

Scenario 9

Army & Judiciary in 1984-85:

Qanoon e Shahadat:

On 28th October 1984, the *Qanun-e-Shahadat* (law of evidence) Order 1984 replaced the Evidence Act 1872, though it essentially restated the original legislation, but as it was intended to bring the law of evidence closer to Islamic injunctions, there were changes which specifically impacted upon women. This Order of 1984 introduced changes to the law as it related to the presumption of legitimacy. The original Evidence Act did not provide for a minimum period of gestation, and the maximum was 280 days. Through the new enactment, the minimum gestation period was set at six months and the maximum at two years, placing the provision in accordance with the majority position in classical Hanafi *fiqh*.

Article 151(4): 'When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was generally of immoral character.' This provision was enough to spread anarchy and lawlessness in the society because if someone rapes a woman and subsequently proves that she was of bad character so the criminal would walk away free. The influential groups of Pakistan, especially the landlords and employers used this provision mostly that is why none of them has ever been punished since 1984 till at least 11th February 2009 when a full bench of the Federal Shariat Court held it against the teachings of the holy *Qura'an & Sunnah*. It should have been addressed much earlier.

The bench, consisting of Chief Justice Haziqul Khairi, Justice Dr Fida Khan, Justice Salahuddin Mirza and Justice Zafar Yasin, held that Article 151(4) was repugnant to the holy *Qura'an & Sunnah* and directed the president of Pakistan to take appropriate steps for repealing the provision within six months, after which the provision would cease to be effective, even if it is not repealed. The court held that the provision was discriminatory on the basis of gender and was in violation of the constitution, adding that it negated the concept of gender equality as enshrined in the holy *Qura'an*.

The bench observed that it had failed to comprehend '*what tide of wisdom had prevailed upon lawmakers to add Sub-article 4 [of Article 151] as it served no useful purpose.*' It said even if assumed that the victim was of a '**generally immoral character**', it would not exonerate the man accused of raping or attempting to rape her. The act would still be a crime, it was held.

At different occasions, so many times the human activists, NGOs, Bar Councils and the media had raised their demands to re-write this *Qanoon e Shahadat* (1984) because it was only promulgated in the name of Islam but actually so many basic teachings of Islam were ignored or twisted when made in haste under military umbrella. During the first week of March 2010, the Chief Justice Iftikhar M Chaudhry was approached by a political figure of PML(N) to take *suo-moto* notice of it but the promise was not fulfilled yet.

The intervention of apex court was considered necessary because thousands of innocent citizens, especially women were suffering at the hands of blackmailers, therefore, redressing this issue would be vital to ensure the sanctity of law & justice in the country. The controversial laws like mentioned above should be repealed or amended in way that all lacunas could be removed, as they were crafted by various dictatorial regimes aiming at narrow political goals. Such laws were blemish on the original 1973 Constitution of Pakistan as well; hence, they needed to get purged for the revival of original 1973 constitution.

It was observed that the lacunas of the controversial Qanun-e-Shahadat were resulting in denial of justice and being used by blackmailers against the innocent and law-abiding people of Pakistan, especially the weaker segments of the society including women.

This order except with few exceptions, and the repealed Evidence Act, 1872 are subjectively the same but objectively they are poles apart. It is an admitted position that all Articles or the Order 1984 are substantially and subjectively mere reproduction of all sections of the repealed Act with exceptions of Article 3, Article 4 to 6 (with reference to Hudood), addition of Article 44 and addition of a proviso to Article 42 if compared with corresponding sections of the repealed Act. The term 'Qanun-e-Shahadat' is an Urdu or Arabic translation of English term 'Law of Evidence'.

The significant change made in the Qanun-e-Shahadat is that 'Court Martial' covered under the Army Acts besides a tribunal or other authority exercising judicial or quasi judicial powers or jurisdiction have been included. The repealed Evidence Act, 1872 was applicable to 'affidavits' but in the Qanun-e-Shahadat Order 1984, affidavits are not immune from its application. Only the proceedings saved are the proceedings before an Arbitrator, the reason thereof is obvious that award, if any, announced by the Arbitrator is subject to strict scrutiny under the Arbitration Act, 1940.

The Object of Qanun-e-Shahadat Order 1984 is evident from its preamble which has never been the object of the repealed Evidence Act. With reference to the preamble, Intention of object of introduction this Order, as stated therein, is to bring all the laws of evidence in conformity with the injunctions of Islam as laid down in the Holy *Qura'an & Sunnah*.

