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Article:	**ISLAMISATION OF LAWS UNDER CHAPTER 3A OF THE CONSTITUTION OF PAKISTAN**
Author(s):	Ghufran Ahmed Assistant Profesoor, Faculty of Law, University of Sialkot, Sialkot, Pakistan.
	Zeeshan Ashraf Qureshi Lecturer, Faculty of Law, University of Sialkot, Sialkot, Pakistan. Pakistan.
	Muneeba Javid Randhawa Lecturer, Faculty of Law, University of Sialkot, Sialkot, Pakistan. Pakistan.
	Shagufta Bashir Lecturer, Faculty of Law, University of Sialkot, Sialkot, Pakistan. Pakistan.
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Author(s) Note:	Ghufran Ahmed is serving as Assistant Professor Faculty of Law, University of Sialkot, Pakistan. Email: ghufran.ahmed@uskt.edu.pk
	Zeeshan Ashraf Qureshi is serving Assistant Professor at Faculty of Law, University of Sialkot, Pakistan. Email: zeeshan.ashraf@uskt.edu.pk

	Muneeba Javid Randhawa is serving Assistant Professor at Faculty of Law, University of Sialkot, Pakistan Email: muneeba.javid@uskt.edu.pk
	Shagufta Bashir is serving Assistant Professor at Faculty of Law, University of Sialkot, Pakistan Email: shagufta.bashir@uskt.edu.pk

ABSTRACT

Article 203D of the Constitution of the Islamic Republic of Pakistan, 1973 uses three important phrases. These are "the Injunctions of Islam as laid down in the Holy Quran and the Sunnah of the Holy Prophet" (the last of the Prophets, ﷺ) "repugnant to the Injunctions of Islam" and "in conformity with the Injunctions of Islam." However, these phrases have not been defined in the Constitution. The Federal Shariat Court is established under Chapter 3A and this Court is vested with the exclusive jurisdiction to declare any law void if the same is repugnant to the Injunctions of Islam. This paper analyses the establishment of the FSC and a few judgments rendered by the FSC and its appellate forum under Chapter 3A to determine the scope of the above-mentioned phrases. It is to be found that if a law is not found repugnant to the injunctions of Islam, it remains a valid law though the same may not conform with the Islamic injunctions. For the conduct of this research, the library and internet sources will be used as a tool for data collection. The qualitative methodologies will be adopted for this analytical and descriptive study. Moreover, the data analysis for the secondary data will be carried out through a critical analysis of the Pakistani legal framework dealing with financial transactions Further, to give suggestions and recommendations for Pakistani institutions and legislature the process of Islamization of laws under Chapter 3A would be imperfect in so far it allows the continuity of laws not in conformity with the Islamic injunctions.

Key Words: *SAB, Injunctions of Islam, FSC, Pakistan, Repugnant, Judiciary.*

Introduction

One of the tests for the validity of laws prescribed under the Constitution of the Islamic Republic of Pakistan (the Constitution) is based on the "Injunctions of Islam as laid down in the Holy Quran and the Sunnah of the Holy Prophet" (the last of the Prophets, ﷺ). However, this phrase is not defined anywhere in the entire Constitution (Cheema, 2013). Since it is one of the validity tests, the phrases "repugnant to the Injunctions of Islam" and "in conformity with the Injunctions of Islam" obviously become very important. All these phrases have been used in Article 203D of the Constitution. Similarly, another very interesting issue to be analyzed is to find out who has the final binding authority to determine the meanings and scope of the "Injunctions of Islam" in a particular case (Abbasi, 2018).

This paper analyzes the Islamisation of laws under Chapter 3A of the Constitution. In this regard, first, a brief history, establishment, and conferment of various jurisdictions upon the Federal Shariat Court (FSC) and the Shariat Appellate Bench of the Supreme Court (SAB) are discussed[1]. This paper also analyses some important judgments rendered by the FSC and the SAB exercising jurisdiction under Chapter 3A. Based on this analysis, it is argued that only those laws which are held repugnant to the Injunctions of Islam are required to be brought in conformity with the Islamic injunctions. Conversely, if a law is not found to be repugnant to such injunctions, that law shall still be considered a valid law though it may not conform with the Injunctions of Islam. This follows that a law not declared repugnant to the Injunctions of Islam does not necessarily mean that it conforms or accordance with the Injunctions of Islam. The above argument, if properly justified, leads to the proposition that the Islamisation of laws under Chapter 3A is not an exhaustive and comprehensive mechanism to achieve the desired objective of Islamisation of laws.[2]

The Constitution (Amendment) Order, 1980

The Federal Shariat Court (FSC) has been established by the Constitution (Amendment) Order, 1980 President's Order (P.O.) No. 1 of 1980 by substituting Chapter 3A of the Constitution. It is well known that the Constitution may only be amended by an Act of Parliament as provided in Article 238 of the Constitution. Moreover, under Article 239, such an Act must be passed with a two-thirds majority of both the houses before it gets the assent of the President. But, the 1980 Constitution Amendment Order is a President's Order issued under the Proclamation of the fifth day of July 1977 read with the Laws (Continuance in Force) Order, 1977. So, this can neither be termed as an Act of the Parliament nor it was passed with a two-thirds majority of both the houses. How then it could amend the Constitution is analyzed below.

