

IN THE FEDERAL SHARIAT COURT.  
(Original Jurisdiction)

**PRESENT:**

MR. JUSTICE HAZIQUL KAHIRI, CHIEF JUSTICE.  
MR. JUSTICE DR. FIDA MUHAMMAD KHAN.  
MR. JUSTICE SALAHUDDIN MIRZA  
MR. JUSTICE MUHAMMAD ZAFAR YASIN.  
MR. JUSTICE SYED AFZAL HAIDER.

- (1) SHARIAT PETITION NO.44/I/1993  
(2) SHARIAT PETITION NO.4/I/1993.

CoL. (Retd) Muhammad Akram  
Son of Malik Fateh Khan ... .. Petitioner/

*Versus*

1. Federation of Pakistan.  
Through Secretary Ministry of Defence  
Rawalpindi.  
2. Secretary, Senate Secretariat,  
Islamabad. ... .. Respondents. ✓ A

For the petitioner: ... Col: (R) M. Akram, Petitioner/  
Advocate.

Counsel for Federal  
Government. ... Sardar Abdul Majeed, Standing  
Counsel for Federal Government.

Col. Jehangiree, Pakistan Army, JAG, Dept.

Cmdr. Jan Sher, Pakistan Navy.  
(alongwith Lt. Cmdr. M. Nawaz Mirza,  
Assistant JAG, Pak Navy.

Sq. Ldr. Sohail, Assistant JAG, Pakistan Air  
Force.

Mr. Muhammad Tahir Khan, S.O., Senate  
Secretariat.

Counsel for the State  
Peer Liaqat Ali Shah, AG, NWFP alongwith  
Mr. Sharif Janjua, Advocate and Qari Abdul  
Rasheed, Advocate.

Mr. Shafqat Munir Malik, Addl.  
A.G., Punjab.

Mr. Mehmood Raza Khan, Addl. A.G.,  
Baluchistan.

Mr. M. Sabir Hyder Addl. A.G., Sindh  
alongwith the Mr. Arshad H. Lodhi, Assistant  
A.G., Sindh.

Juris-consults  
Dr. Hafiz Muhammad Tufail and Dr.  
Muhammad Aslam Khaki, Juris-consults.

Dates of Institution ... 13.02.1993 and 23.12.1993.

Dates of hearing ... 25.05.1993, 08.01.1994, 18.01.1994,  
10.04.1994, 29.11.1995, 08.06.2000,  
14.09.2000, 10.10.2000, 24.10.2007,  
12.02.2008, 27.03.2008, 29.04.2008, 30.04.2008  
and 27.05.2008.

Date of decision: ... 2-9-2008

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**JUDGMENT.**

**JUSTICE HAZIQUL KHAIRI, C.J.:-** These two Shariat Petitions namely S.P. NO.4/I/1993 and S.P. NO.44/I/1993 were filed by Col (Retd) Muhammad Akram through his counsel Ibad-ur-Rehman Lodhi, Advocate challenging Sections 133-A and 133-B of The Army Act 1952 under Article 203.D of the Constitution of Islamic Republic of Pakistan on the ground of its being repugnant to Quran and Sunnah.

2. It may be recalled that this Court in exercise of its suo moto powers had examined the Pakistan Army Act 1952, whereunder there was no provision for appeal against conviction of a Court Martial. After hearing the parties, the Federal Government was directed to constitute appellate Court to hear appeals against conviction under Hudood and other laws except petty punishment which may be made subject to revision only (PLD 1985 F.S.C.365).

Aggrieved by the order of Federal Shariat Court, the Federation of

Pakistan had preferred an appeal before the Hon'ble Supreme Court Shariat Appellate Bench, which upheld the judgment of this Court in Pakistan vs. The General Public PLD 1989 Supreme Court Shariat Appellate Bench 6. Accordingly Sections 133.A and 133.B Army Act 1952, Section 162.A Air Force Act 1953 and Section 138 Pakistan Navy Act 1961, were introduced whereby appellate Courts were established.

3. In Shariat Petition bearing No.44/I/1993 the petitioner had raised the following grounds under Article 203.D of the Constitution:-

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- a) That under Section 133.A, of The Pakistan Army Act 1952, an Army convict is required to file his appeal against the sentence of HADD, awarded to him by a Court Martial under an Islamic Law, before the Court of Appeals, which is to be presided over either by the Chief of Army Staff or by one of his subordinate officers, and
  - b) That the constitution of the Court of Appeals is repugnant to the Injunctions of Islam and the natural justice on the following grounds:-

- (1) Under sub-section (2) of the section *ibid*, the sentence of HADD, before being put to execution, is required to be confirmed by the Court of Appeals. The appeal shall also be heard by the Court of Appeals against its own confirmed decision. Thus a Judge has been allowed to be a judge in his case/cause, which is against all the accepted canons of 'ADL' and 'QIST' and the natural justice.
- 2) The appellate review too has been retained within the Army, which does not inspire confidence of its judicial impartiality, which is otherwise *sine qua non* for fair dispensation of Military Justice.
- 3) The presiding officer, being from the executive and not from the judiciary, the convict will have no confidence in the soundness of *jus* judgment.
- 4) The Army convict stands discriminated in the matter of 'equal treatment and protection under the law', as is guaranteed under the Constitution, and the 'Independent Islamic System of Justice without any discrimination', as is guaranteed under 'Enforcement of Shariah Act, 1991'.
- 5) Most of the common law countries, on the pattern of which our criminal law is mainly based, have granted, since fifties, the right of appeal to the members of their

Armed Forces before Courts, which are not only presided over by Civilian Judges but are also totally independent of the command influence of the armed forces.”

4. In Shariat Petition bearing No.4/I/1993 the petitioner had raised the following grounds under Article 203-D of the Constitution:-

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- (1) That vide sections 120 to 123 of Pakistan Army Act, 1952, the findings and sentences by court martial are subject to the confirmation by Commander-in-Chief or by an officer empowered in this behalf by him, whereas in view of the newly inserted section namely section 133 B, the Commander-in-Chief/Chief of Army Staff or his nominee/nominees have been designated appellate courts. In view of this section, the confirming authority of the trial courts' decisions will have the power to hear the appeals against their own/confirmed judgments which is against the principles of natural justice as well as the letter and spirit of the concept of "ADL" & "QIST" as laid down in Holy Quran and Sunna of Holy Prophet.
  - (2) That it is a settled law that an authority which had already manifested open hostility to cause of a party and had expressed its views in that matter in another capacity, should not sit in judgment of the same matter as appellate

authority in view of the principles of natural justice and it is also a settled law that no person could be a judge in his own cause.

