Scenario 41

PAKISTAN'S JUDICIARY IN 2004-05:

An extract of ***Report N°86 dated 9th November 2004*** compiled by ***the International Crisis Group*** which had categorically stated that when military coups ended democratic rule in Pakistan the judiciary not only failed to check extra-constitutional change, but also endorsed and abetted the consolidation of illegally gained power. Gen Musharraf's government had deepened the judiciary's subservient position among national institutions, ensuring that politics trumped the rule of law, and weakened the foundations for democratic rule.

Since Chief Justice Muneer's days in 1955, Pakistan's higher courts have been playing a critical political role by reviewing the legitimacy of unconstitutional take overs- or continuity. To eliminate potential judicial challenges, the successive military governments devised ways to keep the judiciary weak. The executive always exercised control over the courts by using the system of judicial appointments, promotions and removals to ensure its allies fill key posts. Immediately after all military coups, the judiciary was washed out of judges who might have opposed the military's unconstitutional assumption of power.

Such cleaning actions were accomplished by requiring judges to take an oath to military ruler's Provisional Constitutional Order, an oath that required judges to violate oaths they had all previously taken to uphold the 1973 Constitution. Fear, that another oath would be used to remove more judges, brought limits to the bench's freedom. Moreover, new judges were more cautious because the executive would remove them after one or two years by declining to 'confirm' their appointments.

During Gen Musharraf's regime, his political allies filled key judicial positions, particularly the posts of Chief Justices of the Lahore and of the Sindh High Courts. Compromised by this political bargain, the superior judiciary was unable to address creeping financial corruption within its own ranks. Dysfunction in the superior judiciary also hampered reform in the subordinate judiciary, which comprises the trial courts in which the mass of ordinary judicial business was handled. Endemic corruption in the subordinate judiciary led to agonising delays in the simplest cases and diminished public confidence in the judiciary and the rule of law.

In some subject areas and in some territories, the government simply bypassed the ordinary courts by establishing parallel judiciaries as had been done in Nawaz Sharif's era. In 1997 and 1999 respectively, the government had established separate [and parallel] anti-terrorism and accountability courts, amazingly headed mostly by the serving army officers.

In fact, PML's political government had gone too far by establishing military courts during democratic rule. Those tribunals contained procedural shortcuts that made them too attractive to overzealous police and prosecutors. On the other hand, the gesture had created rift and misunderstanding between the judiciary and executive. CJP Sajjad Ali Shah's row with PM Nawaz Sharif had taken start from the point of establishing these courts in mid 1997 which ended with attack on the Supreme Court in November of the same year and the Chief Justice winding up his baggage.

17th AMENDMENT UPHELD:

On **13th April 2005**, a five member Bench of the Supreme Court of Pakistan delivered a Judgment, known as *Pakistan Lawyers Forum vs Federation of Pakistan* and through this bunch of different petitions, the constitutionality of 17th Amendment was challenged before the apex court. One of the grounds was that the 17th Amendment was violative of the basic structure of the constitution. The five member bench had also included two judges named Justice Iftikhar Mohammad Chaudhry [later the CJP] and Justice Javed Iqbal [*both were the victims of 3rd November 2007's Emergency later reinstated in March 2009*].

Gen Musharraf's Uniform cum Presidential Office [*quite analogous to Mr Zardari's dual Office: President's portfolio & PPP's Acting Chairperson's designation*] was also challenged in the same petition and were dismissed accordingly. Supreme Court's wisdom as to how it handled that question in 2005 was ignored at the time when Gen Musharraf's above mentioned petition was placed before the SC's bench in 2007 in which the same two judges aforementioned were also sitting with the only difference that one of them was the Chief Justice.

The five member bench in 2005 dismissed the petition and upheld the 17th Amendment. The court held that the Indian Doctrine of Basic Structure of the Constitution had never been accepted in Pakistan's judicial history; and that the Court could strike down a Constitutional Provision only if it was not passed in accordance with the procedures provided by the Constitution itself. Once an amendment is passed, it is left to the wisdom of the Parliament which passed it to change it in future according to the aspirations of the people of Pakistan.