The Proclamation of Martial Law

The Chief of the Army Staff, General Muhammad Zia-Ul-Haq, had proclaimed Martial Law throughout Pakistan and assumed the office of the Chief Martial Law Administrator (CMLA) through the Proclamation of Martial Law of the fifth day of July 1977. This Proclamation, *inter alia*, held the Constitution in abeyance. On the same day, the CMLA also issued the Laws (Continuance in Force) Order, 1977 which *inter alia*, provided that the State shall be governed as nearly as may be by the provisions of the Constitution. But the Constitution was made subject to

the Laws (Continuance in Force) Order, 1977 and any other Order made by the President and any Martial Law Regulation or Martial Law Order made by the CMLA. The Supreme Court of Pakistan in *Begum Nusrat Bhutto versus Chief of Army Staff and Federation of Pakistan* validated the Proclamation of Martial Law of the fifth day of July 1977 and the Laws (Continuance in Force) Order, 1977 (Begum Nusrat Bhutto versus Chief of Army Staff and Federation of Pakistan, 1977).

Furthermore, the CMLA was authorized to do all in the legislative and the executive fields that had been allowed by the Pakistani courts in previous such cases (The State versus Dosso and another, 1958). This included, *inter alia*, the power to amend the Constitution. It was clarified that these powers could be used by issuing Martial Law Regulations, President's Orders and Ordinances, and so on.

After the retirement of the President of Pakistan, Mr. Chaudhry Fazal Elahi, on 16 September 1978, the CMLA also assumed the office of the President and now he could issue not only the Martial Law Regulations and Martial Law Orders but also President's Orders. He used these powers excessively and made several amendments in the Constitution mainly through various P.Os. That is how Chapter 3A was substituted by the Constitution (Amendment) Order, 1980. But how this chapter was first inserted in the Constitution is discussed below.

The Insertion of Chapter 3A

Chapter 3A was first inserted in the Constitution by P.O. No. 3 of 1979. Even before the insertion of this Chapter, Shariat Benches of Superior Courts were established by another P.O. in 1978. This Order was called the Shariat Benches of Superior Courts Oder, 1978 and the same was to come into force on the twelfth day of *Rabi-ul-Awwal*, 1399 *Hijri*. However, this P.O. was never enforced since it was repealed by P.O. No. 3 of 1979 just three days before it was supposed to come into force. The P.O. No. 3 of 1979 inserted a new chapter after Chapter 3 in Part VII of the Constitution namely Chapter 3A Shariat Bench of Superior Courts. This newly inserted chapter was to come into force on the same day as the repealed Order i.e. on the twelfth day of *Rabi-ul-Awwal*, 1399 *Hijri**[3]*. This chapter was substituted by President's Order No. 1 of 1980 after almost fifteen months with a new chapter namely Federal Shariat Court[4].

The Establishment of the Federal Shariat Court

The FSC is established under Article 203C of the Constitution. The purpose of the establishment of the FSC has been described as the enforcement of the provisions of Chapter 3A. According to clause 2 of this Article, only Muslim Judges can be appointed in the FSC. The total number of judges including the Chief Justice is eight, and the manner of their appointment is the same as that of the judges of the Supreme Court and the High Courts under Article 175A of the Constitution.

The qualification of the Chief Justice is the same as that of a Judge of the Supreme Court or a permanent Judge of a High Court. Similarly, the qualification of four of the remaining seven judges is that of the judge of a High Court while the remaining three judges called the *ulema* judges have different qualifications. Their qualification has been provided by clause 3A which is at least fifteen years experience in Islamic law, research, or instruction (The Constitution of Pakistan (Eighteenth Amendment) Act, 2010). The total number of traditional judges is five as compared to three *ulema*

judges. The need for an *alarm* judge was felt after the decision of the FSC in the *Hazoor Baksh* case (Hazoor Baksh versus the State, 1981).