5. The points raised by the petitioner against section 133-A of the Pakistan Army Act 1952 in Shariat Petition No.44/I/1993 as well as against Section 133-B thereof in Shariat Petition No.4/I/1993 on a bare reading, are substantially the same and are, therefore, dealt with together.

6. Notices were issued to the respondents namely (i) Federation of Pakistan and (ii) Senate of Pakistan, through the Attorney General of Pakistan who made request to this Court to implead Pakistan Navy and Pakistan Air Force as necessary parties since identical provisions as well are contained in Pakistan Navy Ordinance 1961 and Pakistan Air Force Act 1953. Accordingly they were made parties and they participated in the proceedings before us.

7. During the course of arguments, it was considered expedient to appoint Dr. Muhammad Aslam Khaki, Dr. Tahir Mansoori, Dr. Hafiz

Muhammad Tufail who are on our panel as jurisconsults to assist us and to address the court on the question involved in the case. It was further ordered that the matter may be placed before a larger Bench of five judges because of its importance and may be heard at Islamabad, Karachi and Lahore.

8. In order to examine the grounds urged by the petitioner on the touchstone of Quran and Sunnah it will be advantageous to reproduce Section 133.A and Section 133.B of the Army Act 1952 as under:

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**SECTION 133.A.** (1) Any person to whom a Court Martial has awarded a sentence of Hadd under an Islamic Law may, within sixty days from the date of sentence, prefer an appeal against the finding and sentence of the Court Martial to Court of Appeals consisting of the Chief of Army Staff or an officer, being a Muslim, designated by him in this behalf, hereinafter referred to as the Court of Appeals for Hadd cases.

(2) No sentence awarded by a Court Martial as Hadd under an Islamic Law shall be executed unless it is confirmed by the court of appeals for Hadd cases.

(3) The Court of Appeals for Hadd cases shall have power to:-

- (a) Confirm the finding or sentence or both; or
- (b) Substitute a valid finding or sentence for an invalid finding or sentence ; or
- (c) call any witness for the purpose of recording additional evidence in the presence of the parties, who shall be afforded an opportunity to put any question to the witness ; or
- (d) annul the proceedings of the Court Martial on the grounds that they are illegal or unjust; or
- (e) order retrial of the accused by a fresh court.

(4) The decision of the Court of Appeals for Hadd cases shall be final and shall not be called in question before any Court or other authority."

### SECTION 133.B

- (1) Any person to whom a court-martial has awarded a sentence of death, imprisonment for life, imprisonment exceeding three months, or dismissal from the service after the commencement of the Pakistan Army (Amendment) Act. 1989, may, within forty days from the date of announcement of finding or sentence or promulgation thereof, whichever is earlier, prefer an appeal against the



finding or sentence to a Court of Appeals consisting of the Chief of the Army Staff or one or more officers designated by him in this behalf, presided by an officer not below the rank of Brigadier in the case of General Court-Martial or Field General Court-Martial or District Court-Martial or Summary Court-Martial convened or confirmed or countersigned by an officer of the rank of Brigadier or below as the case may be, and one or more officers, presided by an officer not below the rank of Major General in other cases, hereinafter referred to as the Court of Appeals:

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Provided that where the sentence is awarded by the court-martial under an Islamic law, the officer or officers so designated shall be Muslims:

Provided further that every Court of Appeals may be attended by a judge advocate who shall be an officer belonging to the Judge Advocate General's Department, Pakistan Army, or, if no such officer is available, a person appointed by the Chief of the Army Staff.

- (2) A Court of Appeals shall have power to ---
- (a) accept or reject the appeal in whole or in part; or
  - (b) substitute a valid finding or sentence for an invalid finding or sentence; or

- (c) call any witness, in its discretion for the purpose of recording additional evidence in the presence of the parties, who shall be afforded an opportunity to put any question to the witness; or
- (d) annul the proceedings of the court-martial on the ground that they are illegal or unjust; or
- (e) order retrial of the accused by fresh court; or
- (f) remit the whole or any part of the punishment or reduce or enhance the punishment or commute the punishment for any less punishment or punishments mentioned in this Act.

3- The decision of a Court of Appeals shall be final and shall not be called in question before any court or other authority whatsoever.

9. It was stated by all the parties that identical provisions were incorporated in Pakistan Navy Ordinance 1961 and Pakistan Air Force Act 1953, therefore, we need not repeat them here, being unnecessary.

10. The Federal Government on its behalf and on behalf of Pakistan Army had serious reservations about the pleas raised by the petitioner

which run into a large number of pages. However for the sake of brevity, the objections raised by them in both the petitions are summarized as under:

1. That the petitions are liable to be rejected as no verse from the Holy Quran or tradition of the Holy Prophet (Peace Be Upon Him) has been quoted that the provisions of law in question were repugnant to the injunctions of Quran and Sunnah.
2. That major portion of the judgment of the Federal Shariat Court had been implemented for the establishment of Court of Appeals against the finding and sentences of 'Hadd' under the Islamic Laws vide Section 133A of the Pakistan Army Act, 1952.
3. The learned judges of the Shariat Appellate Bench of the Supreme Court after having heard the arguments, agreed with the view of the Federal Shariat Court and held that although the United Kingdom and the United States of America have gone to the extent of appointing Civil Judges for hearing appeals against the decisions of courts martial the defect would stand removed if the Courts of Appeal provided for hearing appeals against the decisions of courts-martial in three Defence Service Laws. Case of offenders sentenced to 'Hadd' under the Islamic Laws directed that, Section 133A of the Pakistan Army

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Act, 1952, be suitably amended, providing the right of appeals against the orders passed by the courts-martial, except for petty offences, which were made subject to revision only. Consequent upon the above judgment of the Shariat Appellate Bench of the Supreme Court, Section 133B of Pakistan Army Act, 1952 was enacted vide Gazette of Pakistan (Extraordinary) dated December 24, 1992. The enacted law stipulates constitution of the Courts of Appeals consisting of the Chief of the Army Staff, or one or more officers designated by him in this behalf.

