lay down what the law on the subject is. Reference may be made to the case of Asma Jilani versus Government of the Punjab, reported as

PLD 1972 Supreme Court 139 Justice Yaqub Ali (as his Lordship then was) at page 230 held as under:-

> "Law" was not defined in the Constitution. It is, therefore, *for the Courts to lay down what "law"* is, and if any decree, or behest of Yahya Khan expressed as a Martial Law Order, Martial Law Regulation or Presidential Order, or Ordinance, does not conform to the meaning of the term 'law' in Article 2 these Regulations, Orders and Ordinances will be void and of no legal effect." (Emphasis Added)

It is thus the domain of Superior Courts to assign meanings to those words and terms which, used technically by jurists, and employed in legislative instruments, have been willfully left undefined by legislature. The definition of the term *Hudood*, as may be settled in the light of Injunctions of Islam by the Federal Shariat Court, will therefore determine the meaning of the term as well as the extent of its jurisdiction.

56. The term *Hadd* as mentioned above, has also been given a meaning in Ordinance VI of 1979, Ordinance VII of 1979, Ordinance VIII of 1979 and President's Order No.4 of 1979. This meaning is in tune with the arguments advanced above. According to this definition the term *Hadd*

means a punishment *"ordained by Holy Quran or Sunnah"*. This defini ion has not been held to be repugnant to the Injunctions of Islam in the t ıree decades of its application.

57. Chapter 3-A of Part VIII of the Constitution, dealing witl the Federal Shariat Court, contemplates very vividly that the Shariat C ɔurt, shall be guided in its decisions and findings by the Injunctions of Isla n as laid down in the Holy Quran and the *Sunnah* of the Holy Prophet (PB JH). Likewise, Article 227 (1) of the Constitution prescribes that all ex sting laws shall be brought in conformity with the Injunctions of Islam a laid down in the Holy Quran and the Sunnah and further that no law in uture shall be enacted which is repugnant to these injunctions. The ultimat ɔ role of examining the vires of an impugned legal instrument on the touc stone of Injunctions of Islam is therefore the exclusive preserve of the F ɔderal Shariat Court as mandated by Article 203 D of the Constitution of I lamic Republic of Pakistan. The parliament is debarred from enacting a law which is repugnant to the Injunctions of Islam. This reality amoun s to a

declaration in loud terms that the statute book of Pakistan *has to be in conformity with the Injunctions of Islam* and consequently the term *Hudood* has, in fact, to be defined in the light of Injunctions as laid down in the Holy Quran and the Sunnah. *The term Hudood according to the meaning and scope of various Injunctions of Islam, referred to above, includes every activity which falls directly or indirectly within the mischief of 11 offences tabulated in the next section.*

58. In literary and legal parlance some words in the field of law, science, philosophy etc. assume a wider meaning than the actual dictionary meanings. This is also the case with the expression *Hudood.* It includes the term *Tazir.* A parallel may be conveniently drawn from the term **viz** *major* or ***force majeure***. The term ***force majeure*** according to law lexicons means irresistible force or compulsion; circumstances beyond one's control. The expression ***force majeure*** 'is not a mere French version of the Latin expression ***vis major.***' The term ***force majeure*** has therefore become a

term of wide import. Strikes, breakdown of machinery, which, though normally not included the term *vis major* are included in *force majeure*.

B. OFFENCES COVERED BY THE TERM *HUDOOD*

59. It is therefore time to recapitulate the scope of the term *Hudood*. In the light of the foregoing discussion the following categories of offences are therefore covered by the term *Hudood:*

i. Zina = Adultery, Fornication and Rape.

ii. Lawatat= Sexual intercourse against the order of nature;

iii. Qazaf= Imputation of Zina;

iv. Shurb = Alcohlic drinks/Intoxicants/Narcotics etc;

v. Sarqa = Theft simplicitor;

vi. Haraba = Robbery, Highway Robbery, Dacoity. All categories of offences against property as mentioned in Chapter XVII of Pakistan Penal Code.

vii. Irtdad= Apostacy;

viii. Baghy =Treason, waging war against state; All categories of offences mentioned in Chapter VI of the Pakistan Penal Code and

ix. Qisas = Right of retaliation in offences against human body. All these offences are covered by definition Hadd because penalty therein has been prescribed by *Nass/Ijma*.

Abdul Qadir Audah, has discussed to some extent the scope of Hadd in his treatise Tashree ul Janai al Islami, volume 1 at page 119.

x. Human Trafficking.

Reference *Ayah* 90 *Surah* 16 of Holy Quran where *Fhashaa, Munkar* and *Baghee* have been forbidden.

60. It is immaterial for the purpose of the petitions under discussion whether penal provisions relating to Qisas/kidnapping/abduction/enticing/fornication/adultery/rape/un-natural offences/prostitution/buying or selling a person for sexual purposes: theft/Haraba/Drinking alcoholic liquor or sale, purchase, manufacture, import or export or possession of intoxicants/Narcotic, alcoholic liquors of various categories, theft, extortion, waging war against state or offences against human body, false imputations, etc, are retained in Pakistan Penal Code, or President's Order No.4 of 1979, Ordinance VI of 1979, Ordinance VII of 1979, Ordinance VIII of 1979, or even Control of Narcotics Substance Act No. XXV of 1997,

Prevention And Control of Human Trafficking Ordinance, 2002 (Ordinance LIX of 2002) or any other legal instrument for the time being in force. What is material is that all such offences relating to enforcement of *Hadd* as ordained by Holy Quran and Sunnah are within the exclusive jurisdiction of the Federal Shariat Court before or after the trial has been initiated or completed by any criminal court (of course under any law) and no other court would exercise appellate or revisional powers over such criminal cases initiated either on police report or by way of complaint direct in the court or at the instance of the Court itself.

61. In the case of Dr. Muhammad Aslam Khaki vs. Federation of Pakistan reported in PLD 2010 FSC page 191 a Bench consisting of four Hon'ble Judges of the Federal Shariat Court, after considering different view points found that a sin does not mean *Haram* only. There is no doubt in the mind of any Muslim that Quran and Sunnah shall always serve as a sure guide in determining what are major sins.

In many societies sins are distinguishable from crimes but in some cultures sins are inseparable from crimes. In an Islamic society sins are crimes and not separate entities. In the said report it was also held in paragraph 24 that the State is duty bound to enforce that which is prohibited and inflict requisite punishment to the transgressors.

ISSUES NO.(b) and (i)

JURISDICTION AND JUDICIAL POWER AND JURISDICTION

62. We consider it expedient to examine this issue relating to the Judicial power, Jurisdiction and allied matters as these points are intrinsically related to Issues No.(b) and (c) discussed above. This issue will therefore be discussed under 08 following distinct heads:-

A. JURISDICITON IN GENERAL
B. NATURE OF ARTICLE 203 DD
C. REVISIONAL CUM APPELLATE JURISDICITON
D. TERMS: ANY CASE, ANY COURT, ANY LAW
E. TERM: ENFORCEMENT OF HUDOOD
F. FOUNDATION AND SCOPE OF ARTICLE 203D
G. DECISIONS OF FEDERAL SHRIAT COURT
H. FEDERAL SHARIAT COURT AND COUNCIL OF ISLAMIC IDEOLOGY.

A. JURISIDICITON IN GENRAL

63. Jurisdiction is the right to hear and determine and the result of this exercise is the judgment of the Court. Deniels Vs. Tarney, 102 U.S. 415, 26 L.ED. 187.

64. Justice Hamood-ur-Rehman, Hon'ble Chief Justice Supreme Court of Pakistan, in the case of State Versus Zia-ur-Rehman PLD 1973 Supreme Court 49 at pages 69-70, explained the scope of the terms "Judicial Powers" and "Jurisdiction" in the following words:-

> "So far, therefore, as this Court is concerned it has never claimed to be above the Constitution nor to have the right to strike down any provision of the Constitution. It has accepted the position that it is a creature of the Constitution; that it derives its powers and jurisdictions from the Constitution; that it derives its powers and jurisdictions from the Constitution; and that it will even confine itself within the limits set by the Constitution which it has taken oath to protect and preserve but it does claim *and has always claimed that it has the right to interpret the Constitution and to say as to what a particular provision of the Constitution means or does not mean, even if that particular provision is a provision seeking to out the jurisdiction of this Court.*
>
> This is a right which it acquires not de hors the Constitution itself. It is not necessary for this purpose to

invoke any divine or super-natural right but *this judicial power is inherent in the Court itself.* It flows from the fact that it is a Constitutional Court and it can only be taken away by abolishing the Court itself.

In saying this, however, I should make it clear that I am making a distinction between "judicial power" and "jurisdiction". In a system where there is a trichotomy of sovereign powers, then *ex-necessitate rei* from the very nature of things the judicial power must be vested in the judiciary. But what is this judicial power. "Judicial Power" has been defined in the Corpus Juris Secundum, Vol. XVI, Paragraph 144, as follows:

> "The judiciary or judicial department is an independent and equal coordinate branch of Government, and is that branch thereof which *is intended to interpret, construe, and apply the law,* or that department of Government which is charged with the declaration of what *the law is, and its construction, so far as it is written law.*" (Emphasis added)

This power, it is said, is inherent in the judiciary by reason of the system of division of powers itself under which, as Chief Justice Marshal put it, "the Legislature makes, the executive executes, and the judiciary construes, the law." Thus, the determination of what the existing law is in relation to something already done or happened is the function of the judiciary while the predetermination of what the law shall be for the regulation of all future cases falling under its provisions is the function of the Legislature.

It may well be asked at this stage as to what is meant by "jurisdiction"? How does it differ from

"judicial power"? Apart from setting up the organs the Constitution may well provide for a great many other things, such as, the subjects in respect of which that power may be exercised and the manner of the exercise of that power. Thus it may provide that the Courts set up will exercise revisional or appellate powers or only act as a Court of a cessation or only decide Constitutional issues. It may demarcate the territories in which a particular Court shall function and over which its Writs shall run. It may specify the persons in respect of whom the judicial power to hear and determine will be exercisable. These are all matters which are commonly comprised in what is called the jurisdiction of the Court. It expresses the concept of the particular res or subject matter over which the judicial power is to be exercised and the manner of its exercise. *Jurisdiction is, therefore, a right to adjudicate concerning a particular subject-matter in a given case, as also the authority to exercise in a particular manner the judicial power vested in the Court.*" (Emphasis added)

In this very report the Hon'ble Chief Justice at page 70 was pleased to hold as under:-

"In exercising this power, the judiciary claims no supremacy over other organs of the Government but acts only as the administrator of the public will. Even when it declares a legislative measure unconstitutional and void, it does not do so, because, the judicial power is superior in degree or dignity to the legislative power; but because the Constitution has vested it with the

> power to declare what the law is in the cases which come before it. It thus merely enforces the Constitution as a paramount law whenever a legislative enactment comes into conflict with it because, it is its duty to see that the Constitution prevails."