Original Jurisdiction of the FSC

Article 203D provides special and exclusive jurisdiction to the FSC to knock out any law or any provision thereof being repugnant to the injunctions of Islam as laid down in Holy Quran and the Sunnah of the Holy Prophet, (the last of the Prophets, ﷺ).[5] It is perhaps the most important provision contained in Chapter 3A. The FSC can exercise this jurisdiction in either of the following ways:

1. On its motion
2. On the petition of a citizen
3. On the petition of the Federal Government
4. On the petition of a Provincial Government

The *suo moto* jurisdiction to examine law and decide its fate was vested upon the FSC in 1982 by the Constitution (Second Amendment) Order, 1982. When the Court exercises this jurisdiction on its motion or the petition of a citizen and the law *prima facie* appears to be so repugnant, the Court will join the Federal government if the law is concerning a matter in the Federal Legislative List or the Provincial government if the case is otherwise as respondent. Previously, the Federal government or the Provincial government had not to be joined as respondents. This provision was added by the Constitution (Amendment) Order, 1984.

However, the power of the Federal or Provincial government to invoke the jurisdiction of the FSC under this provision is very meaningful. Who will be joined as a respondent in such proceedings is to be found out (Pakistan versus Public at large, 1986). The government, Federal or Provincial, is itself the law-making authority[6]. Under the Constitution, the government is restricted to making any law that is repugnant to the injunctions of Islam (Constitution of Islamic Republic of Pakistan, 1973). Moreover, the government can seek the advice of the Council of Islamic Ideology (CII) to bring a law in conformity with the injunctions of Islam (Constitution, 1973). If the government thinks that a particular law or any provision thereof is repugnant to the injunctions of Islam, being itself the law-making authority it can repeal that law or amend it accordingly without needing any other institution. In case, the government doubts whether a particular provision is or is not so repugnant, the more suitable option is to seek the advice of the CII instead of knocking at the door of the FSC. It is so because the court procedure has its restraints and technicalities while the proceedings of the CII are quite liberal.

If having examined the law and heard the point of view of the petitioner and the concerned government/respondent(s), the FSC finally decides a law to be repugnant to the injunctions of Islam, the FSC shall do the following:

1. Give reasons of its opinion
2. State the extent to which the law is so repugnant
3. Mention the date on which the decision is to take effect

This last point is very important because until the decision takes effect, the law having been declared repugnant to the injunctions of Islam will continue to be a valid law. Similarly, according to Article 203H, when a law or provision of law is challenged being repugnant to the injunctions of Islam, the proceedings under that law or provision in any court will not stay and the rights and liabilities of the parties will be determined according to that law. It is because of the proviso which has been added to this provision by the Constitution (Amendment) Order, 1984. The proviso says that the decision shall not take effect before the expiration of the period in which an appeal against the decision of the FSC can be filed to the SAB. The period so provided is six months from the date of the decision of the FSC. It further says that if the appeal has been filed, the decision shall not take effect until the appeal is decided. The case can be remanded to the FSC for decision afresh. So the wheel shall start revolving again from the same point. However, if the decision of the FSC is maintained by the SAB, still a review petition under Article 188 can be filed before the SAB. It is interesting to note that this is not only presumptive but has happened many times. In this regard, a few important cases are analyzed after a brief analysis of the appellate forum i.e. the SAB.

The Shariat Appellate Bench

Reference has already been made to the SAB above. It finds mention in Article 203F (3) which provides for the constitution of a Bench in the Supreme Court consisting of three Muslim judges of the Supreme Court and two *ulema* judges as *ad hoc* members. It is worth mentioning that the Supreme Court has held in several cases that the reference to the SAB is a reference to the Supreme Court itself (Mst. Aziz Begum and others versus Federation of Pakistan and others, 1990).

The *ulema* judges are either selected from the judges of the FSC or from out of a panel of *ulema* drawn up by the President in consultation with the Chief Justice. A question arises whether the consultation with the Chief Justice is for nominating two judges of the FSC as *ad hoc* members of the SAB or for drawing up the panel of *ulema* or for both. It should be noted that the reference to Chief justice in this clause is a reference to the Chief justice of the FSC and not the Chief Justice of Pakistan. It is interesting to note that the Chief Justice of the FSC can be a permanent judge of a High Court. So if the consultation is for the nomination of *ad hoc* members of the SAB, a junior judge is a consultee for a senior post. On the other hand, if the consultation is for drawing up a panel of *ulema*, neither the President nor the Chief Justice is known to be well-versed in Islamic law to draw up the panel. A better option in this regard could be the Chairman of the CII as a consultee (Hafiz Abdul Waheed versus Mrs. Asma Jahangir and another, 2004).

Literature Review (Analysis of Judgments)

In the following lines, some important judgments rendered by the FSC and the SAB are analyzed as a literature review. First of these is the judgment of the SAB regarding the pre-emption laws. It is followed by the famous *riba* judgment and the *Qazalbash Waqf* case. Finally, the verdict of the FSC in the *Allah Rakha* case is analyzed. Following are the key points to be established by the analysis of these cases.

v That although few judges of the FSC and the SAB have held that the scope of the injunctions of Islam is limited to the explicit texts of the Holy Quran and the Sunnah of the Holy Prophet, (the last of the Prophets, ﷺ).

v That the phrase repugnant to the injunctions of Islam has been held to be contradictory to such injunctions. Thus, if a law or any provision thereof does not contradict or conflict with such injunctions, the law is held to be valid through the same may not conform with such injunctions.

v That once a law or any provision thereof is held repugnant to the injunctions of Islam, steps are taken not to remove just the repugnancy but to bring that law in conformity with the Islamic injunctions.

v That the final verdict of the SAB can be assailed invoking Article 188 of the Constitution in review jurisdiction.