The following are the paragraphs taken from that judgment of 2005, numbered as original being easy to comprehend. [*Had the Supreme Court turned down the 18th Amendment later, as it was a roaring demand through media and other political pressures, it would have come up with a very strong reasoning for deviating from its own judicial precedents.*]

> *32. As to the issue of striking down the 17th Amendment on procedural grounds, it is observed that an Amendment to the Constitution, unlike any other statute can be challenged only on one ground: it has been enacted in a manner not stipulated by the Constitution itself.*
>
> *41. It has been urged by the petitioners that the 17th Amendment in its entirely or at least specifically, Article 41(7)(b) and Article 41(8) should be struck down as violative of the basic structure of the Constitution. It may first be noted that it has repeatedly been held in numerous cases that this Court does not have the jurisdiction to strike down provisions of the Constitution on substantive grounds.*
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> *46. A challenge to the Fourth Amendment to the Constitution on the ground of the doctrine of basic structure was rejected by the High Court of Sindh in Dewan Textile Mills v. Federation* ***(PLD 1976 Karachi 1368)****.*
>
> *56. The superior courts of this country have consistently acknowledged that while there may be a basic structure to the Constitution, and while there may also be limitations on the powers of the Parliament to make amendments to such basic structure, such limitations are to be exercised and enforced not by the judiciary (as in the case of conflict between a statute and Article 8), but by the body politic, i.e. the people of Pakistan.*
>
> *In this context, it may be noted that while CJP Sajjad Ali Shah had observed that 'there is a basic structure of the Constitution which may not be amended by the Parliament', he nowhere observes that the power to strike down offending amendments to the Constitution can be exercised by the superior judiciary. The theory of basic structure or salient features, insofar as Pakistan is concerned, has been used only as a doctrine to identify such features.*
>
> *57. The conclusion which emerges from the above survey is that prior to Syed Zafar Ali Shah's case, there was almost three decades of settled law to the effect that even though there were certain salient features of the Constitution, no constitutional*

amendment could be struck down by the superior judiciary as being violative of those features. The remedy lay in the political and not the judicial process. The appeal in such cases was to be made to the people not the courts. A constitutional amendment posed a political question, which could be resolved only through the normal mechanisms of parliamentary democracy and free elections.

58. It may finally be noted that the basic structure theory, particularly as applied by the Supreme Court of India, is not a new concept so far as Pakistani jurisprudence is concerned but has been already considered and rejected after considerable reflection as discussed in the cases noted hereinabove. It may also be noted that the basic structure theory has not found significant acceptance outside India, as also discussed and noted in the Achakzai's case.

More specifically, the Supreme Court of Sri Lanka refused to apply the said theory in a case, reported as in the 13th Amendment to the Constitution and the Provincial Councils Bill (1990) LRC (Const)1.

Similarly, the said theory was rejected by the Supreme Court of Malaysia in a case titled Phang Chin Hock v. Public Prosecutor (1980) 1 MLJ 70.

59. The position adopted by the Indian Supreme Court in Kesva Bharati case is not necessarily a doctrine, which can be applied unthinkingly to Pakistan. It has been the consistent position of this Court ever since it first enunciated the point in Zia ur Rahman's case that the debate with respect to the substantive vires of an amendment to the Constitution is a political question to be determined by the appropriate political forum, not by the judiciary. That in the instant petitions of this Court cannot abandon its well settled jurisprudence.

85. The petitioners also argued that the statute be struck down because it was not a 'good thing'. This Court, however, held in Zia ur Rahman's case that ***'it is not the function of the judiciary to legislate or to question the wisdom of the Legislature in making a particular law'.*** *This Court has consistently held that the wisdom or policy of the legislature is not open to question in exercise of the power of judicial review.*

87. Lastly, the petitioners argued that the statute be struck down because that would be the more appropriate thing to do and would be in consonance with popular demand. This Court has, however, always held that statutes are not to be struck down lightly. The Court must make every attempt to reconcile the statute to the Constitution and only when it is impossible to do so, must it strike down the law.

88. Statutes are presumed constitutional and the burden of proving otherwise is on the petitioners. This Court has never struck down a statute on subjective notions of likes and dislikes or what is popular and unpopular. That is not its function. It is as much its duty to uphold a statute, which is constitutional as is its duty to strike down an unconstitutional statute.

90. This Court must have due regard for the democratic mandate given to Parliament by the people. That requires a degree of restraint when examining the vires of or interpreting statutes. It is not for this Court to substitute its views for those expressed by legislators or strike down statutes on considerations of what it deems good for the people. This Court is and always has been the judge of what is constitutional but not of what is wise or good. The later is the business of the Parliament, which is accountable to the people.

