THE ROLE OF ISLAM IN THE LEGAL SYSTEM OF PAKISTAN

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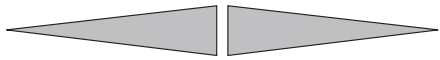

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THE ROLE OF ISLAM IN THE LEGAL SYSTEM OF PAKISTAN

by

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IN MEMORIAM

Dr Dieter Conrad

(1932 – 2001)

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Introduction

The purpose and aim of this book is the exploration of the Islamisation of Pakistan's legal system. The focus will, however, not be on the introduction of Islamic laws during and following Zia-ul-Haq's martial law, but on the role of Islamic law in the legal system as a whole. The central thesis is that the Islamisation of laws in Pakistan has been primarily a judge-led process, which was initiated to enhance the power of the judiciary and to expand the scope of constitutionally guaranteed fundamental rights. It will be argued that the role of judges in the Islamisation of the legal system has been largely obscured by the more visible manifestations of Islamisation, namely the promulgation of the infamous Hudood Ordinances[1] and other isolated pieces of Islamic legislation, such as, for instance, the Enforcement of Shari'ah Act 1991.

It will be argued that the judicial appropriation of Islam and its integration into the vocabulary of courts was a conscious process aimed not only at the fulfilment of a general desire to indigenise and Islamise the legal system after the end of colonial rule but it was also a way of enhancing judicial power and independence. The Islamisation of law did, perhaps ironically, not only precede Zia-ul-Haq's regime, but was actually used to challenge him.

The judge-led Islamisation of Pakistan's legal system has continued until the present. It is no longer confined to a few distinct areas of law but has become an integral part of the legal discourse being relied on in the context of a wide range of issues, from the permissibility to erect high-rise buildings in Karachi to the dismissal of a prime minister under Article 58(2)(b) of the 1973 Constitution.[2]

The book is thematically divided into three parts. Chapters 1 and 2, the first part of the book, deal with the role of Islam and Islamic law in Pakistan's superior courts, i.e. the Supreme Court and the four provincial high courts, up to 1977. Chapters 3 to 5 form the second part of the book. They deal primarily with the relationship between Islamic law and constitutional norms including fundamental rights. The third and last

1 The term 'Hudood Ordinances' refers to the Islamic criminal laws promulgated by Zia-ul-Haq in 1979 and 1980. They comprise the Offences against Property (Enforcement of Hudood) Ordinance 1979, the Offence of Zina (Enforcement of Hudood) Ordinance 1979, the Offence of Qazf (Enforcement of Hadd) Ordinance 1979, the Prohibition (Enforcement of Hadd) Order 1979, the Baluchistan Prohibition (Enforcement of Hadd) Rules 1980, the Punjab Prohibition (Enforcement of Hadd) Rules 1980 and the Sindh Prohibition Rules 1979. Corporal punishments envisaged under these laws were further regulated by the Execution of Punishment of Whipping Ordinance 1979.

2 See the Constitution of the Islamic Republic of Pakistan, 1973 ('the 1973 Constitution').

part comprises Chapters 6 to 11. These chapters examine the decisions of the shariat courts, i.e. the shariat benches of the four high courts, the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court, and the impact of these decisions on the legal system of Pakistan.

Chapter 1, the first substantive chapter of this book, examines the initial suppression of and subsequent emergence of Islamic law in Pakistan's superior courts between independence and 1977, when martial law was imposed by Zia-ul-Haq. This period is of particular interest, since up to 1977 no legislative effort had been made to make Pakistan's legal system more Islamic. The gradual surfacing of Islamic law within the framework of a legal system which was neither overtly Islamic nor committed to any radical Islamisation is intriguing. The objective of this chapter is therefore to examine when, how and why Islamic arguments were used as a basis for judicial decisions.

Chapters 2 and 3 trace and analyse the determined and overt incorporation of Islam and Islamic law into judicial reasoning and discourse, whereas Chapter 4 concentrates on the use of Islamic law in the context of Pakistan's constitutional breakdowns, which occurred after the lifting of martial law in 1985. The role of Islamic law in the advent of public interest litigation and in the interpretation of constitutionally guaranteed fundamental rights is the subject of Chapter 5. The shariat courts are the focus of the remaining chapters. In a first step, a detailed analysis of their position in the constitutional set-up of Pakistan is offered. It will be argued that there was a deliberate attempt to control the shariat courts as much as possible. However, it will also be argued that once created, even Zia-ul-Haq found it difficult to influence and to interfere with the shariat courts. This will be demonstrated on the basis of a comprehensive and detailed analysis of the reported judgments of the shariat courts.

The main source for this book has been reported case law. As can be readily discerned from the Bibliography, there has never been an examination of the role of Islam in judicial decision-making in Pakistan. The focus of virtually all debates and discussions concerning the Islamisation of Pakistan's legal system has been either on the Hudood Ordinances or the political motivations behind particular Islamisation policies. A particular focus of the academic treatment of Islamisation in Pakistan has been the status of women. Whilst fully acknowledging the importance of research on the status of women in Pakistan, it will nevertheless be argued that an approach exclusively centred on women living under Islamic law tends to obscure other facets and consequences of the Islamisation of laws in Pakistan. The book is premised on the belief that a proper assessment of the impact of Islam on Pakistan's legal system ought to consider not only the visible hallmarks of Islamisation, i.e. the various Islamic laws introduced from the late 1970s onwards, but also the use of Islam and Islamic law in the judicial discourse. It is for this reason that the conclusions of this book are based almost entirely on an analysis of those cases which have considered the role of Islam in the legal system of Pakistan.

The methodology adopted in this book is therefore primarily based on an analysis of reported cases covering a period of just over 50 years, i.e. from 1947 up to 2001. Conclusions based on the analysis of reported decisions handed down by Pakistan's superior judiciary have limitations. Whilst they reflect judicial attitudes and trends in the interpretation of laws, they cannot offer an accurate description of the impact of

Islamisation on Pakistan's society or economy. Nevertheless, judicial attitudes as expressed in reported decisions are indicative of wider social and cultural perceptions – judges do not exist in a societal or political vacuum but are informed at least to some extent by their personal convictions. The book demonstrates that judicial perceptions of the role of Islam in Pakistan's legal system were often at odds with the official law leading to situations where judges had to decide whether to follow an official law perceived as un-Islamic or to follow their own religious convictions. Thus, the detailed examination of reported judgments offers a perspective on legal developments in Pakistan which not only reveals the changing role of Islam in the legal system but also changing judicial attitudes. Wherever possible, political developments which informed and at times caused judicial reactions have been discussed so as to provide sufficient relevant contextual information on the political and historical setting of a particular case.

The book's focus on the role of Islam in the legal system of Pakistan does not allow for a detailed examination of the nature of those manifestations of Islamic law which have been relied upon by the country's higher judiciary: to put it bluntly, this book is not concerned with Islamic law in its own right. Such a task would justify a separate research project and can therefore not be undertaken within this book. As a result the analysis of reported decisions offered here does not extend to a detailed discussion of Islamic law and Islamic jurisprudence *per se* but is confined to the way a particular interpretation of Islamic law was used by individual judges and courts.

Chapter 1
The Role of Islam in the Legal System of Pakistan from 1947 to 1977

Structure of Islamisation

Attempts to introduce Islamic norms into a legal system can take two basic forms. There can either be a complete legal revolution, i.e. a complete removal of the old legal order and its replacement with an Islamic legal system. Contemporary examples for this type of Islamisation are rare,[3] not only because the potential chaos caused by a prolonged period of legal uncertainty makes such an endeavour too daunting a task but also because of the difficulties inherent in formulating a complete system of Islamic law that can serve as an adequate substitute for the old secular legal system.[4] More usually, as has been the case in Pakistan, policies to Islamise a legal system are based on the introduction of institutional and legal mechanisms which allow for a gradual and controlled introduction of Islamic law. In theory, an institutionalised Islamisation provides for a gradual transformation of the legal system ensuring that political, moral and legal ideals of Islamic law can be realised within the framework of an existing legal system. Pakistan's experiments with Islamic law and, more specifically, with the creation of an Islamic state have been marred by controversy since the creation of Pakistan as an independent state itself. Calls for the wholesale replacement of the inherited colonial system have been made frequently, though its proponents have never managed to muster enough support to carry out this plan.[5]

3 This appears to have been the case in the areas of Afghanistan under the control of the Taliban, see William Maley, *Fundamentalism Reborn? Afghanistan and the Taliban*, London, 1998 and Human Rights Watch, *Humanity Denied: Systematic Denial of Women's Rights in Afghanistan*, New York, 2001.

4 See in general Norman Anderson, *Law Reform in the Muslim World*, London, 1976.

5 See on the Islamisation of Pakistan's legal system, Afzal Iqbal, *Islamisation of Laws in Pakistan*, Lahore 1986; Rashida Patel, *Islamisation of Laws in Pakistan*, Karachi,1986; Mohammed Amin, *Islamization of Laws in Pakistan*, Lahore, 1989; Afak Haydar, 'From the Anglo-Mohammadan Law to the Shariah: The Pakistan Experiment', in: *Journal of South Asian and Middle Eastern Studies*, Vol. X:4, 1987, pp. 33-50; Omar Noman, *Pakistan. Political and Economic History Since 1947*, London, 1990 (2nd. ed.); Akbar Ahmed, *Pakistan Society. Islam, Ethnicity and Leadership in South Asia*, Karachi,1986; Leonard Binder, *Religion and Politics in Pakistan*, Los Angeles,1961; Barbara Metcalf, 'Islamic Arguments in Contemporary Pakistan', in William R. Roff, *Islam and the Political Economy of Meaning*, London, Sydney, 1989, pp. 132-159; and Rubiya Mehdi, *Islamisation of the Law in Pakistan*, London, 1994. It should be noted that none of these publications examines the role of the judiciary in the Islamisation of Pakistan's legal system.

As a result of this distinct lack of commitment to radical Islamisation,[6] Pakistan's numerous constitutions have always contained provisions which would provide mechanisms for a gradual transformation of the legal system whilst at the same time preserving the basic structure of inherited laws of either British India or, since independence, the legal system as it stood prior to the imposition of the various martial laws.[7] Until the creation of the Federal Shariat Court, the locus for any introduction of Islamic law was parliament. Earlier proposals to give the Supreme Court the jurisdiction to judicially review legislation on the basis of Islam were never incorporated into any of the constitutions prior to 1979, when Zia-ul-Haq created a separate court charged, *inter alia*, with the task of examining certain parts of the legal system on the basis of Islam. A contemporary critique observed with regard to the *Report of the Basic Principles Committee*,[8] which had proposed giving the Supreme Court the power to strike down laws deemed to be repugnant to Islam, that 'This provision gives a power to the Supreme Court which may be misused and, in any case, which the directly elected representatives of the people could be expected to exercise without any extra-parliamentary check.'[9]

The Islamic provisions of the pre-1973 constitutions shared a basic structure in respect of their provisions for Islamisation: there was the Objectives Resolution, which served as a preamble, containing a general commitment to create an Islamic society and various constitutional provisions asking the state to promote Islam and to bring the legal system in conformity with Islam. Pakistan's first Constitution, the 1956 Constitution, envisaged two mechanisms to introduce Islamic laws. The first took the form of a 'Directive Principles of State Policy' which obliged the state to

6 See Leonard Binder, *Religion and Politics in Pakistan*, Berkeley, 1961, pp. 90ff and *Report of the Court of Inquiry Constituted under Punjab Act II of 1954 to Enquire into the Punjab Disturbances of 1953* ('The Munir report'), Lahore, 1954, pp. 243ff, and Dieter Conrad, 'Conflicting Legitimacies in Pakistan: The Changing Role of the Objectives Resolution (1949) in the Constitution', in: Subrata K. Mitra and Dietmar Rothermund, *Legitimacy and Conflict in South Asia*, New Delhi, 1997, pp. 122-155, at p. 124.

7 The Indian Independence Act 1947 under which Pakistan gained independence, provided in section18(3) that:

> 'Save as otherwise expressly provided in this Act, the law of British India and of the several parts thereof existing immediately before the appointed day shall as far as applicable and with the necessary adaptations, continue as the law of each of the new Dominions and the several parts thereof until other provision is made by laws of the Legislature of the Dominion in question or by any other Legislature or other authority having power in that behalf.'

The contemplated adaptations were made by the Pakistan (Adaptation of Existing Laws) Order 1947 and by the Adaptation of Central Acts and Ordinances Order 1949. Successive constitutions contained articles providing for the continuance of existing laws. Article 224 (l) of The Constitution of the Islamic Republic of Pakistan 1956 ('the 1956 Constitution'), Article 225 (1) of the 1962 Constitution and Article 280 (1) of the 1972 Interim Constitution, all provided for the continuation of pre-existing laws in substantially the same form as Article 268 of the present 1973 Constitution. This provides that all existing laws should, subject to the Constitution, continue in force, so far as applicable and with the necessary adaptions, until altered, repealed or amended by the appropriate legislation. Continuation of existing laws also applies to periods of martial law, each of which was governed by a Laws (Continuance in Force) Order or similar law. Such legislation was promulgated in 1958, 1969 (see Proclamation of Martial Law) and 1977 and provided for the continuation of the main body of substantial law during the martial law period.

8 Contained in G.W. Choudhury, *Documents and Speeches on the Constitution of Pakistan*, Dacca, 1967, pp. 34ff.

9 See Mazhar Ali Khan, 'Minority Rights', *The Pakistan Times*, 6 November 1953.

take steps 'to enable the Muslims of Pakistan individually and collectively to order their lives in accordance with Islam'.[10] However, Article 24 of the 1956 Constitution provided that the Directive Principles of State Policy were not enforceable in any court though the state was to be guided by them in the formulation of its policies. The non-justiciability of the Directive Principles of State Policy in effect prevented any attempt to force the state to bring the legal system closer to Islam.[11]

The second mechanism centred around the creation of an advisory body, which would make recommendations to parliament as to the content and implementation of Islamic laws. Further, Article 198(1) of the 1956 Constitution provided in seemingly stringent terms that 'no law shall be enacted which is repugnant to the injunctions of Islam as laid down in the Holy Quran and Sunnah, hereinafter referred to as injunctions of Islam, and existing law shall be brought in conformity with such Injunctions'. However, the potential force of Article 198 and the advisory body on Islamic law were carefully limited: the advisory body was to submit a report containing guidelines on Islamisation to parliament including guidelines as to how the mandate of Islamisation contained in Article 198 could be achieved.[12] However, there was no obligation imposed on parliament to act upon these recommendations. The abrogation of the 1956 Constitution following the imposition of martial law on 6 October 1958 meant that none of the Islamic provisions had any effect on the legal system of Pakistan.

The Constitution Commission appointed by President Ayub Khan in 1960 to make recommendations on the structure of a new constitution for Pakistan adopted a cautious approach: the legal system should only be subject to any Islamisation if the different schools of Islamic law 'could evolve unanimity with regards to the fundamentals of Islam as far as traditions are concerned.'[13] The 1962 Constitution reflected Ayub Khan's secular outlook. Even the Objectives Resolution, though retained as the Preamble to the 1962 Constitution, was slightly changed in order to remove any reference to a limitation of the legislative powers of parliament on the basis of Islam.[14] Pakistan was no longer an Islamic Republic but just the Republic of Pakistan and no legal mechanism was provided for any form of Islamisation of the legal system. Public pressure led to an amendment of the 1962 Constitution in 1963: the amendments centred around the reintroduction of the 'repugnancy formula', i.e. a constitutional provision to the effect that no laws should be repugnant to Islam and that the legal system should be brought into conformity with the Qur'an and Sunnah, and the setting up of an advisory body, the Advisory Council of Islamic

10 See Article 25 (1) of the 1956 Constitution.

11 It should be noted that there is one reported case where the Directive Principles of State Policy were held to be enforceable. In *Nizam Khan v. Additional District Judge, Lyallpur* PLD 1976 Lahore 930, Justice Muhammad Afzal Zullah held that these principles could be used as a source of law whenever there was a vacuum in the statute law.

12 See Article 198 (3) of the 1956 Constitution.

13 See *Report of the Constitution Commission*, in Safdar Mahmood, *Constitutional Foundations of Pakistan*, Lahore, n.d., pp. 395-535, at p. 517.

14 The Preamble provided, *inter alia*, that 'Whereas sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority exercisable by the people is a sacred trust [...]' thereby omitting to qualify the authority of the people by confining it to 'the limits prescribed by Him'. Section 2 of the Constitution (First Amendment) Act 1963 provided for the reintroduction of this qualification into the constitution.

Ideology.[15] However, the Council of Islamic Ideology could only make recommendations regarding the conformity of laws with the injunctions of Islam to the President and the government but had no power to supervise or to enforce the implementation of its recommendations. Further, Article 8 of the 1962 Constitution provided that none of the Directive Principles of State Policy could be used to determine the *vires* of any law or any action of an organ or authority of the state. The Supreme Court of Pakistan confirmed in the case of *Tanbir Ahmad Siddiky v. Province of East Pakistan*[16] that Islamic law could not be used to strike down a law as unconstitutional:

> 'Such a plea [i.e. that the proposition that God's law must be accorded an over-riding position and that the government could not take any action repugnant to the provisions of Islamic law] is, however, not justiciable in Courts under the present Constitution. The responsibility has been laid on the Legislature to see that no law repugnant to the Islamic law, is brought on the statute book. The grievance, if any, therefore should be ventilated in a different forum and not in this Court.'[17]

The basic structure of non-justiciable constitutional provisions urging the state to bring all laws in conformity with Islam and a provision for the setting up of an advisory body on Islamic law was replicated in Pakistan's third constitution. The 1973 Constitution contained a separate chapter headed 'Islamic Provisions', which provided for the setting-up of a Council of Islamic Ideology.[18] Again, as in previous constitutions, the Council had essentially only an advisory role and enjoyed no inherent jurisdiction to ensure that its recommendations were acted upon by parliament. Further, and in direct continuation of the approach taken in the previous two constitutions, no law could be challenged by way of judicial review on the ground that it had been found to be repugnant to Islam by the Council of Islamic Ideology.[19]

The declaration of martial law and the introduction of a wide range of legal measures aimed at introducing Islamic law into the legal system in 1977 following the *coup d'état* of General Zia-ul-Haq marked the beginning of the first serious attempt by a government to Islamise the legal system of Pakistan. The promulgation of the Hudood Ordinances reintroduced Islamic criminal law for the first time since it had been gradually displaced in favour of English criminal law during British colonial

15 See Articles 199 to 206 of the Constitution of the Islamic Republic of Pakistan 1962 ('the 1962 Constitution').

16 PLD 1968 SC 185.

17 *Ibid*., at pp. 203-204.

18 See Articles 227 to 231 of the 1973 Constitution.

19 See Article 230 of the 1973 Constitution. It should be noted that the setting-up of the Federal Shariat Court with a power to strike down legislation on the basis of repugnancy to Islam temporarily increased the importance of the Council, since it was able to provide draft legislation based on Islamic law to replace the areas of law declared to be in violation of Islamic law. An example for such draft legislation is the Criminal Law (Amendment) Act 1997, which introduced the Islamic law of *qisas* and *diyat* into The Pakistan Penal Code 1860, see Martin Lau, 'The Legal Mechanism of Islamisation: The New Islamic Criminal Law of Pakistan', in *Journal of Law and Society* 1992, 18, pp.43-58. See also Charles Kennedy, 'Repugnancy to Islam – Who Decides? Islam and Legal Reform in Pakistan', in *International and Comparative Law Quarterly*, 41, 1992, pp. 769-787.

rule.[20] However, it is the setting-up of an institutional mechanism to Islamise the legal system independently from parliament which can be identified as the main contribution of Zia-ul-Haq to the Islamisation of laws. For the first time, a specialist court existed, having been set up with the express purpose of judicially reviewing certain parts of the legal system so as to determine whether these parts were in accordance with Islamic law.

Nonetheless, Zia-ul-Haq did not alter the essentially mixed character of Pakistan's legal system, with its division between secular and Islamic spheres. The creation of the Federal Shariat Court lead to a bifurcation of the legal and judicial system into an Islamic and secular wing. However, the Federal Shariat Court has not replaced the ordinary superior courts,[21] but has operated parallel to them, its jurisdiction carefully separated from its secular counterparts. Similarly, the laws of the land have continued to be based to a large extent on the inherited colonial laws – the aim was not to introduce Islamic law *in toto* but to remove un-Islamic elements from essentially secular legislation. The result, as will be seen later, is a legal system that is curiously divided into secular and Islamic laws.

The unique idea of creating two separate legal systems, based on different *Grundnormen* but coexisting in separate areas of the legal system, has created on the one hand conceptual fault-lines and tensions within the legal system. The main reason for this can be located in the lack of an agreed system of basic legal values which can be either founded on the mainly secular values of constitutionally guaranteed fundamental rights and parliamentary democracy enshrined in the constitution or, alternatively, can be based on Islam and Islamic law. An officially endorsed system of legal pluralism, where both secular and religious laws are allowed to coexist, albeit in different niches of the legal system, has therefore left unanswered the question of normative hierarchy, i.e. which *Grundnorm* forms the basic backbone – the philosophical and jurisprudential foundation – of Pakistan's legal system.

However, it is on the other hand possible to see, behind the coexistence of Islamic and secular laws and legal values, a powerful enhancement of judicial power. It can be argued that the formal creation of a dual legal system with its own courts by Zia-ul-Haq in 1979 was preceded by a sustained period of 'judicial Islamisation'. An examination of the reported case law of Pakistani courts since independence reveals a surprising trend: since the late 1960s, Pakistani courts have increasingly recognised and relied on principles of Islamic law. The most visible example of this reliance is the celebrated *Asma Jilani*[22] case of 1972, which expressly recognised Islam as the basic structure of Pakistan's legal system.

20 See Joerg Fisch, *Cheap Lives and Dear Limbs. The British Transformation of the Bengal Criminal Law 1769-1817*, Wiesbaden, 1983; and Shadeen Malik, *The Transformation of Colonial Perceptions into Legal Norms: Legislating for Crime and Punishment in Bengal, 1790 to 1820s*, PhD Dissertation, London, 1994.

21 The expression 'superior courts' refers to the Supreme Court of Pakistan and the four provincial high courts but excludes the 'Islamic wing' of the Supreme Court, i.e. the Shariat Appellate Bench of the Supreme Court, and the Federal Shariat Court.

22 *Asma Jilani v. The Government of Punjab* PLD 1972 SC 139 ('*Asma Jilani*').

Suppression of Islamisation

A study of the reported judgments of the High Courts and the Supreme Court of Pakistan for the period after independence until the late 1960s indicates that the role of Islam in the judicial discourse was confined to a few discrete areas of law. Judges who tried to depart from the inherited 'Western' legal model were swiftly admonished by the higher judiciary, as the following example from the early days of Pakistan illustrates. In 1950, just three years after independence, a Magistrate had to try six persons accused of having assaulted two landowners.[23] The defence contended that all of them were innocent. The law report is silent on the exact nature of the deliberations between the Magistrate, the Attorney General and the defence lawyers but it appears that a deal was struck: the accused would face the large crowd of spectators assembled outside the Sessions Court and would take an oath in public that they were innocent. The prosecution indicated that such an oath would be acceptable as proof of innocence and that the charges would be dropped. Two of the accused refused to take the oath but pleaded guilty instead, 'stating that as they were guilty they were not prepared to take oath as they feared the wrath of God.'[24] The Magistrate was fully aware of the unusual nature of the trial and justified it as follows:

> 'I am quite alive to the fact that the procedure adopted by me is wholly unwarranted. I however feel that it is high time we ceased to sit merely as courts of law. For the sake of equity and justice we should have no hesitation in brushing aside the formal restrictions imposed by the British-made law. The God law which we Pakistanis must and shall eventually follow demands vehemently that justice and equity should be our sole and only aim, and in achieving this God-made law knows no procedural restrictions and formalities'.[25]

The Magistrate's search for an alternative to the British legacy of criminal procedure and evidence had lead him to 'God's law', i.e. Islamic law. There was no reference to any principle of Islamic law as such but there was reliance on the religious aspect of law: a Muslim would not commit perjury in the face of Allah.[26] The Magistrate's justification for his actions was as simple as it was compelling, namely that his course of action was 'essential for the ends of justice no matter if such a course causes infringement of prescribed procedure.'[27] His statement constitutes an early precursor to Pakistan's experiments with public interest litigation since the late 1980s, which have been informed by a very similar dissatisfaction with the inherited 'Western' secular law and which have been based on a similar reliance on Islamic values rather than pure Islamic law.[28]

23 Quoted by Justice Karam Elahee Chauhan in *B.Z. Kaikus v. President of Pakistan* PLD 1980 SC 160, at pp. 172-173.
24 *Ibid*., at p. 172.
25 *Ibid*.
26 The oath, one of the oldest institutions in legal procedure, plays a specific role in Islamic law. The oath was an integral part of legal procedure and could displace the need for witnesses. See especially Joseph Schacht, *The Origins of Muhammadan Jurisprudence*, Oxford, 1950, pp. 187-188.
27 *Supra,* note 23, at p. 172.
28 Below, Chapter 6.

The conscious departure from the British Indian colonial legacy and the reorientation to Islamic values constituted a direct challenge to the established legal order which was met by the Chief Justice of the Lahore High Court. In the Criminal Revision Division *Crown through Muhammad Nawaz v. Mihta and others*, 12 May 1952, Chief Justice Munir ordered a re-trial, observing that:

> '[A]s the Magistrate does not see anything wrong in his following a "wholly unwarranted procedure" in the trial of criminal cases and feels "no hesitation in brushing aside formal restrictions" imposed by the current law, he is a complete misfit in the judicial system and a menace to the administration of criminal justice. It will be dangerous in the extreme to entrust him with any criminal case for trial under the law in force.'[29]

The Chief Justice disapproved in strong terms of the Magistrate's reliance on a religious oath. In his opinion, most criminals would be willing to profane a religious oath in order to gain an acquittal, which would not only result in a public violation of a religious oath but would also mean injustice to the wronged party.

The paucity of reported cases involving an explicit recognition of Islam as an additional source of law indicates that in the 1950s and 1960s judges were still able and willing to reject any express reliance on Islamic law. The areas of law occupied by Islamic law were confined to family law, which had continued to be governed by the British Indian system of personal laws. Any leakage of Islamic law into the secular legal system was swiftly contained, as could be seen in Justice Munir's condemnation of the Magistrate as a 'complete misfit' – in practical terms Islamic law was reduced to Muslim family law and had otherwise no importance in the legal development of Pakistan.

However, despite the appearance of legal uniformity and the limited role of Islamic law, there were still significant geographical areas within the borders of Pakistan where Islamic law and customary law applied. Judgments concerning cases originating from Pakistan's tribal areas reveal that Justice Munir's attitude was not shared by all judges.

In the case of *Sherzada Khan v. Commissioner (F.C.R.)*[30] the High Court of Peshawar had to decide on appeal against a conviction of 14 years' imprisonment for murder. The offence had been committed in the Malakand tribal area. The region had been declared a provincially administered tribal area in 1969[31] and consequently its criminal law was no longer based on the Pakistan Penal Code 1860 but on the Frontier Crimes Regulation 1911 ('the FCR'). The FCR had been introduced during colonial rule in an attempt to exercise some control over the unruly tribal communities straddling the mountainous and ill-defined border between British India and Afghanistan. Under the FCR a traditional Council of Elders, a *jirga*, determined the guilt or innocence of an accused. The conviction and sentence were confirmed by the political agent, a representative of the central government charged with the administration of a tribal area.

29 *Supra*, note 23, at p. 172.
30 PLD 1979 Pesh 165 ('*Sherzada Khan*').
31 *Regulation No. 1 of 1969*.

In *Sherzada Khan* the contention raised by the convict was, *inter alia,* that there had been no witnesses to the offence nor had there been any other physical evidence connecting him to the crime. The Council of Elders had heard the son of the deceased and two witnesses; however, the witnesses had only made statements to the effect that they believed the son to be telling the truth. All three had stated that the appellant had murdered the deceased, alleging that the underlying motive was an arranged marriage that had not come to fruition. In the absence of any other evidence, the Council of Elders had asked the three witnesses to take an oath on the Qu'ran and found the accused guilty on the basis of these oaths. The Peshawar High Court upheld the conviction and the reasoning behind its decision is worth quoting:

> 'But assuming that no direct evidence was available to connect the petitioner with the crime, it appears to meet the requirements of custom that in such a situation the complainant and his two Nasibs should swear on the Holy Qur'an which will result in evidence for the conclusion that the person against whom such sworn statement on the Holy Qur'an is given is indeed guilty. What we want to emphasise is that giving of an oath in accordance with the custom is not only a rule of procedure but also a rule of evidence. We are not concerned with the hazards envolved [sic] in the procedure. All that we have to see is as to whether such a rule will yield evidence on which conviction can be grounded. That such evidence is acceptable to Shariat is axiomatic. The procedure prescribed for *Liyan* has been given in detail in the Holy Qur'an and an assertion or denial by oath has been treated equivalent to evidence. It will follow that no sooner Bhagi Jan [the son of the deceased] and his two Nasibs swore on the Holy Qur'an that the petitioner was guilty, and there was evidence worth consideration before the Council-of-Elders.'[32]

Justice Munir's description of a Magistrate as 'a complete misfit' must therefore be regarded as more hopeful than realistic: even in the early, *de facto* secular years of the new state, there existed within Pakistan's territories instances where Islamic and customary law were applied as part of the official law. In turn, these departures from the general criminal law were recognised and supervised by Pakistan's superior courts.[33] There is little doubt however, that unofficially, even in areas not formally falling under the purview of the FCR, local custom and tradition continued to be an important source of law despite the efforts of judges like Justice Munir to eradicate them from the legal landscape of Pakistan.[34]

32 *Supra*, note 30, at p. 168.

33 It should be noted that the constitutionality of the system of tribal areas has been challenged on many occasions. The most famous challenge occurred in *The State v. Dosso* PLD 1958 SC 533 ('*Dosso*'), where the Supreme Court allowed the system to continue to operate. However, the decision did not condone the system of tribal areas but only held that in the absence of constitutionally guaranteed fundamental rights it could not be declared unconstitutional.

34 On the coexistence of official and unofficial law, see Masaji Chiba, *Asian Indigenous Law in Interaction with Received Laws*, London, New York, 1986; and David Pearl and Werner Menski, *Muslim Family Law*, London, 1998 (3rd ed.), pp. 46-47 and Williard Berry, *Aspects of the Frontier Crimes Regulation in Pakistan*, Durham, 1966.

Islam and Martial Law I

The first express attempt by the higher judiciary to break down the barrier between an essentially secular legal order and an Islamic society occurred in the context of a challenge to the imposition of martial law in 1969. Pakistan's constitutional upheavals have been the subject of an extensive body of literature deliberating the causes of this instability and the frequent descent of the country into martial law.[35]

From a legal perspective, the attempts of the Supreme Court of Pakistan to accommodate extra-constitutional acts such as the usurpation of power within an established constitutional doctrine lead at times to bizarre decisions. In the first decision on the validity of the imposition of martial law in 1958, i.e. the infamous *Dosso* decision, the Supreme Court of Pakistan yielded to the political reality and declared that the only test for the legality of the new legal order, i.e. martial law, 'is the efficacy of the change'.[36] Chief Justice Munir, speaking for the majority, developed a theory of constitutional law that did not distinguish between legality and legitimacy but which validated any 'revolution' as long it was successful in completely replacing the old legal order.

Justice Munir's philosophy of radical legal positivism,[37] which could be reduced to the motto 'might is right' was, however, not shared by Justice Cornelius, who in a cautious note of dissent stated that the fundamental rights that had been guaranteed under the abrogated 1956 Constitution did not derive their entire validity 'from the fact of having been formulated in words and enacted in that Constitution'.[38] In his opinion, the other validation of these fundamental rights was based on the fact that 'a number of these rights are essential human rights which inherently belong to every citizen of a country governed in a civilised mode.'[39] Justice Cornelius' reliance on natural law enabled him to hold that human rights did not depend on a written guarantee. Fundamental rights were elementary rights, which did not disappear only because the legal instrument that had contained them was no longer in force.

35 The most recent analysis of this judgment can be found in Paula Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan*, Cambridge, 1995, at pp. 73-86.

36 *Supra*, note 33, at p. 538 (per Chief Justice Munir).

37 It should be noted that Chief Justice Munir's willing acceptance of the abrogation of the 1956 Constitution must have come as a surprise to his contemporaries. Only a year earlier, Justice Munir had emphatically defended the fundamental right to freedom of religion guaranteed under Article 18 of the 1956 Constitution, stating that it could not be taken away by a law. Justice Munir's reliance on the intentions of the framers of the Constitution are worth quoting in full:

> 'The very conception of a fundamental right is that it being a right guaranteed by the Constitution cannot be taken away by the law, and it is not only technically inartistic but a fraud on the citizens for the makers of the Constitution to say that a right is fundamental but may be taken away by the law. I am unable to attribute any such intent to the makers of the Constitution who in their anxiety to regulate the lives of the Muslims in Pakistan in accordance with the Holy Quran and Sunnah could not possibly have intended to take away from Muslims the right to profess, practise and propagate their religion and to establish, maintain and manage their religious institutions, and who in their conception of the ideal of a free, tolerant and democratic society could not have denied a similar right to the non-Muslim citizens of the State.' see *Jibendra Kishore Achharyya Chowdhury and 58 others v. Province of East Pakistan* PLD 1957 SC 9, at p. 41.

38 *Supra,* note 33, at p. 560.

39 *Ibid*., at p. 561.

Justice Cornelius' approach had the advantage that he could continue to rely on human rights, although these had disappeared from the 1956 Constitution,[40] without having to declare martial law itself to be invalid. Certain rights did not owe their existence to any law-making act but they were inherent in every human being. The resort to a higher legal order, or in other words, a basic legal structure, which would survive the legal changes brought about by martial law was not further developed by Justice Cornelius but his theme was taken up by the Supreme Court of Pakistan when it overruled *Dosso*[41] in the famous *Asma Jilani*[42] case of 1972.

The political backdrop of *Asma Jilani* consisted of yet another martial law, this time imposed by General Yaha Khan in 1969 subsequent to his appointment as successor-in-office of President General Ayub Khan, who had stepped down from office on 24 October 1969. Yaha Khan used his newly acquired position to abrogate the 1962 Constitution and to declare martial law. He followed the ususal pattern set by his predecessors by allowing for legal continuity by promulgating the Continuance of Laws Order 1969 on 25 October 1969, which was followed by the Provisional Constitution Order 1969 promulgated on 4 April 1969.

However, the usurpation of power was not successful: elections under the Legal Framework Order 1970 promulgated by Yaha Khan saw the East-Pakistani politician Sheik Mujib and his Awami League emerge with an absolute majority of National Assembly seats. To be governed by East-Pakistan appeared to unacceptable to West-Pakistan's politicians and the ensuing civil war not only led to the creation of Bangladesh but also to the emergence of Zulfikar Bhutto as the new political leader of West-Pakistan. Though induced into power by yet another martial law, Bhutto's regime was subsequently ratified by the National Assembly, which also approved an interim Constitution.[43] A challenge to the legality of convictions imposed by military courts set up during Yaha Khan's martial law enabled the Supreme Court of Pakistan to re-consider the *Dosso* decision.[44] Unlike Justice Cornelius, who had resorted to Western natural law theory to distance himself from Justice Munir's radical legal positivism and thereby from martial law, Chief Justice Hamoodur Rahman referred to the Objectives Resolution in his search for a *Grundnorm* for Pakistan. Having refuted Kelson's theory of revolutionary legality, Justice Rahman held *obiter* that:

> 'In any event, if a *Grundnorm* is necessary for us I do not have to look to the Western legal theorists to discover one. Our own *Grundnorm* is enshrined in our own doctrine that the legal sovereignty over the entire universe belongs to Almighty Allah alone, and the authority exercisable by the people within the limits prescribed by Him a sacred trust. This is an immutable and unalterable norm which was clearly accepted in the Objectives Resolution passed by the Constituent Assembly of Pakistan on the 7th of March 1949. [. . .] This has not been abrogated by any one

40 Martial law was declared on 7 October 1958. Section 4 of the Laws (Continuance in Force) Order 1958, which came into force on 10 October 1958, provided that 'notwithstanding the abrogation of the late Constitution' all laws other than the 1956 Constitution and some specifically mentioned ordinances should continue to have legal force.

41 *Supra*, note 33.

42 *Supra*, note 22.

43 See the Legal Framework Order 1970 and the Interim Constitution of the Islamic Republic of Pakistan 1972.

44 *Supra*, note 33.

> so far, nor has it been departed or deviated from by any regime, military or Civil. Indeed, it cannot be, for it is one of the fundamental principles enshrined in the Qur'an.'[45]

Justice Rahman developed from this a principle of sovereignty based on the idea of trusteeship, in which the body politic becomes a trustee for the discharge of sovereign functions. According to the Qur'an this trusteeship must consist of a plurality persons which 'negates the possibility of absolute power being vested in a single hand'.[46]

Justice Rahman's reliance on Islamic law is significant. In spite of the fact that he began his deliberations about Pakistan's *Grundnorm* with an 'if', he nevertheless formulated in very certain terms a constitutional theory in which basic principles of Islamic law were 'immutable' and 'unalterable' norms. The idea of a basic structure of Pakistan's legal system based on Islam which would survive any attempts to change 'the written laws', as Justice Cornelius had called them in *Dosso,*[47] would impose a two-fold test on the validity of a legal revolution: first, was the revolution successful, i.e. had it been accepted by the people, and secondly, was the new legal order in accordance with the norms of Islam. Justice Rahman's definition of these norms concentrated on the plurality of political leaders which would rule out a military dictatorship, and an authority properly constituted by and subject to law, i.e. the rule of law. His approach was followed by Justice Sajjad Ahmad who also stated in emphatic terms that:

> 'The State of Pakistan was created in perpetuity based on Islamic ideology and governed on all the basic norms of that ideology, unless the body politic of Pakistan as whole, God forbid, is reconstituted on an un-Islamic pattern, which will, of course, mean the destruction of its original concept. The Objectives Resolution is not just a preface. It embodies the spirit and the fundamental norms of the constitutional concept of Pakistan.'[48]

Importantly, Justice Sajjad Ahmad approved the *amicus curiae*'s submission that the Supreme Court's judicial power did not flow from any legislative act of the executive but 'is a trust from the Almighty Allah, is lodged in society as a whole, which, in turn, is irrevocably committed to the Courts as trustees of the society.'[49]

The two other judges on the bench, Justices Yaqub Ali and Salahuddin Ahmed, chose to ignore Islam as a source of constitutional law or theory. Justice Yaqub Ali conceded the existence of a basic structure which was according to him democracy,[50] whereas Justice Salahuddin Ahmad was content to overrule *Dosso*[51] on the basis that there had in fact not been a successful revolution when martial law was imposed by General Iskandar Mirza in 1958.

The significant shift of the Supreme Court towards Islam in its search for stability and legal continuity in the face of frequent constitutional 'break-downs', which has

45 *Supra*, note 22, at p. 182.
46 *Ibid.,* at p. 183.
47 *Supra*, note 33.
48 *Supra*, note 22, at p. 258.
49 *Ibid*., at p. 258.
50 *Ibid*., at p. 237.
51 *Supra*, note 33.

not received much attention in the literature,[52] appears to be part of a broader movement within the judiciary to use religious norms as a weapon against unconstitutional impositions of martial law: the existence of an immutable basic norm was supposed to provide the means with which any usurper of power could be repelled. However, the emergence of this 'basic-structure' doctrine was less courageous then it might appear at first sight: at the time when the Supreme Court decided *Asma Jilani* General Yaha Khan had already been removed from office.

Nevertheless, the reliance on theology, coupled with a conscious departure from Western constitutional thought, signifies an important trend towards the development of a culture-specific constitutional jurisprudence. It is interesting to note that India's superior courts have so far resisted any express reliance on indigenous traditions of just governance. This fact was criticised by Upendra Baxi, who argued that:

> 'The Pakistan experience certainly demonstrates that the privileging of judicial review is more appropriately and adequately achieved by reference to society's, even if it is a past (like all past) we narratively construct (though with integrity), to imbue political power with a minimum ethic of accountability.'[53]

Whilst the Supreme Court conducted its hearings in *Asma Jilani,*[54] the Lahore High Court examined similar questions, namely the legality of convictions imposed under criminal laws introduced in the course of Yaha Khan's martial law, in the case of *Ziaur Rehman v. The State.*[55] Rather embarrassingly for the Supreme Court, which had condemned Yaha Khan's martial law as unconstitutional, the restrictive criminal laws introduced during martial law had not been removed from the legal system but on the contrary had been expressly saved by Zulfikar Bhutto under Article 281 of the Interim Constitution 1972. The rigid press laws were used expressly to silence critical sections of the press. The petitioners, all journalists and editors of newspapers, argued that if Yaha Khan's imposition of martial law was indeed *ultra vires*, which it was as a result of the Supreme Court's decision in *Asma Jilani,*[56] then the 1962 Constitution would stand revived. In such a scenario, not only Yaha Khan's but also Zulfikar Bhutto's martial law would be invalid. In a preliminary decision which only examined the jurisdiction of the Lahore High Court to deal with the matter and to grant interim relief, Justice Afzal Zullah advanced a position which was far more radical than

52 Paula Newberg, for instance, does not explore the Supreme Court's recourse to Islamic law apart from one mention of Chief Justice Hamoodor Rahman's remark that if a *Grundnorm* was necessary, the Objectives Resolution would provide one. See Paula Newberg, *supra*, note 35, at p.122. A notable exception is Upendra Baxi, 'Constitutional Interpretation and State Formative Practices in Pakistan: A Preliminary Exploration', in Mahendra Singh (ed.), *Comparative Constitutional Law*, Delhi, 1989, pp. 132-153. Baxi recognises the importance of an ideological/theological discourse for the achievement of constitutionalism, calling it 'unparalleled in the annals of contemporary constitutionalism' (at p. 132).

53 See Baxi, *ibid.*, at p. 136. It might be argued in the defence of the Supreme Court of India that an express reference to the 'classical traditions of good governance in the Hindu, Buddhist, Jain, Islamic, Christian, and tribal traditions' (*ibid*., at p. 136) would be more problematic since India is a secular state – in fact, in *Kesvavanda Bharati v. State of Kerala* AIR 1973 SC 1461 the Supreme Court of India held secularism to be part of the basic structure which could not be tampered with by constitutional amendment.

54 *Supra*, note 22.

55 PLD 1972 Lah 382.

56 *Supra*, note 22.

anything which was going to be held in *Asma Jilani.*[57] Justice Zullah elevated the Objectives Resolution to a 'supra Constitutional Instrument' which 'is so fundamental and contains such mandates that it cannot at all be repealed or abrogated and is permanent for all times to come'[58] and extracted from it the following principles:

'(1) the State shall exercise its powers and authority through the chosen representatives of the people;
(2) the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed;
(3) the integrity of the territories of the federation, its independence, and all its rights including sovereign rights on land, sea, and air shall be safeguarded.'[59]

Justice Zullah held that the imposition of martial law had been a violation of these principles. His reliance on Islamic law as embodied in the Objectives Resolution amounted to stating that Pakistan's constitutional order had a basic structure which could not be taken away by anybody. *Asma Jilani*[60] seemed to endorse Justice Zullah's views on the importance of the Objectives Resolution but in that case the Supreme Court did not base its condemnation of the imposition of martial law exclusively on Islamic law. In contrast, for Justice Afzal Zullah, Islam formed both the immutable basis of Pakistan's constitutional order and the ultimate source of constitutional law.

In July 1972, a larger bench of the Lahore High Court ruled on the legality of the criminal convictions itself.[61] By then, the Supreme Court had handed down the *Asma Jilani*[62] decision. An examination of the individual judgments reveals an interesting range of opinions on the role of Islam as a source of constitutional law. Justice A.R. Sheikh held that though the Objectives Resolution was indeed the *Grundnorm*, it could nevertheless not be used to test the *vires* of a constitution itself drafted by a constituent assembly since, 'if, however, the Constituent Assembly fails to fulfil its obligations, the remedy will be the resistance to be offered by the people to accept the Constitution and the complexity of the problem so arising will be settled on the political forum in the country and not before the Courts.'[63]

Justice Muhammad Afzal Cheema's approach to the status of Islamic law was cautious as well. He expressly ruled out that the Objectives Resolution could be used to determine the *vires* of any law, let alone the provisions of the Constitution itself:

> 'Obviously, the fundamental law of the land cannot be left to the vagaries of conflicting and changing notions leading to constantly endless litigation in Court for the resolution of theological controversies and polemics. Thus, the only sound principle of policy is to leave the matter to popular will reflected in the chosen

57 *Supra*, note 22.
58 *Supra*, note 55, p. 390.
59 *Ibid*.
60 *Supra*, note 22.
61 *Ziaur Rehman v. The State* PLD 1986 Lahore 428. The decision was initially only reported as a headnote, see PLD 1974 Note 3 [Lahore]. The long delay in the publication of the full text of the decision gives an indication of the sensitivity of the issues involved: the decision was reported in full only after the lifting of Zia-ul-Haq's martial law.
62 *Supra*, note 22.
63 *Supra*, note 61 at p. 486.

representatives who can frame as also amend the Constitution subject, of course, to the Divine limitations.'[64]

The remaining judgments reveal an equally mixed assessment of the role of Islamic law. Whereas Justice K.E. Chauhan did not once refer to Islamic law, Justice Sajjad relied heavily on the idea that Islam as expressed in the Objectives Resolution constituted Pakistan's *Grundnorm*. However, he came to the conclusion that though a constituent assembly had to frame a constitution in accordance with the directions contained in the Objectives Resolution, 'I do not find that the National Assembly by conferring validity on the laws framed during the Martial Law regime by the usurper has offended against these directions.'[65] Justice Afzal Zullah, who had already been involved in the case at the preliminary stage, repeated his heavy reliance on Islamic law, pronouncing that the Objectives Resolution was a supra-constitutional document which imposed limits on the powers of any law-creating body including a constituent assembly.

In a final analysis, however, in spite of differing interpretations of the place of Islam in the legal system, all judges upheld the validity of Article 281 of the 1972 Interim Constitution, albeit with the restriction that this Article did not remove the superior courts' power of judicial review to examine the validity of acts deemed to be *mala fide* or *coram non judice*.

The jealously guarded right of the judiciary to interpret laws was, therefore, in line with the emerging popularity of Islamic law in the legal discourse, based directly on the principles of delegation contained in the Objectives Resolution. The anchoring of the powers of judicial review in a source of law not connected to a written constitution but to a religion, created boundaries which could not be overstepped by the regime itself. The recognition of inherent limits on the power of any regime or democratically elected government to depart from the basic legal structure left an obvious question unanswered: to what extent did the position of the judiciary itself depend on a written constitution?

In *Yusuf Ali v. West Pakistan Bar Council Tribunal*[66] the Lahore High Court answered this question, holding that the judiciary carried out its judicial functions as a delegate of the sovereign, who, 'in the Islamic Republic of Pakistan, is God Almighty Himself exercising His will and Sovereignty through the people of this country.'[67]

Despite the judicial endorsement of Islam as a source of constitutional law, reliance on Islam as a supra-constitutional norm was expressly rejected by the Lahore Court in a case decided only a few months after the more ambiguous judgment given in *Ziaur Rehman*[68] In *Hussain Naqvi v. D.M. Lahore*[69] Justice Muhammad Iqbal held

64 *Ibid*., at p. 518. Justice Cheema's doubts concerning the desirability of introducing theological arguments into the process of judicial review of legislation have a certain prophetic quality in the light of subsequent developments since even the Federal Shariat Court would find it difficult to agree on the precise content of Islamic law.

65 Ibid., at p. 602.

66 PLD 1972 Lahore 404. As will be seen further below, these early assertions of judicial independence were given more forceful expression in the late 1990s, see Chapter 5.

67 Ibid., at p. 413, per Justice Mushtaq Hussain.

68 *Supra*, note 61.

69 PLD 1973 Lahore 164.

that the Objectives Resolution could only be considered as a guideline for the framing of a constitution. He observed that:

> '[. . .] the *Grundnorm*, is in my view [. . .] a concept of Western Legal Theorists which has its importance only so long as the Constitution is not framed, or it operates when the country is in the occupation of an usurper, but it cannot be relied upon for challenging the provisions of a written Constitution, or to contend that a certain constitutional provision is *ultra vires* the *Grundnorm*. It is only a basic ideology not actionable before the courts.'[70]

The reluctance of Justice Iqbal of the Lahore High Court to endorse Justice Zullah's radical approach continued in the Supreme Court. An appeal against the Lahore High Court's decision in *Ziaur Rehman*[71] to the Supreme Court ended, for the time being, the higher judiciary's experiments with Islamic law and its relation to a *Grundnorm*: in *Ziaur Rehman v. State,*[72] decided by the Supreme Court after the 1973 Constitution had been passed by the National Assembly, Chief Justice Hamoodur Rahman expressly rejected Justice Zullah's elevation of the Objectives Resolution to a supra-constitutional instrument. Having asked himself the question whether a judge could strike down any provision of the 1973 Constitution itself either because it was in conflict with the laws of God, of nature or of morality, he forcefully stated that:

> 'I for my part can conceive of no situation, in which, after a formal written Constitution has been lawfully accepted by the people including the judiciary as the Constitution of the country, the judiciary can claim to declare any of its provisions *ultra vires* or void . . . Therefore, in my view, however solemn or sacrosanct a document, if it is not incorporated in the Constitution or does not form part of the Constitution it cannot control the Constitution.'[73]

The Supreme Court's retraction from its earlier endorsement of the Objectives Resolution as an expression of Pakistan's immutable *Grundnorm* seemed to have ended the Supreme Court's flirtation with something which had come very close to pre-empting India's basic structure doctrine.[74] In effect, the Supreme Court voluntarily limited its power. It would not interfere with the traditional separation of powers and therefore would not meddle with parliament's power to make laws or to amend the constitution.[75]

70 *Ibid*., p. 175.

71 *Supra*, note 61.

72 PLD 1973 SC 49.

73 *Ibid*., at p. 71. It should be noted that the Objectives Resolution was incorporated into the Constitution in 1985 in the form of a new Article 2A. On the effect of this incorporation, see below, Chapter 3.

74 See *Kesavanda Bharati v. The State of Kerala* AIR 1973 SC 1461, *supra,* note 53. It should be remembered that the Indian legal discourse on the basic structure was confined to the justiciability of amendments to the constitution. The task of Pakistan's Supreme Court was therefore conceptually much wider, being concerned with the creation of a new constitution or legal order.

75 This was confirmed by *Federation of Pakistan v. Saeed Ahmad* PLD1974 SC 49, where the Supreme Court examined a similar ouster of jurisdiction clause, this time under the 1973 Constitution (see Article 281 (1) of the 1973 Constitution). The Supreme Court held that the right to review decisions made *mala fides* could not be taken away but there was no reliance on any 'extra-constitutional' norms to justify this result.

The Supreme Court's stance that any violation of principles contained in a supra-constitutional norm like the Objectives Resolution had to be corrected by the people but not by the courts is understandable in the context of the country's return to democracy in 1972. However, bearing in mind the troubled constitutional history of Pakistan, it could also be argued that the Supreme Court was unwilling to become a 'hostage to fortune' by expanding its jurisdiction to such an extent that it would never be able to condone any future 'constitutional irregularity', like the imposition of martial law for a limited period, without breaching its own dicta. Significant for the purposes of this book is, however, the refusal of the Supreme Court to recognise Islam as the immutable *Grundnorm* of Pakistan. In the final analysis, the Supreme Court pronounced that even a complete departure from the Islamic ideals enshrined in the Objectives Resolution would not be justiciable.

However, it should be noted that the Supreme Court's rejection was not an absolute one: Chief Justice Hamoodur Rahman conceded that the position might be different if the Objectives Resolution were incorporated in the Constitution, a course of action which was adopted by Zia-ul-Haq in 1985.

Islam and Martial Law II

The idea of Islamic law as the inviolable basic norm of the constitution was, despite the rejection of this concept by the Supreme Court in 1973, resurrected in order to challenge the flood of repressive laws introduced by Zulfikar Bhutto. It was, ironically, Zulfikar Bhutto himself, who, having benefited from the *Asma Jilani*[76] decision, introduced laws which restricted both judicial independence and weakened fundamental rights. Many of these repressive laws were challenged and judges at times relied on Islamic law to restrict what was effectively a piecemeal imposition of martial law.[77] The civil unrest which followed the national assembly elections of March 1977 led the re-elected Prime Minister Zulfikar Bhutto to call in the army to assist the overstretched police forces. This was done in reliance on Article 245 of the 1973 Constitution, which allowed the armed forces to act in aid of a civilian government when called upon to do so. Bhutto amended the Article with retrospective effect so as to prevent any judicial review of his decision to call upon the army. [78] Further, on 21 April 1977, Bhutto amended the Proclamation of Emergency 1971, which had been in force since 1971, to the effect that the reason for the proclamation of an emergency could also be an internal disturbance rather than an external threat.

In areas affected by martial law, all fundamental rights were suspended. The net effect of these changes was to make the entire population of an area in which martial law had been declared subject to the amended the Pakistan Army Act 1977 and triable by military courts for a wide range of offences. In *Darvesh M. Arbey v. Federation of Pakistan*[79] the petitioners challenged this localised imposition of martial law and the

76 *Supra*, note 22.

77 For a useful account of the Bhutto years, see Paula Newberg, *supra*, note 35, pp. 138-170, and Hamid Khan, *Constitutional and Political History of Pakistan*, Oxford, 2002, pp. 509-553.

78 See the Constitution (Seventh Amendment) Act 1977.

79 PLD 1980 Lahore 206 ('*Darwesh M. Arbey*'). It is interesting to note that the decision was only reported three years after it had been handed down.

setting-up of military courts by arguing that these actions exceeded the scope of Article 245 of the 1973 Constitution. The petitioner submitted that Article 245 only allowed the government to call on the army in aid of the exercise of its civil power but did not allow the army to take over the functions of the judiciary. A five-member bench of the Lahore High Court faced the task of reconsidering the limits, if any, to constitutional amendments and yet again of tackling the thorny question of the basic structure or *Grundnorm* of Pakistan's legal order.

The timing of the decision is significant: the judgment in the form of a short order was handed down on 2 June 1977. When the judges wrote their respective judgments, Zia-ul-Haq had already disposed Zulfikar Bhutto and imposed his own martial law. Unlike the *Asma Jilani*[80] decision, which had declared Yaha Khan's martial law to be unconstitutional after the dictator had been removed from office, *Darwesh M. Arbey*[81] declared Zulfikar Bhutto's martial law to be *ultra vires* while he was still very much holding onto power. However, by the time the written judgments were handed down Zulfikar Bhutto had been overthrown and thus the decision had, albeit it indirectly, also became a benchmark for Zia-ul-Haq's martial law itself.

Chief Justice Aslam Riaz Hussain avoided any reference to Islam or the basic structure by concentrating on the legal framework surrounding the imposition of martial law itself. He found that there was no provision within the constitutional framework which would allow for the imposition of martial law. His emphasis on the absence of any reference to martial law within the 1973 Constitution seems curious at first, especially since Justice Hussain adds to this that:

> 'However, if the Constitution is abrogated, set aside or placed in a state of suspended animation or hibernation, it might be possible to impose Martial Law outside the Constitution. Such an action may or may not be justified by the doctrine of necessity.'[82]

The end result was somewhat convoluted: a martial law within the existing constitutional order could not be justified and would always be unconstitutional, since it was not contemplated by the constitution itself, whereas a martial law imposed by actually abrogating or suspending the constitution could, under certain circumstances, be condoned by the doctrine of necessity. The confusion was compounded by the fact that the government had in fact argued that their martial law was a 'constitutional' one, whereas the previous martial law imposed by Yaha Khan had been unconstitutional. Justice Hussain's response appeared to be that only an unconstitutional martial law could ever be condoned by the doctrine of necessity. The confusion can probably be explained by the course of events which took place while Justice Hussain wrote his judgment: on 4 July 1977 General Muhammad Zia-ul-Haq staged a *coup d'état* and imposed martial law promising fresh elections within three months, i.e. on 18 October 1977. Zulfikar Bhutto had indicated his willingness to participate in these elections and had even gone on record saying that he would not challenge the constitutional validity of that martial law. The Chief Justice of the Lahore High Court was, it appears, unwilling to declare – albeit only by implication

80 *Supra*, note 22.
81 *Supra*, note 79.
82 *Ibid*., at p. 236.

– Zia-ul-Haq's martial law to be unconstitutional. Justice Hussain's judgment can therefore be regarded as a compromise: it allowed for the invalidation of Bhutto's martial law and at the same provided a basis for the preservation of Zia-ul-Haq's openly unconstitutional act.

Justice Hussain's judgment must be regarded as highly unattractive, hinting as it does at a resurrection of the *Dosso*[83] doctrine of revolutionary change disguised as a doctrine of necessity. Justice Karam Elahee Chauhan managed to avoid any ruling on the question of the validity of Bhutto's martial law itself by confining himself to a close interpretation of Article 245. As a result, he found that the functions performed by the armed forces in areas subjected to martial law exceeded the scope of Article 245 and were therefore unconstitutional. Justice Shameen Hussain Kadri, however, did not duck the issue but plunged straight into the muddied waters of the limits of constitutional amendments. It will be recalled that by virtue of the seventh amendment to the Constitution the jurisdiction of the courts to review any direction given to the armed forces to assist the civil power was ousted.[84] Justice Kadri decided that such an amendment was in violation of the basic structure of the 1973 Constitution and therefore *ultra vires* and invalid. The basic structure was, according to Justice Kadri, the two nation theory and the ideology of Pakistan. Justice Kadri located the source of the basic structure as the Objectives Resolution which, in his judgment, imposed fetters on the legislative powers of the national assembly. The Objectives Resolution also afforded Justice Kadri a gateway to the resurrection of the fundamental rights which had been suspended by Zulfikar Bhutto:

> 'In my humble view, suspension of certain fundamental rights and in particular Fundamental Right 14(1) comes in direct conflict with the Holy Qur'an. Any legislative or executive authority cannot enact a law or promulgate any Ordinance or Order in view of Article 227 of the Constitution which clearly prohibits the enactment of law which is repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah. I am conscious of the fact that Courts are not empowered to strike down such laws. But any person or authority acting contrary to the provisions of Article 227 is likely to run the risk of the consequences as envisaged in Article 6[85] of the Constitution.'[86]

Islamic law also provided Justice Kadri with the necessary arguments to counter the submission of the Attorney General that martial law was part of English common law which in turn was the law applied by a Pakistani court whenever a principle of natural justice had to be enunciated. Justice Kadri ruled that the principles of natural justice were not based on common law but were enshrined in the Qur'an, observing also that it was strange that the government should try to rely on English law to justify the

83 *Supra*, note 33.

84 The amended Article 245 of the 1973 Constitution provided in clause 2 that: 'The validity of any direction issued by the Federal Government under clause (1) shall not be called in question in any court.'

85 Article 6 of the 1973 Constitution provides that anybody who abrogates or subverts the Constitution by use of force is guilty of high treason.

86 *Supra*, note 79, at p. 267.

imposition of martial law whilst at the same time having pursued a policy of Islamisation.[87]

The use of Islam made by Justice Kadri did not amount to a bold assertion of Islam as the *Grundnorm* of Pakistan but was more subtle: Islam was an additional source of law. It replaced English principles of natural justice as contained in the common law and imposed, similar to a fundamental right, limits on the law-making powers of the legislature. The latter can be deduced from Justice Kadri's examination of the legal validity of the extensive curfew orders imposed by the army in martial law areas. Justice Kadri held these curfew orders to be invalid because they did not allow for a reasonable amount of time for Muslims to offer prayers in mosques. This, according to Justice Kadri, was in violation of both Article 20 of the 1973 Constitution, which provides for freedom of religion, and of Islamic law. The elevation of Islamic law to the level of fundamental rights was unprecedented but, as will be seen later, would play an important part in the development of public interest litigation in Pakistan in the 1980s and 1990s.

Justice Zakiuddin Patel went so far as to resurrect the basic structure doctrine in its entirety. Relying on the Indian cases *Kesavananda*[88] and *Golakh Nath,*[89] Patel argued that the 'basic structure, framework and essential features have been fully given in the preamble of the Constitution, which is an integral part thereof.'[90] It is worth quoting Justice Patel at length since his forceful formulation of a basic structure doctrine was made at a time when Bhutto's martial law had just been replaced by the one imposed by Zia-ul-Haq:

> 'According to the objectives given in the preamble, the Constitution of Pakistan would be Islamic, federal and Democratic in character . . . [T]he scope of Article 238, does not allow such sweeping changes in the Constitution by way of amendment which can destroy its basic structure and essential features, otherwise such amendments would be void being beyond the scope of the relevant Articles.[91]

Justice Patel gave some examples of constitutional amendments which would amount to a violation of the basic structure doctrine: the deletion of Article 2 of the 1973 Constitution, which provides that Islam shall be the state religion of Pakistan, or a declaration that Pakistan was to be a secular state would amount to the destruction of the basic structure. Further, any attempt to change the democratic and federal character of the state would be invalid for the same reason.

Justices Patel's and Kadri's resurrection of the basic structure doctrine in a form more radical in its imposition of legislative limits than the only other precedent,

87 Justice Kadri mentioned as examples of Islamisation measures taken by Bhutto's government the Prohibition Act 1977, the declaration of Friday as a public holiday and the formation of a new Islamic Advisory Council.

88 *Supra*, note 53.

89 *Golak Nath v. State of Punjab* AIR 1967 SC 1643.

90 *Supra*, note 79, at p. 297.

91 *Ibid*.

namely *Asma Jilani*,[92] is noteworthy for two reasons: first, both judges attempt to distinguish and circumvent the Supreme Court's decision in *Ziaur Rehman*[93] which had held that the Preamble, unless incorporated into the 1973 Constitution, could not control it.[94] It can be argued that the open departure from the binding precedent set by the Supreme Court demonstrates a split in the judiciary between proponents and opponents of the basic structure doctrine. Secondly, and less obvious, is the reliance on Islamic law to oppose the imposition of martial law and radical amendments of the 1973 Constitution. Especially Justice Patel's criticism of Bhutto's opportunistic use of Islam, namely the introduction of Islamisation measures on the one hand and the reliance on English common law to justify an un-Islamic martial law on the other, must have sent warning signals to Zia-ul-Haq. It is perhaps for this reason that the decision was only reported in 1980, i.e. three years after the judgment had been handed down. It is difficult to see a more judicially determined challenge to Zulfikar Bhutto's and, indirectly, to Zia-ul-Haq's experiments with martial law.

Darwesh M. Arbey[95] had invalidated Zulfikar Bhutto's attempts to impose localised martial law regimes but it obviously had not in any way questioned the legality of his government as such. However, as could be seen, the Lahore High Court left little doubt that any permanent imposition of martial law would as a matter of principle be regarded as a violation of the basic structure doctrine.

The latter, namely the validity of Zia-ul-Haq's imposition of martial law and the suspension of the 1973 Constitution, was the central issue in the case of *Begum Nusrat Bhutto v. Chief of Army Staff*.[96] Zulfikar Bhutto's wife moved the Supreme Court under Article 184(3) of the 1973 Constitution to challenge the detention of her husband and ten other leaders of the Pakistan People's Party. The Supreme Court faced a by now somewhat familiar situation: a martial law dictator had established himself effectively in power and it was abundantly clear that a judgment of the Supreme Court would not remove him. Justice Qaisar Khan bluntly described the situation as follows:

> 'The argument that a decision holding the action of the Martial Law authority immune from judicial scrutiny by Courts would encourage revolutions and coups d'état has no substance in it as revolutions and coups d'état cannot be prevented by judgments. Despite the judgment of this Court in Asma Jilani's case a coup d'état did take place, for whatever reason, it is immaterial. We daily see that revolutions and coups d'état do take place despite provisions regarding treason in Constitutions of the countries. The persons who want to stage a revolution or coups d'état do not have any regard for the judgments or the Constitutional provisions. They go forward despite these and rule if they succeed or are executed if they fail.'[97]

92 *Supra*, note 22.
93 *Supra*, note 72.
94 However, it must be considered controversial that a constitutional provision could control all other provisions contained in that Constitution.
95 *Supra*, note 79.
96 PLD 1977 SC 657.
97 *Ibid*., at p. 747.

Justice Qaisar's rather resigned approach proceeded on the basis that Zia-ul-Haq's martial law had brought into existence a new legal order which was in no way connected to the previous constitutional order. Even the 1973 Constitution, which had been partially revived by the Laws (Continuance in Force) Order 1977, was part of the new legal order, since it had been reintroduced only by the 'grace' of the Chief Martial Law Administrator Zia-ul-Haq and not because it represented the legitimate basis of government. The declaration of martial law on 5 July 1977 brought the legal order based on the 1973 Constitution to a complete end. It could be revived only if Zia-ul-Haq was removed from power and tried for treason under the revived provisions of the 1973 Constitution but until then the ultimate source of law was the Martial Law Administrator himself. Justice Qaisar saw little point in pretending that the courts had retained any power to judicially review the actions or pledges of the martial law authorities – such powers had been taken away and any pledge made by a politician or for that matter a general was not enforceable in any event:

> 'The assertion that the Chief Martial Law Administrator had given statements and made pledges that he would do this and in such and such a time does not detract from the existence of the Martial Law or the powers which are exercised under it. The Courts have nothing to do with these statements as such like statements and pledges are not enforceable under any law in any Court.'[98]

But what about the idea of an Islamic *Grundnorm* based on the Objectives Resolution? Justice Qaisar did not spend much time on it. In his opinion the 'total legal order' was contained in the 1973 Constitution. In any event, the extent to which this legal order was in fact Islamic was doubtful because:

> 'At some stage in the arguments it was suggested that the Resolution of March 1949 was the *Grundnorm* in Pakistan and action should be tested keeping that as a touchstone. There is, however, no force in this contention as no body in Islam is above law but under our Constitution of 1973 the President and the Governors have been placed above law and they were not answerable to any Court or law nor could they be tried in any Court. The offence of murder is compoundable according to the Holy Qur'an but we in the Courts do not accept compromise in murder cases. The resolution was the wish and ultimate aim for the realisation of the Islamic order but it was not the *Grundnorm* in Pakistan. It was also held so by this Court in the case of Zia-ur-Rahman.'[99]

All judges came to the same result, namely that Zia-ul-Haq's regime was not to be declared invalid or unconstitutional. However, unlike Justice Qaisar who plainly stated that Zia-ul-Haq's actions amounted to a *coup d'état*, the remaining judges including the Chief Justice attempted to achieve a compromise between the detrimentally opposed decisions of *Dosso,*[100] which would have recognised the *de facto* revolutionary legal change as the beginning of a new legal order, and *Asma Jilani,*[101] which had imposed strict limits on the imposition of martial law. It will be

98 *Ibid*., p. 747.
99 *Ibid*., p. 747.
100 *Supra*, note 33.
101 *Supra*, note 22.

recalled that in the latter case the Supreme Court had argued in no uncertain terms that:

> 'Maybe, that on account of their holding the coercive apparatus of the state, the people and the Courts are silenced temporarily, but let it be laid down firmly that the order which the usurper imposes will remain illegal and the Courts will not recognise its rule and act upon them as *de jure*. As soon as the first opportunity arises, when the coercive apparatus falls from the hand of the usurper, he should be tried for high treason and suitably punished. This alone will serve as a deterrent for would-be adventurers.'[102]

The 'third way' out of the dilemma of either admitting defeat, like Justice Qaisar, or to risk ridicule by invalidating the martial law without any hope of enforcement, was to be the 'doctrine of necessity' as formulated by Chief Justice Muhammed Munir in *Reference by H.E. the Governor General.*[103] Chief Justice Munir's definition of the doctrine of necessity, namely 'that subject to the condition of absoluteness, extremeness and imminence, an act which would otherwise be illegal becomes legal if it is done bona fide under the stress of necessity, the necessity being referable to an intention to preserve the constitution, the State or the Society and to prevent it from dissolution',[104] was an obvious solution capable of cutting the Gordian knot. A further distinct advantage of Chief Justice Munir's approach was the fact that he had limited the emergency legislative powers, conferred by the doctrine of necessity, to matters connected to the necessity. Any constitutional changes were, according to Chief Justice Munir, only permitted if referable to the emergency itself.[105] However, Justice Cornelius' condemnation of the pedigree of the doctrine of necessity as undemocratic and steeped in a period of absolutism and colonialism, appears to have been noted by the Supreme Court in 1977. Chief Justice Anwarul Haq did not rule on the position of

102 *Ibid.,* per Chief Justice Hamoodur Rahman.

103 PLD 1955 FC 435 ('*Reference*'). For a comprehensive discussion of the doctrine of necessity see Leslie Wolf-Phillips, *Constitutional Legitimacy: A Study of the Doctrine of Necessity*, London, 1979.

104 *Ibid*., at p. 485.