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- (i) Under Section 123 the Pakistan Army Act, 1952, legally, the finding and sentence of a Field General Court Martial may be confirmed by the "convening officer" in cases falling under the provision of Section 84(b) of the Pakistan Army Act, 1952 without having been so empowered by the Chief of Army Staff in case the court has been convened under the provisions of section 84 (b) of the Pakistan Army Act 1952.
  - (ii) As regards the contention of the petitioner that it would be against the principles of natural justice and repugnant to letter and spirit of concept of 'Adl' and 'Qist' as laid down in the Holy Quran and Sunnah; that the confirming authority and the

appellate authority would be the same and reference was made to Rule 208 of the Pakistan Army Act Rules, 1952, which reads as under:

**“208, ineligibility of officers for Court of Appeals:-**

Save the Chief of the Army Staff, an officer shall not be eligible to be designated on the Court of Appeals if he investigated the charges before trial, or took down the summary or abstract of evidence, or was a member of the Court of inquiry respecting the matter on which the charges against the accused were found or was a member of court martial in that case, or was the commanding officer who held the trial or who convened the court or confirmed or countersigned court martial proceedings of the case”

(iii) It would be observed that except the chief of Army Staff who is the supreme authority in the Army as far as dispensation of justice is concerned, all others in the circumstances stipulated therein the Rule ibid are rendered ineligible to be designated on the Court of Appeals.

(iv) Reference made by the learned judges of the Shariat Appellate Bench of the Supreme Court as to the civilian judges as members of the appellate court in America was in context of stressing the

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need for the appellate courts in the three Defence Forces of Pakistan, but it was never intended that the appellate courts in the Armed Forces of our country should also include civilian judges. This was not the spirit of the impugned judgment of the Shariat Appellate Bench of the Supreme Court, which is manifest from the fact that the learned judges of the Shariat Appellate Bench of the Supreme Court in their judgment have explicitly laid down that, even if the Courts of Appeals provided for hearing the appeals against the decisions of the courts-martial, who are sentenced to 'hadd' under the Islamic laws, are empowered to hear appeals against the convictions for other serious offence.

- (v) Under the Article 8(3) of the Constitution of the Islamic Republic of Pakistan, 1973, the provisions relating to fundamental rights of the citizens of this Article shall not be applicable to any laws relating the Armed Forces.
- (vi) Army has its own judicial system which deals with the investigation, arrest and trial of offenders under the Pakistan Army Act 1952, which withstood the

test of the time and contingencies arising out of exigencies of the service.

(vii) Section 133B of the Pakistan Army Act, 1952, has been enacted in compliance with the judgment of the Shariat Appellate Bench of the Supreme Court. It is not repugnant to any injunctions of Islam and needs no amendment in it, as the petitioner contends.

(viii) The procedure of courts of appeal of the armed force is not violative of fundamental Rights. Reference was made to section 152 of PAF Act, stating that CAS is confirming authority of all court martial findings and sentences. PAF Act Rule 256(2) debars the officer who passed the judgment to confirm its Judgment or to sit as a court of appeal or member of court of appeal. The accused has full right to object on any member of the court on any ground and in almost 100% cases the officer objected to was replaced. The petitioner has failed to bring forth adequate grounds to justify waving off the period of limitation. The review of laws of the Defence Forces was carried out after due notice given to the general public. The Federal Shariat Court and

Supreme Court had held that laws applicable to the civilian in this regard is distinct from the laws applicable to the members of the Armed Forces. The objection raised by the petitioner on section 90,91 and 93 of PAF Act Rules is not relevant being not repugnant to the Injunction of Islam.

11. Pakistan Air Force in its objections and comments had stated as under:

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"We generally agree with the stand taken by the Pakistan Army and their parawise comments. The forum of Appeal Courts for Hadd cases under Sec. 162.B PAF Act is in line with the judgment of Federal Shariat Court dated 13.10.83 and the Shariat Appellate Bench of the Supreme Court dated 18.9.88. As per judgment of the Shariat Appellate Bench amendment to the Pakistan Air Force Act, 1953 vide section 162-B has the requisite legal sanction and thus not challengeable. The Court of appeal consists of an officer designated by CAS and not by Chief of the Air Staff.

It is incorrect to say that the findings and sentence of all courts Martial are subject to the confirmation by CAS. The proceedings of General Court Martial are only confirmed by CAS because he is the convening Authority for that (Section



152 PAF Act refers). The proceedings of District Court Martial and Field General Court Martial are confirmed by the confirming authority (Base Cdrs of the rank of Gp Capt or above who are empowered by CAS to convene and confirm the proceedings of DCM and FGCM). It is incorrect to say that confirming authority of the trial court's decisions will have the power to hear the appeals. In fact PAF Act Rule-256 (2) debars the officer who either convened the court confirmed its proceedings to sit as court of appeal or remained member of the court, which tried the appellant. The accused had all the rights to object on any member of the court or on any ground and in case such member is replaced.

12. On behalf of the Chief of the Navy Staff parawise comments were filed supporting the stand taken by Pakistan Army and Pakistan Air Force stating that most of the directions issued by The Federal Shariat Court have been implemented through ordinance No. XXXVII of 1984 whereby Hudood laws were made applicable to Naval personnel and the court-martials to award 'Hadd' and 'Tazir' to the offenders. Provisions were also enacted for the establishment of a Court of Appeals consisting of three officers (including one member

from Naval Law Branch) to be nominated by Chief of the Naval Staff.

Right of appeal has been granted under section 138-A vide Pakistan Navy (Amendment) Ordinance 1984. The provisions of appeal are in line with civil law. The court of appeal is convened by the Chief of Naval Staff yet it consists of three officers, including one member from JAG department. The decision of the court of Appeal is final and is not required to be confirmed by any authority. The accused has the right to engage a civil advocate in addition to services of 'friend of the accused' as per the choice of the accused.