92. In consequence, the petitions are dismissed. Above are reasons for the short order announced on 13th April 2005.

However, such juggleries are often seen in Pakistan. The rulers, military and civil both, get the legislations on paper as per their own suitability, sometimes through higher courts and sometimes through the Parliament. During 17th Amendment Gen Musharraf got suitable

verdict from the SC and for 18th Amendment, the politicians from both treasury and the opposition benches, got the law suitable to them but from the Parliament.

The tragedy with Pakistan is the greed and incompetence of mostly ruling politicians belonging to all sects and parties. Due to their incompetence there were four 'martial laws' in which a nexus of Generals, judges and a section of the press having 'good relations' with ISI or GHQ were visible. Once Justice Ramday of the Supreme Court of Pakistan had opined that:

> *'Whereas the higher judiciary gave a temporary reprieve to military rulers, parliaments gave them permanent relief'.*

Ayaz Amir, in ***'the News' of 16th July 2010***, had not considered it as the whole truth. The fact remained that the parliaments which sanctified the actions of military dictators were the creatures of those dictators and shaped by them but the judges who legitimized military takeovers were not under such compulsions. They were on their benches before those takeovers. In the next paragraph Ayaz Amir opined that:

> *'No constitution in the world says there should be elections in political parties; not even American which poses as champion of democracy. Yet their lordships [would] observe that with the provision of party elections deleted from the constitution, the command of the Pakistan's constitution is affected.'*

At this point the intelligentsia also felt disturbed, genuinely raising a point that though the elections in political parties are not mentioned in the written constitutions world over but:

- *Is there any true democracy in the world where elections are not held in the political parties though not provided in the constitution.*
- *Is there any true democracy in the world where the party is transferred by the chairpersons to their sons and daughters in succession like a family property as in Pakistan.*
- *Is there any true democracy in the world where elections in political parties are made optional by constitutional provisions as in Pakistan vide 18th Amendment. Like the worldly constitutions, the mention of party elections was not required with either sense.*

Ayaz Amir, widely respected for his democratic thoughts, always struggled for the people's genuine will and never hesitated to differ even with his own boss Nawaz Sharif of PML(N) to which party Mr Amir belonged; neither in 2001 nor in 2011 as the media witnessed.

HIGH COURTS vs FEDERAL SHARIAH COURT:

In 2004, a controversy appeared in Lahore chapter of Pakistan's judiciary that whether the high court could review or re-assess the judgments passed by the Federal Shariat Court (FSC). A question was also taken up that whether the expression 'decision' in Article 203(GG) of the Constitution included the 'judgment' or order or the sentence passed by the FSC and whether the same would be binding on the High Court and its subordinate courts.

The cause of controversy: that numerous judgments of the superior courts especially the FSC were available on record that an adult *sui juris* Muslim girl could contract a valid *'Nikah'* on her own and consent of guardian or near relations was not needed. This judgment was incorporated in the Constitution of Pakistan in 1982 by virtue of Article 203(GG) but was not being normally followed [and still it is so] by the subordinate courts under the threat of local feudal community.

The said Article [203(GG)] says that any decision of the FSC in the exercise of its jurisdiction under the Chapter 3-A of the Constitution would be binding on the High Court. Article 203(D) describes the original jurisdiction of the FSC and Article 203(DD) 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. Article 203(DD)(3) lays down that *'the Court shall have such other jurisdiction as may be conferred on it by or under any law'*. Thus exercising the appellate jurisdiction, the FSC in fact is exercising jurisdiction conferred by Article 203(DD)(3), a part of Chapter 3-A.

Moreover, the expression 'decision' in Article 203(GG) seems to have been used in a generic sense which would include the reasons of an order: say of confiscation of property, and / or an order regarding compensation or sentence of imprisonment or fine. Of course, the High Court can take up scrutiny of the judgments or orders or sentences imposed by the FSC but keeping in view the cost of repetition, in terms of both time and money, such an ugly situation has to be avoided.