105 *Ibid*., at p. 486. It should be noted that Justice Cornelius disagreed with this part of the judgment, holding instead that the Governor-General could not invoke any powers except such as were available to him under the constitutional instruments in force (at p. 515). Munir's reliance on English law to legitimise the doctrine of necessity received the somewhat prophetic reply that:

> 'The record of these affairs belong to periods when, and to territories where, the power of the king was, in fact, supreme and undisputed. The record of these affairs are hardly the kind of scripture which one could reasonably expect to be quoted in a proceeding which is essentially one in the enforcement and maintenance of representative institutions. For they can bring but cold comfort to any protagonist of the autocratic principle against the now universal rule that the will of the people is sovereign. In the case of North America, the territory was eventually lost through the maintenance of just such reactionary opinions, as those which the Senior Counsel for the Federation of Pakistan has been pleased to advance for the acceptance by the Court. And in the English case, the fate of the King, and the Judges who delivered the opinion favouring absolute power in the King, stands for all time as a warning against absolutism, and as a landmark in the struggle for the freedom and eventual sovereignty of the people' . . . (at p. 516).

Justice Muhammad Sharif echoed this observation, holding that:

> '[I]t might lead on occasion to dangerous consequences if in any real or supposed emergency of which the head of the State alone must be the judge, the constitutional structure could be tampered with . . .' (at p. 519).

the Objectives Resolution as the *Grundnorm* of Pakistan as such, but he was nevertheless at pains to find a legitimisation of the doctrine of necessity, not just in English common law but also in Islam. This attempt to find a new, indigenous, source of constitutional law is significant: in *Asma Jilani*[106] it was held that the Objectives Resolution could amount to a *Grundnorm* which imposed limitations on any radical change of the established legitimate constitutional order. The negative, protective function of the Objectives Resolution was transformed by Justice Haq into a positive, law-creating, function: whereas in the *Reference,*[107] as was observed by Justice Cornelius, the doctrine of necessity was exclusively based on English common law, *Begum Nusrat Bhutto*[108] postulated a new, Islamic source of constitutional law.

The same applies to the principle that the 'Courts remain the Judges of the validity of the actions of the new regime in the light of the doctrine of necessity.'[109] Chief Justice Haq effectively, if not expressly, confirmed the Islamic basic structure doctrine when he held that even if for any reason this power were to be removed from the 1973 Constitution, 'the fact remains that the ideology of Pakistan embodying the doctrine that sovereignty belongs to Allah and is to be exercised on his behalf as a sacred trust by the chosen representatives of the people, strongly militates against placing the ruler for the time being above the law.' Chief Justice Haq continued by stating that, '[T]he Courts of Justice are an embodiment and a symbol of the conscience of the Millat (Muslim community), and provide an effective safeguard for the rights of the subjects.'[110]

The Chief Justice's reliance on Islamic law was followed by the remaining members of the Bench.[111] Justice Muhammad Afzal Cheema observed that Islam was the ideological foundation of Pakistan and that for this reason the Kelsonian theory of revolutionary legality had no applicability at all since Islam did not recognise a legal order divorced from morality.[112] Justice Cheema also embarked on a detailed examination of the Islamic doctrine of necessity, finding that the people were obliged to follow a ruler who had come to power under that doctrine with the objective of removing an unjust tyrant. However, this duty came to an end if the *bona fide* 'usurper' did not himself observe the limits of Allah.[113]

Justice Muhammad Akram followed the precedent stating that:

> 'Moreover, as observed by my Lord, the Chief Justice, ours is an ideological State of the Islamic Republic of Pakistan. Its ideology is firmly rooted in the Objectives Resolution with emphasis on Islamic laws and concept of morality. In our way of life we do not and cannot divorce morality from law . . . It [i.e. the pure theory of law] has no place in our body politic and is unacceptable to the Judges charged with the administration of justice in this country.'[114]

106 *Supra*, note 22.
107 *Supra*, note 103.
108 *Supra*, note 96, at pp. 708-709.
109 *Ibid*., at p. 717.
110 *Ibid*., at p. 717.
111 Except Justice Nasim Hasan Shah who did not refer to Islamic law once.
112 *Ibid*., at p. 724.
113 *Ibid*., at p. 727.
114 *Ibid*., at 733.

The Supreme Court's condonation of Zia-ul-Haq's martial law under the doctrine of necessity was made subject to the condition that it was to be limited in time, that the President and the courts continued to function under the 1973 Constitution and that the courts were entitled to exercise their power of judicial review to judge the validity of any act or action of the martial law authorities, notwithstanding anything contained in any martial law regulation or order, presidential order and ordinance.[115]

The fate of the *Begum Nusrat Bhutto*[116] decision is well known. The elections promised by Zia-ul-Haq to be held in October 1977, i.e. just two months after the imposition of martial law, were postponed indefinitely while Zia-ul-Haq proceeded to rule the country under martial law until 1985. In that period, he was able to introduce far-reaching changes to the legal system of Pakistan, especially in the field of Islamic law. Justice Qaisar's resigned acceptance of usurpations was, in retrospect, more realistic than the Chief Justice's optimistic assessment that 'it would be highly unfair and uncharitable to attribute any other intention to the Chief Martial Law Administrator, and to insinuate that he has not assumed power for the purposes stated by him, or that he does not intend to restore democratic institutions.'[117]

To summarise: the resurrection of the basic structure doctrine in the form of Islam was a useful tool to impose limitations on the doctrine of necessity. Reliance on Islamic law also enabled judges to formulate new principles of constitutional law that were to exist independently from any written legal source, and were not based on principles of English common law. This 'indigenisation' of constitutional law constituted a momentous step in the legal history of Pakistan: by 1977 it was well established that Islamic law imposed limits on the legislative powers of the government. The transcendental authority of Islamic law was, however, not necessarily based on the Objectives Resolution alone. As was made apparent in *Begum Nusrat Bhutto,*[118] the authority of Islamic law was regarded as being rooted in the genesis of Pakistan as an ideological state.

The 1970s must be regarded as the temporary high-water mark of the 'indigenisation' of constitutional laws and the acceptance of an unwritten basic structure based on legal and ethical principles derived from Islamic jurisprudence. By the early 1980s, a curious situation had emerged: on the one hand, there was Zia-ul-Haq's concerted effort to Islamise the legal system through both specific legislation and the introduction of new powers of judicial review conferred upon the newly created Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court. On the other hand, Pakistan's Supreme Court showed a marked reluctance to admit to any limitation on the powers of the legislature, i.e. Zia-ul-Haq. This can be best illustrated with reference to the decision of the Supreme Court in *Fauji Foundation v. Shamimur Rehman.*[119] The case concerned the legal validity of certain orders made during Zulfikar Bhutto's reign, which deprived the appellant of the benefit of contracts he had entered into with the government of the 'usurper' Yaha Khan. The contracts were concerned with the finance and management of a sugar cane mill built for the benefit of ex-servicemen.

115 *Ibid*., at pp. 715-716, per Chief Justice Anwarul Haq.
116 *Ibid*.
117 *Ibid*., at pp. 715.
118 *Ibid*.
119 PLD 1983 SC 457.

Zulfikar Bhutto's orders meant that the appellant was deprived of the benefit of these contracts and that into his shoes stepped the Fauji Foundation, a charitable trust concerned with the welfare of ex-servicemen. It was argued that the orders were *mala fide* and invalid. Justice Muhammad Haleem, the acting Chief Justice, declined to invalidate the orders and held that:

> 'Our constitutional framework is different from the American Constitution. Accordingly, the fundamentals of the due process clause cannot be invoked to annul a legislation which affects the life, liberty or property of a person. It is only the criterion of a constitutional provision itself which can be a touchstone for testing the constitutionality of a legislation, affecting the life, liberty and property of a citizen, be it of general application or confined to an individual or a group of person.'[120]

Justice Haleem also rejected any implied limitation on the legislative powers derived from the social compact between the government of a state and its citizens, holding that 'no idea or philosophy extraneous to our Constitution can constitute a criterion for testing the validity of a statute.'[121] In a judgment covering more than 200 pages of the law report, Justice Haleem did not mention Islam once – an extraordinary development considering that Islam featured prominently in the constitutional cases concerning the validity of Yaha Khan's regime, the constitutionality of orders made during martial law, and the powers of judicial review of Pakistan's superior courts. It is interesting to note that one of the other two judges on the bench, namely Justice Zaffar Hussain Mirza, voiced some unease about Justice Haleem's conservative and, one may, say legalistic approach:

> 'I generally agree with my Lord the Chief Justice and other points lucidly discussed by him and I say so with respect, except with regard to his observations regarding the concept of limitations on judicial power of scrutiny into the motives of the law-making authority as a ground for declaring the invalidity of law, on which I would refrain from expressing any opinion, because the question does not arise for decision in this case.'[122]

The reason for Justice Haleem's approach must be located in the political setting of his decision: Zia-ul-Haq was firmly entrenched in power and there is little doubt that the Supreme Court was unwilling to challenge his position. In such a scenario, it was safest for the Supreme Court to stay within the confines of the *de facto* legal order rather than to explore legal concepts that would inevitably have amounted to a judicial challenge of Haq's regime.

120 *Ibid*., at p. 646.
121 *Ibid*., at p. 648.
122 *Ibid*., at p. 692.

Chapter 2
The Assertion of Islamic Law

Repugnance to Islam

The emergence of Islamic law outside the traditional sphere of family law was not confined to the struggle of the judiciary to contain martial law and military take-overs. Islamic law was also used in attempts to invalidate ordinary laws on the basis of an alleged repugnance to Islam. The 'repugnance' argument became a common issue in the late 1980s but it can in fact be traced back to the late 1960s. One of the first cases was *Chaudhary Tanbir Ahmad Siddiky v. The Province of East Pakistan and others.*[123] The case involved attempts by the government to take over certain *wakf* properties. The petitioner argued that Islamic law must be held to override all other laws. This, according to the petitioner, would mean that any attempt by the government to appropriate *wakf* properties should be deemed to be repugnant to Islam. The Supreme Court was not impressed with this argument and held that:

> 'Such a plea is, however, not justiciable in Courts under the present Constitution. The responsibility has been laid on the Legislature to see that no law repugnant to the Islamic law, is brought on the statute book. The grievance, if any, therefore should be ventilated in a different forum and not in this Court.'[124]

A year later, the Labour Federation of Pakistan challenged a whole series of laws restricting trade union activities[125] on the basis of repugnance to Islam.[126] The petitioner argued that there was a hierarchy of laws in Pakistan. The highest law was Islamic law, which was described as the fundamental permanent law of the sovereign. Next came the constitution – but only to the extent to which it was consistent with the 'fundamental permanent law'. At the bottom of the hierarchy were statutes passed by the legislature subject to the proviso that they were consistent with Islamic law. Justice Nasim Hassan Shah dismissed the petition on the ground of lack of jurisdiction holding that, first, the Preamble of the 1973 Constitution was not a source of any substantive

123 PLD 1968 SC 185.
124 *Ibid*., at p. 203-205.
125 *Inter alia*, the Industrial Disputes Ordinance 1968 and the Trade Union Ordinance 1968.
126 *Labour Federation of Pakistan v. Pakistan and another* PLD 1969 Lahore 188.

judicial power at all and, secondly, that the constitutional provision that no laws should be repugnant to Islam was not justiciable.

Under the 1973 Constitution, it appeared that as a result of the Supreme Court's decision in *Ziaur Rehman*[127] the Objectives Resolution and with it Islamic law were denied any role in the legal system. However, a number of cases in the mid-1970s do show that these two sources of law had not been completely obliterated from the legal discourse but continued to flourish in remote corners of Pakistan's legal landscape, to be visited only by the most desperate or zealous petitioner. In 1976 for instance, Zulfikar Bhutto banned the National Awami Party under the provisions of the amended Political Parties Act 1962. A challenge to the validity of such an order was possible under Article 17 of the 1973 Constitution, i.e. the fundamental right to freedom of association. However, Bhutto had amended Article 17 in 1975 to the effect that this fundamental right was subject to 'any reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan, public order or morality.'[128] Article 17 had already been amended once before: in 1974 a new clause was added, which drastically reduced the right to a judicial review of a dissolution order. Under the new subsection 2, whenever a political party was declared to be acting in a manner prejudicial to the sovereignty or integrity of Pakistan, the federal government was to refer the matter to the Supreme Court, 'whose decision on such reference shall be final.'[129]

The National Awami Party, which stood accused of operating in a manner prejudicial to the integrity of Pakistan, argued that the 'two-nation theory' had ceased to be operative since the aim of the creation of Pakistan had been achieved in 1947.[130] Justice Muhammad Gul strongly disagreed with this contention and embarked on a lengthy exposition of the 'two-nation theory' and the Islamic character of Pakistan since independence. Unperturbed by the decision in *Ziaur Rehman*, which he did not mention at all, Justice Gul proceeded to re-state the basic structure doctrine. Justice Gul's judgment deserves to be quoted *in extenso*, since it represents by far the most determined judicial pronouncement on Pakistan's basic structure:

> 'The preambles to the four Constitutions we have had since Independence are also eloquent testimony of the affirmation of Pakistan ideology. Part IX of the Constitution enjoins the State to bring all existing laws into conformity with the Divine Laws and forbids the State from enacting any law repugnant to injunctions of Islam. This establishes the supremacy of the Divine Laws and to that extent the legislative powers of Legislatures in Pakistan are abridged. . . . In a secular State, the Legislature is supreme and laws are made in accordance with the will of the majority, free from any outside curbs. Recently legislation was reported to have

127 *Supra*, note 72.

128 See the Constitution (Fourth Amendment) Act 1975. Section 1 of Article 17 of the 1973 Constitution had previously made this right only subject to public order or morality.

129 See the Constitution (First Amendment) Act 1974.

130 *Islamic Republic of Pakistan v. Abdul Wali Khan* PLD 1976 SC 57. On the creation of Pakistan, see Richard Symonds, *Making of Pakistan*, Karachi, 1966; Zulfikar Khalid Maluka, *The Myth of Constitution in Pakistan*, Oxford, 1995; Abrar Husain Bokhari, *Constitutional History of Indo-Pakistan*, Lahore, 1964; Khalid Bin Sayeed, *Pakistan – The Formative Phase*, Karachi, 1968; and the unsurpassed account of Ayesha Jalal, *The Sole Spokesman: Jinnah, the Muslim League and the Demand for Pakistan*, Cambridge, 1985.

> been introduced in one of the Scandinavian countries to legalise marriage between a brother and his sister. This would be an impossibility in Pakistan, even if the measure is passed by an unanimous vote, because of Quranic injunctions. This brings into bold relief the distinction between a secular State and an ideological State. According to this concept the supreme authority vests with the Holy Qur'an.'[131]

Justice Gul's forceful exposition flies in the face of *Ziaur Rehman*[132] and it might be asked why he felt compelled to rely on the 'basic-structure' doctrine in the first place. The answer can most probably be found in the nature of the issues to be decided: at the heart of the case was the Federal Government's declaration that the National Awami Party had been trying to break up Pakistan and had rejected the two-nation theory. Justice Gul regarded especially the rejection of the two-nation theory as an attack on the 'ideology' of Pakistan. However, in *Ziaur Rehman*[133] the Supreme Court had held that it was up to the people to ensure that the ideological, i.e. religious basis, of Pakistan was preserved and properly reflected in the constitutional set-up. This would, of course, have played into the hands of the National Awami Party, which was willing to let the electorate decide these issues. Justice Gul therefore had to find an immutable basis for the two-nation theory – the Objectives Resolution and the claim that the preservation of the Islamic character of the state was a continuing obligation provided such an immutable basis.

Whereas the National Awami Party fought for the right to depart from the two-nation doctrine, others tried to increase the pace of Islamisation. It will be recalled that the 1973 Constitution had adopted an Islamisation mechanism that was, like the previous constitutions, based on parliament. The obligation imposed on parliament to bring the legal system in line with Islamic law was non-justiciable and followed the pattern established in the 1956 and 1962 Constitutions. The Islamic Research Institute was now called the Council of Islamic Ideology[134] but there were no departures from the principle that Islamisation was to be carried out by the elected representatives of the people and was as such not justiciable. An attempt by the opposition parties to authorise the superior courts to judicially review laws on the basis of conformity to Islam had not been accepted.[135]

The Lahore High Court and the Supreme Court made their initial experiences with Islamic public law in the context of constitutional turmoil and civil war, a time when Islam could provide a modicum of legal stability and an 'ideological' foundation unassailable by martial law. However, the potential uses were not lost on those discontented with the sluggish pace of Islamisation under Zulfikar Bhutto. The first challenge to the 1973 Constitution came in 1976 when Kaikus, a retired judge of the Supreme Court, moved a writ-petition in the Lahore High Court seeking a declaration

131 *Ibid*., at p. 176.
132 *Supra*, note 72.
133 *Ibid*.
134 The curious concept of 'Islamic ideology' to denote the religious character of the state and of public life is a formulation which is unique to Pakistan. The idea that an ideology, i.e. a political theory, could be of a religious character seems to instrumentalise Islam but the term is nevertheless widely used in Pakistan where the country itself is commonly referred to as an 'ideological state'.
135 See Mohammad Amin, *Islamization of Laws in Pakistan*, Lahore,1989, at p. 47.

inter alia to the effect that the 1973 Constitution itself and the legal system in its totality were un-Islamic.[136] The writ petition invoked Article 199 of the 1973 Constitution and, in addition to this, an inherent Islamic jurisdiction of the High Court. The latter was an attempt by Kaikus to avoid complete reliance on the allegedly invalid and un-Islamic 1973 Constitution. The Islamic jurisdiction of the High Court was described as the 'judicial "*Ululamr*" for the Province of the Punjab' and Kaikus claimed that the High Court could, on the basis of that inherent jurisdiction, strike down the Constitution itself on the grounds of being repugnant to Islam. Kaikus' petition challenged the entire legal system of Pakistan as being un-Islamic and argued that all Muslims, including the judges of the High Court, were under an obligation to follow Islamic law. Moreover, Kaikus sought a declaration that the President, the Prime Minister and the national and provincial members of parliament had ceased to be Muslims because they had taken the stand that Islamic law was not applicable unless expressly enacted as valid laws.[137]

In his judgment Justice Sardar Muhammad Iqbal, the Chief Justice of the Lahore High Court, followed the Supreme Court's decision in *Ziaur Rehman*[138] holding that courts were a creature of the 1973 Constitution and that for this reason their power of judicial review did not extend to the constitution or provisions of the constitution itself. In his submissions, Kaikus had anticipated the application of *stare decisis*[139] and had argued that the High Court was not bound by an otherwise binding precedent if that precedent was itself repugnant to Islam. This issue had not been addressed in *Ziaur Rehman.*[140] The question whether a Muslim was obliged to follow Islamic laws rather than the un-Islamic law of the land had hitherto been confined to the problem of Muslim minorities living in secular states. However, to state that Muslims in Pakistan, if they were to remain faithful to their religion, had to follow Islamic law in preference to the laws and the Constitution of Pakistan, had potentially far-reaching consequences.

It was therefore not sufficient for the High Court to simply follow *Ziaur Rehman*[141] and to hold that no court could question the validity of the Constitution itself, even if the same was alleged to be contrary to Islam, but it had to address directly the question of 'how Islamic is the legal system of Pakistan?'. Justice Sardar M. Iqbal adopted two approaches: first, he held that 'in an Islamic state the members of the judiciary while discharging their judicial functions act as trustees of divine sovereignty . . .'.[142] Iqbal's argument can be traced back to the idea of trusteeship embodied in the Objectives Resolution, though he did not expressly refer to it. His second strand of reasoning focused on the Islamic provisions of the 1973 Constitution. After a systematic examination Justice Iqbal found that the 1973 Constitution was neither un-Islamic nor infidel.

136 *Mr. Badi-Uz-Zaman Kaikus v. President of Pakistan* PLD 1976 Lah 1608.
137 *Ibid*., at p. 1615.
138 *Supra*, note 72.
139 Article 189 of the 1973 Constitution provides that, 'Any decision of the Supreme Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all other courts in Pakistan.'
140 *Supra*, note 72.
141 *Ibid*.
142 *Supra*, note 136, at p. 1619.

The Supreme Court, which heard the appeal four years later, followed the reasoning of the High Court.[143] It should, however, be noted that by then a number of Islamisation measures had been introduced by Zia-ul-Haq, including the setting-up of the Federal Shariat Court seized with the power to invalidate certain laws, deemed to be un-Islamic. The Supreme Court could therefore have avoided any discussion about the Islamic character of the legal system by simply declining jurisdiction on the ground that there was a specialist court enjoined with the power to determine any alleged repugnance of a law to Islam.[144] This the court did not do: there is no mention of the Federal Shariat Court at all.

Kaikus' application to declare the legal system or parts thereof to be repugnant to Islam, would, however, continue to occupy Pakistani courts after 1985, when the incorporation of the Objectives Resolution into the main body of the Constitution triggered another wave of applications. These developments will be examined in Chapter 3.

Islam as Residual Law

However, the seed of Islamic law, once planted, was not easily removed from the judicial discourse. In a variety of contexts, petitioners tried to rely on the argument that a particular law was against the injunctions of Islam or should receive a particular Islamic interpretation. The response of courts to these attempts is illuminating: after a more or less complete refusal to entertain these arguments, individual judges showed at least a willingness to consider repugnance and consonance arguments. This acceptance phase led to the emergence of what was portrayed as a firm judicial policy in 1976.[145] In a contempt of court case, for instance, it was argued that it was against Islamic law for a judge to decide a contempt of court matter if the judge himself had been the subject of the contempt.

Judge Muhammad Afzal Zullah did not reject this argument as irrelevant, as he could have done in reliance on *Ziaur Rehman*,[146] but as incorrect: the result was an ambiguous judgment since Justice Zullah did not determine whether his decision would have been any different if Pakistan's law of contempt of court had in fact been against the injunctions of Islam.[147] Justice Zullah's failure to reject the argument as irrelevant can be contrasted with another contempt of court case, *Ashfaque Ahmad Sheikh v. State,*[148] decided by the Supreme Court in 1971 under the provisions of the 1962 Constitution. In that case, the petitioner had also argued that the law of contempt of court was un-Islamic. In a first step, the Supreme Court rejected this argument as fallacious since the Directive Principles of State Policy Number 1 of the 1962 Constitution, which provided that no law should be repugnant to Islam and that all existing laws should be brought in conformity with Islam, was non-justiciable and

143 See *B.Z. Kaikus v. The President of Pakistan* PLD 1980 SC 160, *supra*, note 23.
144 In *Hakim Khan v. Government of Pakistan* PLD 1992 SC 595 the Supreme Court adopted this approach.
145 See *Nizam Khan v. Additional District Judge, Lyallpur* PLD 1976 Lahore 930, *supra*, note 11.
146 *Supra*, note 72.
147 See *State v. Mujibur Rehman* PLD 1972 Lahore 1, at p. 38.
148 PLD 1972 SC 39, decided on 29 November 1971.

not enforceable by virtue of Article 8 (2) of the 1962 Constitution. The latter provided that:

> 'The validity of an action or of a law shall not be called in question on the ground that it is not in accordance with the Principles of Policy, and no action shall lie against the State or any person on such a ground.'

The law of contempt, contained in Article 123 of the 1962 Constitution, had to be obeyed by everybody and could not be challenged on the grounds of an alleged repugnance to Islam. This should have been the end of the matter but the Supreme Court nevertheless proceeded to examine the validity of the contention. After quoting from a variety of texts on Islam and Islamic law it was found that 'even under the Islamic law, one is to obey all persons in authority who necessarily include the Qazi.'[149] It was only the Lahore High Court decision in *Kaikus*, discussed above, which finally settled any remaining ambiguities about using Islam as a touchstone to test the validity of both a constitution and other laws: it could not be done.

However, the role of Islamic law was not confined to questions of repugnance; in many instances judges were asked either to exercise a judicial discretion or to interpret statutory provisions in favour of Islamic law. In the 1970s, Islam was increasingly used to justify a particular exercise of judicial discretion or to interpret a statute in such a way that an 'Islamic result' was achieved. Occasional instances of Islamic interpretations of statutes can be found in earlier decisions but these do appear to be isolated cases.[150] At times, judges bolstered a supposedly moral content of a law with a reference to Islam: in the context of an contempt of court case, for instance, Justice Cornelius held that the offence was forgiven if the offender truly repented his action. In order to find further moral support for this decision Justice Cornelius stated that 'there are texts in the Scriptures of Islam to the effect that to him who repents after his transgression and makes amends, mercy will be shown.'[151]

However, the most fascinating insight into the importance of Islamic values is offered by the case law under section 491 of the Code of Criminal Procedure 1898. The section empowers a court to set at liberty a person illegally or improperly detained in public or private custody, mirroring the writ of habeas corpus. Cases under section 491 offer a revealing perspective on the moral and religious outlook of Pakistan's judiciary because most cases did in fact concern disputes over women. In many section 491 cases it was the purported husband, i.e. the 'paramour', who tried to free his 'wife', who in reality was only his fiancée or girlfriend, from the custody of her parents. The allegation of illegal detention was made to force the parents to produce their daughter in open court, even though the petitioner knew very well that the allegation of illegal imprisonment would ultimately fail. However, similar to habeas corpus proceedings, the court would normally make an order for the allegedly illegally confined woman to be produced in open court. The judge was then called upon to decide first, whether the woman was held in illegal detention. Secondly, if there was a claim that the couple were married, the judge had to decide whether or not there

149 *Ibid*., at p. 47.

150 See for instance *Fahmida Begum v. Syed Mashaf Hussain Shah* PLD 1958 SC 284, where the Supreme Court held that Islamic law can be taken into consideration when deciding cases under section 488 of the Code of Criminal Procedure 1898.

151 *A.K.M.A. Awal v. The State* PLD 1964 SC 562, at p. 568.

was a valid marriage. More often than not, there was insufficient evidence to support the contention of a valid marriage or an illegal detention. Judges then faced a moral dilemma: even if the judge decided that there was no valid marriage or illegal detention, he was nevertheless compelled to allow the woman present in court to go wherever she wanted to go. However, in many cases this result was very much in conflict with the judge's sense of probity and morality – ideally he would want an unmarried daughter to be returned to her parents or, alternatively, to her 'real' husband, rather than allowing her to join her boyfriend. The idea that she was free to leave the courtroom so as to join her paramour, though representing the correct legal position, was unattractive to most judges and in a series of decisions Pakistani courts openly and blatantly denied women their constitutionally guaranteed right to freedom of movement on the grounds that existing laws had to be interpreted in the light of Islamic morality.

The Supreme Court's decision in *Muhammad Rafique v. Muhammed Ghafoor*[152] can serve as an illustration of the application of section 491 without any reference to Islam. The facts of the case are to some extent typical for applications under section 491. One Mr. Rafiq, allegedly a relative of Mrs. Begum, filed an application under section 491 of the Code of Criminal Procedure 1898, alleging that Mrs. Begum had been abducted by a Mr. Ghaffor and was forcibly detained in his house. A bailiff of the High Court was deputed to locate Mrs. Begum and to produce her in court. In court Mrs. Begum corroborated Mr. Rafiq's complaint: she stated that her parents had forced her to marry Mr. Ghaffor against her will. She also claimed that her thumb-impression on the marriage certificate had been obtained by force. Predictably, her parents and her in-laws denied these allegations and maintained that she was the lawful wife of Mr. Ghaffor. The High Court believed the parents and consequently dismissed Mr. Rafiq's petition. Significantly, the High Court also ordered that Mrs. Begum should be returned into the custody of her husband, Mr. Ghaffor. Mrs. Begum, who evidently did not want to return to her husband's house after having been 'freed' by the bailiff, filed an appeal against this order. The Supreme Court did not entertain any moral or religious arguments but remained firmly within the law. According to the Supreme Court, the issue to be decided concerned the kind of order regarding the custody of an adult person that a high court could issue after having found that this person had not been improperly or illegally detained. The Supreme Court held that:

> 'If the person is a minor, the Court may make over his custody to the guardian which will be dealing with him in accordance with law, but if the person is a major, the only jurisdiction which the Court can exercise is to set him at liberty whether illegally or improperly detained in public or private custody or not. The Court may "set at liberty", but cannot restore *status quo ante* against the wishes of the person brought before it. Such a course will lead to curtailment of liberty for which there is warrant under section 491 nor can such an order be sustained under section 561 A of the Code as it cannot be said that allowing a person freedom is an abuse of the process of the Court.'[153]

152 PLD 1972 SC 6.
153 *Ibid*., at p. 8.

This judgment stands in stark contrast to a decision of the Lahore High Court reached just one year earlier. In *Fateh Sher v. Sarang*[154] the Court found that the wife's boyfriend had conspired with the wife to file a petition under section 491 in order to 'free' her from her husband. It appears that he tried to convince the High Court that he was properly married to her and that his 'wife' had been abducted by the respondent. The boyfriend's claim that he was her husband did not, however, succeed and the Lahore High Court was faced with the prospect of having to set her at liberty – which, of course, would have meant that she could have joined her boyfriend. The Lahore High Court found that:

> 'If in the exercise of her fundamental right of personal liberty she is allowed to make a choice, I am certain that she would go with the petitioner, her paramour, the two having collusively maneuvered to file this petition invoking the discretionary jurisdiction of this Court under section 491 of the Cr.P.C. Under Islamic Law, the respondent, being the husband of the woman, is entitled to her custody as her legal guardian. His right of guardianship coupled with the liberty granted to him in the above-quoted Quranic verse cannot be allowed to be frustrated by such collusive circumvention and as such in my humble opinion the provision contained in section 491, Cr.P.C. cannot be given full effect to in circumstances of this nature. I am not, therefore, inclined to allow this petition in exercise of my discretionary jurisdiction which would virtually amount to giving this Court's blessings to the immoral activities of two unscrupulous persons who, in Islam, are liable to extreme penalty.'[155]

Consequently, Justice Cheema restored the wife to her husband, who was present in court. Justice Cheema himself expressed concerns about the clash between Qur'anic injunctions and the long line of precedents under section 491, which had never imposed any restriction on the freedom of movement of a person freed from illegal private detention. However, in a departure from established precedent the Supreme Court condoned Justice Cheema's preference of Islamic law to fundamental rights: in *Sardara v. Kushi Muhammad* the Supreme Court held that Justice Cheema had been correct in 'restoring' the wife to her husband, since this enabled her to correct herself.[156] Almost exactly one year after the Supreme Court's decision in *Muhammad Rafique v. Muhammad Ghafoor*,[157] which had held that a woman's freedom of movement could not be restricted on the basis of Islamic law or morality, the Supreme Court changed its position, holding that:

> 'We are also inclined to agree with the views expressed by the learned Judge regarding the tendency to abuse the provisions of section 491 of Cr.P.C. on part of some young men in furtherance of their illicit love affairs. Courts do not function in a vacuum and must take due note of the social and moral environments prevailing in the community for which the law is to be administered. Such being the case the

154 PLD 1971 Lah 128.
155 *Ibid*., at p. 130, per Justice M.A. Cheema.
156 1973 SCMR 190, at p. 192, per Justice Salahuddin Ahmad.
157 *Supra*, note 152.

> High Court was justified in refusing relief if it came to the conclusion that the petition had been presented for the sake of furthering an illicit love-affair.'[158]

Justice Muhammad Afzal Zullah considered the relationship between section 491 and Islamic law in the case of *Ramzan v. Muhammad Aslam*.[159] With his usual vigour, Justice Zullah examined in some detail the Islamic law on the issue, finding that the husband had a right to the custody of his wife and was allowed to restrain his wife's movements if he suspected her of wanting to become unfaithful. Unsurprisingly, Justice Zullah found English and American case law on this issue unhelpful, since according to him the legal concept of marriage was different in Christian societies. Justice Zullah could see only one possible scenario in which a judge could be justified in 'setting at liberty' a wife rather than compelling her to return to her husband: if the wife wanted to obtain a *khula* divorce and her desire for such a divorce was not motivated by 'immoral' or 'undesirable' motives.[160] It is interesting to note that Justice Zullah avoided any mention of the constitutionally guaranteed right to freedom of movement, nor did he mention that a husband could apply for a decree for restitution of conjugal rights. Especially the latter would have thrown serious doubts on Justice Zullah's approach, since an order for the restitution of conjugal rights against a wife could only be enforced by the imposition of a fine but not by physically forcing a wife to join her husband. Imprisonment or an order for 'specific performance' were not available. For Justice Zullah to hold that a husband did not even have to apply for a decree for the restitution of conjugal rights in order to win back his wife but instead could just physically take her from the premises of the High Court of Lahore to his residence, where she could be restrained from leaving the house, amounts to an extraordinary departure from fundamental principles of Pakistani public and criminal law. Justice Zullah's only justification for this departure was based on Islamic concepts of law and morality, though there was no indication in the judgment of why Islamic law should be allowed to override fundamental rights.

The failure of the Supreme Court to follow its own precedent and to condone the blatant denial of criminal justice and fundamental rights to women on the basis of Islamic law and morality is indicative of the gradual shift of Pakistan's judiciary away from principles of English or 'Western' concepts of justice in favour of Islamic law.

Filling the Gaps

The interpretation of statutory provisions in the light of Islamic law did indirectly lead to the creation of another gateway for the infusion of Islamic law into the legal system. The key to be turned to open the door to Islam was hidden in the formula 'justice, equity and good conscience'. Since the early days of the East India Company, this formula had been used to provide law for areas of the legal system not covered by statute law or personal laws. The Regulations of 1781 and 1793 for instance, stipulated that in cases not otherwise specially provided for the judges should decide

158 1972 SCMR 398, at p. 400, per Justice Anwarul Haq.
159 PLD 1972 Lahore 809.
160 *Ibid*., at p. 834.

according to justice, equity and good conscience. The formula was copied from Regulation to Regulation and from Regulation to Statute.[161] As was convincingly shown by J.D.M. Derrett, this formula, when it was first introduced in the Royal Charters of 9 August 1683, did not exclusively refer to English law but primarily to other sources of law which were deemed to be appropriate as a 'just' rule to the facts of the case.[162] This could be the personal laws of Hindus and Muslims, 'natural justice', the laws of civil law countries, English law (both common and statute) and 'Natural Law'.[163] However, by the end of the 19th century, British Indian courts tended to apply under the formula 'justice, equity, and good conscience' in the first instance English law as residual law to fill any legal lacunae. It should be noted that, in spite of the priority of English law as the residual law, in matters of personal law English law was not considered to be the first choice. In fact, Derrett points to examples where analogies were drawn from the nearest personal law of the parties.[164]

In Pakistan, courts would occasionally apply principles of Islamic law to fill a lacuna in the law. In *Abdul Ghani and others v. Mst. Taleh Bibi and another*[165] for instance, Islamic law of evidence was applied to determine the legitimacy of a daughter, the statute law being silent on the point. Similarly, in *Allah Bux v. Jano*[166] the Islamic law of pre-emption was applied under the formula 'justice, equity and good conscience'. There was, however, no obligation on a judge to apply Islamic law and in practice English law remained the main residual law, even after independence. In other cases, judges expressly refused to rely on Islamic law. For instance, in *Niaz Ahmed v. Province of Sindh*[167] the petitioner challenged the imposition of localised martial law, *inter alia*, on the basis of Islamic law. He argued that as a result of Article 2 of the 1973 Constitution, which provides that Islam shall be the state religion of Pakistan, Islamic law was part and parcel of the laws of Pakistan. It was held that:

> 'Apparently, what the Article means is that in its outer manifestations, the State and its Government shall carry on Islamic symbol. This Article does not even profess that by its own force, it makes Islamic law to be the law of the land. Otherwise, there would have been no scope for separate provisions being incorporated in a separate Part of the Constitution in Part IX under the Heading "Islamic Provisions".'[168]

One of the first cases which relied heavily on principles of Islamic law in the interpretation of statutes was *State Bank of India v. Custodian of Evacuee Property*[169] decided by the Lahore High Court in 1969. The case concerned the ability of the State Bank of India to pursue civil actions against the Custodian of Evacuee Property after the outbreak of the war between India and Pakistan in 1965. The Defence

161 See, for instance, section 6 of *The Punjab Laws Act 1872.*
162 See J.D.M. Derrett, 'Justice, Equity, and Good Conscience', in J.N.D. Anderson, *Changing Law in Developing Countries*, London, 1963, pp. 114-154, at p. 140.
163 *Ibid.*
164 *Ibid*., at p. 144.
165 PLD 1962 Lahore 531.
166 PLD 1962 Karachi 317.
167 PLD 1977 Kar 604.
168 *Ibid*., at pp. 648 and 649.
169 PLD 1969 Lah 1050.

of Pakistan Ordinance 1965 and the Defence of Pakistan Rules 1965 had prohibited enemy aliens from pursuing civil action against Pakistani citizens. Justice Afzal Zullah interpreted the above-mentioned laws in the light of US case law and common law principles. However, he also added a substantial discourse on the Islamic law of war before holding that the right of the enemy to pursue civil actions was merely suspended during the period of hostilities but was not completely distinguished.

However, none of these cases had elevated the recourse to Islamic law in cases of statutory ambiguity to the level of a legal principal. In *Nizam Khan v. Additional District Judge, Lyallpur*[170] Justice Afzal Zullah, one of the leading proponents of the indigenisation of Pakistani law, in a carefully reasoned and researched decision, held that the formula 'justice, equity and good conscience' meant Islamic law to the exclusion of all other laws. As a result, all areas of law not occupied by statute or binding precedent were to be decided in accordance with Islamic law. Justice Zullah's examination of the charters and regulations which contained the formula revealed that they did not seem to contemplate the introduction of English law into areas not occupied by statute or precedent – a result identical to the one arrived at by Derrett. Justice Zullah found that, despite the liberty to refer to other sources of law, even judges of Indian origin 'preferred, by and large, to follow the general principles of British Jurisprudence with particular reference to common law and equity prevailing in England.'[171] However, Justice Zullah was careful to stress that Islamic law could be no substitute for any subsisting law or the 1973 Constitution itself. On the facts of the case this meant that a grandfather in comfortable circumstances was obliged to maintain his grandchildren. No such liability could be imposed under the existing statute law but Justice Zullah held that this gap in the law had to be filled with Islamic law. The creation of new rights and obligations on the basis of Islamic law though, not entirely new as could be seen from the above, had entered a phase where what had been random and haphazard could now be advanced as a firm principle of Pakistani law.

Justice Zullah's approach was radical in that it was absolute. Both British Indian and Pakistani courts had, as could be seen above, occasionally allowed for Islamic law to be applied under the principles of 'justice, equity and good conscience'. Justice Zullah's stress on exclusivity meant that no reference to any other source of law was possible. What was to happen in cases where either Islamic law did not provide an answer or where Islamic law could be considered to be inappropriate, remained unanswered.

In spite of his enthusiasm for Islamic law, Justice Zullah was careful to delineate the limits of judicial Islamisation: judges were not permitted to apply Islamic law to areas of law occupied by statutes and were equally barred from striking down any existing law on the basis of Islamic law. The areas left for Islamisation were, according to Justice Zullah, 'exceptional':

170 *Supra*, note 11.
171 *Ibid*., p. 954.

> 'The exceptional position with regard, however, to their [statutory laws] interpretation, supplying the omissions where they are silent, exercising discretion where allowed by them and construing the norms of justice, equity and good conscience, as discussed already, is different. The Courts in these exceptional branches are free to apply Muslim Common Law and jurisprudence and there is no need now to give preference to the foreign juridical norms including British Common Law or rules of equity or, for that matter, general Anglo-Saxon law.'[172]

Justice Zullah identified a wide range of concepts which had been hitherto been interpreted in line with 'Western' or, to be more precise, English legal definitions including expressions like natural, universal, rational, humane, moral, substantial, justice, natural laws, laws of God, natural or human jurisprudence, general law, equity, propriety etc. These concepts had, according to Justice Zullah, to be seen in the light of Islamic philosophy and jurisprudence.[173]

Justice Zullah's new rules of interpretation were made at High Court level and were therefore not binding on any of the other High Courts. However, he applied the same approach after his elevation to the Supreme Court. In 1981, Justice Zullah applied Islamic law in the interpretation of customary international law and Pakistani statutory law. In the case of *A.M. Qureshi v. Union of Soviet Socialist Republics*[174] a Pakistani party to a contract claimed damages for breach of contract against the Soviet Union and its trade representative. The contract involved the sale of military equipment from the Soviet Union to Pakistan. The Soviet Union claimed state immunity, both under general international law and specific provisions of Pakistan's Civil Procedure Code.[175] The case is an interesting one, since four separate judgments were delivered, all four to the effect that the Soviet Union could be sued in contract in Pakistan. However, whereas three judgments relied exclusively on 'Western' jurisprudence and case law, Justice Afzal Zullah ignored these precedents completely and instead referred to and repeated his observations on Islamic residual law made in *Haji Nizam Khan*.[176] Justice Zullah held that had it been found that under 'Western' international law, the Soviet Union enjoyed sovereign immunity and could therefore not have been sued in Pakistan, he would have applied Islamic international law:

> 'My learned brother Karam Elahee Chauhan, J., has after a detailed analysis held that the Pakistan Code of Civil Procedure does not bar the suit of the appellant against the respondent. Section 9 of the Code permits the institution of this suit unless it is barred expressly or impliedly. There is no express bar in the Code or any other law. Mr Khalid Farooq Qureshi, the learned counsel for the respondents, tried to spell out an implied bar from the customary International Law but as shown

172 *Ibid*., at p. 1008.

173 *Ibid*., at p. 1011. Justice Zullah would refer to principles of Islamic law whenever possible. For instance in a murder case, Justice Zullah bemoaned the collusion between prosecution witnesses and the police and commented that, 'while doing the important exercise of appreciation of evidence, the Courts should also keep in mind those principles underlying the Islamic law of evidence which are not prohibited by any positive law': *Muhammad Nawaz v. The State* PLD 1979 BJ 42 at p. 52.

174 PLD 1981 SC 377.

175 See Rule 11 (d) of Order VII and sections 86 and 87 of the Code of Civil Procedure 1908, which govern the instances and circumstances under which foreign sovereign entities such as states and office holders of such states can sue and be sued in Pakistan.

176 PLD 1976 Lah 930.

> by my learned brothers Karam Elahee Chauhan and Nasim Hasan Shah, JJ., in an elaborate treatment of the subject, the effort has not succeeded. On my part, even if any such implied bar would have been discoverable in what is called customary International Law and that too on the basis other than that of "justice", I would have, consistently with the view taken in *Haji Nizam Khan's* case (particularly when there is no dissent thereto, so far, rather it is being endorsed and relied upon), applied the Islamic International Law.'[177]

This was followed by yet another application of Islamic law in 1982. In the case of *Muhammad Bashir v. State,*[178] a murderer contested the imposition of the death penalty on the grounds of grave and sudden provocation. He had fatally stabbed his fiancée after her parents broke their promise to marry her to him. The daughter, his fiancée, had herself refused to elope with him. He relied on earlier decisions, where courts had accepted such a plea in similar circumstances.[179] Justice Zullah refused to follow these precedents, all at High Court level, because:

> 'Motive and desire to pursue or to make advances, preparation or attempt regarding *illicit* liaison/affairs are not approved by Islam and are not acts of justification in Muslim Jurisprudence for mitigation of sentence; as, they impinge upon moral, ethical, matrimonial or sexual norms in Islamic Philosophy . . .'[180]

In 1988 Justice Zullah claimed that:

> 'Indeed, now there are hundreds of cases wherein, in order to interpret and apply constitutional and other statute laws or where the law is silent or a field is unoccupied by it or when answering discretionary questions, the courts of Pakistan have applied the rules of Islamic law and jurisprudence amongst others as residuary law. It is our effort to continue the process (in an evolutionary manner) as it is the demand of national consensus and ethos.'[181]

This might have been an exaggeration, since there are certainly not 'hundreds of cases' reported in Pakistan's law reports which involve the application of Islamic law in the interpretation of statutory provisions, or to fill lacunae in the existing law. Nevertheless, in the cases where Justice Zullah's approach was adopted, the infusion of Pakistan's statutory laws with Islamic law more often than not led to a more 'ethical' or 'just' result. Most notable is the case of *Ghulam Ali v. Ghulam Sarwar Naqvi.*[182] At issue was the custom of depriving female relatives, especially sisters, of their right to inherit their prescribed shares to the agricultural land of a common ancestor legally due to them under the Islamic law of inheritance. In *Ghulam Ali*,[183] two sisters had relinquished their share in land in favour of their brothers and a change in the land revenue records was effected, showing that the land was owned by the brothers. Almost 25 years later, the sisters went to court claiming that they had not

177 *Supra*, note 174, at p. 432.
178 PLD 1982 SC 139.
179 See for instance *Muhammad Siddique v. The State* PLD 1958 Lah 601.
180 *Supra*, note 178, at p. 142.
181 *Sardar Ali v. Muhammad Ali* 1988 SC 287, at p. 321.
182 PLD 1990 SC 1.
183 *Ibid*.

received their shares in the land. The brothers argued that the claim was time-barred and that the sisters had received a fair share of the estate of the deceased, since money had been spent by the family on their respective marriages, a remarriage of one of the sisters, and the payment of money to settle a murder case which, it was alleged, had been connected to the divorce of one of the sisters.

Justice Afzal Zullah, in a long and learned judgment, upheld the sisters' claim. He decided that a time-bar against such suits would operate only in the most exceptional circumstances since, as a matter of Islamic law, the shares of all those who had a right to inherit from the deceased vested in them at the time of his death. No further action had to be taken by the heirs in order to claim their respective shares due to them under the Islamic law of inheritance. An heir who had received more than the share he was entitled to was holding such surplus on trust for the other heirs. However, despite Justice Zullah's vigorous defence of the inheritance rights of female heirs, there was nevertheless a legal hurdle to be surmounted: the sisters had relinquished their share and transferred it to their brothers. Under the Contract Act 1872, such a contract was valid. Justice Zullah overcame this problem by reinterpreting section 23 of the Contract Act 1872, which renders void any contract which is contrary to public policy. He observed that, 'in Pakistan's constitutional set-up, with the Objectives Resolution being its part, new situations with new principles of public policy with Islamic Ethos/spirit would have to be defined and applied.'[184]

Justice Zullah's vigorous defence of the inheritance of female heirs on the basis of an Islamic public policy did not stop at inheritance rights: he called upon non-governmental organisations, courts and the legal community to actively assist women living in rural areas who were, according to Justice Zullah, routinely deprived of their inheritance rights and other protective laws accorded to them under Islamic law – on the basis of either common law or pre-Islamic customary law. Justice Zullah went so far as to call upon the government to provide finances for the setting-up of committees in rural areas, charged with the protection of the rights of the 'womenfolk of rural areas' arguing that finances cannot be a problem since the 'Government, the legislature, the taxpayer and the Urban elite will not grudge this small facility for 80 per cent of these have-nots of the Social Sector, while 20 per cent get all the other facilities of the urban paraphernalia, which includes amongst others, better facilities and services in nearly all fields.'[185]

Justice Zullah's concern for the protection of the legal rights of women was based on the conviction that Islamic law, properly applied, would support rather then restrict the legal position of women. In the case of *Muhammad Akram v. Farman Bi*[186] he even suggested that fundamental rights could be expanded by interpreting in the light of Islam. The case concerned the tort of malicious prosecution. The appellant, Mr. Akram, had falsely claimed to be married to the respondent, Mrs. Farman Bi. Mrs. Bi successfully refuted this claim and subsequently sued Mr Akram for damages in the tort of malicious prosecution. Counsel for Mr. Akram argued that damages for malicious prosecution could not be claimed as a result of a civil action: the award of costs to the successful party was all that could be claimed by Mrs. Bi. In support of

184 *Ibid*., at p. 22.
185 *Ibid*., at p. 27.
186 PLD 1990 SC 28.

his contention, counsel relied on a number of Indian and English cases and a decision of the Privy Council, all to the effect that there was a distinction to be made between criminal and civil suits – whereby only the former could attract damages for malicious prosecution. Justice Zullah, however, was unconvinced, observing that '[t]he resort to a rule of common law of England in preference to the one of Pakistan law or a rule of Islamic law or jurisprudence; or for that matter, the Islamic common law, is not now possible under the Pakistan Constitutional set-up.'[187] Justice Zullah concluded that under Pakistani law there was a basic right to a good reputation, which derived from the Objectives Resolution. For the first time, Justice Zullah indicated that basic rights could be granted under both the 1973 Constitution and under Islamic law, thereby allowing for the possibility that Islamic law could supplement or complement existing fundamental rights.[188]

A review of the case law, however, indicates that it was mainly Justice Afzal Zullah who relied on principles of Islamic law in the interpretation of statutes or the 'filling of gaps' not covered by Pakistan's written law. It must be noted that Justice Zullah's application of Islamic law did not proceed on the basis of a detailed or literal reading of the Qur'an and Sunnah but appears to proceed on the basis of broad ethical and moral principles, discoverable from his interpretation of Islamic law. As will be seen below, Justice Zullah's reliance on general Islamic principles like justice and morality, were discounted by him as a judge of the Shariat Appellate Bench of the Supreme Court: there he insisted that the Federal Shariat Court was to refer to concrete rules contained in the Qur'an and Sunnah whenever a law was declared to be repugnant to Islam. However, as will be seen later, even the Federal Shariat Court and the Shariat Appellate Bench eventually came to accept general principles of Islamic law and equity, which were similar if not identical to those found in the fundamental rights chapter of the Constitution.[189] There is one major exception: Islamic sexual mores, for instance Islam's abhorrence of extra-marital sexual intercourse, imposed interpretations of Pakistani statutory laws, which were at odds with the secular tenor of the fundamental rights.

187 *Ibid*., at p. 39.

188 This liberal interpretation of Islamic law has to be contrasted with Zullah's application of section 491 of the Code of Criminal Procedure 1898, discussed further above.

189 Below, Chapter IX.

Chapter 3
Article 2-A and the Objectives Resolution

Chief Justice Hamoodor Rahman's *obiter* remark that the Objectives Resolution, '[i]f it is not incorporated in the Constitution or does not form part of the Constitution it cannot control the Constitution'[190] appeared to suggest that the Objectives Resolution could indeed assume a supra-constitutional character if it were only made a substantive part of the constitution. However, the Supreme Court was not required to examine how such a constitutional 'supra-norm' would operate. This position changed in 1985, when the Objectives Resolution was incorporated into the Constitution.[191] The incorporation of the Objectives Resolution as a substantive part of the Constitution triggered a new wave of petitions to Pakistan's superior courts attempting to invalidate laws on the basis of repugnance of laws. It was also used by judges to bolster their reliance on Islamic law in the interpretation of statutes. The latter was to be by far the least controversial result of the incorporation – and must now be regarded as an accepted principle of Pakistani law.

Justice Zullah, who, as was shown in the previous chapter, was the main proponent of the Islamic interpretation doctrine, relied on the new Article 2-A in the case of *Mian Aziz A. Sheikh v. Commissioner, Income Tax*.[192] The case concerned a married couple. The husband had increased the amount of dower paid to the wife, thereby substantially reducing his taxable assets. The income tax department suspected fraud and argued that the increase of the dower had been done retrospectively in order to reduce the taxable income of the husband. The High Court had held in favour of the income tax department on the ground that the husband had failed to furnish contemporaneous evidence of the increase of the dower. However, there was no rule in Pakistan's statute law which required there to be contemporaneous evidence. Justice Zullah reversed the decision and held that, 'in such a situation ordinarily if there is no statutory rule of evidence governing a situation the Court is not prohibited from adopting any just and fair rule of evidence.'[193] He found that as a matter of Islamic

190 *Supra*, note 22.
191 The Objectives Resolution was incorporated into the Constitution in 1985 in the form of a new Article 2-A. See the Presidential Order No. 14 of 1985.
192 PLD 1989 SC 613.
193 *Ibid*., at p. 620.

law it was quite sufficient for the husband to state that he had increased the dower and as long as this was not disputed by his wife the husband's statement constituted sufficient evidence vis-à-vis the income tax department. Justice Zullah based his decision on Articles 2-A and 227(1)[194] of the 1973 Constitution, holding that no public authority had the power to lay down an un-Islamic rule which has the force of law.

However, a number of judges used the new Article 2-A to invalidate laws and constitutional provisions on the basis of Islamic law. The incorporation of Article 2-A created a deep division in Pakistan's superior courts unprecedented in the country's legal history. Between 1985 and 1992, when the matter was finally settled by the Supreme Court, at least 30 cases involving a consideration of the effects of Article 2-A were decided by the four High Courts and the Federal Shariat Court. Divisions emerged not only between High Courts but even within individual High Courts, with some judges unwilling to comply with the ordinary conventions of *stare decisis* and binding precedent. The result was legal uncertainty and confusion in important areas of law. Several judges refused to make any order involving the payment of interest, others invalidated parts of the Muslim Family Laws Ordinance 1961 as un-Islamic. The issue at the heart of all these cases was the effect of the incorporation of the Objectives Resolution: was it a supra-constitutional provision controlling all other parts of the 1973 Constitution and Pakistan's statute law and making them subject to an overriding repugnancy to the Islam test, or had the Objectives Resolution, in spite of having been incorporated into the 1973 Constitution, remained just a programmatic and inspirational advice to Pakistan's first Constituent Assembly? Pakistan's judiciary took up diametrically opposed positions with no concessions made. Six years after the incorporation of the Objectives Resolution, the Supreme Court observed that:

> '. . . in our *milieu* it has given rise to a controversy and a debate which has had no parallel, shaken the very Constitutional foundations of the country, made the express mandatory words of the Constitutional instrument yield to nebulous, undefined, controversial juristic concepts of Islamic *fiqh*. It has enthused individuals, groups and institutions to ignore, subordinate and even strike down at their will the various Articles of the Constitution by a test of what they consider the supreme Divine Law, whose supremacy has been recognised by the Constitution itself.'[195]

The above observation of the Supreme Court conveys not only the seriousness of the situation but also a sense of doom, of a country in the grip and at the mercy of 'nebulous, undefined and controversial concepts of Islamic *fiqh*'. No longer was Islamic law seen as a benevolent additional source of judicial power to advance principles of justice and democracy, to counter the imposition of martial law, or to instil the legacy of colonial laws with indigenous values. It had become a danger to the very foundations of the state, used by groups and institutions undefined but presumably meant to be Islamic fundamentalists, to subordinate and strike down at their will provisions of the 1973 Constitution. Islam, no longer controlled by a largely secular, liberal and

194 Article 227(1) of the 1973 Constitution provides that, 'All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions.'

195 *Hakim Khan v. Government of Pakistan* PLD 1991 SC 595, at p. 629, *supra*, note 144, per Justice Shafiur Rahman.

'westernised' judiciary, had become a revolutionary force, which was threatening the state from within the very judicial institutions set up to protect it. The judicial developments leading to this state of affairs had humble beginnings.

One of the first cases that considered the effect of the new Article 2-A was *Muhammad Bachal Memon v. Government of Sind,*[196] a case concerned with the validity of amendments to the 1973 Constitution as a result of the Constitution (Eighth Amendment) Act 1985. No other than the Chief Justice of the Karachi High Court, Justice Naimuddin, examined the impact of Article 2-A on Pakistan's 1973 Constitution. The petitioner had argued that the Constitution (Eighth Amendment), Act 1985, which *inter alia vide* Article 270A validated all actions taken during Zia-ul-Haq's reign, violated Article 2-A. Justice Naimuddin rejected the argument holding that:

> 'Thirdly, Article 2-A on the basis of which also validity of Article 270-A is sought to be questioned was inserted by the President's Order No. 14 of 1985 promulgated on 2 March 1985, by the President of Pakistan. I do not find any valid reason nor has any been advanced by any counsel to test the validity of an amendment made in the Constitution by Parliament by the Constitution (Eighth Amendment) Act 1985, on the touchstone of a provision which was initially not an enforceable part of the Constitution and which was made enforceable by the President's Order of 1985. In my opinion both amendments have the same force and the validity of one cannot be tested on the touchstone of the other.'[197]

However, this judgment did nothing to prevent judicial expeditions into the controversial sphere of Islamisation. At the least controversial level was Justice Zullah's reliance on Article 2-A which, as seen in the previous chapter, did not break any new legal ground: the principle that legislation ought to be interpreted in the light of Islamic law did not depend on Article 2-A. It was initially Justice Tanzil-ur-Rahman, newly-appointed judge of the Karachi High Court, who realised the potential of Article 2-A for the Islamisation of Pakistan's legal system.[198] Having been made a judge of the Karachi High Court in 1986, after having acted as the *amicus curiae* in a number of cases before the Federal Shariat Court, he used his newly-found judicial power to advance the Islamisation of Pakistan's legal system.

The first case decided on the basis of Article 2-A was *Bank of Oman Ltd v. East Trading Co. Ltd.*[199] At issue was the validity of a mortgage of residential premises in favour of the Bank of Oman under section 58 of the Transfer of Property Act 1882.

196 PLD 1987 Kar 296.

197 *Ibid*., at pp. 328-329.

198 See *Qaiser Ali v. Karachi Road Transport Corporation* PLD 1986 Kar 489 for a case decided by Justice Tanzil-ur-Rahman applying Islamic law to the interpretation of statutes. He held that,

> 'Generally speaking, the Courts of Pakistan, while interpreting certain principles in a given case including those which relate to the matters of discretion, adhered to the principles of English Common Law. The reason is obvious. It is due to the supremacy of Anglo-Saxon law and its system, which is being practised in this sub-continent for about one and a half centuries, but, now, in the Islamic Society of Pakistan, all such laws and principles, as are found repugnant to Islamic law, have to vacate their place for the Islamic Common Law and its principles, so as to make room for their enforcement with the Constitutional backing for the Islamisation of Law through Courts . . .', at p. 513.

199 PLD 1987 Kar 404.

Counsel for the defendant had argued that section 58 was repugnant to Islam. Justice Tanzil-ur-Rahman reviewed in meticulous detail the history of Islamisation in Pakistan and concluded that:

> 'The up-shot of the entire discussion is that the Courts in Pakistan are bound by the Constitution, and any law repugnant to the Constitution is void. The principles and provisions of the Objectives Resolution, by virtue of Article 2-A, are now part of the Constitution and justiciable. Any provision of the Constitution or law, found repugnant to them, may be declared by a superior Court as void, subject, however, to the limitations imposed by Articles 203-A, B(c), 203-D and 203-GG of the Constitution, whereby special and specific jurisdiction has been conferred on the Federal Shariat Court to declare the law (as defined by Article 203-B(c) read with Article 203-G) or any provision thereof, as repugnant to the Injunctions of Islam laid down in the Holy Qur'an and Sunnah of the Holy Prophet (p.b.u.h.), and that the said law or any provision thereof has been so declared by it (Article 203-GG).'[200]

Justice Tanzil-ur-Rahman found section 58 of the Transfer of Property Act 1882 to be repugnant to Islam but, in a twist of irony, was unable to declare it void: the Federal Shariat Court had already examined section 58 and found it to be in accordance with Islam.[201] Bound by this precedent, Justice Tanzil-ur-Rahman only observed that the Federal Shariat Court 'may, perhaps, consider the advisability of reviewing its order.'[202]

Nevertheless, Justice Tanzil-ur-Rahman's judgment envisaged a most extraordinary state of affairs: by virtue of Article 2-A all superior courts had been conferred jurisdiction to declare on the basis of a repugnancy to Islamic law test invalid all laws, including provisions of the 1973 Constitution itself, save those areas of laws that were within the exclusive jurisdiction of the Federal Shariat Court. The 1973 Constitution demarcated the jurisdiction of the Federal Shariat Court in negative terms, i.e. it specifically excluded certain laws, like for instance Muslim personal law or fiscal laws, from its jurisdiction.[203] According to Justice Tanzil-ur-Rahman these very laws, specifically excluded from the jurisdiction of the Federal Shariat Court, could now be examined on the basis of Islamic law by the superior courts. The only law immune from any review by any court in Pakistan, indeed by any branch of the state or even a successful revolution, was the Objectives Resolution itself: it constituted according to Justice Rahman a truly supra-constitutional norm anchoring the country and its people in the realm of Islam. This bond could not be severed.

Bank of Oman[204] must be regarded as a warm-up, since in fact Justice Tanzil-ur-Rahman was not able to exercise his self-conferred powers. However, there were two issues, both regarded as highly important by orthodox Muslims, which had escaped

200 *Ibid*., at p. 445. It is interesting to note that despite his enthusiasm for Islamisation Justice Tanzil-ur-Rahman disapproved of Justice Afzal Zullah's willingness to resort to Islamic law to fill gaps present in the written law, stating that 'The Courts are not to legislate': see *ibid*., at p. 439.

201 *Infra,* note 683.

202 *Supra*, note 199, at p. 446.

203 See Article 203-B of the Constitution, 1973.

204 *Supra*, note 199.

Zia-ul-Haq's Islamisation measures: the payment of interest, i.e. *riba*, and the changes in Islamic family law effected by the Muslim Family Laws Ordinance 1961. Both these issues were beyond the jurisdiction of the Federal Shariat Court, the former because of the express bar contained in the Constitution itself[205] and the latter as a result of the *Farishta* decision.[206] In *Irshad H. Khan v. Parveen Ajaz*[207] Justice Tanzil-ur-Rahman launched an attack on interest, having already made numerous references to this case in *Bank of Oman.*[208] At issue was a suit for the recovery of money on the basis of a demand promissory note. The defendant submitted that she had signed the promissory note under coercion. Rehman found against the defendant on the issue of coercion but this was not the end of the matter: the plaintiff had asked the court for an award of interest on the outstanding amount as well in line with the accepted principle that a court can allow the award of interest on equitable grounds. Further, the promissory note itself provided for payment of interest. Justice Tanzil-ur-Rahman in a first step decided that the payment of interest was repugnant to the injunctions of Islam:

> 'So, it is the Constitutional command for the State (Islamic Republic of Pakistan) to take such steps as would "enable" the Muslims of Pakistan to live as Muslims. Therefore, any law which not only disregards such a commandment but positively violates it, is to be disregarded in view of Article 2-A. The provisions of Sections 79 and 80 of the Negotiable Instruments Act 1881, Section 34 and Rule 2 of Order XXXVII, C.P.C. so far as they relate to awarding interest on money claims are clear violations of the Constitutional mandate, as provided in Article 2-A read with clause 3 of the Objectives Resolution, referred to above.'[209]

Justice Rahman was in no doubt about the effect of such repugnance, namely that:

> 'The aforesaid provisions of law and Rules, on the other hand, "disable" Muslims of Pakistan from leading their lives as Muslims, according to the requirements of Islam as set out in the Holy Qur'an and Sunnah in relation to *Riba* [interest] and , therefore, for the obvious repugnancy to the Injunctions of Islam . . . the aforesaid provisions of substantive as well as procedural law relating to interest [*Riba*] cannot be enforced by this Court, due to their repugnancy to the mandatory provisions of the Qur'an and Sunnah relating to interest [*Riba*].'[210]

There was one last hurdle to be surmounted by Justice Rahman: the Supreme Court's decisions were binding on the Karachi High Court and did not support his reliance on Article 2-A, or his decision not to award any interest. Justice Rahman decided to ignore the precedent by holding that:

> 'Before parting with this decision, it may be added that I am conscious of the Constitutional position as laid down in Article 189 of the Constitution that law declared by the Honourable Supreme Court is binding on all the Courts of Pakistan,

205 See Article 203-B of the 1973 Constitution.
206 *Federation of Pakistan v. Farishta* PLD 1981 SC 120. Discussed below, Chapter VIII.
207 PLD 1987 Kar 466.
208 *Supra*, note 199.
209 *Ibid*., at p. 486.
210 *Ibid.,* at p. 486.

> but I feel equally bound by the provisions of Article 2-A of the Constitution, and since I have already held that Article 2-A is in the nature of a paramount clause and supra-Constitutional, it covers Article 189 also, and so the law declared by the Honourable Supreme Court either prior to insertion of Article 2-A, or without considering the said Article, with utmost respect, is also, in my humble opinion, subservient to the provisions of Article 2-A.'[211]

In the end, Justice Rahman decreed the plaintiff's suit for the principal amount but awarded no interest.

In the same year, Justice Rahman decided a third case concerned with the award of interest, this time in the context of a loan advanced by a bank.[212] Rahman had no hesitation in holding such interest to be un-Islamic and therefore 'no more lawfully due against the defendant and so cannot be decreed by this Court.'[213] However, the plaintiff had also petitioned the court for the award of interest for the period of the pendency of the suit under section 8(2) of the Banking Companies (Recovery of Loans) Ordinance 1979. This Ordinance was introduced by Zia-ul-Haq during martial law and was as such protected against judicial review by Article 270-A of the 1973 Constitution. A full bench of the Karachi High Court had already decided that Article 270-A could not be judicially reviewed on the basis of either Article 2-A or any other part of the Constitution.[214] Justice Rahman found himself bound by this precedence and was 'therefore, constrained to say, with a heavy heart, that the plaintiff is entitled under section 8(2) of the Banking Companies (Recovery of Loans) Ordinance 1979, to claim interest for the period of pendency of the suit . . .'.[215]

This decision is at odds with Justice Rahman's refusal to follow even a precedent set by the Supreme Court espoused in *Bank of Oman*. One possible explanation is Rehman's respect for Zia-ul-Haq's contributions in the area of Islamisation: any admission that Haq's legal measures could be made subject to a judicial review would bring with it the possibility of a challenge to the legal framework of Islamisation itself. In fact, the incorporation of the Objectives Resolution into the Constitution was one of the legal measures forced upon the hand-picked National Assembly as a condition for the country's return to democracy: to attack Article 270-A could have opened the door for a challenge to Article 2-A itself.

However, Justice Tanzil-ur-Rahman was handed a second chance to invalidate the Ordinance when he became Chief Justice of the Federal Shariat Court. In the landmark decision, *Mahmood-ur-Rahman Faisal v. Secretary, Ministry of Law,*[216] he held that the constitutional protection of the Ordinance provided by Article 270-A of the Constitution did not apply to the jurisdiction of the Federal Shariat Court. Consequently, he declared section 8(2) of the Banking Companies (Recovery of Loans) Ordinance 1979 to be repugnant to Islam.[217]

211 *Ibid.,* at p. 486.
212 *Habib Bank Ltd. v. Muhammad Hussain* PLD 1987 Kar 612.
213 *Ibid*., at p. 647.
214 See *Muhammad Bachal Memon v. Government of Sind* PLD 1987 Kar 297.
215 *Supra*, note 212, p. 651.
216 PLD 1992 FSC 1.
217 *Ibid*., at p. 177.

The second most important target of the proponents of Islamisation was the Muslim Family Laws Ordinance 1961. Similar to fiscal and banking law, it was excluded from the jurisdiction of the Federal Shariat Court. In 1988, in the case of *Mirza Qamar Raza v. Tahira Begum*,[218] Justice Rahman was given the opportunity to examine the validity of the Ordinance. The facts of the case were somewhat unusual: a husband had divorced his wife and in doing so had fully complied with the requirements laid down under section 7 of the Muslim Family Laws Ordinance 1961.[219] His wife contested the validity of the divorce before a family court, arguing that the husband had failed to pronounce the divorce in accordance with the rules of the Shia sect. The matter eventually reached the Karachi High Court. Here the wife argued that section 7 of the Muslim Family Laws Ordinance 1961 was repugnant to the injunctions of Islam, since it excluded the application of the rules of Islamic law of particular sects of Islam to the determination of the validity of a divorce.

The position of the Muslim Family Laws Ordinance 1961 in the legal system of Pakistan is a curious one. It was promulgated by Ayub Khan on 15 July 1961 during a state of emergency. The National Assembly stood dissolved during that period and martial law had been declared. Under the 1962 Constitution, the Ordinance was protected against judicial review.[220] A similar protection against judicial review was incorporated in the Interim Constitution 1972.[221] Under the 1973 Constitution, immunity against judicial review was provided by Article 8(3) which provided that, *inter alia,* the Muslim Family Laws Ordinance 1961 could not be declared void on the basis of any inconsistency with the fundamental rights guaranteed by the 1973 Constitution.

Justice Tanzil-ur-Rahman readily accepted the contention that the *vires* of the Muslim Family Laws Ordinance 1961 could not be reviewed on the basis of the fundamental rights, in particular Article 20, which guarantees the right to freedom of

218 PLD 1988 Kar 169.

219 Section 7 of the Muslim Family Laws Ordinance 1961 provides that:

'(1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talaq in any form whatsoever, give the Chairman a notice in writing of his having done so, and shall supply a copy thereof to the wife.

(2) Whoever contravenes the provisions of subsection (1) shall be punishable with simple imprisonment for a term which may extend to one year or with a fine which may extend to five thousand rupees or with both.

(3) Save as provided in subsection (5), Talaq unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under subsection (1) is delivered to the Chairman.

(4) Within thirty days of receipt of notice under subsection (1) the Chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about reconciliation.

(5) If the wife is pregnant at the time Talaq is pronounced, Talaq shall not be effective until the period mentioned in subsection (3) or the pregnancy, whichever later, ends.

(6) Nothing shall debar a wife whose marriage has been terminated by Talaq effective under this section from re-marrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time so effective.'

220 See section (vi) of the Fourth Schedule of the 1962 Constitution. In *Syed Ali Nawaz Gardezi v. Lt.-Col. Muhammad Yousuf* PLD 1963 SC 51 a challenge to the Muslim Family Laws Ordinance 1961 on the basis of Islam was rejected by the Supreme Court on the ground that the Ordinance was immune from judicial review.