65. The Supreme Court of Pakistan in its Appellate Jurisdiction, in the case of Dr. Munawar Hussain versus Dr. Muhammad Khan, District Health Officer, Sargodha and two others, reported as 2004 SCMR 1462 (at page 1462) and PLJ 2005 SC 64 (at page 67, 68) while dilating upon the question of jurisdiction of the Federal Shariat Court held as under:-

> "Article 203-A of the Constitution provides that the provisions of this Chapter i.e. Chapter 3-A relating to Federal Shariat Court shall have effect notwithstanding any thing contained in the *Constitution meaning thereby that* provisions of this Chapter containing Article 203-A to Article 203-J have overriding effect on the other provisions of the Constitution. Article 203-G of the Constitution imposes bar on the jurisdiction of the Courts and Tribunal including the Supreme Court and the High Court to entertain any proceedings or exercise any power or jurisdiction in respect of the matters within the power or jurisdiction of the Federal Shariat Court, as such, the High Court neither had the jurisdiction under Section 561-A Cr.P.C. nor under Article 199 of the Constitution in the matter which fell within the jurisdiction of the Federal Shariat Court, as

such, the jurisdiction exercised by the High Court under Article 199 of the Constitution after conversion of quashment petition, was *coram non judice*. It may be noted that the Federal Shariat Court had already directed the trial Court vide its judgment dated 11.5.1994 passed in Criminal Revision No.110-L of 1993 to issue process against Dr. Muhammad Khan respondent and to decide his case alongwith other respondents in accordance with law. This judgment which was rendered by the three Hon'ble Judges of the Federal Shariat Court was binding on the High Court and all other Courts subordinate to it under Article 203-GG and a Single Judge in Chambers of the High Court had no jurisdiction to sit in judgment over the judgment of the Federal Shariat Court which had exclusive jurisdiction in the matter and its decision had a binding effect as stated earlier. Since the matter was exclusively amenable to the jurisdiction of the Federal Shariat Court under Article 203-G, therefore, the impugned judgment passed by the Single Judge of the High Court was without lawful authority and of no legal consequence. Consequently, this appeal is allowed, the impugned judgment of the learned Single Judge in Chambers of the High Court being *coram non judice* is set aside and the trial Court is directed to proceed with the complaint as directed by the Federal Shariat Court vide its order dated 11.5.1994 and decide the same in accordance with law as expeditiously as possible." (Emphasis added)

66. In this context perusal of Article 203G would be useful:-

"Save as provided in Article 203F, no Court or tribunal, including the Supreme Court and a High Court, shall

entertain any proceedings or exercise any power or jurisdiction *in respect of any matter within the power or jurisdiction of the Court."*

(Emphasis added)

This provision read with Article 203-DD(2) establishes beyond doubt *that all offences relating to Hudood are within the exclusive jurisdiction of Federal Shariat* Court. All matters connected with *Hudood* would therefore automatically be included in the jurisdiction of Federal Shariat Court. This is precisely what is meant by *enforcement of Hudood* as prescribed in Article 203 DD of the Constitution.

67. It is indeed true that all judicial power is lodged with the judiciary and wide powers have undoubtedly been conferred by the Constitution upon the Federal Shariat Court which include:-

(a) To administer punitive and remedial justice to and between parties subject to Constitution and law;

(b) To exercise exclusive jurisdiction in matters relating to examination of laws on the touchstone of Injunctions of Islam and in cases relating to *Hudood* laws;

(c) To exercise the special jurisdiction without further legislative sanction;

(d) To define the scope and extent of its jurisdiction within the parameters identified in Chapter 3-A of Part VII of the Constitution;

(e) To determine the meaning and scope of the undefined terms used in Chapter 3-A ibid;

(f) To exercise powers of a Civil Court in respect of certain matters;

(g) Authority to conduct its proceedings and regulate its procedure in all respects as it deems fit;

(h) To punish its own contempt;

(i) To make rules for carrying out the purposes of Chapter 3-A ibid;

(j) Exercising such other jurisdiction as may be conferred on it by or under any law;

(k) To call for and examine the record of any case decided by any criminal court under any law relating to the enforcement of *Hudood*; and

(l) Exclusive authority and the jurisdiction to examine and decide the question whether or not any law or provision of law is repugnant to the Injunctions of Islam as laid down in Holy Quran and Sunnah.

68. On the question of jurisdiction, the Supreme Court of Pakistan in the case of Asma Jilani Versus Government of the Punjab, reported as PLD 1972 Supreme Court 139 at page 197, held as under:-

> "The Courts undoubtedly have the power to hear and determine any matter or controversy which is brought before them, even if it be to decide whether they have the jurisdiction to determine such a matter or not. The Superior Courts are, as is now well settled, the Judges of their own jurisdiction. This is a right which has consistently been claimed by Supreme Court and other Courts of superior jurisdiction in all civilized countries".

It may be useful to refer also to the case of Yousaf Ali Khan Versus The West Pakistan Bar Council Tribunal, Lahore PLD 1972 Lahore 404, a Full Bench case of the Lahore High Court, wherein it was held as under:-

> "It is not possible for the executive to wrest from the judiciary its jurisdiction to interpret any law promulgated in the country. The superior judiciary is clothed with this jurisdiction as a delegate of the sovereign who, in the Islamic Republic of Pakistan, is God Almighty Himself exercising His Will and Sovereignty through the people of this country. It is hardly possible to deny that the making of laws, their implementation by three independent delegates of the sovereign in respect of its own particular field. The Legislature exercises that delegated sovereign power of the sovereign to make laws and the executive exercises it to implement them, the judiciary does, by interpreting laws made in pursuance of the exercise of the legislative part of the powers of the sovereign by the Legislature. The right of the superior judiciary delegated to it by the sovereign which can neither be curbed nor can it be taken away".

69. It is necessary for a Judge to know the meaning and the scope of the term *law* because he is under oath to administer law. He should be clear in his mind that the law under consideration was made by an authority legally competent to make laws. The Federal Shariat Court has the additional but onerous constitutional responsibility to examine whether the impugned law or provision of law is in accordance with Injunctions of Islam. This authority of the Federal Shariat Court is necessary extension of the mandate given in Article 227 of the Constitution. The notion of

legitimacy and efficacy therefore becomes relevant because not only the law making authority should be legally competent but the law should be capable of being enforced according to the Injunctions of Islam and the principles established by the Constitution.

70. The ouster of jurisdiction of Federal Shariat Court can be accomplished by only one jurisdictional fact: that the act complained of is not covered by the mischief of an offence covered by the term *Hudood*. If however the impugned transgression falls in the ambit of *Hudood* then the jurisdiction of Federal Shariat Court cannot be ousted. This element is the key to the question of jurisdiction. It is immaterial whether the offence complained of is mentioned in the four *Hudood* laws of 1979 or any other law. The issue stands settled by the terminology employed in Article 203 DD - *any case*; *any criminal court* and *under any law*. The term *any case* is relatable to all such offences which might be covered in the definition of *Hudood*. All actions which are ancillary or auxiliary or related to or germane to or connected with offences falling in the ambit of *Hudood* are also included in the term *any case* related with *Hudood*. *Any case* also includes all those cases in which one of the alleged offences is covered by the definition of the term *Hudood*. It may be mentioned here that the

principle identified by the Supreme Court of Pakistan in the case of State versus Khalid Masood, PLD 1996 Supreme Court 42 is that when a matter has been dealt with by the Constitution and it is not subject to any statute then no statute can control or curtail the power conferred upon a superior court by the Constitution.

B. NATURE OF ARTICLE 203DD

71. Allied with the question of jurisdiction of Federal Shariat Court is the subject regarding determination of the exact scope and nature of Article 203DD incorporated in the Constitution. The language employed in this Article shows that a calculated step was taken to give legislative effect to the principles and commandments relating to *Hudood* enumerated in Holy Quran and Sunnah. While interpreting Article 203 DD of the Constitution of Islamic Republic of Pakistan it becomes imperative to ascertain the nature of this constitutional provision. Does this Article contain a policy? Does it provide only a guideline? Does it contain a principle of law? The answer goes beyond these questions. An examination of this Article demonstrates that it confers power upon the Federal Shariat Court to exercise jurisdiction in all cases, pending or decided by any criminal court under any law in relation to the enforcement

of *Hudood*. The *Hudood* laws were in existence and being implemented at the time *Article* 203DD was made operational in the Constitution with effect from 22nd March 1982. The analysis of the contents of this Article therefore leads to the irresistible conclusion that the nature of this article is *self-executing*. Justice Shafiur Rehman in the case of Hakim Khan versus Government of Pakistan, reported as PLD 1992 Supreme Court 595, at pages 633-634 (para 16 of the Report), while approving a passage from Bindra's Interpretation of statutes, observed as under:-

> "A Constitutional provision is self-executing if it supplies a sufficient rule by means of which the right which it grants may be enjoyed and protected, or the duty which it imposes may be enforced without the aid of a legislative enactment. It is within the power of those who adopt a Constitution to make some of its provisions self-executing, with the object of putting it beyond the power of the Legislature to render such provisions nugatory by refusing to pass laws to carry them into effect. Where the matter with which a given section of the Constitution deals is divisible, one clause thereof may be self-executing and another clause or clauses may not be self-executing. Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given of the enforcement of a duty imposed. That a right granted by a Constitutional provision may

be better or further protected by supplementary legislation does not of itself prevent the provision by question from being self-executing, nor does the self-executing character of the Constitutional provision necessarily preclude legislation for the protection of the right secured. A Constitutional provision which is merely declaratory of the common law is self-executing. A Constitutional provision designed to remove an existing mischief should never be construed as dependent for its efficacy and operation on Legislature.

Constitutional provisions are not self-executing if they merely indicate a line of policy or principles, without applying the means by which such policy of principles are to be carried into effect, or it appears from the language used and the circumstances of its adoption that subsequent legislation was contemplated to carry it into effect. Provisions of this character are numerous in all Constitutions and treat of a variety of subject. They remain inoperative until rendered effective by supplemental legislation. The failure of the legislation to make suitable provision for rendering a clause effective is no argument in favour of self-executing construction of the clause. Self-enforcing provisions are exceptional.

The question whether a Constitutional provision is self-executing is always one of intention, and to determine intent, the general rule is that Courts will consider the language used, the objects to be accomplished by the provision, and surrounding circumstances. Extrinsic matters may be resorted to where the language of the Constitution itself is ambiguous."

72. A scrutiny of Article 203DD of the Constitution consequently illustrates that exclusive powers of judicial nature in relation to matters pertaining to *Hudood*, a particular branch of administration of Criminal Justice, have been conferred upon the Federal Shariat Court to:

i. call for and examine the record of
ii. any case
iii. decided by any criminal court
iv. under any law
v. *relating to enforcement of Hudood.*

The *Hudood* laws were made part of the Statute Book of Pakistan on 9th February 1979 Chapter 3A entitled Federal Shariat Court was incorporated thereafter as substantive provision in Part VII of the Constitution of Pakistan with effect from 26th May 1980 vide Constitution (Amendment) Order, 1980. The opening provision of this Chapter ie. Article 203A reads as follows:-

> "The provisions of this Chapter shall have effect notwithstanding anything contained in the Constitution."

73. It is this Chapter which contains Article 203DD. The present text of Article 203 DD substituted the original Article 203 DD vide section 5 of Constitution (Second Amendment) Order, 1982 with effect from 22nd March 1982. The previous text of Article 203DD was incorporated in the Constitution vide section 4 of the President's Order No.4 of 1980, Constitution (Second Amendment) Order, 1980 with effect from 21st June, 1980) which provided simply that.

"The Court shall have such other jurisdiction as may be conferred on it by or under any law."