13. The petitioner who later on was enrolled as advocate of this Court pleaded his case in person and submitted the following verses of Holy Qura'an in support of his case:-

“Verily, Allah commands that you should render back the trusts to those to whom they are due; and that when you judge between men, you judge with justice. Verily, how excellent is the teaching which He (Allah) gives you! Truly, Allah is Ever All-Hearer, All-Seer” (4:58)

O you who believe! Obey Allah and obey the Messenger (Muhammad) and those of you (Muslims) who are in authority. And if you differ in anything amongst yourselves, refer it to Allah and His Messenger if you believe in Allah and in the Last Day. That is better and more suitable for final determination. (4:59)

Surely, We have sent down to you (O Muhammad) the Book (this Qur'an) in truth that you might judge between men by that which Allah has shown you (i.e. has taught you through Divine Revelation), so be not a pleader for the treacherous. (4:105)

O you who believe! Stand out firmly for justice, as witness to Allah, even though it be against yourselves, or your parents, or your kin, be he rich or poor, Allah is a Better Protector to both (than you). So follow not the lusts (of your hearts), lest you avoid justice; and if you distort your witness or refuse to give it, verily, Allah is Ever Well-Acquainted with what you do. (4:135)

(They like to) listen to falsehood, to devour anything forbidden. So if they come to you (O Muhammad, either judge between them, or turn away from them. If you turn away from them, they cannot hurt you in the least. And if you judge, judge with justice between them. Verily, Allah loves those who act justly. (5:42)

Verily, Allah enjoins Al-'Adl (i.e. justice and worshipping none but Allah Alone --- Islamic Monotheism) and Al-Ihsan [i.e. to be patient in performing your duties to Allah, totally for Allah's sake and in accordance with the Sunnah (legal ways) of the prophet in a perfect manner], and giving (help) to kith and kin (i.e. all that Allah has ordered you to give them e.g., wealth, visiting, looking after them, or any other kind of help), and forbids Al-Fahsha' (i.e. all evil deeds, e.g. illegal sexual acts, disobedience of parents, polytheism, to tell lies, to give false witness, to kill a life without right), and Al-Munkar (i.e. all that is prohibited by Islamic law: polytheism of every kind, disbelief and every kind of evil deeds), and Al-Baghy (i.e. all kinds of oppression). He admonishes you, that you may take heed. (16:90)

And the heaven: He has raised it high, and he has set up the Balance. (55:7)

And observe the weight with equity and do not make the balance deficient. (55:9)

Indeed, We have sent Our Messengers with clear proofs, and revealed with them the Scripture and the Balance (justice) that mankind may keep up justice. And we brought forth iron wherein is mighty power (in matters of

war), as well as many benefits for mankind, that Allah may test who it is that will help Him (His religion) and his Messengers in the unseen. Verily, Allah is All-Strong All-Mighty. (57:25)

Allah does not forbid you to deal justly and kindly with those who fought not against you on account of religion nor drove you out of your homes. Verily, Allah loves those who deal with equity. (60:8)

14. Dr. Abdul Malik Irfani on behalf of Federal Government submitted a research paper the up shot whereof is that Islam permits special law for administering justice for the Army forces and in this respect he differentiated between general and special principles of Islamic law. However the conclusion as drawn by him was on the following basis:

- (i) The principle of practice (Urf) is one of the source of Islamic jurisprudence. This principle is derived from the verse وَأْمُرْ بِالْعُرْفِ (and enjoin kindness) (7:199). He quoted example from the traditions of the Holy Prophet and history

of the Muslim caliphs enjoining the Muslims strict obedience to the orders of the person in power. He argued that there are so many special occasion where in the general principles are not applied on the criminals and punishment on the spot for the deterrence of others. Prolonging of cases is not justice; however the accused must be given sufficient opportunity to be heard. In support of his arguments he quoted reference from the Holy Quran 2 :249 and from Meshkat al Masabih, tradition No.3475, 3477. He also referred to the battle of Uhud. Therefore, the laws relating to the Army must also be sensitive and of a special nature. A crime committed by a common person may not be a big crime but if committed by an army official or by person with special qualities may amount to a heinous crime and the criminal deserves sever punishment. Allah Almighty warned grave punishment for the wives of the Holy Prophet (S.W.A.S) if they committed the crime. Allah says: يَا نِسَاءَ النَّبِيِّ

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( O من يأت منكراً بفاحشة مبينة يضاعف لها العذاب ضعفين وكان ذلك على الله يسيراً

ye wives of the Prophet ! Whosoever of you committeth manifest lewdness, the punishment for her will be doubled, and that is easy for Allah) Al-Ahzab verse no 30. The reason is that the status of the wives of the Holy Prophet (S.W.A.S) is far high than the other women. They are the Ummahat ul Mo'meneen. However when a slave girl committed a crime she would be awarded half punishment, if committed by a free woman.

- (ii) Army is the only institution where discipline is very necessary and who breaches discipline is punished severely.

In this respect special temporary courts consisting Army officers for Army were constituted in the past. If a court consisting of Army officers is constituted empowering to investigate, decide and execute the case, this is not against the injunctions of Islam. The Muslim jurists have also

opined that constitution of special Courts for particular group of people is permissible (Mujahid ul Islam Qasimi : Islami Adalat Page 213) .

- (iii) During the era of the Prophet (S.A.W.S) the complainant himself used to appear and pursue his case before the Prophet or His Qazi and that he himself was investigating about the criminal. The judicial and the executive officers in the period of the Holy Prophet was the same person. The judge was performing all the functions e.g. investigation, judgment and execution. These were not considered as repugnant to the Injunctions of Islam.
- (iv) Now a days the function of the government are countless, therefore the government separated institutions from each other and some time one institution is further divided in small units. Judiciary is separated from executive and the investigation of a complaint and the execution of judgments



have been made the responsibility of independent institutions. In these days the executive appoints judges and police department is also under the control of executive.

This cannot be said as against the injunctions of Islam.

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- (v) The same is the situation of Army Courts. The Commander-in-Chief orders for Investigation of a crime, he constitutes temporary Court for summary Court Martial to hear the case. Quran and Sunnah both are silent on the issue of separation of powers, investigation of cases and execution of judgments by one or more persons independently. The real issue is 'Justice'. This is not correct that a person investigating a case and then gives judgment based on his own investigation and then execute his own judgment means that he is judge in his own case/cause.

- (vi) The Holy Prophet summarily tried the case of Abdullah Ibn-e-Jahan an army commander. During the conquest of

Makkah, the Holy Prophet punished Saad bin Ubadah for saying only one sentence and deprived him from the honour of flag bearing. In this case the Holy Prophet decided on the evidence of only one witness. The Holy Prophet announced social boycott against the three persons at the event Tabuk.