221 See Article 7(2) and First Schedule Part III, No. 3 of the 1972 Interim Constitution.

religion. But could it be reviewed under Article 2-A on the basis of the injunctions of Islam? Justice Tanzil-ur-Rahman answered this question in the affirmative:

> 'It will thus follow that while the protected laws covered by Article 8 *ibid*., prima facie, qualify the test of the Constitution, nonetheless, all such laws have to qualify another test, namely their conformity to the Holy Qur'an and Sunnah. In the event any provision in any such protected legislation is found to be in derogation of the Qur'an and Sunnah, the Courts in Pakistan on reaching a conclusion to this effect would be bound to ignore and overstep such a provision as the same does not conform to the Supreme Law of Almighty Allah. The conclusion is further fortified by the fact that Article 2-A is a later introduction in terms of time than the protection granted by Article 8. According to ordinary canons of interpretation an earlier law is subject to a later law and if validation cannot stand on the touchstone of the later law which is also declared to be supreme then it follows that the validation or protection to the extent of inconsistency is ineffective. An exception was, however, made to this rule as provided in the provisions of clause (1) of Article 270-A by inserting the "notwithstanding anything contained in the Constitution", at the time of insertion of Article 2-A in the Constitution, which is absent from Article 8(3)(b).'[222]

Orthodox Muslims regarded the divorce provisions of the Muslim Family Laws Ordinance 1961 as repugnant to Islam. One provision in particular was regarded as a blatant violation of Islamic law, namely that the effectiveness of a divorce was made dependent on the receipt of a notice by the Chair of a Union Council. Other features, like the fact that the Ordinance allowed a *talaq* 'in any form whatsoever' were also considered controversial, since it did not differentiate between the distinct forms and their respective results on the marriage and its dissolution under Islamic law.[223] However, it was the state's control over the validity of the divorce, and consequently the disempowerment of husbands, which was regarded by many Muslim husbands as particularly offensive and intrusive. The same sentiments applied to the fact that subsequent case law declared receipt of the notice by the wife as an essential requirement for the validity of a divorce.[224]

Other provisions of section 7 were regarded as un-Islamic as well: for instance the fact that the *iddat* period of 90 days commenced with the receipt of the notice by the chair and not immediately after the pronouncement of the divorce, if the wife was not menstruating at that time, was a clear departure from Islamic law. Further, section 7 made all forms of divorce revocable. Again, this was not in accordance with Islamic law, where different forms of divorce have distinct effects on the status of the marriage. In fact, the divorce most common on the Indian subcontinent, namely the *talaq Al-Bid'at*, the triple *talaq* pronounced at one occasion, was regarded in Islamic law as sinful but also as irrevocable.

222 *Supra*, note 218, at p. 201.

223 For a critical review see Tanzil-ur-Rahman, *Muslim Family Laws Ordinance. Islamic and Social Survey*, Karachi, 1997.

224 See, for instance, *Rashida v. Ghulam Raza* PLD 1977 Lah 363 or *Inamul Islam v. Mst Hussain Bano* PLD 1976 Lah 1466.

Justice Tanzil-ur-Rahman, after an exhaustive survey of the Islamic law on divorce, had no hesitation in refusing 'to recognise section 7 of the Muslim Family Laws Ordinance to the effect that the receipt of the petitioner's *talaq* dated 10 February 982 by the Chairman (Respondent No. 5) and the expiry of 90 days from the date thereof has *ipso facto* made the divorce effective, in derogation of the provisions of the Qur'an and Sunnah relating to *talaq*.'[225] Justice Tanzil-ur-Rahman now had to decide the submission of the wife that the divorce pronounced by her husband was ineffective under the rules of Shia law, since he had not pronounced the divorce orally in her presence and that of two male witnesses. Justice Tanzil-ur-Rahman accepted this submission, following the precedence set by the Supreme Court in *Gardezi*, and held the divorce to be invalid. He added that the husband was free to pronounce a fresh divorce but reminded him that according to the traditions of the Holy Prophet, *talaq* was the most undesirable among lawful things.

The outcome of this decision handed down by one of the most fervent supporters of radical Islamisation is a curious one: the departure from section 7 of the Muslim Family Laws Ordinance 1961 actually benefited the wife in that it resulted in the invalidation of the divorce. However, it is noted that a similar result could have been achieved within the provisions of section 7. As was shown in *Gardezi,*[226] a *talaq* could be made 'in any form whatsoever', but it still had to be a form of *talaq* recognised by the sect or school of Islam followed by the parties. According to *Gardezi*, a Shia could therefore not avail himself of the less stringent forms of *talaq* available under Sunni law.

Justice Tanzil-ur-Rahman relied on Article 2-A, not only in the context of Muslim family law and the issue of *riba*. In *Jagan v. State*[227] he granted pre-arrest bail to a group accused of various offences involving the infliction of bodily harm. Justice Tanzil-ur-Rahman relied on Justice Zullah's decision in *Muhammad Bashir v. The State*[228] and decided that:

> 'In the matter of grant of bail, no doubt, the principles have been thereto enforced by the superior courts of Pakistan as laid down under sections 497 and 498 of the Code of Criminal Procedure 1898 which are based on English common law. In the changed circumstances, as warranted by Article 2-A of the Constitution, the Courts are now expected to apply the principles of Islamic law more often, including the question of grant of bail.'[229]

In another criminal case, Justice Tanzil-ur-Rahman acquitted a defendant sentenced to death by a sessions court on the basis that the evidence against him was unreliable.[230] Justice Tanzil-ur-Rahman applied Islamic law of evidence, thereby departing from the Qanun-e-Shahadat Order 1984*,* in order to justify his decision that the evidence of one prosecution witness on its own was not sufficient in a situation where other witnesses could have been made available.

225 *Supra*, note 218, at p. 222.
226 *Supra*, note 220.
227 PLD 1989 Kar 281.
228 PLD 1982 SC 139. It will be recalled that this case was decided before the insertion of Article 2-A into the Constitution. It was held that in cases of a statutory vacuum, courts were obliged to exercise any discretionary powers according to principles of Islamic law.
229 *Supra*, note 227, at p. 290.
230 *Ghulam Murtaza v. The State* PLD 1989 Kar 293.

Some judges followed Justice Tanzil-ur-Rahman's lead, while others refused to follow, thereby creating a tangled web of contradictory decisions. In the case of *Aijaz Haroon v. Inman Durrani*[231] Justice Wajihuddin Ahmad held that Article 2-A was introduced into the 1973 Constitution as a panacea to remedy the defects inherent in the other parts of the Constitution concerned with the Islamisation of the legal system. Adopting Justice Tanzil-ur-Rahman's approach he held that:

> '[. . .] I am of the view that all laws whether they be constitutional or sub-constitutional must yield to the Sovereignty of Allah as reflected in the Holy Qur'an and Sunnah and if there to be a clear command in that behalf it is that command alone which has to be given effect to and all other legislation applicable in this Islamic Republic of Pakistan must be construed as subordinated thereto.'[232]

Justice Wajihuddin was the only judge who considered the merits of a judge-led Islamisation policy. According to him Islamisation through courts were comparable to an evolutionary process, 'with ample room for trial and error, the latter of course correctable at the level of the higher echelons or that of the legislature.'[233] It was of course the capriciousness and resultant uncertainty in the law which can be identified as the main objection to a court-centred Islamisation of Pakistan's legal system. In *Tyeb v. Alpha Insurance Co. Ltd*[234] Justice Wajihuddin Ahmed had to consider the validity of an insurance policy. He decided in favour of the policyholder, whose ship had been destroyed as a result of the bombing of Chittagong harbour by Pakistani war planes in 1972. However, the plaintiff had also asked for the award of interest on the sum payable by the insurance company. The request was not unreasonable, considering that the damage was incurred almost 20 years earlier. Justice Wajihuddin decided that the award of interest was un-Islamic and that due to the incorporation of Article 2-A, which he termed a self-executing provision, he was not allowed to make an order for the payment of interest on the principal amount due to the plaintiff. However, he came up with a compromise. An assessor was appointed to calculate how much the principal sum had been devalued by inflation and to determine the equivalent sum due in 1990. Thus the final order provided that:

> 'The suits are, therefore, decreed for Rs. 42,000– each in terms of constant value of rupee, as of 1972, payable at Karachi, reckoned in present day monetary terms, as above.'[235]

At the High Court of Lahore it was Justice Khalil-ur-Rehman who promoted the Islamisation of Pakistan's legal system by judicial means, basing his jurisdiction to do so on Article 2-A. In *Shahbazud Din Chaudhry v. Services I.T. Ltd.*[236] Justice Khalil-ur-Rehman was concerned with a petition for the winding-up of a public

231 PLD 1989 Kar 304.
232 *Ibid*., at p. 333. It was held that Pakistani courts could no longer award interest under the Negotiable Instruments Act 1881 and the Code of Civil Procedure 1908.
233 *Ibid*., at p. 315.
234 1990 CLC 428.
235 *Ibid*., at p. 447.
236 PLD 1989 Lah 1.

limited company under section 305 of the Companies Ordinance 1984.[237] The petition was filed by a group of minority shareholders who had lost confidence in the management of the company. The case is of interest, since the language and content of the Pakistani Companies Ordinance 1984 closely follows the English Companies Act 1948. As such, Justice Khalil-ur-Rehman extensively referred to English case law and later in his judgment to Indian case law.[238] However, an important issue in the case was the fact that under section 290 of the Companies Ordinance 1984 it was also open to the court to make any order if 'the affairs of the company are being conducted in a manner prejudicial to the public interest.' 'Public interest' itself remained undefined in the Ordinance. Justice Khalil-ur-Rehman's approach to defining public interest did not follow the English and Indian case law. Instead, he observed that:

> 'Now when the Objectives Resolution forms a substantive part of the Constitution of Islamic Republic of Pakistan the "public interest" lies in creating conditions whereby Muslim citizens are enabled to order their lives in the individual and collective spheres in accordance with the requirements of Islam as set out in the Holy Qur'an and Sunnah. In this perspective the question whether investment for deriving interest income is conducive to public interest, is to be answered. So, reference will have to made to the Holy Qur'an and Sunnah.'[239]

Quoting from the Qur'an and Sunnah, Justice Khalil-ur-Rehman decided that the charging of interest by the company was not in the public interest and ordered the company to enter into an agreement with the borrower, which was in accordance with the injunctions of Islam. So radical was his order that it is worth quoting Justice Kahlil-ur-Rehman in full:

> 'In view of the afore-noted Injunctions contained in the Holy Qur'an and the Traditions of the Holy Prophet (p.b.u.h.) elimination of *Riba* from the Society and from the economy is the bounden duty of the State. The Courts, while remaining within their domain and limits of jurisdiction are also under constitutional mandate in view of the inclusion of Article 2-A in the Constitution, to act in accordance with the Injunctions of the Holy Qur'an and Sunnah. Section 290 of the Companies Ordinance 1984 confers power on the Court to give appropriate order and to initiate corrective measures wherever a company is acting in a manner prejudicial to the public interest. The receiving of interest on the money lent and investment made in view of the clear and unequivocal Injunctions of the Holy Qur'an and Sunnah is

237 The relevant sub-sections of section 305 of the Companies Ordinance 1984 provide that:
'A company may be wound up by the Court – (b) if default is made in delivering the statutory report to the Registrar or in holding the statutory meeting or any two consecutive annual general meetings; (f) If the company is – (iii) conducting its business in a manner oppressive to any of its members or persons concerned with the formation or promotion of the company or the minority shareholders; (iv) run and managed by persons who fail to maintain proper and true accounts, or commit fraud, misfeasance or malfeasance in relation to the company.'

238 In turn, the Indian Companies Act 1956 also follows the example set by the English statute.

239 *Supra*, note 236, at p. 43. One of the complaints advanced by the minority shareholders was that the company had made a loan to a company controlled by one of the directors, who also happened to be one of the majority shareholders. An annual interest of 14 per cent was payable by the lender to the company.

> not conducive to public interest and as such corrective measures are required to be taken by the respondent Company. The mode of investment as such will have to be changed ... Respondents Nos. 2 to 5, are, therefore, directed to work out arrangements with the loanee company so as to eliminate interest and instead to enter into arrangements to make investment on the lines of Mudaraba or Musharaqa financing.'[240]

Justice Khalil-ur-Rehman's approach was, however, far less radical than the one adopted by Justice Tanzil-ur-Rahman: he did not strike down a statute as un-Islamic on the basis of Article 2-A but merely interpreted the term 'public interest' in the light of Islamic law. As such, his approach was not dissimilar to the one adopted by Justice Afzal Zullah in *Nizam Khan*[241] who interpreted the term 'public policy', contained in section 23 of the Contract Act 1872, from an Islamic perspective. Nevertheless, it is obvious that a consistent application of Islamic principles to the interpretation and enforcement of private contracts would eventually render many contracts providing for the payment of interest unenforceable because they violate Islamic injunctions.

A year later, in 1990, Justice Khalil-ur-Rehman, expounded his views on Article 2-A in *Ittefaq Foundry v. Federation of Pakistan,*[242] a case concerned with a decision of the government to impose tax on certain steel products. Justice Khalil-ur-Rehman examined in the course of his judgment the US due process of law doctrine and found that in Pakistan the combination of fundamental rights and the principles and aims set out in the Objectives Resolution were in no way less in meaning and import than the US doctrine. Again, the use of Article 2-A to interpret the ambit of constitutionally guaranteed fundamental rights, was in itself not entirely new and would be officially endorsed by the Supreme Court in the early 1990s.

In 1990, Justice Mian Nazir Akhtar of the Lahore High Court followed Justice Tanzil-ur-Rahman's invalidation of section 7 of the Muslim Family Laws Ordinance 1961, basing his jurisdiction on Article 2-A. In *Allah Banda v. Khurshid Bibi* [243] he held that a triple *talaq* pronounced in one sitting became effective immediately irrespective of whether or not section 7 had been complied with. Justice Tanzil-ur-Rahman's decisions also formed the basis for the judgment in *Muhammad Ashraf v. National Bank of Pakistan.*[244] Justice Raja Afrasiab Khan of the Lahore High Court refused to award interest payable on loans, basing his refusal on an obligation not to make an order violative of the injunctions of Islam, which in turn he derived from the Objectives Resolution.

The string of decisions seemingly ushering in a new era of Islamisation tends to obscure the fact that there was at the same time considerable judicial disquiet about the court-centred attack on established, and at times even constitutionally protected, legal norms. Divisions and frictions soon appeared. Even at high court level, the

240 *Ibid*., at pp. 44 and 45.
241 *Supra*, note 116.
242 PLD 1990 Lah 121.
243 1990 CLC 1683. Regrettably, some pages of this report have been torn out of the copy held by the library of the School of Oriental and African Studies, University of London. Unfortunately, no other copies of this report are held by any other library in the United Kingdom. Hence reliance has been placed on the head notes.
244 1991 CLC 1018.

experimentations with Article 2-A were not universally welcomed. In *Sharaf Faridi v. Federation of Islamic Republic of Pakistan*[245] the petitioners moved the High Court of Sindh asking for the striking down of those laws and provisions of the Constitution which militated against the independence and judiciary as un-Islamic. It was argued before the court that Article 2-A was a supra-constitutional provision giving the court jurisdiction to strike down un-Islamic parts of the Constitution. Justice Ajmal Mian disagreed holding that, 'it is not open to this Court to hold that any of the constitutional provisions is violative of the Objectives Resolution.'[246] The decision, however, did not directly challenge Justice Tanzil-ur-Rahman, since he had not actually invalidated any constitutional provisions.

The same holds true for the case of *Ghulam Mustafa Khar v. Pakistan,*[247] which concerned the validity of the contentious Article 270-A of the 1973 Constitution. It was introduced as part of the equally contentious Eighth Amendment to the Constitution and *inter alia* protected all legal measures taken by Zia-ul-Haq during his military dictatorship against judicial review. The case was decided by the Lahore High Court. The petitioner argued along the by now familiar lines that the insertion of the Objectives Resolution into the Constitution enabled the Court to determine the legality of Article 270-A on the basis of Islamic law. The Court disagreed, holding that:

> 'It is to be noticed that behind every constitutional document there are certain values adopted by the makers of the Constitution. In our Constitution, some of these values are enshrined in the Objectives Resolution which represents the aspirations of the nation, and offers a moral and historical intuition, for understanding the Constitution. While interpreting the Constitution, the Objectives Resolution must be present to the mind of the Judge and where the language of the Constitutional provision permits exercise of choice, the Court must choose that interpretation which is guided by the principles embodied therein. But that does not mean, that the Objectives Resolution is to be given a status higher than that of other provisions and used to defeat such provisions. One provision of the Constitution cannot be struck down on the basis of another provision.'[248]

A year later, a judge of the Lahore High Court distanced himself expressly from Justice Tanzil-ur-Rahman. In the case of *Kaniz Fatima v. Wali Muhammad*[249] Justice Allah Nawaz confirmed the validity of section 7 of the Muslim Family Laws Ordinance 1961. The case concerned the dissolution of a marriage by a compromise agreement. However, the divorce had not been notified to the union council under section 7 of the Ordinance. The wife insisted that the divorce was therefore invalid and claimed maintenance from her husband. The husband argued that section 7 was un-Islamic and that the court was compelled by Article 2-A to ignore the same. Justice Allah Nawaz referred to the jurisdiction of the Federal Shariat Court and the history of the Objectives Resolution before deciding that:

245 PLD 1989 Kar 404.
246 *Ibid*., at p. 430.
247 PLD 1988 Lah 49.
248 *Ibid*., at p. 118.
249 PLD 1989 Lah 490.

> 'From the foregoing examination of applicable law, the relevant authorities and the constitutional history of the Objectives Resolution I am clear in my mind that the founding fathers were irrevocably committed to the principles of federalism and principles of democracy and were committed to the basic concepts of Islam as laid down in Qur'an and Sunnah. The three fundamental guidelines were provided to the framers of the Constitution who are required to frame the Constitution incorporating therein the aforesaid principles. I am, therefore, of the positive view that the change in the Constitution is the prerogative of the legislature and not the Court. The Court, therefore, has no jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan to declare any constitutionally protected law to be invalid being repugnant to the Injunctions of Islam.'[250]

Justice Allah Nawaz found support for his position in the fact that the Federal Shariat Court had an exclusive jurisdiction to examine laws on the basis of Islamic law. He held that it 'is an established canon of construction that when the Tribunal or the Court of exclusive jurisdiction is established, the jurisdiction of the other Courts is taken away'.[251] However, despite upholding the validity of section 7 of the Muslim Family Laws Ordinance 1961, Justice Allah Nawaz nevertheless declared the divorce valid. According to him the wife, having entered into a compromise agreement with her husband, had contracted out of the otherwise compulsory provisions of section 7. Justice Allah Nawaz's rejection of Article 2-A was, however, not complete. In *Government of Pakistan v. Zafar Iqbal*[252] he relied on both fundamental rights and Islamic law in order to invalidate a decision made by the Evacuee Trust Property Board. The Board's decision concerned the disposal of three properties occupied by different parties. One property was sold to the occupant, whereas the other two properties were sold by public auction with the occupants having the right of first refusal. The Board had justified the unequal treatment of the three parties by stating that one of the occupants was a 'feudal lord' of the area and that 'if the property was sold through public auction, Sardar Mahmood Khan Leghari would not allow anyone to participate in the auction.'[253] Justice Allah Nawaz observed that the fundamental right to equality 'has roots in the divine message contained in the Holy Qur'an'[254] and concluded that Articles 4, 25 and 2-A of the Constitution incorporate the doctrine of equality before the law as an anchor-sheet of the Constitution.[255] However, the use of Article 2-A to confirm existing interpretations of constitutional provisions was of course by then an established principle of Pakistani law which could no longer be regarded as controversial or groundbreaking. In *Massu v. United Bank Ltd*,[256] Justice Allah Nawaz considered the effect of Article 2-A on the contractual obligation to pay interest contained in a large number of loan agreements, challenged by the petitioners

250 *Ibid*., at p. 502.
251 *Ibid*., at p. 503.
252 1992 CLC 219.
253 *Ibid*., at p. 222.
254 *Ibid*., at p. 223.
255 It should be noted that Justice Fazal Karim arrived at exactly the same result, namely that the Board had exercised its discretion in an 'oppressive and clearly discriminatory manner', without any reference to Islamic law.
256 1990 MLD 2304.

as repugnant to Islam and therefore unenforceable. In no uncertain terms Justice Allah Nawaz distanced himself from Justices Tanzil-ur-Rahman and Wajihuddin and their view that Article 2-A was a self-executory provision, holding that the loan agreements were valid and could not be challenged on the basis of Article 2-A. According to him, the Objectives Resolution was a 'blue-print of the State of Pakistan' and the incorporation of the text of the Resolution as Article 2-A had not changed its character and effect.[257] However, he was at pains not to be seen to disregard the Objectives Resolution altogether:

> 'Before parting with this judgment, I feel it necessary to state that by this opinion, I do not mean to undervalue the value of the Objectives Resolution. The Objectives Resolution is the spirit of the Constitution. It has been the propelling force in the creation of the country. I am, therefore, clear that the State functionaries including the judiciary are under a statutory duty to follow the Common Law of Islam in the fields where there is no statutory dispensation and in fields where state functionaries had to pass orders in exercise of their discretionary authority.'[258]

The judicial reaction against an over-reliance on Article 2-A caused conflicting decisions in the same High Courts. The Karachi High Court, where Justice Tanzil-ur-Rahman, had been advancing his quest for the Islamisation of laws, reviewed all decisions involving an application of Article 2-A handed down by Justice Tanzil-ur-Rahman.[259] At issue was a loan agreement. The defendant claimed that the obligation to pay interest under that agreement was contrary to the injunctions of Islam and therefore unenforceable. Justice Saeeduzzaman Siddiqui, in a carefully researched judgment, refused to follow the precedents set by Justice Tanzil-ur-Rahman. According to him, Article 2-A was not a self-executing, supra-constitutional provision, and could not override existing laws, let alone other constitutional provisions. In no uncertain terms, Justice Siddiqui concluded that:

> 'I am accordingly of the view that the provisions of the Objectives Resolution read with Article 2-A of the Constitution cannot be given effect to by the Courts inasmuch as that no law in Pakistan can be tested by the Courts on the touchstone of the Objectives Resolution to bring it in accord with the Injunctions of Islam except within a limited sphere as pointed out above, and the Courts in Pakistan are under a moral and legal obligation to give effect to the law in force in Pakistan. Consequently, even if the contention of Mr Manji that charging of interest is prohibited in Islam, is accepted, still the laws in force in Pakistan permitting the plaintiff to charge interest on the principal amount due against the defendant must be given effect to.'[260]

Similarly, in *Saghir Ahmad Warsi v. Industrial Development Bank of Pakistan*[261] a two-member bench of the Karachi High Court refused to follow Justice Tanzil-ur-Rahman's precedents, observing that 'as regards the above order of the learned Single

257 *Ibid*., at p. 2321.
258 *Ibid*., at p. 2322.
259 *Habib Bank Limited v. Waheed Textile Mills Limited* PLD 1989 Kar 371.
260 *Ibid*., at pp. 390 and 391.
261 1989 MLD 968.

Judge, it will be suffice to observe that the matter is under appeal and a stay has been granted.'[262]

The Supreme Court of Pakistan was equally cautious in embracing Article 2-A. The first time it considered the legal status and effect of Article 2-A was in connection with the legal turmoil surrounding the invalidation of several parts of Pakistan's pre-emption laws.[263] In numerous review petitions, the Supreme Court and its Shariat Appellate Bench were called upon to clarify the effects of the invalidation on pending pre-emption suits. In *Ahmad Ali v. Abdul Aziz*[264] it was argued that Article 2-A had lent a new dimension to the validity of the pre-emption laws and that they should be re-examined by the Supreme Court. Justice Shafiur Rahman refused the petition holding that the jurisdiction of the Federal Shariat Court under Article 203-D of the 1973 Constitution was exclusive due to Article 203-A which provides that, 'The provisions of this Chapter shall have effect notwithstanding anything contained in the Constitution.'[265] In *Mian Aziz A. Sheikh v. The Commissioner of Income Tax, Investigation, Lahore*,[266] already discussed above, Justice Zullah offered the first tentative attempt to determine the effects of Article 2-A. It is worth quoting him at full:

> 'Article 2A read with Objectives Resolution of the Constitution according to some jurists, as well as some decided cases, was enacted on account of an observation in the judgment of this Court in the case *The State v. Ziaur Rehman and others* PLD 1973 SC 49. According to others it always formed part of the constitutional set-up of Pakistan. Be that as it may, the present position is that Article 2-A read with Objectives Resolution; the Principles of Policy . . . ; Chapter 3-A, Part VII of the Constitution, *vis-à -vis* the functioning of the Federal Shariat Court and the Shariat Appellate Bench of this Court; and Article 227; and, other provisions of the Constitution relating to Islamisation, are being interpreted and applied in various situations. This Court no doubt has, for the time being, left open the final verdict on the combined effect of these constitutional provisions and mandates and other parts of our Constitutional set up in so far as the question of Islamisation is concerned.'[267]

Having established that the true effects of Article 2-A were still being considered, Justice Zullah then turned to those provisions which were 'clear and its effect is clear'. In his judgment, this clarity applied to Article 227(1) of the 1973 Constitution, which provides that, 'No law shall be enacted which is repugnant to such injunctions [of Islamic law]'. Since it applied to all law-making bodies Justice Zullah found that it also applied to other functionaries of the state who have the power to lay down rules having the force of law. However, Article 227 also provides in clause 2 that the

262 *Ibid*., at p. 969.
263 A passing reference to Article 2-A and the Objectives Resolution was also made in the landmark decision of *Miss Benazir Bhutto v. Federation of Pakistan* PLD 1988 SC 416 with reference to public interest litigation. However, there was no proper consideration of the legal implications flowing from the incorporation of the Objectives Resolution into the Constitution.
264 PLD 1989 SC 771.
265 *Ibid*., at p. 791.
266 PLD 1989 SC 613, *supra*, note 192.
267 *Ibid*., at p. 625.

obligation not to enact any law repugnant to Islamic law could only be given effect to 'only in the manner provided in this part.' As mentioned earlier, the 1973 Constitution did not contemplate a judicial review of all legislation on the basis of Islam but instead provided for the establishment of an advisory Islamic council which could make non-binding recommendations to the legislative bodies. Did this scheme also apply to rules laid down by state functionaries and public bodies like the Income Tax Department? Justice Zullah thought not, holding that:

> 'But this prohibition in Clause (2) of Article 227 does not apply to decisions by functionaries of State where in the judicial, quasi-judicial or other spheres involving exercise of judgment, as distinguished from exercise of law-making or statutory law-making authority, they take decisions. In other words whatever a decision is contained in any such judgement of any such functionary which lays down a rule of law or declares so as a rule of law, the Superior Courts shall be within their competence in a properly instituted proceeding to strike it down both under the general mandate contained in clause (1) of Article 227 as well as under Article 2-A read with the Objectives Resolution.'[268]

Justice Zullah held that the jurisdiction to strike down as un-Islamic rules having the force of law made by functionaries of the state was to be exercised in addition to the principle laid down in *Muhammad Bashir v. The State*[269] and *Haji Nizam Khan v. Additional District Judge, Lyallpur*[270] that courts were duty-bound to apply Islamic law to those areas of law not occupied by a statute. Justice Zullah observed that Articles 2-A and 227(1) lend further support to this duty to apply Islamic law.

Justice Zullah's approach relied heavily on the provisions of Article 227(1). Article 2-A was referred to in passing presumably to find additional support for his proposition that a superior court could invalidate certain types of 'law', i.e. rules having the force of law not made by a law-making body, as being in violation of Islamic law. As such, radical as it was, his decision did not in any substantive manner clarify the impact of Article 2-A on the jurisdiction of Pakistan's superior courts. In *Ghulam Hussain v. Iqbal Ahmad*[271] Justice Zullah made another passing reference to Article 2-A in the context of the law of adverse possession, observing that the established case-law ought to be reconsidered 'due to Islamic umbrella to all interpretations in Pakistan's Constitutional set-up, through Objectives Resolution and Article 2-A of the Constitution.'[272] However, no such reconsideration took place. A very real possibility to determine the impact of Article 2-A was offered to Justice Zullah in *Mumtaz Industries v. Industrial Development Bank of Pakistan*[273] where the petitioners sought leave to appeal against a decision of the High Court which ordered them to repay a loan and the interest charged. The petitioners argued that on the basis of Article 2-A they should not be ordered to pay interest the same being un-Islamic. Justice Zullah could have taken this opportunity to examine the scope of Article 2-A. Instead, he

268 *Ibid*., at p. 626.
269 PLD 1982 SC 139, *supra*, note 178.
270 PLD 1976 Lah 930, *supra*, note 116.
271 PLD 1991 SC 290.
272 *Ibid*., at p. 300.
273 PLD 1991 SC 729.

used his discretionary powers to refuse leave ordering the petitioner to enter into negotiations with the government holding that:

> 'Learned counsel contended and rightly so that the scope of Article 2-A of the Constitution needs to be examined and determined finally. This question is already before this Court in some other matters, therefore, for that purpose alone leave need not be granted in this case.'[274]

In *Resham Bibi v. Elahi Sain*[275] Justice Afzal Zullah again made a passing reference to Article 2-A to the effect that in the interpretation statutes and constitutional provisions Article 2-A would have to be kept in mind 'in the sense that any doubt, major or minor, has been resolved in such a manner so as to advance the dictates of justice as well as the rule that justice not only should be done but it should seem to have been done.' He elaborated that this principle was enshrined as much in Islamic jurisprudence as in any other juridical system before holding that:

> 'It may be clarified that if need would have arisen to further rely on Article 2-A of the Constitution so as to give effect to the Objectives Resolution treating the right to obtain justice as a very important substantive part of our entire constitutional set up as well as the Constitution itself, we would have of course done it.'[276]

Justice Zullah's determination to instil a principle of justice into the legal system, visible from cases decided by him from the early 1970s onwards was, it seems, not dependent on Article 2-A at all. In fact, in 1991 he rejected a petitioner's reliance on technical arguments by holding that '. . . even if there would have been some force in the technical objection of the learned counsel, justice could not have been sacrificed, at least in this Court, on the altar of the technicality which does not go to the root of the cause, in sofar as the fairness thereof is concerned.'[277] He stated in emphatic terms that:

> 'Thus, while trying our best to do justice in accordance with law, the principles in our own jurisprudence governing just dispensation shall have to be kept in view. In other words while adhering to the principle: justice in accordance with law, we will have to keep in mind that it is the birthright of every citizen in an Islamic State to seek and obtain justice. In this exercise of keeping balance between undiluted justice and justice only in accordance with law, the general directional principles in Islam come to the aid when one exerts.'[278]

It should be noted that this statement, innovative as it might appear, has been an established principle of Pakistani law for some time. Its most evocative expression can be found in the case of *Imtiaz Ahmad v. Ghulam Ali*,[279] decided in 1963, where it was held that:

274 *Ibid*., at p. 730.
275 PLD 1991 SC 1034.
276 *Ibid*., at p. 1041.
277 *Phul Shah v. Muhammad Hussain* PLD 1991 SC 1051. The case concerned a pre-emption matter.
278 *Ibid*., at pp. 1054 and 1055.
279 PLD 1963 SC 382.

> 'I must confess that having dealt with technicalities for more than forty years, out of which thirty years at the Bar, I do not feel much impressed with them. I think that the proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All technicalities have to be avoided unless it be essential to comply with them on grounds of public policy. The English system of administration of justice on which our own is based may be to a certain extent technical but we are not to take from that system its defects. Any system which by giving effect to the form and not to the substance defeats substantive rights is defective to that extent. The ideal must always be a system that gives to every person what is his.'

Justice Zullah had another opportunity to refer to his principles of Islamic justice in the case of *MacDonald Layton Constain Ltd. v. Punjab Employees' Social Security Institution.*[280] The case concerned the obligation of a foreign company to make social security payments on behalf of their workers employed in the construction of the United States, Canadian and British embassies in Islamabad. The company had argued that its office being in Rawalpindi the demand notice issued by Punjab Employees Social Security Institution was invalid, since Islamabad was not under its jurisdiction. Justice Zullah found against the company on facts but further observed that:

> 'Unfortunately we cannot help making an observation that the petitioner, in order to deprive a section of labour class employed by them, of due benefits under the Ordinance, took up untenable pleas and adopted such positions which it was difficult to establish. In such a situation under Islamic dispensation, even if the case for both sides had been equally balanced, in order to advance the command regarding social justice, as contained in the Objectives Resolution, the decision to be rendered by this Court would have gone in favour of upholding the workers' right to the Social Security Cover.'[281]

By the early 1990s the Supreme Court's stance on Article 2-A was at best an ambiguous one: some judges, most notably Justice Afzal Zullah, referred to it in order to introduce general principles of Islamic justice into the legal system. However, apart from acknowledging the existence of such a principle it must be concluded that there were only very few cases where the outcome of the decision was actually determined by such an application. The truly controversial aspect of Article 2-A, namely whether it could serve as a jurisdictional basis for the invalidation of laws as being in violation of Islamic law, the Supreme Court had remained silent. It was only in the case of *Hakim Khan v. Government of Pakistan*[282] that the Supreme Court finally dealt with this issue. *Hakim Khan* was concerned with a commutation order issued by the President of Pakistan acting on the advice of Prime Minister Benazir Bhutto. The order was passed shortly after Benazir Bhutto had been voted into power, following the dismissal of Prime Minister Junejo's government by President Zia-ul-Haq in 1988 and Zia's death in the summer of the same year. The order provided for remission, reduction or commutation of sentences of a wide class of prisoners sentenced to

280 PLD 1991 SC 1055.
281 *Ibid*., at p. 1058.
282 *Supra*, note 144.

either imprisonment or death by military courts or other courts under martial law regulations. The order also commuted all death sentences awarded by the military or other courts up to 6 December 1988 to imprisonment for life. Hakim Khan, the petitioner, assailed the constitutional validity of the order on the basis of Islamic law, arguing that under Islamic law only the *wali* of the deceased could waive the execution of the death sentence. A full bench of the Lahore High Court had decided that the order issued by the President under Article 45 of the 1973 Constitution, which allowed the President to commute sentences, was un-Islamic and that:

> 'In the view of the above, our humble view is that Article 2-A is an effective and operative part of the Constitution and no Court may refuse to enforce it. Consequently, the Federal Shariat Court shall exercise its jurisdiction assigned to it under Chap. 3-A of the Constitution, whereas, the High Courts shall exercise their jurisdiction with regard to all other laws. They may declare them repugnant to the Injunctions of Islam, as contained in Qur'an and Sunnah of the Holy Prophet (p.b.u.h.) and may also grant relief, as may be called for in the circumstances of the case.'[283]

The state appealed. In *Hakim Khan v. Government of Pakistan*[284] the Supreme Court in an unanimous decision overturned the judgment delivered by the Lahore High Court. Justice Nasim Hasan Shah traced the history of the Objectives Resolution from its inception to its incorporation into the Constitution as new Article 2-A. He concluded that through the act of incorporation the Objectives Resolution had changed its character: it was no longer merely concerned with providing the aims and objectives which the Constituent Assembly was expected to implement in the substantive part of the Constitution but had become a 'substantive, binding, integral provision of the Constitution.'[285] Justice Hasan Shah then proceeded to examine the effect of Article 2-A, pointing out that the Objectives Resolution was expressly addressed to the Constituent Assembly, declaring that: 'This Constituent Assembly representing the people of Pakistan resolves to frame a Constitution for the sovereign independent State of Pakistan.'

Could this clause be interpreted to mean that in the changed context – after all, the Constitution had already been framed not once but three times – those provisions of the Constitution which did not live up and were repugnant to the principles and provisions set out in the Objectives Resolution could be declared inoperative by courts to the extent of the repugnancy? Justice Shah held that according to the well-established rule of interpretation that a constitution has to be read as a whole, any repugnancy between different constitutional provisions had to be harmonised by the courts if at all possible. This, of course, left Justice Hasan Shah to deal with the argument advanced by the Lahore High Court that Article 2-A was a supra-constitutional provision. Justice Shah enumerated the consequences of adopting this interpretation and his analysis deserves to be quoted in full:

283 *Sakina Bibi v. Federation of Pakistan* PLD 1992 Lah 99, at p. 123.
284 *Supra*, note 144.
285 *Ibid*., at p. 616.

> 'And even if Article 2-A really meant that after its introduction it is to become in control of the other provisions of the Constitution, then most of the Articles of the existing Constitution will become questionable on the ground of their alleged inconsistency with the provisions of the Objectives Resolution. According to the opening cluase of this Resolution the authority which Almighty Allah has delegated to the State of Pakistan is to be exercised through its people only "within the limits prescribed by him". Thus all the provisions of the existing Constitution will be challengeable before courts of law on the ground that these provisions are not "within the limits of Allah" and are in transgression thereof. Thus, the law regarding political parties, mode of election, the entire structure of Government as embodied in the Constitution, the powers and privileges of the President and other functionaries of the Government will be open to question. Indeed, the very basis on which the Constitution is founded [. . .] could be challenged. Thus, instead of making the 1973 Constitution more purposeful, such an interpretation of Article 2-A, namely that it is in control of all the other provisions of the Constitution would result in undermining it and pave the way for its eventual destruction or at least its continuance in its present form.'[286]

Justice Shah pointed out that this could not have been the intention of Zia-ul-Haq, who inserted Article 2-A under the Revival of the Constitution Order 1985, nor the intention of the first parliament which enacted Article 270-A *vide* section 19 of the Constitution (Eighth Amendment) Act 1985, which in turn affirmed and adopted the Revival of Constitution Order 1985. Justice Shah concluded that the Objectives Resolution was equal in weight and status to the provisions of the Constitution but that courts being 'creatures of the Constitution . . . could not annul any existing Constitutional provisions (on the plea of its repugnancy with the provisions of Article 2-A) as no court, operating under a Constitution, can do so.'[287] Repugnancy to Islam of constitutional provisions could be rectified by amending the Constitution and likewise statutes could be amended by the competent legislative bodies.

Justice Shah's judgment emphasised that the locus of the Islamisation of laws was to be parliament rather then the courts. As such he did not explain whether or not the Objectives Resolution had any role to play at all in the constitutional set-up. This gap was filled by Justice Shafiur Rehman, whose dark diagnosis of the state affairs was quoted further above. Concurring with Justice Shah he held that 'nowhere in the Objectives Resolution, whether expressly or impliedly do I find either a test of repugnancy or of contrariety, nor empowering of an individual or of an institution or authority or even a court to invoke, apply and declare Divine limits, and go on striking everything that comes in conflict with it by reference to Article 2-A.'[288] He held that the only accepted use of Article 2-A was to correct and review orders of judicial or quasi-judicial tribunals. Nevertheless, some ambiguity remained: Justice Abdul Shakurul Salam, the third member of the bench, opined in rather ambiguous terms that the fact that parliament can amend the Constitution in the light of Islam 'does not absolve the Courts of their duty to give effect to the provisions of Article 2-A as it has

286 *Ibid*., at p. 617.
287 *Ibid*., at pp. 617 and 618.
288 *Ibid*., at p. 630.

been made a "substantive part of the Constitution".'[289] How this could be done he left unexplained and unexplored.

In what can be described as rubbing salt into the wounds of the Islamic faction of the judiciary, the Supreme Court rejected the High Court of Lahore's conclusion that the order of the President commuting certain death sentences to life imprisonment, not only on jurisdictional but also on substantive, in fact Islamic, grounds. The Supreme Court found that the death sentences had been awarded by way of *tazir* and not as a *hadd* punishments and that consequently the President was within his rights, even under Islamic law, to commute them to life imprisonment without the consent of the heirs of the deceased. The rejection of the Lahore High Court's approach was therefore complete: not only had it been wrong in its interpretation of Article 2-A and in its pursuit of judicial Islamisation, but even in the application of Islamic law the self-declared guardians of Islamisation had erred. For the proponents of judicial Islamisation *Hakim Khan*[290] brought to an end what must have seemed like the golden age of Islamisation, where courts were willing to invalidate laws, to render contracts providing for interest unenforceable, where the right of the husband to divorce his wife by triple *talaq* without the supervisory control of the courts was restored and where courts could invalidate provisions of the 1973 Constitution itself. All this had been achieved, albeit for a period of six years only, without having to participate in the democratic process by seeking representation in the legislative assemblies or by lobbying parliamentarians.

A year later, the Supreme Court dealt with Justice Tanzil-ur-Rahman's invalidation of section 7 of the Muslim Family Laws Ordinance 1961. *Hakim Khan*[291] had only held that a provision of the Constitution could not be declared invalid on the basis of Islamic law. However, it had not directly dealt with the invalidation of statutes. Could Article 2-A be used in that way? In *Mst Kaneez Fatima v. Wali Muhammad*[292] the Supreme Court considered this question. In a first step it observed that virtually all provisions of the Objectives Resolution were in fact incorporated in the Constitution mainly as Directive Principles. In a second step, Justice Saleem Akhtar distinguished between administrative actions taken under a law and the law itself: the former could be invalidated by courts on the basis of Articles 2-A and 227(1). The Supreme Court reiterated that:

> 'It in this context it may be observed that while interpreting the Constitution, enactments, rules and regulations having the force of law and examining orders, acts and actions of Government functionaries/authorities, the Court is competent to apply well-recognised principles of Islamic Common Law or principles in conformity with Injunctions of Islam can be pressed into service.'[293]

The Supreme Court relied heavily on the distinction between self-executing provisions and not self-executing provisions already developed in *Hakim Khan,*[294] pointing out

289 *Ibid*., at p. 636.
290 *Supra*, note 144.
291 *Ibid*.
292 1993 PSC 1376, PLD 1993 SC 909.
293 *Ibid*., at p. 1389.
294 *Supra*, note 144.

that the High Court's power to invalidate laws was restricted to the enforcement of fundamental rights. However, perhaps unwisely, it posed a question which was left unanswered: 'However, it may be considered that can a law which is inconsistent with the injunctions of Islam involve violation of fundamental rights and be struck down?'[295] In other words, was there inherent in the fundamental rights an obligation that all laws should be consistent with the injunctions of Islam? This would mean that any law repugnant to Islam would *ipso facto* be in violation of the constitutionally guaranteed fundamental rights. More will be said about this proposition further below.

Before parting from *Kaneez Fatima*, the outcome of the case should be mentioned: it will be recalled that the Lahore High Court had declared that though section 7 of the Muslim Family Laws Ordinance 1961 could not be declared un-Islamic and invalid under Article 2-A, it was nevertheless decided that section 7 did not apply to a consensual divorce. The Supreme Court disagreed, holding that it could not be elevated to the level of a legal principle that in consensual divorces a couple had effectively contracted out of the provisions of the Muslim Family Laws Ordinance 1961. Rather, in an appropriate case section 7 should not be construed strictly and therefore the High Court might either accept the notification of the divorce at a later stage or, in the alternative, exercise its discretionary powers and refuse to issue a writ and to exercise its jurisdiction.

It should be noted that the bar on superior courts other than the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court to invalidate laws on the basis of Islam had an impact on the substantive rights of the aggrieved parties contending that a law was repugnant to Islam. Not only were certain laws, like the 1973 Constitution, outside the jurisdiction of the Federal Shariat Court, and were now immune from an Islamic challenge, but as will be explained in more detail further below,[296] the Federal Shariat Court when declaring a law invalid does so prospectively. Should an ordinary court pass an order or decree under a law subsequently declared un-Islamic by the Federal Shariat Court the order already made would not be disturbed. This was an obvious injustice caused by the exclusive and distinct jurisdiction of the Federal Shariat Court. In *Mir Afzal Khan v. Ejaz Akbar*[297] Justice Zullah acknowledged this but held that this in itself was not a ground for interference. The case concerned a challenge to the North West Frontier Pre-emption Act 1987, which had been enacted after the preceding legislation, namely the North West Frontier Province Pre-emption Act 1950, had been declared un-Islamic. The petitioner had asked the Peshawar High Court to invalidate the impugned section but that application was refused on the ground that it was the Federal Shariat Court which had exclusive jurisdiction over the matter of repugnance to Islam. It was obvious that by the time the Federal Shariat Court had entertained and decided the question in separate proceedings the Peshawar High Court would have decided the matter. The position was neatly summarised by Justice Nasim Hasan Shah in the case of *Sardar Ali v. Muhammad Ali*:[298]

295 *Supra*, note 292, at p. 1391.
296 Below, Chapter 10.
297 PLD 1991 SC 215.
298 PLD 1988 SC 287.

> 'The law is well settled that where the rights of the parties have been judicially determined with reference to the terms of a law in force at the time of the adjudication, the finality of such a judgment will not be effected merely because the law on the basis of which that decision was rendered has subsequently been altered unless a provision is expressly made in the changed or modified law destroying the finality of the aforesaid judgement.'[299]

The decisions of *Kaneez Fatima*[300] and *Hakim Khan*[301] ostensibly put an end to judicial experiments with Islamisation of laws on the basis of Article 2-A. It seems that the High Courts had no choice but to follow the precedent set by the Supreme Court. Nevertheless, attempts were still made to invalidate laws on the basis of Article 2-A. For instance, in *Tank Steel and Re-Rolling Mills Pvt. Ltd. v. Federation of Pakistan*,[302] the validity of the Regional Development Finance Corporation Ordinance 1985 was challenged on the basis of Article 2-A. At issue was the repayment of a loan and interest. Predictably, the Supreme Court rejected the claim on the basis of *Hakim Khan*[303] but also added that the petitioners were estopped from raising Islamic arguments since:

> 'while taking the loan from the Corporation they conveniently ignored the rigours of the first Ordinance but when the Corporation sought the recovery of the loan, they got mindful of its effects of violation of the Injunctions of Islam.'[304]

The rejection of Article 2-A as a means to invalidate legislation on the basis of Islam was almost complete had it not been for one case decided by the Supreme Court shortly after the *Hakim Khan* judgment. In the case of *Zaheeruddin v. The State*[305] the Supreme Court held that the constitutional right to freedom of religion was limited by Islamic law. The result was that a law had to fulfill two distinct tests: first, was it in accordance with the fundamental right and secondly, was it in accordance with Islam. The case will be discussed further below in more detail.[306]

Article 2-A after *Hakim Khan* and *Kaneez Fatima*

The trend of Pakistani courts to use Article 2-A in the interpretation of statutes continued unabated despite the restraint urged by the Supreme Court in the cases of *Kaneez Fatima*[307] and *Hakim Khan.*[308] Even the question of interest was raised again, now ostensibly not in order to invalidate an existing law but by way of statutory interpretation in the light of Islam. This trend becomes apparent with the case of

299 *Ibid*., at p. 354.
300 *Supra*, note 292.
301 *Supra*, note 144.
302 PLD 1996 SC 77
303 *Supra*, note 144.
304 *Supra*, note 302, at p. 84.
305 1993 SCMR 1718.
306 Below, Chapter 4.
307 *Supra*, note 292.
308 *Supra*, note 144.

Abdul Rahim v. United Bank Ltd.[309] which was concerned with the attempt by a bank to recover loans from a defaulting party. In a first step the Karachi High Court held that in the light of Article 2-A it was not mandatory for an appellant to deposit the contested amount in court before being allowed to appeal.[310] The same was stipulated by the Banking Tribunals Ordinance 1984. In a next step, the Karachi High Court examined the contention of the appellant that the bank was not permitted to recover interest due under the loan agreement. The bank in response contended that the loan did not ask for interest but for a 'mark-up'. As a matter of fact, the Banking Tribunals Ordinance 1984 was intended to provide a machinery for the recovery of finance provided by banking companies under a system of financing which is not based on interest.[311] The Karachi High Court held that therefore a court acting under the provisions of the Banking Tribunals Ordinance 1984 had to examine the transaction itself in order to determine whether the use of 'mark-up' was just another term for interest or was indeed an interest-free financial agreement.

Even attempts to invalidate provisions of the Muslim Family Laws Ordinance 1961 on the basis of Islam continued inspired by Justice Tanzil-ur-Rahman's decision in *Mirza Qamar Raza.*[312] There is little doubt that many judges doubted the Islamic *vires* of section 7 of the Muslim Family Laws Ordinance 1961 and found support in Justice Tanzil-ur-Rahman's bold assertion that the intention of Article 2-A allowed them to declare parts of the Ordinance to be invalid on the basis of Islam. In *Fida Hussain v. Najma*[313] in a purely civil matter the validity of a divorce had to be considered. There was evidence that section 7 of the Muslim Family Laws Ordinance 1961 had not been complied with by the husband. The High Court of Baluchistan relied on *Mirza Qamar Raza*[314] and on *Allah Dad v. Mukhtar*[315] and concluded that in cases of conflict between Islamic laws and secular laws the former always prevailed. The decision, which precedes the *Allah Rakha*[316] decision of the Federal Shariat Court, which declared the contentious section 7 of the Muslim Family Laws Ordinance 1961 repugnant to Islam, is indicative of a judiciary deeply divided on the role of Islam in the legal system. It must be regarded as nothing but extraordinary that in the year 2000, eight years after *Hakim Khan*[317] and *Kaneez Fatima*[318], a High Court would still disregard statutory laws on the basis of Islam.

309 PLD 1997 Kar 62.
310 See also *Munir Ahmed v. United Bank Ltd.* PLD 1998 Kar 278.
311 See preamble and section 2(c) of the Banking Tribunals Ordinance 1984.
312 *Supra*, note 218.
313 PLD 2000 Quetta 46.
314 *Supra*, note 218.
315 1992 SCMR 1273.
316 *Allah Rakha v. Federation of Pakistan* PLD 2000 FSC 1.
317 *Supra*, note 144.
318 *Supra*, note 292.

Article 2-A and the Federal Shariat Court

Ostensibly, there seems little reason for the Federal Shariat Court to consider Article 2-A. The jurisdiction of the court was carefully demarcated by the 1973 Constitution and it seemed to be accepted as settled law that the Federal Shariat Court was bound by these jurisdictional exclusions.

Nevertheless, the Objectives Resolution, incorporated as Article 2-A in the 1973 Constitution, was pressed into service also before the Federal Shariat Court. The main purpose of relying on Article 2-A was to circumvent the constitutional limitations on the court's jurisdiction contained in Article 203-B. In the case of *Muhammad Salah-ud-Din v. Government of Pakistan*[319] the petitioner challenged the entire electoral system of Pakistan as un-Islamic. However, Article 203-B prohibited the Federal Shariat Court from examining the Constitution itself on the basis of Islam. The petitioner argued, by now along familiar lines, that the Objectives Resolution was a supra-constitutional provision which dissolved 'the bonds to exercise of power' contained in Article 203-B and therefore made all other constitutional provisions justiciable by the Federal Shariat Court. The Federal Shariat Court was doubtful observing that:

> 'Whether this Resolution now forming part of the Constitution would remove the embargo provided in clause (c) of Article 203-B of the Constitution is doubtful and whether this Resolution occupying a place in the introductory chapter of the Constitution is at all operative through a Court is debatable.'[320]

However, in the case of *Muhammad Sarwar v. State*[321] the Federal Shariat Court went one step further,endorsing Justice Tanzil-ur-Rahman's invalidation of section 7 of the Muslim Family Laws Ordinance 1961. As will be seen in more detail below, the procedural requirements for a valid divorce caused difficulties in criminal cases under the Offence of Zina (Enforcement of Hudood) Ordinance 1979 since any consensual sexual intercourse outside a legally valid marriage constitutes a criminal offence. A remarried divorcee could therefore face criminal prosecution if it turned out that her divorce was after all not valid.[322] The Federal Shariat Court used to avoid the problem in a practical manner, best exemplified by the following quotation:

> 'Thus, the view from this Court from 1982 has been that if two persons were living as husband and wife for a long time and it is proved that there was a pronouncement of *talaq* but no notice to the Chairman, they may not be punished for Zina . . . the Court did not attach much importance to the objection that no notice had been given and thought it only of academic interest.'[323]

Justice Tanzil-ur-Rahman's decision nevertheless removed the uncertainty surrounding compliance with, or breach of, section 7. Embracing the invalidation of section 7 and

319 PLD 1990 FSC 1.
320 *Ibid*., at p. 7.
321 PLD 1988 FSC 42.
322 Men usually are not affected by this problem since they are allowed to be married to more than one wife. An invalid divorce will therefore just increase the number of wives.
323 *Supra*, note 321, at p. 49.

Justice Tanzil-ur-Rahman's reliance on Article 2-A, the Federal Shariat Court was now able to declare that:

> 'So, the High Court in the present situation had the authority to declare any provision of Muslim Personal Law to be repugnant to Qur'an and Sunnah and this Court is obliged to follow that decision.'[324]

The Federal Shariat Court's decision must be regarded as predictable considering that most Islamic scholars regarded section 7 of the Muslim Family Laws Ordinance 1961 as repugnant to Islam. However, the reliance on Justice Tanzil-ur-Rahman's precedent nevertheless seemed somewhat immature, since his decision could be easily overturned, as indeed it was in *Hakim Khan.*[325] The Federal Shariat Court would then find it quite difficult to justify its pragmatic approach to section 7, having declared itself bound by decisions of the other superior courts on matters not covered by its own exclusive jurisdiction.

In *Muhammad Saifullah v. Federal Government of Pakistan*[326] Justice Tanzil-ur-Rahman, now the Chief Justice of the Federal Shariat Court, confirmed with unusual restraint that 'this Court, therefore, cannot stretch the jurisdiction under Article 2-A to matters specially excepted and barred by Article 203-B(c).'[327] In the case the petitioner had challenged the exclusion of the constitution from the Federal Shariat Court's jurisdiction.

The only substantive use of Article 2-A by the Federal Shariat Court occurred in a somewhat unusual *zina* case: the accused had been found guilty of performing sexual intercourse with the dead body of a young woman. However, there was no such offence on the statute book. The appellant argued that in the absence of any statutory provision no court had jurisdiction to try him. The Federal Shariat Court disagreed holding that 'now the entire field of Muslim Law has been made applicable, not by any ordinary law, but by the Constitution itself, as per Article 2-A.' Accordingly the 'entire body of Muslim law . . . is made the existing law of Pakistan.'[328] The Federal Shariat Court relied on Justice Tanzil-ur-Rahman's decisions and added, perhaps unnecessarily, that:

> 'In fact the Sindh High Court in the *Bank of Oman* case PLD 1987 Kar 4040 and *Mirza Qamar Raza* case PLD 1988 Kar 169 not only applied the uncodified Muslim Law as in Qur'an and Sunnah but declared the laws made by the State legislature as void due to their repugnancy.'[329]

324 *Ibid*., at p. 51.
325 *Supra*, note 144.
326 PLD 1992 FSC 376.
327 *Ibid*., at p. 385.
328 *Muhammad Naseer v. State* PLD 1988 FSC 58, at p. 69.
329 *Ibid*., at pp. 69 and 70. It should be pointed out that the appellant was acquitted for lack of evidence.

Chapter 4
Constitutional Crisis, Democracy and Islam

Dismissal of the Junejo Government

Pakistan's return to democracy in 1985 was marred by the fact that Zia-ul-Haq not only ensured that the legal measures taken by him have remained an enduring legacy until the present but also that he stayed on as the country's President and Chief of Army Staff. The first parliament had been elected on the basis of non-party elections and Prime Minister Muhammad Khan Junejo was perceived to be very much under Zia's control. Nevertheless, for all its faults democracy had returned, the 1973 Constitution revived,[330] and fundamental rights were again enforceable by Pakistan's superior judiciary. The fragility of the post-martial law democratic process was, however, quickly exposed when President Zia-ul-Haq, to everybody's surprise, dismissed Junejo's government on 29 May 1988 under Article 58(2)(b) of the 1973 Constitution. That Article provided that:

> 'Notwithstanding anything contained in clause (2) of Article 48, the President may also dissolve the National Assembly in his discretion where, in his opinion . . . (b) a situation has arisen in which the Government of the Federation cannot be carried out in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.'

The legality of Zia's order was examined in the case of *Federation of Pakistan v. Muhammad Saifullah Khan.*[331] The Court decided that Zia's order had indeed been unconstitutional but nevertheless allowed fresh elections to take place. As is well known, these elections brought Benazir Bhutto, daughter of the late Prime Minister Zulfikar Bhutto, into power albeit only briefly: her government was dismissed under Article 58(2)(b) 20 months later, this time by President Ghulam Ishaq Khan. As already explained in the Introduction, this book is not concerned with the development of constitutional law in Pakistan *per se.* Rather, it traces the impact of Islam on, *inter*

330 See the Revival of the Constitution Order 1985 and the Proclamation of the Withdrawal of Martial Law 1985.
331 PLD 1989 SC 166.

alia, constitutional law. The otherwise important case of *Saifullah Khan*[332] is in this context is of interest for reasons of omissions: none of the judges referred to any significant extent to principles of Islamic law nor were any of the relevant constitutional provisions interpreted in the light of Islam. The only judicial discourse on Islam was occasioned by one of the reasons given by President Zia to justify his dismissal of the Junejo government, namely that he had failed to pursue and further the Islamisation of the legal system. As such,'the objects and purposes for which the National Assembly was elected have not been fulfilled.' In fact, a Constitution Ninth Amendment Bill directed at enforcing Islamic law in country had been drafted but the National Assembly had made no effort to pass it. The Supreme Court rejected this ground holding that:

> 'National Assembly has a Charter of its own, an existence distinct and separate, and its utility, efficacy, representative character, success or failure could be judged not by any test or opinion outside the provisions of the Constitution but by reference to the provisions of the Constitution itself. Therefore, we are unable to endorse the view of the learned Attorney-General that the National Assembly had to earn its existence and continuance by maintaining such a pace and progress on the question of Islamisation as could satisfy the late President. Article 2-A of the Constitution does not demand or prescribe a time schedule.'[333]

President Zia-ul-Haq's assumption that a failure of the government to pursue Islamisation of the legal system would be sufficient justification for its dismissal is revealing in itself since he defended his prolonged reign as *de facto* military dictator on the ground that he was introducing Islamic law and morals. However, none of the Pakistani courts had ever accepted any type of 'Islamic necessity' as a legitimate justification for extra-constitutional measures. This principle was reaffirmed in *Saifullah Khan.*[334] There was no need as such for the Supreme Court to refer to a basic structure doctrine in order to invalidate the President's order dismissing the government since the case turned on the question whether or not the President's order was justiciable. Nevertheless, the failure to refer to principles of Islamic law can also be seen as an indication that the Supreme Court was distancing itself from the Islamic rhetoric which had been in vogue up to 1988. It would, for instance, have been perfectly appropriate to refer to the principle, established in *Pakistan v. Public at Large,*[335] that nobody should be dismissed from office without having been given an opportunity to be heard.[336]

332 *Supra*, note 331.
333 *Ibid*., at p. 214.
334 *Ibid*.
335 PLD 1991 SC 459.
336 It is somewhat ironic that the right to be heard was used as a ground to refuse the reinstatement of Benazir Bhutto's government, which had been dismissed on 6 August 1990 by the President under Article 58(2)(b). Abdul Shakurul Salam J. held that 'Relief of restoration cannot also be allowed for the additional reason that the gentlemen elected to the new National Assembly have not been impleaded as a party to these proceedings. It is an elementary principle of law that no adverse order can be passed against anybody without hearing him', see *Ahmad Tariq Rahim v. Federation of Pakistan* PLD 1992 SC 646, at p. 679.

Dismissal of the Bhutto Government

The second use of Article 58(2)(b) occurred when President Ghulam Ishaq dismissed Benazir Bhutto's government in August 1990.[337] In a curious reversal, the Supreme Court this time refused to reinstate Bhutto's government but it should noted that the Supreme Court was deeply divided. However, and perhaps somewhat strangely, the dismissal was, along with other reasons, held to be constitutional on the ground that many members of the governing party had defected thereby destroying the representative character of the National Assembly. Justice Shafiur Rahman held that such defections and 'horse-trading' destroyed the normative moorings of the Constitution of an Islamic State. Justice Rahman held that:

> 'The normative moorings of the Constitution prescribe that "sovereignty over the entire universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits described by Him is a sacred trust" and the State is enjoined to "exercise its powers and authority through the chosen representatives of the people". An elected representative who defects his professed cause, his electorate, his party, his mandate, destroys his own representative character. He cannot on the mandated Constitutional prescription participate in the exercise of State power and authority.'[338]

His words were echoed by Justice Rustam S. Sidhwa, who was even more emphatic holding that:

> 'And whilst all forms of defection must be abhorred as violative of the Islamic spirit that binds a man to his word, such transgression on the part of a legislator must be all the more looked down upon as a serious breach of the authority reposed in him by Allah to represent his constituency on the basis of the sacred trust reposed by them in him. By defection he basically violates the very spirit of the teachings and requirements of Islam, under which he is ordained to act, and such an act can only be treated as a negation of the very spirit of the Constitution, which he is bound to preserve and protect.'[339]

Justice Rahman therefore refused to reinstate Bhutto's government, *inter alia,* on Islamic grounds: her government was not any longer representative of the will of the people. It is therefore somewhat surprising to see that Justice Abdul Shakurul Salam used references to Islam to achieve the opposite effect, namely that the dismissal was *de jure* unconstitutional.[340] Justice Salam held that the scope and efficacy of Article 58(2)(b) had to be determined in the light of Article 2-A and the Objectives Resolution. Quoting exactly the same part of the Objectives resolution as Justice Rahman, namely that the state should exercise its powers and authority through the chosen representatives of the people, he held that the President was not chosen by the people nor had he direct contact with them. Therefore, the president should not,

337 *Benazir Bhutto v. The Federation of Pakistan* PLD 1988 SC 416.
338 *Ibid*., at p. 666.
339 *Ibid*., at p. 697.
340 He refused to order the reinstatement of Bhutto's government nevertheless but on purely procedural grounds.

under Islamic legal principles, be allowed to dismiss the government. Further, Justice Salam relied on Islamic legal principles to support his contention that in any event the president was supposed to act in accordance with the advice of, *inter alia,* the prime minister.[341]

Dismissal of the Sharif Government

The third time a dismissal of government came under consideration was in 1993.[342] On 18 April 1993, Nawaz Sharif's government was dismissed under Article 58(2)(b). Unlike Benazir Bhutto, who had more or less accepted the dismissal and not challenged her dismissal before a court herself, Nawaz Sharif reacted quickly. One week after his dismissal he moved the Supreme Court in its original constitutional jurisdiction under Article 184(3) of the 1973 Constitution, asking the Supreme Court to declare the dismissal to have been made unlawfully and without legal authority. He also challenged the appointment of a caretaker cabinet. The Supreme Court admitted the petition for hearing with lightning speed: the very next day, i.e. 26 April 1993, a full bench of 11 permanent judges held the first preliminary hearing. Exactly one month later the Supreme Court held the dismissal of Nawaz Sharif's government unconstitutional and reinstated his government.

The decision must be regarded as a landmark in Pakistan's constitutional history: for the first time in Pakistan's history a government, dismissed by a president, was reinstated.[343] The decision was as much a reflection of the political changes taking place in Pakistan as it was an indication of the increased powers of the Supreme Court in the country's democratic setting: the power conferred upon the president under Article 58(2)(b) did not in fact increase his ability to manipulate political processes since his decision to dismiss a government was subject to a judicial review by the Supreme Court. In such a scenario, the Supreme Court emerged as the one institution of the state which could determine what were essentially political questions.

To what extent did Islamic law feature in the decision? It will be remembered that by now the Supreme Court had reduced the importance of Article 2-A and relegated it again to a mere preamble of the Constitution which was, at the most, to be equated with a directive principle of policy.[344] The decision of the case rested on the interpretation of Article 17(2) of the 1973 Constitution which guaranteed the right of every citizen to form and to be a member of a political party. Did such a fundamental right include the right for a government to complete its tenure of five years? As will be seen below, Nawaz Sharif relied, *inter alia,* on the Objectives Resolution, arguing that it provided an additional fundamental right to 'political justice'.

341 *Supra*, note 327, at pp. 672 and 673.

342 *Muhammad Nawaz Sharif v. President of Pakistan* PLD 1993 SC 473.

343 The main author of the decision, Justice Nasim Hasan Shah, was to hand out decorative plates, produced by the then Speaker of the National Assembly, Gohar Ayub Khan, to visitors to the Supreme Court. An extract of the case, etched on a brass plate, has also been mounted in the entrance hall of the Supreme Court in Islamabad, as a reminder of the Court's power and its commitment to democratic rule. However, the fact that Benazir Bhutto's government, dismissed twice under Article 58 (2)(b), was never reinstated by the Supreme Court, whereas Nawaz Sharif's was, exposes the Supreme Court to allegations of political basis.

344 See *Hakim Khan v. The State* PLD 1992 SC 595, supra, note 144.

The first judgment was written by Justice Nasim Hasan Shah, the principal architect of *Hakim Khan.*[345] He had become the new Chief Justice of Pakistan after the retirement of one of the main proponents of judicial Islamisation, Justice Afzal Zullah. It is therefore not surprising that Justice Nasim Hasan Shah proceeded on entirely secular grounds. According to him, the fundamental right to form and to be a member of a political party, enshrined in Article 17 of the 1973 Constitution, extended to the right to form the government, wherever the political party possessed the requisite majority in the legislative assembly. Justice Nawaz Sharif therefore had sufficient standing to challenge the order of the President. On substantive grounds, Justice Nasim Hasan Shah held that as a matter of fact rather than law, no situation had existed in which the country could not be governed in accordance with the Constitution and that therefore the dismissal under Article 58(2)(b) was unconstitutional and *ultra vires*. Justice Hasan Shah made only one reference to Islam:

> 'The people of Pakistan have willed to establish an order wherein the State shall exercise its powers and authority through chosen representatives of the people; wherein the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed (Article 2-A). No one man however so high can, therefore, destroy an organ consisting of chosen representatives of the people unless, proper and sufficient cause exists for taking such grave action . . . Enough has been said above to indicate that no such situation had arisen here and if any such situation could be said to have arisen it was not of the making of the Prime Minister.'[346]

Justice Shafiur Rahman did not refer to principles of Islamic law once. Justice Saad Saood Jan, however, was one of the 11 judges who discussed the effect of the Objectives Resolution on the dissolution of the National Assembly. Nawaz Sharif had, *inter alia,* argued that the dismissal had violated the Objectives Resolution in that his right to 'political justice' enshrined in the Resolution had been breached. Justice Jan held the dismissal to be unconstitutional. Nevertheless, he also decided that a breach of the right 'to political justice' in itself did not amount to the breach of a fundamental right. Relying on *Hakim Khan*[347] he held that:

> 'The expression "political justice" represents an idea with [a] myriad of facets and for that very reason it does not admit of a precise definition. Broadly speaking, every time a group or class or even an individual is deprived of a right or privilege which is available to the majority of others similarly placed or is discriminated against, one immediately starts thinking in terms of political justice. So far as the Objectives Resolution is concerned it does not by itself add any new independent fundamental right in Chapter 1 of Part II of the Constitution as to bring its violation within the compass of the jurisdiction conferred on this Court by Article 184(3), ibid.'[348]

345 *Ibid*.
346 *Supra*, note 342, at p. 569.
347 *Supra*, note 144.
348 *Supra*, note 342, at p. 645.

This view was echoed by Justice Ajmal Mian who held that:

> 'I am inclined to take the view that the factum that the Objectives Resolution has been incorporated as a substantive part of the Constitution by virtue of Article 2-A, does not justify reading into any additional Fundamental Rights in the Chapter pertaining to Fundamental Rights contained in the Constitution. The object of adopting the Objectives Resolution in 1949 has been thoroughly discussed in the case of *Hakim Khan* (*supra*), namely, to provide guidelines and to serve as a beacon light to the framers of the Constitution but it was never intended or designed to be enforced as Fundamental Rights.'[349]

The only role accorded to the Objectives Resolution was that it should be kept in view whilst construing fundamental rights. The rejection of a wider interpretation and role of the 'political justice' provision was, of course, a direct departure from *Benazir Bhutto* where it had been held that:

> 'The expression "political justice" is very significant and it has been placed in the category of fundamental rights. Political parties have become the subject matter of a fundamental right in consonance with the said provision in the Objectives Resolution. It is also clear from the Objectives Resolution that principles of democracy as enunciated by Islam are to be fully observed.'[350]

The result was that the Objectives Resolution was to be seen as a tool of interpretation rather than a substantive fundamental right, designed, however, to expand the scope of fundamental rights rather than to restrict them. It was Justice Afzal Lone, who explicitly established a normative connection between the right to 'political justice' and the right to form political parties enshrined in Article 17:

> 'We may add that the concept of political justice will also include the right to participate in political decision-making. Thus illegal and unconstitutional denial to the petitioner to run the Government as long as he enjoyed the support of the majority of the House, will be a denial of political justice, guaranteed by Article 17.'[351]

The most outspoken opponent to the 'political justice' right was Justice Sajjad Ali Shah, the lone dissenting voice, since he held that as matter of precedent the Supreme Court had no choice but to declare the dismissal of Nawaz Sharif's government to be *intra vires* having upheld the dismissal of Benazir Bhutto's government two years earlier. Justice Sajjad Ali Shah held that:

> 'Fundamental rights are specifically mentioned in the Constitution and no such fundamental rights can be deemed to be there by implication if not mentioned specifically. If the legislature wants to add any fundamental right it can do so expressly.'[352]

349 *Ibid*., at p. 663.
350 *Supra*, note 263, at p. 616 (per Justice Zaffar Hussain Mirza).
351 *Supra*, note 342, at p. 738.
352 *Ibid*., at p. 765.