The Fate of the Pre-emption Laws

The FSC dismissed the Shariat Petitions challenging, *inter alia,* certain provisions of different laws adding to the categories of the pre-emption and excluding certain properties from being the subject of pre-emption (Hafiz Muhammad Ameen, etc. versus Islamic Republic of Pakistan and others, 1981). The North-West Frontier Province Pre-emption Act, 1950 under Section 5 (a), (c), and (d) exempted certain properties from the exercise of the right of pre-emption. Moreover, Section 7(2) of the same Act empowered the Provincial government to exempt properties and sales from the right of pre-emption. Similarly, Paragraph 25(3) (d) of the Land Reforms Regulation, 1972 conferred the first right of pre-emption on the tenant in respect of the land comprising the tenancy. Likewise, under Section 15(c) of the Punjab Pre-emption Act, 1913 the owners of the sub-divisions of the estate were given the right of pre-emption.

The above provisions were challenged by being repugnant to the injunctions of Islam. The provisions of the 1950 Act were challenged before the Shariat Bench of the Peshawar High Court under Article 203B of the P.O. No. 3 of 1979 (Haji Naimatullah Khan and another versus Government of Pakistan through Ministry of Law, 2021). While the other provisions stated above were challenged before the FSC. Interestingly the petitions before the Shariat Bench of the Peshawar High Court were accepted on 01.10.1979 and three months from the date of the judgment was given to bring the said provisions in conformity with the injunctions of Islam. The Court held that the right of pre-emption has only been conferred in Islam on the persons who fall under the following categories:

1. Co-owners of immovable property
2. Participators in amenities and appendages in immovable property
3. Owners of contiguous properties.

Moreover, the Court explained that the law would be applicable with all its force on the matters relating to the right of pre-emption in the sale of immovable property. The only exception created by law is the one having reference to the sale of well and date trees.

On the other hand, the petitions filed before the FSC were dismissed as being not maintainable as well as on merits. Concerning the provisions of the 1972 Regulation, it was held that the FSC lacked jurisdiction to determine their fate on the touchstone of the repugnancy with the Injunctions of Islam as these were protected under the Constitution. Besides, the purpose of pre-emption in Islamic law is to avoid harm, so to achieve this purpose the categories of persons granted the right of pre-emption could be changed according to the circumstances.

Consequently, appeals were filed in the SAB challenging both the said judgments. The SAB in *Malik Said Kamal Shah* case held that the Islamic law of pre-emption creates an exception to the freedom of contract and purchase (Government of N.W.F.P. through Secretary Law Department versus Malik Said Kamal Shah, 1986). It is so because the right of pre-emption vests the first right of purchase of certain immovable properties in certain persons. Therefore, being an exception to the general law its entitlement will be recognized only to those persons who have been specifically mentioned by the provisions of Islamic law. Similarly, as this right is recognized concerning immovable property generally, there must be some specific provision for the exemption of any sort of such property. In other words, the right of pre-emption cannot be increased person-wise or curtailed property-wise.

Accordingly, it was desired that a consolidated law of pre-emption be enacted in conformity with the injunctions of Islam till 31.07.1986. However, no such pre-emption law could be enacted before 01.08.1986. Meanwhile, the impugned provisions of law ceased to have effect by the above-mentioned judgment of the SAB. Consequently, there were difficulties and ambiguities in disposing of pre-emption matters. This did not escape the notice of the SAB. Hence, to address this issue authoritatively, the SAB took *suo moto* review under Article 188 of the Constitution on 05.07.1989 (Said Kamal Shah versus Federation of Pakistan, 1990). After issuing notices to all the concerned parties and providing the interested parties a fair hearing, the SAB unanimously held, *inter alia,* on 26.05.1990 that "the Shariat Appellate Bench of the Supreme Court is empowered to explain, clarify, review its orders (Said Kamal, 1990)." The SAB based its above finding on the following well-settled principle of law:

…when an established Court without more is provided a forum for a particular redress, it will be implied that the ordinary incidents of the procedure of that Court are to attach, and also that any general right of appeal or a review or other remedy from its decision likewise would be attracted to (Kamal, 1990).