When the above matter was brought before the Supreme Court, Justice M Ajmal Mian maintained that:

> 'The FSC is a Constitutional Court and it is at least undesirable and inappropriate, if not illegal that another Constitutional Court (like High Court) should hold FSC's judgments as without jurisdiction. Even in normal course the point of jurisdiction has to be urged before the same Court and adjudication obtained. The Constitution provides appeal to the Shariat Appellate Bench of this Court and the question of jurisdiction could have been urged there. Additionally, under the provision of Article 203(E)(9) of the Constitution, added through Presidential Order No. 5 of 1981, the FSC has the power of review which could have been moved, if desired.' ***(P L D 2004 SC 219)***

Justice M Ajmal Mian also held that Muslim Personal Law cannot be examined by the FSC and Muslim Personal Law in Article 203(B)(c) means (i) statutory law of Muslim and (ii) it is the personal law of a particular sect; if these two conditions are not present, the matter can be examined by the FSC.

However, in the following two highly trumpeted cases, the Constitutional provisions and the ruling passed by the Supreme Court of Pakistan were over-turned first by the LHC and then the apex court itself.

MUKHTARAN MAI CASE (2002-05):

Customary and extra-judicial practices are always a source of abuse of women in Pakistan. In June 2002, a tribal *Jirga* (local council) in southern Punjab overlooked the gang rape of one **Mukhtaran Mai**, a young woman. Four men, including one of the tribal council members had then allegedly raped Mukhtaran Mai which was intended as 'punishment' for the suspected conduct of her under 18 brother named Abdul Shakoor. Abdul Shakoor was accused of an illicit relationship with a woman named Salma of another tribe called 'Mastoi'.

The subsequent story came up that earlier on that day of 22nd June 2002, Shakoor was abducted by three Mastoi men, was taken at the *dera* of one Abdul Khaliq (Salma's brother) and each of whom sodomized him. The medical report had testified that Shakoor had indeed been sodomized and assaulted. [*Abdul Khaliq and the two others were convicted later in a separate trial*] Shakoor shouted for help in that dragging and his relatives heard his cries. Many women including Mukhtaran Mai rushed outside and urged Abdul Khaliq to release Shakoor but he refused. Mukhtaran's mother then sent her brother to get the local police from the Jatoi Police Station, 18 km away from there.

Members of Mukhtaran's clan also came there and were told that Shakoor had been accused of illicit sex with Salma. On the other side about 200 men of Mastoi tribe also gathered and a Mastoi tribal *jirga* formed immediately under their clan chief, Faiz M Mastoi, known as Faizan. The police arrived before sunset, freed Shakoor from the Mastois and took him to the police station for further probe.

Mukhtaran's family proposed to settle the matter with the Mastois by marrying Shakoor to Salma, and marrying Mukhtaran to one of the Mastoi men, and if Shakoor was found guilty, to give some land to Salma's family. This proposal was conveyed to Faizan but Abdul Khaliq refused the offer and insisted that illicit sex must be settled with illicit sex as per their tribal rules. The *Jirga* decided that the Mastoi would accept the proposed settlement, if Mukhtaran Mai would personally come and apologize before the gathering. Mukhtaran Mai agreed and it was settled that her family should be forgiven.

Immediately after, Abdul Khaliq armed with pistol and with two others, forcibly took Mukhtaran Mai into a nearby stable where she was allegedly gang raped. About an hour later, she was pushed outside wearing only a torn shirt and paraded naked before hundreds of onlookers. Her father covered her up with a shawl and took her home. [*Her clothes were later presented as evidence in the court after medical examination of Mukhtaran and chemical analysis of her clothes.*] That same night, the police were informed that the two clans had settled their dispute, and that Mastois were withdrawing their complaint against Shakoor.

In next Friday's prayer, the local *imam* named Abdul Razzaq condemned the gang rape incident in his sermon, got a local journalist Mureed Abbas to meet Mukhtaran's father, and persuaded the family to file charges against the rapists. On 30th June 2002, Mukhtaran and her family went to Jatoi Police Station and filed their complaint. Within few days the story became headline news in Pakistan media. On 3rd July, the BBC picked up the story; the Time magazine published the front page article on it in mid-July 2002 and major international print & electronic media jumped in.

The police went proactive then, case hurriedly investigated, culprits picked up and the trial conducted. The alleged rapists including Abdul Khaliq and members of the Mastoi *jirga,* six men in total, were sentenced to death by the Dera Ghazi Khan Anti-Terrorism Court (ATC) on 1st September 2002. [*Four men were found guilty of rape and two others, who were part of the tribal council, were found guilty of aiding and abetting the crime but all were sentenced to be hanged which was not considered fair by any court practice*] Eight other accused men were released. Mukhtaran Mai filed an appeal the very next day in Lahore High Court (Multan Bench) against the acquittal of the eight men set free.