An interpretation of all articles of Qanun-e-Shahadat must be done in conformity with the injunctions of Islam as laid down in the Holy *Qura'an & Sunnah* instead of adopting old interpretation of the repealed Evidence Act 1872. However, principles of Islamic Law of evidence so long as they are not codified or adopted by Qanun-e-Shahadat, 1984 are not per se applicable Order apply to all judicial and quasi judicial proceedings. All technicalities have to be avoided and calls for doing substantial justice between parties are to be heeded.

Gen Ziaul Haq's Referendum:

19th December 1984: Gen Ziaul Haq had held a referendum in Pakistan by virtue of which he 'declared' himself as President. On 17th April 1984, an act to amend the Referendum Acts 1942 to 1983 was passed and called as Ninth Amendment of the Constitution Bill, 1984. On this basis the said referendum was held on 19th December 1984 in all the four provinces under the control of Election Commission of Pakistan.

Gen Ziaul Haq wanted to establish a pseudo-democracy in Pakistan, to continue as President under a civilian setup. Gen Ziaul Haq took a number of steps in this direction; the first was the establishment of the ***Majlis-i-Shoora*** to take the place of National Assembly but without any legislative powers. Gen Zia's second step was to ask the public to endorse his rule. This appeal was in the form of a referendum, which was so worded that a "Yes" meant that Gen Ziaul Haq himself would be further endorsed, even though the referendum did not refer to this directly. The Referendum had put forward a complex question to the citizens, in fact, seeking endorsement of the process of 'Islamization' initiated by him.

The referendum was manoeuvred in a way that the people had no choice except to mark 'yes' on the ballot paper. The question given was that:

*"Whether the people of Pakistan endorse the process initiated by General **Muhammad Zia-ul-Haq**, the President of Pakistan, for bringing the laws of Pakistan in conformity with the injunctions of Islam as laid down in the Holy *Qura'an & Sunnah* of the Holy Prophet (PBUH) and for the preservation of the Islamic ideology of Pakistan, for the continuation and consolidation of that process, and for the smooth and orderly transfer of power to the elected representatives of the people."*

In the ballot paper, the part of the paper having the above question and the place to mark 'yes' was printed in green and 'No' was in white part. When the MRD gave a call to the gen-

eral populace to boycott the referendum, it was declared 'a criminal offence' to make such appeal. In the words of **A S Ghazali**:

'In fact, the opposition leaders were detained throughout the country a week before the referendum. Troops patrolled the streets in Karachi. 'Unauthorised persons' near polling stations were banned, making an independent check of the turnout virtually impossible.'

The stage of referendum was set but on 19th December, the polling day' most of the polling stations were deserted. Even then the announcement made in the evening told that in total 62.15% turn over of voters had been registered out of which 93% had said 'yes'.

The Chief Election Commissioner Incharge of that Referendum, Justice S A Nusrat had subsequently told in an interview published in media on 25th July 1999 that:

'The said Referendum Order was prepared by Sharifuddin Pirzada and not by the Law Ministry nor by Election Commission. The golden idea behind was to bring Gen Ziaul Haq towards democracy gradually. National ID card's condition was also waived and the ballot boxes were even placed in mosques so how there could be a check on fake votes.'

The state propaganda was made in media and PTV, the only channel then available, that:

'The overwhelming mandate in the Referendum was convincing demonstration of the people's confidence in Gen Ziaul Haq's leadership: his achievements during the last seven & half years and his dynamic policies and plans for the future. Under his most dynamic leadership, the Nation has witnessed the implementation of the cannons of Islam in every walk of life-social, political, economic, judicial and cultural.

Also Promulgation of Zakaat and Ushr, rejuvenation of the Council of Islamic Ideology and Ministry of Religious Affairs, establishment of the Federal Shariat Courts, Qazi Courts, Federal Law Commission, the Islamic Research Council and the institution of Wafaqi Mohtasib; implementation of interest free banking, complete prohibition of alcoholic drinks, Laws relating to Qisas and deyat, Hudood Ordinance and giving true and meaningful rights to the minorities of Pakistan - are glimpses of the great many constructive steps taken by the President.'

The world media was there to laugh at us and our courts remained mum.

Economist.com / 1100672: In 1984, another military usurper, General Ziaul Haq, also used a referendum to win a semblance of legitimacy as president. He did it by proclaiming that he wanted to establish an Islamic system of government and asking them whether they were for or against Islam. Since Pakistanis, who are almost all Muslims, could hardly say they were not for Islam, most stayed home rather than vote against him. In the event he claimed a 95% "yes" vote, even though independent observers said the turnout was barely 10%.