It is interesting to observe that in pursuance of the judgment of the SAB in the *Said Kamal Shah* case, the Punjab Pre-emption Act, 1991 was enacted. The preamble of this Act reads as, "Whereas it is expedient to re-enact the existing law relating to pre-emption, to bring it in conformity with the injunctions of Islam as set out in the Holy Quran and Sunnah…" Similarly, in 1987 the pre-emption law for the province of Khyber Pakhtunkhwa was brought in conformity with the injunctions of Islam.

The *Riba* Case

In another case famously known as the *riba* case, various provisions of both federal and provincial fiscal laws providing for *riba* i.e. interest in different situations were challenged by more than one hundred petitioners before the FSC being repugnant to the injunctions of Islam (Dr. Mahmood-ur-

Rehman and others versus Secretary Ministry of Law, Justice and Parliamentary Affairs, Government of Pakistan, Islamabad, and others, 1992). To decide the issue of interest conclusively, a comprehensive questionnaire was prepared by the FSC. This questionnaire was sent to distinguished religious scholars, bankers, and economists both in Pakistan and abroad.

In response to this questionnaire, various scholars submitted their responses and their opinions were made part of the proceedings. Several other experts were provided a personal hearing on this issue before the FSC. Likewise, several scholarly documents in the form of conference reports, juristic opinions, etc. were also considered apart from the texts of the Holy Quran and the Sunnah of the Holy Prophet, (the last of the Prophets, ﷺ). There was no difference of opinion on the prohibition of interest in Islam since the Holy Quran in unequivocal terms prohibits interest and declares that those who do not abstain from this exploitative practice should be ready for waging a war against the Almighty and His Prophet, (the last of the Prophets, ﷺ).

However, one of the prime questions before the FSC was whether the contemporary practices of interest as protected by different legal provisions fall in the category of the prohibited interest. To answer this question, the FSC traced the interest practices prevailing in Arab at the time when the interest was prohibited by Islam. It also analyzed the current modes of interest from all angles. After a very long proceeding that lasted for more than ten months, the FSC consisting of a three-member bench under the Chief Justice unanimously declared the various legal provisions null and void being repugnant to the injunctions of Islam.

Nonetheless, this decision of the FSC was challenged in appeal before the SAB. It is interesting to note that the appellants included the Federation of Pakistan as well as the Province of Punjab. Thus, the government otherwise duty-bound to eliminate *riba* from the economy preferred to approach the SAB for setting aside the order of the FSC requiring the elimination of *riba*. These appeals were filed in 1992 but were disposed of in December 1999. The SAB affirmed the findings of the FSC (*Dr. Muhammad Aslam Khaki versus Syed Muhammad Hashim and two others* 2000). However, the date on which the impugned laws were to be removed from the statute book was extended. Different dates were fixed for different laws according to their nature. About some of the laws, the SAB decided to take effect on 31.03.2000 while some of the laws were to cease to have effect from 30.06.2001 and so on. The judgment of the Appellate Bench not only affirmed the judgment of the FSC, but it also made certain recommendations to Islamise and transform the existing banking and financial systems. This judgment like the one given by the FSC was again widely appreciated other than the fact that the time taken for the disposal of these appeals was too long.

Nonetheless, a review petition under Article 188 of the Constitution was filed before the Supreme Court praying for the setting aside of the above judgments. Moreover, by two miscellaneous applications filed before the reviewing court, it was prayed that the date of the enforcement of the decision of the Appellate Bench is extended pending the decision of the reviewing court. These applications were accepted and the time was extended till 30.06.2002.

In the review petition, it was argued, *inter alia,* that the FSC did not say anything about the prohibition of interest for the non-muslims. On the other hand, the Appellate Bench declared such prohibition for the non-muslims while it was not an issue before the said Bench. Similarly, few other points were raised regarding which the FSC had observed that further research is required to

determine those issues. On these grounds, the review petition was accepted and the case was remanded to the FSC (*United Bank Limited versus M/s Farooq Brothers and others,* 2002). Interestingly, it was held by the reviewing court that the parties are free to raise any other relevant grounds before the FSC in the rehearing of the case. Likewise, the FSC would be free to take notice of any other relevant fact that could have remained unnoticed in the earlier hearing. [7]

Thus, the practice of interest amounts to waging war against Allah and His apostle (the last of the Prophets, ﷺ). s having been declared repugnant to the injunctions of Islam by the FSC in 1991 still holds the field and is likely to continue for several years owing to the procedure provided for Islamisation of laws through the judiciary.

The Qazalbash Waqf Case

The SAB in *Qazalbash Waqf and others versus Chief Land Commissioner, Punjab, Lahore, and others,* held, *inter alia*, certain provisions of the Land Reforms Regulation, 1972 and the Land Reforms Act, 1977 repugnant to the injunctions of Islam (*Qazalbash Waqf and others versus Chief Land Commissioner Punjab, Lahore and others*, 1990). To determine the validity of these laws on the touchstone of the Islamic injunctions, the SAB circulated a questionnaire among different Islamic scholars and institutions containing twenty-six questions. Some of the scholars and the institutions responded to this questionnaire and their opinions were formed part of the record of the case. Interestingly, the head of the Bench, Muhammad Afzal Zullah J., referred to these questions and the opinions thereon while giving his verdict. Few such questions and their answers are discussed below. It will help ascertain the scope of the injunctions of Islam.