On 3rd March 2005, the Lahore High Court reversed the judgement of the trial court on the basis of insufficient evidence and subsequently five of the six men sentenced to death were acquitted, however, the Pakistani government decided to appeal the acquittal.

Mukhtaran Mai was lucky enough to be represented by the highly acclaimed panels of lawyers. One such team was headed by Pakistan's Attorney General [Makhdoom Ali Khan] and the other panel was led by Aitzaz Ahsan, a veteran politico-lawyer of the PPP but the alleged rapists were found not guilty. The accused were subsequently released. The Federal Sharia Court (FSC) decided to suspend the said decision of Lahore High Court on 11th March on the pretext that Mukhtaran's case should have been tried under the Islamic *Hudood* laws. Three days later the Supreme Court ruled that ***'the Federal Sharia Court has no authority to overrule the High Court's decision'*** and decided to hear this case in the Supreme Court.

On ***6th June 2005, the Lahore High Court ruled*** that the accused persons could be released on payment of Rs: 50,000 (£450 then) bonds, however, the men were unable to come up with the money, and remained in jail while the prosecution appealed their acquittal. Two weeks later, the Supreme Court intervened and suspended the acquittals of the five men (which were originally sentenced to death) as well as the eight others who were acquitted in the original trial of 2002 by the ATC. All 14 were placed at the mercy of the Supreme Court.

On 21st April 2011 the Supreme Court upheld the Lahore High Court verdict.

Mukhtaran Mai's case was not the only case of chequered cultural perspective of Pakistan. Earlier in 2001, the same kind of case was reported in the NWFP commonly known as Zafran Bibi Case.

ZAFRAN BIBI CASE:

Daily the ***'Guardian' of 12th May 2002*** stated that Human Rights Commission of Pakistan estimates that every two hours a woman in the country is raped but very little thought has been paid as to how it is possible for innocent illiterate young female victims to be so thoroughly abused by Pakistan's judicial system. Given the inherent weaknesses in the investigation system, with a zero per cent chance of punishment to the assaulter, hardly any rape case is reported to the police. In Zafran Bibi Case she was convicted with the maximum punishment available under any law in the country divulging that how a rape case could be twisted to a perverse conclusion under the prevailing legislation. The victim reported that she was subjected to a crime against her will while the police insisted that she was a consenting party. What could be the consequences then?

On 26th March 2001, one Zafran Bibi, aged 28 years, had reported in the police station concerning with the village Kerri Sheikhan of Kohat in NWFP [now Khyber PK] that one Akmal Khan [*a villager involved in a long-running dispute with her family*] had overpowered her in the nearby fields and raped. After the report, Zafran Bibi was referred to a hospital for an examination. The medical officer there found her to be over seven weeks pregnant. Given the discrepancy in the period between the alleged rape and her pregnancy, the police accused Zafran Bibi as an accused along with Akmal Khan under the Zina Ordinance 1979. The allegation was that she had consented to sex with Akmal Khan but had only disclosed it when she became pregnant.

During the trial, however, Zafran Bibi told the truth that it was in fact Jamal, her brother-in-law, who had raped her repeatedly, but her father-in-law implicated Akmal Khan to save his son. The trial court acquitted Akmal Khan and on the basis of circumstantial evidence and her statement ***sentenced Zafran Bibi to death by stoning u / s 5 of the Zina Ordinance***. The court ruled that she had not been raped but had committed adultery, which entailed that punishment.

When Zafran Bibi's in-laws felt that the person whom they implicated had been acquitted and the victim was adamant that the actual culprit was her brother-in-law, her husband gave a new twist to events by telling the superior court through an affidavit that his wife was pregnant by him. He stated that although he was imprisoned but worked at the residence of the Jail Superintendent where his wife frequently visited him and they had sex there, resulting in the pregnancy; the story no body believed because if there were any wrongful act on the part of the victim she would have never reported the matter to police.