At the other end of the spectrum we find Justice Saleem Akhtar, who had no difficulty in holding that the '. . . Constitution recognises political justice and guarantees it.'[353] Justice Saeeduzzaman Siddiqui, on the other hand, refused to decide the issue of whether or not there was a right to political justice.[354]

The outcome of the case, as far as the role of the Objectives Resolution is concerned, is not clear cut. There is no doubt that most of the judges were unwilling to concede that the Objectives Resolution had introduced new fundamental rights *per se.* Equally, most of the judges were reluctant to denude the Objectives Resolution of all significance. The compromise appears to be a construction which allowed the Objectives Resolution a role in the interpretation of fundamental rights, so as to enlarge rather than to restrict them. This must be regarded as a retraction from the earlier judicial enthusiasm for the Objectives Resolution. The reason for the cooling off can be easily surmised: the reckless use of the Objectives Resolution between 1985 and 1992, as discussed above, had made the judiciary wary. There was a very real danger that under the pretext of the Objectives Resolution significant changes of the legal system could be attempted. Therefore, even in a case in which the recognition of an additional fundamental right to political justice would actually have supported the majority decision, most judges were nevertheless reluctant to rely on it exclusively.

Emergence of a Basic Structure Doctrine

The issue of dismissal and the use of Article 58 (2)(b) arose for a fourth time in 1996. On 5 November 1996, the President dismissed the government of Benazir Bhutto under Article 58(2)(b).[355] The constitutionality of her dismissal was examined in the case of *Mahmood Khan Achakzai v. Federation of Pakistan.*[356] The case is of significance not only because of the Supreme Court's renewed exploration of the powers of the president to dismiss democratically elected governments but also because the Supreme Court decided to determine in the same proceedings an underlying, far more thorny question: was the Eighth Amendment to the Constitution, which had introduced Article 58(2)(b), in itself constitutional, or could the validity of the amendments to the Constitution be challenged bearing in mind that the Martial Law Administrator General Zia-ul-Haq had prolonged his reign in direct violation of the Supreme Court's orders pronounced in the case of *Begum Nusrat Bhutto v. Chief of Army Staff*?[357]

353 *Ibid*., at p. 809.
354 *Ibid*., at p. 850.
355 In 1996, fresh elections took place following a settlement between Ghulam Ishaq Khan and Nawaz Sharif, under which the former resigned as President after the latter had advised the President to dissolve the National Assembly. Benazir Bhutto's Pakistan's People Party ('PPP') emerged as the winner, though without a substantial majority. It is ironic that Pakistan's new President, Farooq Ahmed Khan Leghari, considered to be close to the PPP, nevertheless dismissed her government under Article 58(2)(b).
356 PLD 1997 SC 426.
357 PLD 1977 SC 657, *supra*, note 96.

The validity of the Eighth Amendment had been challenged before several high courts but the petitions had been kept pending. Several petitions were therefore joined in one proceeding and, unsurprisingly, one of the petitions also claimed that Pakistan's parliamentary democracy was not contemplated by Islam and thus repugnant to it. A challenge to the validity of the Eighth Amendment not only exposed Article 58(2)(b) to the danger of being declared unconstitutional but also the Islamisation measures introduced by Zia-ul-Haq. Therefore, the Supreme Court allowed Mutteheda Ulema Council and several other Islamic organisations to be impleaded as parties. The Supreme Court divided the proceedings into two stages: in the first stage, the question of validity of the Eighth Amendment was to be decided, whereas the validity of the dismissal of Bhutto's government was to be decided in subsequent proceedings.[358]

Achakzai must be regarded as a landmark decision of Pakistan's Supreme Court, establishing for the first time in the country's legal history that Pakistan's legal system had a basic structure which could not be tampered with. As such, it incorporated into Pakistani law what India had achieved in the case of *Kesavananda Bharati v. State of Kerala,*[359] namely to establish a 'basic structure doctrine'. The doctrine itself must be regarded as controversial in former British colonies, since it interferes directly with the right of parliament to amend constitutions. Supreme Courts of some former British colonies, more often than not with authoritarian governments, rejected the basic structure doctrine – mention can be made of Singapore and Malaysia.[360] On the other hand, Bangladesh's Supreme Court recognised the basic structure doctrine in 1989.[361] In Pakistan, the doctrine had never been recognised with one notable exception, already mentioned above, namely the case of *Darvesh M. Arbey v. Federation of Pakistan*[362] where it was held that 'the Parliament is not sovereign to amend the Constitution according to its likes and dislikes much less than changing the basic structure of the Constitution.' However, this bold statement was discounted in subsequent cases, the most recent being *Pir Sabir Shah v. Federation of Pakistan.*[363]

Chief Justice Sajjad Ali Shah identified the Objectives Resolution as the 'sheet-anchor' of Pakistan's three constitutions, since it reflected the aspirations of the people of Pakistan 'as to what they want and how they want to be governed'.[364] Justice Shah accepted that the Objectives Resolution was not to be equated with a *Grundnorm* or with a basic structure. Nevertheless, Justice Shah went on to state that:

> 'In a nutshell it can be said that the basic structure as such is not specifically mentioned in the Constitution of 1973 but the Objectives Resolution as preamble of the Constitution and now inserted as the substantive part in the shape of Article 2-A when read with other provisions of the Constitution reflects salient features of

358 See *Benazir Bhutto v. President of Pakistan* PLD 1998 SC 388.
359 AIR 1973 SC 1461, *supra*, note 53. The case overruled *Golak Nath v. State of Punjab* AIR 1967 SC 1643.
360 See *Phang Chin Hock v. Public Prosecutor* (1980) 1 MLJ 70 and *State of Kelanatan v. Government of the Federation of Malaysia* (1977) 2 MLJ 187.
361 See *Anwar Hussain Chowdhry v. Government of the People's Republic of Bangladesh* 1989 BLD (Supplement) 1.
362 PLD 1980 Lah 206, *supra*, note 79.
363 PLD 1994 SC 738. See also *Fouji Foundation and another v. Shamimur Rehman* PLD 1983 SC 457, *supra*, note 119, and *State v. Ziaur Rehman* PLD 1973 SC 49, *supra*, note 72.
364 *Supra*, note 356, at p. 455.

> the Constitution highlighting federalism, parliamentary form of Government blended with Islamic provisions.'[365]

But what was the effect of these 'salient features' in the face of clause 6 of Article 239 of the 1973 Constitution, which was introduced by Presidential Order[366] in 1985 and protected by the Constitution (Eighth Amendment) Act 1985 from being judicially reviewed or indeed removed by parliament? Clauses 6 and 7 of Article 239 declared that there was no limitation whatsoever on parliament to amend any provision of the Constitution.[367] Justice Shah boldly declared that the power to amend the Constitution did not extend to the salient features of the Constitution identified above. The next question, of course, was the validity of the Constitution (Eighth Amendment) Act 1985. Could it be said to be violative of the salient features of the Constitution? Justice Shah did not think so and his reasoning again relied on the role of Islam in Pakistan's legal system. According to Shah, the Eighth Amendment protected constitutional changes brought about by Zia-ul-Haq for two purposes: to include Islamic provisions in the revived Constitution and to achieve a balance between the powers of the president and the prime minister. The fact that the Eighth Amendment specifically incorporated the Objectives Resolution in the substantive part of the Constitution as new Article 2-A was emphasised by Justice Shah in order to support his argument that an amendment aimed at bringing the constitutional order closer to Islam could not be regarded as a change of the salient features. In fact, according to Justice Shah, the salient features of Pakistan's legal system were not be found in the Constitution, which did not have a basic structure, but in the Objectives Resolution, since it was the only document that had remained as a continuing feature in Pakistan's legal system since the country came into existence having been the preamble of all constitutions of Pakistan. Consequently, the power of parliament to amend the 1973 Constitution under Article 239 was confined not by the basic structure of the 1973 Constitution but by the salient features of the legal system as outlined in the Objectives Resolution. Justice Shah found that an amendment making the country secular or a monarchy would amount to an alteration of these salient features.[368] As a result, Article 58(2)(b) could not be objected to especially since none of the three post-Zia parliaments, elected on a party basis, had removed it. Starkly foreseeing future developments, Justice Shah added that:

> 'In fact Article 58(2)(b) has shut the door on Martial Law forever, which has not visited us after 1977. The country is entering into the 21st century still at the threshold as a developing country with many serious problems as items high on our agenda including economic morass. We have to fix our priorities with extra caution and pragmatism.'[369]

365 *Ibid*., at p. 458.
366 See Presidential Order No. 14 of 1985.
367 Article 239 (6) provides that, 'No amendment of the Constitution shall be called in question in any Court on any ground whatsoever' and clause 7 provides that, 'For the removal of doubt, it is hereby declared that there is no limitation whatever on the power of Majlis-e-Shoora [Parliament] to amend any of the provisions of the Constitution.'
368 *Supra*, note 356, at pp. 479 and 480.
369 *Ibid*., at p. 480.

Justice Shah's assessment of the importance of Article 58(2)(b) to prevent martial law was not entirely misplaced: the 1997 elections brought into power Nawaz Sharif, whose party, the Muslim League, won an overwhelming majority in the National Assembly and the Senate. Sharif removed Article 58(2)(b) from the 1973 Constitution, thereby ensuring that his government could not be dismissed again, only to be removed from power by the Chief of Army Staff General Pervaiz Musharraf in October 1999.

In *Achakzai*, according to Justice Shah, the Objectives Resolution has indeed been confirmed as a supra-constitutional provision containing the salient features which had to be reflected and preserved in any constitution. The resort to the Objectives Resolution also enabled Justice Shah to uphold the validity of the Eighth Amendment since according to Justice Shah all 62 amendments to the 1973 Constitution introduced by it had been made in order to further the aims contained in the Objectives Resolution and to balance the powers of the President and the Prime Minister.

Justices Saleem Akhtar and Raja Afrasiab Khan were the other two judges to deliver a judgment in *Achakzai*.[370] Justice Akhtar was somewhat more cautious in elevating the Objectives Resolution to the level of a basic structure. In his opinion, Pakistan's constitutional history was too checkered to identify any basic structure and the Objectives Resolution had been declared to be incapable of being used as a basis to strike down a law in *Hakim Khan*.[371] Therefore, it could not serve as a limitation on the amending powers of parliament under Article 239. Instead, he found that Article 8 of the 1973 Constitution, which provides that the state shall not make a law in contravention of the fundamental rights guaranteed by the Constitution, as placing a limit on the amending powers of parliament. Article 8 uses the term 'any law' which, according to Justice Akhtar, implied that also laws amending the constitution were covered by the restrictions on the legislative powers of parliament. Without referring to it, Justice Akhtar seems to have followed the reasoning of the Indian Supreme Court in *Golak Nath v. State of Punjab*[372] which in similar vein had struck down a constitutional amendment taking away the right to own property on the ground that even a bill amending the constitution was covered by the term 'law' in Article 13(2) of the Indian Constitution. As mentioned above, this was later overruled in *Kesavanada*[373] where the Indian Supreme Court distinguished between the 'constituent' and 'legislative' functions of parliament.

Justice Khan likewise was unwilling to concede that there was a basic structure or that the Eighth Amendment was unconstitutional. He rejected the latter contention as a largely political question: if certain features of the Constitution did not find favour with parliament they could be removed or amended by parliament provided that the constitutional requirement of a two-thirds majority had been met.

In the end, the final order of the Supreme Court was somewhat ambiguous on the recognition of the basic structure doctrine. It provided that:

> 'What is the basic structure of the Constitution is a question of academic nature which cannot be answered authoritatively with a touch of finality but it can be said that the prominent characteristics of the Constitution are amply reflected in the

370 *Supra*, note 356.
371 *Supra*, note 144.
372 *Supra*, note 359.
373 *Supra*, note 53.

Objectives Resolution which is now a substantive part of the Constitution as Article 2-A inserted by the Eighth Amendment.'[374]

After deciding *Achakzai* the Supreme Court had to determine whether or not the dismissal of Benazir Bhutto's government was constitutional. The main reason given by President Leghari for the dismissal was the 'shoot to kill' policy adopted by the police against members of the MQM in Karachi, which was a violation of 'our Islamic faith and all canons of civilized Government'.[375] Further reasons given were the allegation that Bhutto had implicated the President in the killing of her brother, had not implemented the decision on appointment of judges in the *Al-Jehad Trust*[376] case thereby undermining the independence of the judiciary as guaranteed by Article 2-A and that a bill had been passed to amend the Constitution allowing parliament to rid itself of inconvenient judges. Illegal phone-tapping, corruption and nepotism completed the list of grounds supporting the dismissal of Bhutto's government. The Supreme Court was particularly shocked with the law and order situation in Karachi, where more than 1,000 people had been killed by law enforcement agencies since Bhutto had come into power in 1993. The Supreme Court held this fact alone to be tantamount to a breakdown of the constitutional order. The Supreme Court also took into consideration that Bhutto had largely failed to comply with its orders in the *Al-Jehad Trust* case.[377] The phone-tapping was held to be a violation of the right of privacy and of Islamic traditions.

In the end, the Supreme Court refused to reinstate Benazir Bhutto's government because the facts supported the grounds given by the President to justify the dismissal. It was held that these grounds in themselves were sufficient to justify a dismissal of the government under Article 58(2)(b). A glaring feature of the Benazir Bhutto case is the absence of a sustained discussion of the legal dimensions of the dismissal: the Supreme Court proceeded on the basis of a factual rather than a legal investigation. It seems that all parties had by then accepted that the President was indeed entitled to dismiss a democratically elected government in circumstances of national crisis rather than see a complete breakdown of the constitutional machinery. Islam did play an important part in the case: the President had mentioned in several places of his order dismissing Bhutto's government that her actions had been in violation of Islam. This was confirmed by the Supreme Court.

Judicial Disarray

In the elections following Benazir Bhutto's dismissal, Nawaz Sharif's Muslim League won an overwhelming majority in both the Senate and the National Assembly. His second ascent to power was swiftly followed by one of the most significant amendments to Pakistan's Constitution since martial law was lifted in 1985. On

374 *Supra*, note 356, at p. 446.
375 *Supra*, note 358, at p. 435.
376 *Al-Jehad Trust v. Federation of Pakistan* PLD 1996 SC 324.
377 In fact, Benazir Bhutto in an address to the National Assembly had claimed the order of the Supreme Court in the *Al-Jehad Trust* case to be unconstitutional itself. *Supra*, note 358, at p. 486.

1 April 1997, the National Assembly passed the Constitution (Thirteenth Amendment) Act 1997, which repealed Article 58(2)(b), thereby removing the power of the president to dismiss a government on the ground of constitutional breakdown, and restored the prime minister's mandatory advice in the appointment of armed services chiefs and provincial governors. The Act's 'Statement of Objects and Reasons' candidly says that 'in order to strengthen parliamentary democracy, it has become necessary to restore some of the powers of the Prime Minister which were taken away by the Constitution (Eighth Amendment) Act 1985'.[378] As a result, Prime Minister Sharif and his Muslim League enjoyed virtually unlimited power. With a solid two-thirds majority in both the National Assembly and the Senate, Prime Minister Sharif had finally freed himself from the watchful eyes of the President.

In a second step towards consolidation of power, the National Assembly amended the Constitution a second time with the passing of the Constitution (Fourteenth Amendment) Act 1997. The amendment inserted a new Article 63-A in the 1973 Constitution which, in essence, allowed members of the National Assembly to be removed from parliament if they breached party discipline or defected from their respective political party.[379] Their seats were to be declared vacant and to be filled in by-elections.

The amendments made it *de facto* impossible to challenge Nawaz Sharif's power during the duration of the National Assembly. The President had already lost his power to dissolve parliament and under the 14th Amendment even the National Assembly itself would find it very difficult to unseat Nawaz Sharif's government. Predictably, Nawaz Sharif secured the constitutionally required two-third majorities in both houses of parliament and thus succeeded in amending the 1973 Constitution.[380] The Supreme Court of Pakistan was the only check on Sharif's inexorable rise to absolute power. The constitutionality of the new Article 63-A was examined in the case of *Wukula Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan.*[381] The petition was filed by an association of lawyers under Article 184(3) of the 1973 Constitution, which claimed that the amendment was void because it violated the basic structure of the Constitution and the fundamental right to freedom of speech guaranteed

378 See *Comparative Statement of the Constitution as it Stood before the 20th March, 1985 and as it Stands after that Date*, Islamabad: Government of Pakistan, M-Law-265 (no date), for a detailed account. For a critical discussion, see Hamid Khan, *8th Amendment. Constitutional and Political Crisis in Pakistan*, Lahore: Wajidalis, 1994.

379 'Article 63A, *inter alia,* provides that, '(1) If a member of a Parliamentary Party defects, he may by means of a notice addressed to him by the Head of the Political Party or such other person as may be authorised in this behalf by the Head of the Political Party, be called upon to show cause, within no more than seven days of such notice, as to why a declaration under clause (2) should not be made against him. If a notice is issued under this clause, the Presiding Officer of the House shall be informed accordingly.

Explanation: A member of a House shall be deemed to defect from a political party if he, having been elected as such, as a candidate or nominee of a political party ...

(a) commits a breach of party discipline which means a violation of the party constitution, code of conduct and declared policies, or

(b) votes contrary to any direction issued by the Parliamentary Party to which he belongs, or

(c) abstains from voting in the House against policy in relation to any Bill...'

380 See the Constitution (Fourteenth Amendment) Act 1997. The Act received the assent of the President on 3 July 1997.

381 PLD 1998 SC 1263.

by Article 19 of the 1973 Constitution. There is no doubt that Article 63-A went further than Pakistan's previous anti-defection laws which had made a member of parliament who defected to another political party liable to be disqualified.[382]

Chief Justice Ajmal Mian observed that the basic structures had not been accepted by Pakistan's courts despite the observations made in *Achakzai*[383] that certain salient features incorporated in the Constitution by the Objectives Resolution, could not be changed by way of constitutional amendment. The second possibility of maintaining a basic structure had been left open by Justice Akhtar, namely to declare an amendment void because it violated a constitutionally guaranteed fundamental right. Justice Mian clarified this aspect of *Achakzai,*[384] holding that the validity of a constitutional provision cannot be tested on the touchstone of Article 8 of the 1973 Constitution.[385] So what was left of the Supreme Court's tentative forays into the basic structure doctrine? The Supreme Court declined to decide the issue holding that even if a basic structure doctrine were recognised in Pakistan, Article 63-A could not be held to be violative of it. In place of the basic structure doctrine, Justice Mian postulated a third way:

> 'We may observe that in Pakistan instead of adopting the basic structure theory or declaring a provision of the Constitution as *ultra vires* to any of the Fundamental Rights, this Court has pressed into service the rule of interpretation that if there is a conflict between two provisions of the Constitution which is not reconcilable, the provision which contains lesser rights must yield in favour of a provision which provides higher rights.'[386]

It should be noted that there was dissent in the Supreme Court: Justice Raja Afrasiab Khan upheld the basic structure doctrine in emphatic terms.[387] Emphasising that the very basis for the creation of Pakistan was Islam, he held that the Islamic character of the state and the fundamental rights guaranteed by the Constitution could not be repealed or altered by parliament 'keeping in view the background of the Pakistan Movement and thinking on human rights in the modern world.' Justice Mamoon Kazi was even more forceful in his assertion that something akin to the basic structure doctrine existed in Pakistan, and it is worth quoting this part of his judgment *in toto*:

> 'Therefore, in my view this Court as a guardian of the Constitution, has a right and the power to declare an amendment in the Constitution as unenforceable or void if the same is construed to be violative of the basic structure of the Constitution or is found to have been passed in derogation of a Fundamental Right. However, the question as to what are the basic essential features of the Constitution of Pakistan is yet to be answered with clarity. Nevertheless, regarding certain basic essential features of our Constitution, there can hardly be expressed any doubt. Any amendment in the Constitution which purports to alter the existing federal structure or the Islamic character of the Constitution or the exisitng Parliamentary system or which undermines the independence of Judiciary or abrogates or abridges any

382 See the Political Parties Act 1962 as amended in 1985, 1990 and 1993.
383 *Supra*, note 356.
384 *Ibid*.
385 *Supra*, note 381, at p. 1313.
386 *Ibid*., at p. 1315.
387 Ibid., at p. 1423.

Fundamental Right may be regarded as repugnant to the basic structure of the Constitution.'[388]

Proclamation of Emergency in 1998

In May 1998, Pakistan's neighbour, India, tested several nuclear devices in the desert of Rajasthan.[389] Shortly afterwards on 28 May 1998, Pakistan's President issued a Proclamation of Emergency under clause (1) of Article 232[390] and issued an order under clause (2) of Article 233[391] suspending all constitutionally guaranteed fundamental rights.[392] The constitutionality of both orders were challenged in the case of *Farooq Ahmad Leghari v. Federation of Pakistan.*[393] In a carefully argued judgment the Supreme Court decided that it did have the power to examine both the constitutionality of the imposition of a state of emergency and the suspension of the fundamental rights. The Supreme Court did not invalidate the declaration of the state of emergency itself but found that the suspension of fundamental rights was in itself unwarranted being disproportionate to the level of external aggression faced by Pakistan. Significantly, the Supreme Court held that even the suspension of fundamental rights did not affect the operation of Article 4 of the 1973 Constitution, which provides that: 'To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and every other person for the time being within Pakistan.' The Supreme Court referred to a wide range of legal materials, including the International Covenant on Civil and Political Rights and the European Convention on Human Rights and did not shy away from stressing the importance of being seen as progressive and dynamic, especially in respect of the enforcement of fundamental rights.[394]

388 *Ibid*., at p. 1436. Justice Mamoon Kazi was the only judge to hold certain parts of Article 63-A to be unconstitutional and void.

389 India detonated nuclear devices on 11 and 13 May 1998.

390 Clause (1) of Article 232 of the 1973 Constitution provides that, 'If the President is satisfied that a grave emergency exists in which the security of Pakistan, or any part thereof, is threatened by war or external aggression, or by internal disturbance beyond the power of a Provincial Government to control, he may issue a Proclamation of Emergency.'

391 Clause (2) of Article 233 of the 1973 Constitution provides that,

> 'While a Proclamation of Emergency is in force, the President may, by Order, declare that the right to move any court for the enforcement of such of the Fundamental Rights conferred by Chapter I to Part II as may be specified in the Order, and any proceeding in any court which is for the enforcement, of any of the rights so specified, shall remain suspended for the period during which the Proclamation is in force, and any such Order may be made in respect of the whole or any part of Pakistan.'

On 13 July 1998, the complete suspension of all fundamental rights was reduced to a suspension of the fundamental rights guaranteed by Articles 10, 15, 16, 17, 18, 19, 23, 24 and 25.

392 On the same day, Pakistan detonated several nuclear devices in what may be described as a retaliatory nuclear test.

393 PLD 1999 SC 57.

394 This was the third time that fundamental rights had been suspended under the 1973 Constitution. The first suspension was imposed by Zulfiqar Bhutto in 1973 but was in fact a continuation of an existing suspension. It was lifted in August 1974. However, with the imposition of martial law in 1977 the fundamental rights were again suspended: section 2(3) of the Laws (Continuance in Force) Order 1977. Fundamental rights were restored in 1985: section 1 of the Proclamation of Withdrawal of Martial Law 1985.

Chief Justice Ajmal Mian did not mention Islam once in his decision, but other judges did. Justice Irshad Hasan Khan found that Islam supported the contention that a court had jurisdiction to examine whether the pre-conditions required for the issuance of a Proclamation of Emergency existed or not.[395] Justice Muhammad Bashir Jehangiri was the only judge to discuss the issues in the light of the status of Islamic law and Islam in the legal system of Pakistan. He found that those fundamental rights which 'have the element of Islamic mandate are not amenable to any change or subject to any usurpation by way of suspension for days much less than for years together.'[396] Justice Jehangiri concluded his judgment with the following observation:

> 'Even if a Proclamation of a State of Emergency was justified as we have held, the suspension of Fundamental Rights were unwarranted a move which created fresh doubts about the intention of the Government. Not only the Government revealing the extent of its faith in the patriotism of ordinary Pakistanis, it was also insulting their intelligence unnecessarily.'[397]

Leghari[398] must be regarded as yet another instance of judicial re-assertion. It is interesting that judges would arrive at identical conclusions via very different routes: at one end of the spectrum there is Justice Mian's entirely secular approach, firmly rooted in Western jurisprudence, and on the other there is Justice Jehangiri's reliance on the status of Islam in the legal system and its importance for the protection of fundamental rights. What is, however, most striking is that Justice Jehangiri's reliance on Islamic law elevates fundamental rights to a qualitatively higher importance than Justice Mian's secular approach: according to Justice Jehangiri those human rights that have an Islamic mandate cannot be suspended at all. Unfortunately, Justice Jehangiri does not enumerate which of the fundamental rights enjoyed complete protection though he gives an indication at the end of his judgment. There he states that he regretted that by its second order the government had removed from the suspension some fundamental rights but this order 'does not touch the freedoms which have a practical bearing on everyday life like the freedom from arbitrary arrest or the freedom of speech and association.'[399]

It should be noted that in the same year, the Supreme Court invalidated the Pakistan Armed Forces (Acting in Aid of the Civil Power) Ordinance 1998, which had allowed civilians to be tried by military courts.[400] The Supreme Court recognised that the state was enjoined to make laws facilitating the maintenance of law and order, 'which is the spirit behind the Objectives Resolution.'[401] However, in doing so, the constitutional provisions could not be permitted to be contravened. Another fallout of the proclamation of emergency was the Foreign Exchange (Temporary Restrictions) Act 1998, which limited the rights of holders of Pakistani foreign currency accounts to expatriate foreign currency. Instead, they were forced to exchange their foreign currency to Pakistani rupees at a rate stipulated by the government. Needless to

395 *Supra*, note 393, at p. 259.
396 *Ibid*., at p. 386.
397 *Ibid*., at p. 394.
398 *Ibid*.
399 *Ibid*.
400 *Liaquat Hussain v. Federation of Pakistan* PLD 1999 SC 504.
401 *Ibid.,* at p. 793.

say, the rate was significantly lower than the market rate. Relying on the decision of the Shariat Appellate Bench of the Supreme Court in *Qazalbash Waqf v. Chief Land Commissioner, Lahore*[402] where it had been held that in cases of compulsory acquisition of property the state had to pay the market value in compensation to the affected owner. As a result of the judgment, the restrictions imposed on the remission of foreign currencies were significantly reduced.

Coup d'Etat of 12 October 1999

Fifteen years after Zia-ul-Haq returned the country to democracy, having ruled the country for a period of eight years from 1977 onwards, another *coup d'état* occurred in October 1999. On 12 October 1999, the government of Prime Minister Nawaz Sharif, in power since 1997, was overthrown in a bloodless *coup d'état* by General Musharraf, the Joint Chief of Army Staff. In spite of the *prima facie* unconstitutionality of Musharraf's action, the population greeted the return to military rule with indifference, and in some quarters with relief. Nawaz Sharif had not managed to fulfil the expectations of Pakistan after his resounding victory in the 1997 elections, which had given him an absolute majority in both the upper and lower house of representatives (the Senate and the National Assembly). Economic stagnation, allegations of corruption, the ill-fated Kargil campaign in Kashmir, which had not only lead Pakistan to the brink of war with India but had also forced the Pakistani army into a humiliating withdrawal, had all weakened the popularity and authority of the Sharif government.

The legality of the *coup d'état* and its consequences was the subject of the case of *Zafar Ali Shah v. Pervez Musharraf, Chief Executive.*[403] The Supreme Court condoned the military takeover on the basis of the doctrine of necessity, holding that there had been a breakdown of the constitutional machinery that justified the intervention of the army. General Musharraf was allowed to rule the country for a period of three years so as to eradicate corruption, regarded as a prerequisite for a functioning democracy. In the context of this chapter, the most interesting aspect of the case is the resurrection of the basic structure doctrine: the *coup d'état* was regarded as a constitutional deviation. Therefore, the old legal order had not been replaced but continued to exist, albeit in a somewhat altered form. This had obvious implications for the law-making powers of General Musharraf: to what extent was he permitted to alter laws or even amend the constitution? The Supreme Court relied on *Achakzai*[404] and expressly confirmed that the case had indeed introduced the basic structure doctrine:

> 'We are of the considered view that if Parliament cannot alter the basic features of the Constitution, as held by this Court in Achakzai's case (supra), power to amend the Constitution cannot be conferred on the Chief Executive of the measure larger than that which could be exercised by Parliament. Clearly, unbridled powers to amend the Constitution cannot be given to the Chief Executive even during the

402 PLD 1990 SC 99.
403 PLD 2000 SC 869.
404 *Supra*, note 356.

> transitional period even on the touchstone of "State Necessity". We have stated in unambiguous terms in the Short Order that the Constitution is the supreme law of the land and its basic features, i.e. independence of judiciary, federalism and parliamentary form of government blended with Islamic Provision cannot be altered even by the Parliament.'[405]

Thus, the Supreme Court achieved the seemingly impossible: it validated the military takeover and at the same time imposed limitations on the powers of Musharraf to alter the 1973 Constitution. In the hands of Pakistan's higher judiciary, the basic structure of the 1973 Constitution appears to be reduced to very basic features. The role of Islam in this basic structure is ill-defined. Musharraf would most probably exceed the restrictions imposed by the Supreme Court if he were to declare Pakistan a secular state. However, a removal of the Hudood Ordinances would in all likelihood not be regarded as in interference with the basic structures of the legal system.

Enforcement of Shari'ah Act 1991

On 18 June 1991, the government of Prime Minister Nawaz Sharif introduced the Enforcement of Shari'ah Act 1991. Despite its title and section 3, which provides that 'The Shari'ah that it is to say the Injunctions of Islam as laid in the Holy Qur'an and Sunnah, shall be the supreme law of Pakistan', the Act does very little in terms of concrete legal measures to enforce Islamic law. In its preamble the Act makes express reference to the Objectives Resolution and states that 'it is obligatory for all Muslims to follow the Injunctions of Islam of the Holy Qur'an and Sunnah to regulate and order their lives in complete submission to the Divine Law'. There follow a large number of policy directions to the State, all without any time limits, to include the study of Islam in the syllabi of educational institutions, to Islamise the economy, for the mass media to promote Islamic values and for obscenity, vulgarity and moral vices to be removed from society. The only concrete Islamisation measure is contained in section 4 which provides that:

> 'For the purpose of ths Act,
> (a) while interpreting the statute law, if more than one interpretation is possible, the one consistent with the Islamic principles and jurisprudence shall be adopted by the Court; and
> (b) where two or more interpretations are equally possible the interpretation which advances the Principles of Policy and Islamic provisions in the Constitution shall be adopted.'

Section 4, of course, did not break any new legal ground but merely codified what the Supreme Court had already established in any event. Interesting, however, are the exclusion clauses of the Act. Section 3(2) provides that, notwithstanding anything contained in the judgment of any court or law, 'the present political system, including the Majlis-e-Shoora [Parliament] and Provincial Assemblies and the existing system of Government, shall not be challenged in any Court, including Supreme Court, the Federal Shariat Court or any authority or tribunal.' Further, despite an express duty

405 *Supra*, note 403, at p. 1211.

of the government to eliminate interest in the shortest period of time possible, the Act preserves existing financial obligations of the government and Pakistan's international financial obligation. Finally, the Act provides that nothing in it shall affect the rights of non-Muslims and women as guaranteed by the Constitution.

Sub-section 2 of section 3 was challenged as repugnant to Islam before the Federal Shariat Court in the case of *Muhammad Ismail Qureshy v. Federal Government of Pakistan.*[406] The petitioner argued that sub-section 2 effectively put the government above Islamic law and was as such a contravention of Articles 2-A and 277(1) of the 1973 Constitution as well as of section 3(1) of the Enforcement of Shari'ah Act 1991 itself. Justice Tanzil-ur-Rahman held subsection 2 to be repugnant to Islam on three grounds. First, it curtailed the jurisdiction of the Federal Shariat Court. This ground must be regarded as dubious since the jurisdiction of the Federal Shariat Court only extends to the invalidation of laws on the basis of Islamic law but not on the basis of a violation of other constitutional provisions. Indeed, as will be seen below, even the fundamental rights did not form a permissible basis for the exercise of the Federal Shariat Court's Islamic jurisdiction. The second ground determined by Justice Tanzil-ur-Rahman was based on the fact that though the jurisdiction of the Federal Shariat Court did not extend to the Constitution itself, it nevertheless included ordinary laws which have a bearing on Pakistan's political system. The latter could not be taken away. The third ground, namely that section 3(2) is violative of the injunctions of Islam, must be regarded as the only valid ground advanced by Justice Tanzil-ur-Rahman. Further, Justice Tanzil-ur-Rahman examined the exclusionary provision pertaining to the existing financial obligations of the state contained in section 19 invalidating it as well:

> 'In view of the above, if any financial obligation, contract, agreement or commitment relates to Riba, that is, it involves lending and borrowing of loan on Riba, it is not valid, binding or operative to the extent of such Riba, such obligation, agreement, contract or promise relates to Federal Government, Provincial Governments, Banks or other financial institutions, firms, companies registered in Pakistan on the one hand and Pakistan citizens, on the other wherever they may be, Thus the impugned section 19 of the Shari'ah Act to the extent of involving Riba is declared repugnant to the Injunctions of Islam as laid down in the Qur'an and Sunnah of the Holy Prophet (p.b.u.h.).'[407]

The Enforcement of Shari'ah Act 1991 has not had any significant impact on the legal system of Pakistan. In fact, it could be argued that it was passed by the government to curb rather than to support judicial Islamic activism: the exclusion of existing contractual obligations of the government from the Islamic jurisdiction of the courts *prima facie* brought the Act in conflict with several judgments at high court level, discussed above, which had declared the charging of interest as un-Islamic and contracts providing for the payment of interest to be unenforceable. This contention finds support in the case of *Mahmood-ur-Rahman Faisal v. Secretary, Ministry of Law.*[408] The decision, which will be discussed in more detail further

406 PLD 1992 FSC 445.
407 *Ibid*., at p. 475.
408 PLD 1992 FSC 1.

below,[409] invalidated all laws providing for the payment of interest for being repugnant to the injunctions of Islam. The government submitted that the Federal Shariat Court should not decide the issue at this particular point in time since the government had indicated its commitment to eradicate interest from the economy by the passing of the Enforcement of Shari'ah Act 1991. Needless to say, the Federal Shariat Court dismissed the argument as a delaying tactic.

Nevertheless, the Enforcement of Shari'ah Act 1991 did achieve at least one concrete objective, namely statutory recognition of the principle first developed by Justice Zullah that statutes should be interpreted in the light of Islamic law. This principle was applied by courts. For instance in the case of *Allah Ditta v. The State*[410] the Lahore High Court had to decide whether a conviction for bribery under the Prevention of Corruption Act 1947 could be sustained if the evidence against the accused was procured by way of entrapment. Justice Abdul Majid Tiwani observed that the use of decoy witnesses should be examined in the light of Islamic law since Islamic law was now the supreme law of the land under the provisions of the Enforcement of Shari'ah Act 1991 adding critically that this was the case despite 'some of its apparent infirmities in the form of certain vague and exclusionary provisions aiming at saving the present political and economic system which is being perpetuated by a particular class to safeguard its own vested interest in violation of the basic concept of Shariah'.[411] He concluded that, on the basis of Islam, the evidence of a decoy witness could be used as evidence in court if the witness was not motivated by vengeance.

409 Below, Chapter XII.
410 PLD 1992 Lah 45.
411 *Ibid*., at p. 51.

Chapter 5
Islam and Fundamental Rights

The Objectives Resolution and Fundamental Rights

The Objectives Resolution has become an accepted interpretative tool of fundamental rights. The amorphous nature of the Objectives Resolution incorporating references to Islam and secular human rights, to social justice and Pakistan's place among other nations has transformed it from a tool for radical Islamisation to a 'jack of all rights, master of none'. The case of *Nasrullah Khan Henjra v. Government of Pakistan*[412] can serve as an example. The case was concerned with extradition proceedings. The petitioner, indicted in the US on drug-related charges, was to be extradited to the US in pursuance of an order of a Pakistani magistrate pursuant to the Extradition Act 1972 and an extradition treaty between the US and Pakistan. The petitioner argued that the extradition violated his fundamental right to remain in Pakistan guaranteed by Article 15 of the 1973 Constitution which provides that, 'Every citizen shall have the right to remain in, subject to any reasonable restriction imposed by law in the public interest, enter and move freely throughout Pakistan and to reside and settle in any part thereof.' Justice Saad Saood Jan held that on first sight the argument of the petitioner seemed unassailable, since his extradition would be in direct conflict with his right to remain in Pakistan. Justice Jan then stated that Article 15 had to be seen in the light of other constitutional provisions. However, in fact he interpreted Article 15 only on the basis of one other constitutional provision, namely the Objectives Resolution. The latter provides, *inter alia*, that:

> 'So that the people of Pakistan will prosper and attain their rightful and honoured place amongst the nations of the world and make their full contribution towards international peace and progress and happiness of humanity.'

Justice Jan held that:

> 'This goal of the Pakistani nation was reiterated in the various Constitutions that held sway in Pakistan at different times and is repeated in the Preamble of the present Constitution as well. It may also be mentioned that the Objectives Resolution

412 PLD 1994 SC 23.

> now forms a substantive part of the Constitution. It does not stand to reason, that, on the one hand, one Constitution after another should be reiterating the commitment of the Pakistan nation to attainment of an honoured place among the nations of the world, yet, on the other hand it should incorporate a provision which would make Pakistan a safe haven for those of its citizens who commit serious crimes abroad and then take refuge in Pakistan to avoid punishment . . . It therefore seems that Article 15 was never intended to afford protection against citizens who are accused of serious crimes in other countries.'[413]

Similarly, in the case of *National I.C.C. Corporation Ltd. v. Province of Punjab*[414] both Article 2-A and the Enforcement of Shari'ah Act 1991 were relied upon in order to allow a cooperative society to move the Lahore High Court for the enforcement of a fundamental right. The Lahore High Court held that its writ jurisdiction conferred by Article 199 stood enlarged with the introduction of Article 2-A and that, read with the Enforcement of Shari'ah Act 1991, the principle of equality in Islam had been extended to corporations.

Islam and Public Interest Litigation

The main use of Islamic law and the Objectives Resolution, was however, made in the context of Pakistan's manifestation of public interest litigation.[415] Public interest litigation emerged in Pakistan only in the early 1990s.[416] In the celebrated decision of *Darshan Masih v. The State*[417] Justice Afzal Zullah admitted as a writ petition a telegram sent by bonded labourers to the Supreme Court. In the telegram the labourers implored the Supreme Court to help them since they were threatened by their employers. As a matter of fact, the bonded labourers had been accused by their employer of a criminal breach of trust: they had received advance payment of wages but instead of working at the brick kiln so as to pay off the loan they had, it was alleged, 'slipped away'. Some of the bonded labourers were already in police custody and arrest warrants had been issued against others. Justice Zullah's attempts to resolve the matter were hindered by the fact that the police colluded with the owner of the

413 *Ibid*., at p. 27.

414 PLD 1992 Lah 462.

415 The concept of public interest litigation in the context of this book refers to two of types of cases. First, petitions which are filed in the interest of the general public for the enforcement of fundamental rights or in connection thereto. Secondly, cases which exhibit a discernible degree of judicial activism and address problems larger than those issues to be decided. For a useful account of the concept of judicial activism in Pakistan see Werner Menski, 'Introduction', in: Werner Menski, Ahmad Rafay Alam and Mehreen Kasuri Raza, *Public Interest Litigation in Pakistan*, Karachi, 2000, pp. 1-6. For an account of the emergence of public interest litigation in Pakistan, see Mansoor Khan, *Public Interest Litigation: Growth of the Concept and its Meaning in Pakistan,* Karachi, 1993.

416 It was the Indian judiciary which spearheaded public interest litigation in South Asia. For a recent overview, see Sangeeta Ahuja, *People, Law and Justice. Casebook on Public Interest Litigation*, New Delhi, 1997 (2 vols), and Indria Jaising, 'Public Interest Litigation; The Lessons from India', in: Roger Smith (ed.), *Shaping the Future. New Directions in Legal Services*, London, 1995, pp. 175-187. See also Martin Lau, 'Islam and judicial activism: public interest litigation and environmental protection in Islamic Republic of Pakistan', in: Alan Boyle and Michael Anderson (eds.), *Human Rights Approaches to Environmental Protection*, Oxford, 1996, pp. 285-302.

417 PLD 1990 SC 513.

brick kiln. Further, it appeared that bonded labour contracts as such were not illegal under Pakistani law.[418] Justice Zullah's approach to the matter was unique: he abandoned all rules of formal litigation and instead proceeded with the case as a mediator, listening to all sides, proposing solutions, and finally issuing court orders which had been agreed by all parties. Considering Justice Zullah's commitment to alternative, indigenous, Islamic forms of justice, his approach to public interest was not entirely surprising. In *Darshan Masih*, Justice Zullah for the first time equated different sources of human rights by stating that courts and lawyers were concerned with the enforcement of fundamental rights 'and other similar rights enshrined in the Constitution and the Objectives Resolution'.[419]

Justice Zullah suggested that these human rights should be collated in a self-contained code which 'might cover all aspects of human dignity, deprivations and misery, including those rights in this behalf which are ensured, in addition, as basic human rights in Islam.'[420] Justice Zullah added that, 'This Court has in the Shariat jurisdiction dealt with some of them.'[421] But was there a bar on incorporating into the 1973 Constitution additional rights? Justice Zullah thought not, holding that:

> 'There is no bar in the Constitution to the inclusion in such laws of these rights, in addition to the Fundamental Rights contained in Chapter I, Part II thereof . . . These aspects of the enforcement of Fundamental Rights guaranteed by the Constitution and other basic human rights ensured by Islam can, by law, be made also into an independent *inalienable* right, with self-operating mechanism for *its* enforcement as well.'[422]

It should be noted that Justice Zullah refused to invalidate existing bonded labour contracts on the ground that such a course of action would not be just to the owners of brick kilns who had invested their live savings in establishing brick kilns. The concrete result of the *Darshan Masih* case is a curious one: despite many references to human rights, to the exploitative nature of the advance payment of wages, and the low wages paid, Justice Zullah was only prepared to invalidate *peshgi*[423] provisions prospectively. The reason for this is most probably his decision in the case of *Qazalbash Waqf v. Chief Land Commissioner*[424] in which he had held the retrospective provisions of the land reform laws to be un-Islamic. It was therefore difficult for him to deprive the owners of brick kilns of their investments retrospectively. The only solace for bonded labourers was the fact that Justice Zullah left open the possibility that these contracts may be declared void on the ground of being against public policy as enunciated in Islam. However, he did not examine any of the contracts on that basis. As it happened, not a single bonded labour contract was ever declared to be void on that ground.

418 Bonded labour was declared illegal shortly afterwards, see the Bonded Labour System Abolition Act 1992.
419 *Supra*, note 417, p. 539.
420 *Ibid*., at p. 546.
421 *Ibid*.
422 *Ibid*.
423 'Advance'.
424 *Supra*, note 402.

The advent of public interest litigation in Pakistan was closely linked to the Islamisation of the legal and judicial discourse: since the early 1990s it has become commonplace for judges to make references to Islamic law and to apply fundamental rights in an 'indigenised' manner, namely by interpreting them in the light of Islam. Without doubt it was Justice Afazal Zullah, Pakistan's Chief Justice in the early 1990s, who was primarily responsible for the initiation of this trend. In 1991, he convened a Chief Justices Committee in Quetta, where he agreed with the Chief Justices of the four High Courts and the Federal Shariat Court a 'Scheme for the Protection of Human Rights of Classes of Society in the Country', commonly known as the 'Quetta Declaration'. The introductory words of the document, reprinted in the Pakistan Legal Decisions, is instructive, emphasising as it does the Islamic dimension of human rights in Pakistan:

> 'The mandate given to the nation by the founding fathers in the shape of the Objectives Resolution, now a substantive part of our Constitution, and other Articles of the Constitution, ensuring and guaranteeing all fundamental human rights and emphasising social, economic, and political justice to all has yet to fully achieve its promise in practical terms. The Judiciary, before and after independence, time and again has come to the rescue of the citizens by safeguarding their rights whenever dictates of justice so demanded by following our own ethos and conscience . . . and by invoking directly, Muslim Law and Jurisprudence in individual cases for the protection of human rights in society . . . Superior Judiciary has clearly emphasised the need for a genuine effort for reconstruction of the Islamic concepts in this field and for evolving steps in an indigenous manner for guiding and motivating the citizens and the State for asserting, promoting and enforcing the legal rights of citizens guaranteed and provided by Islam, the Constitution and the Law.'[425]

The aim of the Quetta Declaration was to ensure that all citizens were aware of their rights and obligations as provided for under three distinct sources of law: Islam, the Constitution and other laws. More concretely, all courts resolved to 'strive for realising the objectives set out in the "Objectives Resolution" as well as in the "Constitution" with particular emphasis on Islamic social justice'.

The Quetta Declaration envisaged the creation of a complex system of human rights committees stretching from local levels to the Supreme Court of Pakistan. At the top was the 'Central Council for Awareness and Enforcement of Human Rights and Obligations' consisting of senior judges of all superior courts and the vice-chair of the Pakistan Bar Council supported by various federal ministers, the attorney general, the ombudsman, the chair of the Council of Islamic Ideology, a senior journalist and other members 'from different walks of life'. Similar constituted councils were to be set up at provincial level. The practical implementation of the scheme at ground level was to be carried out by the human rights committees. The committees consisted of judges, police officers, human rights' activists, minority and women's representatives, the civil service and non-governmental organisations. The remit of the committees was to investigate and take cognizance of human rights violations. In a first step, they were asked to 'rectify the infringement by all lawful means of

425 PLD 1991 J 142, at p. 142.

persuasion', but should this fail they were enjoined, through their lawyers, to take legal action in existing legal fora. The remit of the committees was not confined to just human rights violations: they were also asked to act as fora for the resolution of petty disputes of the poor by way of methods commonly described as alternative dispute resolution, namely negotiation, conciliation and settlement. In particular, the committees had to 'act as primary vehicles of social justice, an Islamic mandate, for maximisation of national wealth, and its circulation on Islamic principles'. It could be argued that the tasks assigned to the committees was impossibly wide, since they also included the holding of literacy programmes, environmental and consumer protection, the supervision of health and educational institutions in their respective areas and, as is evident in the quote, the introduction of an Islamic economic system.

The scheme was an ambitious one, trespassing on governmental functions and conflating the role of the judiciary with that of social activists and governmental policy-makers. As it happens, the scheme was never realised in full: there were no resources available and the scheme, being closely associated with Justice Zullah himself, died when Justice Zullah retired from the Supreme Court in 1992. Nevertheless, the Scheme can serve as a starting point for an investigation of Pakistan's radical reformulation of human rights on the basis of Islam.

Public interest litigation, once recognised and introduced to Pakistan through *Benazir Bhutto*[426] and *Darshan Masih*,[427] found in the country's superior courts a fertile ground. Within a year, there were public interest cases in most high courts. For instance, the High Court of Lahore initiated its first public interest litigation case in pursuance of its *suo moto* jurisdiction. In *The State v. Senior Superintendent of Police*[428] Justice Muhammad Munir Khan took it upon himself to assume *suo moto* jurisdiction in order to investigate the high incidents of so-called stove blasts. The blasts invariably injured and killed young, recently married, women, and there was a suggestion that they were in fact dowry murders disguised as unfortunate domestic accidents. Justice Munir Khan justified the exercise of his jurisdiction as follows:

> 'In this view of historical perspective of relevant provisions of the Constitution and provisions of inherent powers under section 561-A of the Code of Criminal Procedure, section 151 of the Code of Civil Procedure, Article 2-A of the Constitution of Islamic Republic of Pakistan 1973, clause 22 of the Letters Patent (Lahore), I have reached the conclusion that to secure the ends of justice and to protect the life, honour and property of the citizens, in cases of cruelty, atrocities and highhandedness and to save the people from deaths/injuries from stove bursts, the High Court has vast authority to undertake *suo moto* assumption and/or exercise its jurisdiction in accordance with law.'[429]

This, however, did not mean that all courts were willing to abandon traditional rules of *locus standi*. A case in point is *Muntizma Committee v. Director, Karachi Development Authority,*[430] a case concerned with the attempt of a housing association to stop certain construction projects in the vicinity of its neighbourhood carried out

426 *Supra*, note 263.
427 *Supra*, note 417.
428 PLD 1991 Lah 224.
429 *Ibid*., at p. 226.
430 PLD 1992 Kar 54.

by the Karachi Development Authority. Justice Syed Haider Ali Pirzada refused the Committee standing stating that its grievance came not within the definition of public interest litigation, which according to him was meant for 'little Pakistanis in large numbers seeking remedies in Courts.'[431] Therefore, public interest litigation did not, according to him, extend to a case of an association or residents' society suing on behalf of its members where its own interests are not affected and where its members 'do not answer the description of little Pakistanis'.[432] It is interesting to note that there was no reference to Islamic law or to the Objectives Resolution in this case at all: this can be taken as a further indication that Islamic law in the context of Pakistani law manifested itself on the plane of constitutional law as an enhancement rather than a restriction to access to justice.

This becomes clearer with the case of *Al-Jehad Trust v. Manzoor Ahmad Wattoo*[433] which represents the first public interest litigation case against corruption. At issue was the disbursement of government land, more specifically residential plots, by the former Chief Minister of Punjab, Manzoor Ahmad Watoo. On account of newspaper reports, the Lahore High Court *suo moto* enlarged the scope of the petition so as to institute an 'inquisitorial probe 'into all allotments of residential land by prime and chief ministers since the lifting of martial law in 1985. This order brought three former prime ministers, namely Mustafa Jatoi, Benazir Bhutto and Nawaz Sharif before the Lahore High Court. It was Nawaz Sharif who contested the jurisdiction of the court, arguing that the Lahore High Court enjoyed no *suo moto* jurisdiction under Article 199 of the 1973 Constitution.[434] The Lahore High Court rejected this argument and declared all allotments made by the three Prime Ministers to be illegal having been made without lawful authority.

In the second *Al-Jehad Trust v. Manzoor Ahmad Wattoo*[435] case the Lahore High Court dealt more extensively with the issue of jurisdiction. Justice Abdul Majid Tiwana expressly distanced himself from the precedents established by English common law and colonial law and noted with regret that the present legal system was a hangover of colonial times which 'continues to hold that field even now despite the introduction of Islamic concept of justice though by intermittent and half-hearted measures, mostly due to the Westernised legislators and British-system trained lawyers and Judges.'[436] He contended that 'to go back to our splendid judicial heritage based on Divine Law is considered to be a retrograde step despite the fact the very basis of our State is Islam.'[437] Referring to the Objectives Resolution, Article 2-A and the Enforcement of Shari'ah Act 1991 he concluded that the 1973 Constitution had a predominantly Islamic character under which no one, not even a head of state, stood above the law and where everybody was accountable to a 'Muslim Qazi who has an exalted place in the administrative and judicial set-up.'[438] Therefore, even the argument advanced by

431 Ibid., at p. 61.
432 *Ibid.*
433 PLD 1992 Lah 855.
434 Benazir Bhutto and Ghulam Mustafa Jatoi did not submit any defence and chose not to participate in the proceedings.
435 PLD 1992 Lah. 875.
436 *Ibid.*, at p. 893.
437 *Ibid.*
438 *Ibid.*, at p. 895.

the respondents that there was no legal provision in the written law under which they could be held accountable for allegedly illegal allotments of residential land was without force since, according to Justice Tiwana:

> 'This being the position, the vacuum has to be filled in by Shariah, which is now statutorily recognised supreme law of the land, as held by the Supreme Court . . . Under Shariah, this Court, as a Qazi of a Muslim State, can lawfully ask the respondents to explain as to under what authority they have allotted a large number of plots, constituting public property, belonging to the entire nation, to a chosen few and for what reason? For this too this Court has the jurisdiction. In view of the above, this Court, in the exercise of its powers under Article 199(1)(a) read with Article 2-A thereof, coupled with the Quetta Declaration of the Chief Justices' Conference on Public Interest Litigation and Fundamental Rights read with sections 3, 4, and 5 of the Enforcement of Shariah Act 1991, has the jurisdiction to look into the grievance voiced in the press reports about the illegal and arbitrary allotments of the State-owned plots . . .'.[439]

A similar application of Islamic law took place in *Pervaiz Elahi v. Province of Punjab*[440] where it was held that:

> 'In an Islamic State the sovereignty belongs to Allah Almighty and is a sacred trust with those to whom it has been entrusted as trustees. They must discharge their functions and exercise their powers within the limits prescribed by Allah Almighty and for the good and welfare of people in accordance with Constitution and the law. The Constitutional provisions when read as whole, lead to indubitable conclusion that any such breach of trust is open to judicial scrutiny, by the Superior Courts to that limited extent.'[441]

The direct *suo moto* attack on high-ranking politicians by a single judge of the Lahore High Court lead to a strong response even before it could reach the Supreme Court. A year later, a two-member bench of the Lahore Court overturned all *Al-Jehad Trust* cases in an intra-court appeal.[442] The two-member bench disagreed with virtually every aspect of the *Al-Jehad Trust* cases holding that there was no *suo moto* jurisdiction emanating from the Enforcement of Shari'ah Act 1991 and Article 2-A. These laws were only available as guidelines for deciding cases properly brought before a court. Further, there was according to the Division Bench no vacuum in the law at all: politicians were accountable to parliament or the provincial legislative assemblies as provided for by the 1973 Constitution. In addition, the judges found that the defendants had been denied the right to be heard. Serious note was also taken of the judges' critical remarks about the prevalence of corruption in the country: in line with a judgment of the Supreme Court, courts were not supposed to lament about the

439 *Ibid*., at pp. 895 and 896.

440 PLD 1993 Lah 595.

441 *Ibid*., at p. 608. See also *Al-Jehad Trust v. Pakistan Bait-ul-Mal* 1993 Lah 905.

442 *Manzoor Ahmad Watoo v. Abdul Wahabul Khairi* PLD 1994 Lah 466. It should be noted that the fact that the *Al-Jehad Trust* cases were in fact overturned by this decision is at times ignored by the literature on public interest litigation in Pakistan. See, for instance, Werner Menski, Ahmad Rafay Alam and Mehreen Kasuri Raza, *Public Interest Litigation in Pakistan*, Karachi, 2000, at p. 90.

prevailing evils in the country.[443] Despite this retraction there is ample case law to show that references to Islamic law continued to be made in the context of accountability of public figures. In the case of *Muhammad Muqeem Khoso v. President of Pakistan*[444] a Member of the National Assembly was disqualified on the ground that he had misused his position to obtain a loan by fraudulent means. The Supreme Court upheld the disqualification stating, *inter alia,* that:

> 'I may point out that under the Objectives Resolution which has now become a substantial part of the Constitution of the Islamic Republic of Pakistan, 1973 . . . by virtue of Article 2-A thereof, sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan through their chosen representatives within the limits described by Him, is a sacred trust. Any abuse of position on the part of a chosen representative will amount to breach of the above sacred trust entailing heavenly and worldly punishment.'[445]

It should be noted that this view was not shared by all judges on the bench. Justice Sajjad Ali Shah found that Article 2-A was not attracted to the facts of the case since the loan was advanced not to the politician personally but to a partnership. As such, the bank could have taken the usual steps to recover the monies from the partnership and no breach of a 'sacred trust' could be made out.[446]

The application of Article 2-A and its 'sacred trust' provision was a useful basis from which to confirm the application and validity of laws aimed at maintaining the sanctity of political processes. Party political defections in the context of so-called 'horse-trading', i.e. the defection of a member of parliament to another party often through the offer of a bribe, have played an infamous part in Pakistani politics. Numerous laws were enacted to combat such activities. In *Sabir Khan v. Shad Muhammad Khan*[447] the Supreme Court of Pakistan held that:

> '"Defection" in its concept and political parlance refers to an act of political opportunism to obtain immoral gains and worldly advantages through exploitative approach of one's representation and political status. Such acts cannot be justified on any known principle of Islamic polity. Islam ordains the believers to stand by their promises and fulfil their commitments.'[448]

The application of Islamic law was, as could be seen from the above, firmly established in the context of public interest litigation creating a justification for the courts' jurisdiction. It also enabled courts to leave behind the strict confines of statutory law and to infuse Islamic concepts of morality and conduct into the legal system. However, as significant as the positive assertion of jurisdiction was the substantive relief granted. Accountability of public officials, despite not being firmly enshrined in any law, was one example of the positive impact of Islamic law on the substantive body of Pakistani law.

443 *Ibid*., at p. 478.
444 PLD 1994 SC 412.
445 *Ibid*., at p. 435.
446 *Ibid*., at p. 451.
447 PLD 1995 SC 66.
448 *Ibid*., at p. 241.

Public interest litigation, once implanted in Pakistan's legal soil, was quickly propagated by the country's superior judiciary. The Supreme Court decided a number of public interest litigation cases in 1994, the most important being the case of *Shela Zia v. WAPDA*[449] where the construction of a grid-station in a residential part of Islamabad was put on hold because of a potential violation of the constitutionally guaranteed right to life. However, there is little reference to Islamic law in these cases with one notable exception, namely the case of *Khalil-uz-Zaman v. Supreme Appellate Court.*[450] The case concerned the award of a death sentence imposed by a special court for speedy trials. The Supreme Court took the matter up in the exercise of its original constitutional jurisdiction under Article 184(3) of the 1973 Constitution, holding that it was a matter of public importance since under the Special Courts for Speedy Trials Act 1992 there was no further right to appeal to either the High Court or the Supreme Court. The Supreme Court referred extensively to Islamic law, admonishing lower courts to take utmost care when sentencing defendants to death. In the case at issue, the Supreme Court found that the court for speedy trial had imposed the capital punishment wrongly and in excess of its jurisdiction. The most direct application of Islamic law or, to be more precise, the Objectives Resolution and Article 2-A, occurred in the case of *Government of Sindh v. Sharaf Faridi*[451] which ordered the government to separate the judiciary from the executive. The Supreme Court based its decision on Article 2-A which, *inter alia*, provides that 'the independence of the judiciary should be fully secured'.

This was followed up in the celebrated *Al-Jehad Trust* cases on the independence of the judiciary. The first case, *Al-Jehad Trust v. Federation of Pakistan,*[452] must be regarded, in Pakistan's legal history, as an unprecedented display of judicial self-assertion. In a judgment covering more than 100 pages in the law report, Pakistan's Supreme Court laid down that the recommendation of the Chief Justice of the Supreme Court or the respective chief justices of the High Courts as to the appointment of judges to these courts was binding upon the President and the Executive in the absence of very sound reasons. Further, a candidate appointed by the President found to be unfit for judgeship by the a chief justice of a superior court was improper and invalid. The practice of appointing ad hoc judges to the Supreme Court while permanent vacancies existed was also held to be unconstitutional. Furthermore, the most senior judge of a superior court could expect to be appointed as the chief justice of that court should a vacancy arise. The practice of appointing acting chief justices who in turn recommended judges for appointment was also declared unconstitutional. The practice of getting rid of judges by transferring them to the Federal Shariat Court was also held to be *ultra vires* the Constitution. While holding so, the Supreme Court decided that this practice, specifically permitted under Article 203-C of the 1973 Constitution, was nevertheless unconstitutional in view of Article 290 of the 1973 Constitution, which guaranteed the tenure of a judge. In a most extraordinary break with past martial law, the Supreme Court distanced itself from the constitutional

449 PLD 1994 SC 693. For a discussion of this case, see Martin Lau, 'The Right to Public Participation: Public Interest Litigation and Environmental Law in Pakistan', in: 4 *RECIEL* 49 (1994).
450 PLD 1994 SC 885.
451 PLD 1994 SC 105.
452 PLD 1996 SC 324, *supra*, note 376.

changes inflicted by General Zia-ul-Haq in the form of the infamous Eighth Amendment and held that since 'the former Article [i.e. 203-C] was incorporated by the Chief Martial Law Administrator and the latter was enacted by the Framers of the Constitution, the same shall prevail and, hence, such an appointment shall be void.'[453] The political backdrop of the case is in itself revealing: at issue was the wholesale 'cleansing' of the judiciary by Prime Minister Bhutto following her re-election and the appointment of judges who at times had little legal experience but close connections to the Pakistan's People Party. The tenure of many of these judges was kept insecure since they were appointed as additional judges or ad hoc judges. The case therefore must also be regarded as a concerted effort to free the judiciary from political pressures.[454]

For the purposes of this book, the most striking aspect of this public interest litigation case is the heavy reliance placed by the Supreme Court on Islamic law. Chief Justice Sajjad Ali Shah, who was later forced to resign by his fellow judges, preceded the substantive part of his judgment with a lengthy exposition of the position of judges and their appointment under Islamic law and in Islamic history, concluding that:

> 'The purpose of quoting from Islamic books is to show as to how much importance is given in Islam to "consultation" and how much respect and binding force is given to the opinion of the Qazi or Judge and very wide powers given to the Chief Justice including all appointments of subordinate Judges under him.'[455]

The interpretation of the term 'consultation' accordingly had to proceed in the light of the Objectives Resolution, 'which is an integral part of the Constitution providing in unequivocal terms that the independence of the Judiciary shall be fully secured.'[456]

Justice Sajjad Ali Shah's reliance on Islam was echoed by Justice Ajmail Mian, who also started his deliberations on an Islamic note observing that the incorporation of the Objectives Resolution into the main body of the Constitution had made it imperative to examine the question of appointment of judges with reference to Islam. It should be noted that Justice Mian was not convinced that as a matter of Islamic law and history a chief *qadi*, once appointed, was entitled to appoint all subordinate judges. Nevertheless, Justice Mian liberally referred to concepts of Islamic law throughout his judgment as did Justice Manzoor Hussain Sial, the third judge to deliver a judgment.

Al-Jehad Trust reasserted the independence of the judiciary in emphatic, Islamic terms. In effect, the result arrived at was identical to the one achieved by the Indian judiciary in the two landmark decisions in *S.P. Gupta v. President of India*[457] and *Supreme Court Advocates-on-Record Association v. Union of India.*[458] The only difference between these cases is the extensive reliance on Islam in the *Al-Jehad Trust*[459] case. Nevertheless, it can be argued that this reliance was in fact not required

453 *Ibid*., at p. 366.
454 See Hamid Khan, *Constitutional and Political History of Pakistan*, Oxford, 2001, pp. 773ff.
455 *Supra*, note 376, at p. 389.
456 *Ibid*., at p. 403.
457 AIR 1982 SC 149.
458 AIR 1994 SC 268.
459 *Supra*, note 376.

in any strictly legal sense. As in the Indian cases, the matter could have been decided without any reference to Islam, since ordinary rules of constitutional interpretation were all that was required in order to arrive at the final decision. However, Islam provided moral support to the decision and made it more difficult for the government to attack the judgment itself: non-compliance would have amounted not only to contempt of court but also to a derogation and departure from Islam. References to Islam also provided the decision with a distinct Pakistani flavour: the Supreme Court was not just following a trend initiated by the Supreme Court of India but applied its own uniquely Pakistani laws and legal principles.

One year later, the Supreme Court revisited the question of appointments of judges in the second *Al-Jehad Trust v. Federation of Pakistan*[460] case. The case was concerned with the tardy implementation of the orders made in the first *Al-Jehad Trust*[461] case by Benazir Bhutto's government. Part of the difficulties resulted from the fact that the first *Al-Jehad Trust* case had decreed that the President should appoint judges to the superior judiciary after consultation with the Chief Justice of Pakistan. However, under Article 48(1) of the 1973 Constitution, the President had to act on the advice of the Prime Minister. This provision led to a dispute between the President and the Prime Minister, who both insisted that it was up to them to select and appoint judges albeit in consultation with the Chief Justice. To make matters more complicated, the position of Justice Sajjad Ali Shah, the Chief Justice, had itself been challenged in a writ petition pending before the Peshawar High Court, since he had been appointed Chief Justice in violation of the seniority principle established as a binding constitutional convention in the first *Al-Jehad Trust*[462] case. To make the confusion complete Benazir Bhutto's government was dismissed by the President under Article 58(2)(b) before the hearings started.[463] The Supreme Court decided that it was indeed the President who had to act on the advice of the Prime Minister in the appointment of judges subject to the overriding consideration that it was the Chief Justice who was entitled to declare a candidate fit for appointment, thereby effectively controlling who could become a judge. The arguments to be considered were largely of a technical nature but this did not prevent some of the judges referring to Islamic law. Justice Mian, for instance, held that the appointment of judges was a 'sacred trust which should be exercised in utmost good faith'.[464]

Judicial independence was also at issue in the case of *Mehram Ali v. Federation of Pakistan*,[465] a case concerned with the constitutional *vires* of the sweeping provisions of Nawaz Sharif's Anti-Terrorism Act 1997. The Act gave wide powers to law enforcement agencies to shoot persons likely to commit terrorist offences, allowed for searches of premises without a search warrant and for the trial of terrorist suspects *in absentia* and set up anti-terrorism courts whose decisions could not be reviewed by a High Court or the Supreme Court. All these provisions were held to be

460 PLD 1997 SC 84.
461 *Supra*, note 376.
462 *Supra*, note 376.
463 Benazir Bhutto's government was dismissed on 5 November 1996.
464 *Supra*, note 460, at p. 188.
465 PLD 1998 1445.

unconstitutional by the Supreme Court.[466] Islamic law was referred to only in one instance: the admissibility of confessions made to a police officer were held to be a violation of Islamic law.[467]

The Expansion of Fundamental Rights

The furtherance of fundamental rights on the basis of Article 2-A was not confined to public interest litigation cases but permeated a wide range of issues. Especially worthy of note is the case of *Government of N.-W.F.P. v. Muhammad Irshad*,[468] where the system of tribal areas, subject to separate laws and procedures from the rest of the country, was challenged. At issue was the issuance of the Provincially Administered Tribal Areas Criminal Law (Special Provisions) Regulation 1975, which set up special tribunals headed by a deputy commissioner for the trial and sentencing of anyone accused of criminal offences in a provincially administered tribal area. A similar system was introduced for the resolution of civil disputes.[469] Common to both criminal and civil matters were the unfettered powers of the deputy commissioner to determine the outcome of these cases. Further, the constitutionally guaranteed fundamental rights had only limited application in the tribal areas. The system introduced by these regulations was highly complex and, by maintaining a dual system of criminal law, inherently discriminatory.[470] Despite being highly discriminatory in nature, the dual legal system of tribal areas on the one hand and the rest of the country on the other, was constitutionally recognised and endorsed.[471] As such, it was difficult to challenge the system on the basis of a violation of Article 25 of the 1973 Constitution, which guarantees equality before law of all citizens. However, the Supreme Court found a solution to this hurdle in the Objectives Resolution:

> 'However, there is another aspect of the matter. No doubt, the Federal Government and the Parliament, the Provincial Government and the Provincial Assembly have been precluded by Article 247 from exercising their respective functions in the Areas and the same have been entrusted to the President and Governor but that does not necessarily imply that the President and Governor have and will have a free hand for all times to come in making laws of their own choosing for the Areas. In this context, reference may be made to the Objectives Resolution which now forms a substantive part of the Constitution (see Article 2-A). One of the clauses of

466 Two persons, sentenced to death under the Anti-Terrorism Act 1997, were executed before the order of the Supreme Court came into effect 15 May 1998.

467 *Supra*, note 405, at p. 1491.

468 PLD 1995 SC 281.

469 The tribunals were later termed '*jirgas*' thereby reintroducing the terminology of the Frontier Crimes Regulation 1911, which provided for the resolution of criminal cases by *jirgas* supervised by a political agent.

470 It is somewhat ironic that in two of the areas affected by the regulations, namely Dir and Swat, no *jirga* system had ever been in existence.

471 See Article 247 of the 1973 Constitution, which provides that no law passed by the national assembly or a provincial assembly applied to a tribal area unless specifically made applicable by the President. Further, the jurisdiction of the Supreme Court and the high courts does not extend to the tribal areas unless specifically extended to such an area by law. This was rectified in 1973 with the passing of the Supreme Court and High Courts (Extension of Jurisdiction of Certain Tribal Areas) Act 1973.