This very portion has now become clause (3) of Article 203 DD by virtue of President's Order No.5 of 1982. It is therefore amply clear that the four Hudood laws ie, Ordinance No.VI of 1979, Ordinance No.VII of 1979, Ordinance No.VIII of 1979 and President's Order No.4 of 1979 had come in force before Article 203 DD was reconstituted in an elaborate manner. In the domain of legislation it is presumed that the legislature is fully cognizant of previous legislation on the given subject. The effect of this amendment i.e, incorporation of clauses (1) and (2) in Article 203DD in the Constitution is as follows:-

i. All the offences mentioned in the above mentioned laws fall within the ambit of *Hadood;*

ii. As such all the offences are within the jurisdiction of Federal Shariat Court;

iii. These offences are no more susceptible to amendment or repeal through an ordinary or routine legislative measure other than amendment of Article 203 DD of the Constitution;

iv. The Constitution did not limit the scope of Article 203 DD to the offences covered by the said four Hudood laws alone but mandated that the Court shall have such other jurisdiction as may be conferred on it by or under any law. It was a clear indication that the meaning and scope of the term *Hudood* is wider than what the four above mentioned *Hudood* laws

have professed. This clause pre-supposes that in due course of time when the scope of the term *Hudood* has been defined appropriately, the jurisdiction of the Federal Shariat Court will keep on expanding.

v. The Constitution purposely refrained from defining the term "enforcement of Hudood" and left it for the Federal Shariat Court to spell out the scope of term *Hudood* for a safe and progressive evolution of law in the light of Injunctions of Islam; and

vi. It was after lapse of a period of five years that it was ultimately decided to incorporate the term *Hudood* for the first time in the Constitution so that a complete range of offences falling within the purview of *Hudood* would progressively become part and parcel of the penal law of Pakistan. It is in this way that gradual fulfillment of Islamic tenets becomes possible.

74. During the three decades of its existence, a lot many Articles of the Constitution were amended on as many as 10 occasions and very recently far reaching amendments have been effected through Eighteenth Constitutional Amendment Act which have been made operative from 20.04.2010. However during this long period, the successive Parliaments did neither disturb the powers conferred upon Federal Shariat Court under Article 203DD nor limit the scope of the term *Hudood* to the four *Hudood* laws with the result that this self-executing provision, which had become operational in 1982, continues holding the field. It was and continues to be operational and shall remain operational so long as any criminal court

under any law takes cognizance of a matter in the domain of *Hudood*. The operational character of this Article was never made dependent upon any subsequent legislation or existence of any other condition. The nature of this Article is not at all different from the nature of Articles 184 through 190 as well as Articles 199, 201 and 203 of the Constitution. These are all self contained and self executing provisions of the Constitution. It may be added that the exclusive jurisdiction of the Federal Shariat Court has remained intact throughout.

75. It is, therefore, clear that the words used in any legal instrument relating to the jurisdiction of the Court, if not defined in the enactment, will be interpreted and construed by the court exercising that jurisdiction. The term *law* for the purposes of Article 203D has been defined in clause (c) of Article 203B of the Constitution in the following terms:-

> (c) "law" **includes** any custom or usage having the force of law but does not include the Constitution, Muslim personal law, any law relating to the procedure of any court or tribunal or, until the expiration of [ten] years from the commencement of this Chapter, any fiscal law or any law relating to the levy and collection of taxes and fees or banking or insurance practice and procedure;

The scope of the term *law* will have to be determined by the Court.

76. It is noteworthy that the term **Law** includes the judge made law. In support of this argument it might as well be stated that Article 189 mandates that the decisions of the Supreme Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all Courts in Pakistan. Article 203 GG of the Constitution straight away directs that the decisions of Federal Shariat Court shall be binding on a High Court and all Courts subordinate to a High Court The Constitution does not say that the decision of the Federal Shariat Court shall be binding only if "it decides a question of law or is based upon or enunciates a principle of law." In the case of Kundan Bibi and 4 others versus Walayat Hussain, Controller of Estate Duty, Government of Pakistan, Karachi and another, reported as PLD 1971 Lahore 360 D.B. case at page 365), Justice Sardar Muhammad Iqbal (as his lordship then was) held that "law" does not mean only the statute law but includes the principles which are laid down by the judicial pronouncements of Superior Courts. Reliance in that report was placed on the case of Government of

West Pakistan vs. Begum Agha Abdul Karim Shorish Kashmiri PLD 969 S.C. 14 where Justice Hamood-ur-Rehman (as his Lordship then was) held that the term law includes judicial pronouncements laid down from time to time by the superior courts. This constitutional provision, as well a the *Hudood* laws promulgated in 1979 partake of the nature of mandating absolute enactments. These provisions are not directory. An absolute enactment is defined to be an instrument which must be obeyed or fulfilled *exactly*. It is only in the case of a directory enactment that it may be obeyed substantially. These constitutional provisions confer powers for the enforcement of *Hudood*. It would be useful to refer to another related principle which was settled long ago *in re Dudlay Corporation* (1882)8 QBD 86 (93,94) by Brett, L.J. wherein it was held that where legislature gives power to do anything, the legislature "means also to give the public body all rights without which the power would be wholly unavailable."

C. REVISIONAL CUM APPELLATE JURISDICTION

77. It was hinted at the bar that revisional power and not appellate power was conferred upon the Federal Shariat Court under Article 203DD of the Constitution meaning thereby that the powers of the Federal Shariat Court are limited. The argument is erroneous. It would be useful to refer to relevant provisions relating to appeals and revisions as incorporated in the Code of Criminal Procedure.

78. Chapter XXXI of Part VII of the Code of Criminal Procedure deals with appeals. Section 404 of the said Code mandates that no appeal shall lie from any judgment or order of criminal court except as provided for by the Code or any other law for the time being in force. Section 412 commands that where an accused person has pleaded guilty and has been convicted by a High Court, a Court of Sessions or Magistrate of 1st Class on such plea, there shall be no appeal except to the extent or legality of the sentence. Similarly sections 413 and 414 do not permit appeals from petty cases/certain summary convictions. Section 417 deals with appeals in cases of acquittal. Section 418 concedes that an appeal may lie on a matter of fact as well as matter of law. Section 423 deals with powers of appellate court in disposing of appeals and section 426 deals with suspension of sentence

and release of appellants on bail during pendency of appeal. Section 428 enables the appellate court to take further evidence itself or direct it to be recorded by the lower court. Under section 431, every appeal under section 411-A (2) or section 417 shall finally abate on the death of the accused and every other appeal under this chapter (except an appeal from a sentence of fine) shall finally abate on the death of appellant.

79. It will be noticed that piecemeal power was given to appellate courts under twenty eight consecutive sections of Chapter XXXI of Part VII of the Code of Criminal Procedure. The power to enhance the sentence *was however not provided in the chapter relating to appeals.* Chapter XXXII of Part VII of the Code of Criminal Procedure deals with Revisional Jurisdiction. Section 439 singly enables the High Court to *perform any of the powers conferred on a court of appeal by virtue of sections 423, 426, 427 and 428. This section also enables the revisional court to enhance the sentence after providing an opportunity to the accused of* being heard. A comparison with Article 203DD of the Constitution shows that the revisional jurisdiction conferred upon Federal Shariat Court, at constitutional plane, not only encompass at one place the power that are exercised by an appellate court under different sections of the Code but at

the same time, in exercise of the same jurisdiction, the Federal Shariat Court in its capacity as the revisional court, has the additional potential of enhancing any sentence if, after examination of the record of any case decided by any criminal court, it is convinced that punishment awarded was scanty. It is for this reason that Article 203-DD of the Constitution of Islamic Republic of Pakistan conferred revisional jurisdiction alone on the Federal Shariat Court because powers of a revisional court are much wider than that of the powers of an appellate court.

80. Section 439 of the Code of Criminal Procedure, authorizes the High Court to enhance the sentence of the convict in the exercise of revisional jurisdiction. The Constitution could have been content by providing that the Federal Shariat Court will exercise the same powers as conferred on High Court under section 439 ibid. But it was not done for the obvious reason that section 439 ibid places an embargo on the powers of High Court to convert an order of acquittal into conviction while exercising revisional jurisdiction. In the case of Muhammad Babar versus Muhammad Akram and three others, PLD 1987 Federal Shariat Court 38 (at page 41) it was held that the power of Federal Shariat Court to order retrial remains intact under the constitutional provisions because "the Court

may pass such orders as it deems fit." However in appropriate cases, in order to save time, expense, and harassment the Federal Shariat Court may straight away convict the accused, it after hearing him, it finds that there is sufficient evidence on record to do so (Page 42 of the report)

81. The concept of Appeal is not unfamiliar to the Constitution. Articles 185 and 203-F of the Constitution confer appellate jurisdiction upon the Supreme Court of Pakistan. Article 203DD of the Constitution does not confer appellate jurisdiction simplicitor upon the Federal Shariat Court. It confers revisional and other jurisdiction. *Appeal is a right conferred upon a person by a legislative instrument to move a superior tribunal against an order whereas Revision is a privilege, prerogative, discretion and power conferred upon a Court to examine proceedings conducted by a lower tribunal.* Appeal is re-examination of case at judicial level by a Superior Court. The object of appeal in contradistinction to revision under the Code of Criminal Procedure, is to examine the correctness and legality of the impugned order. The powers vesting in this Court under Article 203DD of the Constitution with regard to any case decided by any criminal court under any law relating to the Enforcement of Hudood are all in-colllusive in nature. A statute may or may not confer a

right of appeal but the Constitution has provided a permanent remedy for every aggrieved person to invoke revisional jurisdiction of this Court in appropriate proceedings. Revision is a wider jurisdiction. This is what the head note of Article 203 DD indicates. The term Revision includes re-examination, re-assessment, careful reading over for correction and improvement. Holy Quran, in *Ayah* No.90 *Surah* 16, *An-Nahl* enjoins Justice tempered with Kindness. The words in the *Nass* are *ADL* and *IHSAN*. The Federal Shariat Court has also to see whether justice, as tempered by kindness, has been done by the trial court. This power of *Adl* with *Ihsan* is not prescribed upon any Appellate Court in the Code of Criminal Procedure. It is therefore abundantly clear that wide powers have been conferred upon the Federal Shariat Court by way of revisional jurisdiction to do complete justice according to relevant Injunctions of Islam in cases decided by any criminal court under any law relating to the enforcement of *Hudood*.

82. It would be advantageous at this stage to look up the meaning and scope of the technical term *Revision* in legal parlance.

83. The term Revision is wider in meaning and scope than the term Appeal. The term Revision also includes revision of statutes which in

substance is the re-examination of laws. It is different from an amendment. It implies re-examination and restatement of law. Reference volume 35-A of WORDS and PHRASES, Permanent Edition. The well known book entitled: STATUTORY CONSTRUCTION by Crawford published by Pakistan Publishing House records at page 184: that the "Legislators are often authorized by constitutional provisions to revise and to restate all the statute law of a general and permanent nature of the state up to a certain date, in corrected and improved form". This legislative function has been conferred on the Federal Shariat Court to undertake examination of laws on the touchstone of the Injunctions of Islam. This is precisely the jurisdiction of the Federal Shariat Court under Article 203D of the Constitution. The Court at the same time enjoys the jurisdiction under Article 203D *ibid* to examine any law on its own motion. There could be cases when the court is called upon to exercise its jurisdiction under both the articles in one and the same case. *This special type of jurisdiction is enjoyed only by the Federal Shariat Court in the judicial hierarchy of Pakistan.*

84. In this view of the matter I am of the confirmed view that the absence of the word "appeal" does not in any way limit the widest possible jurisdiction of the Federal Shariat Court conferred upon it by virtue of

Article 203 DD of the Constitution which enables it to call for and examine the record of *any case* decided by *any criminal court under any law* relating to the enforcement of *Hudood*. In fact very wide powers have been conferred upon this Court by virtue of just one Article of the Constitution without enumerating twenty eight sections in quick succession as has been done in Chapter XXXI of Part VII of the Code of Criminal Procedure. The Federal Shariat Court would, in view of this constitutional provision, exercise widest possible jurisdiction in cases decided by any criminal court under any law relating to an offence covered by the term *Hudood*. All the recognized incidents of the term *Appeal* have been included in the powers conferred upon Federal Shariat Court by Article 203-DD of the Constitution under the so called title Revision. The Constitution does not concede such broad based revisional powers to the High Courts. The revisional jurisdiction of a High Court is certainly dependent upon an enabling provision in the Code of Criminal Procedure which can be omitted, altered, substituted, or even restricted by ordinary legislative measure.