It is interesting to note the post-1984 referendum events. Gen Ziaul Haq had presumed that the people would vote 'yes' because of the linkage between his extension and issues such as the injunctions of the Holy *Qura'an & Sunnah* of the Holy Prophet, future of the ideology of Pakistan and a promise to transfer power to the elected representatives. The idea was to seek extension in the garb of value laden issues. The bluff was called. The people of Pakistan gave blatant thumbs down by virtually boycotting the referendum and refusing to come out to vote.

The 20th December 1984 issue of daily *The Muslim* reported merely 10% turnout for voting. A displeased military contingent banned the issue's public circulation and lifted all of its copies from the market and newspaper's office in Islamabad.

The question was, by all standards, a very complicated and complex one, particularly for the un-educated rural class. It was a loaded question that simply asked: '**Do you wish Pakistan to be an Islamic state?**' An affirmative vote in the referendum was to result in a five-year

term for Gen Ziaul Haq as President of Pakistan. After the referendum, Gen Ziaul Haq announced that the elections for the National and Provincial Assemblies would be held in February 1985, on a non-party basis.

Militarized Elections of 1985:

In January 1985, Gen Ziaul Haq announced a plan to hold elections on non-party basis. The move was clearly aimed at not allowing the Pakistan Peoples Party (PPP) to participate in the elections. Till then he had not defined the role and powers of the Majlis e Shoora (MeS) for which the PPP had already announced that none of its candidates would be able to contest the election under the flag of the PPP. No party tickets were at all issued to anyone.

The elections were held on 25th February 1985 for the National Assembly (MeS) and polling for the provincial assemblies took place on 28th March 1985. **A S Ghazali** writes in his e-book in Chapter VIII:

'More than eight hundred prominent politicians were arrested in a pre-election crack-down; campaigning was forbidden by a ban on political parties, processions, rallies and even loudspeakers. However, the voters took both the government and banned political parties by surprise. They ignored the call of the MRD to boycott the polls. The verdict was a rebuff for the government, for the opposition and for the religious parties which cooperated with the martial law regime.'

'Apart from six cabinet ministers, a presidential adviser, two provincial ministers and three city mayors were defeated. Over half of the members of the nominated majlis-i-shura were not returned to the new house. Virtually the entire leadership of the Jamaat-i-Islami was wiped out. The party won only eight of the 63 national seats contested. Karachi, the traditional stronghold of the party, turned it down.'

The historians observed that it was a deliberate effort of Gen Ziaul Haq to bring the landlords & Jageerdars of Punjab and Sindh, religious *gaddi nasheens*, Gen Jilani's newly wealthy friends (Sharifs), sardars of FATA and Balochistan and retired army officers to occupy seats in the Assemblies. The purpose was obvious. The only change was that the younger generation of landlords had taken over from their elders.

The social background of the new members of MeS could be judged from the fact that this National Assembly had 117 landlords, 17 tribal leaders, six religious leaders, eight urban professionals, seven former army officers, two student leaders and 42 businessmen in its fold. Most of these tycoons had opted to enter into politics in vengeance against Pakistan Peoples Party (PPP)'s anti-business policies.

Even earlier, Gen Ziaul Haq had hand-picked MeS (parliament) on 24th December 1981 under Presidential Order (PO 15 of 1981) and its 284 members were nominated by none other than the General himself, therefore, they had to raise their hands whenever they were pointed to do so, especially while making cogent amendments in the Constitution of 1973.

They were allowed to take rest at home or to sleep in the assemblies because all the legislation and control were to be administered from the Army House. Most of these families were snubbed and sent home during elections of 1970 and 1977 in which PPP earned the sweeping victory.

THE 8TH CONSTITUTIONAL AMENDMENT:

During the third week of March 1985, Gen Ziaul Haq pronounced certain changes in the Constitution to keep ultimate powers with him in the name of president when the members of MeS were waiting to be called for their first session and oath taking. By virtue of these self-assigned powers he got authority to 'select' the prime minister, governors and chiefs of the armed forces in the capacity of president.

In addition, he had absolute power to decide his powers under the constitution and indemnity clauses ensured that he would not be questioned. He had also assumed powers to dissolve parliament at his discretion. Any laws inconsistent with fundamental rights were to be taken as void but excusing president's orders. The whole set of that power snatching scheme was called 'The Revival of the Constitution of 1973 Order 1985'.