> the Resolution declares that in Pakistan the State power and the authority shall be exercised by the chosen representatives of the people. Although in view of the conditions that prevail there the Constitution-makers did deviate from the said declarations when making special provisions for the administration of the Areas but then they also envisaged the ultimate raising of the quality of the administration therein to the same status and position as was enjoyed by the rest of the country.'[472]

Referring to the fact that clause 6 of Article 247 allows the president or a governor to direct that an area shall cease to be a tribal area, Justice Saad Saood Jan continued:

> 'The clause [i.e. clause 6 of Article 247] when read with the Objectives Resolution places a special responsibility on the President and also on the Governor in respect of the Area. The extraordinary power that has been vested in them must be exercised in a manner that would facilitate the introduction of representative administration in those Areas and thus bring them at par with the other parts of Pakistan. Any legislative and administrative measure which obstructs or delays this ultimate goal must be held to be beyond the bounds of this power . . . There can be little doubt that the Regulations, trespassing as they did on the jurisdiction of the ordinary Courts, were pieces of retrograde legislation and in the absence of any visible justification, constituted in a way a negation of the goal set out in clause (6) *ibid*., and the Objectives Resolution.'[473]

The close link between Islam and human rights was perhaps best summarised by Justice Saiduzzaman Siddiqui in 1996:

> 'From the above discussion, it is quite clear that this Court, while construing the provisions of Article 184(3) of the Constitution, did not follow the conventional interpretative approach based on technicalities and ceremonious observance of rule or usage of interpetation. Keeping in view the avowed spirit of the provision, this Court preferred the interpretative approach, which received inspiration from the triad of provisions which saturated and invigorated the entire Constitution, namely, the Objectives Resolution (Article 2-A), the Fundamental Rights and Directive Principles of State Policy so as to achieve, democracy, tolerance, equality and social justice according to Islam. This liberal interpretative approach opened the door of "access to justice for all".'[474]

The mixing of secular constitutional provisions and Islamic law appears at times fuzzy, inviting the question whether Islam really added anything substantial to the evolution of public interest litigation and human rights jurisprudence in Pakistan. If Islam is viewed just as another basis for providing access to courts under the banner of 'justice', it could be argued that resort to Islam was in the nature of an ideological exercise devoid of any real legal import, since without doubt the widening of the

472 *Supra*, note 468, at p. 298.

473 *Ibid*., at pp. 298 and 299.

474 *Shahida Zahir Abbasi v. President of Pakistan* PLD 1996 SC 632, at p. 662. It should be noted that Siddiqui's view that the Supreme Court should exercise its jurisdiction under Article 184(3) on behalf of the petitioners was not followed by the two other judges on the bench. The case concerned the constitutionality of court martials under the Pakistan Army Act 1950. The Act could not be reviewed on the basis of the fundamental rights: see Article 8 of the 1973 Constitution.

locus standi could have easily been achieved without any mention of Islam. As could be seen above, there are some cases where reliance on Islamic law did have a real impact on the substantive issues of a case. It can be seen that some judges, especially Justice Afzal Zullah, went even further and decided that Islamic law could actually add to the existing fundamental rights. The most pertinent exposition of this principle can be found in *Human Rights Case No. 1 of 1992*[475] where Justice Zullah held that:

> '. . . the fundamental rights conferred in Chapter 1 of Part II are by and large very comprehensive and no internationally recognised Human Right would ordinarily remain out of them. While trying to discover the connection of a Human Right which is not, *prima facie*, conferred by Chapter 1 of Part II of the Constitution, the necessary exercise would be done under another mandate of the Constitution; namely that contained in Article 2-A thereof. It makes the principles and Provisions of the Objectives Resolution as substantive part of the Constitution and the Courts are obliged to give effect to it accordingly. There are such Human Rights in Islam which, when properly analysed and understood, definitely stand at higher pedestal as compared to the internationally recognised Human Rights. For example, the right to obtain justice and the right to dignity of man are more pronounced in Islam than they are in any other system. When interpreting the fundamental rights and their scope as conferred by Chapter 1 in Part II, corresponding or extended right in Islamic jurisprudence would obviously be kept in view.'[476]

However, Justice Zullah's approach must be taken to represent the high watermark of 'Islamic' human rights' jurisprudence. No other judge relied more heavily on Islamic law in the furtherance of human rights. Justice Zullah's almost complete disregard for the traditional role of the court as a place for the adjudication of disputes led to unprecedented situations: in the above-mentioned *Human Rights Case No. 1 of 1992*, Justice Zullah co-drafted two laws for the protection of women in open court and incorporated the draft laws in his decision, evidently expecting them to be passed. It should be noted that neither of them ever appeared on Pakistan's statute books.

Furthermore, a vacuum of law to be filled by reference to Islamic law did not occur very often. In fact, there are very few cases in which courts were faced with a situation where no statutory rules were available. One of these few cases is *Ahmad Latif Qureshi v. Controller of Examination*[477] where a student, wrongly accused of cheating in an examination, approached the Lahore High Court in order to have his paper counted on average marks. The court refused but it was found that, despite the fact that none of the applicable rules governed the particular situation, the petitioner was entitled to a remedy since:

> 'Although the Rules of the Board are silent and do not cover the situation in question [yet] this Court is not powerless to do complete justice in the cases where there is no prohibition to adopt a particular course. It is an established principle of law that in vacant areas the principle[s] of Islamic Law which are now enshrined in the Constitution as per Article 2-A of the Constitution, will take over and hence a

475 1993 PSC 1358.
476 *Ibid*., at p. 1363.
477 PLD 1994 Lah 3.

person illegally deprived of a benefit has a right to be restored to the same beneficial position which he enjoyed before he was deprived thereof.'[478]

The indiscriminate use of Islamic law, even in areas of law covered both by statutes and by case law did at times attract criticism from the Supreme Court. Most notable is the case of *Sikkander A. Karim v. The State*[479] which concerned a bail application. Justice Shafi Muhammad refused to grant bail to the accused on the ground that, *inter alia,* the accused had a 'lust for collecting wealth at the cost of poor persons' hard labour'[480] and that even Islamic law allowed exceptions to the general law only in cases of necessity. The Supreme Court took issue with the judge's forays into areas of law unrelated to the issues at hand[481] and in the same year Shafi Muhammad obediently observed in the case of *Pakistan Development Corporation (Private) Ltd. v. Ministry of Defence*[482] that:

'I would like to confine myself in the grip of bars and fetters of the traditional requirements of the said Code [i.e. the Code of Conduct prescribed by the Supreme Judicial Council] which says that "The oath of a Judge implies complete submission to the constitution and under the constitution to the law although the constitution, by declaring that all authority exercisable by the people is a sacred trust from Almighty Allah, makes it plain that justice is of Divine origin. It connotes full implementation of the high principles which are woven into the constitution as well as the universal requirements of natural justice." Hence I have tried to imprison the interpretation of the sentences in dispute within the four walls of the Act.'[483]

The terminology used by Shafi Muhammad, namely the 'bars and fetters of the Code' and his feeling of being 'imprisoned' by the requirement to apply just the statutory law and nothing else, is indicative of his displeasure with the order of the Supreme Court to decide cases within the four corners of the existing law.

Despite such sporadic criticism, references to Islam continued to be made either in order to fill vacuums and gaps in Pakistan's statutes or to make the decision appear Islamic. This trend becomes apparent in cases of corruption. For instance, corruption and governmental harassment of political opponents were at issue in the case of *Ahmad Nawaz v. State*[484] decided by the High Court of Karachi. The petitioner had moved the High Court, complaining that after having lost a local election he was being harassed by the District Commissioner. In particular, the Commissioner had demanded the payment of revenues which it was alleged the petitioner had not paid since 1987. When the matter came to court, the petitioner had become afraid of the potential repercussions of his boldness and tried to withdraw his petition. However, the High Court refused to allow him to do so, observing that 'the grievance of the petitioner is not peculiar to him but a growing menace of maladministration and it

478 *Ibid*., at p. 8. The student was allowed to resit the paper and the resit to be counted as a first attempt.
479 PLD 1995 Kar 73.
480 *Ibid*., at p. 105.
481 See *Sikandar A. Karim v. The State* 1995 SCMR 387.
482 PLD 1995 Kar 286.
483 *Ibid*., at p. 292.
484 PLD 1998 Kar 180.

was necessary to lay down guidelines for the exercise vested in the administrations by law . . .' Referring to the Objectives Resolution and the Principles of Policy of the Constitution the High Court proceeded to state the duties of a Deputy Commissioner which deserve to be quoted in full:

> 'A Deputy Commissioner in a district is a highest officer of administration and holds responsible position. He has to act in accordance with law at all time. Not only that but with the powers which are given to him in law more responsibilities are saddled on his shoulders corresponding to the powers. It is his duty to treat the poor and rich alike (and also winning and defeated candidate alike) in accordance with the Injunctions of Islam and teachings of Qur'an and Sunnah. He must treat all children of Adam (which includes non-Muslim citizens as well) without any discrimination which is not only the essence of Islamic way of life but also in consonance with Article 25 of the Constitution. He is a public servant and not a private employee of any person holding authority either in the federation or the federating unit. It is expected of the Deputy Commissioner that like Caesar's wife he should be above suspicion in his words, actions and dealings.'[485]

Equally pertinent are a number of cases which deal with court fees. In 1991, the Karachi High Court decided that in view of prevailing uncertainty regarding the jurisdiction of a high court to strike down existing legislation on the basis of Islam it was not possible to invalidate the Court Fees Act 1870. However, the Karachi High Court directed all courts to ignore sections 4 and 6 of the Sindh Finance Act 1990, which had amended the Court Fees Act 1870 with the result that court fees were increased.[486] It should be noted that the decision was informed by the fact that all parties, including the Government of Sindh, were in agreement that court fees as such were repugnant to Islam. Six years later, the same matter was argued, again this time in relation to the Punjab Finance Act 1973 which enhanced the court fees payable under the Punjab Court Fees Act 1870.[487] The Lahore High Court referred not only to Islam but also to the Universal Declaration of Human Rights and the European Convention on Human Rights before stating that:

> 'If a citizen is prevented from approaching a court of law on account of his inability to pay the court fee, surely the command of Allah Almighty and His Holy Prophet stands violated. The court fee act is a vestige of our colonial inheritance. Though we are celebrating 50th year of independence nothing substantial has been done to remedy this situation. On the other hand it is a matter of shame and regret that the State is resorting to methods like enhancement in court fee to earn profit from the administration of justice.'[488]

However, the Lahore High Court was equally unable to declare the court fees invalid since apart from the jurisdictional hurdles there was now a decision of the Federal Shariat Court on the matter which had declared all laws providing for the payment of

485 *Ibid*., at p. 185. For a similar application of Article 2-A in the context of what was coined 'administrative tyranny' see *Ahmad Nawaz v. The State* PLD 1998 Kar 180.

486 *Sindh High Court Bar Association, Karachi v. The Islamic Republic of Pakistan* PLD 1991 Kar 178.

487 *Hameed Ahmad Ayaz v. Government of Pakistan* PLD 1997 Lah 434.

488 *Ibid*., at p. 439.

court fees to be repugnant to Islam.[489] However, an appeal against that decision was pending before the Shariat Appellate Bench of the Supreme Court. The Lahore High Court therefore only ordered all courts in Punjab to ignore the increase of court fees rather than not to charge any court fees at all. This must be regarded as an ingenious compromise position since the Lahore High Court did not invalidate the amending law expressly but only ordered courts to ignore it.

In *Wajid Shamas-ul-Hassan v. Federation of Pakistan*[490] the Lahore High Court had another opportunity to examine the effect of Article 2-A on the legal system. The case concerned a Pakistani citizen whose name had been placed on the so-called exit control list, thereby preventing him from leaving Pakistan.[491] Criminal proceedings involving corruption charges were pending against him but bail had been granted. Justice Faqir Muhammad Khokhar referred in his judgment not only to the Objectives Resolution, but also to US and Indian case law, international human rights treaties and the Magna Carta in order to support his contention that the right to travel and to leave one's country were as important as other fundamental rights. The mere registration of a criminal case was in itself not sufficient to curtail this fundamental right, especially if the person affected had not been given any reasons or an opportunity to be heard. The latter was regarded as a violation of the principles of natural justice, which in turn had to regarded as 'basically the concept of Islamic jurisprudence.'[492] Consequently, the petitioner, a former High Commissioner to the UK, was allowed to travel abroad. Exactly the opposite result was arrived at in the case of *Naheed Khan v. Government of Pakistan*[493] where the Karachi High Court held that the failure of the government to provide reasons for placing a person on the exit control list was a mere technical flaw which did not infringe any constitutionally guaranteed fundamental rights. No reference to Islam was made.

Article 2-A was also relied on in a case of a woman who had been sold into marriage by her father. The woman approached the Karachi High Court, petitioning for an order restraining him from preventing her to approach a family court to have the marriage invalidated. She was concerned that her father might abduct her with the help of the local police. The Karachi Court granted the restraining order, observing that:

> 'Article 11 of the Constitution prohibits slavery and trafficking of human beings. Article 14 of the Constitution dictates that dignity of human beings shall be inviolable. Dignity and liberty are bestowed on every human being by God Almighty. In Islamic Republic of Pakistan all organs of the State have been charged to Islamic law of life by virtue of introduction of Article 2-A in the Constitution which adopts Objectives Resolution to be the substantive part of the Constitution.'[494]

489 *Dr. Mahmood-ur-Rehman Faisal v. Secretary, Ministry of Law and Parliamentary Affairs, Government of Pakistan* PLD 1992 FSC 195.

490 PLD 1997 Lah 617.

491 See section 2 of the Exit from Pakistan (Control) Ordinance 1981.

492 *Supra*, note 490, at p. 632.

493 PLD 1997 Kar 513. For a similar result see also *Anwar Saifullah Khan v. The Passport and Immigration Officer, Government of Pakistan* PLD 1998 Pesh 82 and *Babar Khan Ghori v. Federation of Pakistan* PLD 1999 Kar 402. However, in *Munawar Ali Sherazi v. Federation of Pakistan* PLD 1999 Lah 459 it was reiterated that to place a person on the exit control list without giving him cogent reasons and an opportunity to be heard was unlawful.

494 *Mst Gulzaran v. Amir Baksh* PLD 1997 Kar 309.

The overall impression conveyed by these cases is that Islamic law constituted an important additional source of law, which could be referred to and relied upon by judges to expand the scope of fundamental rights and to fill gaps present in the existing framework of statutory laws.

The Restriction of Fundamental Rights on the Basis of Islam

On the other end of the spectrum is the case of *Zaheeruddin v. The State*[495] which used Islamic law to reduce the scope of a fundamental right. The case concerned the constitutional validity of the Anti-Islamic Activities of the Quadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance 1984, which added the new sections 298-B and 298-C to the Pakistan Penal Code 1860, and amended section 99-A of the Code of Criminal Procedure 1898 and section 24 of the West Pakistan Press and Publications Ordinance 1963. The constitutional *vires* of the Ordinance, which was promulgated in the last year of President Zia-ul-Haq's martial law regime, were challenged by a number of Ahmadis, who had been charged with criminal offences under the provisions of the Ordinance.[496] In their appeal against the convictions it was argued that the Ordinance was in violation of the constitutionally guaranteed fundamental right to freedom of religion as provided in Article 20 of the 1973 Constitution. Article 20 provides that:

'Subject to law, public order and morality:

(a) every citizen shall have the right to profess, practise and propagate his religion; and

(b) every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions.'

The Ordinance has to be seen in the light of a legal development, which began in 1974, when the Government of Prime Minister Zulfiqar Bhutto declared all members of the Ahmadiyya community to be non-Muslims. Up to then, the Pakistani state had regarded Ahmadis as a religious minority within Islam. Members of the community were therefore governed by Muslim personal law in the area of family law. They were furthermore allowed to contest elections as Muslims and were able to assume public office reserved for Muslims. In short, their legal status was not any different from that of any of the other Muslim communities in Pakistan such as, for instance, the majority Sunni sect or the minority Shia sect. Attempts to declare Ahmadis to be non-Muslims had up to 1974 been firmly rejected by both the respective Governments and Pakistan's higher judiciary.

495 1993 SCMR 1718.

496 For a comprehensive discussion of the history of the Ahmadiyya movement see Yohanan Friedmann, *Prophecy Continuous: Aspects of Ahmadi Religious Thought and its Medieval Background*, Berkeley: University of California Press, 1989. The Ahmadiyya movement was founded at the turn of the century by Mirza Ghulam Ahmad. Ahmad's followers regard him as a prophet, a claim which is rejected by other Muslim communities since it implies that Muhammad is not the final 'seal of the prophets'. It is estimated that there around three million Ahmadis currently living in Pakistan.

The spirited defence of the Ahmadiyya community is well illustrated in the case of *Abdul Karim Shorish Kashmiri v. The State of West Pakistan*[497] where it was held that Ahmadis as citizens of Pakistan were guaranteed by the Constitution the same freedom to profess and proclaim their religion as any other citizen of Pakistan and that Ahmadis were within the fold of Islam. The Court furthermore held the legal process as being incapable of determining who is a Muslim, holding that there was an 'absence of any legal right . . . to have this abstract question determined by any right legal process, unless it is somehow linked with any right to property or right to office . . .'[498] The court asserted that the true Islamic precepts and injunctions of Islam as manifested in the Holy Quran guaranteed freedom of religion in clear mandatory terms and concluded that the persecutions of Ahmadis 'are sad instances of religious persecution against which human conscience must revolt, if any decency is left in human affairs.'[499]

The change of the legal status of Ahmadis from Muslims to a non-Islamic religious minority was achieved by an amendment to Article 260 of the 1973 Constitution, which defines terms used in the Constitution. The Constitution (Second Amendment) Act 1974 added to these definitions a new clause 3 which provided that:

> 'A person who does not believe in the absolute and unqualified finality of the Prophethood of Muhammad (Peace be upon him) the last of the Prophets or who claims to be a Prophet, in any sense of the word or of any description whatsoever, after Muhammad (Peace be upon him), or recognises such claimant as a prophet or a religious reformer, is not a Muslim for the purposes of the Constitution or the law.'

The new clause was clearly aimed at Ahmadis, since it was alleged that Ahmadis regard Mirza Ghulam Ahmad, the founder of their religious movement, as a Prophet. The legal effect of the re-definition of Ahmadis as non-Muslims was, however, limited. They were barred from contesting general elections as Muslim candidates or voters and were given special minority representation in parliament along with Christians, Hindus, Sikhs and other non-Muslim communities but attempts to prevent Ahmadis from describing themselves as Muslims under Pakistan's civil law failed. In *Abdur Rahman Mobashir v. Amir Ali Shah*[500] the High Court of Lahore decided that no permanent injunction could be granted to bar Ahmadis from continuing to perform religious practices associated, as it was alleged by the petitioners, exclusively with Islam as defined by the majority Sunni community. The court held that civil law could only be used to protect rights of a legal character and explained that religious practices or religious terms could never constitute a proprietary right, stating that 'a suit regarding such matter is only competent if it involves dispute about right to property or office.'[501] The Lahore High Court furthermore held that religious terms did not fall within the domain of intellectual property law either, holding that:

> 'Rights in trademarks or copyrights are matters which are the concern of the statutory law. There is no positive law investing the plaintiffs with any such right to debar

497 PLD 1969 Lah 289.
498 *Ibid*., at p. 307.
499 *Ibid*., at p. 308.
500 PLD 1978 Lah 113.
501 *Ibid*., at p. 143.

> the defendants [i.e. the Ahmdaiyya community] from freedom of conscience, worship, or from calling their places of worship by any name they like.'[502]

The Court further held that neither public nuisance law nor any direct application of Islamic law based on the equitable jurisdiction of 'equity, justice and good conscience' could be used so as to prevent Ahmadis from calling themselves Muslims. Consequently, a further constitutional amendment, carried out under the provisions of the Constitution (Third Amendment) Order 1983, clarified the definition of non-Muslims as contained in Article 260 by, *inter alia,* adding a new sub-clause (b) which states that:

> '"non-Muslim" means a person who is not a Muslim and includes a person belonging to the Christian, Hindu, Sikh, Buddhist or Parsi community, a person of the Quadiani group or the Lahori group (who call themselves "Ahmadis" or by any other name), or a Bahai, and a person belonging to any of the scheduled castes.'

The difficulties in using the ordinary civil law to curb the religious practices of the Ahmadiyya community was overcome by resorting to the area of criminal law: for Ahmadis to call themselves Muslims was now elevated to a criminal offence. The Ordinance XX of 1984 provides that:

> '298-B. Misuses of epithets, descriptions and titles, etc., reserved for certain holy personages or places.
> (1) Any person of the Quadiani group or the Lahori group (who call themselves "Ahmadis" or by any other name) who by words, either spoken or written, or by visible representation:
> (a) refers to, or addresses, any person, other then a Caliph or companion of the Holy Prophet Muhammad (peace be upon him) as "Ameer-ul-Mumineen", "Khalifa-tul-Mumineen", "Khalifa-tul-Muslimeen", "Sahabii" or "Razi Allah Anho";
> (b) refers to, or adresses, any person, other than a wife of the Holy Prophet Muhammad (peace be upon him), as "Ummul-Mumineen";
> (c) refers to, or addresses, any person, other than a member of the family (Ahle-bait) of the Holy Prophet Muhammad (peace be upon him), as Ahle-bait; or
> (d) refers to, or names, or calls, his place of worship as "Masjid";
> shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.
> (2) Any person of the Quadiani group or the Lahori group (who call themselves "Ahmadis" or by any other name) who by words, either spoken or written, or by visible representation, refers to the mode or form of call to prayers followed by his faith as "Azan", or recites "Azan" as used by the Muslims, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

502 *Ibid*., at p. 139.

298-C. Person of Quadiani group, etc., calling himself a Muslim or preaching or propagating his faith:

Any person of the Quadiani group or the Lahori group (who call themselves "Ahmadis" or by any other name), who, directly or indirectly, poses himself as a Muslim, or calls, or refers to, his faith as Islam, or preaches propagates his faith, or invites others to accept his faith, by words, either spoken or written, or by visible representations, or in any manner whatsoever outrages the religious feelings of Muslims, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.'

Legal representatives of the Ahmadiyya community initially tried to challenge the validity of the Ordinance before the Federal Shariat Court. In the case of *Mujibur Rehman v. The Federal Government of Pakistan*[503] the Federal Shariat Court upheld the validity of the Ordinance arguing that Ahmadis were not Muslims according to the tenets of Islam and that therefore any restrictions imposed on the Ahmadis' claim to be Muslims would not be repugnant to Islam as laid down in Qur'an and Sunnah.

The constitutional challenge of Ordinance XX of 1984 before the Supreme Court was therefore the last resort for the Ahmadiyya community to regain their right freely to practise their religion. It should be noted that Ordinance XX of 1984 has been vigorously enforced in Pakistan: up to 1992 a total of 1,790 criminal cases had been filed under Ordinance XX of 1984 and were pending before the courts.[504] The Supreme Court of Pakistan rejected by a majority decision of four to one the contention that Ordinance XX of 1984 was in violation of any of the fundamental rights guaranteed by the Constitution. The minority judgment delivered by Justice Shafiur Rahman held that the restrictions imposed on the Ahmadiyya community on the use of the terms "Azan", meaning the call for prayer, and "Masjid", the Urdu term used to denote a place of worship, were unconstitutional since they formed part of the Ahmadi religion having been used by them for a long time:

'Historically this [i.e. the naming of the place of worship by the Ahmadis as "Masjid" and calling of "Azan"] has been shown in the Lahore High Court case [PLD 1978 Lahore 113, quoted above] to be a tenet or a practice of Ahmadis or Quadianis not of recent origin or device and adopted not with a view to annoy or outrage the feelings and sentiments of non-Ahmadis and non-Quadianis. Being an essential element of their faith and not being offensive per se prohibition on the use of these by them and making it an offence punishable with imprisonment and fine violates the Fundamental Right of religious freedom of professing, practising and propagating and of [the] Fundamental Right of equality inasmuch as only Quadianis or Ahmadis are prevented from doing so and not other religious minorities.'[505]

Furthermore, he held that the restriction on the Ahmadis' right to propagate or to preach their religion, contained in section 298-C of the Pakistan Penal Code 1860 as

503 PLD 1985 FSC 8. For a detailed discussion of the Federal Shariat Court, see below, Chapter 6.

504 For an account of the persecution of Ahmadis, see, for instance, Asia Watch, 'Persecuted Minorities and Writers in Pakistan', *Asia Watch*, Vol. 5: 13, p. 3, and Amnesty International, *Pakistan: Violations of Human Rights of Ahmadis*, September 1991, AI Index: ASA/33/15/91.

505 *Supra*, note 495, at p. 1747.

amended by the Ordinance, to be in violation of the fundamental right to freedom of religion. Justice Shafiur Rahman concluded his argument by asserting that the wearing of batches by members of the Ahmadiyya community carrying religious messages pertaining to Islam would not constitute a criminal offence since 'for ascertaining its peculiar meaning and effect one has to reach the inner recesses of the mind of the man wearing or using it and to his belief for making it an offence.' This would be beyond the scope of the law and 'in any case it will infringe directly the religious freedom guaranteed and enjoyed by the citizens under the Constitution, where mere belief unattended by objectionable conduct cannot be objected to.'[506]

The majority judgment, delivered by Justice Abdul Quadeer Chaudhary, did not follow Justice Shafiur Rahman's liberal approach and dismissed the appeals. The decision can be reduced the following:

1. Certain religious terms are peculiar to Islam. In analogy with the law on trademarks and copyrights, these terms can be protected by the state from being used by other religious communities.
2. An Islamic state is under an obligation to protect Islam. In order to do this, it can prevent religious communities from claiming to be Muslims. It follows that Ahmadis are only allowed to use religious symbols and terms which are not already being used in connection with Islam.
3. The right of freedom of religion extends only to the integral and essential parts of a religion. It is up to the courts to determine the nature of these integral and essential elements of a religion. However, even these essential elements, which are protected by the constitutionally guaranteed right to freedom of religion can be restricted if their exercise leads to law and order problems.
4. The fundamental right to freedom of religion together with all other fundamental rights is subject to the limits imposed by Islamic law since Islamic law is the positive law of the land.

The most obvious difficulty with Justice Chaudhury's conclusions was the squaring of the demand that Ahmadis should be forced to coin their own terms for their religion with their constitutional right to freedom of religion. It was met by Justice Chaudhury with two arguments. First, courts were allowed to determine what constitutes a particular religion. He arrived at this conclusion by analysing two leading Indian decisions on freedom of religion, namely *Commissioner H.R.E. v. L.T. Swamiar* [507] and *Durgah Committee, Ajmer v. Syed Husain Ali*[508] which established the principle that '. . . though religious practices are protected by the term "freedom of religion" yet only such practices are so covered as a integral and essential part of the religion . . . it is for the Courts to determine whether a particular practice constitutes [an] essential part of the religion or not.'[509] Secondly, he stated that the right to freedom of religion could be restricted not only in the interests of the maintenance of law and

506 *Ibid*., at p. 1749.
507 AIR1954 SC 282.
508 AIR 1961 SC 1402.
509 *Supra*, note 495, at p. 1762. For an excellent discussion of the right to freedom of religion in India, see Marc Galanter, 'Hinduism, Secularism and the Indian Judiciary', in: *Philosophy East & West*, vol. 21, no. 4, 1971, reprinted in: Marc Galanter, *Law and Society in Modern India*, Oxford, 1989, pp. 237–259.

order but also by the limits on the scope of all constitutionally guaranteed fundamental rights imposed by the positive law of the land, i.e. Islamic law. The essential parts of a religion were, however, not protected as absolute rights under the fundamental right to freedom of religion. The State was allowed to interfere even with these 'essential' parts of a religion if these were liable to disturb law and order.

Applied to the Ahmadiyya community this argument led Justice Chaudhary to assert that, first, the Muslims of the Indian sub-continent regarded the movement as 'a serious and organised attack on its ideological frontiers', a 'permanent threat to their integrity and solidarity', and 'a threat to the integrity of "Ummah" and tranquillity of the nation', which 'is also bound to give rise to a serious law and order situation'.[510] Secondly, Justice Chaudhary held that Ahmadis had always claimed to be the only true Muslims, which lead him to conclude that:

> 'It is thus clear that according to the Ahmadis themselves, both the sections, i.e. Ahmadis and the main body cannot be Muslims at the same time. If one is Muslim, the other is not . . . However, being an insignificant minority [they] could not impose their will. On the other hand, the main body of Muslims, who had been waging a campaign against their [Ahmadis'] religion, since its inception, made a decision in 1974, and declared them instead, a non-Muslim minority, under the Constitution itself. As seen above, it was not something sudden, new and undesirable but one of their own choice; only the sides were changed. The Ahmadis are, therefore, non-Muslims; legally and constitutionally and are, of their own choice, a minority opposed to Muslims. Consequently, they have no right to use the epithets etc, and the Shaa'ire Islam, which are exclusive to Muslims and they have been rightly denied their use by law.'[511]

In the last part of his judgment, Justice Chaudhury concluded this argument by holding that, first, a Muslim could not be blamed for losing 'control of himself on hearing, reading, or seeing such blasphemous material as has been produced by Mirza Sahib [the founder of the Ahmadiyya movement].'[512] In such a scenario, the state was obliged to take actions against the Ahmadiyya community since 'if an Ahmadi is allowed by the administration or the law to display or chant in public, the Shaair-e-Islam, it is like creating a Rushdie out of him. Again, if this permission is given to a procession or assembly on the streets or a public place, it is like permitting civil war.'[513] The state's obligation to protect Islam was furthermore supported by the 1973 Constitution and the legal system of Pakistan. Justice Chaudhary arrived at this conclusion by offering a new interpretation of the position of Islamic law in Pakistan. Earlier Supreme Court decisions, especially *Hakim Khan*,[514] had rejected the claim that Islamic law could be directly applied by courts as a source of law or as a benchmark for the judicial review of legislation by arguing that only laws enacted in accordance with the provisions of the 1973 Constitution constituted valid law. The Islamisation of the legal system was, according to *Hakim Khan*, to be carried out by the elected

510 *Ibid*., at p. 1765.
511 *Ibid*., at p. 1768.
512 *Ibid*., at p. 1777.
513 *Ibid*., at p. 1777.
514 *Supra*, note 144.

representatives of the people and not by the High Courts or the Supreme Court. Courts were therefore barred from directly applying Islamic law so as to strike down laws which might be repugnant to Islamic law.

Zaheeruddin constituted a departure from this principle, since Justice Chaudhury held that the 'Constitution has adopted the Injunctions of Islam as contained in Qur'an and Sunnah of the Holy Prophet as the real and the effective law. In that view of the matter, the Injunctions of Islam as contained in Qur'an and Sunnah of the Holy Prophet are now the positive law.'[515] This principle applied to the interpretation of the right of freedom of religion led, according to Justice Chaudhary, to a situation where:

'Therefore, every man-made law must now conform to the Injunctions of Islam as contained in Qur'an and Sunnah of the Holy Prophet (p.b.u.h.). Therefore, even the Fundamental Rights as given in the Constitution must not violate the norms of Islam . . . Anything, in any fundamental right, which violates the Injunctions of Islam thus must be repugnant.'[516]

Zaheeruddin v. The State must be regarded as a problematic decision. Not only did it confirm the legality of the continued persecution of members of the Ahmadiyya community, which is in itself a worrying prospect, but it also attempted to establish a new interpretation of the scope and the limits of fundamental rights in Pakistan. This restrictive interpretation of fundamental rights stands in stark contrast with the development of public interest litigation in Pakistan, which has been based on the argument that Islamic law can be used to add new rights to the list of fundamental rights contained in the Constitution rather than to limit them.[517] The assertion that a religious term stands on the same footing as proprietary rights to the use of terms in commercial transactions constitutes a radical departure from established Pakistani law and creates a number of difficulties. Who is to determine which terms are the exclusive property of which religious community? The Supreme Court left this question open but indicated that in an Islamic state like Pakistan the state and the courts as the guardians of Islam were under an obligation to take measurers to prevent Islam from being 'usurped' by imposters. The actual mechanism of the registration of copyrights to religious terminology was, however, not discussed. In such a scenario, the state and the courts are reduced to the guardians of just one religion, i.e. the state religion, namely Islam.

The Supreme Court's redefinition of the role of Islamic law in Pakistan's legal system was also unprecedented: Islamic law was regarded as the positive law of the land, capable of restricting all fundamental rights, and binding on both the courts and the legislator. Consistently applied, such a principle would make the continued existence of statute law superfluous, since judges could apply Islamic law directly without any reference to other sources of law.

Finally, the tenor of the decision deserves comment. The Supreme Court's choice of words, like for instance its comparison of Ahmadis with Salman Rushdie, constituted a new element in the legal development of Pakistan and begged a troubling question: could it be that religious sentiments rather than sound legal logic constituted the

515 *Supra*, note 305, at p. 1774.
516 Ibid., at p. 1775.
517 For a discussion of these cases, see Muhammad Afzal Zullah, 'Human Rights in Pakistan', in: *Commonwealth Law Bulletin*, October 1992, pp. 1343-1384.

underlying *ratio decidendi* of the decision? *Zaheeruddin* has remained the only case in which the Supreme Court expressly restricted a constitutionally guaranteed right on the basis of Islamic law. Although it must be regarded as an aberration, it is nevertheless pertinent to point out that the case has not been overruled and thus, though in obvious conflict with the general trend of the other cases on human rights, it is still part of Pakistan's legal system.

Chapter 6
The Creation of Shariat Courts[518]

Zia-ul-Haq used his unfettered powers as a military dictator to initiate a radical programme of Islamisation.[519] As mentioned in the Introduction, the most visible and internationally noticed aspect of this programme was a set of Ordinances which introduced Islamic criminal law for a number of offences.[520] The effect of these measures is considered controversial. On one side of the spectrum is Kennedy, who in two articles argued that the Hudood Ordinances did not have a detrimental effect on the legal status of women.[521] This claim has been refuted by a number of academics and human rights activists.[522] In 1988, Justice Javaid Iqbal, while serving as a Supreme Court judge, stated in an article that:

> 'Ironically, those provisions of the law which were designed to protect women, now provide the means for convicting them for Zina. As a result of this inconsistency in the law, eight out of every ten women in jails today are those charged with the offence of Zina and no legal aid is available to them.'[523]

Irrespective of any particular quantitative evaluation of the new Islamic criminal laws, there can be no doubt that there has been and still is an intense and informed

518 The expression 'shariat courts' denotes all those courts which are constitutionally empowered to declare laws repugnant to Islam. They comprise the shariat benches of the High Courts and their successors, i.e. the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court.

519 For a good overview of Zia's reign, see Mushaid Hussain, *The Zia Years*, Lahore, 1990 and Ayesha Jalal, *The State of Martial Law: The Origins of Pakistan's Political Economy of Defence*, Cambridge, 1990.

520 These were the Offences against Property (Enforcement of Hudood) Ordinance 1979; the Offence of Zina (Enforcement of Hudood) Ordinance 1979; the Offence of Qazf (Enforcement of Hadd) Ordinance 1979 and the Prohibition (Enforcement of Hadd) Order 1979. All four are referred to as 'the Hudood Ordinances'.

521 See Charles H. Kennedy, 'Islamization in Pakistan; Implementation of the Hudood Ordinances', in: *Asian Survey*, XXVIII, 3 (1988), pp. 312–313; and Charles H. Kennedy, 'Islamic legal reform and the legal status of women in Pakistan', *Journal of Islamic Studies*, II, 1 (1991), pp. 45–55.

522 See especially Elisa Giunchi, *The Enforcement of the Zina Ordinance by the Federal Shariat Court in the Period 1980–1990, and its Impact on Women*, P.h.D. Dissertation, Cambridge, 1994; and Asma Jahangir, *The Hudood Ordinance: A Divine Sanction?*, Lahore, 1990.

523 Javaid Iqbal, 'Crimes against Women in Pakistan', in: PLD 1988 J 195.

debate on the effect of the Hudood Ordinances on human rights in Pakistan.[524] This debate has tended to overshadow other aspects of Zia's Islamisation measures. This applies especially to the Federal Shariat Court: there is not a single academic article or monograph which has examined the judgments of the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court under Article 203-D of the 1973 Constitution, i.e. the power to invalidate laws enumerated in Article 203-B if they are found to be repugnant to the injunctions of Islam, nor has there been any examination of the impact of these judgments on legal developments in Pakistan.[525]

However, as will be demonstrated in this section, the creation of the Federal Shariat Court radically transformed the legal system of Pakistan: for the first time in Pakistan's legal history a court was enjoined to examine substantial parts of the legal system on the basis of Islam. The Federal Shariat Court also acted as a court of appeal for decisions involving the Hudood Ordinances. This area of the Federal Shariat Court's jurisdiction, though interesting, has not been examined in this book, since it involves the application of specific, codified Islamic law. Similar to Islamic family law, this area of law is distinct and confined to the application of purely criminal laws based on Islamic law. Though without any doubt relevant to those individuals affected by these laws, these cases do not reveal much about judicial attitudes towards the Islamisation, nor does an examination of the application of Islamic criminal law reveal much about the impact of Islamic law on the legal system. At most, the application of the Hudood Ordinances confirms that trial courts and the Federal Shariat Court did not have any hesitation in implementing these laws. On the basis of the findings of the previous chapters, this does not come as a surprise: as could be seen, parts of Pakistan's judiciary had for a long time lamented the lack of Islamic criminal law, for instance in the context of proceedings under sections 488 and 491 of the Code of Criminal Procedure 1898. However, what remains to be explored is the impact of the judicial review of statutory laws on the basis of Islam on Pakistan's legal system. How many laws were invalidated and for what reason? What exactly is the jurisdiction of the Federal Shariat Court? How did the Federal Shariat Court interact with the other superior courts? What was the relationship and interaction between the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court?

The Shariat Benches

An important part in the implementation of the Hudood Ordinances was the creation of separate courts enjoined with the task of interpreting and applying the new Islamic criminal laws. The first attempt to achieve this emerged in the form of the Shariat Benches of Superior Courts Order 1978. It sought to create shariat benches in all four High Courts. The setting-up of specialist benches solely concerned with one

524 The negative impact of the Hudood Ordinances on human rights of women has been noted, especially by human rights organisations. For an overview see Human Rights Watch, *The Human Rights Watch Global Report on Women's Human Rights*, New York, 1995, pp. 148–154.

525 A selection of cases decided by the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court is discussed by Nasim Hasan Shah in 'Islamisation of Law in Pakistan', in: PLD 1995 J. 37. This appears to be the only mention in the available literature of non-Zina related decisions by the shariat courts.

particular area of law was somewhat unusual. Traditionally, the English legal system and also the colonial legal system did not feature specialist courts.[526] Prior to the Judicature Acts 1873, English courts fell into two classes: courts of equity or common law courts, depending mainly on the type of remedies available to them rather than the area of law over which they had jurisdiction.[527] In British India, the jurisdiction of courts was again defined not so much by areas of laws but by their territorial boundaries, the main distinction being drawn between the courts operating in the presidency towns on the one hand and in the provinces on the other. However, by the end of the 19th century, a unified system of courts had emerged. Pakistan followed the colonial precedent: apart from the creation of military courts during periods of martial law, the only specialist court ever set up were the family courts.[528] Since independence, Pakistani courts had applied Islamic family law to Muslims and there had never been any official demand for the creation of specialist Islamic law courts.[529] In fact, in the celebrated decision of *Kurshid Bibi v. Muhammad Amin*[530] the Supreme Court reasserted its authority to interpret the Qu'ran and Sunnah and to act in the context of a family law matter as a *qazi* court. However, the reason for the establishment of a distinct Islamic court can be gleaned from its jurisdiction. The shariat benches, and subsequently the Federal Shariat Court, were to act as a court of appeal in all cases arising under the new Islamic criminal laws. However, unlike ordinary courts, the shariat benches were also given an original jurisdiction to strike down certain laws if they were found to be un-Islamic.

By now, shariat courts empowered to strike down legislation have been in existence for more than two decades but it should be noted that the present system is the product of a long period of experimentation. The first appearance of shariat courts in the legal system was based on the provisions of the Shariat Benches of Superior Courts Order 1978 ('the 1978 Order'). It appears that the 1978 Order was never implemented but was substituted by the Constitution (Amendment) Order 1979, which introduced a new chapter 3-A in the Constitution dealing specifically with the shariat benches. The 1978 Order constitutes a prominent example of the high-handedness of the martial law regime, which tried to bring into a effect a major reform of the legal system without even bothering to amend the Constitution to do so. The underlying idea behind the 1978 Order was to constitute within the four High Courts and the Supreme Court separate benches consisting of three judges selected from the Muslim judges of the respective courts. These judges were to be appointed by the president, i.e. General Zia-ul-Haq. Significantly, the judges were to remain, for all intents and purposes, judges of their respective High Court or Supreme Court. The 1978 Order did not expressly state that the three 'shariat' judges would deal only with shariat bench matters and it must therefore be presumed that they were meant to continue to exercise their ordinary judicial functions as well. As will be seen later, this position was to change dramatically with the creation of the Federal Shariat Court, whose judges enjoyed considerably less judicial independence than their counterparts at the four

526 See M.P. Jain, *Outlines of Indian Legal History*, New Delhi, 1952.
527 See J.H. Baker, *An Introduction to English Legal History*, London, 1990 (3rd ed.), p. 132.
528 The West Pakistan Family Courts Act 1964.
529 The replacement of customary law in favour of Islamic law was completed in Pakistan with the passing of the West Pakistan Muslim Personal Law (Shariat) Application Act 1962.
530 PLD 1967 SC 97.

High Courts. The jurisdiction of the shariat benches was confined exclusively to the judicial review of legislation: section 6(1) of the 1978 Order provided that:

> 'A Shariat Bench may, either on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government or of its own motion; examine and decide the question [of] whether or not any law or provision of law is repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and the Sunnah of the Holy Prophet, hereinafter referred to as the Injunctions of Islam.'

This judicial review clause was to remain identical throughout the evolution of the shariat courts, as was the restrictive definition of law contained in section 2(a) of the 1978 Order: 'law' was defined as any law including any custom or usage having the force of law but did not include the Constitution, any fiscal law, Muslim personal law, any procedural law or 'any law relating to the levy and collection of taxes and fees or banking and insurance practice and procedure.' This definition of law severely circumscribed the power of the shariat courts to bring about a radical change of the legal system itself and it will be seen that the shariat courts initially adhered strictly to this restriction. The power to review some parts of the legal system on the basis of an Islamic repugnancy test was accompanied by an attempt to introduce a more Islamic courtroom procedure. There were to be no lawyers representing petitioners but only so-called 'jurisconsults'. These were to be experienced advocates admitted to appear before the superior courts, who were not only Muslims but also qualified as an '*aalim*', i.e. as a person learned in Islamic law. Only those advocates who were included on the panel of jurisconsults maintained by the shariat bench of a High Court or the Shariat Appellate Bench of the Supreme Court were allowed to appear before the shariat courts. The legal position of the jurisconsult was more akin to that of an expert witness than a lawyer representing his or her client. Section 7 of the 1978 Order provided that the jurisconsult should not plead for the party, 'but shall state, expound and interpret the Injunctions of Islam relevant to the proceedings so far as known to him; and a statement so made shall be recorded by the Shariat Bench . . . as a deposition of a witness and shall form part of the proceedings.'

Presumably to discourage multiple proceedings and the abuse of the judicial review provision as a means of interfering with ongoing litigation, the 1978 Order provided that any pending litigation whose outcome may depend on the outcome of a petition for judicial review of relevant legal provision should not be stayed but should be continued under the existing law. However, if the law was deemed to be un-Islamic before a final decision was reached in the main action, the issue would have to be decided on the basis of the decision of the shariat bench. As a result, the 1978 Order created an incentive to delay the main action as soon as a legal challenge had been mounted against a law relevant to the issue of the main action.

It appears that the 1978 Order was never implemented but was repealed and substituted by the Constitution (Amendment) Order 1979 ('the 1979 Order'), which came into force on 10 February 1979, i.e. a day after the coming into force of the Hudood Ordinances. The 1979 Order introduced a new chapter 3 A into the 1973 Constitution headed 'Shariat Benches of Superior Courts'. The original idea of the 1978 Order, namely the setting up of shariat benches in all four High Courts and a Shariat Appellate Bench in the Supreme Court was maintained as was the principle that the judges appointed to these benches were to remain ordinary High Court or

Supreme Court judges. The definition of 'laws' was, however, slightly modified: whereas the 1978 Order had categorically excluded from this definition all fiscal laws, the 1979 Order restricted the examination of fiscal laws on the basis of the injunctions of Islam to a period of three years from the commencement of the Order. As will be seen, the most controversial aspect of fiscal laws relates to the levying of interest or *riba* in Islamic law. The introduction of a time limit can therefore be regarded as major concession to those Muslim activists who were radically opposed to a fiscal system based on the payment of interest which they considered to be un-Islamic.

On the other hand, some of the restrictive provisions contained in the 1978 Order were modified, especially the provisions in relation to legal representation. Whereas the 1978 Order had allowed only jurisconsults approved by the shariat benches to appear, the Constitution provided now for two classes of legal representatives. First, Muslim High Court or Supreme Court advocates, the former only after a minimum of five years' practice before a High Court, and secondly, jurisconsults who did not need to have any formal legal qualification as long as they had been accredited by a superior court.[531] The advocates were still required to expound Islamic law, rather than to plead a case on behalf of their clients but the requirement of the advocate making a witness statement was removed, presumably because a lawyer cannot at the same time be an officer of the court and a witness in the same proceedings.

Any law declared un-Islamic by a shariat bench was to become ineffective on the day on which the decision came into effect but there was an unqualified right to appeal to the Shariat Appellate Bench of the Supreme Court within 60 days.[532] The new chapter 3A was silent about the procedure governing the production of evidence and the calling of witnesses, nor was there any provision to the effect that a shariat bench had the power to issue contempt of court proceedings. The 1978 Order had provided that the shariat court was invested with the same powers as a civil court acting under the Code of Civil Procedure 1908 and that the shariat benches and the Shariat Appellate Bench of the Supreme Court had the same powers to punish for contempt of court as the other superior courts.

Five months after the 1979 Order had come into effect, the chief justices of the High Courts and the Supreme Court passed the Shariat Benches of Superior Courts Rules 1979 ('the Rules'). The Rules dealt in some detail with the internal administration of the shariat benches, such as, for instance, the appointment of registrars, the form of petitions, and the pronouncement of decisions. They also addressed the question of who is qualified to appear before the shariat benches as a jurisconsult, ie. somebody who was not an advocate on record but was learned in Islamic law. Section 14 of the

531 The rule that only Muslim advocates were allowed to appear before the Federal Shariat Court was relaxed in that in cases involving non-Muslim parties the advocate representing such parties could also be a non-Muslim, see: *Muhammad Ashraf v. State* PLD 1988 SC 176 and Rule 2(e) of the Federal Shariat Court (Procedure) Rules 1981.

532 The date on which a decision repealing a particular law came into effect caused much confusion and was only clarified in 1988 in *Sardar Ali v. Muhammad Ali* PLD 1988 SC 287. In a lengthy decision, Justice Afzal Zullah held that any proceedings pending at the time of the effective date would be decided on the basis of the law as changed by the decision of the Federal Shariat Court unless an appeal had been filed against the decision of the Federal Shariat Court. However, any proceedings which had been proceeded to a final decree remained to be governed by the old, un-Islamic law.

Rules lists a number of qualifications, *inter alia*, any qualification from a recognised seat of Muslim learning in Pakistan or abroad, a degree in Arabic, or just a general recognition of somebody's knowledge and understanding of Islam. It seems from the list that knowledge of Islam, Arabic or Muslim learning were all considered to be sufficient to qualify as a jurisconsult and to be included in the panel of *aalims* maintained by the shariat benches.

The shariat benches constituted a new, if not revolutionary, measure to initial a gradual reform of the legal system. The careful confinement of the jurisdiction of the shariat benches meant that no laws directly concerned with the governance of the country, the running of the legal system and the economic order of Pakistan could be invalidated. The promulgation of the Hudood Ordinances one day before the setting-up of the shariat benches meant that an important part of Zia's Islamisation programme had already been implemented, though it will be seen later that the shariat courts used their powers of judicial review of legislation on the basis of Islam to strike down some sections of the Offence of Zina (Enforcement of Hudood) Ordinance 1979 as un-Islamic.[533]

However, the most significant feature of the shariat benches was their position within the legal system: the benches were not separate courts but were firmly embedded in the existing judicial structure. The judges appointed to these benches remained for all intents and purposes judges of their respective courts and enjoyed the same rights and privileges as judges of superior courts. Shariat benches therefore constituted a significant enlargement of the powers of judicial review. This was especially significant at a time when the other basis for the judicial review of legislation, namely the fundamental rights guaranteed by the Constitution, were held in abeyance. Theoretically at least, legislative measures introduced by Zia-ul-Haq as part of his martial law administration could now be challenged, not on the basis of fundamental rights but on the basis of an alleged repugnance to Islam. In such a situation, the only resort would have been for Zia-ul-Haq's government to appeal to the Shariat Appellate Bench of the Supreme Court whose decision was, of course, final.

The creation of the Federal Shariat Court radically altered the jurisdiction and structure of the system of shariat courts and can be regarded as an indication that Zia-ul-Haq had not contemplated this very real potential of a weakening of his wide power as Martial Law Administrator and President when he promulgated the 1978 and 1979 Orders. The shariat benches situated in each High Court were difficult to control, since for all intents and purposes they remained on a par with the other superior courts. Further, as will be seen in more detail below, there was a very real potential of conflicting decisions on what was and was not repugnant to Islam between the four shariat benches. Conflicting decisions in an area of law which was to be the main legitimisation to General Zia's otherwise unconstitutional claim to power would have weakened the credibility of his regime: what was the point in having a martial law dictator willing to make Pakistan a truly Islamic republic if even the country's judiciary could not decide on the content of Islamic law?[534]

533 *Hazoor Buksh v. The Governmen*t PLD 1981 FSC 145, overruled in *The Government v. Hazoor Buksh* PLD 1983 FSC 255..

534 See especially Edward Mortimer, *Faith and Power. The Politics of Islam*, London, 1982, pp. 221-229.

The Federal Shariat Court

The Constitution (Amendment) Order 1980 introduced, with effect from 26 May 1980, a new chapter 3A replacing the provisions inserted by virtue of the Constitution (Amendment) Order 1979. It also added a new clause to Article 199 of the 1973 Constitution, barring any court from judicially reviewing any martial regulations or orders made after the imposition of martial law on 5 July 1977, thereby preventing any challenge to the martial law regime from the superior courts, including the newly formed Federal Shariat Court.[535]

The new chapter 3A was, like its short-lived predecessors, concerned with the judicial review of legislation on the basis of the 'Injunctions of Islam'. The wording of many of the sections, like for instance the definition of 'laws', was in fact identical. Nevertheless, despite the appearance of continuity, the Constitution (Amendment) Order 1980 did in fact represent a significant departure, not only from the initially envisaged system of shariat benches but also from hitherto established constitutional and martial law practice.[536] The nucleus of the new chapter 3A was the creation of a completely new court, with its own personnel, its own jurisdiction and its own judges. The new Article 203-C established the Federal Shariat Court with its principal seat in Islamabad. The Federal Shariat Court was to have five members, including a chair. The members were to be either High Court judges or persons qualified to be appointed as High Court judges.

The appointment procedure was somewhat unusual: the members and the chair were to be appointed by the president, i.e. Zia-ul-Haq, but unlike the appointment procedure for judges to the superior courts, this appointment was to be made without the usual consultation with the Chief Justice of Pakistan. The terms of the appointment were also highly unusual. Members were appointed to hold office for a period not exceeding three years 'but may be appointed for such further term or terms as the President may determine'.[537] The radical weakening of judicial independence of the

535 See also section 4(1) of the Laws (Continuance in Force) Order 1977, which provided that 'No Court, tribunal or other authority shall call or permit to be called in question the Proclamation of fifth day of July, 1977, or any Order or Ordinance made in pursuance thereof or any Martial Law Regulation or Martial Law Order.'

536 Strange as the term 'martial law practice' may seem, it is nevertheless useful to describe practices which were followed during all periods of martial law in Pakistan, such as for instance the continuation of all substantive laws, the restriction of superior courts' power of judicial review, the establishment of military courts with jurisdiction over civilians, and a reluctance to introduce fundamental changes to the court structure. The latter must be considered especially significant, since the Supreme Court never ceased to exist despite Pakistan's frequent descents into martial law. The obsession of successive martial law dictators to establish a 'legal' basis for their illegal acts has not received any attention in the literature. However, important and interesting as it may be, any investigation into this phenomenon would go beyond the scope of this book.

537 See Article 203-C(4). The transfer of High Court judges without their consent to the Federal Shariat Court was held to be unconstitutional in *Al-Jehad Trust v. Federation of Pakistan* PLD 1996 DC 329. In that judgment, the Supreme Court also found that Article 203-C had been used by the executive to purge high courts of politically 'undesirable' judges. In particular, the Supreme Court found that the appointment of two Chief Justices of the Sindh and Lahore High Courts respectively as judges of the Federal Shariat Court had been *mala fide* in pursuance of political objectives. Ironically, on transfer to the Federal Shariat Court, the former Chief Justice of a High Court becomes the most junior judge of that court, thus adding insult to injury.

'judges' of the Federal Shariat Court was accompanied by an ingenious weakening of the judicial independence of the judges of the existing High Courts.[538] Sub-sections 4 and 5 of Article 203-C contained special provisions on the appointment of sitting High Court judges to the Federal Shariat Court. A judge of the High Court could only be appointed to be a member of the Federal Shariat Court for a period not exceeding one year. This period could only be extended with his consent and the consent of the President in consultation with the Chief Justice. In other words, a high court judge appointed to the Federal Shariat Court would undergo a 'probation' period of one year and his appointment came to an automatic end if not reappointed. This provision enabled the President to remove judges from High Courts since Article 203-C(5) provided that 'a judge who does not accept appointment as a member shall be deemed to have retired from his office . . .'.

An appointment to the Federal Shariat Court therefore meant immediate removal from the High Court. The judge could either accept the appointment and become a member of the Federal Shariat Court for one year, with the prospect of any further term dependent on the consent of the President, or could decline the appointment, which of course meant instant relegation into retirement. The tinkering with judicial independence was compounded by the fact that 'members' of the Federal Shariat Court were to swear a different oath than the judges of the superior courts which only obliged the maker of the oath to discharge his duties in accordance with law – there was no reference to the Constitution at all.[539]

The jurisdiction of the Federal Shariat Court was identical with the jurisdiction of the shariat benches but some elements of the 1978 Order, which had been omitted in the 1979 Order, were reintroduced. The Federal Shariat Court was to have the power of a court under the Code of Civil Procedure 1908 in respect of the gathering of evidence and the examination of witnesses and was given the power to punish its own contempt. There was now an express bar on any other court to hear a matter within the jurisdiction of the Federal Shariat Court, which in effect meant that only the Federal Shariat Court and on appeal, the Shariat Appellate Bench of the Supreme Court, could invalidate laws held to be repugnant to the injunctions of Islam.[540] The right to appeal to the Shariat Appellate Bench of the Supreme Court was unfettered. The composition of the Shariat Appellate Bench of the Supreme Court was very similar to the original shariat benches of the High Courts created under the 1979 Order: it was to consist of three Muslim judges of the Supreme Court who remained judges of the Supreme Court and who were appointed to the Shariat Appellate Bench on an ad hoc basis whenever an appeal was to be heard.

The emergence of a completely new court within the legal system of Pakistan constituted a blatant violation of the terms on which the Supreme Court had condoned Zia-ul-Haq's martial law,[541] a fact which had not escaped the attention of Zia-ul-Haq.

538 For a critical assessment of the independence of Pakistan's judiciary, see International Commission of Jurists, *Pakistan: Human Rights after Martial Law*, Karachi, 1987.

539 Third Schedule to the Constitution of Pakistan 1973.

540 It should be noted that this was only confirmed by the Supreme Court in 1992 in *Kaneez Fatima*, *supra*, note 292.

541 See *Begum Nusrat Bhutto*, *supra*, note 96. Zia-ul-Haq 'legalised' his constitutional amendments with the promulgation of the Provisional Constitution Order 1981.

In 1981, he introduced a new, provisional Constitution as a replacement of the 1973 Constitution and cleansed the judiciary of dissenters by forcing every judge to swear allegiance to the new Constitution or to face immediate retirement.[542]

Zia-ul-Haq's aim, namely the centralisation of the Islamisation process and, more importantly, close control over it, is reflected in a number of constitutional amendments introducing modifications to the jurisdiction of the Federal Shariat Court, its composition and the terms of appointment of its judges. The most significant of these modifications took place in respect of the membership of the court. The first step in the attempt to gain control over the judiciary was the promulgation of the Provisional Constitution Order 1981 ('the 1981 Order'). The 1981 Order replaced the 1973 Constitution, which continued to be held in abeyance as it had been since the promulgation of martial law in 1977. It drastically interfered with the independence of the judiciary: High Court judges could be transferred to the Federal Shariat Court without their consent for a period of up to two years[543] and cases could be transferred from one High Court to the other on the application of any of the parties to the Supreme Court.[544] The jurisdiction of the High Courts and the Supreme Court was so severely circumscribed that they could neither question the validity of any legislative measure taken by the martial law administration, nor could they interfere with any of the cases seized by the military courts.[545] The principal aim was the complete insulation of the martial law regime from the judiciary. Any constitutional challenge to the 'legalisation' of martial law was prevented by a radical weeding out of any of the judges who might be opposed to the measure: all judges of superior courts had to swear a new oath before the President, i.e., Zia-ul-Haq, *inter alia* 'to perform my functions honestly . . . in accordance with the Provisional Constitution Order 1981', and 'to abide by the Provisional Constitution Order, 1981.'[546] Any judge who did not take the new oath automatically ceased to be a judge. The allegiance of the judiciary to the new regime was cemented by section 16, which provided that 'the President as well as the Chief Martial Law Administrator shall have, and shall be deemed always to have had, the power to amend the Constitution[547].

The special oath to be sworn by a member or the chair of the Federal Shariat Court was shorter than the new oath of the judges of the other superior courts. Whereas the latter mentioned that a judge was to do 'right to all manner of people, according to law, without fear or favour, affection or ill-will' and was to abide by the Provisional Constitution Order 1981, the former had no such provision. More importantly, and clearly an omission, the Federal Shariat Court's oath did not oblige a prospective judge to swear that he is a Muslim. This was, for instance, required of the vice-president who had to swear that he was a Muslim and that he believed in 'the Unity and Oneness of Almighty Allah, the Books of Allah, the Holy Qur'an being the last of them, the Prophethood of Muhammad (peace be upon Him) as the last of the Prophets, and there can be no Prophet after him, the Day of Judgement, and all the

542 See the Provisional Constitution Order 1981.
543 Section 10(1) of the Provisional Constitution Order 1981.
544 *Ibid.*
545 Sections 4 and 15 of the Provisional Constitution Order 1981.
546 Section 17 of and Schedule to the Provisional Constitution Order 1981.
547 Section 16 of the Provisional Constitution Order 1981.

requirements and teachings of the Holy Qur'an.'[548] This omission was rectified by the Provisional Constitution (Amendment) Order 1981, which added the definition of a Muslim to Article 1 of the Provisional Constitution 1981:

> '"Muslim" means a person who believes in the unity and Oneness of Almighty Allah, in the absolute and unqualified finality of the Prophethood of Muhammad (peace be upon Him), the last of the prophets, and does not believe in, or recognise as, a prophet or religious reformer, any person who claimed or claims to be a prophet, in any sense of the word or of any description whatsoever, after Muhammad (peace be upon Him).'[549]

The aim of the definition was, of course, the exclusion of members of the Ahmadiyya sect, who had already been declared to be non-Muslims by the government of Zulfiqar Bhutto in 1974.

The tinkering with the composition of the Federal Shariat Court took a new turn with the insertion of a new Article 203-CC in the 1973 Constitution, which provided for the establishment of a panel of '*ulema*', i.e. persons well versed in Islamic law. In all cases before the Federal Shariat Court at least three *ulema* had to attend the sittings of the court and 'while so sitting, they shall have the same power and jurisdiction'[550] as a member. The implantation of judges not formally legally qualified was, however, short lived and was reversed by the Constitution (Second Amendment) Order 1981, which simply provided that the Federal Shariat Court 'shall consist of not more than eight Muslim members, including the Chairman, to be appointed by the President.' The previous strength of the court had been five judges.

The radical inclusion of members of the *ulema*, very much within the spirit of Islamic law, was undertaken well after the creation of the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court. In 1982, the judges of the Shariat Appellate Bench of the Supreme Court were to consist of three Muslim judges of the Supreme Court and no more than two members of the *ulema* to appointed by the President as ad hoc members. The *ulema* members could either be judges of the Federal Shariat Court or 'from out of a panel of Ulema to be drawn up by the President in consultation with the Chief Justice'.[551] The possibility of including judges of the court whose decisions were going to be reviewed by the Appellate Bench was constitutionally awkward, since it potentially breached the principle that nobody should be a judge in his or her own cause. The Federal Shariat Court included members of the *ulema* from 1985 onwards, when yet another amendment to the Constitution provided that the Federal Shariat Court should consist of eight judges, of whom not more than three should be members of the *ulema,* well versed in Islamic law.[552]

The actual decisions of the shariat courts and their impact on Pakistan's legal system will be examined in the next part of this book.

548 Schedule (Article 3) of the Provisional Constitution Order 1981.
549 New article 1A (a) inserted by section 2 of the Provisional Constitution (Amendment) Order 1981.
550 See section 2 of the Constitution (Amendment) Order 1981.
551 See the Constitution (Third Amendment) Order 1982.
552 See the Constitution (Third Amendment) Order 1985.

Chapter 7
The Islamisation of Laws in Practice I

The Decisions of the Shariat Benches

The Peshawar High Court was the only one of the four provincial high courts to report decisions handed down by its Shariat Bench. It is difficult to identify the reasons for the other three high courts' reluctance or for the Peshawar High Court's enthusiasm in deciding and reporting Shariat decisions.[553] Five judgments of the Shariat Bench of Peshawar High Court are reported but their case numbers indicate that there were at least 19 Shariat petitions which had been admitted for hearing in late 1979 and early 1980. All five reported cases provide ample illustration for the formidable power flowing from the newly conferred Islamic jurisdiction of the Shariat Bench. They also provide a first glimpse of the legal problems involved in a judicial review based on Islamic law. Appeals against decisions made by the other three Shariat Benches of the High Courts of Sindh, Punjab and Baluchistan indicate that a substantial number of petitions were filed under the new Article 202-B of the 1973 Constitution. The petitions fall into two categories. In the first category are petitioners who claimed that a law which has affected their rights or legal position is un-Islamic. Many of these cases involve property disputes based on pre-emption rights and murder cases, where the petitioner is appealing against a death sentence. The second category involves petitioners who approached the Shariat Benches in order to either change governmental policies perceived to be un-Islamic, like for instance the co-education of girls and boys or the organisational arrangements of the annual haj pilgrimage, or to have particular laws declared un-Islamic without having a personal interest in the matter. In the short time of their existence, the Shariat Benches did not exercise any *suo moto* jurisdiction unlike the Federal Shariat Court, which in the mid-1980s reviewed a large number of statutes in the exercise of its *suo moto* jurisdiction. It should be noted that there is not a single case where the government actually filed a petition to have a law declared repugnant to Islam. This is unsurprising, since it must

553 Reported case law of the Federal Shariat Court indicates that Shariat petitions were filed in the High Courts of Karachi, Lahore and Peshawar. However, apart from the Peshawar Shariat Bench only the Lahore High Court seems to have decided a petition filed under Article 203-D of the 1973 Constitution. This case was not reported but the appeal decided by the Federal Shariat Court is reported as *B.Z. Kaikus v. Federal Government of Pakistan* PLD 1981 FSC 1.

be presumed that the government would always be able to rectify any repugnance to Islam present in a law by taking legislative action. However, as will be seen later, there are some areas of law, such as laws imposing a ceiling on the maximum size of property holdings which could be owned by an individual, which were immune from amending legislation but could nevertheless be invalidated on the basis of Islam by the shariat courts.

The first case, *Naimatullah Khan v. Government of Pakistan,*[554] invalidated an important part of the Land Reforms Regulation 1972, which gave a tenant of agricultural land a first right of pre-emption. In the second case, *Gul Hassan Khan v. Govt. of Pak and another,*[555] a number of sections of the Pakistan Penal Code 1860 and the Code of Criminal Procedure 1898 all dealing with punishments of offences ranging from murder to bodily harm, were declared repugnant to Islam. In the third case, *Mst. Farishta v. Government of Pakistan,*[556] the Shariat Bench of the Peshawar High Court invalidated section 4 of the Muslim Family Laws Ordinance 1961 as being violative of Islam. The fourth reported case, *Mumtaz Khan v. Government of Pakistan,*[557] established that any law declared repugnant by the Shariat Bench 'gets extinct from the date [the] decision of [the] Shariat Bench takes effect', irrespective of whether the Government introduced a new, Islamic law, as a replacement for the one invalidated by the Shariat Bench. The last case to be decided by the Shariat Bench of the Peshawar High Court, namely *Qasim Shah v. Government of Pakistan,*[558] held that Islamic law did not confer absolute rights of ownership on landowners but that Islam 'looks upon the sharing of the blessings of God in the form of wealth and worldly goods by the "haves" with the "have-nots" as most praiseworthy behaviour of Muslims', and that 'instead of jealously guarding the property and the hoarded wealth of an individual, the position in Islam is rather converse'.[559] The areas of law attacked in these decisions as repugnant to Islam were highly sensitive and central to Pakistan's legal system. The *Naimatullah*[560] case significantly weakened the programme of land reform introduced by Zulfiqar Ali Bhutto. The Peshawar High Court declared as un-Islamic the right of a landless tenant renting agricultural land from his or her landlord, to exercise a first right of pre-emption should the land be transferred by way of sale.[561] The *Gul Hassan*[562] decision effectively introduced the Islamic law of *qisas* and *diyat* by removing from the Penal Code the mandatory statutory punishments for all offences involving the death of or injury to a person. The judicial introduction of the laws of *qisas* and *diyat* revolutionised the criminal law of Pakistan[563] by reversing a programme of criminal law reform which had been

554 PLD 1979 Pesh 104.
555 PLD 1980 Pesh 1.
556 PLD 1980 Pesh 47.
557 PLD 1980 Pesh 154.
558 PLD 1980 Pesh 239.
559 *Ibid*., at p. 243.
560 *Supra*, note 554.
561 See section 25(3)(d) of the Land Reforms Regulation 1972 (M.L.R. 115).
562 *Supra*, note 555.
563 It took ten years for the government to introduce a codified Islamic criminal law in the form of the Criminal Law (Second Amendment Ordinance) VII of 1990, 5 September 1990. This Ordinance was re-promulgated every four months under Article 89 of the Constitution from then onwards until the government of Nawaz Sharif enacted the Criminal Law (Amendment) Act 1997.

initiated by Lord Cornwallis in 1791, who had abolished the right of the next kin of a murdered person to remit the penalty of death.[564] Subsequent piecemeal reform of the criminal law culminated in the enactment of the Indian Penal Code in 1860, which was adopted by Pakistan following independence.

Criminal Law

The *Gul Hassan* case deserves closer examination, being the first ever criminal case decided on the basis of an alleged repugnance to Islam. As could be seen in the previous sections, earlier judicial attempts to declare laws repugnant to Islam had to resort to legal concepts like basic norms and basic structure in order to challenge existing laws. In *Gul Hassan*, the Peshawar High Court did not have to justify its jurisdiction in any way: there was no doubt in anybody's mind that the Peshawar High Court had by virtue of Article 203-B of the Constitution the jurisdiction to examine Pakistan's criminal law on the basis of Islam.[565] The case came before the Shariat Bench of the Peshawar High Court in 1979, when one Gul Hassan, convicted and sentenced to death for murder under section 302 of the Pakistan Penal Code 1860 moved a Shariat Petition arguing that the provisions of section 302 of the Pakistan Penal Code 1860, certain sections of the Code of Criminal Procedure 1898 covering procedural matters with regard to section 302 and the laws relating to mercy were all repugnant to the injunctions of Islam.[566] By way of background, it should be noted that Gul Hassan was a minor at the time the offence was committed and that there had been a compromise between the heirs of the murdered man and Gul Hassan, to the effect that they had pardoned him. Gul Hassan submitted that both the Qur'an and the Hadith provided that *qisas*, i.e. retaliation by the imposition of the death penalty in the case of murder, could be remitted completely on payment of *diyat* or waived altogether by the estate of the victim. Furthermore, it was argued on behalf of the petitioner that the imposition of the death penalty on a minor was in itself repugnant to Islam.

Though no reference is made to it in the reported judgment of the Peshawar High Court, it is nevertheless noteworthy that in 1979 there had been another attempt by a convict condemned to death by hanging to challenge the capital punishment for murder on the basis of Islam. Deposed prime minister Zulfikar Ali Bhutto, sentenced to death for murder, advanced in an appeal before the Supreme Court the argument that with the introduction of Islamic criminal law on 10 February 1979, the mandatory death sentence for murder under section 302 of the Pakistan Penal Code 1860 was un-Islamic and could not be imposed. The Supreme Court rejected the argument on procedural grounds, deciding that proceedings pending before that date were to continue under the old law. Further, it held that no Islamic arguments had been raised

564 Judicial Regulation 10 Oct 1791, IOR P/127/73/, 408f., cf. Fisch, J., *Cheap Lives and Dear Limbs. The British Transformation of the Bengal Criminal Law 1769–1817*, Wiesbaden, 1983, pp. 43-46.

565 Article 203-B was introduced into the 1973 Constitution by the Constitution (Amendment) Order 1979 (P.O. No. 3 of 1973) with effect from 7 February 1979.