The superior courts held that *'a mere delay in reporting is no basis for drawing an adverse inference. In this case, the delay has also been plausibly explained in the First Information Report itself.'* Thus the conviction order of the Additional Sessions Judge Kohat, Anwar Ali Khan, was set aside by the Federal Shariat Court (FSC) which acquitted Zafran Bibi as there were material irregularities in the procedure adopted by the lower court. The FSC, interalia, observed that:

- Firstly, the Pakistani *Hudood* Laws are clearly discriminatory, as they exclude altogether the testimony of female witnesses in awarding the punishment of *hadd*. If a woman is raped in the presence of any number of women, the rapist cannot be punished under the Ordinance.
- Secondly, rape in the absence of any witness is no crime at all under the provisions of Zina Ordinance 1979.
- Thirdly, as the offence of Zina is based on the injunctions of Islam it comes within the domain of Muslim personal law. Hence, non-Muslims should be exempted from this law, which at present they are not.
- Fourthly, the law does not protect a child victim who has not attained mental maturity. The only criteria set forth by the Ordinance are that a male be aged 18 years while a female be aged 16 years or have attained puberty. This means that a

12-year-old girl can be punished with having had wilful sexual intercourse out of wedlock if she has started menstruating. The Ordinance does not in any way account for the girl's mental maturity, which in criminal law is a fundamental requirement to construe criminal liability.

- Fifthly, the law does not contain a single word about the possible compensation or rehabilitation of the victim, neither as a result of being raped in the first place, nor subsequent to wrongful prosecution and all of the suffering and anguish that it has caused.

Gen Musharraf, the military ruler, knew nothing about the case until he was questioned by foreign journalists that if he had planned to reform the adultery laws, introduced in 1979 in a wave of Islamisation led by another military dictator Gen Ziaul Haq. *'Frankly, I haven't given it such deep thought, let me admit,'* said Gen Musharraf who had worriedly insisted that Bibi would not be executed. But hundreds more women who had reported rapes till then were held in jail under the same adultery laws. The foreign reporters were sure that the military regime, despite its promise to eradicate that misuse of Islamic judicial provisions, was unwilling to reform the specific laws for fear of angering his religious friends around the government.

Chairman of the Human Rights Commission of Pakistan, Afrasiab Khattak urged in that Zafran Bibi's case that:

> *'She is not the first case and she is not going to be the last. If Gen Musharraf really wants to do away with extremism, then there is no alternative to doing away with the structures created by Gen Ziaul Haq, which include the so-called Islamic laws. Even if Zafran Bibi returns to her village now, the stigma is so severe that it will be a very harsh life for her and her children.'*

The misuse of the Hudood Ordinance of 1979 was effectively highlighted internationally when Zafran Bibi, was charged with adultery and sentenced to death by stoning. Pakistani women's rights groups rallied around the case and formed an alliance for the repeal of discriminatory laws, especially the Hudood Ordinance of 1979. It was after an active campaign led by national women's rights groups, the Federal Shariat Court of Pakistan had opted to hear the case and then overturned the sentence and acquitted Zafran Bibi in June 2002. However, the law that led to her conviction remained in effect and continued to be a major source of abuse against women victims of violence.

HASBA BILL (2005):

In July 2005, the **Hasba bill** (Accountability Bill) was proposed by members of the NWFP assembly of the Mutahida Majlis e Amal (MMA) [an alliance of six religious parties endorsing a system of Islamic justice (sharia)]. In 2003 the Hasba Bill (Sharia Implementation Bill) was approved by the same assembly; which mandated sharia in the province; thus the Hasba bill was intended for overseeing the implementation of Sharia Act of 2003 approved by the same assembly. The bill was blocked by the Supreme Court of Pakistan. CJP Iftikhar Chaudhry declared it to be unconstitutional as the then Attorney General Makhdoom Ali Khan had appeared on behalf of the President of Pakistan who challenged the bill using his powers as Referring Authority.

The proposed bill was drafted by the MMA leadership strongly advocating that it would bring a pleasant change in the society and it will ensure that all miseries of masses will be solved in a short span of time. The opposition and the civil society organizations criticized the bill declaring it unconstitutional; the Marshal Law of Maulvies and a parallel legal system that would spread anarchy and chaos in the society and would deprive the general public of their rights and liberties.

It was astonishing to note that regardless of its tall claims, the government avoided to present the bill in the assembly since 2003. The Governor had once forwarded it to the

Council for Islamic Ideology (CII) for review. The council held a detailed discussion on the bill in August 2004 and sent their comments to Governor NWFP through a letter no PSG-1(2) 2004/324-25-WF openly asking for its rejection.