15. Dr. Hafiz Muhammad Tufail juris-consult, appeared before us and submitted a research paper. He firstly brought to our attention the judgment of PAKISTAN through SECRETARY MINISTRY OF DEFENCE Vs. THE GENERAL PUBLIC PLD 1989 S.C. page 6 Shariat Appellate Bench 6, which upheld the decision of this Court and held that denying right of appeal to an aggrieved person was repugnant to injunctions of Islam and that necessary amendments be carried out in the provisions of Section 133 of Pakistan Army Act, Section 162 of Pakistan Air Force Act and Section 140 of the Pakistan Navy Ordinance. He differed with the view of Dr. Abdul Malik Irfani that both Quran and Sunnah are silent on the issue of separation of

powers. He also differed with the view of Dr. Malik that a person may investigate a case, sit on judgment and execute it. To support his contention he placed reliance on DR. MUHAMMAD ASLAM KHAKI AND OTHERS VS GOVT. OF PUNJAB and others (PLD 2005 FSC 3) in which it was held that vice chancellors having himself imposed punishment can not sit in the meeting of syndicate at the time of adjudication of appeals against their own order. It would amount to making the vice chancellor judge in his own cause which would lead to unsavory, rather unacceptable consequences. He was most likely to exert overt/covert influence on the members of the Syndicate who happened to be his subordinates. The Court held that impugned provisions in their present form, are violative of Injunctions of Islam. Federal Shariat Court directed the Authorities to suitably amend the same, so as to incorporate provisions therein that the Vice Chancellor would be debarred from participation in the meeting of the Syndicate before which the appeal of any employee of the University.

challenging his adverse order, passed qua him, is presented for adjudication.

16. Dr. Hafiz Muhammad Tufail also cited a number of cases from the judicial history of Islam in regard to confirmation of judgments by appellate Court but since they have no nexus with Qur'an and Sunnah we have refrained from discussing them for want of jurisdiction.

17. Mr. Aslam Khaki, a juris-consult and a senior advocate of this Court supported by the counsel/representatives of respondents invited our attention to the case of MRS. SHAHIDA ZAHIR ABBASI and 4 others Vs PRESIDENT OF PAKISTAN and others (PLD 1996 S.C. 632) in which it was held:

"I will now take up the objections of the petitioners urged in support of the contention that they do not expect fair trial before the F.G.C.M. The first two objections of petitioners relate to the alleged bias of convening officer and his Commanding Officer (C.O.). The objection is based on the ground that the convening officer is subordinate to his C.O., the

officer who had conducted the initial investigation of the case against the accused officers. Mere fact that the convening officer happened to be a subordinate of another officer who conducted the initial investigation of case is not enough to conclude that the convening officer is biased against the accused officers. There is nothing on the record before us to show that the convening officer acted at the behest of his C.D. (who is said to be the officer who conducted the initial investigation in the cases) while convening the F.G.C.M. The convening officer in the case being a warrant 'A' holder is not subordinate to C.O. in matter of convening the F.G.C.M. The petitioners have not been able to bring on record any material to show that the C.D. of convening officer has tried to influence the proceedings of F.G.C.M. in any manner. In fact, in view of PAA Rule 30, the C.O. of convening officer being an officer who was associated with the investigation of the charges against the accused officer is disqualified from serving on F.G.C.M. convened for trial of the accused officers in any capacity. I, therefore, see no force in these objections of the petitioners."

18. It was further held:

"It is quite clear that the rules of procedure applicable for trial of a person in a criminal case before a Military Court do not violate any accepted judicial principle governing trial of an

accused person. With the assistance of learned Attorney-General and the learned counsel for the petitioners we have gone through various provisions of the Act governing the procedure of trial before a Military Court and after going through the same, I am of the view that the procedure prescribed for trial before Military Courts is in no way contrary to the concept of a fair trial in a criminal case. I may also add here, that unlike the previous position when no appeal was provided against the conviction and sentence awarded by a Military Court, the Act now provides an appeal against the conviction and sentence awarded by a Military Court before an appellate forum”

19. The petitioner in line with his arguments contended before us the concept of 'Adal, Qist, Mizan (PLD 1989 F.S.C. 30). According to him under Rule 208 of Pakistan Army Rules 1952 (*supra*) referred to by the respondents except the Chief of Army Staff, no officer shall hear an appeal who has investigated the charges before or during the trial or is the commanding officer or has convicted or confirmed or countersigned court martial proceedings. This gives blanket and unfettered power to the Chief of Army Staff who may right from the

stage of investigation of a case till its conclusion, in appeal is empowered to solely and exclusively decide the fate of an accused person rendering the entire proceedings sliding into farce and administration of justice a mockery of first order. It was also submitted by him that in any case no justice would be expected in appeal from the hierarchy of armed forces who are trained and indoctrinated on different lines from civil courts who are trained only to administer justice. He referred to Weiner's book on "Civilians Under Military Justice"\* wherein it is stated that appeals from Court Martial to Civil Tribunal were established in Britain (1951), United States (1950), Canada (1952), New Zealand (1953), Australia (1955). It further states:-

"The importance of the Court-Martial Appeal Court has not only in the fact that it provides a means by which an accused can argue that his conviction was wrong, but it also enables a civilian court to oversee the military legal system. The judges of the court are those who would hear appeals from the Crown Court and they are not therefore within the military command

\*The British Treaties since 1689, published by the University of Chicago (1969) P.232

structure. Weiner expressed the view in 1967 that with 'surprising unanimity, the common law world concluded virtually at the same moment in time that, just as war is too important to be left to the generals, so military justice is too vital to be entrusted to judge-advocate"

20. He also quoted Article 67 (a) (1) from the Uniform Code of Military Justice USA, in support of his contention:

(a) (1) There is hereby established a Court of Military Appeals, which shall be located for administrative purposes in the Department of Defence. The Court of Military Appeals shall consist of three judges appointed from civilian life by the President, by and with the advice and consent of the Senate, for a terms of fifteen years. Not more than two of the judges of such court shall be appointed from the same political party, nor shall any person be eligible for appointment to the court who is not a member of the bar of a Federal court or of the highest court of a State."