85. The revisional jurisdiction conferred upon Federal Shariat Court by Article 203-DD of the Constitution is not a mere power but is in

essence a sacrosanct duty because the said constitutional provision speaks in terms of *enforcement of Hudood.* Reference in this context may be made profitably to the following seven *Nusoos* in quick succession ie. *Ayaat* No.43 through 49 *Surah* 5, *Al-Maidah* which enunciate the principle:-

> Enforce the Injunctions of Quran and judge people according to the mandated provisions.

This principle has been mentioned seven times in these *Ayaat* of Holy Quran. This repetitive emphasis is a pointer towards the significance attached to the implementation of Injunctions of Islam. These verses were addressed to the Holy Prophet (PBUH) which means that it is the duty of a Muslim State to enforce these principle/injunctions. Translation of the said seven *Ayaat* is as follows:-

> "Yet how will they appoint you a judge when they have the Torah with them, wherein there is *Allah's judgment* and still they turn away from it? The fact is, they are not believers."
>
> "Surely We revealed the Torah, wherein there is Guidance and Light. Thereby did Prophets- who had submitted themselves (to Allah) - *judge* for the Judaized folk; and so did the scholars and jurists. They *judged* by the Book of Allah for they had been entrusted to keep it and bear witness to it. So, (O Jews), do not fear human beings but fear Me, and do not barter away My signs for a trivial gain. Those who do not judge by what Allah has *revealed are indeed the unbelievers."*
>
> "And therein We had ordained for them: "A life for a life, and an eye for an eye, and a nose for a nose, and an

ear for an ear, and a tooth for a tooth, and for all wounds, like for like. But whosoever foregoes it by way of charity, it will be for him an expiation." Those who do not judge by what Allah *has revealed are indeed the wrong-doers."*

"And We sent Jesus, the son of Mary, after those Prophets, confirming the truth of whatever there still remained of the Torah. And We gave him the Gospel wherein is Guidance and Light, and which confirms the truth of whatever there still remained of the Torah, and a Guidance and Admonition for the God-fearing."

"Let the followers of the Gospel *judge by what Allah has revealed therein,* and those who do not judge by what Allah has revealed are the transgressors."

"Then We revealed the Book to you, (O Muhammad), with Truth, confirming what-ever of the Book was revealed before, and protecting and guarding over it. *Judge, then, in the affairs of men in accordance with the Law that Allah has revealed,* and do not follow their desires in disregard of the Truth which has come to you. For each of you We have appointed a Law and a way of life. And had Allah so willed, He would surely have made you one single community; instead, (He gave each of you a Law and a way of life) in order to test you by what He gave you. Vie, then, with one another in good works. Unto Allah is the return of all of you; and He will then make you understand the truth concerning the matters on which you disagreed."

"Therefore, *judge between them, (O Muhammad), by what Allah has revealed and do* not follow their desires,

> and do not follow their desires, and beware lest they tempt you away from anything of what Allah has revealed to you. And if they turn away, then know well that Allah has indeed decided to afflict them for some of their sins. For surely many of them are transgressors."(Emphasis added)

It is for the purposes of correcting miscarriage of justice, doing substantial justice, removing any illegality or perversity that the Federal Shariat Court has been clothed with vast powers under the title of Revisional Jurisdiction. One of the fundamental object of this jurisdiction is that the Federal Shariat Court would watch carefully that no Injunction of Islam relating to the enforcement of *Hudood* is violated in any case by virtue of any order or decision by any criminal court exercising power under any law.

86. Existence of law is not sufficient. It is just one aspect of administration of justice. The emphasis of Holy Quran is in fact upon *enforcing the law.* Constitution, in particular, has laid emphasis on *enforcement of Hudood.* Chapter 3A of Part VII is the solitary instance where the Constitution speaks in terms of *enforcement.* This element of enforcement only in relation to *Hudood,* according to the Constitution, is the exclusive domain of Federal Shariat Court through revisional jurisdiction.

87. Jurisdiction is the power to hear and determine the cases as well as power to entertain an action or petition or any other proceedings. The term jurisdiction, therefore, connotes authority and power to act in a given matter. The jurisdiction of the Federal Shariat Court under Article 203 DD not only refers to the power to examine the record of any case pending in a criminal court but also enables it to examine the propriety of any decision or order passed by any criminal court under any law relating to Enforcement of *Hudood*. The word *any* means all, each and every case pending or decided and each law under which the criminal Court takes cognizance of a matter. The term *any case* used in Article 203 DD is therefore very wide and includes any matter which is within the initial cognizance of the criminal trial court. *Any* case therefore means *any matter under any law* connected with the Enforcement of *Hudood*.

88. Even otherwise, as stated earlier, the appellate power over orders passed by court of Sessions in matters relating to *Hudood*, once conferred upon this Court under Ordinance VII of 1979 could not be disturbed through Act VI of 2006 by transferring *Hudood* Offences to Pakistan Penal Code. This is an inroad by subordinate legislation in the realm of constitutional provisions contained in Article 203 A, sub-Articles

(1) and (3) of Article 203DD and Article 203G and consequently of no legal effect.

D. TERMS: ANY CASE, ANY COURT AND ANY LAW

89. The word *any* has been used four times in Article 203 DD of the Constitution. In clause (1) the words are: "of *any* case," "any criminal court" and "under *any* law" while in clause (2) the words used are: "in any case". This calls for determination of meaning of the word *any*. Mr. Justice Zaffar Hussain Mirza, in the case of Inamur Rehman vs. Federation of Pakistan reported as 1992 SCMR 563 at 587, with regard to the meaning of the term ANY observed as follows:-

> "These expressions are of very wide amplitude. The term "any" according to the Black's Law Dictionary (Fifth Edition) page 86 means: one out of many; an indefinite number; one indiscriminately of whatever kind or quantity. With reference to case law it has been stated: Word "any" has a diversity of meaning and may be employed to indicate "all" or "every" as well as "some" or "one" and its meaning in a given statute depends upon the context and the subject-matter of the statute."

The word "any" as employed in Article 203DD has been expressed without any qualification. The word *any* in the context in Article 203DD would

mean: any person, any court or any law under which a trial or proceedings as regards offences relating to *Hudood* are being held or have been concluded. The word *any* is wide enough to include every case, covered by the term *Hudood* or related to *Hudood* and would also cover situations when any case is sought to be transferred in the manner and circumstances visualized by sections 526 and 528 of the Code of Criminal Procedure. The three terms i.e. "any law", "any criminal court" and "any law" as used in Article 203DD not only tend to enlarge the amplitude of the term *Hudood* but lay emphasis on the fact that all type of proceedings related to offences covered by the meaning and scope of the term *Hudood* would remain the exclusive preserve of the Federal Shariat Court. There is no earthly reason to exclude any one matter connected with the proceedings under *Hudood* laws from the jurisdiction of this Court. The term "any" in its meaning and scope, has been discussed *inter-alia* in the following four precedents which may be consulted to appreciate that the word "any" as used in Article 203 DD is a word of "expansion indicative of width and amplitude sufficient to bring within the scope and ambit of the words it governed, all that could possible be included in them."

i. Ch Zahoor Elahi MNA vs The State
PLD 1977 SC 273

ii. M. Amjad vs Commission of Income Tax and two others 1992 PTD 513

iii. NWFP vs. Muhammad Irshad PLD 1995 SC 281

iv. Commission of Income Tax vs. Media Network PLD 2006 Supreme Court 787

In conclusion it may said that term *criminal court* used in Article 203DD is not restrictive in the sense as mentioned in section 6 of the Code of Criminal Procedure. It means *any court exercising criminal jurisdiction under any law of the land* relating to an offence in the domain of *Hudood.* The term criminal court extends to every category of Courts, Tribunals or Authorities competent under any law of the land to try and decide cases in which the offence complained of pertains to *Hudood.*

E. TERM: *ENFORCEMENT OF HUDOOD*

90. Article 203-DD of the Constitution of the Islamic Republic of Pakistan confers revisional and other jurisdiction on the Federal Shariat Court. Following is the text of Article 203DD.

> "[203DD. (1) The Court may call for and examine the record of any case decided by any criminal court under any law relating to the enforcement of Hudood for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed by, and as to

the regularity of any proceedings of, such court and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

(2) In any case the record of which has been called for by the Court, the Court may pass such order as it may deem fit and may enhance the sentence:

Provided that nothing in this Article shall be deemed to authorize the Court to convert a finding of acquittal into one of conviction and no order under this Article shall be made to the prejudice of the accused unless he has had an opportunity of being heard in his own defence.

(3) The Court shall have such other jurisdiction as may be conferred on it by or under any law.]"

Before we discuss the philosophy and purport of this Article let us summarize the extent and scope of the powers bestowed upon the Federal Shariat Court by this Article. The following issues appear to have been contemplated:-

i. The jurisdiction of the Court in respect of enforcement of *Hudood;*

ii. The responsibility of the Court to *satisfy* itself as to the *correctness*, legality and *propriety* of any finding, sentence or order recorded or passed by any court;

iii. The power of the Court to decide the *regularity* or otherwise of any proceedings related to enforcement of Hudood;

iv. The power of the Court to direct suspension of any sentence awarded in cases relating to *Hudood;*

v. Power of the Court to release any accused on bail;

vi. Power of the Court to pass any order it may deem fit in relation to any proceeding related to the enforcement of *Hudood*;

vii. Power of the Court to enhance any sentence passed by any court in relation to *Hudood;* and

viii. Any other jurisdiction conferred on the Court by or under any law.