In fact Gen Ziaul Haq had re-introduced and revived the 'presidential form of government' so that the chosen prime minister would not be able to mess about while in chair. After ensuring his safeguards, he called the first session of the new MeS after three days and nominated one Mohammad Khan Junejo as his Prime Minister on the recommendation of Pir Pagaro of Sindh.

Thus the constitution which he had suspended altogether in 1981 was re-instated after installing himself as president via referendum in 1984, and through Presidential order no: 14 later ratified as 8th Amendment in the Constitution of 1973 by his handpicked parliament on 17th October 1985. The Junejo government had persuaded the National Assembly (then Majlas e Shoora) vigorously to pass it through.

It was a general perception then that the MeS had ratified the said 8th Amendment under hidden threats of continuing martial law because it was lifted on 31st December 1985 only after approval and consents given by the two houses. Criticizing the 8th constitutional amendment, the International Commission of Jurists had said:

'Its foremost purpose is to uphold the rule of the present President, Ziaul Haq. The constitution contains nothing to prevent the President from reintroducing martial law.'

The **Financial Times London** had commented that: '*The constitution has been personalized by Zia.*'

As discussed before, Gen Ziaul Haq took it upon himself to 'Islamise' the society, and thereby effected more than one hundred amendments to the constitution on sectarian lines. '*This meddling with the constitution was so ruthless and crude that its democratic spirit was mutilated and it amounted to a completely new constitution brought in through a blanket constitutional amendment in 1985. This amendment introduced, apartheid style, separate electorates on sectarian lines and a parallel judicial system, the Federal Shariat Court, empowered to undo any law passed by the legislature deemed as 'un-Islamic.'*' An advocate named **Naeem Shakir** of LHC observed in his essay **dated 8th August 2004**.

The most notorious clause of this 8th amendment in the Constitution was Article 58(2)(b) which was:

(2) Notwithstanding anything contained in clause (2) of Article 48, the President may also dissolve the National Assembly in his discretion where, in his opinion,

(a) a vote of no-confidence having been passed against the Prime Minister, no other member of the National Assembly is likely to command the confidence of the majority of the members of the National Assembly in accordance with the provisions of the Constitution, as ascertained in a session of the National Assembly summoned for the purpose; or

(b) a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.

In the political history of Pakistan, the 8th Amendment is normally taken synonymous with Article 58 2(b), a provision that gives power to the sitting president to dissolve the National Assembly. However, the 8th Amendment was in fact a compromise between the Parliament elected in the non-party elections of 1985 and then President Gen Ziaul Haq.

During 6 years rule before the 1985 election, Gen Ziaul Haq had already made numerous amendments to the Constitution of 1973 through various Constitutional Amendment Orders,

the most significant being the Revival of Constitution of 1973 Order (President's Order No. 14 of 1985) mentioned above. The clause of Art 58(2)(b) was included in it with similar wording. By virtue of that *'the test of the constitutional functioning of the government was not required for the President to dissolve the National Assembly.'* The first session of the 1985 National Assembly was held on 20th March 1985 and Article 58(2)(b) had received a vote of confidence on 24th March 1985.

The more significant aspect of the 8th Amendment was that the elected Parliament endorsed all Orders made by Gen Ziaul Haq by substituting the Article 270A introduced by the said President's Order No. 14 of 1985 by a slightly modified version, preserving the text declaring the validity of all of Gen Zia's actions, including his takeover of 5th July 1977 and subsequent constitutional amendments done during the previous six years.

Tariq Butt placed certain facts on *www.saudigazette.com.sa* that many sitting legislators, including Prime Minister Syed Yousaf Raza Gilani, had not only supported Gen Ziaul Haq's referendum of December 1984, but were also part of the parliament that had approved the 8th Constitutional Amendment in November 1985, which gave him discretionary powers to dissolve the National Assembly under Article 58(2)(b).

The 1985 parliament had earlier endorsed a Constitutional Order on 2nd March 1985 through which a large number of amendments were made to the Constitution. More interestingly these Pakistani politicians, hailing from all political parties, once again successfully deceived the people of Pakistan when they 'unanimously voted to erase the name of Pakistan's longest - serving military ruler, Gen Ziaul Haq, from the Constitution for his unconstitutional acts during his tenure (1977-1988).'