Question No. 5 of the questionnaire inquires whether the Islamic State has any right to make a permissible act obligatory for the citizens. If yes, what are its limits? In answer to this question, such a right for the Islamic State has been acknowledged. The only limitation prescribed for this purpose is to ensure that clear liberty is left for those who want to do the permissible act voluntarily so that they may obtain *"Falah"* after death. Similarly, question No. 9 states that many Muslim jurists have allowed the Islamic State to compulsorily acquire private property in case of need. The question inquires the limits of the need. Likewise, question No. 11 asks whether the accumulation of property, money, gold, and silver is permissible. The answer is in the affirmative.

Likewise, Muhammad Taqi Usmani J., a member of the Bench, frames four questions/issues for himself. He opines that the proper determination of the case at the bar depends upon the answers to these questions/issues. Question/issue No. 3 reads whether it is permissible for the Islamic State, considering the general welfare of its subjects, to prescribe maximum limits beyond which no citizen can lawfully hold property. In response to this question/issue, he seeks guidance not only from the explicit texts of the Holy Quran and the Sunnah of the Holy Prophet, (the last of the Prophets, ﷺ) but also from the *Islamic Fiqh.* He also relies on a famous book, "*Radd-ul-Mukhtaar*" of *Hanafi Fiqh* by Allama Ibn-e-Abideen apart from various other juristic opinions to reach his verdict.

Allah *Rakha* Case

In this case, the FSC disposed of various Shariat Petitions challenging Sections 4-7 of the Muslim Family Laws Ordinance, 1961 (MFLO) being repugnant to the injunctions of Islam (*Allah Rakha*

and others versus Federation of Pakistan and others, 2000). In this paper, however, the above case is analyzed only to the extent of Section 5 of the MFLO (Rakha, 2000). This provision generally provides for the registration of marriages and the non-compliance of this provision is an offense punishable with simple imprisonment which may extend to three months or with a fine which may extend to one thousand rupees or with both.

The main argument of the petitioners was that the compulsory registration of marriage is not required by the injunctions of Islam. Therefore, non-registration of marriages cannot be made a punishable offense. Rather, it impedes the solemnization of marriages. Consequently, this provision is not in conformity with the Islamic injunctions. The relevant part of the petitioners' arguments provides, "It has been contended by the petitioner that under "Shariah" Registration of marriage is not a necessary condition to the performance of Nikah. It has been conceded that though Kitabat-e-Nikah is desirable, prescribing of punishment for nonregistration is not in conformity with the Holy Qur'an and Sunnah (Rakha)."

The FSC, on the other hand, rejected these arguments. It was pointed out that the registration of marriages is compulsory for several desired ends such as the legitimacy of the children, payment of dower, inheritance of the heirs, and so on. In these circumstances, the FSC did not declare Section 5 of the MFLO null and void. Rather, it was recommended that the punishment for the non-compliance of this provision may be enhanced. Nonetheless, it was acknowledged and held accordingly that an unregistered marriage is as valid as a registered one.

Besides, the FSC pointed out very clearly that other than the Holy Quran and the Sunnah of the Holy Prophet, (the last of the Prophets, ﷺ) the great Muslim jurists agree that *Ijma**[8]*** (consensus) and *Qiyas**[9]*** (reasoning through analogy) are valid sources of the Islamic law. It was also highlighted that another such source is *Istihsan**[10]*** (preference of weak *qiyas* over the stronger one due to the more desired objectives) according to *Hanafi* jurists and *Masha Mursla* (public interest) according to *Maliki* jurists.

Results and Discussion

As far as the phrase "injunctions of Islam as laid down in the Holy Quran and the Sunnah of the Holy Prophet" (the last of the Prophets, ﷺ) is concerned, literally it gives an impression that the reference is limited to the explicit texts of these sources. In this regard, the observations of the FSC in the *Saleem Ahmad* case further strengthen this stance (*Saleem Ahmad versus Government of Pakistan*, 2014). In this case, Section 10 of the Family Courts Act, 1964 was challenged under Article 203D being repugnant to the injunctions of Islam. This provision makes it mandatory for the Family Court to pass, *inter alia*, a decree of dissolution of marriage in favor of the plaintiff without recording evidence if the reconciliation between the spouses fails at the pre-trial stage.