566 Article 45 of the 1973 Constitution gives the President the right to pardon any prisoner condemned to death.

before the Sessions Court and the Lahore High Court.[567] It is intriguing to notice that the argument so briskly rejected by the Supreme Court was at about the same time rather more eagerly welcomed by the Peshawar High Court. However, there is no evidence to support the proposition that Article 203-D, which provided that any pending proceedings were not to be affected by a petition for the invalidation of a law on grounds of repugnance to Islam, was introduced to prevent Zulfikar Ali Bhutto from escaping the death penalty. Nevertheless, the contrast with the more established jurisdiction of Pakistan's higher judiciary to review laws on the basis of constitutionally guaranteed fundamental rights is nevertheless intriguing: it is well established that a law declared invalid on the ground of a breach of a fundamental right ceases to have effect immediately.[568] The constitutional provision dealing with pending proceedings is in itself ambiguous. Article 203-D provided that no proceedings pending in any court or tribunal either before or after the setting-up of the Shariat Benches should be adjourned or stayed on the ground that a relevant law had been challenged on the basis of an alleged repugnance to Islamic law. Instead, pending proceedings 'shall continue, and the point in issue therein shall be decided, in accordance with the law for the time being in force.'[569] As a result, Zulfikar Ali Bhutto could not rely on Islamic law to challenge his conviction, though it may be argued that he could have challenged his conviction in fresh proceedings.

Returning to *Gul Hassan,*[570] Chief Justice Abdul Hakeem Khan identified the following issues to be determined:

'(1) Whether penalty prescribed by the Pakistan Penal Code for the murder is repugnant to the injunctions of Islam?
(2) Whether a person who was a minor at the time of commission of murder, can be subjected to "Qisas"?
(3) Whether the provisions of sections 54, 55 of the Pakistan Penal Code as also sections 401 and 402 of The Code of Criminal Procedure 1898 are repugnant to Islam?
(4) Whether the provisions of the Schedule of the Code of Criminal Procedure 1898 with regard to section 302, P.P.C. showing the same to be uncompoundable and those of section 345 of the same Code are part and parcel of the substantive law and can be questioned before a Shariat Bench despite the explanation to Article 203-B of the Constitution that a law relating to the procedure of a Court or tribunal cannot be so questioned?'[571]

In respect of ascertaining the correct position under Islamic law, there was in this early Shariat case no dispute between the parties and the bench. The Chief Justice stated at the outset that there was 'no doubt whatsoever that the Holy Qur'an, all the authentic compilations of the "Hadis", the great Imams and the jurists who followed them to date are unanimous on the point that an offence affecting the human body can

567 See *Zulfikar Bhutto v. The State* PLD 1979 SC 741.
568 See Article 8(1) of the 1973 Constitution which provides that, 'Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void.'
569 See Article 203-D of the 1973 Constitution.
570 *Supra*, note 555.
571 *Ibid*., p. 6.

be disposed of on the basis of a pardon or on payment of *diyat* by the person affected, if he is alive, or in in case he be dead, by his heirs.'[572] The Chief Justice referred directly to the relevant verses of the Qur'an, in Urdu translation, and to the commentaries of the translators.[573] The Government of Pakistan, through the Attorney General, resisted Gul Hassan's petition on two grounds: first, the Government argued that the provisions of the Code of Criminal Procedure 1898 could not be reviewed by the Shariat Bench since procedural law had been expressly excluded from its jurisdiction.[574] This argument received short shrift: it was held that no questions of procedure were involved, since these provisions were part and parcel of the substantive law. Another argument advanced by the Attorney General was that section 302 of the Pakistan Penal Code was not in itself un-Islamic but only deficient or incomplete in that section 302 provided for *qisas*, i.e. the death penalty, but not for blood money and pardon. The Chief Justice did not agree, deciding that under section 302 of the Pakistan Penal Code a court had no option but to impose either the death penalty or life imprisonment on anyone convicted of murder. In contrast, Islamic law allowed the heir of the murdered victim to decide over the fate of the murderer the options ranging from the death penalty, monetary compensation to a pardon.

The Chief Justice, however, conceded that if in a grave crime *qisas* or the *hadd* punishment could not be exacted for 'extraneous reasons' the court could still impose *tazir* even if that extended to the death penalty, should public interest so require. In fact, in such a case even a minor could be put to death. Concluding his decision the Chief Justice ordered that:

572 *Ibid*., p. 3.

573 The two main Qur'anic provisions for culpable homicide can be found in *sura al-Baqara* (i.e. 2:178) which says:

> 'O ye believers, retaliation has been prescribed for you in the case of slain, the free for free and the slave for slave and the female for the female, and if any remission is made to anyone by his brother, then prosecution should be made according to usage and payment should be made to him in a good manner; this is an alleviation from your lord and a mercy; and whoever exceeds the limit after this, he shall face a painful chastisement.'

The arabic term *qisas*, here translated as 'retaliation', means more precisely 'to get even', 'to follow the path followed by others', 'to copy the other'. The manner and form of retaliation is therefore qualified: the basic principle of *qisas* is similarity. *Sura al-maiyda* 45 (5:45) introduces principles of mosaic law into the Qur'an:

> 'And we have prescribed for them in which a life for life, and eye for eye, and nose for nose, and ear for ear, and tooth for tooth, and for wounds retaliation. And whoever foregoes, it is a charity that shall be an expiation for him. And whoever judges not by what God has sent down, such as, they are the inquitans.'

Sura al-Baqara 179 (2:179) stresses the beneficial deterrent aspect of this principle:

> 'For you there is life in Qisas, O men of understanding, that you may guard yourself.'

There are various Qur'anic provisions for the payment of *diyat* and in this context it will suffice to quote just one for the sake of illustration and clarification. *Sura al Nisa* states:

> 'And it is not for a believer to slay a believer unless it is by mistake. And he who slays a believer by mistake, shall be bound to free a believing slave and a blood fine shall he pay to his family unless they forgo as free will alms. But if he belongs to a people hostile to you, and is a believer, then let the slayer set free a believing slave. And if he belongs to a people between whom and yourselves there is a pact, then a blood fine is to be paid to his family and a believing slave is to be set free. But he who finds no means, let him fast for two months consecutively, as a penance from God. And indeed God is omniscient and wise.'

574 See Article 203-B of the 1973 Constitution.

'1.The penalties prescribed in the chapter XVI of the Pakistan Penal Court with respect to offences against the human body particularly section 302 are in accordance with the injunctions of Islam in as much such offences can be condoned by pardon or on payment of 'Diyat' and particularly a non-pubert can not be subjected to 'Qisas'.
2. Neither a Provincial Government nor the Federal Government can remit, reduce or commute any sentence — such powers can only be exercised by a Court in accordance with the injunctions of Islam.
3. There is not going to be any violation of the Injunctions of Islam if law provides Tazir (e.g. Imprisonment or death) in case of a recidivist including the one accused of theft or of a murder other than accidental even if there is pardon by the heirs of the deceased or payment of blood money.
4. There can be no 'Qisas' or 'Had' when the accused is non-pubert but he can be awarded any other punishment by way of Tazir.'[575]

With hindsight, somewhat optimistically the High Court also ordered that legislation giving effect to its decision should be enacted within two months of the date of the judgment. It appears that the High Court was not willing to declare the un-Islamic provisions of the criminal law invalid with immediate effect, thereby leaving a lacuna in Pakistan's criminal law. Instead the government was asked to legislate. The express order to the government to pass legislation giving effect to a judgment is in itself unusual, breaching as it does the principle of the separation of powers. However, it is probably not fanciful to suggest that the Chief Justice expected little resistance from a government in the form of Chief Martial Law Administrator General Zia-ul-Haq, who had personally conferred the new Islamic jurisdiction on the high court.

However, the Peshawar High Court encountered immediate difficulties with the enforcement of the *Gul Hassan* judgment: two months passed but no law of *qisas* and *diyat* appeared in the Pakistan Penal Code 1860. This matter was taken up in the case of *Mumtaz Khan v. Government of Pakistan,*[576] a contempt of court case against the government for not having complied with the order of the High Court in the *Gul Hassan*[577] case. The case was heard by a three-member bench headed by the new Chief Justice of the Peshawar High Court, Justice Shah Nawaz Khan, who also delivered the unanimous judgment. It was held that it did not require any act on the part of any authority such as the executive or the legislator to remove a law declared repugnant from the statute book 'as it gets extinct from the date on which the decision of the Shariat Bench takes effect'.[578] The Court realised that there may be situations where a mere removal of a repugnant law may not be sufficient, since doing so would create a lacuna in the law. However, it was the function of the President or the Governor under the newly introduced Article 203-B of the 1973 Constitution to take steps to amend the law so as to bring it into conformity with the injunctions of Islam. No time limits were set by the 1973 Constitution and therefore the Chief Justice held that there was nothing else for the Shariat Bench to do. However, his dictum failed to

575 *Supra*, note 555, at p. 20.
576 *Supra*, note 557.
577 *Supra*, note 555.
578 *Supra*, note 557, at p. 157.

answer the most obvious and pertinent question: what law was to be applied by a judge in an area of law declared void but not replaced by an Islamic law?

The provisions of the Pakistan Penal Code 1860 relating to murder and personal injury were continuously challenged in ten more petitions to the Federal Shariat Court. The Government of Pakistan, however, persistently filed appeals against these decisions and it was only in 1989 that the original Shariat Appeal No 1 of 1980 was heard by the Shariat Appellate Bench of the Supreme Court.[579] The Shariat Appellate Bench declared that the provisions of sections 299 to 338 of the Pakistan Penal Code 1860, which deal with offences against the human body and several other provisions relating to murder and injury, were repugnant to Islam. The judgment was to take effect on 23 March 1990, but the Government of Pakistan managed in a further review petition to get an extension of this deadline, which was now to be 5 September 1990.[580] The government stated in its petition that it had drafted an ordinance relating to *qisas* and *diyat* which was in the process of final scrutiny. The Supreme Court accepted the application but stated that 'even if the required law was not enacted and/or enforced by 12th of Rabi-ul-Awwal 1411 A.H., the said provisions would nevertheless ceased to have effect on 12th of Rabi-ul-Awwal 1411 A.H.' It held that:

> '. . . in such stage of vacuum, vis-à-vis the statute law on the subject, the common Islamic law the Injunctions of Islam as contained in the Quran and Sunnah relating to the offence of Qatl and Jurh (hurt) shall be deemed to be the law on the subject.'[581]

The court was well aware that an ordinance would lapse after four months if it had not met with the approval of parliament and explained that the court may decide murder and injury cases on the basis of such an ordinance 'if it, having once been enforced had lapsed or otherwise had become unenforceable.'[582] The principle that a lacuna in the statute law was to be filled with reference to Islamic law was in itself not new. However, to apply this principle to criminal law was a radical extension: until then it could be presumed that only those actions which were expressly, i.e. by way of enacted law, made part of the legal system could result in punishment. The Pakistan Penal Code 1860 was, in the fashion of the codes of the civil law, a complete code which comprised all acts deemed to carry criminal sanctions. Other crimes were added by specific legislation. Significantly, the Penal Code brought to an end the application of criminal sanctions imposed by the common law. The introduction of Islamic criminal law to those areas of Pakistan's law not covered by the Pakistan Penal Code 1860 because they were declared un-Islamic, could also include the introduction of criminal offences which had never been covered by the Penal Code. The most glaring example is the offence of apostasy, which under Islamic law carries the death penalty: no such offence exists under Pakistan's statutory criminal law but there is at least a serious possibility that under the new principle the offence of apostasy has become part of Pakistan's criminal law.

579 *Federation of Pakistan v. Gul Hasan Khan* PLD 1989 SC 633.
580 *Federation of Pakistan v. N.-W.F.P.Government* PLD 1990 SC 1172.
581 *Ibid*., at p. 1175.
582 *Ibid*., at p. 1173.

Muslim Personal Law

The case of *Farishta v. Federation of Pakistan*[583] gave rise to further elaborations on the jurisdiction of the Shariat Bench. The target of the petitioners was section 4 of the Muslim Family Laws Ordinance 1961 ('MFLO'), which introduced a significant departure from established principles of the Sunni law of inheritance. Under section 4, the children of a predeceased son could inherit from their grandfather. Under the Sunni law of inheritance this was impossible but Shia law, in contrast, did allow it. Many Muslim countries introduced legislation similar to section 4 of the MFLO effectively introducing the Shia law of inheritance to situations where an orphan would under the Sunni law be deprived of inheriting from his grandfather if other sons of the grandfather were still alive.[584] The reason for this departure from Sunni law was a simple one: it was felt unjust that somebody already deprived of his father should suffer further hardship by also losing his father's rights to inherit from his father's estate. Nevertheless, the contrast between the Sunni and Shia law of inheritance was well established and there was no doubt that section 4 of the MFLO was repugnant to the Sunni law of inheritance. As the name implied, the MFLO was supposed to 'reform', *inter alia,* this aspect of Muslim personal law.

The first jurisdictional hurdle to be surmounted by the petitioners was Article 8(3)(b) of the 1973 Constitution, which gave constitutional protection against judicial review of the MFLO on the basis of a constitutionally guaranteed fundamental right. Chief Justice Abdul Hakeem Khan dismissed this contention, holding first that the powers of the Chief Martial Law Administrator Zia-ul-Haq to amend the 1973 Constitution were in themselves 'supra-constitutional' and therefore not limited by anything contained in the 1973 Constitution. Secondly, and more significantly, he held that Article 203-B of the 1973 Constitution provided that it was to take effect 'notwithstanding anything contained in the Constitution'. The constitutional protection of the MFLO therefore no longer existed in relation to proceedings before the Shariat Bench of the Peshawar High Court.

However, a more problematic hurdle remained: Article 203-B expressly excluded from the Shariat Bench's jurisdiction not only procedural laws but also 'Muslim Personal Law'. *Prima facie* it could be argued that a law dealing, *inter alia,* with the Islamic law of inheritance was a part of Muslim personal law. At the outset of the decision, the Chief Justice clarified that he saw himself on a mission to remove whatever was deemed un-Islamic from Pakistan's legal system, stating that 'It is our duty to sift grain from the chaff and to throw out the latter in exercise of our Constitutional jurisdiction under Article 203-B.'[585] A refusal to exercise its jurisdiction in the area of Muslim personal law would in the view of the Chief Justice have grave results in that future legislatures would be allowed to introduce un-Islamic provisions into Pakistan's family law like 'a marriage between members of the same sex and provide for succession, marriages, and divorces of such spouses'.[586] In the opinion of the Chief Justice, 'such shocking deviations' should not be allowed to become part of

583 *Supra*, note 556.
584 See Hamid Khan, *Islamic Law of Inheritance*, Karachi, 1999 (2nd edn.), pp. 152-168.
585 *Supra*, note 556, at p. 52.
586 *Ibid*., p. 52.

Muslim personal law. Chief Justice Khan's solution to the difficulty posed by the exclusion of Muslim personal law was as simple as it was ingenious: in his judgment the term 'Muslim personal law' denoted the Shariat itself. The Shariat was not to be touched by the Shariat Benches since 'if the Shariat Benches are to reopen established propositions of Shariat, then they will be opening the Pandora's box.'[587] However, the expression 'Muslim personal law' used in the 1973 Constitution, though it included the Shariat, did not include legislative enactments which overruled the Shariat. The Chief Justice found support in his approach in the series of statutes which had removed the application of non-Islamic customs from Pakistan's family law. Beginning in 1937, when the Muslim Personal Law (Shariat) Application Act 1937 was enacted during colonial rule, up to the West Pakistan Muslim personal law (Shariat) Application Act 1962, these statutes had made it mandatory for courts to apply Shariat, i.e. Islamic law, to matters concerning Muslim family law.[588] However, these enactments never spelled out the exact provisions of Islamic law to be applied in preference to local, non-Islamic custom, other than stating that courts were compelled to apply Islamic law as laid down in Qur'an and Sunnah. In the judgment of the Chief Justice, this fact indicated that what was meant in Article 203-B of the 1973 Constitution by 'Muslim personal law' was the Shariat itself and not those pieces of special legislation, like the Muslim Family Laws Ordinance 1961, which effectively departed from or created exceptions to the Shariat.

Having successfully overcome the jurisdictional hurdle, Chief Justice Khan proceeded with a careful and exhaustive examination of the Qur'an and Sunnah so as to ascertain whether or not section 4 of the MFLO was repugnant to Islam. Two eminent scholars were invited to provide their expertise: Khalid M. Ishaq and Dr Tanzil-ur Rahman.[589] The conclusion, namely that section 4 of the MFLO was repugnant to Islam, left the High Court to deal with the widely perceived injustice and hardship inflicted on an orphan under the Sunni law of inheritance. Chief Justice Khan rejected the Egyptian model, where in such a situation the grandfather was forced to make a will providing for his orphaned grandchildren, and instead favoured a system where an orphan could approach a district judge, who in turn would advise the grandfather to make a will. Should this persuasion fail, the state should provide maintenance for those orphans left destitute.

The final order of the court was a curious one: 'The law repealing section 4 shall come into force as from today and that we give to the Government a period of three months for necessary legislation.'[590] The order could be interpreted as meaning that the government was allowed three months to remove section 4 of the MFLO from the statute book. Alternatively, it could mean that section 4 of the MFLO had ceased to apply with immediate effect.

587 *Ibid*., p. 51.

588 See also The North-West Frontier Province Muslim Personal (Shariat) Application Act 1935; the Punjab Muslim Personal Law (Shariat) Application Act 1948, the Muslim Personal Law (Shariat) Application (Sind Amendment) Act 1950 and the Bahawalpur State (Muslim Personal Law) Application Act 1951.

589 Dr Tanzil-ur Rahman, a law graduate of Karachi University, was an adviser to the Islamic Research Institute from 1968 to 1979, became a judge of the Sindh High Court in 1980 and was appointed as the Chief Justice of the Federal Shariat Court in 1990, a post which he occupied until 1992.

590 *Supra*, note 556, at p. 78.

The Right to Property

The last case to be decided by the Shariat Bench of the Peshawar High Court dealt with the right to own property.[591] More precisely, it dealt with the customary right of village communities to a share of the proceeds realised from the sale of trees grown on land which was in the ownership not of the village but of individual land owners. The petitioners were two land owners who were no longer willing to share the profits made from the sale of the trees with the entire population of the village. They moved the Shariat Bench of the High Court, petitioning for a declaration that the sharing of the sale proceeds with the entire proprietary body of the village was repugnant to the injunctions of Islam. The petitioner argued that the customary obligation to share offended the sanctity attached by Islam to the right of an individual of holding private property, 'as the persons who are not owners in the property are allowed to enjoy its ususfruct [sic].'[592]

The Government of Pakistan argued that the custom of sharing the sale proceeds had existed from time immemorial. A written record of this custom was expressly laid in the *Wajibul Arz*, a written record of the customary practices of the village, which provided that a total of four species of trees growing on land owned by a member of the village were considered communal property. To complicate matters further, the government itself also kept half of the sale proceeds, presumably because it was the government which actually cut and sold these trees. For once there was no jurisdictional obstacle, since Article 203-B of the 1973 Constitution expressly empowered the Shariat Bench to exercise its jurisdiction over 'customs or usages having the force of law.'

In a first step, Justice Karimullah Durrani traced the ownership rights of the two petitioners. He found that they had acquired the land in question as absolute owners under the provisions of the N.W.F.P. Tenancy Act 1950. However, he held that the custom in question had been adhered to by the previous owners of the land and that therefore 'although the land underneath the trees has come in the absolute ownership of the petitioners the trees of the kinds in question have not become so.'[593] An examination of the Islamic law on private ownership followed in a second step. The court referred to Maulana Muhammad Ali's *The Religion of Islam* (1950) and Hadiths Nos. 1502 and 1503 from volume II of the collection '*Shaih Muslim Sharif*' to establish that Islam did indeed recognise the right of an individual to own property. However, the Court also referred to *sura* 51 (19) which provides that 'And in their property there is right for the beggars and the needy.' In a final step, the Court declared that the right of the village community to a share of the sale proceeds had attained the status of an agreement. Such an agreement was not repugnant to the injunctions of Islam and was therefore not to be struck down by the Court.

The case is significant in that it alluded to an implied obligation on the owner of property to share his wealth with the needy and the poor, thereby rendering the right to property no longer absolute. The case stands in curious contrast to the first case decided by the Shariat Bench of the Peshawar High Court. In *Naimatulah Khan v.*

591 *Supra*, note 558.
592 *Ibid*., p. 240.
593 *Ibid*., p. 242.

Government of Pakistan[594] the right of pre-emption of a tenant of agricultural land was challenged as being repugnant to Islamic law. The government was not opposed to this right of pre-emption being removed and it was therefore left to the Shariat Bench to justify the invalidation of paragraph 25(3)(d) of the Land Reforms Regulation 1972 on the basis of Islam. It should be noted that British Indian courts had consistently applied the Islamic law of pre-emption to the exclusion of the tenant of the land in question. In *Mst Sakina v. Amiran Bibi*[595] the High Court of Allahabad had held that no tenant was entitled to a right of pre-emption. The Land Reforms Regulation 1972 had reversed this aspect of the Islamic law of pre-emption in order to benefit the large number of landless tenants unable to acquire the land cultivated by them. The well-established principle of Islamic law which vests the right of pre-emption in first, the co-sharer, secondly, the participator in annuities and appendages, and, thirdly, in contiguous owners, was thereby restored. It is interesting to note that the Shariat Bench did not elaborate on the social implications of its decision, apart from noting that this principle was being applied in many Islamic countries.

These five decisions ended Zia-ul-Haq's experiments with Shariat Benches. It is probably not far fetched to assume that Zia realised the dangers inherent in giving four high courts wide powers of judicial review on the basis of Islam. The cases illustrate that the new, Islamic, jurisdiction was indeed capable of bringing about radical changes in the legal system despite the carefully drafted constitutional exclusions. Not much control could be exercised over four separate high courts and there was consequently also a real possibility that different dicta on what was and was not repugnant to Islam could emerge: this in itself would have had the potential of throwing doubts on the viability and validity of the Islamisation project, since it was as of necessity premised on the idea that it was possible to determine the content of Islamic law with some precision. Conflicting interpretations of Islamic law went against this very idea and would have exposed the judicial Islamisation project to a potentially wider-ranging religious controversy. This had been pointed out by the Shariat Bench of the Peshawar High Court itself, when it held that 'if the Shariat Benches are to reopen established propositions of Shariat, then they will be opening the Pandora's Box.'[596]

594 *Supra*, note 554.
595 (1888) 10 All. 472.
596 *Farishta v. The Government of Pakistan* PLD 1980 Pesh 47, *supra*, note 556, at p. 51.

Chapter 8
The Islamisation of Laws in Practice II

In May 1980, the Shariat Benches were dissolved and their jurisdiction was assumed by the newly founded Federal Shariat Court.[597] The creation of the Federal Shariat Court was a blatant attempt to reduce the potential of conflicting decisions on Islamic law. It was also designed to allow Zia-ul-Haq greater control of the composition of the court and thereby greater control over the direction Islamisation was to take. For more than two decades the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court have decided whether or not particular laws are repugnant to Islam. There is therefore a considerable body of case law that examines the Islamic *vires* of laws. Moreover, it will be seen that in addition to examination of laws on the basis of Islam, a significant number of cases deal with jurisdictional issues. The analysis of the case law of the shariat courts offered in this part of the book attempts to differentiate between the substantive and the jurisdictional issues, although at times it proved more convenient to mention the outcome of a case on the substantive issues while focusing on its jurisdictional dimensions. An attempt has been made to present the case law as much as possible in chronological order, so as to be able to identify trends and changes in policy.

Binding Precedence and the Policy of Islamisation

The first ever case decided by the Federal Shariat Court was concerned with the contentious laws of *qisas* and *diyat*.[598] As mentioned above, similar issues had already been decided by the Shariat Bench of the Peshawar High Court in the case of *Gul Hassan v. Government of Pakistan*.[599] The newly constituted Federal Shariat Court had to decide nine Shariat petitions filed in the High Courts of Lahore and Karachi under Article 203-B of the 1973 Constitution. All nine petitions involved convictions

597 The Constitution (Amendment) Order 1980, 27 May 1980. Article 203-H of the 1973 Constitution provided that all proceedings pending before the shariat benches of the high courts were to be transferred to the newly constituted Federal Shariat Court.

598 *Muhammad Riaz v. Federal Government* PLD 1980 FSC 1.

599 *Supra*, note 555.

for murder and sought to challenge the validity of section 302 of the Pakistan Penal Code 1860 and the associated sections of the Code of Criminal Procedure 1898.

The Federal Shariat Court immediately encountered a procedural and jurisdictional problem: was it bound by the decision of the Shariat Bench of the Peshawar High Court? The majority of the members of the Federal Shariat Court decided that they were, reasoning that the Federal Shariat Court was a successor of the Shariat Bench and as such bound by its decisions. It was fortunate that only the Peshawar Shariat Bench had ever decided and reported any substantive issues since this meant that there were no conflicting decisions between the four provincial shariat benches. However, it was this potential for conflicting decisions which convinced Justice Aftab Hussain, one of the four members of the Federal Shariat Court, to decide in a minority decision that the Federal Shariat Court could not possibly be bound by the decision in *Gul Hassan*. Since the Shariat Bench of the Peshawar High Court was under a territorial limitation, whereas the Federal Shariat Court had no such territorial limitations, it was clear according to Justice Hussain that the decision of the Peshawar High Court was not binding upon the Federal Shariat Court.[600]

The *Gul Hassan* decision having been declared binding on the Federal Shariat Court there was nothing left to be decided on the substantive issues. Nevertheless, two of the four members of the Federal Shariat Court carefully traced the sources of Islamic law underlying *qisas* and *diyat* and wrote lengthy and learned expositions on Islamic law, quoting a wide range of sources. Further, this being the first decision of the Federal Shariat Court, most members also made general 'policy' statements about the nature and course of judicial Islamisation. Two immediate concerns were addressed: first, how would the Federal Shariat Court exercise its jurisdiction? Would it condemn as un-Islamic large sections of Pakistan's legal system and thereby trigger a legal revolution? Secondly, there was the sensitive question as to which school or sect of Islamic law the Federal Shariat Court was to follow in deciding an alleged repugnancy to Islam.

Justice Hussain addressed both questions fully: the Federal Shariat Court's function was 'to repair the existing structure by eliminating from it what is repugnant to the divine law comprised in the Holy Qur'an and the Sunnah of the Prophet (peace be upon Him).'[601] So there was not going to be a *tabula rasa* approach, as had been demanded and rejected by the Supreme Court, in the case of *B.Z. Kaikus v. President of Pakistan*.[602] Justice Hussain rejected the contention that Pakistan's statute law and Islamic law 'are poles asunder and the twain shall never meet'.[603] In fact, since the Qur'an itself had adopted many pre-Islamic tribal Arab customs, it was not wrong to apply the same approach to existing Pakistani law:

> 'Our statute laws whether inherited from the British Government or enacted after Independence are based upon the principle of common good and justice, equity and good conscience, which is the same as the principles of public good (*Masaleh Mursila*) of Imam Malik and principle of *Ishtihsan* of Iamam Abu Hanifa. *A fortiori* these laws must be more in harmony with Shariah. In some respects the statute law

600 *Supra*, note 598, at p. 10.
601 *Ibid*., at p. 14.
602 PLD 1980 SC 160.
603 *Supra*, note 598, at p. 16.

may not fulfil the standard of the law of the Qur'an and may also be repugnant to it but such instances are few.'[604]

Justice Hussain's view was repeated by Justice Zakaullah Lodhi who held that, 'the examination of the historical background of our people, their temperament and the place and position that they occupy in the present-day civilisation are other considerations which will have to be kept in mind.'[605]

The question of which school of Islamic law to follow was more difficult to answer. Obviously the two primary sources of Islamic law, namely the Qur'an and the Sunnah, were to be applied, but this nevertheless invited conflict on the effect and interpretation of these primary sources between the various schools and sects. Justice Hussain proposed a methodology which would allow the Federal Shariat Court to conduct its own investigation into the primary sources of Islamic law, and to ultimately choose an interpretation which was in harmony with the demands of the modern age.[606] The object of the exercise was to 'reconcile the requirements of the present era with the teaching of the Qur'an and the Sunnah.'[607]

The first decision of the Federal Shariat Court seemed to indicate that Islamisation was going to be a gradual, gentle and very piecemeal process, premised on the assumption that Pakistan's statute law was not fundamentally in conflict with Islamic law and that any Islamisation of laws was to take into consideration the requirements and conditions of modern Pakistani society.

The policy of gradual Islamisation was put to its first test by the formidable B.Z. Kaikus, who had unsuccessfully sought to challenge the very existence of a secular legal order in Pakistan before the Lahore High Court and the Supreme Court.[608] He took advantage of the creation of the Shariat Benches and later the Federal Shariat Court and filed petitions claiming that the Representation of the People Act 1976 and the Political Parties Act 1962 were repugnant to Islam. The decision could have been a brief one, since all four members were in agreement that both statutes had been made in order to implement constitutional provisions.[609] As such, they were outside the jurisdiction of the Federal Shariat Court.[610] Nevertheless, a controversy erupted between the four members triggered by the Chair Justice Salahuddin Ahmed's contentious suggestion that only pious Muslims should be allowed to become members of parliament. According to Justice Ahmed, both the Houses of Parliament and Provincial Assemblies (Elections) Order 1973 and the Representation of the People

604 *Ibid*., at p. 16.
605 *Ibid*., at p. 46.
606 *Ibid*., at p. 15.
607 *Ibid*., at p. 16.
608 *Supra*, note 602.
609 *B.Z. Kaikus v. Federal Government of Pakistan* PLD 1981 FSC 1.
610 See Articles 203-B and 203-D of the 1973 Constitution. However, it should be noted that almost ten years later the Federal Shariat Court invalidated various provisions of the Representation of People Act 1976, arguing that it was an ordinary law enacted in furtherance of the objects detailed in the Constitution and therefore justiciable: *Muhammad Salah-ud-Din v. Government of Pakistan* PLD 1990 FSC 1. The government appealed against this judgment and the matter has been pending before the Shariat Appellate Bench of the Supreme Court for nine years. See Tanzil-ur-Rahman, 'Islamic Provisions of the Constitution of the Islamic Republic of Pakistan, 1973, What more is required?', PLD 2000 J 66, at p. 73.

Act 1976, should be amended so as to require every member of parliament to have as a minimum qualification, 'that he must be able to read and understand the Qur'an and Sunnah and be pious by reputation'.[611] Justice Agha Ali Hyder disagreed with the Chairman in what can only be described as a withering attack. Questioning the very definition of righteousness, he came to the conclusion that in fact properly applied only the *Ulemas* and the *Mashaikhs* would be eligible for election to the legislative assemblies. Justice Hyder's assessment of such a scenario gives a clear reflection of his opinion of the *ulema*:

> 'There is no gainsaying that there is a considerable section of people, who are of the view that this class had signally [sic] failed to give a proper lead to the Ummah, once the Khilafat-i-Rashida came to an end. They nurse poignant memories of their role during the bitter struggle for the creation of Pakistan.'[612]

Justice Hyder could not help quoting with approval Dr. Ishtiaq Husain Qureshi, who had written in his book, *Ulemas in Politics*,[613] that, 'The main carrot to persuade the Jamiatul-Ulema-i-Hind was that the Muslim personal law would be administered by Qazis and they would be appointed form the Ulemas.'[614] Justice Hyder, clearly not at all impressed with the prospect of having members of the *ulema* in charge of the legislative assemblies, also mentioned the difficulty in prescribing a similar standard for the minorities – whose existence had been conveniently ignored by Chair Justice Salahuddin. Justice Zakaullah Lodi agreed with Hyder, reiterating that it was not within the remit of the Federal Shariat Court to make legislative recommendations which, though *obiter dicta* and of no binding effect, 'are capable of creating confusions as they do not represent realities.'[615] Justice Lodhi's assessment of the Chair's proposal that only 'righteous and pious persons' should be allowed to become members of legislatures deserves to be quoted in full:

> 'One can also easily guess irreconcilable and unending controversies which are bound to spread like [an] epidemic both at the stage of selection and then between the selected ones when they were pitted opposite each other in elections. Other complications that must flow from this step apart. To our misfortune we live in a religion-wise disintegrated society; divided and subdivided into sects and factions, refusing even to offer prayers in a common gathering believing each other with conviction to be "Kafirs" and showering such like "Fatwas" abundantly. We can hardly imagine uniformity of opinion on "righteousness" or otherwise of any one in the country. Such has been our history for over a thousand years. I have regards and respects for the fervour of genuine and honest religiousness of the learned Chairman, but I would submit that the stage for such amends is not yet ripe.'[616]

611 *Supra*, note 609, at p. 12.
612 *Ibid*., at p. 21.
613 It has proved impossible to locate this book.
614 *Supra*, note 609, at p. 21.
615 *Ibid*., at p. 22.
616 *Ibid*., at p. 23.

The disagreement on the question of piety is a curious one, indicating a rift of opinion on the importance of religion between the members of the Federal Shariat Court. There can be little doubt that Justices Hyder and Lodi must be regarded as liberals, whereas there is equally little doubt that the court's Chair Justice Ahmed was a far more orthodox Muslim. Nevertheless, the Federal Shariat Court continued in its first year of existence with a policy of judicial restraint and religious liberalism.

Two subsequent cases, both decided in 1981 by the same members, can be used as illustration. In *Muhammad Ameen v. Islamic Republic of Pakistan*[617] the Federal Shariat Court had to consider a large number of Shariat petitions all challenging the validity of various statutes and ordinances implementing Zulfikar Ali Bhutto's land reform programme.[618] It will be recalled that one piece of Bhutto's land reforms had already been reviewed and invalidated by the Shariat Bench of the Peshawar High Court.[619] To make matters even more complicated, the Federal Shariat Court had in its very first decision held itself bound by cases decided by a Shariat Bench of a High Court.[620] However, with one exception, all members of the Federal Shariat Court were in agreement that none of the land reform measures could or should be declared as being repugnant to Islam. Justice Hussain provided the most extensive and learned judgment. Three distinct issues had to be decided: first, was the Federal Shariat Court bound by the decisions of the Shariat Bench? Secondly, could the Federal Shariat Court declare any of these laws invalid, taking into consideration that the Constitution had excluded them from being judicially reviewed? Thirdly, were the land reform regulations repugnant to Islam?

On the first issue Justice Hussain had no difficulty in deciding that the Federal Shariat Court was not bound by any precedent set by any of the Shariat Benches. Further, he decided that similar to the other High Courts and the Supreme Court, the Federal Shariat Court was also allowed to depart from its own precedent. There was broad agreement with this proposition. On the second issue, there was considerably more controversy: Justice Hussain boldly declared that the Federal Shariat Court was bound by the whole raft of constitutional safeguards protecting the land reform regulations against judicial review and amendment by parliament.[621] Justice Karimullah Durrani disagreed, arguing that Article 203-A of the 1973 Constitution, which stated that the provisions of the chapter establishing the Federal Shariat Court 'shall have effect notwithstanding anything contained in the Constitution' had removed any constitutional restrictions on the powers of judicial review of the Federal Shariat Court.[622] However, there was broad agreement on the substantive issues involved: namely, whether or not the land reform regulations themselves were un-Islamic. The

617 PLD 1981 FSC 23.

618 The laws challenged included the Martial Law Regulation 115 of 1972 Act II of 1977, and various provincial pre-emption laws. The basic tenor of all these laws was to impose a ceiling of 100 acres on land ownership, to allow tenants to exercise rights of pre-emption, and to allow the state to compulsorily acquire land without having to pay compensation at the market value of the land.

619 See *Naimatullah Khan v. Government of Pakistan* PLD 1979 Pesh 104, *supra*, note 554, where the Peshawar High Court invalidated with immediate effect the Land Reforms Regulation 1972, which had given a tenant of agricultural land a right of pre-emption.

620 See *Muhammad Riaz v. Federal Government of Pakistan* PLD 1981 FSC 1, *supra*, note 598.

621 These will be discussed further below.

622 *Supra,* note 617, at p. 97.

Federal Shariat Court had no hesitation in holding that under Islamic law private ownership of property was sacrosanct but not absolute. Justice Hussain held that:

> 'According to the Qur'anic injunctions and the Sunnah of the Holy Prophet the right to spend from one's money and property extends to the satisfaction of his necessities in manner neither niggardly nor extravagant and to meeting the requirements of his dependants. The balance should be spent on the poor and the needy. Islam is opposed to hoarding or accumulation of wealth and its concentration in the hands of only the rich of the community. It should therefore be open to the State to take such steps as are found necessary to stop these vices.'[623]

The positively socialist and liberal interpretation of the Islamic law of property[624] was followed by a similarly brazen decision on the punishment of stoning to death imposed by the Offence of Zina (Enforcement of Hudood) Ordinance 1979. In *Hazoor Baksh v. Federation of Pakistan*[625] the Federal Shariat Court by a majority of four to one declared sections 5 and 6 of the Offence of Zina (Enforcement of Hudood) Ordinance 1979 as being repugnant to Islam. It was held that the only *hadd* punishment which could be imposed for the offences of zina was 100 lashes. The fact that the newly created Federal Shariat Court would dare to challenge one of the most prominent pieces of Zia-ul-Haq's Islamisation programme testifies to the sense of independence and impartiality of the early Federal Shariat Court – in spite of the evident lack of security of tenure.[626]

Another challenge to the Hudood Ordinances, however, did not succeed: in *Nosher Rustam Sidhwa v. Federation of Pakistan* the petitioner, a Parsee, challenged the application of the Prohibition (Enforcement of Hadd) Order 1979 to non-Muslims, who were only allowed to consume alcohol at the time of ceremony prescribed by

623 *Ibid*., at p. 57. The decision was confirmed a year later in the case of *Mohsan A. Rahman v. Federal Government of Pakistan* PLD 1982 FSC 233 where the Federal Shariat Court held that compulsory acquisitions of private property by the Karachi Development Authority were not un-Islamic since, 'The acquisition of land for a public purpose even in Islam is permitted.' (at p. 236, per Justice Aftab Hussain). In the case of *A.B. Awan v. Government of Punjab* PLD 1983 FSC 23 another challenge to Bhutto's land reforms, namely the ceiling of land ownership imposed on civil servants by Article 10 of Martial Law Regulation No. 115, was rejected by the Federal Shariat Court on the ground that the law was constitutionally protected against judicial review. It seems that the Federal Shariat Court accepted this as settled by the *Ameen* precedent, although in fact there was considerable controversy about this issue in *Ameen* itself. The same principle was applied in *Muhammadia Girls High School v. Federal Government* PLD 1983 FSC 24, where the nationalisation of private schools was challenged. The Federal Shariat Court declined jurisdiction because the matter involved the Constitution. In *Muhammad Bashir v. Government of Pakistan* PLD 1983 FSC 492 the powers to compulsory acquire property, conferred by the West Pakistan Highways Ordinance 1959, was held to be in accordance with Islam.

624 See also *Bhai Khan v. Federal Government of Pakistan* PLD 1981 FSC 139, where the Federal Shariat Court refused to invalidate as un-Islamic the Colonization of Government Lands (Punjab) Act 1912.

625 PLD 1981 FSC 145.

626 Zia-ul-Haq reacted quickly to the challenge adding a new Article 203-E (9) to the 1973 Constitution which provided that, 'The Court shall have the power to review any decision given or order made by it.' By the second half of 1981, Zia-ul-Haq also removed Chairman Justice Ahmed, who was succeeded by Justice Hussain, and appointed a member of the *ulema*, Muhammad Taqi Usmani, to the Federal Shariat Court.

their religion.[627] The Federal Shariat Court held that the extension of Islamic criminal laws to non-Muslims was not un-Islamic, since these laws involved matters of public order and morality central to the legal and social system of an Islamic state. Concessions made to non-Muslims in the early days of Islam were matters of expedience rather than principle. The only departure from the uniform application of Islamic criminal law which was allowed in an Islamic state pertained to the freedom of non-Muslims to profess and practise their religion. Applied to the prohibition of alcohol, this meant that only those religions which had integrated the consumption of alcohol in their religious service were allowed to continue to do so. In the case of Parsees, the Federal Shariat Court held that the consumption of alcohol was not part of their religion and therefore the prohibition on the consumption of alcohol applied to the them. It is interesting to note the minority view of Justice Hyder who held that it was not the consumption of alcohol which was banned by the Qur'an but only a state of intoxication so severe that it was impossible to distinguish between right or wrong or lawful and unlawful.[628] An attempt was also made to invalidate parts of the Offence of Qazf (Enforcement of Hadd) Ordinance 1979 but these were firmly rejected by the Federal Shariat Court in the case of *Zaheer Ahmed v. Federation of Pakistan.*[629]

The Federal Shariat Court's power not only opened the doors to everybody dissatisfied with the Islamisation of laws to petition for the invalidation of existing statutes but it also provided the court's members with an opportunity to indulge in lectures on subjects not directly related to the matter in hand. Taking into consideration that since 1979 the constitutionally guaranteed fundamental rights had been held in abeyance, the higher judiciary was confined to cases involving Islamisation in order to air its views on subjects ranging from corruption to the parameters of fine art. The opportunity for action in the absence of fundamental rights was not lost on the Supreme Court either, which openly stated that in respect of:

> '. . . the jurisdiction of a Shariat Bench Court it should be a matter of satisfaction rather than of surprise for all concerned that jurisdiction under Article 203-B is of a very salutary and important nature inasmuch as whereas Courts generally cannot these days entertain petitions for enforcement of Fundamental Rights as given in Chapter 8 of the Constitution due to the existence of the Proclamation of Emergency etc. but the jurisdiction to examine validity of various laws on the anvil of the Injunctions of Islam has been bestowed on the particular courts mentioned therein which is welcome process and a welcome step towards the Islamisation of laws.'[630]

In *Abu Dawood Muhammad Sadiq v. The State*[631] the petitioner, a member of the Sunnat-wal-Jamaat, a conservative Hannafi-Barlevi movement, had asked the Federal Shariat Court to invalidate the National Registration Act 1973. The petitioner argued

627 PLD 1981 FSC 245.

628 See also *Ghulam Nabi Awan v. The Federation of Pakistan* PLD 1983 FSC 55, where other provisions of the Order allowing Muslims to consume alcohol for medicinal purposes was declared to be in accordance with Islam.

629 PLD 1982 FSC 244.

630 See *Saeedullah Kazmi v. Government of Pakistan* PLD 1981 SC 42.

631 PLD 1982 FSC 36.

that the Act required every citizen of Pakistan to obtain a national identity card with a photograph. This, it was argued, was un-Islamic since the Qur'an and Sunnah provided that photography, paintings and other works of fine art were *haram*. Justice Lodhi decided against the petitioner holding that only those pictures and art liable to produce 'disastrous results in society'[632] were condemned by Islam. However, Justice Lodhi also re-evaluated those prohibitions against pictures which were present in the Qur'an and Sunnah, holding that these were imposed at a time when many converts to Islam were still attached to their old beliefs. However, according to him:

> 'these Hadith when read with reference to the times and their requirements would certainly not call for universal application ... it is unimaginable that Islam which is a religion based upon the realities of life would impose an embargo on a subject with which development as well as appeasement of finer sentiments of the people is closely related.'[633]

In open criticism to the orthodox *ulema,* Justice Lodhi held: 'Islam has no enmity with the finer sentiments of the man, as often tried to be preached by some such scholars of Islam, who fail to realise its true spirit and thus can[not] visualise the kind of society that it endeavours to create on earth.'[634] What is significant about this case is Justice Lodhi's unflinching and open commitment to a liberal and 'progressive' interpretation of the sources of Islamic law. Seemingly without hesitation Justice Lodhi went so far as to say that a Hadith could be ignored if the cause of the Hadith had disappeared.[635]

It is interesting to compare this decision of the Federal Shariat Court with the appeal against it decided by the Shariat Appellate Bench of the Supreme Court and reported as *Abu Dawood Muhammad Sadiq v. The Registration Officer.*[636] The Shariat Appellate Bench reached the same result, namely that it was permissable for the government to require a citizen to supply a photograph of his or her face for insertion in the national identity card. However, in stark contrast to the Federal Shariat Court, the Supreme Court restricted the permission of photographs to those required for 'a genuine social need' and for the 'orderly functioning of the lives of the community and the proper organisation of the affairs of the State.'[637] It should be noted that the Supreme Court made a very concerted effort to compile as much material as possible on the issue, including submissions received from Egyptian scholars and pictures of coins reproduced in the law report itself. Nevertheless, it is evident that in 1986, the Shariat Appellate Bench of the Supreme Court regarded pictures not as a civilizing influence on Pakistani society but as a necessary evil, which could only be allowed on the condition that they satisfied a genuine social need.

It can be concluded from the above that the early days of the Federal Shariat Court were, at least in respect of the Islamisation of laws, informed by restraint, moderation and liberalism. The change of heart in respect of the effect of decisions handed down

632 *Ibid*., at p. 41.
633 *Ibid*., at p. 40.
634 *Ibid*., at p. 41.
635 *Ibid*., at p. 40.
636 PLD 1986 SC 564.
637 *Ibid*., at p. 580, per Justice Zullah.

by the Shariat Benches meant that the Federal Shariat Court was free to decide many of the important issues decided especially by the Shariat Bench of the Peshawar High Court *de novo*.

The Jurisdictional Dimension of Islamisation

There is little doubt that questions of jurisdiction constitute an important part of the early jurisprudence on Islamisation. Questions of what constituted Muslim personal law, what type of customs were amenable to judicial review by the shariat courts, and the effect of constitutional limitations on the review of certain laws all occupied the shariat courts to a great extent. In contrast, there was in fact very little controversy or disagreement about the content of Islamic law itself. This is perhaps a surprising result, considering that Islamic law presents itself in a rather fragmented fashion.[638] One reason for the shariat courts' preoccupation with questions of jurisdiction rather than Islamic jurisprudence can be located in the legal system of Pakistan itself. Pakistani judges were not alien to the task of applying Islamic law and of interpreting it in the context of Muslim family law. As such, most judges experienced little difficulty in exploring various sources of Islamic law and were willing to expound their views on the subject with confidence and authority. The jurisdictional questions, however, involved entirely new areas of law which had hitherto never been before Pakistan's courts. As a result, it was jurisdiction rather than jurisprudence which dominated the early case law of the shariat courts.

Zia-ul-Haq created the Shariat Appellate Bench of the Supreme Court to hear appeals initially against decisions of the Shariat Benches of the High Courts and, after their dissolution, of the Federal Shariat Court.[639] In its first manifestation, the Shariat Appellate Bench consisted of three Muslim judges but a year later Zia-ul-Haq refined the Bench's composition by adding 'two ulema to be appointed by the President to attend sittings of the Bench as ad hoc members thereof from amongst the Judges of the Federal Shariat Court or from out of a panel to be drawn up by the President in consultation with the Chief Justice.'[640] The first appeal to be heard by the Shariat Appellate Bench was occasioned by an unreported decision of the Shariat Bench of the Sindh High Court. In that decision, the Sindh High Court had refused to invalidate certain provisions of the Limitation Act 1908 as being in violation of Islam because the Shariat Bench did not have the necessary jurisdiction to review procedural laws. In *S.M. Junaid v. President of Pakistan*[641] the Shariat Appellate Bench of the Supreme Court agreed with the High Court, dismissing the appeal. The matter came up again in 1991. In *Maqbool Ahmed v. Government of Pakistan*[642] the Shariat

638 See Joseph Schacht, *An Introduction to Islamic Law*, Oxford, 1964, pp. 6-100 and Gerhard Endress, *Einführung in die islamische Geschichte*, Munich, 1982, pp. 138-159.

639 The Shariat Appellate Bench constitutes a bench of the Supreme Courts and the rules applicable to the proceedings of the Supreme Court also apply to its Shariat Appellate Bench: see *Abdul Hameed v. The State* PLD 1983 SC 130 [SAB].

640 See Article 203-F of the 1973 Constitution as amended by the Constitution (Third Amendment) Order 1982.

641 PLD 1981 SC 12.

642 1991 SCMR 2063.

Appellate Bench re-examined the provisions of the Limitation Act 1908. It was held that any law which transferred rights *in rem* was not to be regarded as a procedural law. Following from this, section 28 of the Limitation Act 1908, which provided that the adverse possession of property in excess of 12 years defeated the rights of the original owner in that property, was declared to be repugnant to Islam. However, the 12-year limitation period for suits for the repossession of property provided for in Article 144 of Schedule I to the Limitation Act 1908 was held to be a purely procedural law and therefore outside the jurisdiction of the shariat courts.[643] However, in practice the issue of what and what was not a procedural law never occupied the shariat courts to a great extent, perhaps because despite the obvious difficulties in distinguishing what was substantive and what was procedural, most judges took a rather pragmatic approach. As a general rule, any procedure which could be regarded as being part and parcel of a connected substantive law was regarded as being within the jurisdiction of the shariat courts as could be seen in the *Gul Hassan*[644] case.

Customs and Usage

The purely legal focus of the Federal Shariat Court, combined with the fact that the Federal Shariat Court could only invalidate but not order the passing of any law, limited the impact of the shariat courts on the Islamisation of Pakistan's public life to a great extent. Article 203-B (c) of the 1973 Constitution included in the jurisdiction of the shariat courts 'any custom or usage having the force of law' which in turn excluded from its jurisdiction all customs and usages not having the force of law. As will be seen, this exclusion tempered the ability of the shariat courts to imprint on Pakistan's society Islamic notions of morality and social life, since these issues had not been regulated by law. The overwhelming number of these cases is concerned with the exclusion of women from public life.

The case of *Habib-ur Rehman v. Government of Pakistan*[645] can serve as the starting point for the discussion of the long line of cases where the shariat courts were unable to pass judgment on questions of public mores and social conduct despite their obvious relevance for the creation of an Islamic society. The petitioners had asked the Shariat Bench of the Sindh High Court to declare the practice of women to play field sports watched by men as un-Islamic. The Supreme Court's Shariat Appellate Bench upheld the High Court's refusal to entertain the petition on the ground that the petitioner had failed to identify any law or a custom having the force of law which could have been examined by the court. However, the Shariat Appellate Bench was also able to point to one of Zia-ul-Haq's less well-known Islamisation measures, namely a Directive promulgated on 15 March 1980, which prohibited any woman from participating in

643 The imposition of time limits on rights of action was also upheld in *Abdul Majeed Mirza v. Government of Pakistan* (1989 FSC 143), where a clause of the Payment of Wages (Federal Railways) Rules 1938 was challenged as repugnant to Islam. The petitioner challenged as repugnant to Islam the requirement that application against a deduction of wages had to be made within three years of such deduction having taken place. The Federal Shariat Court rejected the petition, deciding that the provision was a procedural law and as such outside its jurisdiction.

644 *Supra*, note 555.

645 PLD 1981 SC 17.

a sport tournament open to the general public and which imposed the wearing of shalvar and kameez or full tracksuit on any woman participating in sports.

The control of women was also at the heart of a series of appeals against a decision of the Shariat Bench of the Sindh High Court, which refused to impose a general purdah on all women, to forbid all religious processions and the co-education of women and men. The Sindh High Court declined jurisdiction because in neither case could there be identified a law or a custom having the force of law. Therefore, there was no law which could be declared un-Islamic. The Shariat Appellate Bench of the Supreme Court agreed with the Sindh High Court in the case of *Saeedullah v. Government of Pakistan*[646] but not without issuing a warning to the petitioner, who had pressed these petitions in what appears to have been a personal attack on the judges of the Shariat Bench, that he would face contempt of court proceedings if he persisted in his conduct. The petitioner, Saeeduallah Kazmi, had on an earlier occasion attempted to forbid any religious institution and any person from announcing the call for morning prayer either too late or too early. The Sindh High Court and the Appellate Bench dismissed the petitions on the ground that no law or custom had been identified which could be declared un-Islamic.[647] Saeedullah Kazmi attempted to re-agitate the very same issue before the Shariat Appellate Bench of the Supreme Court but his petition was dismissed on the ground of *res judicata*. Justice Nasim Hasan Shah observed that:

> 'Although we cannot but admire his persistency and constancy in the cause he has taken up, but lament his lack of knowledge of the law and his complete disdain for the legal and procedural requirements for prosecuting a cause before a legal forum.'[648]

The imposition of purdah on Pakistan's women and their exclusion from public life was the aim of several petitions to the Federal Shariat Court. In all cases, the Federal Shariat Court refused to intervene, initially, as could be seen above, on the basis that there was no law which either prevented women from observing purdah or a law which imposed purdah on women. In such a state of affairs, there was no law which could be judicially reviewed. However, in a later case decided in 1983, a petition was submitted challenging the appointment of women as judges or magistrates as repugnant to Islam.[649] The case caused much interest and the Federal Shariat Court, under the leadership of the liberal Chief Justice Aftab Hussain, invited all those who wished to be heard to participate in the proceedings. *Inter alia,* two formidable female advocates, Mrs Saleema Nasiruddin and Mrs Rashida Patel,[650] were heard, as was the doyen of Islamic jurisprudence in Pakistan, Khalid M. Ishaq. Justice Aftab Hussain, who wrote

646 PLD 1981 SC 627.

647 A similar petition asking the Federal Shariat Court to ban the practice of dancing girls in Lahore's Hira Mandi was dismissed on the basis that the existence of dancing girls in Lahore had not acquired the force of law and was therefore not within the jurisdiction of the Federal Shariat Court: see *Muhammad Siddiq Pahalwan v. Government of Pakistan* PLD 1982 FSC 227.

648 *Saeedullah Kazmi v. Government of Pakistan* PLD 1984 SC 463, at p. 464.

649 *Ansar Buaney v. Federation of Pakistan* PLD 1983 FSC 73.

650 Rashida Patel is the Chair of the All Pakistan Women's Lawyers Association and author of several books on women and the law in Pakistan, see for instance Rashida Patel, *Socio-Economic Political Status and Women and Law in Pakistan*, Karachi, 1991.

the unanimous decision, also heard the Attorney General who submitted that he was not representing the Government's case but was only present to assist the court. However, he referred to the views of the Council of Islamic Ideology, according to which women were allowed to sit as Qazis in family matters as long as they observed purdah and were at least 40 years old. However, the Attorney General distanced himself from the rather restrictive view taken by the Council of Islamic Ideology and submitted that he had found no Islamic basis for the conditions under which women could be permitted to act as Qazis. He also submitted that Maulana Maudoodi, the founder and leader of the Jamait-e-Islamia, had issued a fatwa in favour of Miss Fatima Jinnah's candidature for the presidential elections in 1964. Khalid M. Ishaq submitted that even the rule of evidence, which equates the evidence of one man with that of two women, was in fact not part of Islamic law.

Justice Hussain at the outset of his judgment decided that, there being no law prohibiting purdah, there was no law which could be declared un-Islamic by the court. However, Justice Hussain went further and in a carefully researched and reasoned judgment found that there was nothing in Islam which prohibited women from acting as judges. In fact, albeit *obiter*, he observed that, 'The view that [a] woman cannot appear as a witness in matters of Hudood and Qisas is only a juristic view and is not based on either the Qur'an or Hadith.'[651]

The Federal Shariat Court also declined to interfere in the internal affairs of religious communities, on the ground that no questions of law were involved. The first such case arose with regard to the Bohra community, which belongs to the Ismaeli Shia sect. It was argued before the Court that certain practices of the Bohra community were against the injunctions of Islam, for instance the power of the Dai, the hereditary leader of the Bohras, to excommunicate members who refuse to take or who breach a traditional oath of allegiance to the Dai. The Federal Shariat Court held that the petition involved questions of freedom of religion guaranteed by Article 20 of the Constitution and that it was therefore not competent to deal with the petition.[652] Other sectarian disputes, brought before the Federal Shariat Court, suffered a similar fate. In *Abdul Aziz v. Qureshi Ali Mansha*[653] the petitioner demanded that no particular sect of Islam should be allowed to build its own mosque. Again, the Federal Shariat Court refused to get involved, this time deciding that no question of law was involved.

However, the attitude of non-interference in the internal affairs of religious communities did not apply to one of the most controversial religious issues in Pakistan, namely the religious status and legal position of members of the Ahmadiyya sect. In the case of *Mujeeb-ur-Rehman v. Federal Government of Pakistan*[654] the petitioner challenged the validity of the Anti-Islamic Activities of Quadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance 1984. The Federal Shariat Court dismissed the petition on the ground that the impugned Ordinance did not

651 *Supra*, note 649 , at p. 90.

652 *Dr Amanat Ali v. Federation of Pakistan* PLD 1983 FSC 15. See also *Habibur Rehman Siddiqui v. Government of Pakistan* PLD 1983 FSC 18 where the petitioner objected to the term 'Islamic Republic of Pakistan'. It was held that the court had no jurisdiction to examine the issue, since it involved the constitution.

653 PLD 1983 FSC 22.

654 PLD 1984 FSC 136.

interfere with the right of Ahmadis to practise their own religion. This was a predictable result but it is nevertheless curious to note that Justice Hussain did not refer to Islamic law at all in his decision – it seems that he based his arguments on the fundamental right to freedom of religion. This was rectified in the case of *Mujibur Rehman v. Federal Government of Pakistan*,[655] which confirmed that Ahmadis were not to be regarded as Muslims under Islamic law and that the Ordinance was therefore not repugnant to Islam.[656]

In respect of jurisdiction, it must be noted that the decision was a sound one: the shariat courts assumed jurisdiction over the issue of whether or not Ahmadiyyas were Muslims or not on the basis of a challenge to a criminal law. There is no doubt that the shariat courts had jurisdiction to examine whether or not a criminal law was repugnant to Islam. However, in turn this provided an avenue for the Shariat Appellate Bench to decide on the substantive issue, namely the religious status of Ahmadiyyas. The latter was however not strictly speaking necessary, since the Shariat Appellate Bench Supreme Court could have referred to the constitutional definition of Ahmadiyyas. Instead, it chose to embark on an exhaustive and relentless dissection of everything considered wrong and un-Islamic in the beliefs of the Ahmadiyya community.

In the final analysis, the impact of the Federal Shariat Court on the visible features of an Islamic society, like for instance the ideal of purdah, was extremely limited. Only those areas of public life which were already subject to regulation by law could be examined. One of these was lotteries. In *Mushtaq Ali v. Government of Pakistan*[657] the Federal Shariat Court considered the Islamic *vires* of lotteries. It was held that any lottery or prize draw which incorporated an element of chance was repugnant to Islam. The only exception was governmental draws for plots of land and such like, where a participant does not lose any money but may benefit if successful in drawing the lot. The Federal Shariat Court ruled that even lotteries held in support of religious or charitable causes were un-Islamic, since this 'erodes the morals of people who contribute to a pious project not to please Allah and His Prophet but they have to be persuaded by a material gain.'[658]

Muslim Personal Law

Whereas the exclusion of customs not having the force of law from the jurisdiction of the shariat courts did not cause any insurmountable problems for the shariat courts, the same cannot be said for the area of laws identified by Article 203-B(c) of the 1973 Constitution as Muslim personal law. The most contentious issue was without doubt the Muslim Family Laws Ordinance 1961, which had been attacked as being un-Islamic ever since it had been promulgated by Ayub Khan in 1961. The issue was

655 PLD 1985 FSC 8.

656 The Supreme Court of Pakistan in *Zaheeruddin v. The State* 1993 SCMR 1718, *supra*, note 495, rejected by a majority decision of four to one the contention that the Ordinance XX of 1984 violated any of the fundamental rights guaranteed by the Constitution.

657 PLD 1989 FSC 63.

658 *Ibid*., at p. 67.

considered by the Shariat Appellate Bench of the Supreme Court in the case of *Federation of Pakistan v. Farishta.*[659] The case is significant for two reasons: first, it was the first appeal against a decision of a Shariat Bench filed by the Pakistani government. Secondly, it was the first case in which the Shariat Appellate Bench of the Supreme Court overturned a decision of a Shariat Bench.

The case concerned the sensitive issue of the Muslim Family Laws Ordinance 1961, parts of which had been declared invalid and repugnant to Islam by the Shariat Bench of the Peshawar High Court in 1979.[660] The Peshawar High Court had held that the jurisdictional bar on deciding matters concerned with Muslim personal law did apply only to the 'Shariat Law' of Muslims but not to statutes which departed from 'Shariat Law'. The Shariat Appellate Bench of the Supreme Court disagreed, holding that by the term 'Muslim personal law' 'is meant that portion of the Civil Law of Pakistan which is exclusively applied or which authorises application of certain specified law to Muslim residents of this country as a special and personal law for them.'[661] The decision was significant in that it confirmed a rather curious state of affairs: shariat courts could not examine the validity of any laws which apply to Muslims in their capacity as Muslims. The Shariat Appellate Bench took comfort from the fact that this jurisdictional bar did not constitute an absolute ban on these laws ever being considered from an Islamic perspective: Article 227 of the 1973 Constitution provided for a Council of Islamic Ideology which was specifically entrusted with the task of suggesting Islamisation measures to parliament albeit that the Council had no power to enforce the enactment of its proposals. It should be noted that the judgment was handed down by Justice Muhammad Afzal Zullah, who was later to become the Chief Justice of the Supreme Court and one of the principal architects of Pakistan's public interest litigation. Justice Zullah's restrictive definition of Muslim personal law allowed him a few months later to reject an appeal against a decision of the Shariat Bench of the Sindh High Court.[662] The case concerned the government's selection by ballot of applicants entitled to perform haj. The High Court had dismissed the case because it concerned government policy not amenable to judicial review but Justice Zullah was able to apply the precedent of *Farishta,*[663] holding that matters relating to haj were applicable only to Muslims and were matters of Muslim personal law, and therefore outside the jurisdiction of the Shariat Appellate Bench.

Justices Aftab Hussain's and Zullah's firmness on jurisdictional matters in the early days of the Federal Shariat Court and the Shariat Appellate Bench's existence enabled both courts to stem the tide of petitions filed by Muslims unsatisfied with the state of Islam in Pakistan. In *Saeedullah Kazmi v. Government of Pakistan*[664] a total of 15 Shariat petitions, ranging from the participation of women in haj pilgrimages to the issue of co-education, were all dismissed on the basis that even if these policies fell into the definition of law as contained in Article 203 of the Constitution, they

659 PLD 1981 SC 120.
660 See *Mst. Farishta v. The Federation of Pakistan* PLD 1980 Pesh 47, *supra*, note 556.
661 *Supra*, note 659, at p. 123.
662 *H.I. Sheikh v. Mahmood A. Haroon, Federal Minister, Religious Affairs* PLD 1981 SC 334.
663 *Supra*, note 659.
664 PLD 1981 SC 627.

would nevertheless not come under the jurisdiction of the Federal Shariat Court because they were in the realm of Muslim personal law.[665]

However, the jurisdictional bar on matters relating to Muslim personal law, though binding on the Federal Shariat Court, was nevertheless at times ignored. In *Muhammad Amin v. Government of Pakistan,*[666] a case concerning the right of the heirs of deceased members of the armed forces to 'inherit' pensions and other benefits as part of the estate of the deceased, the Federal Shariat Court chose to ignore the *Farishta*[667] decision altogether and held that:

> 'Inheritance is undoubtedly a subject of Personal Law. It is also true that "personal" law is excluded from the definition of law in Article 203-B of the Constitution. But the jurisdiction of this Court is barred only to the extent of declaring Personal Law as being repugnant to the Holy Qur'an and the Sunnah. The embargo on jurisdiction does not extend to implementation by us of a matter of personal law and to the declaration by us of a law or custom having the force of law as being repugnant to the provisions of Muslim Personal Law in the Holy Qur'an and the Sunnah of the Holy Prophet. While this Court is debarred from giving any opinion as to the repugnancy of "Personal Law" with Shariah, there is no bar to sustaining and preserving it by declaring other laws as repugnant to it.'[668]

The decision is a curious one, since it runs counter to the Shariat Appellate Bench's ruling that any law exclusively concerned with Muslims is outside its jurisdiction under Article 203-B of the 1973 Constitution. It also runs counter to a decision of the Federal Shariat Court itself, which held in the same year (1982) that it was barred from examining the Muslim Family Laws Ordinance 1961 on the basis of Islam.[669] The latter decision, however, must be regarded as the one adopted by the Federal Shariat Court as binding.

Whereas in the above case the Federal Shariat Court was able to avoid the exclusion of jurisdiction issue by claiming that it was simply stating Muslim personal law rather than invalidating it, the case of *Federation of Pakistan v. Muhammad Ishaque*[670] must be regarded as a clear transgression of the exclusion of Muslim personal law from the jurisdiction of the shariat courts. The case concerned the Islamic law of inheritance. At issue was section 5 of the Punjab Laws Act 1872, which recognised Punjabi customary land law. Under customary law, an owner of immovable ancestral property vested in him by way of inheritance had only limited rights of alienation. If he sold the land the purchaser could potentially face a legal action by the revisionary

665 A similar petition against co-education and the non-observance of purdah also failed in the Federal Shariat Court. However, the decision was not based on the exclusion of personal law from the jurisdiction of the Federal Shariat Court but the contention that the petitioner could not identify any law or a custom having the effect of law which provided for the non-observance of purdah or co-education. Therefore, there was no law which could be declared to be un-Islamic: see *Habibur Rehman v. Federation of Pakistan* PLD 1983 FSC 13. Petitions concerned with haj arrangements were also a constant source of petitions, see for instance *H.I. Sheikh v. Mahmood Haroon, Federal Minister for Religious Affairs* PLD 1983 FSC 21.

666 PLD 1982 FSC 143.

667 *Supra*, note 659.

668 *Supra*, note 666, at p. 149.

669 See *Aziz Khan v. Muhammad Zarif* PLD 1982 FSC 156.

670 PLD 1983 SC 273.

heir of the seller on the ground that the land was subject to customary limitations imposed on the free alienation of the ancestral property. A series of statutes, commencing with the West Punjab Muslim Law (Shariat) Application Act 1948 and culminating in the West Pakistan Muslim Personal Law (Shariat) Application Act 1962, had abolished the application of customary law to the inheritance of agricultural land in respect of Muslims. However, there remained a loophole: estates inherited before 16 March 1948 continued to be subject to the rules of customary law, and owners of such estates could only dispose of them in accordance with customary law. This loophole was challenged as being repugnant to the Islamic law of inheritance, which gave heirs absolute powers over the property inherited from a deceased person.

The Shariat Appellate Bench of the Supreme Court upheld the decision of the Federal Shariat Court, which had declared the continued application of the Punjab Laws Act 1872 as being repugnant to Islamic law. It is not surprising that the application of customary law to Muslims was held to be repugnant to Islam. However, the West Pakistan Muslim Personal Law (Shariat) Application Act 1962, which had provided for the continued application of the Punjab Laws Act 1872, was without doubt a Muslim personal law, applicable only to Muslims. According to the *Farishta* decision it would therefore be excluded from the jurisdiction of the Federal Shariat Court. There is no discussion of this aspect in the judgment, delivered by Justice Nasim Hassan Shah, and it must be surmised that the Shariat Appellate Bench had by then softened its stance on the exclusion of Muslim personal law from its jurisdiction.

Nevertheless, almost ten years later in the case *Dr Mahmood-ur-Rahman Faisal v. Secretary, Ministry of Justice, Law and Parliamentary Affairs*[671] Justice Tanzil-ur-Rahman refused to examine the Islamic *vires* of the Zakat and Usher Ordinance 1980, on the ground that the Ordinance was concerned with Muslim personal law and was therefore outside the jurisdiction of the Federal Shariat Court. It was the decision on the appeal against this judgment which brought to an unambiguous end the exclusion of Muslim personal law from the jurisdiction of the shariat courts. Handed down by the Shariat Appellate Bench of the Supreme Court in 1994, the case of *Mahmood-ur-Rahman Faisal v. Government of Pakistan*[672] reversed the long series of cases in which the Federal Shariat Court had held that all laws applicable only to Muslims were to be considered to be part of Muslim personal law and therefore outside its jurisdiction. The Supreme Court proceeded on the basis of the assertion that the Federal Shariat Court had been created to speed up the process of Islamisation. As such, the jurisdictional exemptions should be interpreted narrowly, thereby ensuring that the constitutional mandate of speedy and effective Islamisation was preserved. In the light of this policy, the term 'Muslim personal law' was to be given a new definition that was narrower than that adopted by the Federal Shariat Court in the *Farishta* decision. Support of this complete U-turn was also found in the explanation to Article 227(1) of the 1973 Constitution, inserted in 1980 by President's Order No. 14 of 1980, to the effect that:

> 'In the application of this clause to the personal law of any Muslim sect, the expression "Qur'an and Sunnah" shall mean the "Qur'an and Sunnah" as interpreted by that sect.'

671 PLD 1991 FSC 35.
672 PLD 1994 SC 607 [FB].

Article 227(1) of the 1973 Constitution provides that:

> 'All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such injunctions.'

Though not directly concerned with the jurisdiction of the Federal Shariat Court, in fact sub-section 2 of Article 227 expressly provides that effect 'shall be given to the provisions of clause (1) only in the manner provided in this Part', the Shariat Appellate Bench nevertheless held that the explanatory provision indicated the scope of the process of Islamisation laws and the real meaning of Muslim personal law. It followed that only those Muslim personal laws which were based on a distinct interpretation of a law by a particular school of Islamic law were excluded from the jurisdiction of the Federal Shariat Court under Article 203-B of the 1973 Constitution. In turn, all other statutory laws applicable to all Muslims could not be considered to fall within the definition of Muslim personal law. Six years later, in the case of *Allah Rakha v. Federation of Pakistan*,[673] the Federal Shariat Court declared several sections of the Muslim Family Laws Ordinance 1961 to be repugnant to Islam, arguing that on the basis of the *Faisal* decision it was now free to examine its validity in the light of Islamic law.