In fact they did so to keep away themselves, to delete their names, from the dark pages of Pakistan's history so that the future generations should not be able to see their blackened faces in the mirrors of military dictatorships. But according to Gen Zia's son and former federal minister, Ijazul Haq: *'They cannot delete Gen Ziaul Haq's name from history till Articles 62 & 63 of the Constitution are there.'*

25 years old history archives reveal that the military dictator was also supported whole heartedly then by the PML's Chief Nawaz Sharif, the Chaudhrys of Gujrat (Chaudhry Shujaat Hussain and Chaudhry Pervez Elahi) and the Chief of Jamiat e Ulema Pakistan (JUI) Maulana Fazl-ur-Rehman, Jamaat-e-Islami, Makhdoom Sajjad Hussain Qureshi, father of PPP's former Foreign Minister Shah Mehmood Qureshi, Gilanis of Multan, Nawabs of Bahawalpur and several others.

The present stalwart of the PPP, PM Mr Gilani had organized a huge political meeting in support of the 1984 referendum at Qasim Bagh Stadium Multan; Nawaz Sharif had become Punjab's Chief Minister after the 1985's non-party elections, courtesy Gen Ziaul Haq and the then military Governor of Punjab Gen Ghulam Jilani Khan.

Similarly, some robust politicians of Khyber PK (then NWFP)'s Saifullah family, former NWFP Chief Minister Pir Sabir Shah, late Khawaja Safdar (father of the fiery PML(N) leader Khawaja Asif), Chaudhry Nisar Ali Khan, late Khaqan Abbasi (father of PML(N)'s Shahid Khaqan), Sardar Assef Ahmed Ali, sitting PML(N)'s MsNA Rana Nazir Ahmed, Javed Hashmi, & Senator Zafar Ali Shah were all members of the 1985 National Assembly which had made laws under the military umbrella to facilitate Gen Ziaul Haq.

For record, the salient features of this 8th Amendment of the Constitution (1985) are summarized below:

Article 41 (3) of the Constitution was substituted whereby Provincial Assemblies became part of the Electoral College for election to the office of the President.

Article 58(2)(b) under which the President was empowered to dissolve the National Assembly in his discretion where, in his opinion, a situation had arisen in which the Government of the Federation cannot be carried on in accordance with provisions of the Constitution and an appeal to the electorate was necessary.

Article 270 A was inserted into the Constitution by means of President's Order 14 of 1985 to facilitate transition of power from military to the civilian authorities. It reads:

"270 A (1): The Proclamation of the fifth day of July 1977, all President's Orders, Ordinances, Martial Law Regulations, Martial Law Orders, including the Referendum Order, 1984 (P.O. No.11 of 1984), under which, in consequence of the result of the referendum held on the nineteenth day of December 1984, General Mohammad Zia-ul-Haq became the President of Pakistan on the day of the first meeting of the Majlis-e-Shoora (Parliament) in joint sitting for the term specified in clause (7) of Article 41, the Revival of the Constitution of 1973 Order 1985 (P.O.No.14 of 1985), the Constitution (Second Amendment) Order 1985 (P.O. No.20 of 1985), the Constitution (Third Amendment) Order 1985 (P.O. No.24 of 1985), and all other laws made between the fifth day of July 1977, and the date on which this Article comes into force are hereby affirmed, adopted and declared, notwithstanding any judgment of any court, to have been validly made by competent authority and, notwithstanding any thing contained in the Constitution, shall not be called in question in any court on any ground whatsoever.

270 A (2): All orders made, proceedings taken and acts done by authority or by any person, which were made, taken or done, or purported to have been made, taken or done, between the fifth day of 1977, and the date on which this Article comes into force, in exercise of the powers derived from any Proclamation, President's Orders, Ordinances, Martial Law Regulations, Martial Law Orders, enactments, notifications, rules, orders or bye-laws, or in execution of or in compliance with any order made or sentence passed by any authority in the exercise or purported exercise of powers as aforesaid, shall, notwithstanding any judgment of any court, be deemed to be and always to have been validly made, taken or done and shall not be called in question in any court on any ground whatsoever.

Ms Benazir Bhutto had filed a petition under Article 184(3) of the Constitution in the Supreme Court challenging the *vires* of the amendments made in the Political parties Act, 1962 as violative of Articles 17 and 25 of the Constitution, the *vires* of the Freedom of Association Order, 1978 and the constitutionality of Article 270A in so far as it curtailed the power to judicially review its content or restricted the jurisdiction of the Superior Courts to protect Fundamental Rights of the citizens including the right to form or be a member of a political party under the Constitution as it existed before the 5th July 1977.

The Supreme Court in the judgment reported as ***Benazir Bhutto v. Federation of Pakistan (PLD 1988 SC 416)*** held that the Constitution of Pakistan envisaged parliamentary democracy with a cabinet system based on party system as essentially it is composed of the representatives of a party, which is in majority and therefore the future election would be held on party basis.