A cursory glance over the contents of Article 203-DD clearly establishes that the framers of Chapter 3A of Part VII of the Constitution perceived a much broader role for the Federal Shariat Court in relation to *Hudood* . It was an all-inclusive role which is certainly wider than mere customary appellate jurisdiction. Revisional power granted to the High Courts under

section 439 of the Code of Criminal Procedure can be interfered with by routine legislative measure through ordinary routine process of amendment or even repeal. A bill, in order to amend the Constitution, is passed only if "votes not less than two-thirds of the total membership of the House", from where the Bill has originated and also "two-thirds of the total membership of the House to which it has been transmitted" have been secured as provided in Article 248 of the Constitution. But this is not the case in relation to other laws which may be amended, repealed or enacted by simple majority. The Constitution has made it certain that the Revisional jurisdiction conferred upon the Federal Shariat Court by it is taken out of the scope of ordinary legislative functions of *Majlis-e-Shoora*. The Constitution conceded not only wide powers to the Federal Shariat Court but it proceeded to protect these powers from the vicissitude of legislative procedure prescribed under Article 70 of the Constitution. Additionally the Constitution proclaimed that Federal Shariat Court shall have such other jurisdiction as may be conferred upon it by or under any law. The consequence of this provision of the Constitution is that the Government or the Legislature has been restrained *firstly* from omitting any item from the prescribed jurisdiction of Federal Shariat Court in matters relating to

Hudood, and *secondly* the additional power which may subsequently be included in the jurisdiction of this Court under sub-Article (3) of Article 203DD will be of the nature that it cannot be taken away by routine legislative measure. The additional jurisdiction, whenever conferred would be saved by constitutional provision. The Constitution commands in unambiguous terms that Federal Shariat Court shall, to the exclusion of any other court in Pakistan, have exclusive jurisdiction to control, supervise and streamline the process of the enforcement of *Hudood* under *any law* by *any court* or judicial forum. In Article 203DD the term used is "*enforcement of Hudood*" and not mere *Hudood.* The word *enforce,* according to Oxford, *Advanced Learner's Dictionary* means: to make sure that *people obey a particular law or rule, to make something happen or force somebody to do something.* ***The word enforcement consists of two parts. Part one is* enforce *and part two is* ment. *The portion* men *is a suffix. According to Oxford Dictionary this suffix means: the action or result of. In this context the word enforcement means the action of making sure that people obey the Islamic law relating to Hudood or the result of making sure that people obey the law.*** The intent of the authors of this constitutional provision is clear. It confers wider powers and

jurisdiction on the Federal Shariat Court so that not only the enforcement or implementation of *Hudood* law is ensured but judicial guarantee is provided to ensure correctness, legality and propriety as well as regularity of proceedings in relation to the enforcement of *Hudood as prescribed by* Injunctions of Islam in the administration of criminal justice with a view to protecting ***Din*, Life, Intellect, Progeny** *and* **Family** as well as the legitimately acquired property of the citizens and the people of Pakistan. The positive law must be aimed at protecting and advancing the objectives of *Shariah* so as to achieve a *correct* and *proper* enforcement of *Hudood.* Laws have to be implemented in that spirit. The Constitution authorizes the Federal Shariat Court to interfere and exercise its jurisdiction in any case from any criminal court under any law with a view to ensuring the *correctness,* legality and *propriety* of such implementation. The word *enforcement* has been used by the constitution only in relation to offences relating to or covered by the term *Hudood.* This is clearly wider expression and includes all those steps which may technically be termed as appellate jurisdiction.

91. Whatever has been stated above demonstrates very clearly that the intent and purport of Article 203-DD is to provide a single and a central

judicial forum which should have exclusive jurisdiction of ensuri ıg *correct,* legal, *proper* and regular enforcement of the laws of *Hudo ɔd* throughout Pakistan. The word "revisional" appearing in the head note of Article 203-DD has not been used in narrow and limited sense but it l as been used in a broader sense. The right of appeal is conceded to an aggrieved party whereas Revision is conferring of power, privilege ɛnd discretion upon the Court to undertake examination of proceeding o ` a lower tribunal on the application of an aggrieved person or on its motior. If this article is read with articles 203-G and 203-GG, it establishes bey‹ nd any shadow of doubt that revisionary power includes the appellate pov ers in relation to *Hudood* laws and the enforcement of *Hudood* vest in the Federal Shariat Court to the exclusion of any other court in Pakistan. *The words "any power or jurisdiction in respect of any matter within the po ver and jurisdiction of the Court"* in Article 203G makes it abundantly clear that no court will exercise appellate or revisional jurisdiction in ma ters relating to enforcement of *Hudood* except the Federal Shariat Court. The power of a High Court to reverse an order of acquittal into convictior , on appeal, is stipulated only under section 417 of the Code of Crir inal Procedure but this power which a High Court enjoys under a legisl ative

instrument is conferred upon the Federal Shariat Court specifically thro ıgh a superior piece of legislation i.e. the Constitution. The Constitu ion authorizes the Court to convert an order of acquittal into conviction. The Constitution therefore preserves and consolidates all the le; ally conceivable powers and jurisdiction in Federal Shariat Court in all ma ters relating to the enforcement of *Hudood* which any other court may e ıjoy collectively as an appellate and revisional court under ordinary law.

92. Be it the Psalms of David, Gospel of Jesus, Tablets of M oses or the Scripture revealed upon Muhammad PBUH, Allah Almighty nade His promise abundantly clear that the weak and the oppressed, the neek and the browbeaten shall inherit this earth. Allah was Gracious to hose who were oppressed in the land and in His infinite mercy, He made them leaders of humanity and helped them succeed to the resources o this world. The Righteous servants of God, in turn, uphold the gı iding principles and permanent values ordained and preserved in the Revc lation and come forward to implement the regulations proposed by the Lord Creator. They do not hesitate to implement and enforce the injur ctions prescribed by Allah. Reference in this context may be made to *Ayc at* No. 133 and 165 of *Surah* No.6, *Ayaat* No. 100, 130 and 134 of *Surah* No. 7,

Ayah No. 14 of *Surah* No.10, *Ayah* No. 57 of *Surah* No.11, *Ayaat* No 11 and 105 of *Surah* 21, *Ayah* No.55 of *Surah* 24, *Ayah* No.62 of *Surah* 27, *Ayah* No.5 of *Surah* 28, *Ayah* No.39 of *Surah* 35, *Ayah* No. 26 of *Surah* 38, *Ayah* No.38 of *Surah* 47, *Ayah* No.7 of *Surah* 57, *Ayah* No.4 of *Surah* 70.

F. FOUNDATION AND SCOPE OF ARTICLE 203 D

93. The basis of Article 203 D can be traced to *Ayaat* 59 through 65 of *Surah* 4, *An-Nisa.* The meaning of these *Ayaat* s as follows:-

"O ye who believe!
Obey Allah, and obey the Apostle,
And those charged
With authority among you.
If ye differ in anything
Among yourselves, refer it
To Allah and His Apostle,
If ye do believe in Allah
And the Last Day:
That is best, and most suitable
For final determination."

"Hast thou not turned
Thy vision to those
Who declare that they believe
In the revelations
That have come to thee
And to those before thee?
Their (real) wish is
To resort together for judgment

(In their disputes)
To the Evil one,
Though they were ordered
To reject him.
But Satan's wish
Is to lead them astray
Far away (from the Right)."

When it is said to them:
"*Come to what Allah hath*
revealed.
And to the Apostle":
Thou seest the Hypocrites avert
Their faces from thee in disgust.

How, then, when they are
Seized by misfortune,
Because of the deeds
Which their hands have sent forth?
Then they come to thee,
Swearing by Allah:
"We meant no more
Than good-will and conciliation!

"Those men,- Allah knows
What is in their hearts;
So keep clear of them,
But admonish them,
And speak to them a word
To reach their very souls."

"We sent not an Apostle,
But to be obeyed, in accordance
With the Will of Allah.
If they had only,
When they were unjust
To themselves,
Come unto thee
And asked Allah's forgiveness,
And the Apostle had asked
Forgiveness for them,
They would have found
Allah indeed Oft-Returning,
Most Merciful."

"But no, by they Lord,

They can have
No (real) Faith,
Until they make thee judge
In all disputes between them,
And find in their souls
No resistance against
Thy decisions, but accept
Them with the fullest conviction."

A perusal of these *Ayaat* shows that the following two standards have been identified by Holy Quran for the resolution of disputes particularly between the citizenry and the State:-

(i) The first point of reference is *the Word of God;*

(ii) The second point of reference is the *Sunnah of the Holy Prophet PBUH;*

Those who deny this procedure/process are termed hypocrites by Holy Quran. The nutshell of *Ayah* 62 *Surah* 4, *An-Nisa* and *Ayaat* 47 through 52 is that those who do not observe what Allah or His Chosen Messenger PBUH has ordained may fall in the category of *Munafiqeen* i.e. the hypocrites. This is the situation which a believer would certainly avoid in all circumstances.

94. The message of the above mentioned seven *Ayaat* of *Surah* 4 is restated with full vehemence in *Ayaat* 43 through 50 of *Surah* 5, *Al-Maida* whose translation has been referred to in a section of this

judgment. The nutsheli of the Divine verdict in these **Ayaat s that those who do not judge between people in accordance with what has been revealed are Disbelievers, Wrong-doers and Evil-li ers.** It is in this background that Article 203D and Article 227 of the Constitution of Islamic Republic of Pakistan has to be unde stood, appreciated, construed, interpreted and implemented.

95. *Ayah* 49 of *Surah* 5 as well as *Ayah* 65 of *Surah* 4 leclare and direct in very vivid terms:-

> "So Judge between them by what Allah has Revealed "
>
> (AND)
>
> "But nay, by the Lord, they will not believe (in trut ı) until They make thee (O Muhammad) a Judge of wh t is in dispute between them and find within themse ves no dislike of that which thou (O Muhammad) decid ed, and submit with full submission."

96. Article 203D of the Constitution provides a p actical mechanism to:

a). ensure implementation of the mandate contained ir Article 227 of the Constitution that no law shall be enacted which is re ugnant to the Injunctions of Islam contained in Holy Quran or Sunnah;

b). achieve the goal, visualized in clause three of Objec ives Resolution that the Muslims shall be enabled to order their lives i1 the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah, an l

c). provide machinery at national level not throug1 an ordinary piece of legislation but through the agency of the **fundamental law of Pakistan** by way of creating a Superior Court with exclusive jurisdiction to undertake solemn exercise of ada pting the Statute Book of Pakistan with Injunctions of Islam.

97. The reason that a constitutional provision has empo vered the Federal Shariat Court to examine laws on the touchsto ne of Injunctions of Islam can be traced to *Ayah* 85 of *Surah* 28, *Al Qasas* which proclaims that Allah made the teachings of Holy Quran b nding upon the believers. The other reason is furnished by *Ayah* 23 *Si rah 3, Ale-Imran, Ayah* 105 *Surah* 4, *An-Nisa; Ayaat* 44, 47 *Surah* 5, *Al-M aidah; Ayah* 114 *Surah* 6, *Al-Anam.* All these verses proclaim that people should be judged according to the teachings and principles l anded over by Revelation. Still another reasons is that the Holy Quran proclaims itself as *FURQAN* i.e. Distinguisher. In other words Quran is

the litmus test. Human conduct in Muslim societies should not be apposed to the spirit and teachings of the Holy Book.

G. DECISIONS OF FEDERAL SHARIAT COURT

98. The criteria for resolving conflicts among people at judicial level is best illustrated by the instructions given by Holy Prophet PBUH to Maaz bin Jabel on the eve of his appointment as Governor of Yemen. Decisions were to be given in the light of Injunctions contained in Holy Quran and if no guidance was available in the primary source, the judgment was to be based upon the guiding principles provided by *Sunnah* and in the absence of any precedent or Injunction available in the above two basic sources, then the judge was to undertake *Ijtehad* i.e. application of mental faculties to the maximum in resolving the issue without violating the spirit of guiding principles provided by two primary sources. This was the first occasion when the term *Ijtehad* was employed in the realm of administration of justice by a Companion in the presence of Holy Prophet PBUH who approved it whole heartedly.

This was the time and occasion when the exercise of *Ijtehad* for the resolution of disputes received formal sanction. From that point onward *Ijtehad* played an important role in the evolution of Islamic jurisprudence and the administration of justice.

99. A careful reading of Article 203 GG as well as Articles 189 and 201 of the Constitution indicates that the Federal Shariat Court is not bound even by its own decisions. There is no institutionalized *taqlid* in so far as this Court is concerned. It is the continuation of the time honoured practice in Muslim Societies that the judges were not bound by previous decision in mattes within the ambit of uncovered field. The reason was simple: In the given circumstances of a situation when no legal provision was available to resolve a controversy, an effort to discover a remedy was resorted to by undertaking *Ijtehad* in the larger interest of Justice. Justice is indeed related to the restoration of rights. Resolution of human problems does not brook a vacuum. A still better view is always possible on account of practical experience gained by all

the stakeholders in the administration of justice particularly on account of change of conditions and circumstances. Human thought is not stagnant. Human mind is a dynamic faculty. It progresses and develops by experience. The process of development and evolution is ongoing. This course is not static. Injunctions of Islam do not enjoin negation of movement. Islamic teachings beckon a person to look forward for a better future.