21. The petitioner further referred to the case of UNION OF INDIA & another Vs CHARANJI S.GILL & others (AIR 2000 Supreme Court (India) 3427) wherein appeal under Army Act was considered as an appeal from Caesar to Caesar's Wife and observed:



“A ban has been imposed on command interference with military justice etc. Our is still an antiquated system. The wind of change blowing over the country has not permeated the close and sacrosanct precincts of the Army. If in Civil Courts the universally accepted dictum is that justice must not only be done but it must seem to be done.”

22. The Pakistan Army in order to rebut this position taken by the petitioner submitted a rejoinder as under:

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- “(i). The presence of civilian judges in the court of Appeals of USA cannot be referred to our system because they have four appellate stages in the finalization of their cases whereas we have only three. Moreover, there is no Islamic injunction to stipulate the appellate stages exactly being followed by USA.
  - (ii) The contention that our Court of Appeals consists of one person is not correct. In fact, our normal composition of the Court of Appeals is of two judges (officers), whereas, in special cases of importance we had even three judges.
  - (iii) The contention of deprivation of fundamental rights is misfounded. If so, then all actions whatsoever in the Army including trials are hit which is not the desire of the legislature.

(iv) PAA Rule 208 deals with the ineligibility of the members of a Court of Appeals. The contention of open hostility is misconceived in the presence of "Civil Review."

23. We may recall that pursuant to our decision in Suo Motu case reported in PLD 1985 FSC 365, appellate courts were established by Army, Navy and Air Force, the object of which was to examine the propriety of judgments given in Court Martial. The respondents in unequivocal terms have stated before us that there never was a single occasion when any Chief of Defence Services had involved himself in the Court Martial cases which fact was candidly conceded by the petitioner Col (Ret) Muhammad Akram, however his contention was that by vesting him with power to confirm the sentence of an accused while sitting as an appellate court would be in violation of the injunction of Islam as laid down in the Holy Quran and Sunnah of the Holy Prophet (peace be upon Him).

24. While examining the alleged exclusive and unfettered powers of C.O.A.S. in Court Martial and appeal we may state that Section

133-A of The Pakistan Army Act 1952, relates to Hudood cases only in which either he or a Muslim officer designated by him would hear appeals but no sentence awarded by a Court Martial as Hadd shall be executed unless it is confirmed by the Court of appeal. There is nothing therein that he or his appointee shall investigate or in any manner interfere with the proceeding in Court Martial: What this section envisages is that the execution of the order of the Court Martial shall be postponed or deferred till the decision and confirmation by the appellate Court. In other words there would be stay of the execution proceedings pending appeal upon the accused filing appeal within 60 days of his sentence. The history of confirmation of sentence and stay of sentence by the appellate Court is not new. Under section 374 Cr.P.C. "When the court of Session passes sentence of death, the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court". Section 376 Cr.P.C. contemplates the power of the High Court to confirm or annul convictions. Similar

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provision is found in Section 133.A of the Pakistan Army Act in which the C.O.A.S. or his nominee has same powers in Hudood appeals as the High Court has in cases falling under Section 376 Cr.P.C.

25. Likewise appeals under section 133-B arise from sentence of death, imprisonment exceeding three months and dismissal from service, which would lie within 40 days before the COAS or one of more officers designated by him presided over by an officer not below the rank of Brigadier in case of General Court Martial or Field General Court Martial or District Court Martial or Summary Court Martial convened or confirmed or countersigned by an officer of the rank of Brigadier or below as the case may be and one or more officers presided over by an officer not below the rank of Major General, in other cases, which would be as the Court of Appeal. In view of this position the petitioner has failed to satisfy us as to how

confirmation of sentence by the appellate courts under section 133.A or 133.B of Pakistan Army Act is repugnant to Quran and Sunnah.

26. We may point out that contrary to the comments filed on behalf of Pakistan Navy that the decision of the court of appeal is final and is not required to be confirmed by any authority, we find that under section 131.A(1) of the Pakistan Navy Ordinance, 1961 "a punishment awarded as Hadd under any Islamic Law shall not be executed unless it is confirmed by the Court of appeal and until the punishment is confirmed and executed, the convict shall be dealt with in the same manner as if sentenced to simple imprisonment." Similar is the position under section 162-A in Hadd case and under Section 162.B in non-Hadd case of the Pakistan Air Force Act 1953.

27. What follows from the foregoing is that confirmation and execution of Court Martial judgment by the appellate court are in line with the procedure prescribed under Cr.P.C. The petitioner as well as

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Dr. Abdul Malik Irfani on behalf of the Federal Government have overlooked this aspect of the case.

28. The other objection raised by the petitioner is that the Army hierarchy which had already manifested open hostility to an accused should not sit in judgment in appeal. Dr. Abdul Malik Irfani who had submitted a Research Paper on behalf of the Federal Government has made an effort to distinguish special law for Armed Forces with ordinary laws of the land. His submission was that a crime committed by a common person may not be a big crime but if committed by an army official it would be a heinous crime and deserves severe punishment. He also gave example from the history of Islam that temporary courts consisting Army Officers for Army were constituted and they were performing all function i.e. investigation, judgment and execution. The present position is no way different but this does not follow that preferring an appeal is repugnant to Quran and Sunnah rather it is the other way round as held by this Court as above.

According to him there is no concept of separation of powers in Islam.

We may disagree with him as the concept of separation of powers is very close to the teachings of Quran and Sunnah and is a salient feature enshrined under the Constitution of the Islamic Republic of Pakistan.

29. The thrust of arguments advanced by Mr. Hafiz Muhammad Tufail was that denying right of appeal to an accused is repugnant to injunction of Islam as was held in PLD 1989 S.C. 6 Shariat Appellate Bench 6 (*supra*) and that a Court Martial Judge cannot act in an appeal against his own judgment as held in PLD 2005 FSC 3 (*supra*). Mr. Aslam Khaki another juris-consult and senior advocate of this court placed his reliance on PLD 1996 SC 632 in which it was held that "the procedure prescribed for trial before Military Courts is in no way contrary to the concept of fair trial in criminal case and "that unlike the previous position when no appeal was provided against the conviction and sentence awarded by a Military Court, the Act now

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provides an appeal against the conviction and sentence awarded by a Military court before an appellate forum”

30. According to Black's Law Dictionary Eighth Edition P.1013

Military Justice means “a situation of punitive measures designated to foster order, morale and discipline within the military. Military Law is the branch of Public Law governing military discipline and other rules regarding service in the armed forces. It is exercised both in peace time, and in war, is recognized by civil courts, and includes rules far broader for punishment of offenders.” In the case of Miss Shahida Zahir Abbasi and 4 others (supra) our Supreme Court had held that “the procedure prescribed for trial before Military Court is in no way contrary to the concept of a fair trial in a criminal case.”