The petitioners while challenging this provision mainly relied on juristic opinions called *fatawa* in support of their claim. The FSC, however, held that the scope of its jurisdiction under Article 203D is limited to the Holy Quran and the Sunnah of the Holy Prophet, (the last of the Prophets, ﷺ). The Court cannot exercise such jurisdiction based on the view, verdicts, and *fatawa* issued by scholars. Fida Muhammad Khan J. speaking for the Full Court said:

…it is pertinent to point out that this Court, is vested with the power to declare only those laws/provisions of laws, as defined in Article 203-B(c) of the Constitution, on the touchstone of Injunctions of Islam, as contained only in the Holy Quran and Sunnah of the Holy Prophet (the last of the Prophets, ﷺ). As such its scope and jurisdiction is limited to the Holy Qur'an and Sunnah of the Holy Prophet (the last of the Prophets, ﷺ) only…this Court cannot declare any law or provision of law merely based on views, verdicts and Fatawa issued by the honorable scholars whosoever they might be…However, unless there is a clear specific "Nass" of the Holy Quran and Sunnah of the Holy Prophet, (the last of the Prophets, ﷺ) prohibiting or enjoining commission or omission of any particular act, this Court cannot declare any law or provision of law as repugnant to the Injunctions of Islam (Saleem Ahmad, 2014).

However, the analysis of the above judgments makes abundantly clear that this phrase has not been used in its literal meaning. Rather, all the sources of Islamic law, definitive as well as probable, have been used extensively by the FSC as well as the SAB in reaching their decisions.

The questionnaire prepared and distributed by the FSC in the above-discussed *riba* case and the *Qazalbash Waqf* case indicate that apart from the opinions of the well-recognized early Muslim jurists, the opinions of contemporary scholars are also taken into consideration. Similarly, the courts have not restricted their approach to the interpretations of Islamic provisions by a particular school of thought. However, different schools of thought have different juristic principles of interpretation. If these principles are followed without limitations, there might appear analytical inconsistency in the judicial pronouncements. Likewise, the approach of different Islamic states on issues under consideration has also been taken note of while pronouncing judicial decisions. So, one can conclude that the injunctions of Islam refer not only to the texts of the Holy Quran and the Sunnah of the Holy Prophet, (the last of the Prophets ﷺ) but also to the spirits of these texts, the practice of companions, the juristic opinions of the early as well as the contemporary jurists, contemporary practices of the Muslim world and so on.

On the other hand, the phrase "repugnant to the injunctions of Islam" has been used in its literal sense. Repugnant is synonymous with inconsistent. In this sense, the word repugnant or inconsistent has been used in different constitutional provisions. The first such provision is Article 8 which uses the word inconsistent in clause 1 and clause 3(b) (ii). The former uses the word inconsistent only while the latter uses both inconsistent and repugnant. Thus, Article 8(1) declares any law including custom or usage having the force of law to be void if the same is inconsistent with the fundamental rights conferred by Chapter 2 Part I of the Constitution. Clause 2 further elaborates the meaning of inconsistent used in the previous clause. According to this clause, a law will be inconsistent with the fundamental rights if it takes away or abridges that right. Similarly, Article 8(3) (b) (ii) uses the word inconsistent and repugnant in the same sense as used in clause 1[11].

The next provision is in the form of Article 143 which talks about the inconsistency between federal and provincial laws. It provides that if a federal and a provincial law is repugnant to each other, the federal law shall prevail and the provincial law to the extent of repugnancy will be void. Here again the word repugnant has been used in the sense of inconsistent, contradictory, or conflicting. Similarly, Articles 165A (3), chapter 3A of Part VII, Part IX, and Article 260 uses the word repugnant in the above-discussed sense. This indicates that jurisdiction under Article 203D

can be exercised only where a law or any provision thereof is contradictory to the injunctions of Islam as discussed above.

In this regard, the observations made by M.S.H. Quraishi J. in *Said Kamal Shah* case are worth quoting here:

…in a matter arising under Article 203-D of the Constitution, we are concerned with the question of whether the law is repugnant to the Injunctions of Islam as laid down in the Holy Quran and the Sunnah of the Holy Prophet, (the last of the Prophets ﷺ). A law may not conform with the juristic opinion of one or the other of the Schools but that would not render the same repugnant for Article 203-D unless the repugnancy is brought out as against some specific Injunction either in the Quran or the Sunnah. To establish repugnancy, it is necessary to show that there is something in the Quran or the Sunnah which expressly or impliedly contradicts or is incompatible with the impugned statutory provisions so that both cannot stand together and the acceptance of one must amount to the abrogation or abandonment of the other…(Government of N.W.F.P, 1986)

The above quotation indicates that it is not essential that a law that is not repugnant to the injunctions of Islam is always in conformity with the injunctions of Islam. As discussed above, if a law is declared repugnant to the injunctions of Islam, the President or the Governor of a province is required not to remove the repugnancy but to bring that law in conformity with the injunctions of Islam. The same is provided in clause 3(a) of Article 203D which reads as:

If any law or provision of law is held by the Court to be repugnant to the Injunctions of Islam,

(a) the President in the case of law concerning a matter in the Federal Legislative List or the Governor in the case of law concerning a matter not enumerated in said List shall take steps to amend the law to bring such law or provision into conformity with the Injunctions of Islam (Constitution, 1973).