100. It may be useful to refer *Ayah* 46 *Surah* 34, *Saba* which gives primacy to the thought process and the element of scrutiny, examination, analysis and reflection. This is precisely what the Holy Quran describes as:

تفکر (تتفکرون) تعقل (تعقلون) تفقہ (تفقہون)

Translation of *Ayah* 46 is as under:

> "Say to them, (O Prophet): "I give you but one counsel: stand up (for heaven's sake), singly and in pairs, and then **think**: what is it in your companion (to wit, Muhammad) that could be deemed as madness?" He is nothing but a

warner, warning you before the coming of a grievous chastisement." (Emphasis added)

101. The Superior Courts, particularly in matters relating to Islamic jurisprudence, are under an obligation to develop law in the light of Injunctions of Islam as laid down in Holy Quran and Sunnah. Exercise of *Ijtehad* implies that the Courts are not bound by one interpretation in the uncovered field for all times to come. Wisdom and saner counsel is the common heritage of humanity. The net result of incorporating Article 203GG is that any decision of the Federal Shariat Court in exercise of its jurisdiction, is binding on a High Court and on all Courts subordinate to such High Court. The trial courts are subordinate to provincial High Courts with the result that the findings of Federal Shariat Court, as regards its jurisdiction over trials relating to enforcement of *Hudood* as well as its interpretation and decisions shall be binding on provincial High Courts and the courts subordinate to the High Courts.

102. Another aspect is worth considering. Let us first examine the language of Articles 189 and 201 and then read Article 203GG:-

> "189. Any decision of the Supreme Court shall, to the extent that *it decides a question of law or is based upon or enunciates a principle of law,* be binding on all other courts in Pakistan.
>
> "201. Subject to Article 189, any decision of a High Court shall, to the extent that *it decides a question of law or is based upon or enunciates a principle of law,* be binding on all Courts subordinate to it.
>
> "203GG. Subject to Articles 203D and 203F, any decision of the Court *in the exercise of its jurisdiction* under this Chapter shall be binding on a High Court and on all courts subordinate to a High Court."
>
> (Emphasis added)

103. The phrase "to the extent that it decides a question of law or is based upon or enunciates a principle of law" mentioned in the first two articles is conspicuous by omission in Article 203GG. It

therefore means in very clear terms that the *ratio* as well as *dicta* in a judgment of the Federal Shariat Court is binding upon the four provincial High Courts as well as all the courts throughout the country as these courts are subordinate to one or the other High Court. Any judgment, order or decision delivered, passed or given by a High Court or a court subordinate to a High Court, contrary to the decision of Federal Shariat Court will be a judgment *per incuriam*. The Supreme Court of Pakistan, in the case of Dr. Munawar Hussain, referred to above, while dilating upon the jurisdiction of the Federal Shariat Court under Article 203DD had held that High Court had no jurisdiction under section 561-A of the Code of Criminal Procedure and Article 199 of the Constitution in matters which fell within the jurisdiction of Federal Shariat Court. Decision of the High Court in such matters was declared as *Coram non judice*. This jurisdiction of the Federal Shariat Court therefore is exclusive in nature and is not shared by any superior Court/Tribunal created by the Constitution. Reference may be made to the following reports:

i. Zaheer ud Din versus The State
1993 SCMR 1718 (at page 1756)

"The Chapter 3A of the Constitution was inducted in the Constitution on 26th May, 1980. It contains Articles 203A to Article 203J. The Article 203A of the Constitution lays down that the provisions of Chapter 3A shall have effect notwithstanding anything contained in the Constitution. Further Article 203G provides that "Save as provided in Article 203F, no Court or tribunal, including the Supreme Court and a High Court, shall entertain any proceedings or exercise any power or jurisdiction in respect of any matter within the power or jurisdiction of the Court".

These provisions when read together, would mean that a finding of the Federal Shariat Court, if the same is either not challenged in the Shariat Appellate Bench of the Supreme Court or challenged but maintained, would be binding even on the Supreme Court. Consequently, the above given findings of the Federal Shariat Court cannot be ignored by this Court."

ii. Aurangzeb versus Massan
1993 CLC 1020 (at page 1023)

"Judgments of the Supreme Court, its Shariat Appellate Bench and Federal Shariat Court were binding on other Courts, by force of a Constitutional mandate. The act of a Court in disagreed of the judgments of the above Courts was denuded of legal authority and was clearly equivalent to an act without lawful authority and jurisdiction."

iii. Hafiz Abdul Waheed versus Mst. Asma Jehangir
PLD 2004 Supreme Court 219 (at page 230)

"The argument is fallacious. The Federal Shariat Court is itself the creation of Chapter 3-A. Article 203D confers, what may be described as original jurisdiction on the Federal Shariat Court. Under this jurisdiction, the Federal Shariat Court, on its own motion or on the petition of any citizen of Pakistan or Federal Government or a Provincial Government can examine and decide the question whether or not any law or provision of law is repugnant to the Injunctions of Islam as laid down in the Holy Quran and the Sunnah of the Holy Prophet (PBUH). Article 203DD empowers the Court to call for and examine the record of any case decided by any criminal Court under any law relating to the enforcement of Hudood for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed by any such criminal Court. Sub-Article (3) of Article 203DD lays down that "the Court shall have such other jurisdiction as may be conferred on it by or under any law". It may be noted here, that right of appeal was provided to the Federal Shariat Court by adding second proviso to section 20(1) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (hereinafter to be referred to as "the Ordinance)", in the year 1980."

104. Sub-Article (9) of Article 203E of the Constitution makes the things further clear. It states:

> "The court shall have power to review any decision given or order made by it".

This power of review is not subject to any Act of Parliament like Article 188 which confers power of Review upon the Supreme Court on the following terms:-

> "The Supreme Court shall have power, subject to the provisions of *any Act of Majlis-e-Shoora (Parliament) and of any rules made by the Supreme Court* to review any judgment or any order made by it."
>
> (Emphasis added)

It will be noticed that the High Courts have no Constitutional mandate to review its orders or judgments. The power of review is conferred upon the High Courts by operation of subordinate legislation. Reference: Section 114 read with Order XLVII of the Code of Civil Procedure.

105. The vast power of review conferred upon the Federal Shariat Court is in effect the acceptance of the principle of IJTIHAD for the development of Islamic Jurisprudence through the agency of this Court of original jurisdiction. The objective in conferring this power upon the Federal Shariat Court has it genesis in *Ayah* 17 *Surah* 13, *Ar-Rad*, Holy Quran:

> Thus does Allah depict truth and falsehood. As for the scum, it passes away as dross; but that which benefits mankind abides on the earth. Thus does Allah explain (the truth) through examples.

The decisions of the Federal Shariat Court are supposed to clean the existing law of any dirt or possible trash.

106. The constitutional mandate of review is quite wide in scope. It includes the power of revisiting, on its own motion, any decision given or order made by itself. This is evident from the cases of Hazoor Bux versus Federation of Pakistan reported as PLD 1981 FSC 145 decided on 21st March, 1981 but reviewed by this Court on 20th June, 1982 in the case entitled Federation of Pakistan versus Hazoor Bux and 2 others PLD 1983 FSC 255.

107. The historic opening words of the first *Ayah* of *Surah Mujadilah* is very significant as it is the solitary instance in the history of revealed literature where a woman, aggrieved by an inhuman custom, having the force of law, entered a caveat. Her rights as a wife had been suspended unilaterally by oral pronouncement made by the husband. She lodged a protest before Muhammad (PBUH), the head of the nascent Islamic polity, because she knew that Allah through His

Apostle had the power to promulgate, amend, change, alter, subst tute or even repeal any prevalent rule or custom having the force of law. Her supplication was answered. The prompt revelation proclaimed :

"O protesting lady! Your petition has been heard."

This declaration is preserved in Holy Quran as *Ayah* No.1 *Surah* 58 , *Al-Mujadilah.* The following principles of law can therefore be ded ıced from this very Injunction of Islam:-

i. Right of protest is **conceded** to an aggrieved person;

ii. Every person aggrieved of an inhuman rule, law, custo n or practice, having the force of law, has a right to get it **reviewed** by competent authority;

iii. The aggrieved person in such a situation should have **free access** to justice;

iv. The aggrieved person shall have the **right of audien :e** at the time of initiating the complaint;

v. The Authority is under an obligation **to probe into the** complaint and may for that purpose unde1take examination of any impugned law or practice;

vi. The Authority must examine the issue and deliver a **speaking and an effective order;** and

vii. The Authority, may in the facts and circumstances of the case not only **introduce necessary amendments** in law but may also provide a **remedy to rectify the wrong.**

108. In this view of the matter the creation of Federal Shariat Court is in fact practical realization of the remedy contemplated by Holy Quran for persons aggrieved by anti-people laws and inhuman practices having the force of law. The Federal Shariat Court, in exercise of its jurisdiction under Article 203 D, in fact discharges the obligation imposed by *Ayah* 103 of *Surah* 3, *Ale-Imran* because the power to declare a law to be in conflict or otherwise to the Injunctions of Islam is not only a message to the people to follow what is good and avoid what is wrong. The yardstick to determine what is good or bad according to Muslim belief, is certainly the Revealed principle.

H. <u>FEDERAL SHARIAT COURT AND COUNCIL OF ISLAMIC IDEOLOGY</u>

109. Allama Dr. Muhammad Iqbal, the philosopher poet of East, gave considerable thought to the question of reconstruction of modern Islamic jurisprudence during the second and third decade of twentieth

century. This is evident from his letters to Sahibzada Aftab Ahmad Khan, Secretary Muslim Educational Conference dated 4 June, 1925 wherein he also discussed the scheme then under consideration of Dr. Arnold. Allama Iqbal was of the view that the right to undertake *Ijtehad* should be conceded to the Muslim Parliament but he was also conscious of the fact that technical assistance should be available to the legislative bodies to ensure correct interpretation and enforcement of *Shariah.* The creation of the Council of Islamic Ideology and the Federal Shariat Court in due course of time after the creation of Pakistan, through constitutional apparatus, is in fact realization of the aspirations of Dr. Muhammad Iqbal because the Council of Islamic Ideology provides technical assistance/recommendations to the Parliament/Provincial Assemblies before finalizing legislation while the Federal Shariat Court examines, whenever any question arises, any law or provision of law on the touchstone of Injunctions of Islam after a proposed Bill has materialized into on Act. The Council of Islamic Ideology appears to be an adjunct of the Parliament/Provincial Assemblies/President/Governor but it does not provide remedies to general public. The Federal Shariat Court is not part of the legislative

wing of the State but it has the potential to provide relief to any person who is aggrieved of or is critical of any legislative measure. This Court on the other hand gives personal hearing to a petitioner and undertakes an examination of the question submitted for its consideration. The procedure for invoking jurisdiction of Federal Shariat Court is not only simple but has been made inexpensive as well. Persons desirous of seeking examination of a given law or a provision of law or even custom, having the force of law, may not be permitted an ingress in the premises of legislative bodies to demand review of impugned legal instruments but the Constitution has provided a forum at the federal level to the citizens of Pakistan enabling them to invoke its extra-ordinary jurisdiction by making an application, without stamp duty and claim examination of any law, on the touchstone of 'Injunctions of Islam without constraint of period of limitation. The application for examination can be made at any provincial head-quarter or the principal seat of this Court at Islamabad. Once a Shariat Petition is submitted, it cannot be dismissed on the sole ground of absence or death of the petitioner. The Court may proceed with the examination of the impugned law which has been brought to its notice.