Before dealing with the judgment itself, the timing of the *Allah Rakha*[674] decision has to be considered. The petitions asking for certain sections of the Muslim Family Laws Ordinance 1961 to be declared repugnant to Islam spread from 1993 to 1999. Hearings took place on two days in 1994, one day in 1995, four days in 1998 and eight days in 1999. It is curious that the issue took six years to decide and that the final hearings, three days in December 1999, took place shortly after General Musharraf had come to power. Further, the timing of the decision coincides with the decision of the Shariat Appellate Bench of the Supreme Court declaring all laws providing for the payment of interest to be invalid.[675] It can be concluded that the timing of both decisions was at least in part motivated by a desire to demonstrate to the new military government that the country's judiciary was willing to assert its authority and constitutional position. The Islamisation of laws was a fitting issue for such a demonstration, since even General Musharraf would find it difficult to challenge the power of courts to make the legal system more Islamic.

The substance of the *Allah Rakha*[676] decision can be summarised in a few words: sections 4, 7(3) and 7(5) of the Muslim Family Laws Ordinance 1961 were declared to be repugnant to Islam. Section 4 allowed the children of a pre-deceased son to inherit from the estate of their grandfather. The Federal Shariat Court held that this a clear violation of the mandatory provisions of the Qur'an. Section 7 must be regarded as by far the most controversial provision: section 7(3) made the validity of a divorce dependent on the husband giving notice of the divorce to the Chair of the Union Council. Non-compliance with the notice requirement rendered the divorce invalid. It has already been pointed out that section 7 created difficulties for women who had

673 PLD 2000 FSC 1.
674 *Ibid*.
675 See *Federation of Pakistan v. Mahmood-Ur-Rehman Faisal* PLD 2000 SC 770.
676 *Supra*, note 673.

remarried after having been divorced by their husbands. If the husband failed to register, the marriage continued to exist and the wife's subsequent remarriage was formally not valid. In such a case, a woman was liable to be charged with zina by her disgruntled 'first' husband and would face severe punishment. In its appeal jurisdiction the Federal Shariat Court had decided to ignore the procedural requirements imposed by section 7 of the Muslim Family Laws Ordinance 1961. However, all other courts in the country insisted on compliance with section 7.

The result of the *Allah Rakha*[677] is a curious one: there is now more clarity in the field of criminal law since a 'former' husband can no longer press zina charges against his divorced wife only because he failed to comply with section 7. However, it has also made it easier for husbands to divorce their wives: the judgment fails to clarify whether or not any notice of a divorce is required to be given to the wife at all in order to make a divorce effective. It appears that the validity of a divorce will now rest exclusively on classical Islamic law. The state itself is in no way required to bring about a valid divorce.

It appears that the an appeal against the *Allah Rakha*[678] decision is pending before the Shariat Appellate Bench of the Supreme Court but at this point no confirmation of this has been received.

Fiscal Laws and Tax

However, jurisdictional issues did not only manifest themselves in relation to Muslim family law and un-Islamic 'customs'. Article 203-B excluded not only Muslim personal law but also 'fiscal law' from the jurisdiction of the Federal Shariat Court.[679] In *Essa E.H. Jafar v. Federation of Pakistan*[680] the Federal Shariat Court applied this prohibition and held that it did not have the jurisdiction to declare those parts of the Pakistan Refugee Rehabilitation Finance Corporation Ordinance 1960, which provided for the payment of interest on loans, un-Islamic. However, there was some unease about the extent of this exclusion of the Federal Shariat Court's jurisdiction with Justice Zahooral Haq stating that the Federal Shariat Court nevertheless retained the right to examine the validity of legal provisions for the payment of interest in the context of contractual arrangements not relating to fiscal law or banking law.[681] Similarly, in *Khalid Abdur Raoof v. President of Pakistan*[682] the Federal Shariat Court refused to invalidate an amendment to the Zakat and Usher Ordinance 1980 on the grounds that the Ordinance fell into the spheres of both fiscal and Muslim personal law.

677 *Ibid.*

678 *Ibid.*

679 The exclusion of 'fiscal law' from the jurisdiction of the Federal Shariat Court was initially limited to three years but was extended to four in 1983 (see section 2 of the Constitution (Second Amendment) Order 1983), to five in 1984 (see the Constitution (Second Amendment) Order 1984 and then to ten years in 1985 by Article 2, Schedule item 42 of Presidential Order No. 14 of 1985.

680 PLD 1982 FSC 212.

681 See also *Khurshid Alam v. Muslim Commercial Bank* PLD 1983 FSC 20, where the petitioner sought to have declared un-Islamic the payment of interest on a loan. The Federal Shariat Court held that it did not have jurisdiction to deal with banking matters.

682 PLD 1982 FSC 237.

The issue of what constituted a fiscal law came up again in the case of *Muhammad Sadiq Khan v. Federation of Pakistan*[683] where the Islamic *vires* of section 58(d) of the Transfer of Property Act 1882 were challenged. It was contended before the court that the section, which allowed a mortgagee to retain rents and profits accruing from a property in lieu of interest amounted to *riba* prohibited by Islamic law. Justice Hussain held that the term 'fiscal' was not confined to laws relating to public finance and revenue but included any law concerning interest. The reasoning adopted by him is worth quoting in full:

> 'The primary aim of excluding fiscal laws from the jurisdiction of this Court appears to be to give protection to all laws concerning interest. It would have been opposed to the principle of equality if the Government had given this protection to its own Bank or Insurance Companies and taken it away from the privately owned Banks or Insurance Companies. It is for this reason that no distinction is made between one type of Bank or Insurance Company and another. On the same principle it appears that the laws relating to interest whether applicable to government or to companies or to private persons have been given protection for three years.'[684]

The definition of 'fiscal law' as any law concerning interest was met with hostility by the other members of the bench. Justice Zahoorul Haq repeated the arguments he had voiced earlier in *Essa E.H. Jafar v. Federation of Pakistan*[685] and argued that it should be left open to the Federal Shariat Court to decide on the *vires* of stipulations for the payment of interest in areas of law where interest was incidental to these laws and which could therefore not be regarded as fiscal law, such as, for instance, the calculation of liquidated damages in the form of interest payments on the purchase price in the context of a contract of sale. However, it was the *ulema* member of the Federal Shariat Court, Justice Taqi Usmani, who voiced the strongest dissent. He argued that by equating the term 'fiscal' with financial matters in general, the court was denuded of all meaningful powers and was rendered to almost a 'nullity'.[686] He observed that:

> 'The object of the Act which gave birth to this Court was the Islamisation of the existing laws. Hence, the Court was empowered to examine these laws in the light of the Holy Qur'an and Sunnah. The exclusion of the fiscal law from the jurisdiction of this Court was, in my view, to avoid the consequent vacuum that could have resulted in the financial system of the government in the event of a sudden change in such laws. It does not mean that the Legislature intended to maintain the status quo in the legal system of the country, which would be the practical result of the adoption of this second meaning [i.e. fiscal law denotes laws concerning financial matters], thereby clearly defeating the intention of the Legislature. The establishment of this Court together with the resultant establishment of this Court [sic] together with the resultant changes in the structure of the judiciary was very drastic indeed.

683 PLD 1983 FSC 43.
684 *Ibid*., at p. 46.
685 *Supra*, note 680.
686 *Supra*, note 683, at p. 50.

> Clearly, it was not an exercise in futility. The second meaning, therefore, in my opinion cannot be applied to Article 203-B(c) of the Constitution.'[687]

Justice Usmani's view did not prevail but the divergence of opinions indicates deeper ideological differences: Justice Hussain was reluctant to reduce the definition of 'fiscal', perhaps fearing a flood of litigation and a collapse of the country's private banking and insurance system alluded to by Justice Usmani himself. Justice Usmani, on the other hand, believed in the historic mission of the court and regarded the court as a 'nullity' if it could not deal with the question of interest – a prominent and pressing concern in the Islamic quarters of the country.

There was less controversy on the exclusion of laws concerned with 'tax' from the jurisdiction of the Federal Shariat Court: in *Muhammad Moizuddin Habibullah v. Government of Sind*[688] the petitioner challenged the West Pakistan Urban Immovable Property Tax 1958. In a decision occupying just one paragraph the petition was dismissed on the ground that the Federal Shariat Court lacked jurisdiction to deal with issues involving tax.[689]

The issue of fiscal laws emerged again in the early 1990s at the expiry of the ten-year limitation period.[690] Justice Tanzil-ur-Rahman, a judge fully committed to the mission of the Federal Shariat Court, determined the legality of interest in the case of *Mahmood-ur-Rahman Faisal v. Secretary, Ministry of Law.*[691] He admitted to hearing a total of 115 Shariat petitions challenging a considerable number of laws providing for the payment of interest, namely the Interest Act 1839; the Government Savings Bank Act 1873; the Negotiable Instruments Act 1881; the Land Acquisition Act 1894; the Code of Civil Procedure 1908; the Cooperatives Societies Act 1925; the Co-operatives Societies Rules 1927; the Insurance Act 1939; the State Bank of Pakistan Act 1956; the West Pakistan Money-Lenders Ordinance 1960; the West Pakistan Money-Lenders Rules 1965; the Punjab Money-Lenders Ordinance 1960; the Sindh Money-Lenders Ordinance 1960; the N.-W.F.P. Money-Lenders Ordinance 1960; the Baluchistan Money-Lenders Ordinance 1960; the Agricultural Development Bank of Pakistan Rules 1961; the Banking Companies Ordinance 1962; the Banking Companies Rules 1963; the Banks (Nationalisation) (Payment of Compensation) Rules 1974; and finally the Banking Companies (Recovery of Loans) Ordinance 1979.

687 *Ibid*., p. 50.

688 PLD 1983 FSC 517.

689 An attempt to have a judgment of a court declared to be un-Islamic also failed. In *Sher Afzal v. Shamim Firdaus* PLD 1983 FSC 14, the petitioner moved the Federal Shariat Court to challenge a judgment of the Supreme Court as repugnant to Islam. The Supreme Court had after a lengthy and protracted litigation declared his marriage to be valid. The Federal Shariat Court refused to allow the petition, deciding that, 'it is not the function of this Court to sit over judgment of other courts and, therefore, this petition is hereby dismissed' (at p. 15).

690 The period of 10 years expired on 26 June 1990. It should be noted that whilst General Zia-ul-Haq was able to extend the limitation period from the original three years to ten, Nawaz Sharif's government was evidently unwilling to do so, most probably because it could not be seen to shy away from the Islamisation of the economy, an objective which the government had expressly imposed on itself under the provisions of the Enforcement of Shari'ah Act 1991. Nevertheless, the government appealed the decision and obtained a stay order from the Shariat Appellate Bench of the Supreme Court.

691 PLD 1992 FSC 1.

It can probably be stated without too much fear of contradiction that one important motivation underlying many of these petitions was the desire of the individual petitioners to avoid the payment of interest charged under loan agreements with banks. In that plea, all 115 petitioners were disappointed. Consistent with earlier decisions by the Shariat Appellate Bench of the Supreme Court, Justice Rahman held that the Federal Shariat Court could not examine the validity of individual agreements, nor could it grant any relief by way of issuing injunctions or staying proceedings pending before a court. He added, not without a hint of irony, that:

> 'We would like to add here that all petitioners, except few, are the borrowers of some Banks and Financial Institutions or of Cooperative Finance Corporations or Societies. They being Muslims, are expected to know it fully well that Islam has forbidden the interest, as they have themselves so expressly stated in their petitions. It is manifest that the Holy Qur'an was not revealed today. The Qur'anic mandate prohibiting riba is in existence since fourteen hundred years ago.'[692]

However, whilst conceding that the Federal Shariat Court could not invalidate individual loan agreements, Justice Rahman observed that 'a contract of interest or based on interest is not enforceable to the extent of such interest.'[693] It follows from this that, in his opinion, a court other than the Federal Shariat Court would not be able to enforce the interest provision contained in an individual loan agreement subject to certain exceptions like interest payable under section 8 of the Banking Companies (Recovery of Loans) Ordinance 1979.

In a judgment covering 189 pages of the law report Justice Rahman declared all laws providing for the payment of interest un-Islamic and set 1 July 1992 as the date on which these laws ceased to have effect. The government had asked for an extension of time, since it had ordered a report on the elimination of interest from the economy under the provisions of the Enforcement of Shari'ah Act 1991. Justice Rahman rejected that request, observing that he himself as the chair of the Council of Islamic Ideology had submitted a report on the elimination of interest from the economy to the government in 1980. Since the lifting of martial law there had been six years for successive governments to act on the recommendations contained in the report and Justice Rahman was thus unwilling to grant even more time. Consequently, the government appealed against the decision and the judgment therefore did not take effect. The appeal was pending before the Shariat Appellate Bench of the Supreme Court for eight years. It was only decided in 2000 in the case of *Federation of Pakistan v. Mahmood-Ur-Rehman Faisal*.[694] The Shariat Appellate Bench of the Supreme Court upheld Justice Rahman's decision but several extensions have been granted to the government to adjust the country's economic system to the new Islamic economic order. To date, all the laws declared repugnant by Justice Rahman remain in force.

692 *Ibid*., at pp. 179 and 180.
693 *Ibid*., at 179.
694 PLD 2000 SC 770, *supra*, note 675.

In the second *Mahmood-ur-Rahman Faisal* decision[695] Justice Rahman declared the charging of court fees to be un-Islamic since they taxed access to justice.[696] Rahman conceded that the government could charge fees for the stationery used by courts to record judgments but that was the only concession to the government which had vainly pleaded that 40 per cent of the budget available to run the judicial system was derived from court fees.[697]

The third *Mahmood-ur-Rehman Faisal* decision[698] challenged the *vires* of the Pakistan Insurance Corporation Employees Provident Fund Regulations 1954. It was argued that the fact that the contributions to the fund, deducted by the employer for the employee's monthly salary, earned interest, made the whole scheme repugnant to Islam. Justice Rahman found that the employee had no choice in the matter and was not a party to the transaction in which the charging of interest occurred. Nevertheless, this argument did not help the government which invested the contributions so as to earn interest on the fund thereby increasing it. Regulation No. 14 of the Pakistan Insurance Corporation Employees Provident Fund Regulations 1954 were thus held to be repugnant to Islam. Similarly, the bylaws of National Industrial Cooperative Finance Corporation Limited which provided for the charging of interest were declared to be repugnant to Islam.[699] The same was decided in relation to the Cooperative Societies Act 1925.[700] *S.S.M.R. No 1/I of 1991: In the Matter Of*[701] was a further 'mopping up exercise' to eradicate other instances of statutes providing for the payment of interest. In this case the General Financial Rules of Central Government were scrutinised and all instances where the Rules provided for the payment of interest were declared repugnant to Islam.[702]

The issue of *riba* was also discussed in the case of *Muhammad Iqbal Chaudhry v. Federation of Pakistan.*[703] At issue were the Islamic *vires* of the House Building Finance Corporation Act 1952. The purpose of the statute was to make available loans for the purchase, construction or renovation of residential premises. What makes this statute interesting for the purposes of this book is the fact that in 1979 extensive amendments were made in line with recommendations received by the Council of Islamic Ideology. These amendments substituted the loan with a partnership between purchaser and the corporation in which the corporation invested by buying the house

695 PLD 1992 FSC 195.

696 Court fees were first introduced in 1780 and the system was unified for the whole of British India under the provisions of the Court Fees Act 1870, though it is interesting to note that at the time the three High Courts established in the Presidency towns of Calcutta, Madras and Bombay were exempt from the provisions. British subjects could therefore file suits without paying any court fee.

697 It appears from the law report that the Court Fees Act 1870 had been examined by the Advisory Council of Islamic Ideology in 1971 and found not to be repugnant to the injunctions of Islam, *ibid*., at p. 211. However, the Council of Islamic Ideology set up under the provisions of the 1973 Constitution thought the Act un-Islamic.

698 PLD 1992 FSC 530.

699 *Gulzar Ahmad Khan v. Province of Punjab* PLD 1992 FSC 535 and *Gulzar Ahmad Khan v. Province of Punjab* PLD 1992 FSC 538.

700 *Sarwar Hayat v. Province of Punjab* PLD 1992 FSC 537.

701 PLD 1992 FSC 518.

702 These related to loans advanced to civil servants by the government for the purchase of residential premises, cars and motor boats.

703 PLD 1992 FSC 501.

jointly with the buyer. The corporation was paid back, not on the basis of a loan but by 'renting' out the property to the buyer. Title in the property vested in the buyer after payment of an estimated rental value totalling the cost of the house. The Federal Shariat Court nevertheless found several provisions of the Islamised statute to be in violation of Islamic law. The most important one was the fact that in this partnership virtually all the terms of the agreement were imposed unilaterally by the corporation: the Federal Shariat Court thought that in cases of disputes over the terms of the investment the matter should be referred to a higher authority. Isolated references to interest, mainly in the context of the borrowing powers of the corporation, were also held to be un-Islamic.

The issue of interest acquired an almost comical turn in *Re: N.-W.F.P. Urban Planning Ordinance 1978.*[704] The case had started off as a *suo moto* decision of the Federal Shariat Court where it was held that each residential scheme should make provision for the construction of a mosque and that the government should also increase the amount of compensation in cases of compulsory acquisition of land at the rate of 15 per cent per annum. The Shariat Appellate Bench of the Supreme Court held that the Federal Shariat Court had exceeded its jurisdiction by giving recommendations to the government without actually declaring any law to be repugnant to Islam. The matter was taken by Justice Rahman. He found that not only could the Federal Shariat Court not make any recommendations but in addition the recommendation to increase the compensation to 15 per cent per annum was in itself in violation of Islam.

Despite the impressive number of cases which without exception held that laws providing for the payment of interest are repugnant to Islam, Pakistan has been slow to eradicate interest from its banking system and economy. Unfortunately, neither the Federal Shariat Court nor the Shariat Appellate Bench of the Supreme Court maintain up-to-date data on pending appeals against decisions of the Federal Shariat Court. Therefore, it cannot be established with any degree of certainty whether or not a particular law is in fact in force: despite an unambiguous decision of the Federal Shariat Court it must be assumed that in all probability an appeal against such a decision is in fact pending before the Supreme Court.[705] It may be added that the long delays experienced in the hearing of these appeals is, in all likelihood, at least in part caused by political factors: it is within the discretion of the Supreme Court to decide when to hear an appeal and as such some appeals remain pending for long periods of time before being resurrected. The decision on interest is a case in point, since it had been pending before the Supreme Court for almost a decade before being decided within three months of General Musharraf having come to power: there is no doubt that the decision was as much about the eradication of interest as it was a demonstration of judicial power.

704 PLD 1992 FSC 512.

705 Article 203-D(b) provides in respect of a decision of the Federal Shariat Court that '... no such decision shall be deemed to take effect before the expiration of the period within which an appeal therefrom may be preferred to the Supreme Court or, where an appeal has been so preferred, before the disposal of such appeal.' This proviso was added to Article 203-D by section 2(b) of he Constitution (Amendment) Order 1984.

Revisional Jurisdiction

The shockwaves created by the invalidation of the *hadd* punishment of stoning to death contained in sections 5 and 6 of the Offence of Zina (Enforcement of Hudood) Ordinance 1979 as un-Islamic received a swift response from Zia-ul-Haq: he amended the Constitution adding the provision that, 'The Court shall have power to review any decision given or order made by it.'[706] It will be recalled that the Federal Shariat Court had declared stoning to death, i.e. *rajm*, is not a *hadd* sentence for adultery. In *Federation of Pakistan v. Hazoor Baksh*[707] a six-member bench of the Federal Shariat Court, which included three *ulema* members, exercised for the first time its newly acquired power to review its own decisions under Article 209-E of the 1973 Constitution. The three *ulema* members, Justice Malik Ghulam Ali, Justice Pir Muhammad Karam Shah and Justice Muhammad Taqi Usmani, had already stated before the case commenced that in their opinion the punishment of stoning to death was in accordance with the Qur'an and Sunnah. In the end, with the exception of Justice Hussain, the bench held accordingly and declared the impugned sections not to be repugnant to Islam. However, it should be noted that the operative part of the judgment which overturned the earlier decision was based on a jurisdictional ground and not on the Islamic *vires* of the two sections. The Federal Shariat Court held that, since the impugned sections of the Offence of Zina (Enforcement of Hudood) Ordinance 1979 was applicable only to Muslims, they were to be regarded as matters of Muslim personal law. Applying the decision of the Shariat Appellate Bench of the Supreme Court in *Federation of Pakistan v. Farishta*[708] the Federal Shariat Court held that:

> 'There is no doubt that if a particular statute is applicable to Muslims only, it will be treated to be a provision of Muslim Personal Law. The sentence of stoning being limited only to Muslims, it would be taken to be a provision of Muslim Personal Law which is excluded from the purview of examination by this Court. The Shariat Petition should have been dismissed at this point. But it escaped the notice of the Court as the case [i.e. *Farishta]* cited above was not reported by then.'[709]

The revisional jurisdiction of the Federal Shariat Court was only used in extraordinary circumstances. The most famous of these was the case of *Safia Bibi v. The State*[710] concerning a blind girl, who had been charged with fornication after her defence of rape had failed. Her pregnancy was taken as evidence that she had engaged in sexual intercourse and not being married made her 'automatically' guilty of fornication. Justice Hussain referred in the first sentence of his judgment to the fact that, 'This is an unfortunate case which received considerable publicity in the national and international press.' Hussain overturned the conviction of Safia Bibi on the ground

706 See section 9 of Article 203-E of the Constitution inserted by section 4 of the Constitution (Amendment) Order 1980.
707 PLD 1983 FSC 255.
708 *Supra*, note 659.
709 *Supra*, note 707 , at p. 282 per Justice Hussain.
710 PLD 1985 FSC 120.

that pregnancy in itself did not constitute evidence of *zina* if the mother claims to have been raped.

The express constitutional provision conferring to the Federal Shariat Court the power to review its own judgments was, however, missing in the case of the Shariat Appellate Bench of the Supreme Court. Despite this omission, the Shariat Appellate Bench of the Supreme Court nevertheless decided that it had the same power of review. The most controversial exercise of this revisional jurisdiction occurred in the context of the protracted litigation surrounding the invalidation of the pre-emption laws, which will be discussed further below. In the case of *Aziz Begum v. Federation of Pakistan*[711] a number of petitioners moved the Supreme Court, not the Shariat Appellate Bench, in a constitutional petition. They argued that the Shariat Appellate Court had no power to review its own decision as it had done in the case *Suo Moto Shariat Review Petition No. 1-R of 1989: In re.*[712] In that case, the Shariat Appellate Bench had reviewed and clarified its own judgment on Punjab's pre-emption laws reported as *N.-W.F.P. v. Said Kamal Shah.*[713] The Shariat Appellate Bench had held that, it being part of the Supreme Court, it had identical powers of review as any other bench of the Supreme Court.[714] However, what was the relationship between the Supreme Court and its Shariat Appellate Bench? In *Aziz Begum*[715] the Supreme Court decided that decisions of the Shariat Appellate Bench of the Supreme Court were binding even on the Supreme Court itself. Justice Shafiur Rahman held that:

> 'Such a duality, such an amalgam, has necessarily the effect of keeping the Supreme Court intact, of not carving out a Court out of a Court, but of creating a Bench with a distinction in procedure and subject-matter suited to the subject-matter of adjudication and consistent with the requirement of Injunctions of Islam in the matter of adjudication of questions pertaining to Qur'anic injunctions. The procedures and powers of the Supreme Court, excluding those constitutionally prescribed, have been left untrammeled to hold sway and to govern the proceedings of the Shariat Appellate Bench like that of any other Bench of the Supreme Court . . . But then the question of the declaration of repugnancy of any law to the Injunctions of Islam is in the exclusive jurisdiction of such a Court and thereafter of the Supreme Court in the Shariat Appellate Bench under Article 203-F of the Constitution.'[716]

Justice Rahman concluded that therefore even the Supreme Court could not interfere with a decision rendered by the Shariat Apellate Bench in its revisional jurisdiction or otherwise:

'In view of the express provision made in Article 203-G of the Constitution and the peculiar entrenchment of the Shariat Appellate Bench as a Bench of the Supreme Court in Chapter 3-A of Part VII of the Constitution, the decision of the Shariat

711 PLD 1990 SC 899.
712 PLD 1990 SC 865.
713 PLD 1986 SC 360.
714 See Article 188 of the 1973 Constitution, which provides that the Supreme Court has the power to review any judgment or order made by it.
715 *Supra*, note 711.
716 *Ibid*., at p. 920.

Appellate Bench on review is immune from scrutiny and interference from any other Bench of the Supreme Court itself unless it be given under Article 203-F independently or in exercise of review jurisdiction.'[717]

The binding effect of a decision of the Shariat Appellate Bench of the Supreme Court on the Supreme Court itself was confirmed in *Muhammad Yasin v. Khan Muhammad.*[718] At issue were yet again the confusing judgments pronounced by the Supreme Court and by its Shariat Appellate Bench with regard to the law of pre-emption: there was now a direct conflict between the decision of the Supreme Court in *Ahmad v. Abdul Aziz*[719] and the Shariat Appellate Bench's *suo moto* decision rendered a year later.[720] Justice Nasim Hasan Shah dismissed the petition confirming that the decision of the Shariat Appellate Bench was binding on all courts of the land including the Supreme Court.

Territorial Jurisdiction

The territorial jurisdiction of the Federal Shariat Court needs to be discussed because of the existence of areas within Pakistan which though forming part of the country's territory are nevertheless not part of the country's law of the land. There are three distinct areas of Pakistan which do occupy a special legal status: The Federally Administered Tribal Areas ('FATA'), the Provincially Administered Tribal Areas ('PATA') and the Northern Areas. The status of these areas has for a long time in Pakistan's legal history been the subject of acrimonious litigation.[721] Until quite recently the constitutionally guaranteed fundamental rights did not apply and many general laws, such as for instance the Pakistan Penal Code 1860, had no application in FATAS and PATAS.[722] Criminal law in FATAS and PATAS was based on customary law applied by tribal councils, called *jirgas*, and sentences were confirmed and executed by the government's political agent. The writ jurisdiction of the superior courts did not extend to the tribal areas.

In *Sajjad Hussain v. The State*[723] two appellants challenged their convictions for drug smuggling by a *jirga* under the Prohibition (Enforcement of Hadd) Order 1979 ('the Prohibition Order 1979') and the Frontier Crimes Regulation 1911. They argued that the Prohibition Order 1979 had not been made applicable to the tribal areas and that the Frontier Crimes Regulation 1911 was in violation of the constitutionally guaranteed fundamental rights. The Federal Shariat Court, despite the general ouster

717 *Ibid*.
718 PLD 1990 SC 1060.
719 PLD 1989 SC 771.
720 *Supra*, note 712.
721 It is often forgotten that the famous *Dosso* case, *supra*, note 33, for instance, which established the doctrine of revolutionary legality, concerned the constitutionality of the infamous Frontier Crimes Regulation 1911. As a result of Justice Munir's decision that the suspension of fundamental rights was lawful, the challenge to the Frontier Crimes Regulation 1911, did not succeed.
722 See Article 246 (7) of the Constitution which provides that, 'Neither the Supreme Court nor a High Court shall exercise any jurisdiction under the Constitution in relation to a Tribal Area, unless Majlis-e-Shora (Parliament) by law otherwise provides.'
723 PLD 1989 FSC 50.

of jurisdiction clause contained in Article 247 of the 1973 Constitution[724] held that its jurisdiction extended to the tribal areas because Article 203-DD, which prescribes the revisional and appeal jurisdiction of the Federal Shariat Court, does not impose any territorial limitations on its jurisdiction. However, there was a further difficulty: in 1984, Zia-ul Haq had promulgated the Federally Administered Areas (Exclusion of Jurisdiction of the Federal Shariat Court) Order 1984, which expressly provided that, 'The jurisdiction of the Federal Shariat Court shall not extend, and shall be deemed never to have extended, to the Federally Administered Tribal Areas.' As already mentioned, Article 270-A introduced as part of the controversial Constitution (Eighth Amendment) Act 1985, protected all legal measures taken by the martial law government between the imposition of martial law and the restoration of democracy, against judicial review. Thus, the Constitution expressly barred the Federal Shariat Court from examining the validity of the 1984 Order. The Federal Shariat Court relied on the Supreme Court's decision in *Benazir Bhutto,*[725] where it was held that sub-constitutional laws introduced during Zia-ul Haq's martial law could be challenged on the basis of the constitutionally guaranteed fundamental rights. The Federal Shariat Court held that the same reasoning could be applied to the 1984 Order: it was not incorporated in the Constitution and was therefore to be regarded as sub-constitutional legislation. As a result Article 203-DD prevailed over the 1984 Order. This reasoning enabled the Federal Shariat Court to ignore the 1984 Order – it was not declared repugnant to the injunctions of Islam – and to hold that its territorial jurisdiction was not in any way restricted. But did the Prohibition Order 1979 apply to the tribal areas? The Federal Shariat Court answered this question in the affirmative.

The assertion of territorial jurisdiction in the face of a clear legal instrument ousting its jurisdiction is significant: the Federal Shariat Court deliberately distanced itself of its martial law past and placed its jurisdiction firmly on the Constitution rather than on Zia-ul-Haq's orders. Though significant, it is nevertheless ironic that the Federal Shariat Court never once mentioned that its own provenance was firmly rooted in Zia's martial law.

Other Constitutional Exclusions of Jurisdictions over Specific Laws

The exclusion of certain laws from being judicially reviewed either on the basis of fundamental rights or at all is a peculiar feature of Pakistani constitutional law. As could be seen above, these exclusions either relate to geographical areas, where certain parts of the general law or the Constitution do not apply, or to laws introduced during periods of martial law.

724 Article 247 (3) of the Constitution provides that, 'No Act of Parliament shall apply to any Federally Administered Tribal Area or to any part thereof, unless the President so directs, and no act of Parliament or a Provincial Assembly shall apply to a Provincially Administered Tribal Area, or to any part thereof, unless the Governor of the Province in which the Tribal Area is situate, with the approval of the President, so directs; and in giving such direction with respect to any law, the President or, as the case may be, the Governor, may direct that the law shall, in its application to a Tribal Area, or to a specified part thereof, have effect subject to such exceptions and modifications as may be specified in the direction.'

725 *Supra*, note 327.

The extent to which the Federal Shariat Court was bound by these exclusions became a decisive issue in connection with the judicial review of Pakistan's pre-emption laws and the land reform legislation introduced by Zulfikar Bhutto in the early 1970s. At the heart of the issues was the Martial Law Regulation 115 of 1972 ('MLR 115') which *inter alia* allowed the state to compulsorily acquire property without paying the market value of the appropriated land and which gave tenants of agricultural land a right of pre-emption. Further, the Land Reforms Act 1977 and the Punjab Pre-emption Act 1913 contained similar provisions. The MLR 115 was protected by a whole raft of constitutional provisions against both judicial review and repeal by parliament. In *Muhammad Ameen v. Islamic Republic of Pakistan*[726] the Federal Shariat Court examined these three laws. In a first step, it had to be decided whether the constitutional provisions protecting the MLR 115 against judicial review applied also to the Federal Shariat Court. *Prima facie* the jurisdiction of the Federal Shariat Court was very wide: Article 203-A provided that, 'The provisions of this Chapter shall have effect notwithstanding anything contained in the Constitution' and thus gave the Federal Shariat Court the power to review any law apart from those specifically excluded from its power of judicial review under Article 203-B.

However, several constitutional provisions insulated the MLR 115 against change, repeal or challenge: first, Article 268(2) of the 1973 Constitution provided that no Bill to repeal or amend the MLR 115 shall be introduced without the previous sanction of the President. Secondly, Article 253(2) declared invalid any law which permits a person to own an area of land greater than which immediately before the commencing day, i.e. 24 April 1972, he could lawfully have owned. In effect, Article 253(2) deprived parliament of any authority to increase or abolish the ceiling of land ownership fixed by the MLR 115. Article 253(1) authorised parliament to further reduce the maximum a person could lawfully own. Thirdly, Article 269 of the 1973 Constitution protected all laws made between 20 December 1971, the date when the civilian government came into power, and 20 April 1972, when the 1973 Constitution came into force, from being judicially reviewed. This included the MLR 115. Fourth, Article 8 which declared void any law which was inconsistent with the fundamental rights conferred by the Constitution excluded the MLR 155 from its operation. Fifth, Article 24, which guarantees the right to property, was held not to apply to laws made in pursuance of Article 253 of the Constitution. Further, Article 24(4) provides that the adequacy of compensation under any law providing for the compulsory acquisition of property shall not be called in question in any court. Justice Hussain aptly observed that:

> 'This is a unique example of cases in which the framers of the Constitution have taken unusual, rather extraordinary, pains to plug all the loopholes of attack on the vires of the Regulation. They have gone to the extent of declaring even further laws invalid if they abolish or increase the ceiling of ownership of land fixed by the Regulation.'[727]

The Federal Shariat Court was split over the validity of the ouster of its jurisdiction. Justice Aftab Hussain for the majority held that the *non obstante* clause contained in

726 PLD 1981 FSC 23, *supra*, note 617.
727 *Ibid*., at p. 42.

Article 203-A did not authorise the Federal Shariat Court to examine constitutional provisions. Therefore the exclusion of jurisdiction provided for in Article 24 was held to be binding on the Federal Shariat Court. This meant that all legal provisions which imposed ceilings on the ownership of land, the acquisition of land for housing or other public purposes as well as the absence or inadequacy of compensation in the relevant statutes were all outside the jurisdiction of the Federal Shariat Court by virtue of Article 24(3). However, those laws which were not expressly included in Article 24(3) were only protected by Article 269. With respect to the latter Justice Hussain held that:

> 'The only Constitutional provision which validates them is Article 269 but that validation is only partial and inconsequential for our purposes. The validation is regarding the competence of the authority enacting the regulation. The ouster of jurisdiction of Courts in that Article is overridden by the provisions of Article 203-A and this Court has jurisdiction to determine the question of repugnancy of these provisions with the Islamic Injunctions notwithstanding anything in Article 269.'[728]

This ruling allowed the Federal Shariat Court to examine the provisions of the MLR 115, which placed restrictions on joint holdings, on the alienation of holdings and which gave tenants a right of pre-emption. Justice Hussain found that all provisions of the MLR 115 were in accordance with Islam, including those which were technically outside the jurisdiction of the Federal Shariat Court. The same applied to all laws which gave a tenant a right of pre-emption.

Five years later the Shariat Appellate Bench overturned the *Ameen*[729] decision. In a majority decision of three to two, with Justice Afzal Zullah siding with the *ulema* members Justices Taqi Usmani and Muhammad Karam Shah, the Shariat Appellate Bench overturned *Ameen* both on jurisdictional grounds and on merits.[730] The *ratio decidendi* was a curious one: the Shariat Appellate Bench of the Supreme Court found that the MLR 115 was protected against judicial review by Article 269(1) of the 1973 Constitution. However, it had also been placed in Schedule 1 to the 1973 Constitution. Schedule 1 contains all those laws which cannot be judicially reviewed on the basis of the fundamental rights of the 1973 Constitution.[731] The combination of ouster of jurisdiction clauses found in Articles 269 and 8(3)(b) meant according to the Shariat Appellate Bench that the MLR 115 could not be reviewed on the basis of the constitutionally guaranteed fundamental rights. Equally, the ouster of jurisdiction contained in Article 24(3) was concerned with a fundamental right, namely the right to own property. From this the Shariat Appellate Bench of the Supreme Court concluded that the Constitution only excluded the MLR 115 from being reviewed on the basis of fundamental rights. It followed that the MLR 115 could be reviewed on the basis of the injunctions of Islam. The result was a peculiar one: the MLR 155 could only be challenged on the basis of Islamic law but never on the basis of fundamental rights. The Shariat Appellate Bench justified its decision by holding that:

728 *Ibid*., at p. 47.
729 *Supra*, note 617.
730 *Government of NWFP v. Said Kamal Shah* PLD 1986 SC 360, *supra*, note 713.
731 See Article 8(3)(b) of the Constitution.

> 'We do not think that any such bar in fact exists so far as the new Constitutional dispensation is concerned. An entirely new power was conferred on the Specified Courts or Benches thereof. A test of repugnancy i.e. Injunctions of Islam was prescribed. This empowerment had its own inhibitions and limitations, and, but for these, it transcended all constitutional protections and safeguards. For example all laws, but not the Constitution, Muslim Personal Law, and law relating to the procedure of any Court or Tribunal or, any fiscal law or law relating to the levy and collection of taxes and fee or banking or insurance practice and procedure could be tested on this standard "notwithstanding anything contained in the Constitution". To apply this test of repugnancy to the Constitution or a provision thereof is one thing and to apply this test to any other law, validated, continued or protected under the Constitution is another. The first is prohibited, the latter is not.'[732]

The Shariat Appellate Bench proceeded to apply this principle to the facts of the case holding that:

> 'Article 269 of the Constitution declares inter alia all Martial Law Regulations "to have been validly made by competent authority and shall not be called in question in any Court or any ground whatsoever". In spite of such a comprehensive and complete bestowing of competency, validity and immunity they had to protected by express provisions of Article 8(2)(b) against their inconsistency with Fundamental Rights. On the same reasoning if such laws were to be protected against the normative test of Injunctions of Islam, there had to be express provision in similar words for them in Chapter 3-A of the Constitution. With such a categorical conferment of power, none of the inhibitions being attracted or applicable, it cannot be said that the Court was precluded from examining such laws directly or indirectly.'[733]

Following this decision there was only Article 253, which imposed a bar on the jurisdiction of the shariat courts. The effect of Article 253 was examined in the case of *Qazalbash Qaqf v. Chief Land Commissioner.*[734] The Shariat Appellate Bench held that Article 253 only prevented parliament from passing a law which would allow a person to own more land than he was allowed to own before the commencement date of the Constitution. Being directed at and solely concerned with the legislature, Article 253 could not be construed as imposing any ouster of jurisdiction on the shariat courts to declare a law which imposed limits on the property which could be owned by a person repugnant to Islam. As a result both the MLR 115 and the Land Reforms Act 1977 were examined on the basis of Islam: with prospective effect the Shariat Appellate Bench declared as repugnant to Islam those provisions in the two laws which imposed maximum limits on the area of land which could be owned, which allowed the government to acquire land without the payment of compensation and which imposed statutory conditions to be fulfilled before a tenant could be evicted by his landlord.

The Shariat Appellate Bench's disdain for any limitation imposed on the jurisdiction of the shariat courts is reflected in a number of cases. Invariably these cases involved

732 *Supra*, note 713, at p. 466.
733 *Ibid*.
734 PLD 1990 SC 99, *supra*, note 402.

sensitive issues like land law or reservations of jobs in Pakistan's civil service since it was in these areas of law and policy where the framers of the Constitution found it necessary to impose limitations on the powers of the superior courts to judicially review these laws.[735] For instance in *Nusrat Baig Mirza v. Government of Pakistan*[736] the Shariat Appellate Bench of the Supreme Court had to decide an appeal against a decision of the Federal Shariat Court (unreported). At issue was a quota system for the appointment of civil servants introduced by the Sindh Civil Servants (Appointment, Promotion and Transfer) Rules 1973. It was expressly protected by Article 27(1) of the 1973 Constitution which provides that:

> 'No citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated against in respect of any such appointment on the ground only of race, religion, caste, sex, residence or place of birth:
>
> Provided that for a period not exceeding twenty years from the commencing day, posts may be reserved for persons belonging to any class or area to secure their adequate representation . . .'.

The Federal Shariat Court had held that it was only able to examine the Rules in 1993, i.e. after the expiry of the 20 years, and thus held itself to be bound by the constitutional provision. The Shariat Appellate Bench disagreed, deciding that:

> 'Even if it is proved that the Rules and Memorandum under consideration were framed under the authority of Article 227(1) of the Constitution, they cannot be held to be the provisions of the Constitution itself and their examination in the light of the Injunctions of Islam does not amount to examining a provision of the Constitution. We, therefore, hold that the Federal Shariat Court has the jurisdiction to entertain the petition of the appellant under Article 203-D of the Constitution and has the jurisdiction to decide whether or not the impugned laws are repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah.'[737]

The Federal Shariat Court accordingly examined the Islamic *vires* of the quota system in *Nusrat Baig Mirza v. Government of Pakistan*[738] and found it to be un-Islamic. An appeal against this decision is pending before the Shariat Appellate Bench of the Supreme Court.

The expansive broadening of the jurisdiction of the Federal Shariat Court continued in the case of *Muhammad Salah-ud-Din v. Government of Pakistan*[739] where almost ten years after it had declined to exercise jurisdiction over laws made in pursuance of constitutional provisions, the very same court reversed its own ruling. Several provisions of the Representation of the People Act 1976 were invalidated on the basis that it was an ordinary law enacted in furtherance of the objects detailed in the Constitution and therefore justiciable. The government appealed against this judgment

735 Similar attempts to prevent the judicial review of land reform legislation on the basis of constitutionally guaranteed fundamental rights were made in India. See M.P. Singh, *Shukla's Constitution of India*, Delhi 1990, pp. 702-717.

736 PLD 1991 SC 509 [SAB].

737 *Ibid*., at 513.

738 PLD 1992 FSC 412.

739 PLD 1990 FSC 1.

and the matter has been pending before the Shariat Appellate Bench of the Supreme Court for the past nine years.[740]

It must be considered ironic that the jurisdiction of the Federal Shariat Court and the Shariat Appellate Bench is considerably wider than that of the other superior courts in respect of laws expressly protected against judicial review. It must be regarded as equally ironic that, examined on the basis of the injunctions of Islam, many of the laws examined by the shariat courts were found repugnant on grounds which were similar if not identical in respect of normative content to the constitutionally guaranteed fundamental rights. This will be explored in more detail in the next section.

740 See Justice Tanzil-ur-Rahman, 'Islamic Provisions of the Constitution of the Islamic Republic of Pakistan, 1973, What more is required?', PLD 2000 J 66, at p. 73.

Chapter 9
Human Rights, Natural Justice and Shariat Courts

The *Suo Moto* Jurisdiction

In 1983, the Federal Shariat Court was given the power 'of its own motion' to 'examine and decide the question whether or not any law or provision of law is repugnant to the Injunctions of Islam, as laid down in the Holy Qur'an and Sunnah of the Holy Prophet . . .'[741] The Federal Shariat Court embraced the extension of its jurisdiction enthusiastically and immediately embarked on an ambitious examination of Pakistan's statutory law. Virtually all laws collated in the so-called 'Pakistan Code' in chronological order were examined by the Federal Shariat Court following the pattern of arrangement adopted by the Pakistan Code. The first such case, *In re: The Factories Act 1934,*[742] is indicative of the general pattern of these *suo moto* cases. The names of the statutes intended to be reviewed by the Federal Shariat Court were published in the national press with an invitation to the general public to submit views on the Islamic *vires* of these laws to the Federal Shariat Court. The invitation of the public to express its views on legal matters pending before a court was unprecedented and was not provided for by the Constitution itself. In a further departure from normal practice and procedure, the Council of Islamic Ideology was invited to submit its opinion on the statute under review.[743] In the present case, a member of the Council of Islamic Ideology had brought to the attention of the Federal Shariat Court allegedly un-Islamic provisions of the Factories Act 1934: it did not provide for the segregation of men and women and did not provide for the provisions of mosques

741 The *suo moto* powers were conferred upon the Federal Shariat Court in 1982, see Article 203-D as amended by section 4 of the Constitution (Second Amendment) Order 1982.

742 PLD 1983 FSC 18.

743 Article 230 of the 1973 Constitution, which sets out the functions of the Council of Islamic Ideology, only provides that the Council of Islamic Ideology is to advice the legislature as 'to the way and means of enabling and encouraging the Muslims of Pakistan to order their lives individually and collectively in all respects in accordance with the principles and concepts as enunciated in the Qur'an and Sunnah' and 'to advise a House, a Provincial Assembly, the President or a Governor on any question referred to the Council as to whether a proposed law is or is not repugnant to Islam.'

inside factories. Similar to the cases where customs which were social norms of behaviour were challenged as repugnant to Islam, the Federal Shariat Court was unable to make an order since it did not have jurisdiction to order specific amendments to statutes: it therefore recommended an amendment.[744]

Another illustration for an early *suo moto* case is *In re: The Manouevres Field Firing and Artillery Practices Act 1938*.[745] The Federal Shariat Court examined this statute *suo moto*. Not surprisingly, no views from the public were received and the Council of Islamic Ideology found nothing in the Act to be repugnant to Islam. However, the Federal Shariat Court decided that the provision giving a discretionary power to a revenue officer to hear claims for compensation was un-Islamic and ordered a specific amendment to the statute to be carried out by 31 December 1982. Evidently, the Federal Shariat Court was still confused about its powers since on earlier occasions it had held that it could only invalidate a law but could not order specific amendments.[746] In the same year (1983), the Federal Shariat Court examined another group of statutes from the 1930s, ranging from the Sugarcane Act 1934 to the Registration of Foreigners Act 1939.[747]

The *suo moto* jurisdiction of the Federal Shariat Court was unprecedented in the legal history of Pakistan and constituted a significant departure from the principle that courts, in the words of the Supreme Court, 'do not, therefore, decide abstract, hypothetical or contingent questions or give mere declarations in the air.'[748] The fact that the Federal Shariat Court in its *suo moto* jurisdiction did not operate like an ordinary court but more like a commission has been criticised, even by supporters of the radical Islamisation of Pakistan's legal system. Justice Rahman observed that the Federal Shariat Court hardly ever received any response to the notices published in national newspapers, inviting comments from the general public and 'received no assistance whatsoever from any quarter, perhaps, for lack of involvement of any personal interests.'[749]

Another surprising feature of the exercise of *suo moto* jurisdiction was that hardly any laws were ever declared to be repugnant to Islam. The provisions declared repugnant in respect of statutes related to commercial law can be counted on the fingers of one hand. The first substantive change to an important commercial statute came about in 1983, when the Federal Shariat Court in exercise of its *suo moto* jurisdiction reviewed the Specific Relief Act 1877.[750] Justice Hussain found that those provisions of the Act which hold a buyer liable to pay for goods destroyed before delivery, but after the completion of an executory contract, repugnant to Islam and directed that the illustrations (a) and (b) of section 13 and illustration (e) of section 22 should be deleted. In another *suo moto* case, a whole tranche of statutes including

744 As to date the Factories Act 1934 has remained unamended.

745 PLD 1983 FSC 19.

746 See also *In re: Motor Vehicles Act, 1939 & Motor Vehicles Ordinance 1965* PLD 1983 FSC 29 where the Federal Shariat Court ordered the deletion of certain provisions giving discretionary powers to the government in the calculation of compensation under these Acts.

747 See *Suo Moto Jurisdiction Case* PLD 1983 FSC 60.

748 See *Province of East Pakistan v. Md. Mehdi Ali Khan* PLD 1959 SC 387, at p. 407.

749 See Justice Tanzil-ur-Rahman, *Enforcement of Islamic Law in Pakistan – A New Approach*, n.d., quoted in *Habib Bank Ltd. v. Muhammad Hussain* PLD 1987 Kar 612., at p. 628.

750 *In re: The Specific Relief Act (I of 1877)* PLD 1983 FSC 113.

the Trademark Act 1941 were declared not to be repugnant to Islam.[751] Equally, the Contract Act 1972, the Partnership Act 1932 and the Sales of Goods Act 1930 survived the examination conducted by the Federal Shariat Court largely intact.[752]

The most interesting outcome of the *suo moto* jurisdiction was the emergence of a set of general principles based on Islamic law which were employed to test the Islamic *vires* of legislation. These will be examined in the next part.

Fundamental Rights and Islamic Law: The Right to Equality

Its *suo moto* jurisdiction enabled the Federal Shariat Court to conduct a systematic review of a large number of statutes on the basis of Islam. The most surprising effect of the solitary, inquisitorial nature of the proceedings – as mentioned above in most cases the Federal Shariat Court did not receive any comments or input from third parties – was the emergence of a set of fundamental rights and principles of natural justice, both derived from Islamic law, against which legislation was tested.

The two most important Islamic rights were the right to equality and the right to be heard. These two 'Islamic fundamental rights' were applied in a manner similar to the constitutionally guaranteed fundamental rights: if a statutory provision was in conflict with any of these rights it was liable to be invalidated on the ground that the law was repugnant to the injunctions of Islam. It will be seen that the reliance on generic rights rather than concrete provisions of Islamic law was considered controversial amongst Pakistan's higher judiciary, since quite inevitably the application of general principles led to a situation where the functions of the Federal Shariat Court and those of the other superior courts overlapped. In theory, of course, their respective jurisdictions were carefully demarcated with the Federal Shariat Court examining legislation on the basis of the injunctions of Islam as laid down in the Qur'an and Sunnah and the High Courts and the Supreme Court testing the *vires* of statutes against the benchmark of fundamental rights. In practice, however, a different scenario emerged with the jurisdiction of the shariat courts and of the other superior courts being virtually indistinguishable. This overlapping of jurisdictions was caused by the identical normative content of the laws applied by the shariat courts and the other superior courts: in the final analysis the effect of the right to equality before the law did not depend on whether its normative foundation was derived from a principle of Islamic law, the Constitution or in fact natural justice.[753] In all three cases, a law in conflict with such a right could be invalidated.

However, on a practical level there were important differences. Unlike the Supreme Court and the High Courts, the *suo moto* jurisdiction of the Federal Shariat Court was proactive and did not depend on a petitioner challenging the constitutionality of statute as a party affected by the breach of his fundamental rights, or in the public

751 *In re: Trade Marks Act 1940* PLD 1983 FSC 125.

752 See *SSM 1-3/82, 20 October 1983*, Federal Shariat Court (unreported).

753 Natural justice was never a strong feature of Pakistani jurisprudence. For a review of the cases, see M.A. Fazal, *Judicial Control of Administrative Action in India, Pakistan and Bangladesh*, New Delhi, 2000 (3rd edn), p. 321 ff. See also Syed Shabbar Raza Rizvi, *Fundamental Rights and Judicial Review in Pakistan*, Lahore, 2000.

interest. The pace, scope and timing of the examination of the Islamic *vires* of legislation was entirely within the *suo moto* powers of the Federal Shariat Court. As a result, more statutory provisions were invalidated on the basis of an Islamic right to equality than on the basis of the constitutionally guaranteed right to equality. This must be regarded as a most extraordinary result considering that the implementation of Islamic law is normally associated with a loss of fundamental rights.[754]

A *caveat* to this observation must be mentioned. The Islamic right to equality was never applied to the issue of gender equality, despite the fact that a large number of Pakistani statutes discriminate on the basis of gender. Many of these statutes have no connection to Muslim personal law and there is therefore no reason why they should have escaped the attention of the Federal Shariat Court. The Pakistan Citizenship Act 1951, for instance, allows a woman married to a Pakistani citizen to obtain Pakistani citizenship.[755] No corresponding rights exist for a foreigner who marries a Pakistani woman. Discriminatory provisions can also be found in the Workmen's Compensation Act 1932, and the Factories Act 1934. Both statutes were examined by the Federal Shariat Court but were found not to be repugnant to Islam. In addition, there are obvious instances of gender bias in the *qisas* and *diyat* laws.[756] In the area of gender discrimination the Federal Shariat Court desisted from applying the newly found Islamic right to equality.

There are many cases which explore the human rights dimension of Islamic law. One of the first cases which relied on general Islamic principles of justice and equality was *In re: The Civil Servants Act 1973*[757] which invalidated section 13(i) of the Civil Servants Act 1973 on the basis of Islamic law. The impugned section allowed the government to dismiss a civil servant over and above a certain seniority 'on such date as the competent authority may, in the public interest, direct'. Justice Hussain held that the section violated the Islamic principle of equality before the law observing that:

> 'One of the reasons for affording protection and safeguards against premature retirement, removal or dismissal is that all Government servants may act according to Law without any fear or favour. To withdraw this protection amounts to virtually withdrawing from them the duty to act according to law and conscience and to make them bend to the will of the Chief Executive.'[758]

754 See especially Ann E. Mayer, *Islam and Human Rights*, London, 1995 and also A.K. Brohi, 'Islam and Human Rights', PLD 1976 J 149 and A.K. Brohi, 'The Nature of Islamic Law and the Concept of Human Rights', PLD 1983 J 3 and 'The Nature of Islamic Law and the Concept of Human Rights', in: IJI, *Human Rights in Islam (Report of a Seminar held in Kuwait, December 1980*, Geneva: International Commission of Jurists, Kuwait University, Union of Arab Lawyers, 1980, pp. 41-62 and Abdullah Ahmad An-Na'Im, 'Civil Rights in the Islamic Constitutional Tradition: Shared Ideals and Divergent Regimes', in: *The John Marshall Law Review,* Vol. 25, 1992, pp. 267-293, at p. 268.

755 See section 10(2) of the Pakistan Citizenship Act 1951. For a full discussion of gender discrimination in Pakistan's statutes, see Government of Pakistan, *Report of the Commission of Inquiry for Women*, Islamabad, 1997.

756 See, for instance, section 313(2)(b) of the Pakistan Penal Code 1860 as amended by the Criminal Law (Amendment) Act 1997, which allows the father of a minor victim to ask for *qisas* on its behalf but not the mother.

757 PLD 1984 FSC 34.

758 *Ibid*., at p. 38.

A year later, Justice Hussain invalidated similar dismissal provisions in other service laws, including the Punjab Civil Servants Act 1974, on the basis that they breached the principle of equality and could be used to prevent civil servants from carrying out their duties in accordance with the injunctions of Islam:

> 'It is well established that security of tenure of a civil servant can be an incentive to him for discharging his duties honestly, constitutionally and according to Sharia. On the other hand any apprehension in his mind against this security is liable to breed in him what is known as servility to the boss. This is something which may make him corrupt. Security, therefore tends towards the advancement of the welfare of the society and elimination from it of the main source of mischief, i.e. corruption, servility is likely to endanger his independence of action and make his actions subservient to the wishes of the boss, however unlawful and un-Islamic they may be.'[759]

In both these cases what was at issue was not so much a right to equality – the provisions affected all civil servants above a certain level of seniority – but the wide discretionary powers of the government to dismiss civil servants in an arbitrary manner. As such Justice Hussain was more concerned with principles of Islamic good governance than with concrete provisions of Islamic law. Nevertheless, the two cases also illustrate that the 'Islamic' review of legislation could incorporate a constitutionally guaranteed fundamental right – namely the right to equality enshrined in Article 14 of the 1973 Constitution – without any conceptual difficulty. This is significant in the context of martial law and the fact that fundamental rights themselves remained suspended in 1984.

A similar application of an Islamic notion of equality was made in *In Re: Islamization of Laws*[760] in respect of section 4 of the Members of the National Assembly (Exemption from Preventive Detention and Personal Appearance) Ordinance 1963. Justice Hussain held that even members of the National Assembly should be required to attend civil hearings if and when so required by a court and declared section 4 to that extent repugnant to Islam.[761] In the same case, parts of the Cantonments Rent Restriction Act 1963 were declared repugnant to Islam on the ground that:

> 'The provisions of sections 7 and 8 of the Act of 1963 also violate the Islamic principles of equality before law. There is no logic behind the discrimination between the landlords in the Cantonment areas and the landlords in other urban areas of the country. If once it is conceded that rent can be increased periodically

759 *Muhammad Ramzan Qureshi v. Federal Government* PLD 1986 FSC 200, at p. 235.

760 PLD 1985 FSC 193.

761 The question of whether or not to the Members of National Assembly (Exemption from Preventive Detention and Personal Appearance) Ordinance 1963 was in fact un-Islamic came as an appeal before the Shariat Appellate Bench of the Supreme Court in 1991. In *Federation of Pakistan v. Public at Large* (PLD 1991 SC 459) Justice Nasim Hasan Shah confirmed the judgment of the Federal Shariat Court, adding another ground to justify why members of the National Assembly should not be exempt from appearing in civil suits: it also makes it impossible for the member himself to obtain justice. See also *In re: N.-W.F.P Provincial Assembly* PLD 1991 FSC 283, where a similar provision of the North-West Frontier Province Provincial Assembly (Powers, Immunities and Privileges) Act 1988 was declared to be repugnant to Islam.

> to keep them in line with the increase in prices . . . there is no earthly reason why the other group of people should be deprived of that facility.'[762]

Even after the lifting of martial law in 1985 and the re-emergence of fundamental rights on the legal landscape of Pakistan, the Federal Shariat Court continued to strike down as un-Islamic legislation which breached the rule of equality before the law. In *Abdul Majid Qureshi v. Islamic Republic of Pakistan*[763] the Federal Shariat Court struck down as un-Islamic section 3 of the Corporation Employees (Special Powers) Ordinance 1978, which allowed dismissal or demotion of any civil servant appointed or promoted between 1972 and 5 July 1977 – the day on which General Zia-ul-Haq overthrew Zulfikar Bhutto's government. The Federal Shariat Court held that 'it appears from the provisions challenged before this Court, first, the classification is absolutely arbitrary as no reason or justification for it is given.'[764]

The case law seems to suggest that the right to equality was identical in normative content and effect irrespective of whether or not it was based on Islam or the 1973 Constitution. But were there differences between fundamental rights like the right to equality and an Islamic equality principle? The Federal Shariat Court addressed this question in the case of *Muhammad Ramzan Qureshi v. Federal Government.*[765] The Court's explanation of the Islamic equality clause initially seemed to suggest that there was no difference between the secular and the Islamic approach:

> 'Islam also allows for classification but such classification made in legislation must stand the test of reasonableness and intelligibility. Only the class legislation is forbidden but not reasonable classification. The classification, however, cannot be arbitrary but must rest upon some real and substantial distinction bearing a reasonable and just relation to the things in respect of which the classifications made. In other words the classification must have a reasonable relation to the object or the purpose sought to be achieved by the impugned legislation.'[766]

The Federal Shariat Court then referred to an Indian Supreme Court case,[767] further deepening the impression that there was no difference between the secular and the religious as far basic human rights were concerned. However, secular fundamental rights' jurisprudence in Pakistan had established that a statute which was not *prima facie* discriminatory could only be challenged if it could be shown that it had actually been applied in a discriminatory manner.[768] It was here that differences emerged: the Federal Shariat Court held that in an Islamic legal system legislation had to reduce the chances of oppression and discrimination as much as possible because:

> '. . . it is difficult to find out persons holding qualities and qualifications required of *Ulul Amr* . . . [those having authority]. The principles based on the constitutional provision of equality as interpreted on the basis of English and American law cannot be applied in all their details in a matter in which the legislature is required

762 *Ibid*., at p. 205.
763 PLD 1989 FSC 31.
764 *Ibid*., at p. 34.
765 PLD 1986 FSC 200.
766 *Ibid*., at p. 32.
767 *Shri Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar* AIR 1958 SC 538.
768 See *Jibendra Kishore Acharyya Chowdhury v. Province of East Pakistan* PLD 1957 SC 9.

> to enforce legislation based on Quranic "Musawat" [equality] because the object of legislation should be to reduce as much as possible the chances of its implementation in an unjust and oppressive manner. The idea may appear to be idealistic but an attempt should be made to remove the chances of mischief as far as possible. Where the modern law requires guidelines to be provided for exercise of discretion the object of law enforced on the basis of the Qur'an and the Sunnah is to make it as immune as possible from being misused if the person in authority is not possessed of the required scruples.'[769]

The result is a surprising one: the Islamic right to equality goes considerably further than the constitutionally guaranteed right to equality in that it incorporates a presumption that those authorised to exercise discretion are unlikely to carry out their discretionary powers fairly and equally. The reason for this inherently distrustful approach to civil servants is located not so much in legal theory but in Islamic morality and notions of good governance. Only upright Muslims of the highest moral probity should be allowed to serve as civil servants because only then could it be guaranteed that Islamic standards of conduct would be observed. In Pakistan, according to the Federal Shariat Court, officials did not meet these high Islamic standards. Therefore, the amount of discretion conferred by a statute to a civil servant had to be significantly reduced under the Islamic equality clause – more so than under the secular fundamental right to equality.

The application of the Islamic equality clause proceeded in an almost mechanical fashion in *S.A. Zuberi v. National Bank of Pakistan*,[770] where the National Bank of Pakistan Rules 1980 were challenged because they allowed the bank to retire an employee either at any time after the completion of 25 years of service with the bank or on reaching the age of 60 years. The Federal Shariat Court did not hesitate in declaring this rule to be in violation of Islam.

The attacks on laws allowing for the arbitrary dismissal of civil servants was in itself not highly contentious: in most cases the government seems to have made only half-hearted attempts to defend these rules. However, the Federal Shariat Court had no hesitation in tackling more sensitive and controversial subject matters. The best example of this is the case of *Nusrat Baig Mirza v. Government of Pakistan*,[771] where the Shariat Appellate Bench of the Supreme Court decided that the Federal Shariat Court had the jurisdiction to examine the Islamic *vires* of the quota system for the appointment of civil servants introduced by the Sindh Civil Servants (Appointment, Promotion and Transfer) Rules 1973. This review was carried out in the case of *Nusrat Baig Mirza v. Government of Pakistan.*[772] The quota system itself was considered controversial in Pakistan: unlike India, where a quota system exists in order to improve the socioeconomic conditions of groups of low social status,[773] the Pakistani system was designed to alleviate ethnic and provincial imbalances in the make-up of the civil service. Only ten per cent of the posts were open to applicants

769 *Ibid*., at pp. 32-33.
770 PLD 1989 SC 35.
771 PLD 1991 SC 509 [SAB].
772 PLD 1992 FSC 412.
773 See Marc Galanter, *Competing Equalities – Law and the Backward Classes in India*, London, 1984.

on merit – the remaining 90 per cent were allocated between the four provinces, large cities, tribal areas and Azad Jammu and Kashmir, with further differentiations being made between rural and urban areas.[774] Justice Rahman had little difficulty in holding that the right to equality was firmly enshrined in Islam. However, apart from political reasons the quota system also ensured that those from rural areas had a chance to enter the civil service. Was such an 'affirmative action' permissible in Islam? Justice Rahman did not examine this question from an Islamic perspective but instead doubted the effectiveness of the quota system to tackle this problem:

> 'It is true as submitted by Dr. Irfani, that the standard of education in rural areas is much below as compared to the standard in urban areas and so the quota system has been introduced, but [it] is equally true that the standard of education in different urban areas had also suffered from inequalities: it differs from institution to institution. In fact, there are two systems of education which are running parallel: one is available for affluent people where the medium of instruction, generally speaking, is English whereas the other system of education is available for lower middle and poor classes where Urdu medium is in practice. This double system of education has been responsible in creating polarization in our society which is poisonous for the growth and development of society on Islamic lines. If we look to the past history of Muslim rule in the sub-continent or for that matter in other Muslim countries, we find one and the same system of education meant for all classes of people whether poor or rich, or in rural areas or the urban one.'[775]

The quota system's departure from Islamic principles of equality could therefore not be justified on the ground of social 'necessity'. Further, Justice Rahman observed that under the provisions of the Enforcement of Shari'ah Act 1991, Islamic law was to be the supreme law of the land. He therefore held that:

> 'The Holy Qur'an and Sunnah form the basis of all our directions for all our spiritual as well as worldly endeavours as they provide us a guidance not only towards the good in the Hereafter but also to attain a good life in this world. Quota system in disregard of merit makes the place of domicile as the criteria and this has, unfortunately, been so woven and institutionalised in our socio-political fabric that unless we return to the original message of the Holy Qur'an we will be farther away from the righteous and straight path . . .'.[776]

Consequently, Justice Rahman declared the quota system for admission to the civil service to be un-Islamic and therefore void. There is no doubt that, despite muted public reaction, the effect on Pakistani politics was potentially explosive, since the quota system had to some extent addressed the persistent complaint of Pakistan's smaller provinces, especially Sindh and Baluchistan, that Punjabis were over-represented in the all-Pakistan civil service. The system also dealt with the grievances of rural Sindhis, who felt disadvantaged by the more affluent and educated urban

774 On the quota system see Charles Kennedy, *Bureaucracy in Pakistan*, Karachi, 1987, pp. 181-208 and Tahir Amin, *Ethno-National Movements of Pakistan*, Islamabad, 1988, p. 82.
775 *Supra*, note 772, at p. 426.
776 *Ibid*., at p. 427.

Mohajirs living in Karachi and Hyderabad. The invalidation of the quota system would have removed whatever small protective features there had been in place. Unsurprisingly, the government appealed against the decision. To date, the Shariat Appellate Bench of the Supreme Court has not heard the matter. Therefore, for the time being the quota system continues to operate.

Occasionally, issues of equality were unearthed in unlikely niches of Pakistan's legal system. A good example is the case of *Irshad Ahmad v. Federation of Pakistan.*[777] This is a peculiar case where the petitioner, a civil servant, challenged the right of the government to restrict payment for medical treatment of a civil servant's wife to just one wife, in cases where the civil servant was married polygamously.[778] Justice Rahman found no repugnance to Islam in this provision, since it regulated an essentially contractual relationship between employer and employee. The obligation of the husband to maintain his wife or wives existed independently of the contract of employment and was not affected by the impugned provision. Further, he observed that, 'it will perhaps not be improper to add that the Medical Rules equally apply to Muslims and non-Muslims.'[779] The case is worthy of note because it represents the first and only time that Justice Rahman referred to the rights of non-Muslims, implying that a concession to Muslims to receive free medical treatment might amount to discrimination against non-Muslims who were confined to monogamous marriages.

The decision was considered by the Shariat Appellate Bench of the Supreme Court and overturned in 1993.[780] It is thus one of the very few decisions where a law declared to be in accordance with Islamic law by Justice Rahman was subsequently invalidated by the Shariat Appellate Bench. The reasoning adopted by the Supreme Court was based on the fact that the Rules seemed to provide that the government was responsible for the medical treatment of the family of a civil servant. Therefore, the exclusion of potentially up to three wives from the medical benefits also excluded them from being recognised as members of the civil servant's family. Therefore, as a matter of equality the government was not allowed to restrict the provision of medical treatment to just one wife.

In addition to a right to equality based on Islamic law, the Federal Shariat Court also formulated general principles of natural justice, the most important being the right to be heard. Statutes which allowed the government to take action against citizens without giving them a right to be heard were liable to be invalidated as being repugnant to Islam.[781] In the case of *Pakistan v. Public at Large*,[782] the Shariat Appellate Bench of the Supreme Court held that a civil servant could not be dismissed without having been given an opportunity to be heard and upheld the invalidation of provisions in various central and provincial civil service laws to this effect by the Federal Shariat

777 PLD 1992 FSC 527.

778 See Explanation 4 to clause (d) of Rule 2 of the Federal Services Medical Attendance Rules 1990 which provides that, 'in case of more than one wife, the wife nominated by the Government Servant to receive medical attendance and treatment will be entitled to it.'

779 *Supra*, note 777, at p. 529.

780 *Irshad Ahmad v. Federation of Pakistan* PLD 1993 SC 464.

781 The right to be heard was held to include the right to an appeal. See *In re: Pakistan Armed Forces Nursing Services Act 1952* PLD 1985 FSC 365, where the lack of any appeal court in respect of internal disciplinary proceedings in the armed forces was held to be repugnant to Islam.

782 PLD 1986 SC 304, *supra*, note 335.

Court. Another example is *Iftikharuddin v. Federal Government,*[783] decided by the Federal Shariat Court. At issue was the Evacuee Trust Properties (Management and Disposal) Act 1975, which gave the Chair of the Board wide discretionary powers. His decisions on the allocation of evacuee properties were final and could not be challenged in any court. The Federal Shariat Court found this to be repugnant to Islam. The right to a fair hearing as a principle of Islamic law also included a right to an appeal. In the case of *Pakistan v. General Public*[784] the Shariat Appellate Bench upheld the *suo moto* decision of the Federal Shariat Court, declaring those parts of the various Pakistan Army Acts which did not provide a right to a appeal against a court martial to be repugnant to Islam.[785] It is not suprising that the army vigorously challenged this attack on the system of court martial. In a first line of defence, it was argued that a convict nevertheless had a right to petition the Federal Government or the head of the armed forces concerned. More importantly it was argued that a right to appeal would have a detrimental effect on discipline. Justice Nasim Hasan Shah, who wrote the judgment, rejected both arguments. In a first step he observed that both in the US and the UK rights of appeal against court martials were introduced after the Second World War. Justice Shah did not discuss in any detail the position under Islamic law but simply observed that with respect to statutes which had far less serious consequences on the life of a person affected by them, such as, for instance, the West Pakistan Press and Publications Ordinance 1963, a right to appeal had been found to be mandatory by the Federal Shariat Court. In case of a court martial, 'the need for testing the correctness of a decision which results in deprivation of liberty and also livelihood would obviously be greater.'[786]

In *Re: Passports Act 1974*[787] the Federal Shariat Court invalidated a provision of the Passports Act 1974, which allowed the government to withdraw a passport for up to four months without giving any notice or grounds to the holder or applicant for a passport. The Federal Shariat Court again seemed to equate fundamental and religious rights, observing that:

> 'It is now well settled that the principle of natural justice required that every statute should be read as incorporating in itself the requirement to give a notice to show cause against any action intended to be taken against the person unless the statute expressly or by necessary implication excludes such a Rule. The denial or withholding of a passport to a citizen has been considered throughout one of the principle instruments of intimidation since in that manner the individual concerned is virtually imprisoned at home without a passport. Thus looked at from any angle the existence of the said proviso in the relevant section of the Passport Act is in a way denial of free movement to a citizen as well as the right of hearing.'[788]

783 PLD 1992 FSC 188.
784 PLD 1989 SC 6.
785 See section 133 of the Pakistan Army Act 1952, section 162 of the Pakistan Airforce Act 1952 and section 140 of the Pakistan Navy Ordinance 1961.
786 *Supra*, note 784, at p. 12.
787 PLD 1989 FSC 39.
788 *Ibid*., at p. 43.