31. The petitioner's objection that an appeal to the same tier of Military hierarchy would not fulfill the requirements of the dictates of Qur'an and Sunnah, drew our attention to the decisions of our Supreme Court Shariat Appellate Bench in the case of Pakistan Vs



General Public (PLD 1989 SC. 1) in which while examining this question, it was held:

“In fact these two countries (UK & USA) have gone to the extent of appointing civilian Judges for hearing appeals against the orders of Courts Martial. But we would not express any opinion on that point and consider that even if the Courts of Appeal provided for hearing appeals against the decisions of the Court-martial, who are sentenced to Hadd under the Islamic Law, are empowered to hear appeals against the convictions for other serious offences, the defect would stand removed.”

32. Further in the case of Pakistan Vs General Public, Supreme Court Shariat Appellate Bench (*supra*) it was held:

“No doubt, in the laws governing all the three Defence Services, a remedy is provided to the aggrieved persons who are convicted by a Court-Martial namely they may present a petition against the order to the Central Government or the Head of the armed force concerned, and these authorities may thereupon review the finding or the sentence or the both. But this remedy cannot be equated with the remedy of appeal. Herein, the aggrieved party has not only the right to present a petition to challenge the order of which he is aggrieved but has

also the right to appear before the Appellate Court and to be heard.”

33. Since this question has been elaborately discussed in the above-named case there is no room for further deliberation. We cannot go behind this decision.

34. Time and again Sardar Abdul Majid and learned counsel for the respondents reminded us that clause (3) of Article 199 of the Constitution places an embargo on the High Court to pass any order *inter alia* in respect of action taken against a person who is subject to law of armed forces of Pakistan. We were also reminded that we do not possess powers such as enjoyed by the Supreme Court of Pakistan under Article 184 (3) of the constitution. However once it is brought to our notice that any law or provision of law is repugnant to Qur'an and Sunnah we are empowered under Article 203.D of the Constitution to declare it so. This will cover cases where such law or

provision of law suffers from omission or absurdity or result into palpable injustice within the meaning of Holy Quran and Sunnah.

35. No doubt it is imperative that we take into account the learned views expressed by acknowledged scholars, jurists and judges of the past and present day on the subject matter provided they have nexus with Qu'ran and Sunnah. The Supreme Court of Pakistan in PLD 1986 S.C. Shariat Appellate Bench 240 had held.

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“Regarding interpretation, although it might be possible to rely on those verses which portray the Holy Qur'an and the Sunnah as organic entity capable of meeting the growing needs of all time to come like a growing expanding tree, it would not be permissible to exercise such free imagination to the extent that the nexus with the two holy sources is lost.”

And further:

“While expounding the Injunctions of Islam a possibility of some marginal so-called divergencies might be visualized. It is a very difficult and perilous exercise. It can lead to proper and improper consequences. Be that as it may, no such expounding of the Injunctions of Islam will be permissible which does not

pay attention to the statement of the text of the Holy Qur'an and Sunnah and to its interpretation together with its Khamir and Zamir."

36. What was not urged before us was the right of the convict to appear either in person or through his counsel before the appellate authority of the three Defence Services. The Supreme Court Shariat Appellate Bench in the above-named judgment had held that the aggrieved party has not only the right to present a petition to challenge the order of which he is aggrieved but has also the right to appear before the appellate court and to be heard'. The right to appear and heard has been provided under Rule 195 of the Pakistan Army Rules, 1954, under Rule 313 of Pakistan Navy Rules 1961 and Rule 236 of Pakistan Air Force Rules, 1957.

37. During the course of arguments we asked learned counsel/representatives of Armed Forces to furnish us the format of judgments given by court-martial as communicated to the accused persons in response to which Pakistan Army had submitted the

judgments/findings given by it against one Lt.Col. Munir Ahmed as

under:

SCHEDULE

Dated 24<sup>th</sup> February 1999

Particulars of the offender PA-14067 Lt.Col Munir Ahmed Gili, ASC, Dte Gen

Procurement, at: Sta HQ Rawalpindi.

Offence charged	Plea	Finding	Sentence	Revised Finding and sentence	Confirmation Minute
(1)	(2)	(3)	(4)	(5)	(6)
<p><u>First Charge</u> PAA Sec 55 Conduct to the prejudice of good order and mil discipline.</p> <p>In that he, at Rawalpindi, during Nov.Dec 96, improperly borrowed Rs.100,000/- (Rupees One Lac only) from PA.14372 Col Iftikhar Ahmed of Dte Gen National Guards, GHQ</p>	Not guilty	Guilty			
<p><u>Second Charge</u> PAA Sec 55 Conduct to the prejudice of good order and military discipline</p> <p>in that he, at Rawalpndi, Feb-July97, improperly asked Mian Muhammad Arshad S/O Min Taj Din of Messers Pak Traders Faisalabad, to extend a loan of Rs.200,000/- (Rupees two lacs only) to his (accused) relative namely Mr. Zahid Iqbal.</p>	Not guilty	Guilty.			
<p><u>Third Charge:</u> Conduct to the prejudice of PAA Sec 55 good order and military discipline.</p> <p>In that he, At Rawalpndi, during Feb-Jul 97, improperly asked Malik Muhammad Aslam S.O Malik Muhammad Zakir of Naveed Traders Faisalabad to extend a loan of Rs.200,000/- (Rupees two Lacs only) to his (accused) to his relative namely Mr. Zahid Iqbal.</p>	Not guilty.	Guilty			
<p><u>Fourth charge.</u> Conduct to the prejudice of PAA Sec.55 good order and military</p>	Not guilty	Guilty	<u>a.</u> <u>rigorous</u> <u>imprison</u>		

<p>discipline.</p> <p>in that he, at Rawalpindi, on 30 Sep 96, improperly filed his Tax Returns for the year 96-97, by declaring his salary as sole source of income, well knowing that, he had income from the sources other than his salary.</p>	ty		<p><u>ment.</u></p> <p>To suffer R.I. for one year.</p> <p><u>b.</u> <u>Dismissal.</u></p> <p>To be dismissed from the service. Recomme ndation of mercy</p>	
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Place Rawalpindi Cpmr Rwp Log Area Judge Advocate Lt Col  
 Dated: 24 Feb 99 (Muhammad Siddiq) (Muhammad Anwar) President FGVM  
 Dated 22.6.99 (Khalid Saeed Zafar)  
 Dated. 22 June 1999.