110. The creation of Federal Shariat Court is a natural sequel to Article 227 of the Constitution. There is yet another equally weighty consideration for creating Federal Shariat Court. The possibility cannot be ruled out that the recommendations of the Council of Islamic Ideology are not laid for discussion before both the Houses and each Provincial Assembly. In such an event the jurisdiction of the Federal Shariat Court can be invoked by any citizen of Pakistan to get the impugned laws or provision of law examined on the touchstone of Injunctions of Islam. This convenient, unproblematic, cost-free and simple remedy provided by clause (8) of Article 203E read with The Federal Shariat Court (Procedure) Rules, 1981 may also be successfully availed and the jurisdiction of this court be invoked under article 203D in the event the provisions contained in clause (4) of Article 230 of the Constitution are not complied with. Such a thing would be tantamount to resurrecting the basic principle enunciated in *Ayah* No.1 *Surah* 58. *Al-Mujadalah* of Holy Quran. The enunciation of this principle in Holy Quran was a great step towards developing jurisprudence based upon justice, equity, even handedness, and good conscience. This *Ayah also* proclaims the principle that the purpose of

promulgating positive laws is to secure peace and welfare of the people. In other words the laws should not be made and implemented to stifle or suspend the basic rights of people. The laws and customs ought to work to the advantage and good of the neglected and weak section of society in particular. The spirit and essence of this *Ayah* is that social justice has to be promoted and social evils have to be eradicated. This *Ayah* though related with Family Laws, yet it enunciates a general principle that man-made rules, customs or laws should be constantly and vigilantly reviewed in the larger interests of justice and fair-play. This principle finds support also from *Aya* No.17 *Surah* 13, *Ar-Raad* of Holy Quran which lays down that the rubbish is destined to perish but that which benefits humanity tarries on this earth. Another principle enunciated by Holy Quran may also be referred here in support of the above principle: *Amar bil Maa'oof wa Nahee anil Munkar.* This maxim has been repeated for not less than fifteen time in Holy Quran. This principle refers to the obligation of prescribing *what is good and forbidding what is not good. Aya* 111 of *Surah* 3, *Al-e-Imran*, while addressing the Muslims, declares, that Muslims are the best people because they have *been raised for the*

betterment of humanity and are therefore under a religious obligation to enjoin good and forbid what is evil and also believe in one God a one.

111. In view of our discussion on the question of enforcement of *Hudood*, I would go to the extent of holding in absolutely unambiguous terms that even if the Parliament were to repeal Order No. IV of 1979, Ordinance, VI of 1979, Ordinance, VII of 1979 and Ordinance, VIII of 1979, even then the Federal Shariat Court will continue having exclusive jurisdiction, under Article 203 DD, *to call for and examine the record of any case decided by any criminal court under any law relating to the enforcement of Hudood.*

112. It is therefore abundantly clear that the basic object of creating Federal Shariat Court at the national level was to provide a vigilant and effective forum to oversee that no legal instrument, made enforceable in the Federation, remains *de hors* the Injunctions of Islam. This particular aspect is in fact the practical realization of the second part of clause (1) of Article 227 of the Constitution of Pakistan which proclaims that *no law shall be enacted which is repugnant to Injunctions*

of Islam. The possibility of a legal provision, being incorporated in a Federal or a Provincial law, which is contrary to one or more Injunctions of Islam, cannot be ruled out because to err is human. The powers vesting in the Federal Shariat Court to examine the provisions of any law in fact provide a speedy and an effective remedy to rectify any error which might creep in while drafting the legal instrument.

113. The power conferred upon the Federal Shariat Court under Chapter 3A of Part VII of the Constitution is mandatory. The imperative nature of a decision of the Court is mentioned in Article 203G of the Constitution which state that the final decision of the Federal Shariat Court is binding on all the High Courts and on all courts subordinate thereto. This is at par with the obligatory nature of the decisions of the High Court under Article 201 as well as the provision contained in Article 189 which makes the decision of the Supreme Court conclusive and binding on all other courts in Pakistan. This power is therefore more than what is visualized commonly about mandatory statutes.

Without even alluding to the power of contempt stipulated for the three above mentioned constitutional courts when we examine these constitutional provisions closely we discover that the intention of legislature was indicated in unequivocal terms by mandating that the order passed by courts have to be obeyed, implemented and acted upon and further that the jurisdiction mandated for these three constitutional courts shall has to be honoured and preserved. (clause (2) of Article 5 of the Constitution states that obedience to the Constitution and law is the inviolable obligation of every citizen wherever he may be and of every other person for the time being in Pakistan.

(ISSUE NO.(j)

CONCLUSIONS

114. The conclusions arrived at in this judgment may be summarized as under:

A. Final or interim orders passed or judgments delivered by trial courts exercising jurisdiction on criminal side with regard to

offences covered by the term *Hudood*, whether mentioned in Ordinance VI of 1979; Ordinance VII of 1979; Ordinance VIII of 1979; Presidents Order No.4 of 1979; Act No.XXV of 1997 (Control of Narcotic Substances Act, 1997); The Anti Terrorism Act, 1997; Act No. XLV of 1860 (The Pakistan Penal Code, 1860) or any other law for the time being in force, can be challenged by way of appeal or otherwise only before the Federal Shariat Court and no other court of criminal jurisdiction is competent to entertain and adjudicate upon proceedings connected with *Hudood* offences. Initiation of proceedings to quash First Information Report or pending criminal proceeding related to *Hudood* mattes are within the exclusive jurisdiction of Federal Shariat Court in view of the mandate of Article 203DD of the Constitution of Pakistan.

B. Remedy against grant or refusal of bail before or during the trial of any of the above mentioned offences lies before Federal Shariat Court alone and no other court has jurisdiction to entertain any proceedings in such matters.

C. Sections 11, 28 and 29 of Act VI of 2006 have been found to be violative of Article 203DD of the Constitution of Pakistan. The

overriding effect given to Ordinances VII and VIII of 1979 was doubly fortified as the provisions of Chapter 3A Part VII of the Constitution, which deal with the powers and jurisdiction of Federal Shariat Court, were mandated to have effect notwithstanding contained in the Constitution.

D. Section 48 of The Control of Narcotic Substances Act 1997 (Act. XXVII of 1997) whereby the High Court has been empowered to entertain and decide appeals arising out of the orders passed by the Special Court as well as the power of High Court under section 49 *ibid* to transfer cases, at any stage, from one Special Court to another Special Court are inconsistent with the provisions contained in Chapter 3A of Part VII of the Constitution. The power to entertain appeals against orders passed or judgments delivered by a Special Court established under section 46 *ibid* in matters related to *Hudood* offences and other proceedings including transfer of cases from such court vests in the Federal Shariat Court because offences related to Narcotics are covered by the term *Hudood*. The word High Court occurring in these section shall be substituted with the words Federal Shariat Court.

E. Section 25 of Act VI of 2006 (Woman Protection Act) is declared repugnant to Article 203DD of the Constitution because it makes *Lian* a ground for divorce and thereby causes additional and uncalled for hardship to the "wife" which is contrary to the principal of Ease (Yusr) enunciated by Holy Quran.

F. According to the amendment effected in item 2 of Schedule of Act XXVII of 1997 dated 21.08.1997, the Federal Government in exercise of power vesting in it under section 3 of the Anti-Terrorism Act, 1997 authorized the Anti-Terrorism Courts to try some categories of offences relating to **Hudood** without providing a rider in section 25 (i): **ibid** that appeals in cases involving **Hudood** offence would lie to the Federal Shariat Court. This amendment in the Schedule without corresponding change in section 25(i) offends the constitutional provision contained in Article 203DD which confers exclusive jurisdiction upon this Court in cases relating to the enforcement of **Hudood.** "Any case decided by any criminal court under any law relating to the enforcement of **Hudood**" is to be heard and decided by the Federal Shariat Court alone. (Article 203DD). This position is

therefore travesty of legal constraint imposed by the Constitut on. No authority is superior to the Constitution. Constitution has to be upheld at all costs.

G. The following ten categories of offences are *inter-alia* covered by the term *Hudood* as contemplated by Article 203D) of the Constitution and hence within the exclusive appellate and re visional jurisdiction of the Federal Shariat Court:

i. Zina = In all its forms including Adultery, Fornication and Rape.

ii. Liwatat= Sexual intercourse against the order of nature;

iii. Qazf= Imputation of Zina;

iv. Shurb = Alcohlic drinks/Intoxicants/Narcotics etc;

v. Sarqa = Theft simplicitor;

vi. Haraba = It includes Robbery, Highway Robbery, Daco ty and all other categories of offences against property as mentioned in Chapter XVII of Pakistan Penal Code.

vii. Irtidad= Apostacy. It includes all offences mentioned in Chapter XV of the Pakistan Penal Code, namely: Of Offences Relating to Religion.

viii. Baghee =Treason, waging war against State; All categories of offences mentioned in Chapter VI of the Pakista n Penal Code.

ix. Qisas = Right of retaliation in offences against human body. All these offences are covered by definition *Hadd* because the penalty therein has been prescribed by *Nass/Ijma.*

[Abdul Qadir Audah, has discussed to some extent he scope of *Hadd* in his treatise Al-*Tashree ul Jinai al Islami*, volume 1 at page 119, and

x. Human Trafficking.

Appeal or Revision against any order, final or interim, passed by any criminal court under any law with regard to proceedings connected with or ancillary to or contributing towards commission of any of the above-mentioned offences, shall not be entertained by any court other than the Federal Shariat Court. Section 338-F of the Pakistan Penal Code has, in very clear words, prescribed that in the interpretation and application of its provisions and in respect of matters ancillary or akin thereto, the Court shall be guided by the Injunctions of Islam as laid down in Holy Quran and *Sunnah*. The determination of what is in accordance with Injunctions of Islam is the sole province of Federal Shariat Court and no other court. Additionally all those matters relating to the Family life of Muslims, for which the term *Hadood Allah* has been used in Holy Quran are covered in the abmit of *Hudood* and hence within the appellate and revisional jurisdiction of the Federal Shariat Court.

H. The term "enforcement of *Hudood*" encompasses all categories of offences and matters mentioned above. These offences are included in the scope of the term *Hudood* wherein the punishments have been prescribed by Holy Quran or *Sunnah* of the Holy Prophet PBUH and subsequently through legislative measures. Such punishments can be awarded by trial courts duly constituted under law. The term *tazir* when applied to any offence which partakes of the nature of *Hudood* or is ancillary or akin to or contributing towards commission of offences covered by the term *Hudood* or even where the proof prescribed for establishing *Hadd* is lacking, would of necessity fall within the ambit of the term *Hudood* and hence within the jurisdiction of Federal Shariat Court. Consequently all matters within the parameters of *Hudood,* detailed in the main judgment including offences in which cognizance has been taken in any form as stipulated in section 190 of the Code of Criminal Procedure or under any other law dealing with offences relating to *'Hudood'*, are, for all purposes, enshrined in the jurisdiction of Federal Shariat Court as mandated by the Constitution, which jurisdiction includes, appeal, revision, review, grant or refusal of bail, transfer of cases, calling and

examining record of proceedings, and applications to quash proceeding initiated before or during trial and all matters ancillary to such cases, at any stage of investigation, enquiry or trial.