The main scheme was to establish the offices of Mohtasibeen (Ombudsmen) on provincial, district, tehsil and local levels under the bill. The governor as per the advice of Chief Minister was to appoint of a Mohtasib for a term of four years who would in turn appoint an advisory council consisting upon two religious scholars, two lawyers and two senior serving government officers in grade 20. Similar set ups were to be established at down levels of hierarchy to achieve the desired results. There was a mention of twelve clauses in detail earmarking the sphere of Mohtasib's administrative powers.

The summary of comments of the CII on the proposed Hasba bill was that:

- The said bill would contribute to make Islamic laws disputed in the society giving an edge to the government to utilize it for its vested interests in an unjust manner.
- The inclusion of controversial matters concerning interpretation of Islamic teaching would make Hasba unpopular amongst masses; it would lead to sectarian disputes on grounds of unjust treatment by the powerful groups.
- The 27 sub articles mentioned under clause 23 of the proposed bill were not clearly defined and were left on the discretion of Mohtasib and Hasba force.
- The definition of vice and virtue in Islamic perspective was not equally acceptable to all the existing sects in the country.
- The Jafaria sect had no definable concept of Hasba.
- The bill contradicted many articles of the constitution of Pakistan particularly articles 75 (3) related to the independence of judiciary.
- The responsibilities of Mohtasib were similar to that of judges; therefore, he should possess the required qualification as described for the judges of Sharia court. The term 'certified scholar' (Mustanid Aalim e Deen) was not enough.
- Article 12 of the bill stated that any of Mohtasib's decisions could be challenged in any court of law, which would create anarchy and victimization at large.
- The term Hasba force (volunteers) and their responsibilities were not defined.
- The institution of Mohtasib already existed in Pakistan so it would be taken as a parallel institution creating wide misunderstanding.
- The appointments of Mohtasibeen on district and tehsil levels would lead to open confrontations with existing local government system.
- The CII recommended that power to remove Mohtasib should rest with the supreme judicial council and his tenure should not be extendable.

A thorough review of the above mentioned points raised many crucial questions concerning the establishment of the Hasba institutions, capacity of the government to deliver and implement the existing laws; moral, legal and constitutional and other practical aspects of the bill. Some opined that there would be no need of provincial assembly or other departments in the province because the ultimate concentration of legislative, judicial and administrative powers in Mohtasibeen would lead establishment of clergy rule in the province. It would have deteriorated the relationship of the federal and provincial governments and the selective use of religious teachings had the potential to further polarize the society opening more avenues for the exploitation of religion for political gains. Unknowingly it would have brought defame and criticism for certain Islamic sects.

The Mohtasibeen would have been virtually ruling the entire province but the women and minorities had greatly suffered because it was unlikely that they would have got due

representation in it. Thus the implementation of the bill could have eroded the people trust in the democratic process and the relevant institutions. More so, the powers of Mohtasibeen were likely to be used to obtain the desired results in the upcoming local bodies' elections. Thus the proposed bill had little relevance with the ground realties, ill conceived, vague, and contradictory in nature. No link was seen between its objectives, the proposed structure and the job description of the Mohtasibeen. Furthermore, a component party of MMA was opposing it publicly.

It was definitely a politically motivated and aimed at to establish a totalitarian rule in the province in the name of religion and its implementation would have isolated the province from the rest of the world viz a viz increasing polarization in the society. It will not be out of context to mention that the MMA government faced a big embarrassment when its Sharia bill, passed by the present assembly in 2003, was labelled as a replica of an earlier bill passed by the then Parliament in PM Nawaz Sharif era. The same group of people were involved in that exercise wasting enormous amounts of the public funds in that exercise ended in futile.

Going back to its origin; the then Governor NWFP had not agreed with the Hasba bill; had it got the governor's assent, the bill would have been through. The bill's main accomplishment was the creation of Mohtasibs at various levels of government to 'promote virtue' and to eliminate un-Islamic practices; putting ban on alcohol and music in commercial vehicles and similar like things. Actually, this bill was about power: both of the 'traditional' political kind as well as the religious. One newspaper mentioned it as *'extremism is hardly being rolled back by the King's Party. It is actually creeping in under its door like a stain of blood.'* Creeping was right. 40 km south of Peshawar, two girls' schools were closed down on the day the bill was floated, with threats extended that further closures could be on the way. And the Supreme Court had done its bit to water the original Hasba Bill down; good it was. The daily 'Dawn' had said: *'it is the duty of everyone opposed to this law to resist it, however they can'*.

Thus; it remains a history now.