"I do not confirm the finding of the court on the first, second and third charges. I vary the date of offence on fourth charge as 25 Sep 96 instead of 30 Sep 96 and confirm the finding so varied on the said charge but reserve the sentence for confirmation by the COAS.

Sd/xxx  
 Copy: Rwp Log Area.

38. On our query, we were told by the respondents  
 counsel/representatives that an accused person is informed of the  
 result of his trial as above but he is neither supplied copies of  
 judgment nor of deposition of witnesses and other document from the  
 record to which our next query was on what basis a convict person  
 would prefer an appeal before the appellate authority. Their reply was  
 that the appellate authority itself would go through and scrutinize the  
 judgment of Court Martial and after appraising the evidence and

record of the case the appellate authority would either confirm or set aside or modify its judgment. This drove us home to take suo motu action under Article 203-D of the Constitution of Islamic Republic of Pakistan as to whether non-supply of copies of judgment and other documents of Court Martial whereby an appellant is denied right to raise ground of appeal against his conviction would be in violation of injunctions of Islam.

39. According to Black's Law Dictionary (Eighth Edition) judgment means "A Court's final determination of the rights and obligations of the parties in a case".

40. The term judgment is not defined either in criminal procedure Code or in the Pakistan Penal Code. Section 366 of Code of criminal procedure 1898 has described the mode of delivering of judgments and states that the substance of such judgment shall be explained. Section 367 of Cr.P.C describes the contents of judgment according to which, the presiding officer of the Court shall write the judgment in

the language of the Court and shall contain the points for determination and shall be signed by the presiding officer in open Court at the time of pronouncing it. The judgment shall specify the offence of which, and the section of the Pakistan Penal Code or other law under which the accused is convicted, and the punishment to which he is sentenced. The Sindh High Court had held that the provision is mandatory and its purpose is to let it be known to the accused that the trial judge consciously applied his mind to give a finding against him (Muhammad Ramzan Vs The State, NLR 1984 Cr. 425)

41. In 2004 AC 385 the Supreme Court had held

“It is a cardinal principle of law that judgment must be speaking one, so its reader may understand with clarity, the reasons for which conviction or sentence has been maintained. Judgment of High Court which does not put forward reasonable, convincing and acceptable grounds to understand as to why conviction/sentence was maintained would not be sustainable in the eye of law.”



42. In the case of JALIL ALIAS JALIL-UD-DIN ALIAS JALLO and others Vs THE STATE (PLD 1966 S.C. 971) the Supreme Court of Pakistan had held : "A judgment written without discussing the evidence of witnesses or the circumstances appearing in corroboration of their evidence and without giving any cogent reasons for discarding the evidence of witnesses and the corroborative circumstance, is not a proper judgment."

43. The Federal Shariat Court had held in a number of cases that judgment of the trial Court must contain therein sufficient details qua facts of the case, points for determination decision thereon and reasons for the decision ( Khalid Mahmood Vs. The State 2004 SD 805, PLJ 2004 FSC 66, Khalid Mehmood Vs The State SBLR 2004 FSC 63)

44. Learned counsel/representative of the respondents conceded before us that in Court Martial, the Judge/Presiding Officer would announce 'Guilty' or 'not Guilty' after the conclusion of Court

Martial proceedings, i.e. the operative part of the judgment. However in the legal parlance every judgment shall be based upon evidence backed up by reasons leading to conclusion and operative part. They further stated without any reservation that every judgment of Court Martial is in writing which appraises the evidence and other material on record and embody reasons therein for conviction or acquittal of the accused person. However they frankly admitted that as per practice neither copy of judgment or other record is supplied to an appellant/accused person. We fail to understand why it is so. We ourselves have gone through the Rules of the three Defence Forces and find that under Rule 188 of the Pakistan Army Rules 1954, under Rule 193 of the Pakistan Navy Rules and under Rule 230 of Pakistan Air Force Rules 1951 a person awarded Hadd sentence is entitled to a copy of trial proceedings which shall be provided gratis on announcement of his conviction. But the said Rules of the Pakistan Army Act and Pakistan Air Force Act do not provide procedure regarding supply of a copy of trial proceedings to a person awarded

Non-Hadd sentence which amounts to non-implementation of the directions given by this Court reported in 1985 F.S.C. 365 (*supra*).

Accordingly we have no hesitation in our minds to state that non-supply of copy of judgment, deposition and other record of the case to a convict person/appellant would tantamount to denial of justice to him as he will not be in a position to furnish grounds to assail his conviction in appeal. Similarly it is his basic right to be heard either in person or through his counsel by the appellate authority as was held in Pakistan vs. General Public (*supra*). We may add here that since right of appeal is a substantive right, the denial of copy of judgment and of hearing in appeal would amount to denial of the substantive right resulting into injustice on the touchstone of Quran and Sunnah of Holy Prophet (Peace be upon Him). Accordingly we direct the Federal Government to take necessary steps within six months for amendment of Rules of the Pakistan Army Act 1954 and Pakistan Air Force Act Rules 1957 ensuring supply of judgment, depositions and other record of the case to all the persons to whom sentence has been awarded

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whether under Hadd or not, except petty punishment cases which may  
be made subject to revision only.))

*12/9/08*

JUSTICE HAZIQUL KHAIRI  
CHIF JUSTICE.

*Fida Muhammad Khan*

JUSTICE DR. FIDA MUHAMMAD KHAN

*Salahuddin Mirza*

JUSTICE SALAHUDDIN MIRZA.

*M. Z. Yasin*

JUSTICE MUHAMMAD ZAFAR YASIN

*Syed Afzal Haider*

JUSTICE SYED AFZAL HAIDER.

Announced on 2-9-2008  
at Islamabad  
Daud/\*\*

*Abdullah Zafar  
referring  
12/9/08  
2/9/08*