I. It is an established axiom of law that vires of an Act are to be examined in the light of the limitations imposed by the Constitution. However if the court finds a law or a provision of law to be inconsistent with constitutional provisions, it is competent to strike it down to the extent of such inconsistency. The Federal Shariat Court is additionally empowered to examine a law on the touchstone of Injunctions of Islam. The Court will therefore keep in mind three elements: The legislative competence; the touchstone of Fundamental Rights and the yardstick of Islamic Injunctions. Such an exercise is resorted to not because Judiciary is superior but on account of the fact that:-

a). Dignity of law and legal principles have to be maintained;

b). Constitution has to be upheld and enforced;

c). Above all the people of Pakistan have to be enabled to live upto the permanent values and guiding principles enunciated by Islam; and

d). Members of Superior Judiciary are under oath to do all these things.

J. **CERTAIN LEGAL PRESUMPTIONS**

115. In this Judgment the following propositions have been presumed. These assumptions are based upon various Injunctions of Islam, the constitutional provisions and the Judge made law:-

i. The sole repository of the authority to interpret legal instrument is the Court constituted under the Constitution;

ii. Members of the superior judiciary are under oath to uphold the Constitution and the law;

iii. The Preamble, Articles 2A and 31, Chapter 3A of Part VII and Part IX of the Constitution make it incumbent upon the State to create conditions which may enable the Muslim of Pakistan, individually and collectively, to order their lives in accordance with fundamental principles and basic concept of Islam and to provide facilities whereby they may be **enabled** to understand the meaning of life according to the Holy Quran and Sunnah;

iv. That Holy Quran prohibits very strictly any extra-marital activity between man and woman and is

consequently full of praise for those who shun illicit activity, i.e. those who guard their chastity and private parts. Reference *Ayat* 35 *Sura* 33, *Al-Ahzab* and *Ayat* 29 Sura 70, *Al-Ma'arij.*

v. Human dignity, honour and human life has to be preserved. Laws which protect property of persons have also to be upheld.

vi. Legal provisions are enacted to establish peace, order and balance in the society both at domestic level and among nations at International level. Reference *Ayaat* 1 to 6 *Sura* 83, *Al-Taffit; Ayat* 38 *Sura 2, Al-Baqara; Ayat* 55 *Sura* 24, *Al-Noor.*

vii. Wisdom and saner counsel wherever recorded, according to the well known tradition of the Holy Prophet PBUH, is the lost treasure of believers and they are exhorted to acquire it as and when available. In this view of the matter all the legal principles relating to the domain of interpretation of legal instruments, or reflecting permanent values, from any jurisdiction, if not opposed to the letter and spirit of Holy Quran and Sunnah, will be considered part of principles of Islamic Jurisprudence.

viii. The Court has to be extremely vigilant on the issue of implementation of the Injunctions of Islam because a stern warning has been given to those who cover up the Divine Commandments. Reference *Ayah* 159, *Surah* 2, *Al-Baqarah:*

> "Those who conceal anything of the clear teachings and true guidance which We have sent down even though We have made them clear in Our Book, Allah curses such people and so do all the cursers."

116. It would be pertinent to mention that while writing this judgment in exercise of jurisdiction vesting in this Court under Article 203D of the Constitution, guidance has been sought inter-alia, from the above mentioned principles.

(ISSUE No. (k)

DECLARATION

117. In view of the reasons recorded in this judgment under different issues it is hereby declared:

i. That all those offences whose punishments are either prescribed or left undermined, relating to acts forbidden or disapproved by Holy Quran, Sunnah, including all such acts which are akin, auxiliary, analogous, or supplementary to or germane with *Hudood* offences as well as preparation or abetment or attempt to commit such an offence and as such made culpable by legislative instruments would without fail be covered by the meaning and scope of the term *Hudood.*

ii. The extent of jurisdiction of Federal Shariat Court in matters relating to *Hudood* under Article 203DD is exclusive and pervades the entire spectrum of orders passed or decisions given by any criminal court under any law relating to the enforcement of *Hudood* and no other Court is empowered to entertain appeal, revision or reference in such cases. No legislative instrument can control, regulate or amend this jurisdiction which was mandated in Chapter 3A of Part VII of the Constitution of Pakistan.

iii. An order granting or refusing bail before conclusion of trial in all categories of offences within the ambit of *Hudood* is covered by the word *proceedings,* as used in Article 203DD, and hence within the exclusive jurisdiction of the Federal Shariat Court and can be impugned only in this Court.

iv. The following ten offence are covered by the terms *Hudood* for the purpose of Article 203DD of the Constitution:

1. Zina = Adultery, Fornication and Rape.
2. Liwatat= Sexual intercourse against the order of nature;
3. Qazaf= Imputation of Zina;
4. Shurb = Alcohlic drinks/Intoxicants/Narcotics etc;
5. Sarqa = Theft simplicitor;
6. Haraba = Robbery, Highway Robbery, Dacoity. All categories of offences against property as mentioned in Chapter XVII of Pakistan Penal Code.
7. Irtdad= Apostacy;
8. Baghy =Treason, waging war against state; All categories of offences mentioned in Chapter VI of the Pakistan Penal Code and
9. Qisas = Right of retaliation in offences against human body. All these offences are covered by definition Hadd because penalty therein has been prescribed by *Nass/Ijma.* Abdul Qadir Auda',

has discussed to some extent the scope of Hadd in his treatise Tashree ul Janai al Islam, volume 1 at page 119.

10. Human Trafficking.

The declaration in the above four items shall take effect immediately because all the learned counsel representing the respondents, the jurisconsult as well the *amicus curiae* have, as mentioned in paragraph 17 of this judgment agreed on the four issues which are reflected in the above declaration. These conclusions having been consented to by the parties need nothing more to be done.

v. That sections 11 and 28 of the Protection of Women (Criminal Laws Amendment) Act, 2006 (Act VI of 2006) are hereby declared violative of Article 203DD of the Constitution because these provisions annul the overriding effect of *Hudood* Ordinances VII and VIII of 1979;

vi. That the portions of sections 48 and 49 of The Control of Narcotic Substances Act, 1997 (Act XXV of 1997) whereby the High Court has been empowered to:

a) entertain appeals against the order of a Special Court consisting of a Session Judge or an Additional Sessions Judge and

b) transfer within its territorial jurisdiction any case from one Special Court to another Special Court at any stage of the proceedings, are violative of the provisions contained in Chapter 3A of Part VII of the Constitution because the offences envisaged by Act XV of 1997 are covered by the term *Hudood*. Both the sections are consequently declared violative of Article 203DD of the Constitution. The portion which contains the words High Court should be deemed to be substituted by the words Federal Shariat Court in both the above mentioned sections.

vii. Section 25 of the Protection of Women (Criminal Laws Amendment) Act, 2006 (Act VI of 2006) is declared violative of Article 203DD of the Constitution as it omits sub-sections (3) and (4) of section 14 of The Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 with the result that it has adversely affected the operation of Injunctions of Islam relating to *Lian*. Consequently section 29 of Act VI of 2006 is

also declared violative of Article 203DD as it adds clause *(v i a)* *Lian* in section 2 of the Dissolution of Muslim Marriages Act, 1939. This addition in the latter Act also becomes invalid on account of repugnancy with the Injunctions of Islam relating to *Lian.*

viii. Section 25 of the Anti-Terrorism Act, 1997 (Act No. XVII of 1997) does not make provision for filing an appeal before the Federal Shariat Court in cases where the Anti-Terrorism court decides a case relating to some of the **Hudood** offence included in the Schedule as from 21.08.1997. This omission is violative of Article 203DD. The Federal Government should rectify this error by the target date fixed by this Court otherwise the following rider shall be read at the end of clause (i) of section 25 of Act XXVII of 1997 after on itting the full stops.

> "but where a private complaint or a First Information Report or information, as stipulated in section 190 of the Code of Criminal Procedure, relating to an offence falling within the purview of above mentioned ten categories of *Hudood* Offences, is decided by any court exercising criminal jurisdiction

under any law of the land, the appeal therefrom shall lie to the Federal Shariat Court."

ix. The declaration relating to Protection of Women (Criminal Laws Amendment) Act, 2006 (Act VI of 2006), The Control of Narcotics Substance Act, 1997 mentioned at seria No. vi as well as Anti-Terrorism Act, 1997 shall take effect as from 22nd June, 2011 by which date necessary steps be taken by the Federal Government to amend the impugned laws in conformity with this declaration whereafter the impugned provision shall cease to be effective and this judgment of the Federal Shariat Court will be operative as on 22.06.2011. The other items of the Declaration become operative forthwith.

118. The office is hereby directed to send copies of this judgment to the Federal Government as well as four Provincial High Courts and the Islamabad High Court for information, necessary action and compliance.

SUPPLICATION

رَبَّنَا لاَ تُؤَاخِذْنَا إِن نَّسِينَا أَوْ أَخْطَأْنَا رَبَّنَا وَلاَ تَحْمِلْ عَلَيْنَا إِصْرًا كَمَا حَمَلْتَهُ عَلَى الَّذِينَ مِن قَبْلِنَا رَبَّنَا وَلاَ تُحَمِّلْنَا مَا لاَ طَاقَةَ لَنَا بِهِ وَاعْفُ عَنَّا وَاغْفِرْ لَنَا وَارْحَمْنَآ أَنتَ مَوْلاَنَا فَانصُرْنَا عَلَى الْقَوْمِ الْكَافِرِينَ-

"(Believers! Pray thus to your Lord): "Our Lord! Take us not to task if we forget or commit mistakes. Our Lord! Lay not on us a burden such as You laid on those gone before us. Our Lord! Lay not on us burdens which we do not have the power to bear. And overlook our faults, and forgive us, and have mercy upon us. You are our Guardian; so grant us victory against the unbelieving folk."(2:286)

[redacted] sd/-
JUSTICE SYED AFZAL HAIDER

sd/- [redacted]
JUSTICE AGHA RAFIQ AHMED KHAN
Chief Justice

[redacted] sd/-
JUSTICE SHAHZADO SHAIKH

Announced in open Court
on 22-12-2010 at Islamabad
*Mujeeb-ur-Rehman/**

Fit for reporting

[redacted] sd/-
JUSTICE SYED AFZAL HAIDER

Suo Moto Shariat
Review No. 1/I/2011 in
Shariat Petition No.1/I of 2010
Shariat Petition No.3/I of 2007
Shariat Petition No.1/I of 2007

ORDER

20-01-2011

Some typographical mistakes have been detected in our judgment dated 22.12.2010 delivered in Shariat Petition No. 1/I of 2010, Shariat Petition No. 3/I of 2007 and Shariat Petition No. 1/I of 2007. We have, therefore, in exercise of the Review jurisdiction vesting in us under clause (9) of Article 203E taken Suo Moto notice of these mistakes for the purpose of required corrections. Consequently the necessary emendation is being undertaken.

Page No.	Line	Mistake	Correction
21	9	Omission of Court	Comma after the word amendments,
28	12	Federal Court	Federal Shariat Court
44	4	Hadood	Hudood
47	7	7	deleted
50	11	un Naas	an Naas
60	13	it	its
62	16	Issues	issues
65	3	Hadood	Hudood
78	10	Issues	issues
124	10	mattes	matters

145	16	includes	excludes
146	16	Hadood	Hudood

2. The above mentioned corrections will henceforth be read as part of the said judgment. Copy of this order be sent to all concerned.

JUSTICE AGHA RAFIQ AHMED KHAN
Chief Justice

JUSTICE SYED AFZAL HAIDER

JUSTICE SHAHZADO SHAIKH