The Federal Shariat Court held that, 'The right of free movement from one place to another to all human beings has been fully recognised in Islam'[789] and declared the impugned proviso repugnant to Islam. The Shariat Appellate Bench of the Supreme Court confirmed the repugnance section 8 of the Passports Act 1974 in 1991.[790]

The application of the Islamic equality clause was also used to remove the 'immunity from prosecution' given to public servants and judges who could only be prosecuted with the sanction of the government.[791] The Federal Shariat Court observed that, 'These provisions also deprive the courts of law of their power to adjudicate upon the grievances of a citizen and worse of all is that the ouster is based on the option and discretion of the executive.'[792] The government submitted that these provisions were required to protect civil servants from floods of frivolous litigation, which would reduce their efficiency and independence. The Federal Shariat Court disagreed, holding that such the provisions actually reduced the efficiency of civil servants since their fate was in the hands of the executive and not the courts. The impugned provisions were held to be repugnant to Islam. The Shariat Appellate Bench of the Supreme Court upheld the decision of the Federal Shariat Court, emphasising that:

> 'It is conceded that the remedy cannot be denied to one having a legal right nor can the examination of the grievance be shut out at the absolute discretion of the competent authority. Hence, these provisions, as they stand, are clearly violative of the Injunctions of Islam which make all public power a trust and hence all persons exercising it accountable to the persons suffering at its hands and this process of accountability can take place only in forums and avenues which are independent and regulated by properly set out guidelines for the prosecution and adjudication of causes.'[793]

In *Government of N.W.F.-P. v. I.A. Sherwani*[794] Justice Taqi Usmani declared rule 53 of the Government Servants (Efficiency and Discipline) Rules 1973 to be un-Islamic, since it allowed the government to reduce the salary of a civil servant pending a disciplinary investigation against him. In his judgment, the contractual relationship between the government and a civil servant was to be honoured. Consequently, only after a charge had been proved against a civil servant could penal or financial sanctions be imposed.

Principles of natural justice were also applied in relation to the amount of compensation payable by the government in cases of compulsory acquisition of land.[795] In *Nazir Ali Shah v. Capital Development Authority* (PLD 1992 FSC 360) the Federal Shariat Court declared as repugnant to Islam a provision of the Capital

789 *Ibid*., at p. 43.
790 See *Federal Government of Pakistan v. Government of the Punjab* PLD 1991 SC 505.
791 Section 197 of the Code of Criminal Procedure 1898 and section 6(5) of the Pakistan Criminal Law Amendment Act 1958.
792 *Maqbool Ahmad Qureshi v. Government of Pakistan* PLD 1989 FSC 84, at p. 88.
793 *Federation of Pakistan v. Zafar Awan, Advocate* PLD 1992 SC 72 [SAB].
794 PLD 1994 SC 72 [FB].
795 See for instance *In re: Islamisation of Laws* PLD 1985 FSC 221 where the Federal Shariat Court declared the Capital Development Authority Ordinance 1960 to be in accordance with Islam as long the state paid the market value of the compulsorily acquired land as a compensation.

Development Authority Ordinance 1960, which allowed the authority to acquire property without the consent of its owner at a lower rate than the market rate at the time of acquisition. For identical reasons sections 16 and 28-A of the Land Acquisition Act 1894 and the corresponding provincial statutes were declared un-Islamic.[796]

However, the liberal equation of fundamental rights, principles of natural justice and Islamic law by the Federal Shariat Court did not emerge without controversy. The first criticism was formulated by Justice Afzal Zullah in the case of *Pakistan v. Public at Large*.[797] Justice Zullah expressed his strong disagreement with the way in which some of the laws reviewed by the Federal Shariat Court, mainly in the exercise of its *suo moto* jurisdiction, had been invalidated. Justice Zullah found that it was the constitutional duty of the Federal Shariat Court to identify the concrete provisions of the Qur'an and Sunnah which rendered a particular law repugnant to the injunctions of Islam. This, according to Justice Zullah, had not been done with any consistency by the Federal Shariat Court. He was clearly unhappy about the application of general principles of Islamic law which were liable to lead to a relaxation of concrete Islamic injunctions. Further, he held that it was not permissible for the Federal Shariat Court to suggest amendments to laws declared repugnant. Justice Zullah himself violated this rule, however, in the very same judgment, proposing that all legislative assemblies should pass a law making it imperative on all courts and public authorities to interpret statutory laws in the light of Islam. He also proposed that the service records of all civil servants should include a specific mention whether the person concerned had any tendency against the tenets of Islam and whether there was any outstanding feature in his conduct or character indicating an Islamic way of life.[798]

The case is also instructive in that it contained, very unusually, a lengthy appendix providing references to sources on Islamic law to be used by the Federal Shariat Court in order to identify concrete provisions of Islamic law rather than general principles based on judicial notions of Islamic propriety. There seems little doubt that Justice Zullah was concerned that especially the *suo moto* jurisdiction allowed the Federal Shariat Court too much liberty and leeway to impose its own notions of justice and equity under the cover of Islamic law. As a result, several statutes that were declared in part repugnant to the injunctions of Islam were revalidated and the Federal Shariat Court was asked to re-examine them, this time giving specific references to the Qur'an and Sunnah. However, it should be noted that the Federal Shariat Court did not depart from its earlier judgment in a single review case. It only pointed to the relevant Islamic law and upheld its earlier decision.[799]

796 See *In re: Land Acquisition Act 1894* PLD 1992 FSC 398.

797 PLD 1986 SC 240, *supra*, note 335.

798 *Ibid*., at p. 258.

799 See for instance *In Re: The Baluchistan Chief Minister and Provincial Ministers (Salaries, Allowances and Privileges) Act 1975* PLD 1989 FSC 1, where the Federal Shariat Court confirmed that the right of a deceased to nominate a person entitled to receive compensation on death of the nominator was held to be repugnant to Islam since such compensation was to be made part of the estate of the deceased and thereby subject to the Islamic law of inheritance. See also *In Re: The Members of the National Assembly (Exemption from Preventive Detention and Personal Appearance) Ordinance 1963* PLD 1989 FSC 3 and Federal Employees Benevolent Fund & Group Insurance Act 1969: PLD 1989 FSC 27 for similar rulings.

Justice Nasim Hassan Shah was the other judge who disapproved of the equation of fundamental rights and injunctions of Islam. In *Pakistan v Public at Large*,[800] Justice Shah held, in the context of the already discussed repugnance of certain parts of civil service laws, that a general principle derived from Islamic law, as opposed to a specific injunction contained in the Qur'an or Sunnah, could not be used to invalidate a law. He observed that:

> 'The view expressed by the Federal Shariat Court that in the absence of any specific injunction of the Holy Qur'an or the Sunnah of the Holy Prophet, the Court can still declare a law to be bad on account of its repugnancy to the principles laid down in or emanating from the Holy Qur'an or the Sunnah, though correct theoretically as held by this Court in *Pakistan v. Public at Large* [PLD 1986 SC 240] does not appear to us to have been correctly applied in the present case. The law in question in this case was enacted by the National Assembly in 1973 and was a law made by a representative body of Muslims. Such a law should not be declared to be un-Islamic lightly and only because the views about its propriety and reasonableness are not in conformity with or are not shared by another body of Muslims, sitting as members of a Court. Accordingly, unless it can be shown that the body of Muslims sitting in the legislature have enacted something which is forbidden by Almighty Allah in the Holy Qur'an or by the Sunnah of the Holy Prophet or of some principle emanating by necessary intendment therefrom no Court can declare such an enactment to be un-Islamic. The question of reasonableness of law or the possibility that it is likely to be unjustly observed is a matter which can be examined by the superior Courts in their exercise of their jurisdiction to enforce Fundamental Rights which, inter alia, guarantees equality of citizens under Article 25 of the Constitution.'[801]

It should be noted that Justice Shah's emphatic distinction between fundamental rights and the injunctions of Islam only became possible because of the lifting of martial law and the return of democracy in 1985. Justice Shah's ruling – not followed by the other members of the bench – reasserted the authority of the Supreme Court and the legislature as the supreme organs of the state applying and making laws. Justice Shah was aware of the potential threat to the exclusive constitutional jurisdiction of the superior courts and the danger of convoluting Islamic and constitutional values. He asserted that there is a difference between Islamic law and fundamental rights but failed to identify what this difference may be. His concerns about procedure and forum indicate that he would like to confine the jurisdiction of the Federal Shariat Court to the narrow field of concrete Islamic injunctions. In the case of *Federation of Pakistan v. Public at Large*,[802] Justice Shah again took issue with a decision of the Federal Shariat Court. The original judgment, challenged by the Federal Government and the provincial governments of Punjab and Baluchistan, had invalidated several sections of the West Pakistan Press and Publications Ordinance 1963 as being in violation of both Islamic law and, importantly, Article 19 of the 1973 Constitution, which guarantees freedom of speech. Justice Shah upheld in substance the decision

800 PLD 1987 SC 304.
801 *Ibid*., at p. 356.
802 PLD 1988 SC 202.

of the Federal Shariat Court but reiterated that in its reliance on Article 19 it had overstepped its jurisdiction.

However, despite Justice Shah's formalism there was no doubting that gradually the decisions of both the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court created distinctive Islamic rights which, if breached by legislation, would render these laws liable to be invalidated. From the mid-1980s, even the Shariat Appellate Bench of the Supreme Court was willing to declare that as a general principle any law which did not afford a person an opportunity to be heard before any of his rights were affected to his detriment by governmental action, was as a matter of principle repugnant to Islam because:

> 'However, on principle, we would not hesitate in laying down the rule that all these limitations on human rights must be subordinated to the most fundamental of all the Human Rights in Islam, the one which cannot be abridged, namely the right to justice.'[803]

More concretely, Justice Afzal Zullah laid down that:

> '. . . This Court has now made it quite clear that any provision of law where someone can be harmed or condemned without affording such a person an opportunity of defence against the said action, is against the Qur'anic Commands as supplemented and interpreted by the Sunnah of the Holy Prophet.'[804]

The application of the principle of equality and the right to be heard has continued unabated. More recently, the Shariat Appellate Bench overturned a decision of the Federal Shariat Court which had examined the Islamic *vires* of the appointment procedure of village headmen, called Lambardars.[805] The village headman was responsible for the collection of the land revenue and was given in return a certain percentage of the revenue so collected. Almost inevitably, village headman would come from prosperous land-owning families who exercised considerable control and influence over the affairs in their respective villages. Over time, the position became *de facto* a hereditary one. This was expressly sanctioned in the appointment procedures of village headmen contained in the West Pakistan Land Revenue Rules 1968, which contain detailed rules on how the heir of a deceased village headman was to be identified as a successor to the headmanship. The Shariat Appellate Bench held this system to be un-Islamic because in Islam the appointment to a public office was to be made on the basis of merit and not a hereditary entitlement.

803 *Federation of Pakistan v. General Public* PLD 1988 SC 645, at p. 655, per Justice Afzal Zulla. See also Justice Zullah's statement that, 'The Qur'an and Sunnah are full of injunctions emphasising undiluted justice, with its much more pronounced importance in our polity, as compared to Western jurisprudence' in: *Abdul Wajid v. Federal Government of Pakistan* PLD 1988 SC 167, at p. 169.

804 *Province of Sind v. Public at Large* PLD 1988 SC 138.

805 *Maqbool Ahmad Qureshi v. Islamic Republic of Pakistan* PLD 1999 SC 484.

Chapter 10
The Effect of Repugnance

Land Reforms and the Shariat Courts

The piecemeal invalidation of the pre-emption laws of Pakistan was one of the most controversial decisions ever taken by the shariat courts, with the possible exception of the cases invalidating all laws providing for the payment of interest. Thousands of petitioners who had relied on the pre-emption laws to purchase the agricultural land they had been cultivating as landless tenants found themselves deprived of the one opportunity ever available to them to gain title to land. In the case of *Said Kamal*[806] it was held that those parts of the Punjab Pre-emption Act 1913 which gave a tenant a right of pre-emption were repugnant to Islam and therefore invalid. This is not the place to delve into the finer details of Islamic law applied by the judges, except to say that the decision accorded the Sunnah a high value, making it applicable even in cases where there is no related Qur'anic injunction and the reported tradition itself appears to be concerned with particular circumstances not present any longer.

The law of pre-emption remained in a state of confusion despite the decision of the Supreme Court in *Said Kamal:*[807] the decision became effective on 31 July 1986 but it was unclear what the effect of the decision actually was. One area of uncertainty was the legal efficacy of the part-invalidated pre-emption law. In 1989 in two judgments the Supreme Court declared that only specific sections of the pre-emption laws had been declared repugnant to Islam and that the other parts of that law survived intact.[808] However, what was to happen if the law became unworkable because of the now missing parts? In *Ahmad Ali*[809] it was held by a majority that the courts were not permitted to graft new Islamic principles into the law so as to rectify and fill the gaps. However, in *Safia Begum*,[810] Justice Zullah held that not only those parts of the pre-emption laws specifically mentioned as repugnant were to be regarded as ineffective but that the whole law of pre-emption had been declared un-Islamic. The decisions of

806 PLD 1986 SC 360, *supra*, note 713.
807 *Ibid.*
808 See *Ahmad v. Abdul Aziz* PLD 1989 SC 771 and *Safia Begum v. Ibrahim* PLD 1989 SC 314.
809 *Ibid.*
810 *Ibid.*

the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court triggered an avalanche of litigation and left the law in a highly confused state. New legislation was passed such as, for instance, the Punjab Pre-emption Act 1991, to fill the gaps in the law.

The second area of uncertainty concerned the fate of those laws which had been instigated under the old pre-emption laws. Were they to continue under the old law, or were they to be decided under what had been left intact of the pre-emption laws after the decision in *Said Kamal*? Was the effect of a decision of the Federal Shariat Court in the nature of a repeal of law, or did a law once invalidated become *void ab initio*? The Supreme Court held that all those actions which had been commenced under the old Pre-emption Act 1913, in which no final decree had been obtained were to lapse.[811] There is little doubt that this ruling was considered controversial. Unlike the invalidation of specific laws which affected only relatively small parts of Pakistan's population, for instance the press laws or the Army Acts, pre-emption laws had an impact on the property rights of all those owning or cultivating agricultural land, i.e. the vast majority of Pakistan's population. In a last, desperate attempt to rescue pre-emption claims instituted under the old, un-Islamic pre-emption law, it was pointed out to the Supreme Court that thousands of innocent parties had invested their life savings in prosecuting their suits for pre-emption. Justice Nasim Hasan Shah dismissed this argument holding that:

> 'Believing as I do that law is for the citizen and not the citizen for the law and being a protagonist of the principle that the "law may be blind but the Judge is not", I have personally been deeply moved by this submission. But I also cannot overlook the glorious struggle waged by millions of Muslims to establish this Islamic State of Pakistan and the heart-rending sacrifices made by them for bringing into being this great polity wherein they could fulfill their cherished wish of conducting their affairs in accordance with the Injunctions of Islam, as enshrined in the Holy Qur'an and the Sunnah. The price they are now called upon to pay on account of the overthrow of the un-Islamic provisions of the Punjab Pre-emption Act 1913 to pave the way for the Islamic law of pre-emption is, I believe, one further sacrifice that they must make in the course of establishing this Islamic polity and for ensuring that the generations to follow will be governed by the laws of Islam and Islam alone.'[812]

The upshot of this decision was that a law declared invalid by a shariat court became *void ab initio*: any proceedings brought under the old law lapsed as a result. This stands in sharp contrast with the impact of a repeal of a statute on pending litigation instituted under the old statute prior to its repeal: Article 264 of the 1973 Constitution provides that where a law is repealed, the repeal shall not affect 'any investigation, legal proceeding or remedy in respect of any such right . . . and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the law had not been repealed.'[813]

811 See *Sardar Ali v. Muhammad Ali* PLD 1988 SC 287.
812 *Aziz Begum v. Federation of Pakistan* PLD 1990 SC 899, at p. 913.
813 Article 264 (e) of the 1973 Constitution.

It should be noted that the shariat courts were not completely oblivious of the social impact of their decisions. Reference can be made to the case of *Qazalbash v. Chief Land Commissioners,*[814] where Justice Zullah observed that there had been a failure on the part of the government to implement Islamic alternatives to the un-Islamic land reform laws. His main conclusion was that Islam not only protected the right to own property but also imposed social obligations on those owning property. In the same case Justice Shah went even further, stating that these social obligations, such as, for instance, not to hoard surplus property, could be enforced by the state.[815] Justice Shah concluded that:

> 'From the above discussion it is manifest that in Islam the full exercise by the owner of his rights in his property has been appropriately subordinated to his social responsibility. Furthermore, one the Islamic state enters upon the task of restoring the "rights" (haqq) of the "deprived" and the "oppressed" with a view to realising the ethical principles enunciated in the Holy Qur'an the "distance" between the rich and the poor will be reduced. The view taken that this distance can be corrected through the strict enforcement of the system of Zakat, Usher and proper adherence to the system of inheritance prescribed by Islam is true only to a point. In a society like Pakistan, which has been raised on feudalistic capitalistic principles for centuries to reduce the gulf between the rich and the poor and restore the social balance it would be essential for the State to intervene to discharge its responsibilities and amongst its responsibilities it has to ensure that the society's demand for such basic requirements as health, education, livelihood, and housing are satisfied . . . Accordingly, in the situation as it presents itself today in Pakistan even large-scale State intervention to restrain individual greed so that social welfare is maximised cannot be declared to be against the Injunctions of the Holy Qur'an.'[816]

Justice Shah then called for radical economic reforms, stating that:

> 'The implementation of this Divine commandment on the economic plane would require a heavy redistribution of income and wealth to redress the gross social and moral disequilibrium created by the present economic system. The rich must part with excess wealth because they are not its absolute owners but only trustees and its disposal is subject to the Divine law.'[817]

Nevertheless, once denuded of their constitutional protection, most restrictions on the right to own property were declared repugnant to Islam. It is worth noting that the protection of individual property rights by the shariat courts was not in any way clear cut. Especially in the early years of the shariat courts, judges at times defended restrictions imposed on the ownership of agricultural land. Whereas the early Federal Shariat Court stressed the duty of Muslims to share, the Shariat Appellate Bench resorted to a literal and orthodox interpretation of the sources of Islamic law: at Supreme Court level, there was a conscious effort to limit any resort to general ethical principles and to force the Federal Shariat Court to apply orthodox Islamic law. This

814 PLD 1990 SC 99 [SAB].
815 See *Qazalbash Waqf v. Chief Land Commissioner* PLD 1990 SC 99, *supra*, note 402.
816 *Ibid*., at p. 128.
817 *Ibid*., at p. 129.

can be exemplified by the approach taken by Justice Hussain on the validity of section 4 of the N.W.F.P. Tenancy Act 1950. Section 4 allowed a tenant to acquire land rented by him from his landlord on the payment of compensation to the latter. The petitioner, a landowner, challenged the validity of section 4 thereby attempting to regain land 'lost' under section 4 some 32 years earlier. Justice Zullah declared the legislation to be beneficial for the resolution of property disputes and as such to be in accordance with the injunctions of Islam.[818] Further, he held that the petitioner could have challenged the validity of section 4 on the basis of the constitutionally guaranteed right to property contained in the Constitutions of 1956, 1961 and 1973. His failure to do so amounted to an implied consent and acceptance of the validity of section 4. There is little doubt that Hussain's decision amounts to an express equation of fundamental rights and Islamic law – failure to complain about the former may operate as a bar to resort to the latter.[819]

A few years later, section 24 of the Land Reforms Regulation 1972, which restricted the alienation of holdings 'below the limit of an economic holding', was held to be repugnant to Islam. The purpose of the provision was to prevent the fragmentation of land into plots too small to provide subsistence for a family. However, it was possible under section 24 for an owner to sell all his holdings provided that he did not retain an area smaller than an economic holding. In *Sajwara v. Federal Government of Pakistan*[820] the Federal Shariat Court held section 24 to be un-Islamic since it prohibited what the Qur'an and Sunnah permitted, namely the liberty of an owner of property to deal with it freely and without any restrictions imposed by the state.

In *Amin Jan Naeem v. Federation of Pakistan,*[821] the West Pakistan Requisitioning of Immovable Property (Temporary Powers) Act 1956 was challenged as un-Islamic. It was held that though it permissible for the government to requisition private property in situations of extreme necessity, it was nevertheless un-Islamic to oust the jurisdiction of courts to examine the validity of such an action.[822] The rights of property owners were further strengthened by *Ashfaq Ahmad v. Government of Pakistan*,[823] where it was held that the obligation of a landlord to accommodate his tenant in a new building, built on the site of the old building previously occupied by the tenant, was an un-Islamic interference with the property rights of private individuals. Similarly, large parts of the West Pakistan Urban Rent Restriction Ordinance 1959 were declared to be un-Islamic in as much as they gave excessive protection to tenants of rented premises against eviction. Again, this was held to be in conflict with the rights to private property as enjoined by Islam. However, it appears from the report that after the main judgment had been written it was noticed that, bar certain provisions, the Federal Shariat Court had upheld the validity of the Act, especially the fixation of a fair rent by the rent controller, safeguards against eviction and the provision of accommodation after the reconstruction of a building. As such, the Federal Shariat Court was bound by the precedent unless it reconstituted itself as a full court and examined the statute under

818 *Sultan Khan v. Government of NWFP* PLD 1986 FSC 7.
819 *Ibid*.
820 PLD 1989 FSC 80.
821 PLD 1992 FSC 252.
822 This decision was upheld by the Shariat Appellate Bench of the Supreme Court, see *Province of the Punjab v. Amin Jan Naeem (*PLD 1994 SC 141).
823 PLD 1992 FSC 286.

its *suo moto* review jurisdiction.[824] The case is instructive, since it reveals how within nine years the Federal Shariat Court could arrive at diametrically opposed conclusions about the repugnance of a statute. Unlike in the stoning to death case, where political motivation was at the centre of the change of heart, *Ashfaq Ahmad* reveals genuine conflicting findings on Islamic law.

Justice Usmani upheld the decision of the Federal Shariat Court which had declared several sections of the West Pakistan Requisitioning of Immovable Property (Temporary Powers) Act 1956 to be repugnant to Islam. The Act allowed the government to requisition residential properties to house army officers. In *Muhammad Shabbir Khan v. Government of Pakistan*,[825] Justice Usmani declared several parts of the newly enacted Punjab Pre-emption Act 1991 to be repugnant to Islam.

It can be concluded that the impact of the shariat courts on Pakistan's land reform legislation has been significant: the present state of the law of pre-emption in Pakistan owes its existence exclusively to the jurisdiction of the shariat courts. Further, any future attempts to bring about land reforms in Pakistan will have to be guided by and closely follow Islamic law as understood and interpreted by the shariat courts. The freedom of the government to introduce agricultural reforms and of the legislature to introduce land reform legislation is therefore very restricted – in the area of land ownership it has been the shariat court which has been making the law. However, it can also been concluded that the attitude of the shariat courts towards land reforms has been ambiguous. In the early 1980s there was a marked reluctance to strike down land reform legislation as repugnant to Islam. Most striking in this respect is the *Ameen* case, where Justice Hussain held all land reform measures contained in *the MLR 115* and the Land Reforms Act 1977 to be Islamic. As could be seen, this attitude has undergone change but it is submitted that there is equally nothing to prevent the Shariat Appellate Bench of the Supreme Court to revert to an interpretation of Islam which stresses the social responsibilities inherent in the ownership of property rather than the freedom of an individual owner to deal with his property freely.

Criminal Laws

The effect of the shariat courts on the shape of Pakistan's criminal laws deserves special mention. The promulgation of the Hudood Ordinances had already established significant parts of Pakistan's criminal laws on an Islamic basis. However, the remaining gaps were filled by the Federal Shariat Court. The laws of *qisas* and *diyat* as contained in the Pakistan Penal Code 1860 were introduced as a direct result of decisions of the shariat courts. The only other area of criminal law which was challenged as being un-Islamic pertained to the punishment for the offence of blasphemy. This issue came up in *Muhammad Ismail Qureshi v. Pakistan*,[826] in which Justice Gul Muhammad Khan, the outgoing Chief Justice of the Federal Shariat Court, was called upon to decide this controversial matter. The petitioner challenged the new section 295-C of the Pakistan Penal Code 1860 introduced in 1988, which provided that:

824 *Ibid*., at p. 327.
825 PLD 1994 SC 1 [FB].
826 PLD 1991 FSC 10.

> 'Whoever by words, either spoken or written, or by visible representation, or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (p.b.u.h.) shall be punished with death, or imprisonment for life and shall also be liable to fine.'

It was submitted that the alternative punishment of imprisonment for life was repugnant to Islamic law, since Islamic law provided only the penalty of death as an adequate punishment for the offence of blasphemy. Justice Khan had no difficulty establishing the correctness of this submission: it is generally accepted that the Qur'an provides death as the only punishment for blasphemy.[827] But what conduct amounts under Islamic law to blasphemy, and more importantly, is *mens rea* required to make out the offence? Justice Khan held that Islamic law recognises an offence liable to *hadd* only if it is accompanied by an express intention:

> 'Further, as intention is to be gathered from the facts surrounding the event, the acts falling into the second and third categories [i.e. wrongs of negligence and wrongs of strict liability] will not attract the sentences of Hadd, provided the accused shows that he never intended to commit the offence and is penitent if the words said, gesture made or the act done were ambiguous or they could show some straits of guilty mind or malice. We may also clarify that penitence, in an alleged offence of contempt of the Holy Prophet (p.b.u.h.) would be availed to show that the mind of the accused had no guilty straits or malice and the penalty will be dispelled on that account and not for the reason that penitence can wipe out the intended contempt.'[828]

The words 'or imprisonment for life' ceased to have effect on 30 April 1991 and as such the only punishment for the offence of blasphemy is death. The judgment of the Federal Shariat Court has had significant repercussions for Pakistan: numerous cases against both Muslims and non-Muslims have been filed and a number of people have been sentenced to death as a result. So far, nobody has actually been executed and the High Courts have reversed findings of guilt in some cases. Nevertheless, the insistence on *mens rea* fell in many cases on deaf ears. Criminal prosecutions of Ahmadis proceeded in many cases on the basis that following the Ahmadi faith automatically entailed blasphemy, since Ahmadis did not recognise the Holy Prophet as the last Prophet. In *Riaz Ahmad v. State,*[829] for instance, the Lahore High Court held that *prima facie* an Ahmadi committed an offence under section 295-C by openly declaring that Mirza Ghulam Ahmad, the founder of the Ahmadi faith, 'was not lesser in his position and status than the Holy Prophet'.[830] This claim being an essential part of the Ahmadi faith, it seems to follow that any Ahmadi as of necessity will fall foul of section 295-C by the mere fact of following his religious belief. The case illustrates the difficulties inherent in protecting particular religious belief systems against attack through penal laws: despite many aspirations towards religious harmony there is no

827 See M. Cherif Bassiouni, *The Islamic Criminal Justice System*, Oceana, 1982; and Matthew Lippman, Sean McConville & Mordechai Yerushalmi, *Islamic Criminal Law and Procedure*, Praeger, 1988; and J.N.D. Anderson, 'Homicide in Islamic Law', in *BSOAS*, 1951, pp. 811-828.

828 *Supra*, note 826, at p. 30.

829 PLD 1994 Lah 485.

830 *Ibid*., at p. 515.

doubting that many religions sharply disapprove of each other as a matter of faith and religious tenets. In Pakistan, section 295-C has effectively criminalised such a religiously endorsed disapproval or disagreement with the tenets of another religion. Such disagreements being inherent in the teachings of a particular religion, the issue of *mens rea* does not arise: being a follower of the Ahmadi faith attracts as a matter of absolute criminal liability penal sanction since inherent in the tenets of the belief is a lowering of the Holy Prophet.

However, not all cases concerning criminal laws had a detrimental effect on human rights. In *Haider Hussain v. Government of Pakistan*[831] Justice Rahman invalidated several sections of the Qanun-e-Shahadat 1984 as repugnant to Islam. It is interesting to note that even the 'Islamic' manifestations of inherited, colonial laws – drafted on the basis of reports submitted by the Council of Islamic Ideology – were not immune from being challenged as un-Islamic. The impugned Articles 3 and 16 of the Qanun-e-Shahadat 1984 dealt with the competency of witnesses and allowed for an accused to be found guilty on the basis of the sole evidence of an accomplice. Justice Rahman held that this was in violation of Islamic law as far as *hadd* punishments are concerned. Further, and not entirely unexpectedly, Justice Rahman invalidated those sections of the Code of Criminal Procedure 1898, which allowed the state to tender a pardon to an accused without the consent of the victim. The latter was further clarified in *Habib-ul-Wahab Alkhairi v. Federation of Pakistan*,[832] which held that the government had the power to pardon offenders sentenced to *tazir* punishments and that the consent of the victim was only required for *hadd* and *qisas* punishments.[833]

In *Habib-ul-Wahab Alkheri v. Federation of Pakistan*,[834] Pakistan's obscenity laws were further tightened. Section 294 of the Pakistan Penal Code 1860 made it an offence to carry out any obscene act in any public place 'to the annoyance of others'. This qualification was held to be repugnant to Islam, since under Islamic law it made no difference whether or not these acts were committed openly or secretly. Justice Rahman added a lecture on Islamic morality which may be quoted at length:

> 'In Pakistan, law and morality have to play a special role. In the Constitution of Pakistan it has been guaranteed that no law will be enacted against Islam. The word 'Islam' is to be understood in its widest import and meaning. Islam is a complete code of life in which all the principles governing our individual as well as collective life stand predetermined in the light of the Qur'an and Sunnah. Therefore, the responsibilities of our law-making institutions are not only greater but also different from those of contemporary institutions of the West. It is our duty to see that our laws conform to Islam and correspond exactly to Islamic moral values, particularly after the insertion of Article 2-A in the Constitution of 1973.'[835]

831 PLD 1991 FSC 139.
832 PLD 1991 FSC 236.
833 The Federal Shariat Court thereby also confirmed what had already been held by the Supreme Court in *Hakim Khan v. State* PLD 1992 SC 595, namely that the state was competent to commute *tazir* sentences from death to life imprisonment.
834 PLD 1992 FSC 484. The petitioner in this case is the same as in the case cited at *supra*, note 832.
835 *Ibid*., at p. 496.

The Federal Shariat Court in Decline

In 1991, Tanzil-ur Rahman became the Chief Justice of the Federal Shariat Court – an elevation perhaps influenced by the fact that his judgments on the effect of Article 2-A had made him a potential liability: his decision that even judgments of the Supreme Court were not binding on lower courts if they transgressed Islamic law must have been considered controversial in judicial circles. Equally, his refusal to award interest and his invalidation of the Muslim Family Laws Ordinance 1961 were without doubt destined to be attacked by the commercial community and Pakistan's educated middle and upper class.

Justice Rahman's tenure at the Federal Shariat Court was marked by a perhaps not entirely unexpected 'Islamic judicial activism': in 1991, all but one of the reported cases of the Federal Shariat Court were decided by Justice Rahman. His judicial condemnation of all forms of interest must be regarded as the pinnacle of his tenure. Justice Rahman was removed from the Federal Shariat Court at the end of 1992. In an article published in 2000, he noted that his tenure was reduced to just two years, rather than the normal tenure of three years, 'probably due to my delivering Judgment on Riba.'[836] Justice Rahman's Islamic judicial activism had indeed changed the very foundations of Pakistan's economic system. His successor, Chief Justice Mir Hazar Khan Khoso, was by all appearances under instructions not to pursue any further radical Islamisation. A former Chief Justice of the High Court of Baluchistan, Justice Khoso had no background in Islamic law at all. In the same year, Justice Nasim Hasan Shah, one of the judges who had decided the *Hakim Khan*[837] decision, had become Chief Justice of Pakistan, and it is not unreasonable to propose that there was little judicial inclination to advance the causes of Islamisation. It is therefore not surprising that the section of the PLD covering judgments handed down by the Federal Shariat Court was reduced from 539 pages in the year 1992 to a mere 53 pages in the year 1993. Further, not a single law was declared repugnant to Islam in 1993: virtually all cases dealt with appeals under the various Hudood Ordinances. The same state of affairs obtained in 1994, 1995, 1996 and 1997 when not a single law was examined on the basis of Islam. During the same period, the total number of reported cases of the Federal Shariat Court continuously fell: for instance in 1997 there were only three reported cases, all concerned with sexual offences and wrongful allegations of sexual impropriety. In 1998 and 1999 the PLD, Pakistan's main law report, did not report a single decision decided by the Federal Shariat Court. There is no single explanation for the demise of the Federal Shariat Court in the second half of the 1990s. No doubt, the fact that a large number of laws had already been examined by

836 See Tanzil-ur-Rahman, 'Islamic Provisions of the Constitution of the Islamic Republic of Pakistan, 1973, what more is Required?' in: PLD 2000 J. 66, at p. 81. It appears that Justice Rahman had in preparation another judgment on interest which he could not deliver due to his removal from the Federal Shariat Court, see Tanzil-ur-Rahman, *The Judgement that could not be Delivered. In re: International Loan Agreements under Shari'at Act 1991*, Karachi, 1994, where he states that, 'It is quite ironic that due to the general tendency in Pakistan of the constraint on freedom of expression, this dissertation prepared to be pronounced as Judgement of the Federal Shariat Court is being published in its present form. The reasons behind such an eventuality are, to my mind, not relevant here for the general reader' at p. 3.

837 *Supra*, note 144.

the Federal Shariat Court in its first 15 years of existence meant that the work load diminished over time. However, this should not have affected the court's case load in its function as an appellate court. Closer to the truth is most probably the fact that the Federal Shariat Court was used in the late 1990s, to use the words of Justice Rahman, as 'a dumping ground for the serving Judges who were considered to be "undesirable" by the President or Prime Minister of the country.'[838] During the same period, i.e. the second half of the 1990s, High Courts increasingly decided cases under Hudood Ordinances. There is little doubt that the high courts have tended to adopt a less Islamic and more liberal stance. For instance, in the case *Samina Ali v. Station House Officer*[839] the Lahore High Court was faced with the by now familiar situation of an ostensibly married couple who were being charged with zina by their respective relatives most probably because they disapproved of the union. Mrs Justice Fakhrun Nisa Khokhar, probably the first female judge to decide a *zina* case in the history of Pakistan, did not spend much time on determining the validity of the marriage itself. According to her, it was quite sufficient for the woman/victim to attest in court that she believed herself to be married, to terminate any proceedings for alleged sexual misconduct or an abduction. It was not for the investigating authority to determine the formal validity of a marriage. She added that:

> 'For all purposes provisions may be interpreted in favour of a woman who is actually kidnapped, abducted or induced to compel for marriage against her will or will be compelled . . . [who] for all purposes can enter into contract of marriage out of her sweet will, choice and consent.'[840]

However, the Shariat Appellate Bench continued to hear appeals on the repugnance of laws and could therefore not avoid this type of case. Of course, despite sweeping changes in the judiciary there was also an element of continuity in the Shariat Appellate Bench: Justice Taqi Usmani, the *ulema* member, remained on the Shariat Bench throughout the 1990s. The timing of these appeals remains a mystery – as could be seen above the appeal against Justice Rahman's decision on *riba* was pending before the Shariat Appellate Bench for almost a decade before it was heard and decided in 2000.[841] However, apart from this brief interlude, which was most probably designed to be a show of strength for General Musharraf, who had come into power only a few months before the Shariat Appellate Bench commenced hearing the appeal, even the Shariat Appellate Bench has remained largely dormant.

The Federal Shariat Court re-emerged from oblivion only briefly in 2000, when it declared several sections of the Muslim Family Laws Ordinance 1961 to be repugnant to Islam. An appeal against this decision is pending before the Shariat Appellate Bench of the Supreme Court. It is therefore impossible to conclude that Pakistan's shariat courts have lost in importance: there is nothing to prevent them taking up new cases and new issues. The *suo moto* powers of the Federal Shariat Court have not disappeared, nor has its power to review its own decisions.

838 *Supra*, note 836, at p. 82 [Rahman 2000].
839 PLD 1995 Lah 629.
840 *Ibid*., at p. 632.
841 See PLD 2000 SC 770, *supra*, note 675.

Chapter 11
The Relationship between Shariat Courts and High Courts

The Federal Shariat Court and Muslim Family Law

The Muslim Family Laws Ordinance 1961 caused jurisdictional debates, not only in connection with the judicial review powers of the shariat courts but also in the context of criminal proceedings. As explained in the Introduction, this book is not concerned with the application and enforcement of Zia's controversial Hudood Ordinances. However, cases involving the Offence of Zina (Enforcement of Hudood) Ordinance 1979 also posed challenges to the jurisdictional powers of the Federal Shariat Court. These arose out of the importance of the marital status of the parties in the determination of their criminal liability for sexual offences. A valid marriage was a complete defence to an allegation of adultery or fornication, and even for allegations of rape[842] and abduction. However, the validity of divorces and marriages depended in many cases on the application of statutes, like the Muslim Family Laws Ordinance 1961, or decisions by other civil courts on the marital status of a couple.

It was especially the validity of the Muslim Family Laws Ordinance 1961, which became a central concern in the context of criminal cases involving allegations of abduction, rape or adultery. In many of these cases, the accused would raise in defence the plea that there was a valid marriage preceded by a valid divorce. What was to happen in cases where a couple cohabited, claiming to be married but one of them was a divorcee and could not adduce evidence that his or her divorce had complied with the requirements of section 7 of the Muslim Family Laws Ordinance 1961? In the early years of the Federal Shariat Court, this problem was deliberately ignored since the jurisdictional bar on examining the *vires* of the Muslim Family Laws Ordinance 1961 was declared to be binding. This can be illustrated with the case of

842 The Offence of Zina (Enforcement of Hudood) Ordinance 1979 does not recognise the offence of marital rape. In a case where a married woman is forced to have sex with her husband against her will, no charges can be brought against the husband as long as he can establish that his marriage was valid, see *Riaz Hussain v. The State* PLD 1984 FSC 1.

Noor Khan v. Haq Nawaz,[843] where a couple, who had lived together for more than ten years, were accused of adultery by the wife's former husband. She claimed that he had thrown her out of his house 12 years earlier after having pronounced a triple *talaq*. The first husband denied the divorce and asserted that he was still married to her and that therefore her subsequent marriage was invalid. The Additional Sessions Judge who tried the case acquitted the accused couple on the basis that the first husband had made no attempt to recover his wife after the alleged abduction. However, there was no evidence on record to show that the first husband had complied with the notice requirements laid down in section 7 of the Muslim Family Laws Ordinance 1961. He overcame this obstacle, which would ordinarily have invalidated the divorce and rendered the couple liable to be found guilty of adultery, by declaring that section 7 was repugnant to Islam. The prosecution appealed and the matter came up before the Federal Shariat Court.

The Federal Shariat Court faced a difficult position: on the one hand the court was reluctant to convict the couple. It observed that a long delay in making an allegation involving a *hadd* crime was to be regarded as fatal to the accuser's case. But there was nevertheless the problem caused by section 7 and its application by the Supreme Court in the famous *Gardezi*[844] case, where it was held that a divorce which did not comply with the requirements of section 7 was invalid. Of course, at that time there was no crime of adultery and the only consequences of the invalidation of a divorce were of a civil nature. Undoubtedly, the Federal Shariat Court was bound by legal precedents set by the Supreme Court of Pakistan.

The Federal Shariat Court, in a forceful decision, in a first step clarified the powers of courts to invalidate laws on the basis of Islam. It held that only the Federal Shariat Court had this power and that 'no other Court has the power to declare any law un-Islamic.'[845] The judgment of the Additional Sessions Court was overturned to the extent that it had declared section 7 invalid. However, at the same time the Federal Shariat Court confirmed that it could not invalidate section 7 either, due to the jurisdictional bar imposed by Article 203-B. Several solutions were offered by the Federal Shariat Court. Justice Haq's approach was a curious one: he distinguished the *Gardezi*[846] precedent holding that *Gardezi* was a purely civil case. Further, Haq found that even in *Gardezi* the Supreme Court had indicated that the validity of the marriage, which had taken place within two months of the divorce, would probably have been upheld if it taken place after the expiry of the *iddat* period of 90 days. Justice Haq's view was not followed by Justice Hussain, the Chairman of the Federal Shariat Court. Justice Hussain held in no uncertain terms that *Gardezi* had not allowed for any exceptions to the requirements imposed by section 7 and that, 'In these circumstances it is not open to us to take a different view on this point which otherwise also would not be justified in the face of the unequivocal language of section 7.'[847] However, there was broad agreement on what turned to be the solution to the dilemma,

843 PLD 1982 FSC 265.
844 *Syed Ali Nawaz Gardezi v. Lt.-Col. Muhammad Yousuf* PLD 1963 SC 51, *supra*, note 220.
845 *Supra*, note 843, at p. 273.
846 *Supra*, note 220.
847 *Supra*, note 843, at p. 282, per Justice Hussain.

namely the lack of knowledge of the parties of the notice requirement imposed by section 7. Justice Haq held:

> 'We are of the view that the challenge in respect of lack of notice under section 7 of Muslim Family Laws Ordinance of 1961 is really of academic importance and the trial Judge should have ignored the same as the factum of lack of notice as such was not a fact in respect of which any question had been asked either by the prosecution or the defence and therefore no finding could have been given in respect thereof. The case had been fought on the question of divorce which had been denied by one party and asserted by the defence. None of the parties was conscious of the requirements of notice under section 7 and therefore no one had considered it as material for the purposes of a criminal case.'[848]

This was echoed by Justice Hussain who held that, 'The only exception can be of a benefit of doubt which may be given to the accused in a criminal case as has been given by us to the respondent in the present case.'[849]

A similar question came up in the case of *Muhammad Siddique v. The State,*[850] where a disgruntled ex-husband pressed charges against his former wife claiming that she had not validly divorced him before she remarried. As a matter of fact, the dissolution of her marriage had not taken place as her suit for dissolution of marriage had been dismissed by a district court because of lack of territorial jurisdiction. A second application before a competent court succeeded and she obtained an *ex parte* decree dissolving her marriage. She remarried after complying with section 7 of the Muslim Family Laws Ordinance 1961, i.e. she notified the Union Council of her divorce and the husband was informed of the notice. However, the husband succeeded in getting set aside the *ex parte* decree dissolving the marriage. At the same time he filed a petition for restitution of conjugal rights. As a result, the marriage was revived, albeit only for four months. The sessions court held the couple guilty under the Offence of Zina (Enforcement of Hudood) Ordinance 1979 and they were sentenced to 10 years' rigorous imprisonment and 15 lashes of the whip each. The Federal Shariat Court faced a difficult position: there was no doubt that technically the first marriage had been revived and was valid between 26 June 1981 and 24 October 1981. There was equally no doubt that during this period the accused's wife was living with her second husband. The court adopted what may be called a 'pragmatic approach', by distinguishing between the civil and criminal aspects of the case:

> 'The trial Court should also have kept in view the basic distinction between criminal liability and rights of liabilities of the parties on the civil side.'[851]

The Federal Shariat Court pointed out that the definition of *zina* in section 4 of the Ordinance contained a requirement of *mens rea.*[852] The prosecution had to establish that the couple accused of *zina* was doing so wilfully. The Federal Shariat Court

848 *Ibid*., at p. 275, per Justice Zahoorul Haq.
849 *Ibid*., at p. 281, per Justice Hussain.
850 PLD 1983 FSC 239.
851 *Ibid*., at p. 179.
852 Section 4 of the Offence of Zina (Enforcement of Hudood) Ordinance 1979 defines '*zina*' as 'A man and a woman are said to commit "*zin*"' if they wilfully have sexual intercourse without being married to each other.'

found that it was unlikely that the couple had understood the effect of the complex civil litigation and that therefore the *mens rea* required under the Ordinance was missing. The same 'benefit of doubt' principle was applied in the case of *Muhammad Ashraf v. The State,*[853] where yet another disgruntled husband pressed adultery charges against his ex-wife relying on an invalid divorce. Justice Hussain did not spend much time on the invalid divorce and held that, 'They cannot be held guilty of the offence of Zina if they believed themselves to be married.'[854]

In the case of *Muhammad Imtiaz v. State*[855] Justice Hussain had already held that a marriage of an adult woman without having obtained the consent of her *wali*, i.e. guardian, was valid both under Pakistani civil law and Islamic law. He also held that a man and woman who marry in good faith and believe themselves to be married have to be given the benefit of doubt in the context of criminal charges. This principle, according to Justice Hussain, applied with equal force to *tazir* cases. Further, in *Arif Hussain v. The State*[856] it was held that the mere statement of the accused persons claiming 'that they are husband and wife is sufficient to establish Nikah and the relationship of husband and wife' constituted a valid defence in the absence of proof that they were not married.

What about cases where the husband takes a second wife without complying with the requirements of the Muslim Family Laws Ordinance 1961? The Federal Shariat Court held that the failure of a husband to seek permission from the chairman of the Union Council, as contemplated by section 6 of the Muslim Family Laws Ordinance 1961, did not invalidate the second marriage but may expose him to criminal sanctions under the same Ordinance.[857] In the same case it was held that a marriage before the expiry of the *iddat* period of the woman was nevertheless valid and constituted a complete defence against an accusation of *zina.*[858]

However, the question of whether or not a marriage was valid, had a further jurisdictional dimension: under section 5 of the West Pakistan Family Courts Act 1964 it was the family court which had exclusive jurisdiction to determine the validity of a marriage or a divorce. However, section 3 of the Offence of Zina (Enforcement of Hudood) Ordinance 1979 provided that, 'The provisions of this Ordinance shall have effect notwithstanding anything contained in another law for the time being in force.' The relationship between the two courts, i.e. the sessions court and the family law court, was explored by the Shariat Appellate Bench of the Supreme Court in the case of *Muhammad Azam v. Muhammad Iqbal.*[859] Section 41 of the Evidence Act 1872 seemed to indicate that a matrimonial decree passed by a competent court was a judgment *in rem* and was as such binding on criminal courts. In a lengthy and not entirely clear judgment, Justice Zullah held that a finding of fact regarding the validity of a marriage made by a criminal court, recorded or affirmed by a superior court, was binding on a lower court, including a family court. However, if a family court in previous proceedings had already established the status of a marriage, the same

853 PLD 1981 FSC 323.
854 *Ibid*., at pp 326 and 327.
855 PLD 1981 FSC 308.
856 PLD 1982 FSC 42.
857 *Mian Dad v. The State* PLD 1983 FSC 518.
858 *Ibid*., at p. 522.
859 PLD 1984 SC 95.

was binding on the criminal court. In case the matter was already pending before a family court, the criminal case was to be stayed until the decision of the family court on the validity of the marriage was available. In cases where a party raised a bona fide plea of a valid marriage, a reference should be made to the family court for a decision on this matter and the criminal trial should be stayed until such a decision was available.

The case illustrates the complex jurisdictional problems caused by the criminalisation of sexual intercourse outside the confines of a valid marriage. It appears from the case law that the Federal Shariat Court was initially most willing to accept defence submissions that a valid marriage existed. However, there was at the same time considerable unease in the high judiciary that in many cases young girls were abducted and forced into what is often described as a 'sham' marriage. Justice Zullah's decision took away the power of criminal courts to determine the validity of marriages unilaterally and re-established the authority of the family courts in this respect. Nevertheless, subsequent case law shows that criminal courts continued to decide on the validity of marriages probably because the institution of separate proceedings was regarded as cumbersome and time consuming. A year later, in 1985, the Shariat Appellate Bench of the Supreme Court lamented the fact that neither the trial court nor the Federal Shariat Court had referred the questions surrounding the validity of a marriage to a family court and ordered a retrial.[860] Even worse, in 1986 the Federal Shariat Court re-examined the status and impact of decisions of the family court on criminal cases pending before criminal courts.[861] Ignoring earlier precedents, the Federal Shariat Court performed a U-turn and held that, 'Any finding of fact or inference drawn in the civil proceedings will have no relevance before the criminal court where the guilt or criminality of the accused is to be determined on the evidence produced before that court'.[862]

As will be seen further below, the competing jurisdictions of civil and criminal courts in the determination of the validity of a marriage has continued until the present.

The Hudood Ordinances and the High Courts

The gradual demise of the Federal Shariat Court in the late 1990s was matched by an increased interest in cases involving the Hudood Ordinances by the High Courts. Initially, these Hudood cases came before the High Courts as writ petitions under Article 199 of the 1973 Constitution. However, the petitions sought not the enforcement of a fundamental right but the quashing of First Information Reports (FIRs) alleging the commission of an offence under the Offence of Zina (Enforcement of Hudood) Ordinance 1979. It is interesting to note that these cases only appear in the law reports in the mid 1990s, despite the fact that the discretionary writ jurisdiction of the high courts was available ever since the Hudood Ordinances were imposed on the country by Zia-ul-Haq. In *Irshad Elahi v. Bashir Ahmad*[863] the father registered a case of

860 *Shakir Muhammad v. State* PLD 1985 SC 357.
861 *Abdul Rashid v. Safia Bibi* PLD 1986 FSC 10.
862 *Ibid*., at p. 26.
863 PLD 1997 Lah 554.

abduction under section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance 1979 against the husband of his daughter. It appears that the daughter had married against the wishes of her parents. Her father did not let matters rest there but also managed to get his daughter's first marriage dissolved and have her remarried, all by forging her thumb print. The Lahore High Court quashed the FIR,[864] arguing that Article 203-DD of the 1973 Constitution, which gives the Federal Shariat Court exclusive revisional jurisdiction over any finding, sentence or order involving any of the Hudood Ordinances made by a criminal court, did only apply to proceedings to quash an FIR. The Lahore High Court hastened to add at the end of the judgment that:

> 'The conferring of total revisional jurisdiction on the Federal Shariat Court ... is not controverted nor can there be any second opinion that the Federal Shariat Court now enjoys both appellate as well as revisional powers in all Hudood cases tried by the Sessions Judges/Additional Sessions Judges.'[865]

However, in the course of proceedings for the quashing of *zina*-related First Information Reports, High Courts were able to interpret the Offence of Zina (Enforcement of Hudood) Ordinance 1979 itself. In *Riaz v. Station House Officer, Police Station Jhang City* [866] the police obtained a search warrant under section 98 of the Code of Criminal Procedure 1898 from a magistrate and conducted a raid and search of a residential property. A police informer had alleged that the premises were used as a brothel. The police claimed that they found in the house an unmarried couple engaged in sexual intercourse and subsequently an FIR was filed. The accused couple moved the Lahore High Court asking for the FIR to be quashed and the search to be declared illegal, arguing that section 98 did not authorise a search in these circumstances and that the search had amounted to a violation of the petitioner's fundamental right to privacy. The High Court allowed the petition and took the opportunity to restate the legal position with regard to searches in the context of allegations of *zina*.

The basis of the judgment was provided by Islamic law, more specifically the Islamic concept of privacy. The Offence of Zina (Enforcement of Hudood) Ordinance 1979 had to be interpreted in the light of that principle since with the incorporation of Article 2-A in the Constitution all citizens were entitled to the basic freedoms and rights as enunciated by Islam. Since the Offence of Zina (Enforcement of Hudood) Ordinance 1979 did not contain any provisions relating to the search of a house there was presumption that the police had no right to interfere with the privacy of the home. The High Court held that, 'The irresistible inference is that the common practice of the police to register cases under Zina Hudood Ordinance on the report of the Mukhbar [an anonymous informer] is totally unwarranted and [against] the Injunctions of Islam.'

864 Earlier decisions with a similar outcome are *Nasreen Begum v. S.H.O., Police Station Jahania District Khanewal* 1992 Pcr.LJ 1455 and *Natho Bibi v. S.H.O. Police Station Khana* 1994 PCR.LJ 367.

865 *Supra*., note 863, at p. 563.

866 PLD 1998 Lah 35.

A similar result was arrived at in the case of *Akhtar Perveen v. State*,[867] where a house was raided by the police after an allegation had been received that a man and a woman neither related nor married to each other were seen going into a house. The Lahore High Court quashed the FIR filed under section 10 of the Offence of Zina (Enforcement of Hudood) Ordinance 1979, on the ground that the mere presence of a lady in the house in the company of a man with whom she is not related is no offence and cannot even be regarded as an attempt to commit *zina*.[868] Justice Muhammad Aqil Mirza remarked that 'it is unfortunate that why it cannot be presumed that the two can be together for purposes other than sexual intercourse.'[869]

However, the power of a high court to make orders under Article 199 was a discretionary one. The case law on the quashing of FIRs involving sexual offences under Article 199 of the 1973 Constitution is therefore an interesting indicator of judicial attitudes toward moral propriety. This becomes apparent in the case of *Lubna v. Government of Punjab*,[870] which involved a married couple accused of having committed *zina*. As in the above-mentioned case there was evidence that they had married without parental approval. Justice Khalil-ur-Rehman Ramday found that there were alternative remedies available, in that the charges could be refuted at trial and therefore refused to exercise his discretionary power, observing that:

> 'There is yet another aspect of this case. Though the present proceedings, as has been mentioned above, are not the kind of proceedings where I would consider it appropriate to give a declaration about the existence or legality of the alleged marriage, yet the fact remains that such a marriage which is generally regarded as a "run-away marriage" in our society, is not an appreciable act and thus the ones involved in such an act are not the kind of persons who could be found entitled to a relief in equity or to a relief as a result of exercise of the discretionary jurisdiction of this Court.'[871]

In the same year Justice Ramday repeated this dicta in somewhat stronger language, holding that:

> '. . . discretionary relief in equity is available only to those who approach a Court of Law with clean hands. Persons having acted in a manner not honourable or having acted in breach of the established social and moral norms of society, disentitle themselves to any relief in equity . . . the persons who are parties to the kind of marriages which are in question, are ones who have contravened the wishes of ALLAH; who have offended their parents and families and who have violated the established values of the society. It is, therefore declared that such-like persons are not worthy of any relief in equity.'[872]

These observations were made in the infamous *Saima Waheed* case, which received international attention and condemnation. The case also involved a love marriage between two consenting adults. As is often the case, the parents objected to the actions

867 PLD 1997 Lah 390.
868 *Ibid*., at p. 393.
869 *Ibid*. See also *Muhammad Bilal v. Superintendent of Police* PLD 1999 Lah 297.
870 PLD 1997 Lah 186.
871 *Ibid*., at p. 188.
872 *Abdul Waheed v. Asma Jehangir* PLD 1997 Lah 301.

of their daughter and the father launched a by now familiar attack on the couple: the husband was accused of abducting the daughter and spent almost two years in prison whereas the daughter's marriage was dissolved. However, the couple fought back and the young woman managed to escape to a women's refuge. In *Abdul Waheed v. Asma Jehangir* [873] a Division Bench of the Lahore High Court had to consider whether or not the consent of the guardian of an adult woman was required in order to bring about a valid marriage. The three judgments make it clear that all three judges were very much opposed to the very idea of love marriages and deeply disapproving of a society which allows unmarried man and women to meet freely. There was a consensus that such conduct was not contemplated in Islam. However, by what must be regarded as a twist of irony, the Lahore High Court was confronted with a decision of the Federal Shariat Court, which had declared that a guardian's consent was not required for an adult woman to enter into valid marriage under Islamic law as applied in Pakistan.[874]

The decision has obvious implications for Pakistan's Muslim family law. As will be seen further below, the Federal Shariat Court as the constitutionally designated court of appeal against convictions under the Hudood Ordinances had to decide in a number of cases whether either marriages or divorces were valid. The status of both a marriage and divorce had with the promulgation of the Offence of Zina (Enforcement of Hudood) Ordinance 1979 acquired an importance far beyond the civil consequences and incidents attached to being married or divorced, since any sexual intercourse outside a subsisting valid marriage constituted a criminal offence. The Federal Shariat Court proceeded to view the validity of marriages and divorces from a 'practical' point of view, dispensing with the requirements of the Muslim Family Laws Ordinance 1961. During the same period Pakistan's secular courts had insisted that only a divorce which met the procedural requirements of the Muslim Family Laws Ordinance 1961 could be regarded as valid. This bifurcation of Pakistan's divorce law had lessened the impact of the Offence of Zina (Enforcement of Hudood) Ordinance 1979 to some extent since it was sufficient for a married couple to prove that they were validly married without having to prove that the divorce of one of the partners preceding the marriage had also complied with the Muslim Family Laws Ordinance 1961.

The right of adult Muslim women to be allowed to marry without the consent of their parents was therefore in some respects a Pyrrhic victory.[875] Nevertheless, the extremely conservative views espoused by the Division Bench of the Lahore High Court, which condemned so-called 'love marriages' as un-Islamic and immoral and a threat to the social fabric society, were not shared by all the judges. In the same year (1997), a diametrically opposite view was taken by Justice Muhammad Aqil Mirza, who held that every validly married couple, including so-called love marriages, were entitled to be protected by the state.[876] The case concerned a couple who had married without the consent of their respective parents, and who were subsequently harassed

873 *Ibid*.

874 See *Muhammad Imtiaz v. The State* PLD 1981 FSC 308.

875 See Martin Lau, 'Opening Pandora's Box: The Impact of the Saima Waheed Case on the Legal Status of Women in Pakistan': in *Yearbook of Islamic and Middle Eastern Law*, Vol. 3, 1996, 518-533.

876 *Sajida Bibi v. Incharge, Chouki No.2, Police Station Sadar, Sahiwal* PLD 1997 Lah 666.

by the local police at the instigation of the parents. Justice Mirza denounced such behaviour as being based on tribal customs, social taboos and barbarity and thought that these practices were 'gradually loosening their grip on society, partly on account of religious education by the learned Ulemas and partly due to the awakening through print and electronic media.'[877] Justice Mirza held that the right to life guaranteed under Article 9 of the 1973 Constitution included the right of a married couple to establish a home and live together as a basic human right.[878]

By far the most outspoken criticism of forced marriages and the filing of criminal charges against couples who got married against the wishes of their parents were made by Justice Tassaduq Hussain Jilani in the case of *Humaira Mehmood v. The State.*[879] The facts of the case reveal a particularly brutal case of a forced marriage involving the abduction of the wife with the help of law enforcement agencies,[880] a subsequent forced marriage, and the pressing of criminal charges against the 'first' husband: 'she was chased, harassed, abused, beaten and disgraced.'[881] Justice Jilani did not mince his words in his condemnation of forced marriages, holding that a marriage contract without the consent of the parties is not valid and confirming that an adult Muslim woman could enter into a marriage without having secured the consent of her 'wali', i.e. her male guardian, usually her father. The criminal proceedings against her husband were held to be *mala fide* and were quashed by Jilani. In the course of his judgment he observed that 'male chauvinism, feudal bias and compulsions of a conceited ego should not be confused with Islamic values'.[882]

Isolated appeals against convictions in *zina*-related cases also came before the High Courts from anti-terrorist courts in cases of gang rape which were under the exclusive jurisdiction of anti-terrorist courts.[883] The latter applied the Offence of Zina (Enforcement of Hudood) Ordinance 1979 but appeals against convictions did not go to the Federal Shariat Court but to a high court.[884]

The emergence of *zina* cases in Pakistan's High Courts testifies to the fact that some judges feel uncomfortable with the ethos and the social consequences of the Offence of Zina (Enforcement of Hudood) Ordinance 1979. More importantly in the context of this book, the encounter between *zina* and Pakistan's superior courts reveals the deep divergences of views within the judiciary: some judges can be seen to adhere to a strict compliance with orthodox Islamic moral values whereas others are informed by what must be called liberal, perhaps even Western, values. There is no agreed view on this issue, nor has the Supreme Court managed to impose its own views on

877 *Ibid*., at p. 669.
878 *Ibid*., at p. 670.
879 PLD 1999 Lah 494.
880 Mrs Humaira was taken against her will by Punjab police from Karachi to Lahore, where she was transferred into the custody of her parents. It should be pointed out that all this happened at the instigation of her father, who was at the time was a member of the Punjab Provincial Assembly.
881 *Supra*, note 879, at p. 514.
882 *Ibid*. at p. 515. Unusually, one of the police officers who had participated in the abduction of Humaira from the Edhi Centre in Karachi to Lahore was sentenced to one month's imprisonment for contempt of court under section 3 of the Contempt of Court Act 1976. He had effected her arrest notwithstanding a pre-arrest bail granted by the Lahore High Court.
883 See section 2(c) of the Anti-Terrorism Act 1997.
884 See, for instance, *Imam Din v. State* PLD 1998 Lah 383 and *Mahesar v. Federation of Pakistan* PLD 1998 Kar 311.

the High Courts. For those affected by Islamic criminal laws the law has become a lottery: some judges are willing to quash an FIR using their powers under Article 199 of the 1973 Constitution; others refuse to do so. The result is unsatisfactory: the outcome of cases is determined not by the law but by the moral convictions and religious beliefs of a particular judge. There is no gainsaying which of the trends, the orthodox or the liberal, will in the end prevail.

Conclusion

The role of Islam in the legal system of Pakistan is marked by diversity, complexity and uncertainty. As Chapters 3 to 6 showed, there is no doubt that Islam has become an important factor in judicial decision-making. In the past three decades, Pakistan's superior courts have been willing to depart from the country's colonial and occidental legacy of inherited statutes and legal concepts in favour of an approach deemed by judges to be more in line with indigenous, Islamic values. There is no single event which triggered the adoption of Islam as an alternative to Western jurisprudence. However, there is evidence that even in the 1950s and 1960s the existence of an almost entirely secular legal system caused friction. In some cases, superior courts castigated the lower judiciary for occasional departures into Islamic criminal law but by the 1960s Islamic moral values had manifested themselves in some areas of law. The most visible expression of this gradual acceptance of Islam can be seen in the context of abduction cases, where by the late 1960s even the Supreme Court of Pakistan was prepared to instil constitutionally guaranteed rights with Islamic values.

Chapters 2 and 3 showed that Islamic jurisprudence was embraced by judges, either because their personal beliefs dictated such an approach or because Islamic values could offer support for judicial explorations into hitherto untested areas of law. In the case of the former, it is in particular Justice Afzal Zullah who can be regarded as the most important contributor to the expanding role of Islam in the legal system. From the mid-1970s, he pursued a determined judicial campaign to introduce into the legal system Islamic values and law. Justice Zullah's reliance on Islamic values was, however, informed by an approach marked by liberalism and humanitarianism. As a result, in most cases where Justice Zullah drew on Islamic law it was done to benefit the weaker party, to advance equitable principles and to bring about a result which was just and in harmony with the humanitarian aspects of Islam. Justice Zullah was able to achieve these results by either interpreting statutes in the light of Islam or by applying Islamic law in preference to English common law in areas of law not occupied by statutes. Neither approach brought Justice Zullah in direct conflict with established legal norms: there was nothing in Pakistan's legal system which expressly barred a judge from interpreting statutes in the light of Islam.

The resort to Islamic law in the area of constitutional law was, however, caused primarily not by personal convictions but by legal expediency. It could be seen that in cases of constitutional breakdowns, references to Islam could offer legal continuity

and stability. However, it could also be seen that the application of Islamic law in situations of constitutional breakdown, like for instance the imposition of martial law, was haphazard and inconsistent. There are instances when Pakistan's higher judiciary found support in Islamic law in its formulation of a basic structure doctrine but there are equally a number of instances where the existence of an immutable basic norm was denied and with it also the recognition of a basic, Islamic structure of Pakistan's legal system. The inconsistency in the application of Islamic law to constitutional breakdowns can be explained not so much by judicial attitudes towards Islam, but by the political context which surrounded these cases. There is no doubt that Pakistan's superior courts faced significant challenges when faced with military take-overs. The formulation of an Islamic basic structure doctrine is thus confined to cases where judges knew that their decisions conformed with the political reality.

The permeation of the legal system with Islamic values led in the late 1980s and 1990s to both crisis and triumph. The crisis was caused by the determined efforts of significant sections of the higher judiciary to advance what they perceived to be a very sluggish pace of Islamisation. Again, one individual judge can be identified as the catalyst of this movement. Justice Tanzil-ur Rahman must be regarded as the one judge who most determinedly refused to remain within the confines and boundaries of Pakistan's mixed legal system. He openly defied established legal norms by declaring several statutes un-Islamic and by refusing to apply statutes which he deemed to be repugnant to Islam. In the early 1990s, the situation had reached a point where even within individual High Courts conflicting decisions emerged as a matter of course. This crisis was addressed by the Supreme Court, which sided with those judges who had refused to participate in the invalidation of statutes as un-Islamic.

The decision of the Supreme Court to stem the tide of judge-led efforts to make the legal system more Islamic did not, however, diminish the role of Islam in other areas of law. Islam's main contribution to the legal system of Pakistan in the 1990s was its incorporation into public interest litigation and its role in the advancement of fundamental rights. This development must be regarded as a triumph, since it constitutes a unique contribution to Islamic human rights jurisprudence. Pakistan's higher judiciary has confounded the perception that the relationship between human rights and Islam is as of necessity best described as a 'clash of civilisations'. Instead, Pakistan's superior courts have been able to use Islam to expand the scope of fundamental rights and even to add rights like a fundamental right to justice to those human rights expressly protected by the 1973 Constitution.

Even more surprising than the use of Islam to advance human rights by Pakistan's superior courts is the application of Islamic law by Pakistan's shariat courts. The second part of the book demonstrated that throughout the 1980s the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court formulated an approach to the Islamisation of laws which replicated to a large extent the existing fundamental rights. Statutes which infringed the right to equality, the right to be heard or which accorded the state excessive discretionary powers were declared repugnant to Islam. However, the advancement of human rights on the basis of liberal interpretations of Islam sits uneasily with those cases which relied on more orthodox interpretations of Islam. The piecemeal invalidation of Pakistan's land reforms, the destruction of the right of pre-emption of tenants and the attacks on parts of the Muslim Family Laws

Ordinance 1961 are examples for the potential of Islamisation measures to interfere with social reform legislation intended to protect vulnerable groups in society.

Equally, references to Islam were used to restrict women's rights. The shariat courts never invalidated a statute on the basis that it discriminated against women, nor has Islam been used to promote the legal status of women with the notable exception of Justice Zullah's defence of female rights of inheritance. The same lack of Islamic judicial activism is apparent in relation to the right to freedom of religion: the judicial pronouncements on the legal status of Ahmadis adopt in large parts the arguments of the orthodox *ulema* and are based on the premise that Islam restricts rather than expands the scope of constitutionally guaranteed fundamental rights.

The role and importance of Islam in the legal system of Pakistan has increased steadily. However, this rise in the importance of Islam is a result of judicial self-assertion rather than of deliberate governmental policies. The appropriation of Islam has amplified the power of the judiciary. Under the mantel of Islam, Pakistan's shariat courts have been able to circumvent virtually all constitutional mechanisms which protect legislation against judicial review. They have also been able to threaten the foundations of the country's financial system through the invalidation of all laws providing for the payment of interest. Thus, the role of Islam in the legal system of Pakistan can be regarded as essentially an enhancement of judicial powers. In this enhancement, the normative contents of Islam seem to have played only a small role. The wide range of interpretations of Islamic law offered by Pakistan's judiciary conveys the impression that almost any result can be achieved by reference to Islam. This becomes particularly apparent in those cases where the shariat courts arrived at radically opposed interpretations of Islamic law in different decisions. This applies, for instance, to the decisions on the Islamic *vires* of the punishment of stoning to death, the rights of pre-emption and the land reform legislation where the shariat courts' interpretation of the precise content of Islamic law underwent profound changes.

It is the flexibility of Islamic law in the hands of Pakistan's higher judiciary which has ensured and fostered the role of Islam in the legal system. Nevertheless, flexibility brings with it legal uncertainty and it is this aspect which must be identified as the most problematic facet of the judiciary's use of Islam as a tool for the enhancement of judicial power. The ability to create and recreate new legal norms on the basis of changing interpretations of Islam itself and their application in the legal system exposes the judiciary to the risk of political bias. This becomes most visible in the analysis of the cases surrounding the dismissal of governments post-1985. Further, this legal uncertainty is compounded by the inroads made by the shariat courts into the concept of separation of powers. The systematic invalidation of laws on the basis of Islam in effect amounted to the imposition of particular interpretations of Islamic law by the shariat courts.

No firm predictions can therefore be made about the future role of Islam in Pakistan's legal system. However, it can be concluded that irrespective of government intervention the future role of Islam is very much in the hands of Pakistan's judiciary.

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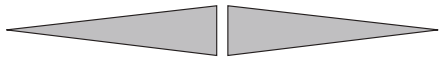

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