Conclusion

It is concluded from the above-mentioned discussion about the analysis of the phrase "in conformity with the injunctions of Islam." It has not been defined in the Constitution either. However, a law is said to conform with the injunctions of Islam if it has its origin and existence in the sources of law recognized by Islam. Moreover, it is developed, interpreted, and enforced according to the Islamic juristic principles. It is interesting to note that certain laws which have been declared repugnant to the injunctions of Islam when amended were brought in conformity with the injunctions of Islam. By way of illustration, pre-emption laws have been analyzed above. Contrarily, those laws which were not found so repugnant stand valid though not conforming with the injunctions of Islam. The ultimate conclusion of this work is that the Islamisation of laws under Chapter 3A is not exhaustive as it allows the continuity of laws that are not in conformity with the injunctions of Islam.

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[1] Since the FSC performs the validity of laws test exercising its original jurisdiction under article 203D, the analysis of the jurisdiction of the FSC is restricted to this provision to a large extent. Besides, the SAB is established under Article 203F of the Constitution to hear appeals against the decisions of the FSC.

[2] The authors intend to undertake separate research focusing specifically on the Islamisation of criminal laws by the FSC. The intended research may have conclusions different than those in the present research.

[3] It is quite interesting that according to Article 262 of the Constitution periods are to be reckoned according to the Gregorian calendar and the same is the official calendar of Pakistan. Nonetheless, chapter 3A inserted by P.O. No. 3 of 1979 was to come into force according to the Islamic calendar.

[4] The present Chapter 3A has undergone various amendments since its substitution in 1980 by P.O. No. 1 of 1980. Finally, some provisions of this chapter were amended by the Constitution (Eighteenth Amendment) Act, 2010.

[5] According to Article 203B(c) the definition of law to exercise jurisdiction under article 203D includes any custom or usage having the force of law but certain laws such as the Constitution, Muslim personal law, and a few others are permanently excluded from the definition of law. While few others such as law relating to the levy and collection of taxes and fees etc. are excluded from the definition of law for ten years from the date of the commencement of Chapter 3A. It is interesting to note that the period of ten years provided for the exclusion of fiscal laws etc. from the definition of law had been kept enlarging. It seems that the Zia regime wanted to exclude these laws from the definition of law as given in Article 203B(c) permanently. That is why the period

for such exclusion was constantly kept being enlarged until President Zia-ul-Haq passed away in an air accident.

[6] Strictly speaking the law-making authority is the Parliament or a Provincial Assembly but the government will be formed obviously by a party enjoying a majority in the house. So it can be said that the government is the law-making authority.

[7] The FSC has recently taken up this case again since being remanded by the SAB. Not surprisingly, the Federation of Pakistan has challenged the maintainability of the Shariat Petitions being outside the scope of the jurisdiction of the FSC.

[8] Ijmāʿ is an Arabic term referring to the consensus or agreement of the Muslim community. Various schools of thought within Islamic jurisprudence may define this consensus as that of the first generation of Muslims only; the consensus of the first three generations of Muslims; the consensus of the jurists and scholars of the Muslim world, or scholarly consensus; or the consensus of all the Muslim world, both scholars and laymen.

[9] In Islamic jurisprudence, qiyās is the process of deductive analogy in which the teachings of the Hadith are compared and contrasted with those of the Qur'an, to apply a known injunction to a new circumstance and create a new injunction. Here the ruling of the Sunnah and the Qur'an may be used as a means to solve or provide a response to a new problem that may arise. This, however, is only the case providing that the set precedent or paradigm and the new problem that has come about will share operative causes. Allah is the specific set of circumstances that trigger a certain law into action.

[10] Istiḥsan (Arabic: اِسْتِحْسَان) is an Arabic term for juristic discretion. In its literal sense, it means "to consider something good". Muslim scholars may use it to express their preference for particular judgments in Islamic law over other possibilities. It is one of the principles of legal thought underlying scholarly interpretation or ijtihad. Several disputes existed amongst the classical jurists over this principle with the Hanafite jurists adopting this as a secondary source. Contemporary proponents of liberal movements within Islam have used istihsan and the similar idea of istislah (Arabic for "to deem proper") as ethical principles to favor feminist and reformist interpretations of the Qur'an and Sunnah, thus looking to reform Islamic law.

[11] However, clause 3 (b) (ii) saves the laws provided in Part I of the First Schedule from being void even though they be inconsistent or repugnant to the fundamental rights.